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Practice and Pleading
in the
Queen's Bench

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THE

RULES OF COURT,

AND

STATUTES

RELATING TO

PRACTICE AND PLEADING

IN THE

QUEEN'S BENCH,

TOGETHER WITH

THE CRIMINAL AND OTHER ACTS

OF GENERAL REFERENCE;

AND

A few Practical Points.

BY JOHN HILLYARD CAMERON.

BARRISTER-AT-LAW, AND REPORTER TO THE COURT OF QUEEN'S BENCH.

TORONTO:

H. & W. ROWSELL.

M DCCC XLIV.

TO

THE HONOURABLE

JOHN BEVERLY ROBINSON,

CHIEF JUSTICE

OF THE COURT OF QUEEN'S BENCH,

This Book

IS

RESPECTFULLY INSCRIBED

BY THE COMPILER,

J. HILLYARD CAMERON.

PREFACE.

I present this book to the Profession, knowing that it is deficient in some points, and imperfect in others, but hoping that it may be found sufficiently useful to permit of its deficiencies and imperfections being passed unheeded, or at most with but light criticism. I trust that it may be made available particularly as a book of reference on circuit and in banc, and for that purpose I have introduced most of the Provincial Statutes, which relate to such subjects as are of the most frequent recurrence at the Assizes and in Term, and I would have made it more comprehensive on such points, and have presented to the Profession several other Acts, in a more convenient form than they are to be found in the Statute Book, such as the Acts relating to Juries, &c., had not the introduction of several bills into the Provincial Parliament on those subjects during the present session, given me reason to believe, that a total change would be made in the existing systems, as soon as, or even sooner than this book could pass through the press. I have collected many authorities on points that have been determined in England under the New Rules, and I have given notes of the various English decisions, in cases that have arisen on the several Imperial Statutes, which have been subsequently adopted by the Provincial Legislature, and placed on our Statute Book, and have endeavoured to point out any additions to, or alterations in them, that have been made to adapt them to the circumstances, or existing laws of this section of the province. All the statutes relating to the "Practice of the Court of Queen's Bench," will be found col-

lected under that head, with notes of the cases that have been decided under their several clauses, in the Court of Queen's Bench in Upper Canada; and under the head of "Criminal Law" will be found all the Criminal Statutes passed in the province, and in force in Upper Canada, including the late Imperial Act, for carrying into effect the treaty with the United States, for the apprehension of fugitive offenders.—Near the end of the book, I have introduced a few Practical Points, relating to affidavits, irregularities, &c., which, being of almost daily occurrence, may be found useful for reference, as the principal authorities on those subjects will there be found collected together. My principal object has been to benefit the country practitioners, as I am aware that they have not the same opportunities of obtaining access to the latest authorities, that are open to their brethren in town, and if this book will afford them any information, or enable them to avoid any difficulty, I shall feel that my time and labour have not been thrown away, and I can only regret that the many other occupations, in which I have been engaged, during the period that I have been preparing these notes, has prevented their being so entirely useful as I could have desired.

J. HILLYARD CAMERON.

Lot Street,
December 4th, 1843.

OLD RULES.

AFFIDAVIT.

1. It is ordered, that the Deputy Clerk of the Crown, in outer districts, do not take any affidavits in any cause after final judgment, except affidavits for Ca. Sa's; nor in any matter in which there is no cause pending.—E. T. 9 Geo. IV.

2. It is ordered, that every affidavit shall contain the christian name, or chistian names, and surname, of the defendant, written at length, *with his place of abode and addition.*—T. T. 3 & 4 W. IV.

3. It is ordered, that the rule of this court of Trinity Term 3 & 4 W. IV. which requires that every affidavit shall contain the christian name or names and surname of the defendant, written at length, with his place of abode and addition, be rescinded, so far as respects the place of abode and addition of the defendant.—E. T. 4 Will. IV.

AGENCY.

1. When the attorney, in any cause depending in this court, resides without the district where the action is brought, all notices and demands, and other papers or pleadings to be served on such attorney, shall be deemed regular by being put up in the Crown office in the district wherein such action is brought, unless such attorney have a known agent in the same district; in which case service on the agent shall be required.—M. T. 4 Geo. IV.

2. Every attorney not resident in the Home district shall enter in alphabetical order, in a book to be kept

for that purpose by the Clerk of the Crown, his name and place of abode, and also in an opposite column the name of some practising attorney in the City of Toronto, as his agent, who may be served with notices, summonses, and all other papers (not required to be personal); and if any attorney shall neglect so to enter his name, with that of his agent as before mentioned, fixing up the notice, summons, or other paper, in the Crown office, shall be deemed good service.—M. T. 4 Geo. IV.

ALIEN.

As soon as may be after filing any inquisition taken under authority of the statute passed in the 54th year of Geo. III., the Clerk of the Crown shall cause an extract therefrom, containing the name of the person found to be an alien, and describing the land found to have been in his possession, or to which he had a title, subject to forfeiture, in order that any person having claim may traverse the said inquisition; and he shall expose such extract in his office from the date thereof to the end of the year from the date of the inquisition.—M. T. 4 Geo. IV.

ARREST.

1. Where the defendant is described in the process or affidavit to hold to bail by initials, or by a wrong name, or without a christian name, the defendant shall not be discharged out of custody, or the bail bond be delivered up to be cancelled on motion for that purpose, if it shall appear to the court that due diligence have been used to obtain knowledge of the proper name.—T. T. 3 & 4 Will. IV.

2. (*a*) It is ordered, that upon every bailable writ and warrant, and upon the copy of any process served for the

(*a*) A bailable writ issued by an attorney in person, must be indorsed with a notice of the claim for debt and costs.—*Washburn one, &c. v. Walsh.*—M. T. 6 Will. IV.

The amount claimed for debt and costs must be indorsed on the bailiff's warrant, as well as on the writ.—*Steele v. Lameux.*—E. T. 6 Will. IV.

payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy and service, exclusive of mileage and attendance to receive debt and costs; and that upon payment thereof within four days to the plaintiff's attorney, or to the plaintiff when the writ shall have been sued out by the plaintiff in person, further proceedings will be stayed. But the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed; and if more than one sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation. The indorsement shall be written or printed in the following form:

"The plaintiff claims —— for debt and —— for costs, exclusive of mileage; and if the amount thereof, with the charge for mileage, be paid to the plaintiff's attorney (or to the plaintiff if he sues in person) within four days from the service hereof, further proceedings will be stayed." T. T. 3 & 4 Will. IV.

ASSIZES.

1. In future no cause shall be tried at the assizes for any district, unless the record at nisi prius is delivered on the commission day, or first day of the court, to the Marshal, who is authorised to receive for the entering or withdrawing of the same, two shillings and six pence.—H. T. 7 Geo. IV.

2. It is ordered, that the causes at nisi prius shall be hereafter called and tried in the order in which they stand in the docket, and according to the practice in England.—M. T. 3 Vic.

AWARD.

It is ordered, that in future where a rule to shew cause is obtained in this court to set aside an award, the several objections thereto, intended to be insisted upon at the time of making such rule absolute, shall be stated in the rule to shew cause.—E. T. 6 Geo. IV.

BAIL.

It is ordered in future, that when bail which has been put in in the country is to be justified in court, the bail-piece, with the affidavit of the due taking thereof, and the affidavit of justification, shall be taken from the Deputy Clerk of the Crown of the district in which they have been filed, and shall be produced in court upon the motion for allowance, and afterwards filed in the office of the Clerk of the Crown and Pleas in Toronto; and that the Deputy Clerk of the Crown shall, on notice given to him for that purpose, on behalf of the party moving for allowance, transmit the same to the principal officer, in order that this rule may be complied with.—T. T. 3 & 4 Will. IV.

COMPUTATION.

It is ordered, that in future rules nisi for referring to the master, to compute principal and interest and to pay the costs after judgment by default in actions upon promissory notes, or in other actions in which a reference may be made to the master for the same purposes, may, if the plaintiff shall desire it, be made returnable at the expiration of such number of days after the day of service as shall be expressed in such rule; and that the practice be the same in this respect upon judges' summonses for the same purpose. And it is further ordered, that upon the rule being made absolute, or upon the granting of a judge's order in any such case, the plaintiff may proceed to tax his costs and enter up his judgment without service of such rule or order, or of any notice; and that the rule nisi, or judge's summons, shall be so drawn as to apprize the defendant that judgment will be entered without further notice, unless cause be shewn to the contrary.—T. T. 5 Will. IV.

CORPORATION.

It is ordered by the court, that the process for compelling the appearance of a corporation aggregate in this court, shall be by a writ of summons in the following form:

"By the Grace of God, &c.

"To the Sheriff of —— greeting:

"We command you that you summon the [insert the proper name of the corporation] to appear before us in our court of our bench at Toronto, on the —— day of —— to answer the complaint of A. B. in a plea of [as the case may be] and have then there this writ.

"Witness the Honourable [Chief Justice or Senior Puisne Judge of the Court of King's Bench, as the case may be] this —— day of —— in the —— year of our reign."

Which writ shall be served agreeably to the law and practice in England in respect to corporations aggregate; and that if within eight days after the return of such process, the corporation having been duly served therewith, shall not have appeared, then it shall be competent to the plaintiff to obtain the process of distringas, and to proceed thereon according to the law and practice in England.—T. T. 2 Geo. IV.

COGNOVIT.

It is ordered, that the seventh rule of this court, made in M. T. 4 Geo. IV., be rescinded, and that in future no judgment be entered on any warrant of attorney to confess judgment, or upon any cognovit actionem, that shall not have been obtained through the intervention of some practising attorney of this court, whose name shall be endorsed on the warrant or cognovit, and unless the affidavit of execution shall state the same to have been obtained through the intervention of some practising attorney, whose name is thereon endorsed.—E. T. 9 Geo. IV.

CROWN OFFICE.

It is ordered, that from and after the end of this term, the hours to be observed in the Crown office, during term, shall be from eight in the morning to eleven, from twelve to three, and from six in the evening to eight; and that the office hours in vacation remain as heretofore, from nine A. M. to three o'clock P. M.—T. T. 4 Geo. IV.

CLERKS OF ASSIZE.

It is ordered by the court, that the 18th rule of this court be rescinded, and that henceforth the Clerks of Assize shall attend in court during the first four days of term immediately following the assizes in each district, with all indictments, records, and proceedings from their respective circuits, together with the various exhibits filed in each cause and not returned to the parties by order of a judge; and that they shall, immediately after the rising of the court, on the fourth day of its sitting, return to the Crown office all indictments, records, proceedings, and exhibits, remaining in their possession, and shall at the same time deliver to the Clerk of the Crown a list of the same.—E. T. 11 Geo. IV.

COSTS.

1. In future the practice of this court, as well as the quantum of costs to be allowed in all proceedings, is to be governed (when not otherwise provided for) by the established practice of the court of King's Bench in England.—I. M. T. 4 Geo. IV.

2. (*b*) It is ordered by the court, that in any action of the proper competence of the District Court, in which final judgment shall be obtained without a trial, the master shall tax no more than District Court costs, unless specially authorized by order of the court, or of a Judge in vacation.—IX. E. T. 11 Geo. IV.

3. It is ordered by the court, that fees shall not in any case be taxed to more than two counsel upon any trial or argument to be had hereafter.—X. E. T. 11 Geo. IV.

(*b*) Such an order must be obtained after an assessment of damages on a judgment by default, where the amount assessed is apparently within the jurisdiction of the District Court. —*Ferrie et al. v. Young.*—E. T. 3 Will. IV.

Where a verdict is taken subject to a reference to arbitration, and the arbitrators award to the plaintiff an amount apparently within the jurisdiction of the District Court, full costs may be obtained by rule of court, or order of a Judge nnder this rule.—*Elmore v. Colman.*—M. T. 6 Will. IV.

4. It is ordered by the court, that no counsel's fee on motion shall be taxed in respect of any rule which may be obtained, without filing a motion paper in court, or in term time.—XI. E. T. 11 Geo. IV.

5. It is ordered by the court, that no fee or other charge shall be payable for any writ to warrant a testatum, unless such writ shall be actually sued out by the party.—XII. E. T. 11 Geo. IV.

6. It is ordered by the court, that at the foot of every bill to be hereafter taxed, the attorney shall certify under his hand that every service or disbursement charged has been actually and necessarily made, which certificate shall, nevertheless, in no case be taken to dispense with the requisite affidavit of disbursement, or to warrant any charge not otherwise taxable.—XIII. E. T. 11 Geo. IV.

7. It is ordered by the court, that after this present Term of Easter, in every case in which the costs taxed shall exceed £20, it shall be necessary for the attorney obtaining the taxation to leave with the master a fair copy of such bill at the time of taxation, which copy shall be furnished gratis; and that the master shall deliver into court during each term all such copies of bills as have been furnished to him since the preceding term, on which shall appear the allowances as they have been taxed.—XIV. E. T. 11 Geo. IV.

8. It is ordered by the court, that an order revising taxation may issue, as a matter of course, upon a motion in court, or upon a judge's summons, and that all fees upon such motions or orders shall be taxed as on motions of course.

A new table of costs was also settled and ordered by the court.—XV. E. T. 11 Geo. IV.

9. (*c*) *It is ordered, that the expense of a witness called only to prove the copy of a judgment, writ, or other public document, shall not be allowed in the costs, unless the party calling him shall within a reasonable time before the trial have required the adverse party, by notice in writing,*

(*c*) See rule 28 of the new rules, the effect of which is to supersede this rule.

and production of such copy to admit such copy, and unless such adverse party shall have refused or neglected to make such admission. This rule not to take effect until next Michaelmas Term.—V. T. T. 3 & 4 Will. IV.

10. (*d*) *It is ordered, that the expense of a witness called only to prove the handwriting to, or the execution of any instrument stated upon the pleadings, shall not be allowed, unless the adverse party shall upon summons before a judge a reasonable time before the trial (such summons stating therein the name, description, and place of abode of the intended witness) have neglected or refused to admit such hand writing or execution, or unless the judge upon attendance before him shall endorse upon such summons that he does not think it reasonable to require such admission. This rule not to take effect until Michaelmas Term next.*—VI. T. T. 3 & 4 Will. IV.

11. It is ordered, that the rule of Easter Term 11 Geo. IV., regulating the amount of costs to be taxed in civil and criminal cases, be amended in that part of it which relates to the counsel's fee, with brief at trial or assessment; by adding at the end of that item the words "or by order of a judge," to such sum as shall appear proper under the circumstances of the case.—II. E. T. 4 Will. IV.

12. It is ordered, that the following fees be allowed to coroners, for services hereinafter named. For summoning a jury and making return to Clerk of Assize:

For each juror actually and necessarily summoned ... 1*s.*

In other respects, same fees as to sheriffs for similar services.

To Witnesses,

Residing within three miles of court house,..... 2*s.* 6*d.* per diem.
Do. over three miles,..... 5*s.* do.
And for every twenty miles travel, as heretofore.

(*d*) See rule 28 of the new rules, the effect of which is to supersede this rule.

Professional Men,

Attornies, Barristers, Physicians and Surgeons, 20*s.* per diem when called upon to give evidence in consequence of any professional service rendered by them, or to give professional opinions.

Surveyors,

When called to give evidence of any professional services rendered by them, or to give evidence depending upon their skill or judgment, 10*s.* per diem.—II. T. T. 5 Will. IV.

DEMURRER.

(*e*) *It is ordered, that from and after the last day of this term, all demurrer books shall be made up with marginal notes opposite the different counts and other parts of the pleadings, briefly stating the substance of each part, and when so completed shall be delivered to the judges by the party applying for a concilium before his motion is filed.*—XIII. A. T. 7 Geo. IV.

DEMAND OF PLEA, &c.

1. (*f*) *It is ordered by the court, that hereafter no rule to plead, reply, or rejoin, shall be necessary; but that a demand shall be sufficient, as in respect to a plea in actions, by non-bailable process.*—IV. E. T. 11 Geo. IV.

2. (*f*) *It is ordered, that when by reason of any privilege the proceedings are not commenced by writ of capias ad respondendum, a demand of plea may be served at any time, when, by the practice in England, a rule to plead might be given, and not before; and that the service of such demand of plea shall suffice as in other cases, without the necessity of taking out any rule to plead.*—II. H. T. 1 Will. IV.

DOWER.

It is ordered, that when the original or first process is required in the action of Dower, a writ of summons may issue under the seal of this court, in the following form:

(*e*) See new rules, 16, 20, 21.

(*f*) See new rule 10, which supersedes this rule.

"William the Fourth, &c.

"To the Sheriff of —— greeting:

"Command A. B. that justly and without delay he render to C. D., widow, who was the wife of E. F., her reasonable Dower, which falleth to her of the freehold which was of E. F. her late husband, in —— whereof she has nothing, as she says, and whereof she complains that the said A. B. deforceth her; and unless he shall do so, then summon by good summoners the said A. B., that he be before us in our court of our bench, at Toronto, on —— the —— day of —— Term, to shew wherefore he has not done it, and have there the summoners and this writ.

"Witness [as in other writs issued from this court]."

The time of return to be conformable to the English practice in such cases.—E. T. 1 Will. IV.

EJECTMENT.

It is ordered by the court, that hereafter it shall be sufficient to leave the consent and plea in ejectment at the office of the Clerk of the Crown and Pleas, and that no entry thereof need be made with any judge.—V. E.T. 11 Geo. IV.

IMPARLANCE.

(*g*) *It is ordered by the court, that after this term the practice of the Court of King's Bench in England, with respect to imparlance, shall not be in use in this Province; but that in all cases the party shall plead at the expiration of the demand of plea, unless he obtain an order for further time.*—III. E. T. 11 Geo. IV.

JUDGMENT.

It is ordered, that judgment may hereafter be signed after verdict or assessment of damages, without any rule for judgment, but not before the time when judgment may be signed according to the present practice of this court.—X. T. T. 3 & 4 Will. 4.

(*g*) Superseded by rule 10 of the new rules.

PRACTICE.

In future the practice of this court, as well as the quantum of costs to be allowed in all proceedings, is to be governed (when not otherwise provided for) by the established practice of the Court of King's Bench in England. —I. M. T. 4 Geo. IV.

PROCESS.

1. No less than eight days, inclusive, shall intervene between the teste and return of all mesne process hereafter to be sued out in any personal action, to be henceforth instituted in this court.—VIII. M. T. 4 Geo. IV.

2. It is ordered, that upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy and service, exclusive of mileage and attendance to receive debt and costs; and that upon payment thereof within four days, to the plaintiff's attorney, or to the plaintiff when the writ shall have been sued out by the plaintiff in person, further proceedings will be stayed. But the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed; and if more than one sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation. The indorsement shall be written or printed in the following form:

"The plaintiff claims —— for debt and —— for costs, exclusive of mileage; and if the amount thereof, with the charge for mileage, be paid to the plaintiff's attorney (or to the plaintiff if he sues in person), within four days from the service hereof, further proceedings will be stayed."—III. T. T. 3 & 4 Will. IV.

PLEADING.

1. (*h*) *In all causes now pending or hereafter to be brought in this court, defendants shall plead within eight days after*

(*h*) Superseded by rule 10, of the new rules.

common bail and declaration shall have been filed and a plea demanded.—X. M T. 4 Geo. IV.

2. (*i*) It is ordered by the court, that hereafter no rule to plead, reply, or rejoin, shall be necessary; but that a demand shall be sufficient, as in respect to a plea in actions, by non-bailable process.—IV. E. T. 11 Geo. IV.

3. It is ordered by the court, that the fifth rule of this court, made in Michaelmas Term, 4 Geo. IV., be rescinded; and that in future no original declaration, or other pleading, roll, or record, shall be received in the office of the Clerk of the Crown and Pleas, or any of his deputies, unless the same be engrossed or written in a plain and legible manner.—VII. E. T. 11 Geo. IV.

4. (*j*) *It shall not be necessary that any pleadings which conclude to the country be signed by counsel.*—VIII. T. T. 3 & 4 Will. IV.

PAPER BOOKS.

1. (*k*) That from and after the last day of this term, when any point or points are reserved at nisi prius on the trial of any action, paper books, containing correct transcripts of all the pleadings in the suit, and of the point or points reserved, shall be made up and delivered to the Judges by the party who applies to the court for a conciliation to argue such point or points, or makes any other motion respecting them; and that no such motion shall be made till the paper books be delivered.—XV. H. T. 7 Geo. IV.

2. (*l*) *It is ordered by the court, that hereafter it shall not be necessary to furnish issue books or paper books in any case; and that the clerks, in passing the record, shall add the similiter as of course.*—VI. E. T. 11 Geo. IV.

PAPER DAYS.

Ordered, that the first Friday, the second Monday, and the second Wednesday, in every term, be paper days,

(*i*) Superseded by rule 10, of the new rules.
(*j*) Superseded by rule 13, of the new rules.
(*k*) See rules 20, 21, of the new rules.
(*l*) Superseded by rule 19, of the new rules.

for the arguing demurrers, special cases, special verdicts, or points reserved; and that on those days the paper list be gone through before any other motion or business is entertained.—H. T. 10 Geo. IV.

PARTICULARS.

(*m*) A summons for particulars and order thereupon may be obtained by a defendant before appearance, and may be made, if the Judge think fit, without the production of any affidavit.—VII. T. T. 3 & 4 Will. IV.

PRIVILEGE.

(*n*) *It is ordered, that when by reason of any privilege the proceedings are not commenced by capias ad respondendum, a demand of plea may be served at any time, when by the practice in England a rule to plead might be given, and not before; and that the service of such demand of plea shall suffice as in other cases, without the necessity of taking out any rule to plead.*—II. H. T. 1 Will. IV.

REAL ACTIONS.

It is ordered, that in real actions generally a writ of summons may issue from this court, corresponding with the form used in England, and tested in the same manner as writs of capias ad respondendum issued from this court. The time of return to be conformable to the English practice in such cases.—I. H. T. 1 Will. IV.

RECORDS.

It is ordered, for the more convenient and safe keeping of the records of this court, that all rolls and records to be filed with the Clerk of the Crown shall be upon

(*m*) See rules 7 and 9 of the new rules. This rule is not superseded by any of the new rules relating to the delivery of particulars by a plaintiff to a defendant, as they all relate to the delivery of particulars *after declaration;* and although their effect is to substitute a demand for particulars by a defendant, for an order for them after declaration, yet the former practice is still continued according to this rule, if the defendant requires the delivery of particulars before appearance or declaration.

(*n*) Superseded by rule 10 of the new rules.

parchment or paper, of such width and length as he shall prescribe by a written notice, to be affixed to some conspicuous place in his office and in the office of each of his deputies, and that the office shall not be bound to receive any roll or record not made up in conformity to such notice. N. B. Not to exceed thirteen inches in length or four in width.—III: H. T. 1 Will. IV.

RULES.

1. All rules which by the English practice may be had, as a matter of course, upon signature of counsel at side bar, or are given by the master, clerk of the papers, or clerk of the rules in England, are to be given by the Clerk of the Crown and Pleas, or his deputies in this province, in the same manner, and the same may issue either in term or vacation.—VI. M. T. 4 Geo. IV.

2. It shall not be necessary to the regular service of a rule that the original rule should be shewn, unless sight thereof be demanded, except in cases of attachment.—IX. T. T. 3 & 4 Will. IV.

SHERIFF'S FEES.

The Sheriff to whom any execution, or process in the nature of an execution, shall be directed, shall include in the return of such execution or process, the amount of his fees levied by virtue thereof, and shall specify in the margin the particular items of the same.—IX. M. T. 4 Geo. IV.

SUBPŒNA.

It is ordered by the court, that hereafter any number of names may be included in one writ of subpœna.—VIII. E. T. 11 Geo. IV.

SUMMONS.

It is ordered by the court, that from and after this Term of Easter, on every judge's summons or appointment, to be made by the master (having been served on the day previous to that on which the attendance shall be required), the person on whom the same shall be served shall attend such summons or appointment without a second, or in default thereof the judge or master may proceed ex parte on the first.—II. E. T. 11 Geo. IV.

CHAPTER XIX.

AN ACT *to confirm certain Rules, Orders, and Regulations made by the Chief Justice and Judges of Her Majesty's Court of Queen's Bench for Canada West.*

[12th October, 1842.]

WHEREAS the Chief Justice and Judges of Her Majesty's Court of Queen's Bench for Canada West have, under the authority of the Act of the Legislature of the late Province of Upper Canada, passed in the seventh year of the reign of his late Majesty King William the Fourth, and intituled, *An Act for the further amendment of the Law, and the better advancement of Justice;* made certain Rules, Orders and Regulations concerning the mode of pleading in the said Court, and the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at Law, and the payment of costs, and have caused the same to be laid before both houses of the Legislature, in the present session, being the next after the making thereof; but whereas the said Rules, Orders, and Regulations were not so laid before both houses of the Legislature within five days after the meeting of the Provincial Parliament, as required by the said Act, and it becomes necessary to remedy this omission; and whereas by the said Act it is provided, that no such Rule, Order or Regulation, shall have effect until six weeks after the same shall have been laid before both houses of the Legislature as aforesaid, and doubts might arise as to the effect thereof, if the Provincial Parliament were prorogued before the expiration of the said term of six weeks, and it is expedient to give effect to the said Rules, Orders and Regulations, and to avoid any such doubt as aforesaid: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and of the Legislative Assembly of the Province of Canada, constituted and assembled by

Preamble.

Act of U. C. 7th Wm. IV. cap. 3, cited.

virtue of and under the authority of an Act passed in the Parliament of the United Kingdom of Great Britain and Ireland, intituled, *An Act to Re-unite the Provinces of Upper and Lower Canada, and for the government of Canada*, and it is hereby enacted by the authority of the same, that the Rules, Orders and Regulations, mentioned in the preamble to this Act, made in Easter Term, in the fifth year of her Majesty's reign, and in the year of Our Lord one thousand eight hundred and forty-two, and signed by the Chief Justice and Judges of the said Court of Queen's Bench at Toronto, on the twentieth day of April, in the year last aforesaid, shall have effect from the day hereinafter mentioned, as if they had been laid before both houses of the Legislature within five days after the commencement of the present session, and that notwithstanding any prorogation of the Provincial Parliament before the said Rules, Orders and Regulations shall have laid six weeks before both houses of the Legislature, the same shall have effect as if the session had continued during six weeks after they were so laid before the said houses of the Legislature.

Certain rules orders and regulations, made by the Court of Queen's Bench for Canada West under the said Act confirmed.

I. Provided always, and be it enacted, that the said Rules, Orders and Regulations, shall have effect from and after the last day of Trinity Term next, after the passing of this Act, and not before.

Time from which the same shall take effect.

NEW RULES.

EASTER TERM.

5TH VICTORIA, 1842.

The RULES *and* REGULATIONS *of the Court of Queen's Bench of Upper Canada, intended to be laid before the Legislative Council and Assembly, during their next session, pursuant to the Statute, 7th Will. IV. chap. 3.*

WHEREAS it is provided by the Statute 7th William IV. chap. 3, that the Judges of his Majesty's Court of King's Bench in Upper Canada, or the majority of them, including the Chief Justice, shall and may by any rule or order to be from time to time by them made in term or vacation, at any time within five years from the time when the said Act shall take effect, make such alteration in the mode of pleading in the said court, and in the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law, and such regulations as to the payment of costs and otherwise, for carrying into effect the said alterations, as to them may seem expedient, which Rules, Orders and Regulations are by the said Act directed to be laid before both houses of the Legislature, as therein mentioned, and are not to have effect until six weeks after the same shall have been so laid before both houses of the Legislature, but after that time shall be binding and obligatory on the said court, and be of the like force and effect as if the provisions contained therein had been expressly enacted by the Legislature: Provided, that no such Rule or Order shall have the effect of depriving any person of the power of pleading

the general issue and giving the special matter in evidence, in any case in which he then was or thereafter might be entitled to do so by virtue of any Act of Parliament then or thereafter to be in force: And whereas, for simplifying the proceedings in the said court (now styled her Majesty's Court of Queen's Bench in and for the Province of Upper Canada), and rendering the same less expensive to the suitors, the Chief Justice and Judges thereof have made certain other Rules regarding the practice and pleading in the said court, which Rules, though made without the aid of the said Statute are, for convenience of arrangement, incorporated with those which are thereby required to be laid before the Legislature, care being nevertheless taken to distinguish the Rules made under the authority of the said Statute, by marking every such Rule in the margin thereof.

I. It is therefore ordered, that from and after the last day of Hilary Term next inclusive, unless the Legislature shall in the mean time otherwise enact, the following Rules and Regulations shall be in force:

II. (*a*) In every case the suing out of process shall be regarded for all purposes, as the commencement of the action.

III. In all cases in which a defendant shall have been or shall be detained in prison on any writ of capias, or being arrested thereon, shall go to prison for want of bail; and in all cases in which he shall have been or shall be rendered to prison before declaration, on any such process, the plaintiff in such process shall declare against such defendant before the end of the next term after such arrest or detainer, or render and notice thereof; otherwise such defendant shall be entitled to be discharged from such arrest or detainer, upon entering a common appearance, unless further time to declare shall have been given to such plaintiff by rule of court or order of a Judge.

(*a*) It had been held by the court that the declaration was the commencement of the action.—Cameron *v.* Ferguson. Hil. Term 4 Will. IV.

IV. (*b*) A copy of every declaration and subsequent pleading shall be served on the opposite party, whether the case be bailable or not bailable, and whether the action be against any person having privilege or otherwise, and as well where the plaintiff has appeared for the defendant under the Statute, as where the defendant has appeared in person or by attorney.

V. No judgment of non pros. shall be signed for want of a declaration, replication, or other subsequent pleading, until eight days next after a demand thereof shall have been made in writing upon the plaintiff, his attorney or agent, as the case may be.

PRACTICE IN DECLARING.

VI. (*c*) A declaration laying the venue in a different District from that mentioned in the process, shall not be deemed a waiver of the bail.

VII. (*d*) With every declaration delivered containing common counts on indebitatus assumpsit, or in debt or

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(*b*) It had been previously held, that it was not necessary under the King's Bench Act *to serve any plea.*—McKinnon *v.* Johnston. Mich. 4 Will. IV.; King *v.* Dunn. Easter. 2 Vic.

(*c*) The plaintiff formerly lost his bail if he declared in any other district than that in which the capias issued.—Yates *v.* Plaxton. 3 Lev. 235, 245. R. E. 2 Geo. II.

(*d*) The plaintiff is obliged to deliver particulars of his demand, only when his declaration contains counts in *indebitatus assumpsit*, or in debt or simple contract, and even then the only penalty for not delivering them is, that he will not be allowed for them in costs, if afterwards compelled to deliver them by judge's order. In other cases the former practice still continues, and if particulars are required, the defendant must proceed by summons and order in chambers, or by rule in the Practice Court to obtain them, and his application may be made before appearance, and granted without any affidavit, if the judge think fit by R. T. 3 & 4 Will. IV. In actions of tort, particulars will sometimes be granted, as in an action against the marshal for an escape, it has been held that he is entitled to a particular of the plaintiff's cause of action.—Webster *v.* Jones. 7 D. & Ry. 774. If the particulars delivered are not sufficiently explicit, an order may be obtained in the same manner as the first order, for better particulars, and if the plaintiff does not comply with the order for the

simple contract, the plaintiff shall deliver full particulars of his demand under those counts, where such particulars can be comprised within three folios; and where the same cannot be comprised within three folios, he shall deliver such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios: and to secure the delivery of particulars in all such cases, it is further ordered, that if any declaration shall be delivered without such particulars or such statement as aforesaid, and a Judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver; and that a copy of the particulars of the demand, and also of the particulars (if any) of the defendant's set off, shall be annexed by the plaintiff's attorney to every record at the time it is entered with the Judge's Marshal.

VIII. (*e*) When the plaintiff declares against a prisoner, it shall not be necessary to make more than two

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delivery of particulars at all, Mr. Chitty says in his Arch. Pr. 7 Ed. 1033, that the defendant's course is, to obtain a further order, compelling the plaintiff to deliver them in a specified time, and expressly reserving to the defendant the liberty of signing judgment of non-pros. if not delivered within it. Such an order has, however, been refused.—Kirby *v.* Snowden. 4 Dowl. 191. Annexing the particulars to the record dispenses with the necessity of proof of their delivery.—Macarthy *v.* Smith. 8 Bing. 146. If the plaintiff annex to the record particulars varying from those delivered to the defendant, and the defendant is prepared at the trial to prove the delivery of the particulars to him, the defendant may nonsuit the plaintiff, if he is unable to give in evidence any cause of action included in the particulars delivered; or if not prepared with proof of the delivery of the particulars, the defendant will be entitled to a new trial, and the plaintiff's attorney might be made to pay the costs of the former trial.—Morgan *v.* Harris. 1 Dowl. 570. 2 C. & J. 461. S. C. See rule 9.

(*e*) See rule 10 post, which orders that in all cases, whether bailable or not, the defendant shall be bound to plead in eight days after a demand of plea. It was formerly necessary, when the defendant was in custody, to make *three* copies of the declaration, one to be delivered to the defendant

copies of the declaration, of which one shall be served and another filed with an affidavit of service, as in non-bailable cases.

IX. (*f*) In all cases when a declaration shall be delivered not accompanied by particulars of the plaintiff's demand, the defendant may serve the plaintiff, his attorney or agent, as the case may be, with a demand of particulars, and no order of the court or a Judge for the delivery of particulars shall in any case be required, and the service of such demand shall operate as a stay of proceedings, until particulars shall be delivered, after the delivery of which, the defendant shall have the same time to plead as he had at the time of such demand being served.

Provided always, that the plaintiff shall in no case be

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or left for him with the gaoler or turnkey, another to be annexed to the original affidavit of such delivery, and filed in the Crown office, and a third to be annexed to an office copy of the affidavit, and a demand of plea being then given, in default of a plea judgment might have been signed.

(*f*) See rule 7 above. There seems to be an inconsistency between this rule and the seventh rule. In the seventh rule it is provided that in actions of *indebitatus assumpsit*, or in debt or simple contract, unless the plaintiff shall deliver particulars with his declaration, that he shall not be allowed any costs on their delivery afterwards under summons and order of a judge, but this rule makes a demand sufficient wherever the plaintiff does not deliver particulars of his demand with his declaration, and makes such demand operate as a stay of proceedings from the time of service, and also renders it necessary for the plaintiff to apply to the court or a judge to proceed without furnishing particulars, where they have been demanded, if the action be of such a nature, that an order for particulars would not have heretofore been granted. It would seem, then, by the operation of this rule, that a summons and order for particulars will not in any case be necessary after service of declaration, and will require only to be taken out in cases where the defendant desires to obtain particulars before declaration, R. 7, T. 3 & 4 Will. IV. having ordered, that a summons for particulars, and order thereupon, may be obtained by a defendant before appearance, and may be made if the judge thinks fit, without the production of any affidavit, and the new rules applying only to a demand of particulars after declaration.

entitled to sign judgment after delivering particulars upon demand, until afternoon of the day following that on which they were delivered.

And provided also, that in case the defendant shall demand particulars in any case, when by reason of the nature of the declaration an order for particulars would not heretofore have been made by a Judge, the plaintiff may apply to the court or a Judge to be allowed to proceed without furnishing particulars notwithstanding such demand; and if any order to that effect shall be granted, it shall be at the cost of the defendant, unless the court or Judge shall otherwise order.

PRACTICE IN PLEADING.

X. (*g*) The defendant shall not in any case be entitled to an imparlance, nor shall a rule or notice to plead, reply, rejoin, &c., be necessary in any case, whether bailable or non-bailable, and whether privileged or otherwise, but a demand shall be sufficient, and the parties respectively shall be bound to plead, reply, rejoin, &c., in eight days after the service of such demand, unless otherwise ordered by the court or Judge.

XI. (*h*) The defendant shall not be at liberty to waive his plea without leave of the court or a Judge, except by consent of the plaintiff, or for the purpose of confessing the action.

(*g*) Imparlance was before abolished by R. 3. E. 11 Geo. IV., and rules to plead, &c. were done away with, and a demand substituted under the same rule and R. 4. E. 11 Geo. IV., and it was held that the plaintiff had eight days to reply after a demand of replication.—Robinson *v.* McGrath. Hil. 2 Vic.

(*h*) If the defendant waive his plea without leave of the court or a judge, the plaintiff may sign judgment.—Palmer *v.* Dixon. 5 D. & Ry. 623. The court or a judge, however, will generally give leave to do so, on the defendant's agreeing to take short notice of trial.—Taylor *v.* Joddrill. 1 Wils. 254. —Wilkes *v.* Wood. 2 Wils. 204. If the defendant be allowed to withdraw his plea, and be ordered to plead *forthwith*, he must plead within twenty-four hours; when ordered to plead *instanter*, he must plead on the same day, or the plaintiff may sign judgment.—Chit. Arch. Pr. 7 Ed. 181.

XII. If a defendant, after craving oyer of a deed, omit to insert it at the head of his plea, the plaintiff on making up the demurrer book, or in any entry of the proceedings on record, may, if he think fit, insert it for him, but the costs of such insertion shall be in the discretion of the taxing officer.

XIII. *(i)* It shall not be necessary that any pleading be signed by counsel.

XIV. *(j)* In the margin of every demurrer, before it is filed, some matter of law intended to be argued shall be stated; and if any demurrer shall be filed or delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the court or a Judge, and leave may be given to sign judgment as for want of a plea.

Providing that the party demurring may, at the time of the argument, insist upon any further matters of law, of which notice shall have been given to the court in the usual way.

XV. *(k)* In any case in which the plaintiff (in order to avoid the expense of a plea of payment) shall have given

Proposed under statute 7th Wm. IV. cap. 3.

(*i*) By R. 8 T., 3 & 4 Will. IV. it was ordered, that it should not be necessary that any pleadings which concluded to the country should be signed by counsel.

(*j*) Under this rule it will now be necessary, according to the English practice, *that each party should state his objections in the margin of his demurrer books, if he intends to object to the other's pleadings*, otherwise he cannot enter into them upon argument.—Clarke *v.* Davies. 7 Taunt. 72.—Darling *v.* Gurney. 2 Dowl. 101. The Courts of Common Pleas and Exchequer have intimated that they will not hear an argument on an objection to any of the former pleadings, unless it be stated in the margin of the demurrer book.—Grottick *v.* Phillips. 9 Bing. 723.—Parker *v.* Riley. 3 M. & W. 230.

(*k*) In assumpsit for work, &c., the particulars of demand contained items amounting to £116 7*s.* 0*d.*, and stated that the action was brought to recover £27 13*s.* 0*d.*, the balance due from defendants to plaintiff on the subjoined account, *after giving credit for all payments on account, and for such sums as the defendants might have to set off.* Pleas: tender of £4, non assumpsit as to the residue, Plaintiff proved £3 10 0 due. Held that the defendant could not under this rule, avail him-

credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money; but this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums. Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar.

Proposed under statute 7th Wm. IV. cap. 3.

XVI. (*l*) In every case in which the defendant shall plead the general issue, intending to give the special

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self of these particulars as dispensing with a plea of payment, and shewing that £88 14*s.* 0*d.* had been paid before action brought, the particular coming within the excepted case in the rule, where the plaintiff "states that he seeks to recover a certain balance, without giving credit for any particular sum;" and it being doubtful whether the credit was given in respect of a payment or set off.—Morris *v.* Jones. *et al.* 1, Q. B. 397. This rule does not apply to set off. Plaintiff in assumpsit claimed a balance, which was made out in his particular of demand by shewing claims against the defendant, and admitting counter claims (to a less amount) in the nature of a set off by the defendant. Held that he was not concluded by the admission of the set off.—Rowland *v.* Blakesley. *et al.* 1, B. 403. Debt for goods sold and delivered. The particulars claimed a balance of £29 for goods sold and delivered after allowing credit for £920, "*paid* at various times." At the trial the plaintiff proved a claim for £949, and admitted that part of this was for £84, the price of a tea urn, which the defendant had returned and plaintiff had taken back. Held that the plaintiff might shew that the £84 was also a part of the £920 allowed as money *paid*, and might therefore recover the balance between £949 and £920.—Lamb *et al. v.* Micklethwait. 1, Q. B. 400.

(*l*) The comprehensiveness of the general issue by statute is not affected by the new rules.—Ross *v.* Clifton. 11, A. & E. 631. Where the defendant seeks to give the special matter in evidence under the general issue under some statutory provision, it is necessary that he should insert the words "by statute" in the margin of his plea, notwithstanding the provisions of 3 & 4 Will. IV. ch. 42 sec. 41 (to which our statute 7 Will. IV. ch. 3, under which the new rules were ordered, is similar) that no rule or order made by virtue of its enactments shall have the effect of depriving any person

matter in evidence, by virtue of any statute, he shall insert in the margin of such plea, the words "by statute," otherwise such plea shall be taken not to have been pleaded by virtue of any statute; and such memorandum shall be inserted in the margin of the nisi prius record.

XVII. (*m*) When money is paid into court, such pay- Proposed under statute 7th Wm. IV. cap. 3.

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of the power of pleading the general issue, and giving the special matter in evidence, in any case where he may be entitled to do so under any act of Parliament now or hereafter to be in force.—Bartholomew *v.* Carter. 9 Dowl. 896. Where in an action of trespass for hunting over the plaintiff's land, the defendant pleaded not guilty "by statute," the court, on an affidavit of the plaintiff's that he could not discover the statute, under which the defendant meant to justify, made absolute a rule upon the defendant, to point out within three days the statute under which the plea was pleaded, or else that the words "by statute" should be struck out of the margin.—Coy *v.* Forrester. 8 M. & W. 312. If a defendant does not add the words "by statute" on the margin of his plea of not guilty, he cannot give special matter in evidence, to bring himself within an act of parliament, which allows a plea of not guilty, but if at the end of the plaintiff's case, it appears that the defendant was entitled to notice of action, and to have the venue laid in the proper county, and the plaintiff gave no notice of action, and the venue be in a wrong county, this is not aided by the defendant having omitted to add the words "by statute" on the margin of his plea.—*Ib.* The general issue "by statute" cannot be pleaded to a count upon an account stated.—Calvert *v.* Moggs. A. & E. 632. Where the defendant pleaded not guilty, intending to justify under a statute, but the nisi prius record had not the words "by statute" added on the margin, the judge at nisi prius refused to allow an amendment by the addition of the words "by statute," as it could not be shewn that those words were on the defendant's plea; but *semble* if that could have been shewn, the amendment would have been allowed.—Forman *v.* Dawes. *et al.* 1 C. & Marsh 127.

(*m*) A plea of payment of money into court under this rule, cannot be pleaded to the same cause of action to which other pleas are pleaded in denial of the existence of that cause of action, at the time of action brought.—Thompson *v.* Jackson. 8 Dowl. P. C. 591. Where the plaintiff gives credit in his particulars of demand for payments, whether made before or after action brought, and goes only for the balance, a plea of payment is to be taken as pleaded to such balance; and if the defendant proves payment to that amount, independently of

ment shall be pleaded in all cases, and as near as may be in the following form, mutatis mutandis:

A. B. Plaintiff. } The
and
C. D. Defendant. } day of

"The defendant by —— his attorney (*or* in person) "says (*or in case it be pleaded as to part only, add* as to "£ —— being part of the sum in the declaration or "count mentioned, or as to the residue of the sum of "£ ——) that the plaintiff ought not further to main- "tain his action, because the defendant now brings into "court the sum of £ —— ready to be paid to the "plantiff; and the defendant further says that the plain- "tiff has not sustained damages (*or in actions of debt*, "that he never was indebted to the plaintiff) to a greater "amount than the said sum, &c., in respect of the cause "of action in the declaration mentioned, (*or* in the intro- "ductory part of this plea mentioned) and this he is "ready to verify; whereupon he prays judgment, if the "plaintiff ought further to maintain his action thereof."

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the sums credited in the particulars, he is entitled to a verdict. —Eastwick *v.* Harman. 6 M. & W. 13. The court refused to compel a defendant to deliver particulars of a plea of payment.—Phipps *v.* Lothian. 8 Dowl. P. C. 208. The form of plea given above for payment of money into court in actions of debt, seems imperfect, as not making any mention of the damages accruing for non-payment of the debt.—See Henry *v.* Earl. 8 M. & W. 228. If the defendant omit to plead this plea, he can, it seems, derive no benefit as to costs from the payment into court.—Adlard *v.* Booth. 1 Bing. N. C. 693. And such payment into court must now, in all cases, be specially pleaded. If the plea begins "as to so much, parcel, &c." and conclude without any prayer of judgment, it is bad on special demurrer; also if the defendant intends to pay money into court on one part of the action, and to defend the other, the pleas in bar should be pleaded first, and the payment into court be pleaded as to the residue.—Sharman *v.* Stevenson. 3 Dowl. P. C. 709.—Porter *v.* Izat. 1 T. & G. 639. It is no ground for judgment non obstante veredicto, and semble not even of demurrer, that the plea alleges the money to have been paid into court by leave of a Judge, before declaration. —Edwards *v.* Price. 6 Dowl. P. C.

XVIII. (*n*) The plaintiff after delivery of a plea of payment of money into court, shall be at liberty to reply to the same by accepting the sum so paid into court, in full satisfaction and discharge of the cause of action in respect of which it has been paid in; and he shall be at liberty in that case, to tax his costs of suit, and in case of non-payment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed, or the plaintiff may reply "that he sustained damages or (that the de- " fendant was and is indebted to him, *as the case may be*) " to a greater amount than the said sum," and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and costs of suit. Proposed under statute 7th Wm. IV. cap. 3.

XIX. (*o*) It shall not be necessary to furnish issue-books or paper-books in any case, and in all special pleadings where the plaintiff takes issue on the defen-

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(*n*) The plaintiff may at once, without prejudice, take the money out of court. If the plea of payment into court be to the whole declaration, and the plaintiff does not accept it in satisfaction, he should reply according to the rule, and proceed to trial as in ordinary cases; if the plea be only to part, and there be another plea to the rest, and the plaintiff accepts the money paid in, in satisfaction of part, but desires to proceed as to the residue, he shall reply as to the payment that he accepts it, and reply to the other plea, and proceed to trial; if the plea be to the whole, and the money be accepted, he may tax his costs, and if they be not paid in forty-eight hours, may sign final judgment. There is no necessity for the defendant to produce at the trial, the rule for the payment of the money into court. Where to a common count in debt the defendant pleaded payment into court, and that he never was indebted to a greater amount, and the plaintiff replied that he was indebted to a greater amount, the replication was held bad on demurrer, for not stating that the defendant was and is indebted according to the form in the rule.—Faithful *v.* Achley. 9 Dowl. P. C. 555.

(*o*) Under this rule the plaintiff may, on demurrer to the defendant's pleading, at once add the joinder in demurrer, without any demand, but the defendant cannot do so, and he must proceed to demand a joinder in demurrer, where he demurs to the plaintiff's pleadings, and if it be not added in eight days, he may sign judgment of non pros.

dant's pleading or traverses the same, or demurs, so that the defendant is not let in to allege any new matter, the plaintiff may proceed as if the cause were at issue, and the clerk in passing the record, shall enter the similiter as of course.

XX. (p) No motion or rule for a concilium shall be required, but demurrers as well as all special cases and special verdicts, shall be set down for argument at the request of either party, with the officer of the court, and notice thereof shall be given by such party to the opposite party four days before the time appointed for such argument.

XXI. Four days before the day appointed for argument, the party setting down the case for argument, shall deliver a copy of the demurrer-book, special case or special verdict, to each of the judges, otherwise the cause shall not be considered as standing for argument.

ENTRIES, ROLLS, RECORDS, &c.

Proposed under statute 7th Wm. IV. cap. 3.

XXII. (q) All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and

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(p) In ordinary cases, the notice should be given in sufficient time to enable the opposite party to prepare his demurrer books, otherwise the court may refuse to hear the demurrer, and perhaps allow the objecting party his costs for appearing to make the objection.—Britten *v.* Britten. 2 Dowl. P. C. 239.

(q) By the common law, judgments had relation back to the first day of the term whereof they were entered, unless from the record itself it appeared they could not have that relation. Before this rule the court would, in some cases, have allowed judgment to be entered nunc pro tunc, where a delay was occasioned by the act of the court, but not where it was occasioned by the act of the party, or by a proceeding in the common course of law, and it would seem that they would be governed by the same principle under this rule. —Lanman *v.* Lord Audley. 2 M. & W. 345; Vaughan *v.* Wilson. 4 Bing. N. C. 116; Lamberth *v.* Barrington. 4 Dowl. P. C. 150. The effect of the rule is that there is no relation back in appearances, &c., as well as in judgments, although the former are not mentioned.—Watson *v.* Dore. 2 M. & W. 386; Colbron *v.* Hall. 5 Dowl. P. C. 534.

shall not have relation to any other day; provided that it shall be competent for the court or a Judge, to order a judgment to be entered nunc pro tunc.

XXIII. (*r*) No entry of continuances by way of imparlance, curia advisari vult, vicecomes non misit breve, or otherwise, shall be made upon any record, or roll whatever, or in the pleadings, except the jurata ponitur in respectu, which is to be retained. Proposed under statute 7th Wm. IV. cap. 3.

Provided that such regulation shall not alter or affect any existing rules of practice as to the times of proceeding in the cause.

Provided also, that in all cases in which a plea puis darrein continuance is now by law pleadable in banc or at nisi prius, the same defence may be pleaded with an allegation that the matter arose after the last pleading or the issuing of the jury process, as the case may be.

Provided also, that no such plea shall be allowed, unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea, or unless the court or a Judge shall otherwise order.

XXIV. After judgment by default, the entry of any subsequent continuances shall not be required.

XXV. (*s*) No entry shall be made on record of any warrants of attorney to sue or defend.

COSTS.

XXVI. (*t*) No costs shall be allowed on taxation to

(*r*) If matters pleadable after the last continuance, arise after plea and before the return of the venire facias, they must be pleaded in banc; if after the return of the venire, they may be pleaded either in banc or at nisi prius.—Tidd's Prac. 9 Ed. 847, 848.

(*s*) This rule virtually repeals the 18 H. 6. ch. 9; 32 H. 8. ch. 30, ss. 2 and 3; 18 Eliz. ch. 14, s. 3; 4 & 5 Anne, ch. 16, s. 3; R. M. T. 5 Anne, r. 2.

(*t*) This rule makes the practice more just towards defendants than it was formerly, and is intended for their benefit in cases where they succeed on any issues raised by their pleadings, or the plaintiff fails on any of his counts; and

a plaintiff upon any counts or issues upon which he has not succeeded; and the costs of all issues found

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where the general issue was pleaded to a declaration containing several counts, and the defendant succeeded under it as to some of those counts, he was held entitled to the costs occasioned by them.—Cox *v.* Thompson. 1 Dowl. 525; Ward *v.* Pell. 2 Dowl. 76; Knight *v.* Brown. 9 Bing. 643; Newton *v.* Harland. 5 Dowl. 644. Where in case for a libel, on the general issue, the jury found for the plaintiff, and also found as a fact that a great part of the declaration did not apply specifically to the plaintiff, though there were innuendos by which it was endeavoured to connect him with the matters complained of; it was held that the defendant was entitled to the costs of that part.—Prudhomme *v.* Fraser. 2 A. & E. 645. So in ejectment where there was but one count, and the lessor of the plaintiff recovered judgment for part only of the lands claimed, the court held that the defendant was entitled to have his costs, as to the part found for him, set off against the costs of the lessor of the plaintiff.—Doe *v.* Errington. 4 Dowl. 602. And the same where there were several demises, and the jury found for the plaintiff on some, and for the defendant on others.—Doe *v.* Webber. 4 N. & M. 381. And also in trespass for entering the plaintiff's house and taking his goods, where the plaintiff recovered for the entry and part of the goods, and the defendant for the other part.—Routledge *v.* Abbott. 8 A. & E. 592. where see form of postea in such case. So in covenant with several breaches assigned, where the defendant succeeds on some of the issues.—Daubuz *v.* Rickman. 4 Dowl. 129. But where in an action for negligently stowing, &c., certain casks, the defendant traversed the breach of contract, and the plaintiff recovered for one cask only, it was held that the issue was not divisable, so as to entitle the defendant to the costs of the portion found for him.—Anderson *v.* Chapman. 3 Jurist, 1154. Where in trespass for seizing goods, the defendants pleaded two pleas, one justifying upon a distress for rent due under a demise, at £5 a year, and another for £2 10s., and both issues were found for him, the court held that they were not inconsistent; and the Judge having certified at the trial, to deprive the plaintiff of costs, the rule for taxing to the defendants the costs of the two issues found for them, was drawn up with this additional clause—"and that the costs, when so taxed, be paid by the said plaintiff to the said defendants:" but the court held that they had no power to make such an order, and they directed the record to be amended, by an entry of a judgment for these costs, upon which the defendants might proceed to obtain them, if

for the defendant shall be deducted from the plaintiff's costs.

XXVII. Where money is paid into court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one and fails, he shall be entitled to costs on the other up to the time of paying money into court.

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they thought proper.—Twigg *v.* Potts. 4 Dowl. 266. On a reference to arbitration, before issue joined, the above rule must be observed on the taxation of costs.—Daubuz *v.* Rickman. 4 Dowl. 129. Neither party will be entitled to the costs of issues, from the trial of which the jury have been discharged.—Vallance *v.* Adams. 2 Dowl. 118. Nor where judgment is given non obstante veredicto, as to the costs of the immaterial issue.—Goodburne *v.* Bowman. 9 Bing. 667. If the defendant seek to deprive the plaintiff of costs, on the ground that his action should have been brought in a Court of Requests, he cannot at the same time have the costs of issues which have been found for him taxed in the superior court.—Jenks *v.* Taylor. 1 M. & W. 578. Where the plaintiff obtained judgment on demurrer to one plea, and the cause was taken down to trial upon another, and a juror was then withdrawn by consent. Held that the plaintiff could not obtain the costs of the demurrer.—Burdon *v.* Flower. 7 Dowl. 706. This rule does not apply to paupers.—Gougenheim *v.* Lane. 4 Dowl, 482.

As to the mode of taxation in these cases, if one issue be found for the plaintiff, and one for the defendant, if the *substantial issue* be in favor of the plaintiff, he shall have the postea and general costs of the cause, with the exception of such parts of the pleadings and briefs, and of such of the witnesses, &c., as are applicable only to the issue found for the defendant, which costs the defendant will be entitled to have deducted from the plaintiff's costs,—Ends *v.* Everett. 3 Dowl. 687; Knight *v.* Moore. 3 Bing. N. C. 535. But the defendant is not entitled to the expense of witnesses called by him, unless their evidence related exclusively to the issues found for him.—Crowther *v.* Elwell. 4 M. & W. 71. The defendant is entitled to the costs of all the issues found for him, although they *exceed* the plaintiff's costs, and in such case he may have judgment and execution for their recovery.—Milner *v.* Graham. 2 Dowl. 422; Twigg *v.* Potts, 4 Dowl. 266. The court will not interfere with the decision of the master, as to the issue to which particular costs incurred at the trial of the cause, are referable.—Doe Smith *v.* Webber. 2 A. & E. 448.

Proposed under statute 7th Wm. IV. cap. 3.

XXVIII. (*u*) Either party, after plea pleaded, and a reasonable time before trial, may give notice to the other,

(*u*) See rules 5 and 6 Trin. Term 3 & 4 Will. IV. It is not compulsory in any case on the party intending to produce documents in evidence, to proceed under this rule; nor is it advisable for him to do so, where the nature of his case requires that he should not give the opposite party information of the nature or contents of his documentary evidence before trial; but in all cases where the steps pointed out by this rule are not taken, the expense of proving documents will not be allowed, though if they have been taken, and the admission of the documents is refused, the party refusing (where the Judge thinks it reasonable that the admission should be made) can only escape the payment of the costs of proving them, by the Judge at the trial refusing to certify that they were proved to his satisfaction. It is altogether in the discretion of the Judge to say whether the admission required is unreasonable or not, but where non est factum is pleaded to a specialty, or forgery, of the making or indorsement of a promissory note, &c., or the execution of a private instrument to which the opposite party is not privy, it is presumed that the admission would not be considered reasonable, and the Judge cannot in any case order the admission of documents against the party's consent.—Smith *v.* Bird. 3 Dowl. 641; Stracey *v.* Blake. 7 C. & P. 404. The court has no jurisdiction to order the admission of documents under this rule, and if a Judge at chambers refer the parties to the full court, they will hear the case argued, and intimate their opinion to the Judge, but will not pronounce judgment.—Smith *v.* Bird. 3 Dowl. 641. On the plaintiff paying the defendant the expenses of examining a judgment and other documents abroad, an order was made for the defendant to pay the expense of proving them at the trial (such proof being satisfactory to the judge, and so certified by him), whatever might be the result of the case, if after such examination the defendant did not admit them—*Ib.* If in a notice to admit documents, a document is described as a counterpart, but is in fact a lease, and the opposite party has consented to admit it, he is bound by his admission, and under it the lease may be given in evidence.—Doe Wright *v.* Smith. 3 N. & P. 335. Although an order has been made on the plaintiff to admit a copy of a letter from himself to the defendant, and the plaintiff has also had notice to produce the original, the copy cannot be read, unless evidence is given of the existence of the original.—Sharpe *v.* Lamb. 3 P. & D. 454. Where by a Judge's order, a copy of a letter was ordered to be admitted, it is not enough to put in the notice to admit under the judge's order, and a copy of a letter between the

either in town or country, in the form hereto annexed, marked A., or to the like effect, of his intention to adduce in evidence certain written or printed documents; and unless the adverse party shall consent by indorsement on such notice within forty-eight hours, to make the admission specified, the party requiring such admission, may call on the party required by summons, to show cause before a Judge, why he should not conseut to such admission, or in case of refusal be subject to pay the costs of proof; and unless the party required shall expressly consent to make such admission, the Judge shall, if he think the application reasonable, make an order, that the costs of proving any document specified in the notice which shall be proved at the trial to the satisfaction of the Judge, and certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause. Provided, that if the Judge shall think the application unreasonable, he shall indorse the summons accordingly. Provided also, that the Judge may give such time for enquiry, or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit. If the party required shall consent to the admission, the Judge shall order the same to be made. No costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on

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same parties with the same date as the one referred to, but if a witness also prove that he was at chambers when the order was made, and that he produced to the clerk of the opposite attorney the copy of the letter produced to be given in evidence, that is sufficient.—Clay *v.* Thackaray. 9 C. & P. 47. Denman. A defendant refused to admit the handwriting of a third person to a document, and the usual order was made for the costs of proving it: at the trial the handwriting was proved, but the document was one which was inadmissible in evidence in the cause. The judge refused to certify for the costs of proving it.—Phillips *v.* Harris. 1 Car. & M. 492.

any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the Judge shall have indorsed upon the summons, that he does not think it reasonable to require it. A Judge may make such order as he may think fit respecting the costs of the application, and the costs of the production and inspection; and in the absence of a special order, the same shall be costs in the cause.

FORM OF NOTICE REFERRED TO.

A.

In the Queen's Bench. A. B. *vs.* C. D.

Take notice that the plaintiff (or defendant) in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the plaintiff (or defendant) his attorney or agent, at —— on —— between the hours of —— and —— and that the plaintiff (or defendant) will be required to admit that such of the said documents as are specified to be originals, were respectively written, signed or executed, as they purport respectively to have been; that such as are specified as copies, are true copies; and that such documents as are stated to have been served, sent, or delivered, were so served, sent or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in this cause.

Dated, &c.

G. R.

Attorney for (*Plaintiff or Defendant.*)

To

E. F.

Attorney, or Agent, for (*Plaintiff or Defendant.*)

Then describe the documents; the manner of doing which may be as follows:

ORIGINALS.

Description of the Documents.	*Dates.*
Deed of Covenant between A. B. and C. D. of the 1st part, and E. F. of the 2nd part	1 January, 1838.
Indenture of Lease from A. B. to C. D.	1 February, 1838.
Indenture of Release between A. B. and C. D. 1st part, &c.	2 February, 1838.
Letter. Defendant to Plaintiff	1 March, 1838.
Policy of Insurance on ——.....	3 December, 1839.
Memorandum of Agreement between C. D. and E. F.	9 January, 1838.
Bill of Exchange for £100 at 3 months, drawn by A. B. on and accepted by C. D. indorsed by E. F. and G. K.....	1 May, 1839.

COPIES.

Description of Documents.	*Date.*	*Original or Duplicate served, sent or delivered, when, how, and by whom.*
Register of Baptism of A. B. in the parish of ——	1 January, 1808.	
Letter. Plaintiff to Defendant	1 February, 1838.	Sent by General Post, 2nd Feb'ry, 1838.
Notice to produce papers	1 March, 1838.	Served 2nd March, 1838, on Defendant's Attorney, by E. F. of ——.
Record of a judgment of the Court of King's Bench, in an action, J. D, vs. J. N.	Trinity Term, 10th Geo. IV.	
Letters Patent of King George III.	1 January, 1800.	

FORM OF DECLARING.

XXIX. (*v*) Every declaration shall in future be en- Proposed under statute 7th Wm. IV. cap. 3.

(*v*) If the declaration is not entitled of any day or year, or of a day different from that on which it is actually filed, it will be deemed irregular, though not a nullity.—Hodson *v* Pennell. 4 M. & W. 373, and in a case before Parke B., at Chambers, 1st August, 1839, Lewis *v.* Duthie, where the declaration was entitled the proper day and year, but "in the year of our Lord" was omitted, the learned baron considered it irregular, and in such cases the defendant may have the declaration set aside on application to the court or a

titled in the court, and of the day of the month and year in which it is filed, and shall commence as follows:—

IN THE QUEEN'S BENCH

Venue. —— day of —— in the year of our Lord ——

A. B. by E. F. his attorney (or in his own proper person) complains of C. D. for that, &c.

Proposed under statute 7th Wm. IV. cap. 3.

XXX. (*w*) Every pleading, as well as the declaration, shall be entitled of the day of the month and year when the same is filed, and shall bear no other time or date; and every declaration and other pleading shall also be entered on the record made up for trial, and on the judgment roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the court or a judge.

Proposed under statute 7th Wm. IV. cap. 3.

XXXI. (*x*) The name of a district shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff; and no

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judge within the time allowed for pleading.—Newnham *v.* Hannay. 5 Dowl. 189; Hough *v.* Bond. 1 M. & W. 314. This rule, it would seem, does not extend to ejectments.—Doe Haines *v.* Roe. 2 M. & Scott 609; Doe Ashman *v.* Roe. 1 Bing. N.C. 253; Doe Evans *v.* Roe. 2 A. & E. 11. Though it does to pleadings in scire facias on a judgment, and although in England the similar rule has been held not to affect real actions or revenue cases, because the courts have not a common jurisdiction over them.—Miller *v.* Miller. 3 Dowl. 408; yet as this reason cannot apply to the Court of Queen's Bench here, it is presumed that the above rule and the following one would be held to apply to such cases.

(*w*) See note to rule 29.

(*x*) If, notwithstanding this rule, the venue should be stated, the opposite party can only move to strike it out, and cannot demur.—Farmer *v.* Champneys. 1 C. M. & R. 369; Fisher *v.* Snow. 3 Dowl. 27; Townsend *v.* Gurney. 3 Dowl. 168. But if there be no venue either in the body of the declaration or the margin, the proper course seems to be to demur.—Remington *v.* Taylor. 1 Lutw. 236. In local actions laying the venue in the wrong county is a ground or nonsuit, or if the error appear on the face of the record of demurrer; but after verdict or judgment by default, the error will be cured by the statute of jeofails. 1 Saund. 241 n.

venue need be stated in the body of the declaration, or in any subsequent pleading.

Provided that in cases where local description is now required such local description shall be given.

XXXII. (*y*) And whereas by the mode of pleading hereinafter prescribed the several disputed facts material

Proposed under statute 7th Wm, IV. cap. 3.

(*y*) Two counts describing the same contract cannot be allowed, though the defendant be described in one of them as jointly responsible, in the other as severally so.—Cholmondley *v.* Payne. 3 Bing. N. C. 708. So where a declaration contained one count claiming a fee or reward in the name of metage on coals imported into the port of Truro, alleged to be due to the plaintiff as lessee under the corporation of Truro of an ancient office of meter, to which the fee was stated to be incident, and another count claiming the same as a port duty; the court held that these counts were only different statements of the same subject matter of complaint, within the meaning of the above rule, and that one of them must be struck out.—Jenkins *v.* Treloan. 1 M. & W. 16. And where a declaration in ejectment on the demise of the church-wardens and overseers of a parish to recover parish property, contained two sets of counts, one specifying the names of the individuals, and the other not, the court ordered one of them to be struck out.—Doe Landeselio *v.* Roe. 4 Dowl. 222. But where the first count was to recover double rent on the statute, 11 Geo. 2 ch. 19 § 18, and the second for use and occupation, both counts were allowed to be retained.—Thornton *v.* Whitehead. 1 M. & W. 14, and in action on the case against a sheriff one count has been allowed for not arresting, and another for an escape.—Guest *v.* Everett. 9 Legal Observer 75, and also against a carrier, one count for not carrying safely to a port, and another for not conveying from the wharf where the goods were landed to the plaintiff's warehouse.—James *v.* Bourne. 6 Dowl. 603. In an action on a policy of insurance two counts were not allowed, one alleging the loss to have been occasioned by the perils of the seas, and the other by the barratry of the master. —Blyth *v.* Shepperd. 1 Dowl. N. S. 880. Where the defendant took premises under a demise for three years from Christmas, 1839, and continued to occupy them until July, 1841, when he quitted them, having paid rent to the midsummer previous: Held in an action brought to recover the rent, which subsequently accrued due, that the plaintiff was not entitled to have a count on the demise, and also a count for use and occupation, but that he must make his election.—Arden *v.* Pullen. 9 M. & W. 430. A count in case for em-

to the merits of the case, will before the trial, be brought to the notice of the respective parties more distinctly than heretofore, and by the act of 7th Wm. IV. ch. 3, sec. 15, the powers of amendment at the trial in cases of variance, in particulars not material to the merits of the case, are greatly enlarged:

Several counts shall not be allowed in taxation of costs, unless a distinct subject matter of complaint is intended to be established in respect of each; nor shall several pleas or avowries, or cognizances be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each.

Therefore counts founded on one and the same principal matter of complaint, but varied in statement, description or circumstances only, are not to be allowed.

Ex. gr. Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed; for they are founded in the same subject matter of complaint, and are only variations in the statement of one and the same contract.

So counts for not giving or delivering, or accepting a bill of exchange, in payment, according to the contract of sale, for goods sold and delivered and for the price of the same goods to be paid in money, are not to be allowed.

So counts for not accepting and paying for goods sold, and for the price of the same goods as goods bargained and sold, are not to be allowed.

But counts upon a bill of exchange or promissory note, and for the consideration of the bill or note, in goods, money or otherwise, are to be considered as founded on distinct subject matters of complaint; for the debt and security are different contracts, and such counts are to be allowed.

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ploying a vessel let to hire to the defendant in an illegal manner, whereby the vessel was rendered liable to forfeiture, may be joined with a count charging a breach of an express contract in detaining the vessel longer than the stipulated time.—Bleaden *v.* Rapallo. 3 Scott N. R. 564.

Two counts upon the same policy of insurance are not to be allowed. But a count upon a policy of insurance, and a count for money had and received to recover back the premium upon a contract implied by law, are to be allowed.

Two counts upon the same charter-party are not to be allowed. But a count for freight upon a charter-party, and for freight pro rata itineris upon a contract implied by law, are to be allowed.

Counts upon a demise and for use and occupation of the same land for the same time, are not to be allowed.

In actions of *tort* for misfeasance, several counts for the same injury, varying the description of it, are not to be allowed.

In the like actions for non-feasance, several counts founded on various statements of the same duty, are not to be allowed.

Several counts in trespass, for acts committed at the same time and place are not to be allowed.

Where several debts are alleged in indebitatus assumpsit to be due in respect of several matters; Ex. gr. for wages, work and labour, as a hired servant, work and labour generally, goods sold and delivered, goods bargained and sold, money lent, money paid, money had and received, and the like, the statement of each debt is to be considered as amounting to a several count, within the meaning of the rule which forbids the use of several counts, though one promise to pay only is alleged in consideration of all the debts.

Provided that a count for money due on an account stated, may be joined with any other count for a money demand, though it may not be intended to establish a distinct subject matter of complaint in respect of each of such counts.

The rule which forbids the use of several counts, is not to be considered as precluding the plaintiff from alleging more breaches than one of the same contract in the same count.

Proposed under statute 7th Wm. IV. cap. 3.

XXXIII. (*z*) Pleas, avowries and cognizances founded

(*z*) By Provincial Statute, 2 Geo. 4 ch. 1, § 7, commonly called the King's Bench Act, "any defendant or defendants in any action or suit in the said court, to plead as many several matters thereto as he shall think necessary without leave of the said court, where he would be entitled to do so by obtaining such leave, under the same regulations and restrictions as are declared by the British Statute passed in the fourth year of the reign of Queen Anne, chap. sixteen, section four, any thing in the said clause to the contrary notwithstanding;" and by the recited statute of Anne it was provided "that the defendant or tenant in any action or suit, or any plaintiff in replevin in any court of record, may, with the leave of the same, plead as many several matters thereto as he shall think necessary for his defence; Provided nevertheless, that if any such matter shall upon a demurrer joined be judged insufficient, costs shall be given at the discretion of the court, or if a verdict shall be found upon any issue in the said cause for the plaintiff or demandant, costs shall be also given in like manner, unless the judge who tried the said issue shall certify that the said defendant or tenant, or plaintiff in replevin, *had a probable cause to plead such matter*, which upon the said issue shall be found against him: Provided also, that nothing in this act shall extend to any writ, declaration or suit of appeal of felony, &c., or to any writ, bill, action or information upon any penal statute." In addition to this and the preceding rule, there are in England rules 6 & 7 of all the courts of H. T. 4 Will. IV., by the former of which provision is made for striking out with costs, counts or pleas, &c., pleaded in violation of the above rules, and by the latter the party pleading more than one count or plea, &c., and failing to establish a distinct subject matter of complaint in respect of each count, or distinct ground of defence in respect of each plea, &c., is rendered liable for all the costs occasioned by such count or plea, &c., It is conceived that, although there is no provision in any of the above rules of the Court of Queen's Bench for striking out counts or pleas, &c., similar to the rule adopted in England, yet that the same practice would be observed in the court here, as if such a rule did exist, as all these rules have the force of statutary enactments, and the express directions in rules 32 & 33 that not more than one count or plea, &c., shall be allowed in the cases pointed out, would seem to make the application to the court or a judge at chambers to strike out such additional count or plea, &c., the proper course of procedure, although it may perhaps be deemed that the payment of the costs of the pleadings, &c., by the party failing to substantiate a distinct cause of

on one and the same principal matter, but varied in statement, description or circumstances only, (and pleas

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action or defence on each issue, under rule 26, would be a sufficient disallowance of the additional count or plea. The statute 4 & 5 Anne, and the Queen's Bench Act, do not bind the Queen.—Attorney General *v.* Algood. Parker 1, 10. Nor do the above rules; and at her suit the defendant cannot plead several pleas without leave of the Attorney General.—Reg. *v.* Bewdley. 1 P. Wms. 220; R. *v.* Archbishop of York. Willes 533. The object of these rules seems to be to prevent the same defence being pleaded in different forms, and not to bring into question the inconsistency of the pleas, unless it be grossly manifest, and in Tribuer *v.* Duerr. 1 Bing. N. C. 266, Tindal C. J. observed that "the late rules for the regulation of pleading nowhere state that pleas that are *inconsistent* with each other shall not be allowed; on the contrary, among the examples of pleas that may be pleaded together, we find pleas of payment, and of accord and satisfaction, or of release are distinct, and are to be allowed; these, and many others that might be referred to, are instances of pleas that cannot *all* be true, and in that sense are inconsistent; it was not intended that the defendant should be shut out from any bona fide ground of defence; though, where pleas that are manifestly inconsistent with each other appear to be vexatiously pleaded, and for the purpose of occasioning inconvenience and expense to the plaintiff, the court will not allow them." Under the statute of Anne, several pleas could not be pleaded without leave of the court, but now in all the courts in England such leave can be obtained by rule drawn up on judge's summons and order, under rule 13, T. T. 1 Will. IV. In this country, the King's Bench Act dispensed with the necessity of obtaining leave of the court to plead several matters, and under these rules several matters may still be pleaded without leave of the court, subject of course to objections as to their allowance and to the payment of the costs of issues raised on them, if the defences should fail to be proved separately and distinctly. In trespass for false imprisonment on a charge of felony, the court allowed the defendant to withdraw a former plea, and plead several pleas, Tindal C. J. observing that "where the same facts and circumstances are differently stated in different pleas, the rule applies; but where the same facts lead to different conclusions in law, it is material to the defendant, and of advantage to the plaintiff, that the different views of the facts which are relied on should be put on the record.—7 Dowl. 251. In trover the defendant has been allowed to plead a right of lien by agreement, a right of lien by usage, and the same usage in two other pleas, but

Pleas allowed together.

in bar in replevin are within the rule), are not to be allowed.

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with reference to a delivery of goods by two different parties. Leuckhart *v.* Cooper. 3 Dowl. 415. In replevin, an avowry justifying the taking of cattle damage feasant, in the locus in quo as the soil of A, and the like avowry as the soil of B, have been allowed.—Evans *v.* Davies. 3 N. & P. 464. In case for the obstruction of a right of way, the defendant was allowed to plead, not guilty, leave and license, a denial of the plaintiff's possession of the locus in quo, and a denial of the plaintiff's right of way.—Forrest *v.* Hale. 2 Jurist 302. In assumpsit against an attorney for negligence in providing insufficient security upon an advance of money, he was allowed to plead non assumpsit, and several other pleas, that the loss was not the result of the alleged negligence.—Wright *v.* Newton. 3 Scott 595. Pleas that part of the consideration for which the action was brought was money lent for the purpose of gaming, and that it was money lost at play, are, (though founded upon the same transaction) distinct defences, and therefore allowable.—Temple *v.* Reily. 9 Dowl. 62. In an action of trespass for entering and obstructing the navigation of a steam-vessel, the court allowed the defendant to plead —first, not guilty; secondly, leave and license; thirdly, that the defendant entered the steam-vessel to prevent two persons from fighting: fourthly, that the steam-vessel was in danger of being wrecked, to prevent which the defendant went on board to save her: fifthly, that a third party had a lien on the vessel, and that the defendant, as his servant, went on board to take possession of her for him.—Johnstone *v.* Knowles. 1 Dowl. N. S. 30. In trespass quare clausum fregit, the defendants were allowed to plead—first, not guilty; secondly, not possessed; thirdly, a plea stating that one, I, was seized in fee of the close, who demised to B., and after stating various demises that one F. demised to H., who became bankrupt, and that the defendants entered as his assignees; fourthly, a like plea, stating, however, that H. mortgaged to one R. and continued in possession as tenant to R. and that the defendants entered as assignees of H. who had become bankrupt; fifthly, a like plea to the fourth, only stating that H. and R., to defraud the creditors of H., demised to the plaintiff.—Pim. *v.* Grazebrook. 1 Dowl. N. S. 489.

Pleas not allowed together.

In trespass quare clausum fregit, two pleas justifying the trespasses under a custom, with and without a condition, were not allowed. Where a defendant may by statute give the special matter in evidence under the general issue, he will not be permitted to plead the general issue, and also a special plea of justification.—Ross v. Clifton. 11 A. & E. 631; Legge

Pleas of solvit ad diem, and of solvit post diem, are of time only, and are not to be allowed.

But pleas of payment and of accord and satisfaction, or of release, are distinct and are to be allowed.

Pleas of an agreement to accept the security of A. B. in discharge of the plaintiff's demand, and of an agreement to accept the security of C. D. for the like purpose, are also distinct and are to be allowed.

But pleas of an agreement to accept the security of a third person in discharge of the plaintiff's demand, and of the same agreement, describing it to be an agreement to forbear for a time in consideration of the same security, are not distinct; for they are only variations in the statement of one and the same agreement, whether more or less extensive, in consideration of the same security, and not to be allowed.

In trespass quare clausum fregit, pleas of soil and freehold of the defendant in the locus in quo, and of the defendant's right to an easement there, and pleas of right of way, are distinct and are to be allowed.

So pleas of a right of way over the locus in quo, varying the termini or the purposes, are not to be allowed.

Avowries for distress for rent, and for distress for damage feasant, are to be allowed.

But avowries for distress for rent, varying the amount

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v. Boyd. 9 Dowl. 39. Pleas varying the allegations of fraud and want of consideration in an action by the indorsee against the maker of the note, were not allowed,—Beavan *v.* Tanner. 8 Dowl. 870. In an action on a policy of insurance effected on a ship and cargo, the defendant was not allowed to plead, first, that the policy had been made by fraud; secondly, that the defendant's promise and subscription to the policy had been obtained by fraud; thirdly, that an inconsiderable portion only of the cargo was put on board as a cloak or pretence for effecting a policy, and with intent of defrauding the underwriter in the event of the loss of the ship: fourthly, that an inconsiderable portion only of the cargo was loaded on board, with intent that it might appear to constitute a valuable cargo, and with the intent that it should be lost by fraud.—Reid *v.* Rew. 6 Jurist, 999.

of rent reserved, or the times at which the rent is payable, are not to be allowed.

The example in this, and other places specified, are given as some instances only of the application of the rules to which they relate: But the principles contained in the rules are not to be considered as restricted by the examples specified.

PLEADINGS.

Proposed under statute 7th Wm. IV. cap. 3.

XXXIV. (*a*) Whereas declarations in action upon bills of exchange, promissory notes, and the counts usually called the common counts, occasion unnecessary expense to parties by reason of their length, and the same may be drawn in a more concise form: Now, for the prevention of such expense, it is ordered, that if any declaration in assumpsit, filed or delivered after these rules shall come into force, (being for any of the demands mentioned in the schedule of forms and directions annexed to this order, or demands of a like nature) shall excced in length such of the said forms set forth or directed in the schedule, as may be applicable to the case, or if any declaration in debt to be so filed, or delivered for similar causes of action, and for which the action of assumpsit would lie, shall exceed such length, no costs of the excess shall be allowed to the plaintiff if he succeeds in the cause; and such costs of the excess as have been

(*a*) The words in this rule "or demands of a like nature," and the direction as to drawing foreign bills at the end of these forms, seem to establish that these particular forms are merely given as a *few instances*, and that in *all other* cases, at least of *common debts*, it is intended that the pleadings may and ought to be framed in the like concise manner. The forms of declaration on bills and notes given in the schedule above, are much more concise than those which were adopted by the courts in England, as the unnecessary statements of the *delivery* of the note or bill to the plaintiff or indorsee, and of *notice* to the defendants of the indorsements, and the *direction* of the bill to the drawee, which are to be found in the English forms, are all omitted here, and in the forms of the common counts "price and value" and "then and there," unnecessarily inserted in the English forms, are also omitted.

incurred by the defendant, shall be taxed and allowed to the defendant, and be deducted from the costs allowed to the plaintiff.

And it is further ordered, that in the taxation of costs as between attorney and client, no costs shall be allowed to the attorney in respect to any such excess of length, and in case any costs shall be payable by the plaintiff to the defendant, on account of such excess, the amount thereof shall be deducted from the amount of the attorney's bill.

SCHEDULE OF FORMS AND DIRECTIONS.

Count on a Promissory Note against the Maker by Payee or Indorsee, as the case may be.

—— DISTRICT, } For that whereas the defendant on the
TO WIT: } —— day of —— in the year of our Lord ——, made his promissory note in writing, and thereby promised to pay to the plaintiff £——, —— days (weeks or months) after the date thereof (or as the fact may be) which period had elapsed before the commencement of this suit, (or if the note be payable to A. B.) and thereby promised to pay to A. B. or order £——, —— days, (weeks or months) after the date thereof, (or as the fact may be), which period had elapsed before the commencement of this suit; (and the said A. B. then endorsed the same to the plaintiff), and the said defendant thereupon became liable to pay the amount of the said note to the plaintiff, according to the tenor and effect thereof.

Count on a Promissory Note against Payee by Indorsee.

—— DISTRICT, } For that whereas one C. D. on the
TO WIT: } —— day of —— in the year of our Lord ——, made his promissory note in writing, and thereby promised to pay the defendant or order, £——, —— days (weeks or months) after the date thereof (as

the fact may be) which period had elapsed before the commencement of this suit; and the defendant then indorsed the same to the plaintiff: (or and the defendant then indorsed the same to one X. Y. and the said X. Y. then indorsed the same to the plaintiff), and the said C. D. did not pay the amount thereof, although the same was duly presented on the day when it became due, of all which the defendant had due notice; whereby the defendant became liable to pay the amount of the said note to the plaintiff, according to the tenor and effect thereof.

Count on a Promissory Note against Indorser by Indorsee.

—— DISTRICT, } For that whereas one C. D. on the
TO WIT: } —— day of —— in the year of our Lord ——, made his promissory note in writing and thereby promised to pay X. Y. or order £——, —— days (weeks or months (after date thereof, (or as the fact may be), which period had elapsed before the commencement of this suit; and the said X. Y. then indorsed the same to the defendant, and the defendant then indorsed the same to the plaintiff, (or, and the defendant then indorsed the same to Q. R. and the said Q. R. then indorsed the same to the plaintiff), and the said C. D. did not pay the amount thereof, although the same was duly presented on the day when it became due, of all which the defendant had due notice; and whereby the defendant became liable to pay to the plaintiff the amount of the said note according to the tenor and effect thereof.

Count on an Inland Bill of Exchange against the Acceptor by the Drawer being also the Payee.

—— DISTRICT, } For that whereas the plaintiff on the
TO WIT: } —— day of ——in the year of our Lord ——, made his bill of exchange in writing, and thereby required the defendant to pay to the plaintiff £——, —— days (weeks or months) after the date (or sight) thereof (as the fact may be) which period had elapsed before the commencement of this suit, and the

defendant then accepted the said bill, and thereby became liable to pay the same to the plaintiff, according to the tenor and effect thereof, (or, if the acceptance be special, add, and of his said acceptance thereof).

Count on an Inland Bill of Exchange against the Acceptor by the Drawer not being the Payee.

—— DISTRICT, } For that whereas the plaintiff on the
TO WIT: } —— day of —— in the year of our Lord —— made his bill of exchange in writing, and thereby required the defendant to pay O. P., or order, £——, —— days (weeks or months) after the date (or sight) thereof, which period had elapsed before the commencement of this suit, and the defendant then accepted the same; yet he did not pay the amount thereof, although the said bill was duly presented on the day when it became due, and thereupon the same was then returned to the plaintiff, whereby the defendant became liable to pay the said bill to the plaintiff, according to the tenor and effect thereof.

Count on an Inland Bill of Exchange against the Acceptor, by Indorsee.

—— DISTRICT, } For that whereas one E. F. on the
TO WIT: } —— day of —— in the year of our Lord —— made his bill of exchange in writing, and thereby required the defendant to pay to the said E. F. (or to G. H.) or order £ ——, —— days (weeks or months) after sight (or date) thereof, which period had elapsed before the commencement of this suit, and the defendant then accepted the said bill; and the said E. F. (or the said G. H.) then indorsed the same to the plaintiff (or, and the said E. F. or the said G. H. then indersed the same to J. K. and the said J. K. then indorsed the same to the plaintiff); whereby the defendant became liable to pay to the plaintiff the amount of the said bill, according to the tenor and effect thereof (or if the acceptance be special, add, and of his acceptance thereof.)

Count on an Inland Bill of Exchange against the Acceptor by the Payee not being Drawer.

—— DISTRICT, } For that whereas one E. F. on the
TO WIT: } —— day of —— in the year of our Lord —— made his bill of exchange in writing, and thereby required the defendant to pay to the plaintiff £ ——, —— days (weeks or months) after the sight (or date) thereof, which period had elapsed before the commencement of this suit, and the defendant then accepted the same, whereby he became liable to pay to the plaintiff the amount of the said bill, according to the tenor and effect thereof (or if the acceptance be special add, and of his acceptance thereof.)

Count on an Inland Bill of Exchange against the Drawer by Payee on non-acceptance.

—— DISTRICT, } For that whereas the defendant on the
TO WIT, } —— day of —— in the year of our Lord —— made his bill of exchange in writing, and thereby required one J. K. to pay to the plaintiff £ —— —— days (weeks or months) after the sight (or date) thereof; and the same was then presented to the said J. K. for acceptance, and the said J. K. then refused to accept the same, of all which the defendant had due notice, whereby he became liable to pay to the plaintiff the amount of the said bill.

Count on an Inland Bill of Exchange against Drawer by Indorsee, on non-acceptance.

—— DISTRICT, } For that whereas the defendant on the
TO WIT: } —— day of —— in the year of our Lord —— made his bill of exchange in writing, and thereby required one J. K. to pay to the order of the said defendant £ ——, —— days (weeks or months) after sight (or date) thereof, and the said defendant then indorsed the same to the plaintiff (or, and the defendant then indorsed the same to one L. M., and the said L. M.

then indorsed the same to the plaintiff) and the same was then presented to the said J. K. for acceptance, and the said J. K. then refused to accept the same, of all which the defendant had due notice, whereby he became liable to pay to the plaintiff the amount of the said bill.

Count of an Inland Bill of Exchange against Indorser by Indorsee, on non-acceptance.

—— DISTRICT, } For that whereas one N. O. on the
TO WIT: } —— day of —— in the year of our Lord —— made his bill of exchange in writing, and thereby required one P. Q. to pay to the order of him the said N. O. (or of one X. Y.) £ ——, —— days (weeks or months) after the sight (or date) thereof, and the said N. O. (or the said X. Y.) then indorsed the said bill to the defendant (or to R. S. and the said R. S. then indorsed the same to the defendant) and the said defendant then indorsed the same to the plaintiff, and the same was then presented to the said P. Q. for acceptance, and the said P. Q. then refused to accept the same, of all which the defendant had due notice; whereby he became liable to pay the amount of the said bill to the said plaintiff.

Count on an Inland Bill of Exchange against Payee by Indorsee, on non-acceptance.

—— DISTRICT, } For that whereas one N. O. on the
TO WIT: } —— day of —— in the year of our Lord —— made his bill of exchange in writing, and thereby required one P. Q. to pay to the defendant or order £ ——, —— days (weeks or months) after the sight (or date) thereof; and the defendant then indorsed the said bill to the said plaintiff (or to one R. S. and the said R. S. then indorsed the same to the plaintiff), and the same was then presented to the said P. Q. for acceptance; and the said P. Q. then refused to accept the same; of all which the defendant then had due notice;

whereby he became liable to pay to the plaintiff the amount of the said bill.

Count on a Promissory Note according to the Form in the Statute of 3 Vic. chap. 8.

—— DISTRICT, } For that whereas the said —— (the
TO WIT: } maker of the note) on the —— day of —— at —— made his promissory note in writing, and thereby promised (setting forth the note in the usual manner) and the said —— (the first, second, or other indorsees) afterwards duly indorsed the same, and the said —— (the last indorsee) delivered the said note so indorsed to the said plaintiff (aver presentment, notice, &c., when by law necessary in the particular case) by reason whereof the said (all the defendants) became jointly and severally liable to pay to the said plaintiff the said sum of money in the said note specified, and being so liable, afterwards jointly and severally promised the said plaintiff to pay him the same. (Add the usual breach.)

Count on a Bill of Exchange according to the Form in the Statute of 3 Vic. chap. 8.

—— DISTRICT, } For that whereas the said —— (the
TO WIT: } drawer) on the —— day of —— at —— drew his certain bill of exchange directed to —— (setting forth the bill according to its tenor and effect) and the said —— (the drawer) afterwards duly accepted the same; and the said —— (the first and other indorsers) afterwards duly indorsed the said bill of exchange; and the said —— (the last indorser) delivered the said bill so indorsed to the said plaintiff (aver presentment, protest, notice, &c., where by law necessary in the particular case) by reason whereof the said —— (all the defendants) became jointly and severally liable to pay to the said plaintiff the said sum of money in the said bill specified, and being so liable afterwards jointly and severally promised the said plaintiff to pay him the same. (Add the usual breach.)

Directions for Declarations on Bills when the Action is brought for non-payment.

First.—On Bills payable after date.

If the declaration be against any party to the bill except the drawer or acceptor, and the bill be payable at any time after date, and the action be brought for non-payment, it will be necessary to insert as in declarations on promissory notes, immediately after the words denoting the time appointed for payment, the following words, viz., "which period had elapsed before the commence-"ment of this suit;" and instead of averring that the bill was presented to the drawee for acceptance, and that he refused to accept the same, to allege that the drawee (naming him) "did not pay the said bill although the "same was duly presented on the day when it became due."

Second.—On Bills payable after sight.

And if the declaration be against any party except the drawee or acceptor, and the bill be payable at any time after sight, it will be necessary to insert after the words denoting the time appointed for payment, the following words, to wit: "and the said drawee (naming him) then "saw and accepted the same, and the said period had "elapsed before the commencement of this suit," and instead of alleging that the bill was presented for acceptance and refused, to allege that the drawee (naming him did not pay the said bill, although the same was duly presented when it became due.

Directions for Declarations on Bills or Notes payable at sight.

If a note or bill be payable at sight, the form of the declaration must be varied so as to suit the case, which may be easily done.

On Foreign Bills.

Declarations on foreign bills may be drawn according to the principles of these forms with the necessary variations.

Common Counts.

—— DISTRICT, } For that whereas the defendant, on the
TO WIT: } —— day of —— in the year of our
Goods. Lord —— was indebted to the plaintiff in £ —— for goods bargained and sold (or sold and delivered) by the plaintiff to the defendant at his request.

Work. And in £ —— for work done and materials for the same provided by the plaintiff, for the defendant, at his request.

Money lent. And in £ —— for money lent by the plaintiff to the defendant, at his request.

Money paid. And in £ —— for money paid by the plaintiff for the use of the defendant, at his request.

Money received. And in £ —— for money received by the defendant for the use of the plaintiff.

Account stated. And in £ —— for money found to be due from the defendant to the plaintiff, on an account stated between them.

General Conclusion.

And thereupon the defendant in consideration of the premises respectively, promised to pay the said several sums of money respectively to the plaintiff. Yet he hath not paid any of the said monies or any part thereof; to the plaintiff's damage of £ —— and therefore he brings suit, &c.

If the declaration contains only one count on a bill of exchange, promissory note, or for money, the conclusion and breach must be framed to suit the case.

PLEADINGS IN PARTICULAR ACTIONS.

1. ASSUMPSIT.

Proposed under statute 7th Wm. IV. cap. 3. Firstly. (*b*) In all actions of assumpsit, except on bills of exchange, and promissory notes, the plea of non-

(*b*) By the terms of the above rule the plea of non assumpsit is to operate only in denial of the *express* contract or promise

assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of

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alleged, or of the *matters of fact* from which the contract or promise alleged may be implied by law, and as the promise alleged in an indebitatus count is only *implied* from the plaintiff's proof that the alleged debt had been *contracted*, and was completely *due and actually payable before the action was commenced*, the plea of non assumpsit to an indebitatus count denies that the alleged debt was *due*, and also denies that the *implied promise* to pay on request had been made; where, therefore, no debt has become completely due, no special plea is necessary, as where the credit for goods sold and delivered has not expired.—Cousens *v.* Paddon. 4 Dowl. 492; Gregory *v.* Hartnoll. *Ib.* 699. And where the requisites of the statute of frauds have not been complied with, the general issue is sufficient to let the defendant into this defence.—Leaf *v.* Tuton. 10 M. & W. 393; although it had been previously decided that such defence should be specially pleaded.—Maggs *v.* Ames. 4 Bing. 470. So in assumpsit for use and occupation, a defence that the premises were held under a demise from the plaintiff for rent payable quarterly, and that before the rent became due, the plaintiff evicted the defendant, could be made under the general issue. — Prentice *v.* Elliott. 5 M. & W. 606. So also the partnership of the plaintiff and defendant.—Payne *v.* Hales. 5 M. & W. 598. And in action for wages, under this plea, the defendant may shew what the services were worth, and the jury may give damages accordingly.—Baillie *v.* Kell. 4 Bing. N. C. 638. And in assumpsit on a guarantee, under the general issue the defendant may shew that the consideration alleged in the declaration is not the real consideration to be inferred from the instrument.—Raikes *v.* Todd. 1 P. & D. 138. So that the goods, &c., were not according to contract, and were not accepted or were returned.—Flight *v.* Booth. 1 Bing. N. C. 70. And that part of contract not performed by plaintiff, and no benefit to defendant.—Oxendale *v.* Wetherall. 9 B. & C. 386; Gardner *v.* Alexander. 3 Dowl. 146. Attorney's bill not delivered more than a month before action brought.—Beck *v.* Mordaunt. 4 Dowl. 112; Moore *v.* Boulcott. 2 Dowl. 145. But an alteration in the contract after execution must be pleaded specially.—Hemming *v.* Trenery. 1 P. & D. 661. And where the plaintiff declared specially that in consideration that he had sold and delivered twenty tons of best Dutch lead to the defendant, the defendant promised to deliver him prussiate of potash to the same amount, and the plaintiff averred the delivery of the lead, but alleged as a breach that the defendant would not deliver the full

fact from which the contract or promise alleged may be implied by law.

Ex. Gr.—In an action on a warranty the plea will operate as a denial of the fact of the warranty having been given, upon the alleged consideration, but not of the breach: and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents, for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach.

In an action of indebitatus assumpsit for goods sold and delivered, the plea of non assumpsit will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

Secondly. (*c*) In all actions upon bills of exchange and

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quantity of potash: Held that under non assumpsit the defendant could not give in evidence that the lead was of inferior quality, but should have specially pleaded it.—Pegg *v.* Stead. 9 C. & P. 636. So illegality of sale or contract must in all cases be specially pleaded.—Fenwick *v.* Laycock. 1 Gale & D. 87. — Clutterbuck *v.* Coffin. 1 Dowl. N. S. 479, even though such illegality appears on the plaintiff's pleadings, or by his own evidence.—Daintree *v.* Hutchinson. 10 M. & W. 85. In assumpsit on an attorney's bill, the defendant may prove under the general issue, that the work became ultimately useless through the plaintiff's negligence.—Bracey *v.* Carter. 12 A. & E. 373.

(*c*) If non assumpsit is pleaded in an action on a bill of exchange or promissory note, the plaintiff may sign judgment. —Kelly *v.* Villebois. 3 Jurist 1172. Where to an action on a bill of exchange, together with the money counts, the

promissory notes, the plea of non assumpsit shall be inadmissible: in such actions therefore a plea in denial must traverse some matter of fact.

Ex. Gr.—The drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note.

Thirdly. In every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transactions to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded.

Ex. Gr.—Infancy, coverture, release, payment, performance, illegality of consideration, (either by statute or common law) drawing, indorsing, accepting, &c., bills or notes by way of accommodation, set off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded.

Fourthly. In actions on policies of assurance, the interest of the assured may be averred thus; "that A. B. "C. and D. or some or one of them, were or was inte-"rested, &c.," and it may also be averred, that the insurance was made for the use and benefit, and on the account of the person or persons so interested.

II. In Covenant and Debt.

Firstly. In debt on speciality, or covenant, the plea of non est factum shall operate as a denial of the execution

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defendant pleads non assumpsit to the whole declaration, the plaintiff should sign judgment as to the count on the bill, and enter a nolle prosequi as to the other counts.—Fraser *v.* Newton. 3 Dowl. 773. Where the first count of a declaration was on a bill of exchange, and the second on an account stated, and two pleas were pleaded, and there had been judgment on demurrer for the plaintiff on the plea to the count on the bill, and issue joined on the other which was not a plea of payment: Held that upon a venire ad triandum et inquirendum, it was not necessary to produce the bill.—Lane *v.* Mullins. 1 Dowl. N. S. 562. A plea denying the indorsement of a bill of exchange puts in issue not only the fact of the signature, but also a delivery with intent to transfer the bill.—Marston *v.* Allen. 1 Dowl. N. S. 442.

of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

Secondly. (*d*) The plea of nil debet shall not be allowed in any action, except in debt on penal statutes.

Thirdly. (*e*) In actions of debt on simple contract, other than on bills of exchange and promissory notes, the

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(*d*) The 4th section of the statute 21 Jac. 1 ch. 4, allowing the special matter to be given in evidence under the general issue, applies to penal actions given by subsequent statutes, and therefore nil debet is a good plea in an action for the penalty on 11 Geo. 2 c. 19 § 4, for fraudulently removing goods from the premises of a tenant.—Jones *v.* Williams. 7 Dowl. 206; Faulkner *v.* Chevell. 2 P. & D. 262. If nil debet be pleaded to a declaration containing a count on an account stated, it is bad for the whole declaration, although to the other counts it is a good plea by statute.—Calvert *v.* Moggs. 10 A. & E. 632.

(*e*) Under the plea of "never was indebted," evidence of an admission by the plaintiff before action brought, that the balance of accounts was in favor of the defendant, is inadmissible.—Evans *v.* Downes. 2 Jurist 1066. In debt for goods sold and delivered, and on account stated, it is not competent for the defendant under the plea of nunquam indebitatus to show that the goods in question originally belonged to a third party, who had assigned his property for the benefit of his creditors, and had since given an authority to the plaintiff to sell the individual goods.—Poole *v.* Williams. 4 Jurist 748. In debt the defendant may plead to the debt and not to the damages, or vice versa.—Henry *v.* Earl. 8 M. & W. 228. Under a plea of nunquam indebitatus in debt for goods bargained and sold, it is open to the defendant to object that the contract is void by the seventeenth section of the statute of Frauds.—Freeken *v.* Thomlinson. 1 Man. & G. 772. In an action on an attorney's bill, plea nunquam indebitatus, the plaintiff may shew that a greater amount is due to him than the master allowed on taxation, pursuant to an order for changing the attorney in the course of the cause, in which the costs were incurred.—Beck *v.* Cleaver. 9 Dowl. 111.—Where goods were sold and paid for immediately, held that this payment could be shewn under nunquam indebi tatus.—Bussey *v.* Barnett. 1 Dowl. N. S. 646. Debt for use and occupation for half a year ending in May, 1840—plea, nunquam indebitatus, At the trial it appeared that the defendant

defendant may plead that "he never was indebted in "manner and form as in the declaration alleged," and such plea shall have the same operation as the plea of non assumpsit in indebitatus assumpsit; and all matters in confession and avoidance shall be pleaded specially, as above directed in actions of assumpsit.

Fourthly. In other actions of debt in which the plea of nil debet has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance.

III. Detinue.

(*f*) The plea of non detinet shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea.

IV. In Case.

Firstly. (*g*) In actions on the case, the plea of "not

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was tenant to the plaintiff from year to year; and that in April, 1839, it was agreed that the tenancy should be put an end to at the following martinmas; and that at that time the defendant accordingly delivered up the keys of the premises, and paid the rent then due: Held that evidence of this agreement was admissible under the plea.—Washington *v.* Harthan. 6 Jurist 127.

(*f*) The plea of non detinet merely puts in issue the fact of detention. If the defence be that the plaintiff was not possessed of the goods, or that the defendant was justified in detaining them, it should be specially pleaded.—Richards *v.* Frankum. 6 M. & W. 420. In detinue upon issue joined on a plea denying property in the plaintiff, it is no defence that there are other persons co-tenants with the plaintiff, who are not joined in the action.—Broadbent *v.* Leadward. 11 A. & E. 209. On a plea in detinue that the goods are not the goods of the plaintiff, the defendant may set up a lien.—Lane *v.* Tewson. 12 A. & E. 116 n.

(*g*) In case for a malicious arrest, the plea of not guilty merely puts in issue the wrongful act, viz., the malicious arrest without probable cause.—Watkins *v*, Lee. 5 M. & W.

"guilty" shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by

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270; Atkinson *v.* Raleigh. 6 Jurist 731. In case against the defendant for negligence in driving his horse and cart against the plaintiff's horse: Held that under "not guilty," the defendant could not shew that he was not the person driving when the injury happened, and that the cart did not belong to him; and after trial the court refused leave to amend by substituting another plea.—Taverner *v.* Little. 5 Bing. N. C. 676. In case for a nuisance in keeping a mizen near the plaintiff's house, whereby the air was corrupted, under "not guilty," the defendant was not allowed to give in evidence an uninterrupted use of it for twenty years.—Flight *v.* Thomas. 2 P. & D. 531. In case for negligent driving, where the plaintiff's possession of the carriage alleged to have been negligently driven is stated in the declaration by way of inducement, such possession is admitted by the plea of not guilty.—Emery *v.* Clark. 2 M. & Rob. 260. The plea of not guilty in case for erecting a cess pool near a well, and thereby contaminating the water of the well, puts in issue both the fact of the erection of the cess pool, and that the water was thereby contaminated.—Norton *v.* Scholfield. 9 M. & W. 665. The declaration alleging that the defendant was possessed of a waggon and horses, which were under the care of his servant, and the servant was driving them, and that the defendant, by his said servant, so carelessly drove the same, that the plaintiff's carriage was injured; on a plea of not guilty, the defendant cannot prove that the servant and horses were not his.—Hart *v.* Crowley. 12 A. & E. 378.

Where not guilty is pleaded, if a conversion in fact be proved, the plaintiff is entitled to a verdict, although it appear from the evidence that, at the time of such conversion, the plaintiff had parted with his property in the goods.—Vernon *v.* Shipton. 2 M. & W. 9. In trover it appeared that the plaintiff being the legal owner of the goods in question, they were seized while in the actual possession of a third party, under an execution against such third party and sold to the defendant; Held that under a plea denying the plaintiff's possession, the defendant might shew the plaintiff authorized the sale; and that a jury might infer such authority from the plaintiff consulting with the execution creditor as to the disposal of the property, without mentioning his own claim, after he knew of the seizure and intention to sell.—Pickard *v.* Sears. 6 Ad. & E. 469. Under not guilty, the defendant cannot set up an absolute property in himself by sale from the plaintiff.—Barton *v.* Brown. 5 M. & W. 298. The plea that the plaintiff was not possessed puts in issue the right of

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the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.

Ex. Gr.—In an action on the case for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of "not guilty" will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. In an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way; and in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods.

In an action of slander of the plaintiff in his office, profession, or trade, the plea of "not guilty" will operate to the same extent precisely as at present, in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession or trade; but it will not operate as a denial of the fact of the plaintiff's holding the office, or being of the profession or trade alleged.

In actions for an escape it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings. In this form of action, against a carrier, a plea of "not

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the plaintiff to the possession of the goods at the time of the conversion.—Isaac *v.* Belcher. 7 Dowl. 516. Under not guilty, the defendant cannot shew a right to detain the goods on a delivery of them to him by the plaintiff, as a security for rent.—White *v.* Teal. 4 Jurist, 890; 4 Per. & D. 43. A lien may be given in evidence, under the plea "that the plaintiff was not lawfully possessed."—Brandas *v.* Barnett. 1 Man. & G. 208. In trover for goods seized under a claim of toll, alleged to be due for landing them at a particular wharf, the defendant can set up his claim to the toll under the plea of not possessed.—Webb *v.* Tripp. 1 Dowl. N. S. 589.

"guilty" will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as carrier for hire, or of the purpose for which they were received.

Secondly. All matters in confession and avoidance shall be pleaded specially as in actions of assumpsit.

V. In Trespass.

Firstly. (*h*) In actions of trespass quare clausum fregit, the close or place in which, &c., must be designated in the declaration by name or abuttals, or other description, in failure whereof the defendant may demur specially.

Secondly. (*i*) In actions of trespass quare clausum fregit, the plea of "not guilty" shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's

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(*h*) In trespass quare clausum fregit, the declaration described the locus in quo as part of the sea beach, and lying between high water mark and low water mark, and abutting landwards towards the north on five closes, particularly described. Upon the trial, it appeared that these abuttals were not immediately contiguous to the locus in quo, but that there intervened a waste strip of shingle, which was no part of the sea beach, held that the abuttals were not proved.—Webbers *v.* Richards. 1 Gale & D. 114. A description of a close by two abuttals only is a sufficient compliance with this rule.—North *v.* Ingamells. 9 M. & W. 249.

(*i*) The plea of liberum tenementum admits the plaintiff's possession, and renders it incumbent on the defendant to prove title, either by deed or by shewing twenty years' actual possession.—Brest *v.* Lever. 7 M. & W. 593. On a plea of liberum tenementum to a close named in the declaration, the defendant is entitled to a verdict, if he establish a title to that part of the close on which the trespass was committed, and is not bound to prove a title to the whole close.—Smith *v.* Royston. 8 M. & W. 381.

Proviso. It was intended by the Court of Queen's Bench that these rules should have been in force after Hil. Term, 6 Vic., but the time of their coming into operation was altered by the legislature to the last day of Trin. Term, 6 & 7 Vic., since which day they have been in operation as to all pleas, &c. pleaded after Trin. Term, although pleaded to declarations filed in or before that term.—Mich. Term, 7 Vic. P. C. Jones J.

possession, or right of possession of that place, which, if intended to be denied, must be traversed specially.

Thirdly. In actions of trespass de bonis asportatis, the plea of "not guilty" shall operate as a denial of the defendant having committed the trespass alleged, by taking or damaging the goods mentioned; but not of plaintiff's property therein.

Fourthly. Where in an action of trespass quare clausum fregit, the defendant pleads a right of way, with carriages and cattle, and on foot, in the same plea, and issue is taken thereon, the plea shall be taken distributively, and if a right of way with cattle, or on foot only, shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found, and for the plaintiff in respect of such of the trespasses as shall not be so justified.

Fifthly. And in all actions in which such right of way as aforesaid, or other similar right, is so pleaded that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively.

Provided nevertheless that nothing contained in any of the above rules or regulations, relating to pleading in particular actions, shall apply to any case in which the declaration shall bear date before the last day of Hilary Term next.

XXXVI. All special traverses or traverses with an inducement of affirmative matter, shall conclude to the country: Provided that this regulation shall not preclude the opposite party from pleading over to the inducement when the traverse is immaterial. Proposed under statute 7th Wm. IV. cap. 3.

XXXVII. (*j*) The form of a demurrer shall be as follows:— Proposed under statute 7th Wm. IV. cap. 3.

(*j*) A demurrer commencing "and the defendant says that the said declaration is not sufficient in law;" and then, proceeding to assign separate causes of demurrer to each count, is in form a demurrer to the whole declaration, and if any count be good the plaintiff is entitled to judgment, the de-

"The said defendant by —— his attorney (or in person, &c.) or the said plaintiff) says that the declaration (or plea, &c.) is not sufficient in law" (showing the special causes of demurrer if any).

The form of a joinder in demurrer shall be as follows:

"The said plaintiff (or defendant) says that the declaration (or plea, &c.) is sufficient in law."

Proposed under statute 7th Wm. IV. cap. 3.

XXXVIII. In all cases under the statute 7 Will. IV. c. 3, in which after a plea in abatement of the non-joinder of another person, the plaintiff shall, without having proceeded to trial on an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement, as joint contractors, the commencement of the declaration shall be in the following form:

"(*Venue.*) A. B. by E. F. his attorney (or in his own "proper person, &c.) complains of C. D. and G. H., "which said C. D. has heretofore pleaded in abatement "the non-joinder of the said G. H. &c." The same form to be used mutatis mutandis in cases of arrest or detainer.

Proposed under statute 7th Wm. IV. cap. 3.

XXXIX. In all actions by and against executors or administrators, or persons authorised by acts of parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or to be sued, shall not in any case be considered as in issue unless specially denied.

Proposed under statute 7th Wm. IV. cap. 3.

XL. The entry of proceedings on the record for trial or on the judgment roll (according to the nature of the case), shall be taken to be, and shall be in fact the first entry of the proceedings in the cause, or of any part thereof upon record, and no fees shall be payable in respect of any prior entry made, or supposed to be made, on any roll or record whatever.

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murrer being too large.—Parrett Navigation Company *v.* Stower. 6 M. & W. 564. A special demurrer for duplicity must point out expressly, and not by way of description, in what the duplicity consists.—Smith *v.* Clinch. 2 Gale, D. 225.

XLI. (*k*) In a plea or subsequent pleading intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of actionem non, or to the like effect, or any prayer of judgment; nor shall it be necessary in any replication or subsequent pleading intended to be pleaded in maintenance of the whole action, to use any allegation of precludi non, or to the like effect, or any prayer of judgment; and all pleas, replications and subsequent pleadings, pleaded without such formal parts as aforesaid, shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action, or in maintenance of the whole action: Provided that nothing herein contained shall extend to cases where an estoppel is pleaded. Proposed under statute 7th Wm. IV. cap. 3.

XLII. No formal defence shall be required in a plea, and it shall commence as follows: Proposed under statute 7th Wm. IV. cap. 3.

"The said defendant by —— his attorney (or in person, &c.) says that, &c."

XLIII. It shall not be necessary to state in a second or other plea or avowry, that it is pleaded by virtue of the statute, or to that effect. Proposed under statute 7th Wm. IV. cap. 3.

(*k*) This rule applies to a plea answering the whole of the count to which it is pleaded, though there are other counts which it does not answer.—Bird *v.* Higginson. 6 A. & E. 824. So, if a plea be pleaded in total bar of a particular part of a count, it is not requisite in a replication replying specially to it, to commence with the formula of precludi non, or conclude with a prayer of judgment.—Phillips *v.* Roderick. 2 Jurist 419. The formal commencement actionem non is necessary in a plea to part of the cause of action, whether pleaded in bar or only to the further maintenance of the particular part to which it is pleaded.—Upward *v.* Knight. 5 Bing. N. C. 338. Pleas need not conclude with a verification, unless they contain affirmative matter; therefore a plea of the statute of limitations without a verification is good, on special demurrer. Bodenham *v.* Hill. 7 M. & W. 274. In debt for £200 for work and labor, money paid, and on an account stated, the defendant pleaded, first never indebted; secondly as to parcel, &c., a set off; and, thirdly, as to other parcel, &c., payment: Held, on special demurrer, that the second and third pleas were good, without the allegation of actionem non, or prayer of judgment.—Ratton *v.* Davis. 1 Gale & D. 21. 1 Q. B. 496.

Proposed under statute 7th Wm. IV. cap. 3.

XLIV. No protestation shall hereafter be made in any pleading, but either party shall be entitled to the same advantage in that or other actions as if a protestation had been made.

Proposed under statute 7th Wm. IV. cap. 3.

XLV. Issues, judgments, and other proceedings, shall be in the several forms in the schedule hereunto annexed, or to the like effect, mutatis mutandis: Provided that in cases of non compliance, the court or a judge may give leave to amend.

No. 1.

Form of an Issue in Fact in the Queen's Bench.

In the Queen's Bench.

The (day of declaration) —— day of —— in the —— year of our Lord, 18

"(*Venue.*) A. B. by E. F. his attorney (or in his own "proper person) or by E. F. who is admitted by the "court here to prosecute for the said A. B. who is an "infant within the age of twenty-one years, as the next "friend of the said A. B. (as the case may be) complains "of C. D. for that (copy the declaration from these "words to the end, and the plea and subsequent pleadings to the joinder of issue).

"Thereupon the Sheriff is commanded that he cause "to come here on the —— day of —— twelve, &c. by "whom, &c. and who neither, &c. to recognize, &c. be-"cause as well, &c."

No. 2.

Form of Nisi Prius Record in the Queen's Bench.

The placita are to be omitted.

Copy the issue to the end of the award of the venire, and proceed as follows:

"Afterwards on the —— day of —— in the year "—— the jury between the parties aforesaid is respited "here until the —— day of —— unless —— shall "first come on the —— day of —— at —— according

"to the form of the statute in such case made and pro-
"vided, for default of the jurors, because none of them
"did appear. Therefore let the sheriff have the bodies
"of the said jurors accordingly."

The postea is to be in the usual form.

No. 3.

Form of Judgment for the Plaintiff in Assumpsit.

Copy the issue to the end of the award of the venire, and proceed as follows:

"Afterwards the jury between the parties is respited
"until the —— day of —— unless —— shall first
"come on the —— day of —— at —— according to
"the form of the statute in that case made and provided,
"for default of the jurors because none of them did
"appear.

"Afterwards on the —— day of —— came the par-
"ties aforesaid, by their respective attorneys aforesaid,
"(or as the case may be) and —— before whom the
"said issue was tried, hath sent hither his record had
"before him in these words:"

Copy postea.

"Therefore it is considered that the said A. B. do
"recover against the said C. D. his said damages (costs
"and charges) by the jurors aforesaid, in form aforesaid
"assessed, and also —— pounds, for his costs and
"charges by the court here adjudged of increase to the
"said A. B. with his assent, which said damages, costs
"and charges, in the whole amount to —— pounds;
"and the said C. D. in mercy, &c."

(Signed) JNO. B. ROBINSON, *C. J.*
J. B. MACAULAY, *J.*
JONAS JONES, *J.*
ARCHD. MCLEAN, *J.*
CHR. A. HAGERMAN, *J.*

Toronto, 20th April, 1842.

STATUTES.

34 GEO. III. CH. 2.

An Act to establish a superior Court of Civil and Criminal Jurisdiction, and to regulate the Court of Appeal.

1. For the general and regular administration of justice throughout this Province, Be it enacted, &c., that there be constituted and established, and there is hereby constituted and established, a court of law, to be called and known by the name and style of *His Majesty's Court of King's Bench* (*a*) for the Province of Upper Canada, which shall be a court of record of original jurisdiction, and shall possess all such powers and authorities as by the law of England are incident to a superior court of civil and criminal jurisdiction: and may and shall hold plea in all and all manner of actions, causes or suits, as well criminal, as civil, real, personal and mixed, arising, happening or beginning within the said Province: and may and shall proceed in such actions, causes or suits, by such process and course, as shall tend, with justice and despatch to determine the same: and may and shall hear and determine all issues of law, and shall also hear and by an inquest of good and lawful men, determine all issues of fact that may be joined in any such action, cause or suit, as aforesaid, and judgment thereon give, and execution thereof award in as full and ample a manner as can or may be done in His Majesty's Courts of King's Bench, Common Bench, or in matters which re-

(*a*) Name and style of court to be *Her Majesty's Court of Queen's Bench in and for the Province of Upper Canada* during the reign of female sovereign.—2 Vic. ch. 1.

gard the king's revenue, by the Court of Exchequer in England: and that his Majesty's Chief Justice of this Province, together with *two Puisne Judges* (*b*) shall preside in the said court, which court shall be holden in a *place certain*, (*c*) that is in the city, town, or place, where the Governor or Lieutenant-Governor shall usually reside: and until such place be fixed, the said court shall be holden at the last place of meeting of the Legislative Council and Assembly.

33. The Governor, Lieutenant-Governor, or person administering the government of this Province, or the Chief Justice of the Province, together with any two or more members of the Executive Council of the Province, shall compose a Court of Appeal (*d*) for hearing and determining all appeals from such judgments or sentences as may lawfully be brought before them.

34. Provided always, that when any person having given the judgment or sentence appealed from, shall be a member of the Court of Appeal, it shall and may be lawful for him to assign to the said court his reasons for delivering such judgment, in case he shall be so disposed, but he shall not be at liberty to give his vote in the decision of the question before the court.

35. An appeal shall lie to the court of the Governor and Executive Council, from all judgments given in the said Court of King's Bench, in all cases where the matter in controversy shall exceed the sum of one hundred pounds, or shall relate to the taking of any annual or other rent, customary or other duty, fee or any other such like demand, of a general and public nature, affecting future rights, of what value or amount soever the same may be, upon proper security being given by the

(*b*) Increased to *four*, 7 Will. IV. ch. 1; members of Court of Appeals from Chancery.—7 Will. 4 ch. 2. § 17.

(*c*) See 2 Will. IV. ch. 8, Act of Union 3 & 4 Vic. ch. 35. § 44.

(*d*) Vice Chancellor to be member of Court of Appeals.—7 Will. IV. ch. 2. § 13. And in appeals from decisions of Vice Chancellor, Puisne Judges to be members of Court of Appeals.—*Ib.* § 17.

appellant that he will effectually prosecute his appeal, and answer the condemnation, and also pay such costs and damages as shall be awarded in case the judgment or sentence appealed from shall be affirmed, and that upon perfecting such security execution shall be stayed in the original cause.

36. The judgment of the said Court of Appeal shall be final in all cases where the matter in controversy shall not exceed the sum or value of five hundred pounds sterling, but in cases exceeding that amount, as well as in all cases where the matter in question shall relate to the taking of any annual or other rent, customary or other duty, or fee, or any other such like demand of a general and public nature, of what value or amount soever the same may be, an appeal may lie to his Majesty, in his Privy Council, upon proper security being given by the appellant, that he will effectually prosecute his appeal, and answer the condemnation, and also pay such costs and damages as shall be awarded by his Majesty, in his Privy Council, in case the judgment of the said Court of Governor and Executive Council, or Court of Appeals shall be affirmed; and upon the perfecting of such security, execution of the said judgment shall be stayed, until the final determination of such appeal to the king in council.

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35 GEO. III. CH. 4.

An Act to explain and amend an Act passed in the thirty-fourth year of His Majesty's reign, intituled, "An Act to establish a Superior Court of Civil and Criminal Jurisdiction, and to regulate the Court of Appeal."

Preamble.

WHEREAS doubts have arisen respecting the jurisdiction of his Majesty's Court of his Bench in this Province, as far as the same may concern the condemnation of contraband goods: Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled

by virtue of and under the authority of an Act passed in the Parliament of Great Britain, intituled "An Act to repeal certain parts of an Act passed in the fourteenth year of his Majesty's reign, intituled, 'An Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said Province," and by the authority of the same, That from and after the passing of this Act, all actions of debt, bill, plaint or information, that may be brought upon any seizure of contraband goods, by any ordinance or act in force, or to be in force in this Province, for the prevention of smuggling, or any clandestine or unlawful commerce or intercourse heretofore, now or hereafter carried on, or to be carried on, by and between his Majesty's subjects or people of any other state or country, when and where the same may be prohibited, shall be heard and determined in his Majesty's Court of his Bench, and that it shall and may be lawful upon any action of debt, bill, plaint or information, brought or to be brought upon any seizure before this Act made, or to be hereafter made of any contraband or prohibited goods, now or hereafter made or to be made contraband, for the Justices of his Majesty's Bench for the time being, to proceed to the hearing and determining thereof, in as full and ample a manner as is now done and practised in his Majesty's Court of Exchequer in England, and to condemn the same, if it shall be lawful so to do, and to award such damages and costs as may now or hereafter be given by any ordinance or law now in being, or hereafter to be, for the regulation of the commerce of this country, any ordinance or law to the contrary hereof in any wise notwithstanding.

(See 4 Geo. IV. sess. 2. ch 11, s. 18; 2 Wm. IV. ch. 3; British Stat. 3 & 4 Wm. IV. ch. 59.)

Jurisdiction granted to the Court of King's Bench in actions for goods seized as contraband, and process to be had therein, as in similar cases in his Majesty's Court of Exchequer in England.

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58 GEO. III. CH. 4.

An Act to regulate the Costs in certain cases in the Court of King's Bench.

WHEREAS the District Courts, established in the several districts of this Province, were intended as well to relieve

Preamble.

defendants from the charge of answering in the Superior Court, as to facilitate the suitor; and whereas suits of the proper competence of the said District Courts are frequently brought into the Court of King's Bench, having concurrent jurisdiction, to the great increase of costs and charges to the parties: For remedy whereof, be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of Great Britain, intituled, "An Act to repeal certain parts of an Act passed in the fourteenth year of his Majesty's reign, intituled, 'An Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said Province," and by the authority of the same, That in any suit hereafter to be brought in the Court of King's Bench, which suit may be of the proper competence of the District Court, (*e*) no more costs shall

In actions hereafter brought in the King's Bench, which the District Courts are competent to try, none but District Court costs shall be taxed against the defendant, unless the judge certifies, &c.

(*e*) The plaintiff was not allowed full costs, where in an action of covenant he recovered only £2, and the judge did not certify.—Gardner *v.* Stoddard. E. T. 11 Geo. 4. Where the plaintiff and the defendant, and the plaintiff's witnesses resided in different districts, full costs were allowed on a cause of action within the jurisdiction of the District Court.—Hugill *v.* Driscoll. M. T. 1 Will. IV. The plaintiff was allowed full costs on a promissory note, the amount of which had been reduced within the jurisdiction of the District Court, *after* action brought.—Kilborn *v.* Wallace. M. T. 3 Will. IV.; *contra*, where reduced *before* action.—Donelly *v.* Gibson. H. T. 2 Vic. Where one of the plaintiffs was the Judge of the District Court, of the district in which the defendant resided, full costs were allowed, although the cause of action was within the district court jurisdiction.—Jones *et al.* *v.* Wing. H. T. 3 Will. IV. If the plaintiff's claim is within the jurisdiction of the district court, a certificate will not be granted, because the defendant's set off is beyond it.—Gooderham *v.* Chilvers. E. T. 7 Will. 4. Full costs were allowed on a promissory note for £10, where the defendant left the district where he made the note, and was residing in another. —Perrin *et al.* *v.* Carson. T. T. 2 & 3 Vic. The plaintiff is

be taxed against the defendant, than would have been incurred in the District Court in the same action, unless the Judge who tried the cause of such suit or action, shall certify in open court at the trial, (*f*) that it was a

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not entitled to full costs on a cause of action within the jurisdiction of the district court, because he resides out of the province.—Sawyer *v.* M'Donell. T. T. 7 Will. IV. Full costs were allowed where there was no Judge of the District Court in the district, where the cause of action arose when the action was brought.—Jennings *v.* Dingman.; Willis *v.* Meriton. T. T. 4 & 5 Vic. P. C. Macaulay J. Where the plaintiff, on a declaration containing a special count and the common counts, recovered a general verdict for a sum within the jurisdiction of the district court, and did not obtain any certificate for full costs: Held that he could tax only district court costs.—Washburn *v.* Longley. M. T. 5 Vic.; Beattie *et al. v.* Cook. M. T. 5 Vic. The plaintiff residing in the London district, sold goods to the defendant residing in the Western district, and the defendant there gave his note for the amount: Held that on a mere surmise that the consideration of the note might be disputed, the plaintiff was not justified in suing in the Queen's Bench, but should have sued in the Western District Court, and could not therefore get full costs.—Cronyn *v.* Probat. M. T. 5 Vic.

(*f*) A certificate for full costs on a verdict. which is for an amount within the jurisdiction of the District Court, must be moved for immediately after the trial.—Falls *et al. v.* Lewis. E. T. 1 Will. IV.; Patton *v.* Williams. H. T. 3 Vic. Where there are issues in law as well as in fact, and a venire to try the issues and assess the damages, and a verdict is rendered for the plaintiff for an amount within the jurisdiction of the District Court, a certificate for costs must be applied for at the trial, and an order cannot be made by a Judge under rule 9 E. T. 11 Geo. IV. ante page 6, as in cases of assessments after judgment by default, for the taxation of such costs.—Mahony *v.* Zwick. H. T. 5 Will. IV. If a Judge at nisi prius orders a certificate for costs under this statute, it may be drawn up at any time.—Linfoot *v.* O'Neill. M. T. 7 Will. IV. Where a verdict was found for the plaintiff for a sum within the jurisdiction of the District Court in a defended cause, and the Judge at nisi prius did not grant a certificate for full costs, but the plaintiff afterwards obtained an order for costs in chambers from another Judge, as if the damages had been assessed after judgment by default, the court set the order aside.—McNab *v.* Reeves. H. T. 6 Vic. P. C. McLean, J.

And so much of defendant's costs taxed against him by his attorney as exceed the costs in the District Court, shall be charged to the plaintiff.

fit cause to be withdrawn from the District Court and commenced in the Court of King's Bench.

2. And be it further enacted by the authority aforesaid, That the defendant's costs taxed between client and attorney in such suit not so certified, or so much thereof as shall exceed the costs taxable in the District Court in such case, shall be set off against the plaintiff's costs taxed, to be recovered from defendant.

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43 GEO. III. CH. 1.

An Act to allow time for the Sale of Lands and Tenements by the Sheriff.

Preamble.

(See British Stat. 5 Geo. II. ch. 7.)

WHEREAS it is expedient, in the present circumstances of this Province, that some time should elapse after the issuing of process of execution against lands and tenements, before the Sheriff proceeds to expose the same to sale; Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of Great Britain, intituled, "An Act to repeal certain parts of an Act passed in the fourteenth year of his Majesty's reign, intituled, 'An Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said Province," and by the authority of the same, That from and after the end of this present session of Parliament, goods and chattels, lands and tenements, shall not be included in the same writ of execution, nor shall any such process issue against the lands and tenements until the return of the process against the goods and chattels.

2. And be it further enacted by the authority aforesaid, That the writ against the lands and tenements shall not be made returnable in less than twelve months from the teste thereof, nor shall the Sheriff expose the same

to sale, within less than twelve months from the day on which the writ shall have been delivered to him. (*g*)

57 GEO. III. CH. 9.

An Act to enable the Commissioners of Gaol Delivery, and Oyer and Terminer, to proceed, although the Court of King's Bench be sitting in the Home District, for which they are commissioned.

WHEREAS by construction of law, without special provision to the contrary, the meeting of the Court of King's Bench, in any district, supersedes all commissions of oyer and terminer and gaol delivery: And whereas, it may so happen that the business of the spring assize, in the Home District, may not be concluded before the first day of Easter Term: Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of Great Britain, intituled, "An Act to repeal certain parts of an Act passed in the fourteenth year of his Majesty's reign, intituled 'An Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said Pro- Preamble.

(*g*) A judgment is not a lien upon lands for the purposes of an elegit, so as to avoid the effect of a fieri facias against the lands, issued on another judgment subsequently entered, but placed in the Sheriff's hands prior to the elegit.—Doe Henderson *v.* Bentick. E. T. 2 Will. IV. A judgment against an executor to recover *de bonis testatoris*, will warrant an execution against the testator's *lands*, on the return of nulla bona to the writ against goods.—Doe Jessup *v.* Bartlett. T. T. 3 & 4 Will. IV. Lands are bound only from the delivery of the writ to the Sheriff.—Doe McIntosh *v.* McDonell. T. T. 5 & 6 Will. IV. A purchaser of lands on execution at Sheriff's sale, is entitled to recover against the debtor or his representative without proof of the debtor's title.—Doe Fisher *v.* Chesser *et al.* E. T. 1 Will. IV. A purchaser at Sheriff's sale of lands sold under an execution, may maintain ejectment without taking actual possession.—Doe Wilkes *v.* Jones. T. T. 1 & 2 Vic.

When any session of Oyer and Terminer and Gaol Delivery for the Home District, shall have been begun to be holden before the first day of any term —the said session shall be continued to be holden and the business concluded, notwithstanding the sitting of the Court of King's Bench

vince," and by the authority of the same, That when any session of oyer and terminer and gaol delivery for the Home District, shall have been begun to be holden before the first day of any term, that the said session shall be continued to be holden and the business thereof finally concluded, notwithstanding the sitting of his Majesty's Court of King's Bench within the said district; and that all trials and proceedings, as well as judgments, had at such session, so continued to be holden, shall be good and effectual to all intents and purposes as if the said session of the Court of King's Bench had not been.

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59 GEO. III. CH. 25.

An Act to prevent the abatement of any Action against a Joint Obligor, Contractor or Partner, on account of the other joint parties not being made defendants.

Preamble. (See 7 Wm. IV. ch. 3; 1 Vic. ch. 7.)

WHEREAS by law the several defendants named in any civil suit or action must be personally served with process: And whereas by law if any joint obligor, contractor or partner, be sued in any action, without naming the other joint obligors, contractors or partners, the defendant may plead the same in abatement of such action, to the great delay of justice in such cases, where one or more joint obligors, contractors or partners, reside out of the jurisdiction of the courts of this Province, and cannot be served with process; for remedy whereof, Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of Great Britain, intituled, "An Act to repeal certain parts of an Act passed in the fourteenth year of his Majesty's reign, intituled, 'An Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said Province," and by the authority of the

No action to abate by reason that any one or more of several joint obligors, contractors, &c. are not made defendants, unless the party plead-

same, That in any action to be brought in this Province, against any joint obligor, contractor or partner, the action shall not abate for or on account of any joint obligor, contractor or partner, not being made defendant, unless the party pleading such matter in abatement shall shew to the court that such joint obligor, contractor or partner, is living within the jurisdiction of the court, so to be served with its process conformably to law. (*h*)

Pleading in abatement shall shew that the joint contractor not named is within the jurisdiction of the court.

2. And be it further enacted by the authority aforesaid, That the joint obligation, contract or promise, may be given in evidence against any one or more of the joint obligors, contractors or partners, and have the same force and effect, as to any judgment or execution thereon, as if the same was the sole obligation, contract, or promise of the defendant, any law, usage or custom, to the contrary notwithstanding.

Joint obligation, contract or promise, may be given in evidence against any one or more of the joint contractors, partners, &c. as if it were a sole obligation.

3. And be it further enacted by the authority aforesaid, That for satisfaction of any judgment against one or more of several joint obligors, contractors or partners, no execution shall issue until the bond, obligation, or other written evidence on which judgment shall be had, be first filed with the record of the said judgment.

No execution to issue upon a judgment against one of several joint obligors until the joint bond, contract, &c. be filed in court.

(*h*) Pleas in abatement for non joinder to state the party's residence, and be verified by affidavit.—7 Will. IV. ch. 3. § 6. The executors, &c. of a deceased joint contractor, &c., made liable although other joint contractors living.—1 Vic. ch. 7. In a plea of non joinder by a defendant in abatement, it is sufficient to state that the parties not joined are living within the jurisdiction of the court at the time of plea pleaded, and a replication to such plea for the non joinder of two persons is not double for assigning a different cause for not joining each of the two.—Tuille *v.* Harvey. M. T. 2 Will. IV. If a plea in abatement of the non joinder of a defendant do not state his place of residence, it is a nullity.—Brewster *v.* Davy. H. T. 2 Vic. A plea of non joinder in abatement is bad on demurrer, if it state only the initial letters of the christian names of the party not joined.—Hastings *v.* Champion *et al.* M. T. 3 Vic. A plea of non joinder in abatement of a co-defendant fails where there is a third contracting party not named, although such third party be out of the province. The plea in such a case should shew all the parties liable, and then state that one is out of the province.—McKnight *v.* Scott. M. T. 3 Vic.

2 GEO. IV. CH. 7.

An Act relative to the service of Process issuing out of his Majesty's Court of King's Bench, and the several District Courts in this Province.

Preamble. (See 2 Geo. IV. ch. 1.)

WHEREAS by the laws now in force in this Province relative to the service of process issuing out of his Majesty's Court of King's Bench, or out of the several District Courts in this Province, it is optional with the plaintiff, his attorney or agent, to cause such process to be served by some literate person, or to compel the Sheriff to serve the same, when it may be inconvenient or difficult for such plaintiff, his attorney or agent, to do so: And whereas it is expedient to grant relief to the several Sheriffs in this Province in respect of such service, and to make provision relative to the service of such process in future: Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of Great Britain, intituled, "An Act to repeal certain parts of an Act passed in the fourteenth year of his Majesty's reign, intituled, 'An Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said Province," and by the authority of the same, That from and after the passing of this Act, no person, other than the Sheriffs and persons employed under them, shall be entitled to receive mileage or other compensation on the service of any process required by law to be directed to the Sheriff of any district.

No persons but Sheriffs and persons employed by them shall be entitled to compensation for serving any process directed to the Sheriff of any District.

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2 GEO. IV. CH. 1.

An Act to repeal part of and amend the Laws now in force respecting the practice of his Majesty's Court of King's Bench in this Province.

Preamble.

WHEREAS it is expedient to make certain amendments in the practice of his Majesty's Court of King's Bench in

this Province: Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of Great Britain, intituled, "An Act to repeal certain parts of an Act passed in the fourteenth year of his Majesty's reign, intituled, 'An Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said Province," and by the authority of the same, That the ninth clause of an Act passed in the thirty-fourth year of his late Majesty's reign, intituled, "An Act for the regulation of Juries;" and an Act passed in the thirty-fourth year of his late Majesty's reign, intituled, "An Act to establish a Superior Court of Civil and Criminal Jurisdiction, and to regulate the Court of Appeal," with the exception of the first, thirty-third, thirty-fourth, thirty-fifth, and thirty-sixth clauses; and the second clause of an Act passed in the thirty-fifth year of his late Majesty's reign, intituled, "An Act to explain and amend an Act passed in the thirty-fourth year of his Majesty's reign, intituled, 'An Act to establish a Superior Court of Civil and Criminal Jurisdiction, and to regulate the Court of Appeal;'" and an Act passed in the thirty-seventh year of his late Majesty's reign, intituled, "An Act for regulating the practice of the Court of King's Bench;" and an Act passed in the thirty-eighth year of his late Majesty's reign, intituled, "An Act to amend part of an Act passed in the thirty-fourth year of the reign of his Majesty, intituled, 'An Act to establish a Superior Court of Civil and Criminal Jurisdiction, and to regulate the Court of Appeal;' and also to amend and repeal part of an Act passed in the thirty-seventh year of the reign of his Majesty, intituled, 'An Act for regulating the practice of the Court of King's Bench, and to make further provision respecting the same;'" and an Act passed in the forty-first year of his late Majesty's reign, intituled, "An Act the better

(See 2 Wm. IV. ch. 8; 4 Wm. IV. ch. 2; 4 Wm. IV. ch. 5, 6, & 8; 5 Wm. IV. ch. 1, 2, & 3; 7 Wm. IV. ch. 1, 3; 1 Vic. ch. 15; 2 Vic. ch. 1; 2 Vic. ch. 2; 3 Vic. ch. 2; Act of Union s. 44, 46, & 47; Statutes of Canada, 4 & 5 Vic. ch. 5.)

9 sec. of 34 Geo. III. ch. 1; 34 Geo. III. ch. 2, except the 1st, 33rd, 34th, 35th & 36th secs; 2nd sec. of 35 Geo. III. ch. 4; 37 Geo. III. ch. 4; 38 Geo. III. ch. 4; 41 Geo. III. ch. 9; 3rd and 4th sec. of 49 Geo. III. ch. 4; 51 Geo. III. ch. 3, repealed.

to adapt the establishment of the Court of King's Bench to the present situation of this Province;" and the third and fourth clauses of an Act passed in the forty-ninth year of his late Majesty's reign, intituled, "An Act for the more effectual preventing of frivolous and vexatious suits, and to authorize the levying of poundage upon executions in certain cases, and to regulate the sales by Sheriffs and other officers;" and also an Act passed in the fifty-first year of his late Majesty's reign, intituled, "An Act to extend personal arrest to the sum of forty shillings, and otherwise to regulate the practice in cases of personal arrest," be and the same are hereby repealed.

Terms of sitting; at what periods the same shall commence respectively. (See 1 Vic. ch. 15.)

2. [Repealed by 6 Geo. IV. ch. 1.]

3. Provided always, and be it further enacted by the authority aforesaid, That when the court shall have good reason to believe there will not be sufficient business to require their daily attendance throughout the term, they may be at liberty to adjourn the court on any return day to the next immediate return day.

Court may adjourn from one return day to another.

Original process; a writ of capias ad respondendum. (See 2 Geo. IV. sess. 1, ch. 7.)

4. And be it further enacted by the authority aforesaid, That the original process for compelling the appearance of the defendant or defendants in any suit hereafter to be brought in his Majesty's Court of King's Bench, shall be a writ of capias ad respondendum, tested in the name of the Chief Justice or senior Puisne Judge of the said court, for the time being; a copy of which process, in actions not bailable, shall be personally served on the defendant or defendants by the Sheriff to whom the process shall be directed, or his lawful deputy or bailiff, being a literate person; (*i*) and that upon every copy of such process to be served upon any defendant, there

Copy whereof to be served on defendant in actions not bailable.

(*i*) A writ of capias ad respondendum can only be served by a sheriff or his lawful deputy or bailiff.—Whitehead *v.* Fothergill. T. T. 11 Geo. IV.; Landrigan *v.* Callaher. M. T. 1 Vic. Even where the deputy is a party to the suit.—Ruttan *v.* Ashford. M. T. 4 Will. IV. But if a defendant accepts process served by a person, who is not a sheriff's officer, he cannot afterwards on that ground set the service aside.—Arnold *v.* Fish. E. T. 6 Will. IV.

shall be written a notice to such defendant of the intent and meaning of such service, to the effect following: English notice on process not bailable.

"A. B. (*j*) you are served with this process to the intent that you may, either in person or by your attorney, appear in *his Majesty's Court of King's Bench*, (*k*) by filing your appearance in the office of the Clerk of the Crown (or deputy, as the case may be) in the —— district, (*l*) at the return thereof, being the —— day of —— or within eight days thereafter, in order to your defence in this action." (*m*)

And that in all actions hereafter to be brought, wherein

(*j*) This notice should be directed to the defendant by name; "to the within defendant," is not sufficient.—Brown *v.* Whitehead. M. T. 1 Vic.

(*k*) Since the statute 2 Vic. ch. 1, altering the style of the court, was passed, notice to appear in the "King's Bench," instead of the "Queen's Bench," is irregular.—Ellerbeck *v.* Sherwood. M. T. 3 Vic.

(*l*) Notice to appear in an outer district to process issued from the Home district is irregular.—Forsyth *v.* Hartwell *et al.*. H. T. 4 Will. IV.

(*m*) In addition to this notice, on every bailable writ and warrant and copy of process served for the payment of any debt, the amount of the plaintiff's claim for debt and costs should be stated by rule 3 T. T. 3 & 4 Will. IV., ante page 11; and under this rule it has been held that an arrest would not be set aside for want of this notice, where it appeared that the omission had been supplied two hours after the arrest, and before the application was made.—Smith *v.* Smith. M. T. 3 Will. IV. Bailable process issued by an attorney must be indorsed with this notice.—Washburn *v.* Walsh. M. T. 3 Will. IV. An alias bailable writ issued under the statute after serviceable process does not require the indorsement of this notice.—Ross *et al. v.* Balfour *et al.* M. T. 2 Vic. Nor does the copy of a bill served on an attorney.—Ainslie *v.* MacNab. H. T. 4 Vic. P. C. Jones, J. If on bailable process this notice is omitted, the arrest under the writ will be set aside, although the omission is supplied immediately after the arrest is made.—Gibbs *v.* Kimble. M. T. 6 Vic. P. C. Jones, J. But to set aside service of process for want of this notice, the defendant must shew by affidavit that the cause of action is a debt.—Leggatt *v.* Marmott. E. T. 3 Vic. The amount claimed for debt and costs must be indorsed on the bailiff's warrant, under which an arrest is made, as well as on the writ.—Steele *v.* Lameux. E. T. 6 Will. IV.

the defendant or defendants shall not be arrested and held to special bail, if the defendant or defendants do not appear at the return of such process, or within eight days after the return thereof, it shall and may be lawful for the plaintiff or plaintiffs, upon affidavit being made and filed of the personal service of such process, (*n*) to enter common bail for the defendant or defendants, and to proceed thereon as if such defendant or defendants had put in and perfected bail to the action.

Manner of proceeding on process not bailable.

5. And be it further enacted by the authority aforesaid, That it shall and may be lawful for each and every defendant, personally or by attorney, to enter his, her or their appearance, (*o*) at the office from which such process not bailable has issued, at any time within eight days after the return of such process or writ; and that

(*n*) Where the plaintiff appeared for the defendant without filing the writ and affidavit of service, and filed and served his declaration, the proceedings were set aside as void.—Forrestel *v.* Graham. H. T. 2 Will. IV. And an appearance by the plaintiff for the defendant must be filed as of the term the writ is returnable, and cannot be entered later than the end of the vacation of the term after.—*Ib.*; Drew *et al. v.* Baby. E. T. 3 Vic. A defendant who has pleaded a plea which is a nullity, cannot object, as a ground for setting aside an interlocutory judgment after such plea, that there is no appearance entered.—Brewster *v.* Davy. H. T. 2 Vic. Where the defendant appeared by attorney, and the plaintiff having overlooked it, entered appearance for him also, and served the declaration on himself personally, and assessed damages after judgment by default, the court refused to set the proceedings aside, as the application was made too late.—Ketchum *et al. v.* Keefer. M. T. 3 Vic. If the plaintiff enters an appearance for the defendant, he is not bound to take notice of any attorney for the defendant, unless he pleads.—Gourlay *v.* McLean. H. T. 3 Vic. Where the plaintiff entered appearance for the defendant without filing the affidavit of service of the writ, the proceedings were set aside.—Courtney *v.* Bigelow. H. T. 5 Vic. P. C. McLean, J.

(*o*) If the defendant enter common bail it is a sufficient appearance to a non bailable writ.—Grace *v.* Meighan. T. T. 11 Geo. IV. It is irregular to file or serve a declaration before appearance or common bail filed, and the acceptance of a declaration by an attorney, does not waive the irregularity.—Ballard *v.* Wright. M. T. 2 Will. IV.

in all actions or suits where the defendant or defendants have appeared, as aforesaid, the plaintiff or his attorney shall, after filing a declaration in the office from whence the writ issued, and service of a copy thereof on the defendant, by a demand in writing, call for a plea, and that if after the expiration of eight days from the service of such demand no plea be filed, (p) it shall and may be lawful for the plaintiff or plaintiffs to sign judgment in the cause.

Privileged persons may proceed by bill, unless altered by rule of court.

6. And be it further enacted by the authority aforesaid, That for and notwithstanding any thing in this Act contained, it shall and may be lawful to proceed by bill in any case where by reason of any privilege such proceeding is practised in the Court of King's Bench in England, and that the like proceeding shall be had in actions so commenced, as in the said court, unless otherwise altered by the rules of his Majesty's Court of King's Bench in this Province. (q)

(p) See ante rule 10, page 22. Interlocutory judgment cannot be signed if pleas have been filed in the office; although they have not been served.—McKinnon *v.* Johnson. E. T. 3 Will. IV.; King *v.* Dunn. E. T. 2 Vic. A defendant has eight days to plead to a new assignment.—Unger *v.* Crosby. E. T. 3 Will. IV. A plaintiff has eight days to reply after a demand of replication.—Robinson *v.* McGrath. H. T. 2 Vic.

(q) By rule 2, H. T. 1 Will. IV., it was ordered, that when by reason of any privilege the proceedings are not commenced by writ of capias ad respondendum, a demand of plea may be served at any time, when, by the practice in England, a rule to plead might be given, but not before; and that the service of such demand of plea shall suffice as in other cases, without the necessity of taking out any rule to plead; rule 4, E. T. 11 Geo. IV., having previously ordered that no rule to plead, reply, rejoin, &c., should be necessary; but that a demand should be sufficient, as in respect to a plea in actions, on non bailable process. Under these rules the following cases have been decided: An attorney has till the following term to plead to a bill filed against him in vacation.—M'Canasy *v.* Foster. E. T. 1 Will. IV. An interlocutory judgment signed in vacation on a bill against an attorney served the same vacation, although filed in term, is irregular.—Fraser *v.* Boulton. M. T. 2 Will. IV. In an action against an attorney he should have four full days in term to plead.—Munro *v.* King. E. T. 5 Will. IV.

Defendants may plead several matters without leave of the court.

(See 7 Wm. IV. ch. 3.)

7. And be it further enacted by the authority aforesaid, That it shall and may be lawful for any defendant or defendants in any action or suit in the said court, to plead as many several matters thereto as he shall think necessary, without leave of the said court, where he would be entitled to do so by obtaining such leave, under the same regulations and restrictions as are declared by the British Statute passed in the fourth year of the reign of Queen Anne, chapter sixteen, section four, any thing in the said clause to the contrary notwithstanding. (*r*)

No person to be arrested for a sum under £5.

8. And whereas much inconvenience is felt by conscientious creditors in the recovery of their just debts, from the difficulty of ascertaining whether any person or persons design leaving the province with an intent to defraud their creditors, an affidavit of which is required by the laws now in force before a capias ad respondendum could issue: Be it therefore enacted by the authority aforesaid, That no person shall be arrested or holden

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Whether a bill against an attorney be filed in term or vacation, a demand of plea must be served during term, or within four days after it, and he has four full days in term to plead.—Sherwood *v.* Boulton. M. T. 3 Vic. A demand of plea must be served in an action against an attorney, a rule and notice to plead are not sufficient.—Hamilton *v.* McDonald. H. T. 3 Vic. These cases were all decided before the passing of the new rules, the tenth of which, ante page 22, again substitutes a demand for a rule, and orders in all cases, whether privileged or otherwise, that the parties respectively shall be bound to plead, &c., in eight days after the service of such demand, unless otherwise ordered by the court or a judge. It would at first seem that this rule entirely supersedes the former rules mentioned above, but it will be seen that such is not the case, and that the effect will be to give to attornies and other privileged persons the same time to plead as persons not privileged, but will not remove the necessity of *serving a demand of plea at the time when a rule to plead may be given in England*, and as a rule to plead could only be given in term time, or within four days after it, a privileged person will still be entitled to have a demand of plea served at such time, before he can be called upon to plead.

(*r*) See ante page 52 et seq.

to special bail upon any process issuing out of the said court, in a civil suit, where the cause of action shall not amount to five pounds (*s*) of lawful money of this Province; and where the cause of action shall amount to five pounds and upwards, it shall not be lawful for the plaintiff to proceed to arrest the body of the defendant or defendants, unless an affidavit be first made by such plaintiff, his servant or agent, of such cause of action, and the amount justly and truly due to the said plaintiff from the said defendants; and also that such plaintiff, his servant or agent, is apprehensive that the defendant will leave this province without satisfying the said debt, and that the said plaintiff, his servant or agent, does not sue out such process from any vexatious or malicious motive whatever; which affidavit shall be filed, and may be made before any judge or commissioner of the court out of which such process shall issue authorised to take affidavits in such court, or before the officer who shall issue such process, or his deputy, which oath such officer or his deputy is hereby authorised to administer, and for the said affidavit one shilling shall be paid, and no more; and the sum or sums specified in such affidavit shall be endorsed on such writ or process, which sum or sums so endorsed, the sheriff, or other officer to whom such writ or process shall be directed, shall take bail, and for no more. (*t*)

Affidavit to be made by plaintiff previous to arrest.

And may be sworn before any Judge, &c.

And 1s. to be paid for oath.

Sum sworn to, shall be endorsed on bailable process.

9. And be it further enacted by the authority aforesaid, That it shall and may be lawful for any plaintiff, his servant or agent, having made such affidavit, as aforesaid, to sue out from any Commissioners of his Majesty's Court of King's Bench for taking affidavits in each and every district, (*u*) a writ of capias ad respondendum, with

Commissioners for taking affidavits and Deputy Clerks of the Crown to issue bailable process.

(See 4 Wm. IV. ch. 6.)

(*s*) Ten pounds by 5 Will. IV. ch. 3, secs. 1 & 2.

(*t*) Where on a bailable writ, the sheriff was directed to take bail for too large a sum, the court allowed the indorsement to be amended and reduced to the proper sum, on payment of costs.—Grantham *v.* Peters. E. T. 3 Vic.

(*u*) By 4 Will. IV. ch. 6 § 4, no commissioner shall issue a writ if he is the attorney in the cause. And where a defendant was arrested under a commissioner's writ, and the com-

which the said commissioners, as well as the several deputies appointed by the Clerk of the Crown, shall be from time to time supplied, signed by the proper officer of the court, on which shall be endorsed the sum sworn to, and to which the said affidavit shall be annexed; whereupon it shall and may be lawful for any constable in the district to arrest the said defendant, and deliver him, her or them, over to the sheriff, in order that he, she or they, may be held to bail for the amount of the sum so endorsed.

Judges may order arrests in certain cases.

10. And be it further enacted by the authority aforesaid, That in all cases in which the cause of action shall be other than a debt certain, of which affidavits may be made as hereinbefore mentioned, it shall and may be lawful to hold the defendant or defendants to bail, a judge's order having been first obtained for that purpose, in such cases and in such manner as is provided by the law and practice of the Court of King's Bench in England. (*v*)

Conditions of recognizances of bail.

(See 4 Wm. IV. chap. 5.)

11. And be it further enacted by the authority aforesaid, That each and every recognizance of bail to be taken in cases of personal arrest, as hereinbefore mentioned, shall be, that if the defendant or defendants shall be condemned in the action at the suit of the plaintiff or plaintiffs, he, she or they, will satisfy the costs and condemnation money, or render himself, herself or themselves, to the custody of the sheriff of the district in which such action shall be brought, or that the cognizors shall do so for such defendant or defendants.

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missioner's name was not attached to the jurat of the affidavit at the time of the arrest, although it was placed there before the motion was made to set the writ and arrest aside, the court held the proceedings irregular, and set them aside with costs. —Black *v.* Halliday. T. T. 5 & 6 Vic. P. C. Macaulay, J.

(*v*) The ordinary conclusion in an affidavit of debt that the deponent does not make the affidavit, &c., from any vexatious or malicious motive, is unnecessary where an order is obtained for an arrest.—McLaughlin *v.* Wismer. M. T. 7 Will. IV. In such case, however, the affidavit must shew the deponent's apprehension of the defendant's departure from the province.—Wiltsee *v.* Bloor. E. T. 2 Vic.

12. And be it further enacted by the authority aforesaid, That whenever any bail in any action or suit now pending or hereafter to be brought in any district, shall be desirous of surrendering their principal in discharge of themselves, it shall and may be lawful for the *Sheriff of such District*, (*w*) and he is hereby required, to receive such principal into his custody at the gaol of his district, and give such bail a certificate under his hand and seal of office, of such surrender, which certificate shall be a sufficient authority for any judge of the court in which such action shall be pending, and he is hereby required on production thereof, to order an exoneretur (*x*) to be entered on the bail piece, in the same manner as if such principal had been surrendered in person before him at his chambers, for which certificate the said Sheriff shall receive the sum of five shillings, and no more.

Bail may surrender their principal to the sheriffs of the respective district where defendants are held to bail, and sheriffs to give certificates of surrender, and judge to order an exoneretur on production thereof.

13. And be it further enacted by the authority aforesaid, That if any defendant or defendants shall be taken or detained in custody in any district of this Province, on mesne process issuing out of any court of Record in this Province, at the suit of any plaintiff or plaintiffs, and shall be detained or imprisoned thereon after the return of such process, (*y*) it shall and may be lawful for such defendant

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(*w*) By 4 Will. IV. ch. 5 § 1, bail may surrender their principal to the sheriff of any district, in which he may be resident or found. The court will not grant leave to enter an exoneretur, when bail have surrendered their principal, without a certificate from the sheriff to whom he was surrendered. —Linley *v.* Cheesman. H. T. 10 Geo. IV.

(*x*) Bail have eight days in full term after the return of process against themselves, to surrender their principal, and the plaintiff is bound to stay the proceedings on receiving notice of the render, although the costs are not paid.—Ives *v.* Robinson. M. T. 2 Vic.

(*y*) By 4 Will. VI. ch. 5 § 2, defendants may put in special bail in vacation, whether they are or are not in actual custody. Since this latter statute, bail excepted to in vacation must justify in vacation, and have not till the following term for that purpose. — McKenzie *et al. v.* MacNab. E. T. 2 Vic.

Defendants may put in special bail in vacation.

or defendants, except in term time within the Home District of this Province, or district where the court shall be holden, and upon due notice thereof given to the attorney of the plaintiff or plaintiffs in such process, to put in and justify bail before any of the Justices of the court out of which such process shall have issued, or before any commissioner duly appointed for taking bail in such court, which Justice, or in case bail shall have been put in and justified before a commissioner, any Justice of the said court upon receipt of the said bail piece and recognizance from such commissioner, may, if he shall think fit, order a rule to issue for the allowance of such bail, and may further order such defendant or defendants to be discharged out of custody by Writ of Supersedeas, in the like manner as may be done by order of the court in term time.

Rule for allowance thereof may be issued by a judge.

Defendant may be held to bail in action previously pending

14. And be it further enacted by the authority aforesaid, That in case the plaintiff in any action now pending or hereafter to be brought in the said court, his servant or agent, shall at any time after action brought, and before final judgment, be apprehensive that the defendant will leave this Province without paying his debt, it shall and may be lawful to and for the said plaintiff, his servant or agent, having made and filed such affidavit as aforesaid, to sue out an *alias writ of capias ad respondendum*, (*z*) and to cause the said defendant to be thereupon arrested and holden to bail, which bail, if the said writ shall have

(*z*) Where after service of non bailable process, the defendant was arrested, and moved to set aside the arrest, on the ground that the affidavit of debt was entitled in the cause, and the plaintiff shewed that the defendant had been arrested under the statute allowing an arrest under an alias writ, on a testatum writ issued to a different district from that in which the first writ had been served, the rule was discharged, the testatum writ being sufficient under the statute, and the affidavit rightly entitled in the cause.—Gass *v.* Colclough. E. T. 3 Vic. Where a judge's order is necessary to arrest, a defendant cannot be held to bail on an alias writ under this clause.—Bowman *v.* Yielding *et al.* M. T. 2 Will. IV.; Ross *v* Urquhart. M. T. 7 Vic.

been sued out after common bail being filed, *shall be bail to the action.* (*a*)

15. And be it further enacted by the authority aforesaid, That in all cases in which the party has been held to special bail, it shall not be necessary to make or file any further or other affidavit before suing out a capias ad satisfaciendum upon the judgment obtained in the same action; (*b*) and that in cases where the party has not been held to special bail, a writ of capias ad satisfaciendum may issue after judgment, upon an affidavit of the same form as is hereby required to be made for the purpose of suing out a capias in mesne process, or upon affidavit by the plaintiff, his servant or agent, that he hath reason to believe that the defendant hath parted with his property, or made some secret and fraudulent conveyance thereof in order to prevent its being taken in execution.

No further affidavit required in bailable action previous to suing out Ca. Sa. otherwise in actions not bailable. (See 5 Wm. IV. ch. 3, sec. 2.)

16. And be it further enacted by the authority aforesaid, That upon all issues joined in the court in any suit or action that shall arise or be triable in the Home district, or in the district where the Court shall be holden under any commission of Assize and Nisi Prius issued after the Terms of Hilary and Trinity, respectively, and tested on the last day of each of those Terms, the Chief Justice, or any other judge of the said court, shall, as judge of Assize and Nisi Prius for the said district, try all manner of issues joined in the said court which ought to be tried by a jury of the said district, and that

Issues joined in the Home District may be tried before any judge. (see 7 Wm. IV. ch. 1, sec. 8.)

Chief Justice or other judge to issue his precept to the sheriff to summon jurors to try such issues.

(*a*) Where a defendant was arrested on an alias writ after serviceable process, and gave a *bail bond* to the sheriff for his appearance, having already entered a common appearance in the suit, the bail bond was set aside with costs.—Douglass *v.* Powell. M. T. 2 Will. 4.

(*b*) Where after entering an appearance to serviceable process, the defendant had been arrested on an alias writ under the 14th section, and subsequently discharged from custody, because the affidavit of debt was not entitled in the cause, the court after judgment refused to set aside his arrest, made under a writ of capias ad satisfaciendum, issued on a new affidavit made after the judgment was entered.—Gordon *v.* Somerville. M. T. 7 Vic. P. C. Jones J.

not less than thirty days after Hilary and Trinity Terms.

the Chief Justice, or any other judge of the said court shall, as judge of Assize and Nisi Prius, issue his precept to the sheriff of the said district, for the summoning of jurors for the trying of all such issues as may be joined in the said court, and arise and be triable in the said district, so that the same may be in no instance holden sooner than thirty days from the end of the said Hilary and Trinity terms, respectively.

Commissions may be issued for the examination of witnesses.

17. And be it further enacted by the authority aforesaid, That when the plaintiff or plaintiffs, defendant or defendants, in any action now pending, or hereafter to be brought, shall be desirous of procuring the testimony in such suit or suits of any aged or infirm person resident within the jurisdiction of His Majesty's Court of King's Bench in this province, or any person who is about to withdraw himself or herself beyond such jurisdiction, or who is residing without the limits of this province, it shall and may be lawful to and for His Majesty's said court, or for any judge thereof in vacation, upon hearing the parties upon the motion of such plaintiff or plaintiffs, defendant or defendants, to issue one or more commission or commissions under the seal of the said court, to one or more commissioner or commissioners, to take the examination of such person or persons, respectively, due notice being given to the adverse party to the end that he, she or they, may cause such witness to be cross-examined. (*c*)

And when executed in a foreign country to be returned under the hand and seals of commissioners.

18. And be it further enacted by the authority aforesaid, That in cases of witnesses residing without the limits of this province, such commission or commissions, with the examination of the witness or witnesses taken pursuant thereto, returned to the said court with an affidavit of the due taking thereof thereto annexed, sworn before and certified by the mayor or chief magistrate (*d*)

(*c*) If one party to a suit issues a commission to examine witnesses, the other party has a right to call for and make use of it at the trial.—Gordon *v.* Fuller. T. T. 6 & 7 Will. IV.

(*d*) The signature and seal of the chief magistrate of a town in a foreign country to an affidavit proving the due exe-

of the city or place where the same shall or may be taken, close under the hand and seal, or hands and seals of one or more of such commissioners shall be taken, prima facie, to have been duly executed and returned, and shall be received as evidence in the said cause; provided always, That such examination or examinations shall not be read or given in evidence in the said cause, in case the deponent or deponents respectively shall be living within the jurisdiction of the said court, and of sound mind, memory and understanding, at the time such examination or examinations shall be offered to be given in evidence; (*e*) and provided it is made appear to the court before which such examination or examinations is or are put in, that the same has or have not been duly taken.

Examination not to be read, if deponent is living within the jurisdiction of the court at the time of trial and of sound mind.

19. And be it further enacted by the authority aforesaid, That it shall and may be lawful in any execution against the person, lands or goods, of any debtors, for the sheriff to levy the poundage fees and the expense of the said execution, over and above the sum recovered by the judgment, together with the legal interest upon the amount so recovered from the time of entering the said judgment. (f)

Poundage fees, expenses of execution, and interest to be levied. (See 7 Wm. IV. ch. 3, sec. 32.)

20. And whereas, it is expedient to provide for the more public and certain notification of sales of lands under execution, in order that all persons having claims thereto may be apprised thereof: Be it further enacted by the authority aforesaid, That before the sale of any real estate be had upon any execution to be sued out after the passing of this act, the sheriff shall cause an

Sales of lands to be advertised in the Upper Canada Gazette. (See 43 Geo. III. ch. 1.)

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cution of a commission to examine witnesses, issued from the Court of Queen's Bench, are to be considered genuine without further proof.—Doe Lemoinè *v.* Raymond. M. T. 7 Will. IV.

(*e*) If a witness is examined under a commission in a foreign country, it is not necessary at the trial to prove that he is still without the jurisdiction of the court.—Watson *v.* Lee. H. T. 6 Vic.

(*f*) By 7 Will. IV. ch. 3, § 32, sheriffs are not entitled to poundage except upon actual levy made, but certain fees may be allowed.

advertisement to be inserted in the Upper Canada Gazette at least six times before such sale, specifying the particular property to be sold, the names of the plaintiff or plaintiffs, and defendant or defendants, and the time and place at which it is intended to proceed to the sale thereof; and the same shall also be advertised in any one public newspaper of the district in which the lands lie, or by notice put up in the office of the clerk of the peace, or on the door of the court house or place in which the Court of General Quarter Sessions for such district is usually holden, for three months before such sale; Provided, always, nevertheless, that nothing herein contained shall be taken to prevent such adjournment of such sale to a future day.

And in any newspaper where land lies.

21. And be it further enacted by the authority aforesaid, That from and after the first day of July next ensuing, it shall not be lawful for any sheriff or his deputy in any district of this Province, directly or indirectly, to trade, traffic, sell or vend goods, wares or merchandize, either by wholesale or retail, or keep a shop, or expose for sale, any such goods, wares or merchandize, or to maintain any action at law for the recovery of any debt, the amount, consideration or account, being for such goods, wares or merchandize, excepting always such as by the duties of his office he is legally commanded to do.

Sheriffs not to trade as merchants or shop keepers.

22. And be it further enacted by the authority aforesaid, That the first and last days of all periods of time limited by this act, or hereafter to be limited by any rules or orders of court, for the regulation of practice, be inclusive.

First and last days of all periods limited by this act, and rules of court, inclusive.

23. And be it further enacted by the authority aforesaid, That the form of proceeding in the said court, shall be by a course of pleading to issue in a most compendious manner, and that in all actions founded on a common undertaking, the following form of declaration may be adopted:

(See 7 Wm. IV. ch. 3, sec. 1.)

"A. B. complains of C. D. late of ——, for that "whereas the said C. D. on the —— day of ——, at

Form of declaration.

" ——, was indebted to the said A. B. in the sum of " ——, [the consideration advanced] and being so in- " debted, he, the said C. D. then and there undertook, " and faithfully promised the said A. B. to pay him the " said sum, when he, the said C. D. should be requested; " and though since requested, doth now refuse so to do, " to the said A. B. his damage of £——, who therefore " brings his suit."

Statutes of jeofails, limitation and amendments, declared to be in force in this province.

24. And be it further enacted by the authority aforesaid, That each and every of the Statutes of jeofails, and each and every of the statutes of limitations, and each and every of the statutes for the amendment of the law, excepting those of mere local expediency, which from time to time have been provided and enacted respecting the law of England, be adopted, and declared to be valid and effectual for the same purpose in this province.

Defendant may pay money into court. (See 7 Wm. IV. ch. 3, sec. 13.)

25. And in order to discourage vexatious suits, and to prevent additional charges upon any defendant or defendants, who may be willing to pay the sum which he or they shall admit to be justly due: be it enacted by the authority aforesaid, That in all cases where the sum demanded by any plaintiff or plaintiffs, is a sum certain, or is capable of being ascertained by computation of numbers, it shall and may be lawful for any defendant or defendants to move that he or they may be at liberty to pay into court such sum as he or they shall propose to pay in full discharge of the said demand; whereupon the court may order a rule to be drawn up to such effect, or in time of vacation such order may be made by a judge of the court, and in case the plaintiff shall be willing to accept and shall accept the same, together with all costs accruing to that time, to be taxed by the proper officer, the same shall be in full satisfaction of such his demand, and all further proceedings in the said action shall cease; and to the end that every plaintiff or his attorney may know of such proceeding, the defendant or defendants shall and are hereby required to serve a copy of the rule, authorising such payment to be made, upon the plaintiff

or his attorney, at the time of filing his plea of the general issue to such plaintiff's declaration. (*g*)

Officer to receive one per cent. on monies paid into court.

26. Provided always, That upon payment of money into court, it shall and may be lawful for the officer receiving the same, to demand and take a sum not exceeding twenty shillings for every hundred pounds so paid into court, and at and after the same rate and proportion for every sum of money so paid; and also to demand and take the sum of one shilling for every receipt by him given on account of money so paid in, as aforesaid.

27. [Repealed by 7 Wm. IV Ch. 1.]

Special Commissions may also be issued to try offenders. (See 7 Wm. IV. ch. 1, sec. 9.)

28. Provided always, and be it further enacted by the authority aforesaid, That nothing herein contained shall prevent or be construed to prevent the governor, lieutenant governor, or person administering the government of this province, from issuing a special commission or commissions for the trial of one or more offender or offenders, upon extraordinary occasions, when he shall deem it requisite or expedient that such commission should issue.

(*g*) By rule 17 of the new rules, when money is paid into court, such payment shall be pleaded in all cases, and as near as may be in the following form, mutatis mutandis:

A. B., Plaintiff, and C. D., Defendant. } The —— day of ——

The defendant by —— his attorney, (or in person), says, or in case it be pleaded to part only, add as to £—— being part of the sum in the declaration, or count mentioned, or as to the residue of the sum of £——), that the plaintiff ought not further to maintain his action, because the defendant now brings into court the sum of £——, ready to be paid to the plaintiff; and the defendant further says, that the plaintiff has not sustained damages (or, in actions of debt, that he never was indebted to the plaintiff,) to a greater amount than the said sum, &c., in respect of the cause of action in the declaration mentioned (or in the introductory part of this plea mentioned), and this he is ready to verify; whereupon he prays judgment, if the plaintiff ought further to maintain his action thereof. See ante pages 26, 27, and Chitty's Archbold's Practice, 7 ed. page 969, et seq., on the subject of the payment of money into court.

29. And be it further enacted by the authority aforesaid, That no writ of inquiry shall issue to the sheriff in cases where judgment shall have gone by default, but in all such cases the damages shall be ascertained at the same time, and in like manner as if the parties had pleaded to issue, and that an entry thereof be made on the roll accordingly.

No writ of inquiry to issue to any sheriffs, but damages to be ascertained as if parties had pleaded to issue.

30. And be it further enacted by the authority aforesaid, That every common juror shall be allowed the sum of one shilling and three pence, in every cause in which he shall be sworn as a juror, to be paid by the plaintiff or his attorney, and to be acccunted for in costs by the party charged with the payment thereof.

Jurors allowed 1s. 3d. each.

31. And be it further enacted by the authority aforesaid, That the sheriffs of the several districts shall and they are hereby required to make return of all writs of Nisi Prius which shall be delivered to them, or their sufficient deputy, before the said Chief Justice, and every other judge who shall be assigned to execute such commissions of Assize and Nisi Prius, and shall give their attendance upon the said Chief Justice and each other justice, as well for the returning of such tales de circumstantibus as shall be prayed for the trial of such issues, as for the maintenance of good order in the King's Court, and for the doing and executing of all other things to the office of sheriff in such case belonging and appertaining.

Sheriffs to return writs of nisi prius and attend the judges on their circuits. (See 34 Geo. III. ch. 1; 7 Wm. IV. ch. 1, sec. 10.)

32. And be it further enacted by the authority aforesaid, That it shall and may be lawful for the Clerk of the Crown and Pleas to have, and he is hereby required to have in each and every district of this province, except the Ottawa, an office, the duties of which shall be discharged by deputy, in which actions in the said court may be instituted, and all necessary proceedings had before final judgment, and a writ of capias ad satisfaciendum after such final judgment, may be issued in the same manner as the same may be done in the principal office of the said clerk. (*h*)

Clerk of the Crown to have an office in each district.

(*h*) An alias writ of capias ad satisfaciendum may issue from the offices of the deputy clerks of the crown.—Scott *et al.* *v.* McDonald. M. T. 7 Vic. P. C. Jones, J.

Precipe and affidavit filed in the said offices on suing out Ca. sa. to be transmitted to the principal office.

33. Provided always, and be it further enacted by the authority aforesaid, That the precipe and affidavit (where one shall be required) filed in the said district office, on issuing any capias ad satisfaciendum, shall be transmitted to the principal office within one month after the same shall have been filed, as aforesaid. (*i*)

Deputy clerks of the crown to certify proceedings if required.

34. And be it further enacted by the authority aforesaid, That whenever either the plaintiff or defendant in any suit hereafter to be instituted in any district, except the Home District, may think it necessary to produce to the court the writ, declaration, plea, or any other proceedings which may have been filed in such cause, it shall and may be lawful for the said plaintiff or defendant to demand and receive from the deputy Clerk of the Crown and Pleas in the district, a copy of such writ, declaration, plea, or other proceeding in the cause, certified by the said clerk to be a true copy of the original, which copy shall be received by the court in all cases in lieu of the original, and as a proof thereof.

All proceedings to be transmitted to the principal office before final judgment.

35. And be it further enacted by the authority aforesaid, That before final judgment, the several proceedings that have been had in the cause shall be transmitted to the principal office of the said clerk, and shall remain in his custody. (*j*)

Eight days' notice of trial to be given in all cases, and four days' notice of countermand.

36. And be it further enacted by the authority aforesaid, That no indictment, information or cause whatsoever, shall be tried at Nisi Prius, before any judge or justice of Assize or Nisi Prius in any district of this province, unless notice of trial, in writing, has been given at least eight days before such intended trial; and in case any party or parties shall have given such notice of

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(*i*) It is no ground for setting aside an arrest made under a writ of capias ad satisfaciendum issued from a deputy's office, that the affidavit on which the writ was issued was not transmitted to the principal office within one month after the writ was filed.—Scott *et al. v.* McDonald. M. T. 7 Vic. P. C. Jones, J.

(*j*) It is irregular to sign a judgment of non pros. without filing the original papers in the judgment office.—Lyman *v.* Cotter.—M. T. 5 Will. IV

trial, as aforesaid, and shall not afterwards duly countermand the same in writing, at least four days before such intended trial, every such party shall, upon neglect of bringing such issue to trial, be obliged to pay unto the party or parties to whom such notice of trial shall have been given, as aforesaid, the like costs and charges as if such trial had not been countermanded.

Dilatory pleas may be argued before a judge in vacation.

37. And be it further enacted by the authority aforesaid, That whenever the defendant in any action shall, in term time, plead any dilatory plea, in case such plea shall be a matter in law and not of fact, it shall and may be lawful to and for the plaintiff in the said action, to set down such plea for argument on the next day on which the said court shall sit, or on any other day in the term, giving two days' notice thereof to the defendant or his attorney; and in case such plea be filed in the time of vacation, or being filed in term time, the said plaintiff shall neglect so to set down the same for argument, as aforesaid, it shall and may be lawful to and for the said plaintiff to apply to any judge of the said court to hear and determine the issue joined thereon, in like manner as the same may now be done in open court; and in case the said judge shall give judgment for the plaintiff, he, the said judge, shall by an order under his hand, direct the said plea to be taken off the file, with costs to be taxed by the proper officer; and the said defendant shall, within four days from the date of such order, plead an issuable plea, and shall rejoin gratis, and shall also be bound to go to trial at such time as he would have been bound to go to trial in case he had pleaded such issuable plea in the first instance, and not such dilatory plea. (*k*)

Costs in civil suits to be regulated by the laws of England.

38. And be it further enacted by the authority aforesaid, That the allowance of costs to either party, plaintiff or defendant, in all civil suits and penal actions, be

(*k*) A general demurrer is not a dilatory plea, within this section, and where a judge in chambers had granted an order to take such demurrer off the file, as being a dilatory plea, the court made absolute a rule to set such order aside.—Charles *v.* Hopkirk. M. T. 4 Vic.

regulated by the statute and usages which direct the payment of costs by the laws of England.

Commissioners to be appointed for taking affidavits.

39. And be it further enacted by the authority aforesaid, That the Chief Justice, and other the Justices of the said Court of King's Bench, for the time being, or any two of them, whereof the Chief Justice, for the time being, to be one, (*l*) shall and may by one or more commission or commissions, under the seal of the said Court, from time to time as need shall require, empower what and as many persons as they shall think fit and necessary, in all the several districts within this province, to take and receive all and every such affidavit and affidavits as any person or persons shall be willing and desirous to make before any of the persons so empowered, in or concerning any cause, matter or thing, depending or hereafter to be depending, or in any wise concerning any of the proceedings to be had in the said respective Courts; and that it shall and may be lawful for any Judge of Assize, and in his circuit to take and receive any affidavit or affidavits as any person or persons shall be willing and desirous to make before him, in or concerning any cause, matter or thing, depending or hereafter to be depending, or in any wise concerning any proceedings to be had in the said Court of King's Bench; which said affidavits, taken as aforesaid, shall be filed in the office of the said court, and there be read and made use of in the said court to all intents and purposes as other affidavits taken in the said court ought to be; and that all and every affidavit and affidavits, taken as aforesaid, shall be of the same force as affidavits taken in the said court shall and may be; and all and every person or persons forswearing him, her or themselves, in such affidavit or affidavits, shall incur and be liable unto the same pains and penalties as if such affidavit or affidavits had been made and taken in open court: Provided always, That for the taking of every such affidavit, the person or persons so empowered,

Penalties of perjury for false swearing.

1s. for oath.

(*l*) Commissions for taking affidavits may be issued in the event of the absence or death of the Chief Justice.—2 Vic. ch 2.

and taking the same, shall, for so doing, receive only the sum or fee of twelve pence, and no more.

40. And be it further enacted by the authority aforesaid, That the Chief Justice, for the time being, and other the Justices of the said Court of King's Bench, or any two of them, whereof the said Chief Justice shall be one, shall or may by one or more commission or commissions, under the seal of the said court, from time to time as need shall require, empower such and as many persons as they shall think fit and necessary in all and every the several districts of this province, to take and receive all and every recognizance or recognizances of bail or bails, as any person or persons shall be willing or desirous to acknowledge or make before any of the persons so empowered, in any action or suit depending, or hereafter to be depending in the said court, in such manner and form, and by such recognizance or bail, as the justices of the said court may hereafter take or may think fit, which said recognizance or recognizances of bail, or bail piece, so taken as aforesaid, shall be filed in the office of the Clerk of the Crown in the district where the same shall be taken, together with an affidavit of the due taking the recognizance of such bail or bail piece, by some credible person present at the taking thereof; which recognizance of bail or bail piece, so taken and filed, shall be of the like effect as if the same were taken in open court; for the taking of which recognizance or recognizances of bail or bail piece, the person or persons so empowered shall receive only the sum or fee of two shillings, and no more: Provided always, nevertheless, that nothing herein contained shall extend to preclude any party from excepting to the bail in the manner and within the time prescribed by law.

(See 2 Vic. ch. 2.)

Commissioners may be appointed for taking bail.

(See 4 Wm. IV. ch. 5.)

41. And be it further enacted by the authority aforesaid, That the justices, respectively, shall make such rules and orders for the justifying of such bails, and making of the same absolute, as to them shall seem meet, so as the cognizor or cognizors of such bail or bails be not compelled to appear in person in the said

Justices to make orders regulating the justifying of bail before commissioners. (See 4 Wm. IV. ch. 5, sec. 2.)

court to justify him or themselves, but the same may, and is hereby directed to be determined by affidavit or affidavits, duly taken before the said commissioners, who are hereby empowered and required to take the same, and also, to be examined by the justices upon oath touching the value of their respective estates.

Judges of assize may take bail.

42. And be it further enacted by the authority aforesaid, That any judge of assize in his circuit, shall and may take and receive all and every such recognizance or recognizances of bail or bails, as any person shall be willing and desirous to make and acknowledge before him, which being transmitted, in like manner as aforesaid, shall without oath be received in manner as aforesaid.

Ordinances of Quebec repealed.

43. And be it further enacted by the authority aforesaid, That the several acts and ordinances of the Governor and council of the late province of Quebec, whereby the several courts of Common Pleas in this province were constituted, and from time to time continued, be and each and every of them are hereby repealed.

No attorney to trade as a shop keeper.

44. And be it further enacted by the authority aforesaid, That after twelve months from the passing of this act, no attorney of this court being a merchant, or in any wise concerned by partnership, public or private, in the purchasing and vending of merchandize in the way of trade as a merchant, shall be permitted to practice in the said court during the time he may be such merchant or so engaged, as aforesaid, nor until twelve months after he shall have ceased to be such merchant or so engaged, as aforesaid.

Judges to establish fees to be taken by all officers of the court.

45. And be it further enacted by the authority aforesaid, That from and after the first day of Easter term next, it shall and may be lawful to and for the said Court of King's Bench, and they are hereby required by order or rule, or orders or rules, to be pronounced by the said court during the said term of Easter, or during any subsequent term or terms, from time to time, to ascertain, determine, declare, and adjudge, all and singular the fees

which shall and may be taken, or be allowed to be taken by any clerk of the crown, counsel, attorney, sheriff, officer, or other person, from or in respect of any business after the first day of Easter term, to be done or transacted in the Court of King's Bench, as well in civil causes as in criminal prosecutions, as in all matters and things, causes and proceedings, which thereafter shall or may be depending in the said court, which regards the King's revenue, or under any commission of Oyer and Terminer and general gaol delivery, or under any special commission of Oyer and Terminer, any former law to the contrary notwithstanding.

46. And be if further enacted by the authority aforesaid, That nothing in this act contained shall extend to annul any existing commission or authority of any officer or Commissioner heretofore appointed to any office which may require to be continued by the provisions of this act, or to make void any proceedings now depending in the said Court of King's Bench, but that the said office shall be conducted, and the said proceedings be continued and carried on, according to the several provisions herein contained.

No commissions or proceedings to be hereby avoided.

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11. GEO. IV. CH. 5.

An Act to extend the provisions of the Law of Set-off, and to prevent unnecessary and vexatious Law-suits.

Preamble. (See 4 & 5 Vic. ch. 3, sec. 37.)

WHEREAS the provision for setting mutual debts, one against the other, is highly just and reasonable at all times, and ought to be extended so as to allow a defendant to recover the balance due to him; Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of Great Britain, intituled, "An Act to repeal certain parts of an Act passed in the fourteenth year of his Majesty's reign, intituled, 'An Act for making more effectual provision for the

Government of the Province of Quebec in North America,' and to make further provision for the Government of the said Province,' and by the authority of the same, That if in any action to be hereafter commenced in his Majesty's Court of King's Bench, or in any of his Majesty's District Courts in this Province, the defendant having given notice of set-off, or pleaded the same according to law, shall on trial of said action prove a sum due to him, or if he be sued as executor or administrator to the testator or intestate, from the plaintiff, or if the plaintiff sue as executor or administrator from the testator or intestate, greater than such plaintiff has proved due to him, or his testator, or intestate from such defendant, or his testator or his intestate, it shall and may be lawful for the jury to render a verdict for the defendant to the amount of the difference of their respective claims proved as aforesaid, and for every such defendant to enter up judgment for such sum, besides his costs and charges, and to have execution therefor. (*m*)

Defendants having given notice of, or pleaded a set-off, may recover judgment for the amount proved by them beyond plaintiff's demand, and have execution therefore.

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1 WILL. IV. CH. 1.

An Act to prevent a failure of Justice by reason of immaterial variances in certain Law proceedings, and to require all Courts to take judicial notice of private Acts of Parliament.

Preamble.

(See 7 Wm. IV. ch. 3, secs. 15 & 16.)

WHEREAS great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances between writings produced in evidence and the recital or setting forth thereof upon the record on which the trial is had, in matters not material to the merits of

(*m*) Where to a declaration in assumpsit claiming £400 for goods sold, &c., the defendant pleaded as to the promises and undertakings a set off of a less sum than the amount alleged to be due from him to the plaintiffs, and averred that his set off exceeded the monies due and owing from him to the plaintiff, and offered to set off and allow to the plaintiff out of the defendant's damages, so much damage as the plaintiff had sustained, on occasion of the not performing the promises, &c., in the declaration: Held bad on special demurrer for not offering to deduct the defendant's set off, instead of pleading it in bar.—Jarvis *et al. v.* Dickson. T. T. 3 & 4 Vic.

the case, and such record cannot now in any case be amended at the trial, and in some cases cannot be amended at any time: And whereas great additional expense is often incurred by reason of the necessity of pleading specially private acts of parliament, which the several courts of justice cannot judicially notice unless they be so pleaded or given in evidence: Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "An act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's reign, intituled, 'An act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, That it shall and may be lawful for every Court of Record holding plea in civil actions; any judge sitting at Nisi Prius, and any Court of Oyer and Terminer, and general gaol delivery in this province, if such court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such court or judge in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs (if any) to the other party as such court or judge shall think reasonable, and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be endorsed on the postea and returned together with the record, and thereupon the papers, rolls, and other records of the court, from which such record issued, shall be amended accordingly. (*n*)

Variances may be amended in civil cases and in prosecutions for misdemeanors, at the discretion of the court or judge holding plea thereof.

(*n*) By 7 Will. IV. ch. III. sec. 15 & 16, the record may

Courts required to take judicial notice of private acts of parliament.

2. And be it further enacted by the authority aforesaid, That all Acts of the Provincial Parliament of this Province, whether the same shall be deemed public or private Acts, shall equally be taken notice of judicially by all Courts, Judges, Justices, and other persons whomsoever, without being specially pleaded; and that a copy of any such Act, printed by proper Authority in this Province, shall be taken as sufficient evidence thereof, any law to the contrary notwithstanding.

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2 WILL. IV. CH. 8.

An Act respecting the Time and Place of sitting of the Court of King's Bench.

Preamble. (See 4 Wm. IV. ch. 8; 7 Wm. IV. ch. 1; 1 Vic. ch. 15; Statutes of Canada, 4 & 5 Vic. ch. 5.)

WHEREAS by an act of the parliament of this province, passed in thirty-fourth year of the reign of his late Majesty King George the Third, intituled, "An act to establish a superior court of civil and criminal jurisdiction, and to regulate the court of appeal," it is provided, "that his Majesty's Court of King's Bench in this province shall be holden in a place certain, that is, in the city, town, or place, where the Governor or Lieutenant-Governor shall usually reside, and until such place be fixed, the said court shall be holden at the last place of meeting of the Legislative Council and Assembly;" And whereas no public building has yet been erected for the accommodation of the Court of King's Bench, and it may be found convenient to allow the said court to be holden at some eligible place in the immediate vicinity of the seat of government, although not within the actual limits of the city, town, or place, in which the Governor or Lieutenant-Governor shall usually reside: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, consti-

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be amended at nisi prius where there is a variance between the contract, &c., and its setting forth on the record, though contract, &c. not in writing.

tuted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "An act passed to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, 'An act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, that such part of the said act hereinbefore recited as appoints the place at which the Court of King's Bench shall be holden, shall be and the same is hereby repealed.

So much of 34 Geo. III. ch. 2, sec. I, as fixes the place of holding the Court of King's Bench, repealed.

2. And be it further enacted by the authority aforesaid, That his Majesty's Court of King's Bench in this province shall be holden at a place certain, that is, in the city, town, or place, which shall be for the time the seat of the civil government of this province, or within one mile of such city, town, or place; and that the place in which the said court shall be holden under the authority of this act, shall be deemed and taken, with reference to the sitting of such court, to form part and parcel of the city, town, or place, which shall be for the time the seat of the civil government of this province, notwithstanding it may be without the geographical limits thereof. (o)

Court of King's Bench may be held within one mile of the seat of government of this province.

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4 WILL. IV. CH. 2.

An Act to render the Judges of the Court of King's Bench in this Province independent of the Crown.

WHEREAS it is expedient to render the judges of the Court of King's Bench in this province independent of

Preamble.

(o) This section is virtually repealed by the act of union of the provinces of Upper and Lower Canada, sec. 44, which enacts, that "until otherwise provided by the act or acts of the legislature of the province of Canada, the said Court of King's Bench, now called the Court of Queen's Bench of Upper Canada, shall from and after the union of the provinces of Upper and Lower Canada, be holden at the city of Toronto, or within one mile from the municipal boundary of the said city of Toronto."

the Crown: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "An act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, 'An Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, that the judges of his Majesty's Court of King's Bench for this province shall hold their offices during their good behaviour, notwithstanding the commissions which have been heretofore granted to them, or either of them, may specify that the office is to be held during the pleasure of his Majesty; and that from and after the passing of this act, the commissions of the judges of the said court shall be made to them respectively to hold during their good behaviour; and that the commissions of judges of the said Court, for the time being, shall be, continue, and remain in full force during their good behaviour, notwithstanding the demise of his Majesty, or any of his heirs and successors, any law, usage, or practice, to the contrary thereof in any wise notwithstanding: Provided always, that it may be lawful for the Governor, Lieutenant-Governor, or person administering the government of this province, to remove any judge or judges of the said court, upon the address of the Legislative Council and Assembly; and in case any judge so removed shall think himself aggrieved thereby, it shall and may be lawful for him, within six months, to appeal to his Majesty in his Privy Council, and such a motion shall not be final until determined by his Majesty in his Privy Council.

Judges to hold their offices during good behaviour.

May be removed on address of council and assembly.

When removed may appeal to King in Council.

2. And be it further enacted by the authority aforesaid, That when any judge of the said court shall die, or shall resign his office, or be removed in the manner authorised by this act, it shall and may be lawful for the

Appointments by Governor, &c. until the King's plea-

Governor, Lieutenant-Governor, or person administering the government of this province, notwithstanding any thing hereinbefore contained, to appoint by commission, under the great seal of the province, some fit and proper person to hold the said office, until his Majesty's pleasure shall be made known, and that such appointment shall be held to be superseded by the issuing of a commission under the great seal of this province, in the terms first directed by this act, to the same person, or to such other person as his Majesty shall appoint in the place of any judge who has died, or resigned, or been removed in the manner authorised by this act, or by the signification within the province of the decision of his Majesty in his Privy Council, restoring to his office any judge who may have been so removed.

sure be known, how superseded.

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4 Will. IV. Ch. 5.

An Act to grant further relief to bail in certain cases, and to regulate the manner of putting in and perfecting bail in vacation.

Preamble.

Whereas it is necessary to afford further relief to Bail in certain cases; Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of Great Britain, intituled, "an Act to repeal certain parts of an Act passed in the fourteenth year of his Majesty's reign, intituled 'An act for making more effectual provision for the government of the province of Quebec, in North America,' and to make further provision for the government of the said Province," and by the authority of the same, That the special bail in any action now pending, or which may be hereafter brought in any of the courts of this Province, may surrender their principal to the sheriff of any of the respec-

Bail may surrender their principal and be discharged.

tive districts in which he may be resident or found, and upon the production of the copy of the bail-piece, certified by the clerk of the court in which the bail shall have been entered, the sheriff of any such district shall receive the defendant into custody, and shall give a certificate under his seal of office of his being so surrendered into his custody, upon which certificate being produced an exoneretur shall be entered upon the bail-piece in the same manner as is now authorized by law in other cases, and upon notice of such surrender to the plaintiff or to his attorney, and upon such exoneretur being so entered, the bail in such case shall be discharged: Provided always, That nothing in this Act contained shall be taken to compel the plaintiff in any such action or suit to change the venue or to conduct his suit in any manner different from that in which he would have been compelled had the render been made in the district in which the defendant had been arrested.

Sheriff to give certificate of surrender.

Plaintiff not prejudiced in conduct of his suit.

2. And be it further enacted by the authority aforesaid, That notwithstanding any thing contained in any law to the contrary, it shall and may be lawful after the passing of this Act, for bail to justify in vacation before a Judge of his Majesty's Court of King's Bench, whether the defendant be or be not in actual custody, and such judge may make his rule or order for the allowance of such bail: Provided always nevertheless, That this provision shall not take effect till after the end of the term of sitting of the Court of King's Bench which shall commence next after the passing of this Act; and that it shall be competent for the Court of King's Bench in the said term, and in any term afterwards, to make such orders or rules as to them may seem fit, respecting the manner of justifying or perfecting bail, as aforesaid, and respecting the notices to be given previous thereto, the attendance of bail before a commissioner or before a judge, and the affidavits or examinations to be required, or any other matter or thing which may to them appear expedient for carrying this proviso the most justly and conveniently into effect.

Bail may justify before a judge in vacation.

Commencement of Act, so far as relates to this provision.

Judges to frame rules of practice with regard to justifying.

4 WILL. IV. CH. 6.

An Act to revive and extend the Provisions of an Act passed in the tenth Year of his late Majesty's Reign, intituled, "An Act to authorise the detention of Debtors in certain cases."

4. And be it further enacted by the authority aforesaid, That no commissioner shall issue any writ of capias ad respondendum in any case in which he shall be employed as attorney for the person suing out such writ. (*p*)

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5 WILL. IV. CH. 2.

An Act to allow the issuing of Writs of Error from the Court of King's Bench.

WHEREAS it would facilitate the correction of errors in the judgment of inferior courts of record, if the writ of error, which for such purposes is required by the law of England to be issued from Chancery, and to be made under the great seal, were allowed in this province to issue from the Court of King's Bench, under the seal of that court: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "An act to repeal certain parts of an act, passed in the fourteenth year of his Majesty's reign, intituled, 'An act for making more effectual provision for the Government of the Province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, that whenever by the law of England a writ of error may be sued out of Chancery, returnable in the court of King's Bench, for removing the record of the judgment of an inferior court of record in order to its examination upon errors assigned, it shall be lawful in similar cases, and for the like purpose, to sue out a writ of error from the Court of King's Bench in this province,

Preamble.

Writs of error may be sued out from the King's Bench.

(*p*) See ante page 83.

running in the name of the King, and having teste and return like other writs of the said court; and upon the return of such writs the said court may proceed thereon as if the record of the judgment had been removed under the great seal of this province.

Court of King's Bench may make rules respecting the same.

2. And be it further enacted by the authority aforesaid, That for securing suitors against vexatious delays and expense through the suing out of such writs of error, it shall and may be lawful for the judges of the Court of King's Bench to make such rules and orders, from time to time during any term of sitting of the said court, as may appear just and expedient for securing the payment of costs, and of the debt or damages awarded by the judgment of the inferior court, or either of them, in case such judgment shall be affirmed in error; and also for restraining frivolous writs of error from being brought merely for delay.

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5 WILL. 4. CH. 3.

An Act to mitigate the Law in respect to Imprisonment for Debt.

Preamble.

(See 3 Vic. ch. 6.)

WHEREAS the imprisonment of persons in execution for debt is no otherwise justifiable than as a means of compelling such persons to apply whatever monies or property they may be posessed of, or may have under their control, to the satisfaction of their creditors: And whereas it is impossible with a just regard to the rights of creditors and to the interests of commerce, to afford effectual relief to insolvent debtors until a proper jurisdiction is provided and suitable laws enacted to facilitate and ensure a recourse against all the property of such insolvent debtors, but in the mean time it is expedient to make such provision as will render the law in this respect less rigorous than at present; Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "An

act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, 'An act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, That from and after the first day of June next after the passing of this act, no person shall be arrested or holden to special bail upon any process issuing from his Majesty's Court of King's Bench for this province, or from any district court in this province, when the cause of action shall not amount to ten pounds: and that so much of the eighth clause of a certain Act of the Parliament of this province passed in the second year of the reign of his late Majesty King George the Fourth, intituled, "An act to repeal part of and amend the laws now in force respecting the practice of his Majesty's Court of King's Bench in this province," as authorises personal arrest in a civil suit when the cause of action shall amount to five pounds or upwards; and also, so much of the eighth clause of a certain other Act of the Parliament of this province passed in the same year, intituled, "An act to reduce into one act the several laws now in force establishing District Courts, and regulating the practice thereof, and also to extend the powers of the said District Courts," as authorises personal arrest in all actions of contract within the jurisdiction of such courts, be and the same are hereby repealed, so far only as the said clauses extend to authorise personal arrest for any sum less than ten pounds: Provided always nevertheless, that such repeal shall not take effect until after the said first day of June next, and shall not render illegal or irregular any arrest for a less sum than ten pounds, which shall take place in any court before or on the said first day of June next, and shall not render illegal or irregular any proceedings which shall be had after or in consequence of such arrest.

Limitation of arrest to debts of £10. and upwards.

Part of eighth sec. of 2 Geo. IV. ch. 1, repealed.

Part of eighth sec. of 2 Geo. IV. ch. 2, repealed

2. And be it further enacted by the authority aforesaid, That from and after the said first day of June next, it shall not be lawful to take execution against the

Ca. sa. not to be issued for costs only, nor for

any judgment under £10 exclusive.

body of any person, plaintiff or defendant, upon a judgment recovered for costs only, nor in any case in which the judgment shall not be rendered for the sum of ten pounds or upwards, exclusive of costs; and that if any person shall be in custody upon an execution at the time of the passing of this act, or at any time hereafter upon an execution which may issue before the said first day of June next, in a case in which it is provided by this clause that no execution shall issue against the body, such person may, upon application to the court from whence the execution shall have issued, or to a judge thereof in vacation, and after notice given to the opposite party, or his attorney, by a rule to shew cause, be discharged from custody by order of the said court or judge; but it shall be lawful to take out execution against the goods and chattels, or against the lands or tenements of the person so discharged, in the same manner as in other cases of debtors discharged under the provisions of this act.

Debtor in execution for sums under £10. may apply to the court for his discharge.

Notice to the other party. Order for discharge.

Liability of future estate.

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7 WILL IV. CH. 1.

An Act to increase the present number of Judges of his Majesty's Court of King's Bench in this Province; to alter the Terms for the sitting of the said Court: and for other purposes therein mentioned.

Preamble. (See 4 Will. IV. ch. 8; 1 Vic. ch. 15; 2 Vic. ch. 1; Act of Union, secs. 44 & 47; Statutes of Canada, 4 & 5 Vic. ch. 5.)

WHEREAS an addition to the number of Judges of the Court of King's Bench in this Province has become indispensable from the great increase of the population, the formation of new districts, and the necessity of providing for the more frequent delivery of the gaols: Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the province of Upper Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of Great Britain, intituled, "An Act to repeal certain parts of an Act passed in the fourteenth year of his Majesty's reign, intituled, 'An Act for making more effectual provision for the Government of the Province of Quebec, in North

America,' and to make further provision for the Government of the said Province," and by the authority of the same, That notwithstanding any thing contained in a certain Act of the Parliament of this Province, passed in the thirty-fourth year of the reign of his late Majesty King George the Third, intituled, "An Act to establish a Superior Court of civil and criminal jurisdiction, and to regulate the Court of Appeal," *his Majesty's Court of King's Bench for the Province of Upper Canada*, shall consist of the Chief Justice of the said Province, and of four Puisne Judges, and that the two additional Puisne Judges to be appointed by his Majesty under the authority of this Act shall hold their offices during their good behaviour, and subject to the same conditions as the present judges of the said court.

34 Geo. III. ch. 2, recited.

(See 2 Vic. ch. 1.) Two additional judges to be appointed.

2. And be it further enacted by the authority aforesaid, That the Governor, Lieutenant-Governor, or person administering the Government of this Province, shall, as soon as it may be convenient after the passing of this act, appoint two fit and proper persons to be judges of the said court, to hold the said office until his Majesty's pleasure shall be made known.

The Lieutenant-Governor to appoint;

Until the King's pleasure be known.

3. And be it further enacted by the authority aforesaid, That from and out of the rates and duties now levied and collected, or which hereafter may be raised, levied and collected, and remaining in the hands of the Receiver-General, there be granted to his Majesty, his heirs and successors, the sum of two thousand pounds annually, to provide for the payment of the salaries of the said two additional judges, the salary of each to be one thousand pounds.

Salaries.

4. And be it further enacted by the authority aforesaid, That it shall and may be lawful for the Governor, Lieutenant-Governor, or person administering the government of this province, from time to time, to issue his warrant or warrants to the Receiver-General of this province for the said sums of money by this act granted, half yearly; and the said Receiver-General shall account to his Majesty, his heirs and successors, for the same, through the Lords Commissioners of his Majesty's treasury, in such

To be paid by warrants on Receiver-General.

manner and form as his Majesty, his heirs and successors, shall be graciously pleased to direct.

Puisne Judges to sit in rotation.

5. And be it further enacted by the authority aforesaid, That after such appointments shall be made, the Puisne Judges of the said court shall sit by rotation in each term, or otherwise, as they shall agree among themselves, so that no greater number than three of such Puisne Juges shall sit at the same time in banc for the transaction of business in term, unless in the absence of the Chief Justice; and that it shall be lawful for any one of the said judges, when occasion shall require, while the other judges of the said courts are sitting in banc, to sit apart from them for the business of adding and justifying special bail, discharging insolvent debtors, administering oaths, hearing and deciding upon matters on motion, and making rules and orders in causes and business depending in the court, in the same manner and with the same force and validity as may be done by the court sitting in banc.

Not exceeding three.

Unless in the absence of the Chief Justice.

One of the judges to sit apart for the purpose of special bail, discharging insolvents, &c.

Law regulating the terms in part repealed.

6. And whereas it is necessary to make a new arrangement of the terms of sitting of the Court of King's Bench, in order to admit more conveniently of two circuits in each year: Be it therefore enacted by the authority aforesaid, That so much of a certain act of the Parliament of this province, passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled, "An Act to remove certain doubts with respect to the commencement of the Terms of Michaelmas in the last year, and of Hilary in this present year, and to appoint the periods of holding the several law terms;" and of a certain other act of the parliament of this province, passed in the second year of the reign of his present Majesty, intituled, "An Act respecting the time and place of sitting of the Court of King's Bench," as appoints the terms of sitting of the said court, shall be and the same is hereby repealed: Provided, that such repeal shall not take effect until after the termination of next Easter Term, which shall commence and be holden at the same time and in the same manner as if this act had not been passed.

7. [Repealed by 1 Vic. chap. 15.]

8. And be it further enacted by the authority aforesaid, That the twenty-seventh clause of an act of the parliament of this province, passed in the second year of the reign of his late Majesty King George the Fourth, intituled, "An Act to repeal part of and amend the laws now in force respecting the practice of his Majesty's Court of King's Bench in this province," shall be and the same is hereby repealed; and that after the end of Trinity Term next, as appointed by this act, it shall be lawful for the Governor, Lieutenant-Governor, or person administering the government of this province, to issue yearly and every year, in the vacation between Easter and Trinity Terms, and also in the vacation between Michaelmas and Hilary Terms, such Commissions of Assize and Nisi Prius into the several districts, as may be necessary, for the purpose of trying all issues joined in the said court in any suit or action, which, according to the practice of the court, ought to be tried in such districts respectively; and that in like manner Commissions of Oyer and Terminer and General Gaol Delivery shall be issued into the several districts in this province twice in the year, within the periods aforesaid: Provided always nevertheless, that it shall be in the power of the Governor, Lieutenant-Governor, or person administering the government of this province, to issue a special commission or special commissions, for the trial of one or more offender or offenders upon extraordinary occasions, when he shall deem it requisite or expedient that such commission should issue: And provided also, that nothing contained in this act shall render it necessary to hold any court in any new district of this province lately organized, or hereafter to be organized, at an earlier period than is or may be provided in the act erecting such new district.

Sec. 27 of 2 Geo. IV. ch. 1, repealed.

Commissions of Assize and Nisi Prius may issue twice in each year.

Special commissions may issue when necessary.

9. And whereas it may happen that from some unforseen casualty it may be impracticable to open a Court of Assize and Nisi Prius, or of Oyer and Terminer or General Gaol Delivery, on the very day appointed in the commission or precept for the opening of the same, and it would be attended with great public inconvenience if such

Provision in case courts of Assize cannot be opened on the day appointed in Commission.

court could on that account not be opened until juries were again summoned, and a new day appointed for holding such court: Be it further enacted by the authority aforesaid, That whenever from illness of the judge, or from unavoidable detention at the last assize town, or from other casualty, it may happen that the judge appointed to hold any Court of Assize and Nisi Prius, Oyer and Terminer or General Gaol Delivery, shall not arrive in time, or shall not be able to open such court on the day appointed for that purpose, it shall and may be lawful for the sheriff of the district in which such court shall be holden, or in his absence for his deputy, after the hour of eight of the clock in the afternoon of such day, to adjourn by proclamation all and every the courts which shall be appointed to be opened on that day, to an hour on the following day to be by him named, and so from day to day until the judge shall arrive to open such court or courts, or until he shall receive other direction from the judge in that behalf.

Judges' travelling expenses allowed at the rate of £25. for each district, except the Home District.

10. And be it further enacted by the authority aforesaid, That from and out of the said rates and duties, there be granted to his said Majesty, his heirs and successors, a sufficient sum annually to enable his Majesty to pay to the judges of Assize and Nisi Prius, Oyer and Terminer and general gaol delivery, the sum of twenty-five pounds for each time that they shall hold any such court or courts in any district of this province, except the Home District, for the purpose of defraying their travelling expenses: and also a sum sufficient to enable his Majesty to pay the Clerks of Assize their usual and accustomed fees, for the duties performed by them as officers of the Courts of Oyer and Terminer and general gaol delivery; and also to pay the Sheriff of the Home District the sum of eleven shillings and eight pence per day, for attending the terms of the Court of King's Bench at the seat of government.

Fees of Clerks of Assize.

Sheriff of Home District to be paid for attending in Court of King's Bench during term.

7 WILL. IV. CH. 2.

An Act to establish a Court of Chancery in this Province.

17. And be it further enacted by the authority aforesaid, That the Puisne Judges of the Court of King's Bench shall be members of the Court of Appeals of this Province, in all cases of appeal from the judgments and decrees of the said Vice-Chancellor, in the like manner as the Chief Justice is now by law a member of the Court of Appeals.

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7 WILL. IV. CH. 3.

An Act for the further amendment of the Law, and the better advancement of Justice.

WHEREAS it would greatly contribute to the diminishing of expense in suits in the Court of King's Bench, if the pleadings therein were in some respects altered, and the questions to be tried by the jury left less at large than they now are, according to the course and practice of pleading in several forms of action; but this cannot be conveniently done otherwise than by rules or orders of the judges of the said court, from time to time to be made, and doubts may arise as to the power of the said judges to make such alterations without the authority of the legislature: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "An Act to repeal certain parts of an Act passed in the fourteenth year of his Majesty's reign, intituled, 'An Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said Province," and by the authority of the same, That the Judges of his Majesty's Court of King's Bench in this Province, or the majority of them, including the Chief Justice, shall and

Preamble. (See 1 Will. IV. ch. 1.)

Judges of the King's Bench au-

thorised to alter the mode of pleading by rule of court.

may, by any rule or order to be from time to time by them made, in term or vacation, at any time within five years from the time when this act shall take effect, make such alterations in the mode of pleading in the said court, and in the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law, and such

And regulations as to the payment of costs.

regulations as to the payment of costs, and otherwise for carrying into effect the said alterations, as to them may seem expedient; and all such rules, orders or regulations,

Such rules to be laid before Parliament.

shall be laid before both houses of the legislature, if they shall be then sitting, immediately upon the making of the same, or if the legislature be not then sitting, then within five days after the next meeting thereof; and no such

Rules not to have effect till six weeks after they shall have been laid before Parliament.

rule, order or regulation, shall have effect until six weeks after the same shall have been so laid before both houses of the legislature; (q) and any rule or order so made, shall, from and after such time aforesaid, be binding and

Afterwards to be binding on court.

obligatory on the said court, and all other courts of common law in this province, to which the same shall be made expressly to extend, and on all Courts of Appeal

And on Courts of Appeal and Error.

or Courts of Error in this province, into which the judgments of the said courts, or any of them, shall be carried by appeal, or by any writ of error, and be of the like force and effect as if the provisions contained therein had been expressly enacted by the legislature of this province: Provided always, that no such rule or order shall have

Rules not to affect pleadings under Acts of Parliament.

the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence, in any case wherein he is now or hereafter shall be entitled to do so, by virtue of any act of parliament now or hereafter to be in force. (r)

(q) On the 20th April 1842, rules were made by the Court of Queen's Bench under this statute, which, as there were doubts of their being laid before both houses of the legislature in sufficient time according to this section, an act was passed 5 & 6 Vic. ch. 19, ante page 15, to give them the same effect, as if the provisions contained in this section had been complied with.

(r) See ante page 24, and note. By the 16th of the new rules, wherever the defendant pleads the general issue, in-

2. And whereas there is no remedy provided by law for injuries to the real estate of any person deceased, committed in his life time, nor for certain wrongs done by a person deceased, in his life time, to another, in respect of his property, real or personal; for remedy thereof, Be it enacted by the authority aforesaid, That an action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased, for any injury to the real estate of such person, committed in his life time, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person: And provided, such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person: And further, that an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his life time to another, in respect of his property, real or personal, so as such injury shall have been

Executors of any person deceased may maintain actions for injuries done to real estate in testator's life time.

Action to be commenced within one year of the death of the party.

Damages recovered to be part of the personal estate.

Actions against executors for

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tending to give the special matter in evidence under the general issue, he must insert the words "by statute," in the margin of his plea. If a defendant does not add the words "by statute," on the margin of his plea of not guilty, he cannot give special matter in evidence to bring himself within an act of parliament which allows a plea of not guilty; but if at the end of the plaintiff's case, it appears that the defendant was entitled to notice of action, and to have the venue laid in the proper county, and the plaintiff gave no notice of action, and the venue be in a wrong county, this is not aided by the defendant having omitted to add the words "by statute," on the margin of his plea. Coy *v.* Forrester, 8 M. & W. 312. Where the defendant pleaded not guilty, intending to justify under a statute, but the nisi prius record had not the words "by statute," added on the margin, the judge at nisi prius refused to allow an amendment, by the addition of the words "by statute," as it could not be shewn that those words were on the defendant's plea; but semble, if that could have been shewn, the amendment would have been allowed.—Forman *v.* Dawes, *et al.* 1 C. & Marsh, 127.

wrongs committed by deceased, To be brought within six calendar months. Damages payable as simple contract debts.

committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; (*s*) and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such persons.

Limitation of time for commencement of particular actions.

3. And be it further enacted by the authority aforesaid, That all actions of debt for rent, upon an indenture of demise; all actions of covenant or debt, upon any bond or other specialty; and all actions of debt, or scire facias upon any recognizance; and also all actions of debt upon any award, where the submission is not by specialty, or for an escape, or for money levied on any fieri facias; and all actions for penalties, damages, or sums of money given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the passing of this act, shall be commenced and sued within the time and limitation here-

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(*s*) An administrator is liable to an action for money had and received by the intestate for coal tortiously raised and taken by him from the plaintiff's land, if the intestate has sold it and received the money; and this, although no direct evidence be given of the actual sum raised on the sale, if the jury believe the fact of the sale, and where part has been raised more than six months before the intestate's death, and part within six months, the plaintiff may bring trespass for so much as was raised within six months, and also for money had and received, for so much as was raised before; the acts being distinct, and therefore the two actions not being incompatible.—Powell *v.* Rees. 7 Ad. & E. 426. In trover against an executor, it appeared that the watch, which was the subject matter of the action, had been given by the testatrix to one S. in September, 1837, that S. re-delivered it to the testatrix in March, 1838, for the purpose of its being pawned by her, that on its being demanded by the plaintiff in December, 1838, the testatrix said that she would consult her solicitor, and that the testatrix died in March, 1839; held that this was sufficient evidence to warrant the jury in finding a conversion within six months before the death.—Richmond *v.* Nicholson. 8 Scott. 134.

inafter expressed, and not after, that is to say: The said actions of debt for rent, upon an indenture of demise or covenant, or debt upon any bond or other specialty, actions of debt, or scire facias upon recognizance, within ten years after the passing of this act, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the passing of this act, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the passing of this act, or within six years after the cause of such actions or suits, but not after: Provided that nothing herein contained shall extend to any action given by any statute, where the time for bringing such action is or shall be by any statute specially limited. (*t*)

Actions of debt on demise or covenant, bond or specialty, or scire facias.

Other actions.

(*t*) It is enacted by sec. 3, 21 Jac. I., ch. 16, that all actions of trespass, quare clausum fregit, &c., detinue, trover, and replevin for taking away goods and cattle; all actions of account, and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors, or servants; all actions of debt grounded upon any lending or contract without specialty, or for arrearages of rent; and all actions of assault, menace, battery, wounding, and imprisonment, shall be commenced and sued within the times hereinafter expressed, and not after; that is to say, the said actions upon the case (other than for slander), account, trespass quare clausum fregit, &c., debt, detinue, and replevin within six years next after the cause of such action or suit, and not after; actions of assault and battery, wounding, and imprisonment, within four years; and actions upon the case for words, within two years next after the words spoken, and not after. This statute which contained the usual saving for infants, &c., was confined to the particular actions enumerated therein, and did not extend to actions of covenant or debt on specialty, or other matter of a higher nature, but only to actions of debt upon a lending or contract without specialty, or for arrearages of rent reserved upon parol leases. It would appear that a foreigner, who always resides abroad and has never come to England, is not affected by these statutes.—Greig *v.* Somerville, 1 Russ. & M. 338, 346; see also, to same point, Flight *v.* Derbyshire, T. T. 6 & 7 Vic. In trover, the statute of limitations runs from the time of conversion, and not from the time of sale.—Denys *v.* Shuckburgh, 4 You. & C. 42. The exception in

Provision in case of disabilities.

4. And be it further enacted by the authority aforesaid, That if any person or persons that is or are, or shall be entitled to any such action or suit, or to such scire facias, is or are, or shall be at the time of any such cause of action accruing, within the age of twenty-one years, femme covert, non compos mentis, or without the limits of this province, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discovert, of sound memory, or returned to this province, as other persons having no such impediment should according to the provisions of this act have done; and that if any person or persons, against whom there shall be any such cause of action, is or are, or shall be, at the time such cause of action accrued, without this province, the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited, after the return of such person or persons to this province: Provided always, that if any acknowledgment shall have been made, either by writing signed by the party liable, by virtue of such indenture, specialty or recognizance, or his agent, or by part payment, or part satisfaction, on account of any principal or interest being due thereon, it shall and may be lawful for the person or persons entitled to such actions, to bring his or their action for the money remaining unpaid and so acknowledged to be due, within twenty years after such acknowledgement by writing, or part payment, or part satisfaction, as aforesaid; or in case the person or persons entitled to such action shall, at the time of such acknowledgement, be under such disability, as aforesaid, or the party making such acknowledgement be, at the time of making the same, without this province, then within twenty years after such

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the 21 Jac. I., ch. 16, sec. 3, as to merchants' accounts, does not apply to an action of indebitatus assumpsit, but only to the action of account, or semble, to an action on the case for not accounting.—Inglis *v.* Haig, 9 Dowl. 817; 8 M. & W. 769.

disability shall have ceased, as aforesaid, or the party shall have returned to this province, as the case may be; and the plaintiff or plaintiffs in any such action, or any indenture, specialty or recognizance, may, by way of replication, state such acknowledgement, and that such action was brought within the time aforesaid, in answer to a plea of this Statute.

In case of written acknowledgment or part payment.

Acknowledgement may be pleaded in replication.

5. And be it further enacted by the authority aforesaid, That if in any of the said actions judgment be given for the plaintiff, and the same be reversed from error in a Court of Error or Appeal, or if a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing for his plaint, writ or bill, or if in any of the said actions the defendant shall be outlawed, and shall reverse the outlawry, that in all such cases the party plaintiff, his executors or administrators, as the case shall require, may commence a new suit or action, from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after.

In case judgment be reversed for error, &c. new action may be commenced within a year.

6. And be it further enacted by the authority aforesaid, That no plea in abatement for the non-joinder of any person as a co-defendant, shall be allowed in any court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea. (*u*)

Pleas in abatement for non-joinder, to state party's residence, and be verified by affidavit.

(*u*) It is not requisite in an affidavit verifying a plea of coverture, to state the residence of the husband to be within the jurisdiction of the court, as this section only applies to the case of pleas in abatement for the non-joinder of co-contractors.—Jones *v.* Smith. 6 Dowl. 557. *Semble*, that the affidavit verifying a plea in abatement for the non-joinder of a party as a co-defendant, must state his actual residence at the time of making the affidavit.—Wheatley *v.* Golney. 9 Dowl. 1019. This affidavit may be made by the defendant or a third person. 2 Saund. 221, f. See the forms, Chitty, forms, 354. It must not be sworn before the declaration is filed or

Under plea in abatement plaintiff may have judgment against defendants who are liable.

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

Judgment and costs to defendants not liable.

8. And be it further enacted by the authority aforesaid, That no plea in abatement for misnomer shall be

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delivered: if it were, and it refers, as it usually does, to the declaration, the plaintiff might treat the plea as a nullity.—Bower *v.* Kemp. 1 Dowl. 281; Johnson *v.* Popplewell, 2 C. & J. 545. If the plea be filed without an affidavit, or with an insufficient affidavit to verify it, the plaintiff may treat it as a nullity, and sign judgment.—Lang *v.* Comber. 4 East, 348; Poole *v.* Pembrey. 1 Dowl. 693. But he cannot get it set aside.—Bray *v.* Haller. 2 Moore, 213; Rex *v.* Cooke. 2 B. & C. 618. A plea of privilege by an attorney must be verified by affidavit, or the plaintiff may sign judgment.—Davidson *v.* Chilman. 1 Bing. N. C. 297.

(*v*) See ante page 62, for form under the new rules of the commencement of a declaration, where after a plea in abatement of the non-joinder of another person, the plaintiff has commenced another action against the persons not joined.

allowed in any personal action, but that in all cases in which a misnomer would, but for this act, have been by law pleadable in abatement, in such actions the defendant shall be at liberty *to cause the declaration to be amended*, (*w*) at the costs of the plaintiff, by inserting the right name, upon a judge's summons founded on an affidavit of the right name; and in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit.

Misnomer not to be pleaded in abatement, but to be amended at costs of plaintiff upon judge's summons.

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

In affidavit to hold to bail, initial or contraction of christian name sufficient.

10. And be it further enacted by the authority aforesaid, That no wager of law shall be hereafter allowed.

Wager of law disallowed.

11. And be it further enacted by the authority aforesaid, That an action of debt on simple contract shall be maintainable in any court of common law against any executor or administrator.

Actions of debt maintainable against executor, &c.

12. And whereas it is expedient to lessen the expense of the proof of written or printed documents, or copies thereof, on the trial of causes; Be it further enacted by the authority aforesaid, That it shall and may be lawful for the judges of his majesty's Court of King's Bench in this province, or the major part of them, as aforesaid, at any time within five years after this act shall take effect,

Court empowered to make rules for admission of documentary evidence.

(*w*) The declaration cannot be set aside as irregular, and the court have refused to set it aside, even where the plaintiff declared by an initial for his Christian name.—Lindsay *v.* Wills. 3 Bing. N. C. 777. The act applies to *plaintiffs* as well as defendants. The application to amend should be made within the time allowed for pleading in abatement, and if the time expire in vacation, it should be made to a judge in chambers.—Hinton *v.* Stevens. 1 H. & W. 521.

to make regulations by general rules or orders from time to time, in term or in vacation, touching the voluntary admission, upon an application for that purpose, at a reasonable time before the trial, of one party to the other, of all such written or printed documents, or copies of document, as are intended to be offered in evidence on the said trial by the party requiring such admission, and touching the inspection thereof before such admission is made, and touching the costs which may be incurred by the proof of such documents or copies on the trial of the cause, in case of the omitting to apply for such admission or the not producing of such document or copies for the purpose of obtaining admission thereof, or of the refusal to make such admission, as the case may be, and as to the said judges, or a majority of them, shall seem meet; and all such rules and orders shall be binding and obligatory in the said court, and of the like force as if the provisions therein contained had been expressly enacted by parliament. (x)

Defendant (except in certain cases) may pay amends into court.

13. And be it further enacted by the authority aforesaid, That it shall be lawful for the defendant in all personal actions, (except actions for assault and battery; false imprisonment; libel; slander; malicious arrest or prosecution; criminal conversation or debauching of the plaintiff's daughter or servant,) by leave of any Court of Record where such action is pending, or of a judge thereof, to pay into court a sum of money by way of compensation or amends, in such manner and under such regulations as to the payment of costs and form of pleading as the said judges of his Majesty's Court of King's Bench, or a majority of them, as aforesaid, by any rules or orders by them to be from time to time made, shall order and direct. (y)

(x) See ante for the rule made on this subject, page 32, and the form of notice to be given. Such notice can only be given after plea pleaded.

(y) For rules under this section, see ante page 25. And ante page 91, for course of proceeding pointed out under 2 Geo. IV. ch. 1, where money is paid into court in cases, where the sum demanded is a sum certain, or capable of being ascertained by computation of numbers. By rule 18, 4 Will. IV., in England, in no case is any rule or judge's

14. And whereas unnecessary delay and expense is sometimes occasioned by the trial of local actions in the district where the cause of action has arisen: be it therefore enacted by the authority aforesaid, that in any action depending in the Court of King's Bench, the venue in which is by law local, the court or any judge thereof may, on application of either party, order the issue to be tried or damages to be assessed in any other district than that in which the venue is laid, and for that purpose the said court or a judge thereof may order a suggestion to be entered on the record, that the trial may be more conveniently had or damages assessed in the district where the same is ordered to take place. (z)

Local actions may be tried in another district by suggestion on the record.

15. And whereas great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances as to some particular or particulars between the proof and the record, or setting forth on the record on which the trial is had, of contracts, names, and other matters or circumstances not material to the merits of the case, and by the mis-statement of which the opposite party cannot have been prejudiced, and the same cannot in any case be amended at the trial, except where the variance is between any matter in writing or in print produced in evidence and the record: And whereas it is expedient to allow such amendments as hereinafter mentioned to be made on the trial of the cause: be it therefore enacted by the authority aforesaid, that it shall be lawful for any Court of Record holding plea in civil ac-

Courts of record may direct pleadings to be amended at the trial in certain actions.

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order to pay money into court necessary, except in cases similar to those in this section, but in this court, a rule or judge's order is still necessary in all cases, as it is expressly directed to be obtained in both of the provincial statutes, and there has been no change made by any rule of court. The plea of payment into court will principally affect costs, but it will do away with the necessity of proving any rule or order, upon the trial of the cause, for the payment of the money into court in any case.

(z) The application to change the venue under this enactment cannot be made until after issue joined.—Bell *v.* Harrison. 4 Dowl. 181.

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

(See 1 Wm. IV. chap. 2).

Upon such terms respecting costs as may seem reasonable.

Or allow the record to be withdrawn.

(a) See ante, 1 Will. IV. ch. 2. Under the similar statute in England, it has been held, that where a contract by which A. guaranteed to B. the amount of a debt to be contracted with B. by C. was described, in pleading, as a promise to pay the debt to be so contracted, an amendment was allowed by the substitution of "guarantee" for "pay." So when in assumpsit sit on the warranty of a horse, a general warranty of soundness was declared on, and the warranty proved was of soundness "except in one foot," the judge allowed the declaration to be amended, the real dispute being whether the horse was a roarer.—Kenning *v.* Perry. 6 C. & P. 580. And where in ejectment, the parish in which the premises were situated was mis-stated, an amendment was allowed, and this although the ejectment was for a forfeiture.—Doe Marriott *v.* Edwards, 6 C. & P. 208. And where in an action on the case against the defendants as carriers, for negligence, it appeared from the evidence that the defendants, if liable at all, were liable as wharfingers, upon a contract to forward; and the judge refused to allow an amendment, but left it to the jury to say whether there was a contract to forward, or to carry, and they found that there was a contract to forward, upon which the

Amendment when allowed.

some particular or particulars in the judgment of such court or judge not material to the merits of the case, but

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judge directed the verdict to be entered for the defendant, but the special finding to be endorsed on the postea, that the court might proceed thereon under the next section of the statute; the court afterwards allowed the amendment, and granted a new trial on payment of costs.—Parry *v.* Fairhurst. 2 C. M. & K. 190; Gaylor *v.* Farrant, 4 Bing, N. C. 286. So an amendment has been allowed by the court in an action on a bill of exchange, when no period was stated when the bill became due.—Pullen *v.* Seymour. 5 Dowl. 164. And by changing in the statement of the period when a contract was to be performed "a reasonable time," into a certain time.—Sainsbury *v.* Matthews, 4 M. & W. 343. Also by increasing the amount of damages in the declaration, to correspond with the bill of particulars delivered.—Dew *v.* Katz. 8 C. & P. 315. And by altering the time when a promissory note was stated to be payable.—Beckett *v.* Dutton. 7 M. & W. 157. And the terms of an agreement to refer to arbitration.—Duckworth *v.* Harrison, 5 M. & W. 427. So in an action for defamation, where the words laid were in the English language, and those proved in the Welsh, an amendment was allowed by the insertion of the Welsh words with an English translation.—Jenkins *v.* Phillips. 9 C. & P. 766. And in an action for libel in the statement of the publication in a newspaper, when it was proved to have been only a printed paper.—Foster *v.* Pointer. 9 C. & P. 718. In ejectment the day of the demise in the declaration has been amended.—Doe Edwards *v.* Leach, 9 Dowl. 877. And the name of the tenant substituted for "Richard Roe."—Doe Stanway *v.* Rock. Where upon an amendment being made, the defendant submits to pay the sums recoverable under the amended declaration, he will be entitled to his costs from the time at which he might have paid money into court: but if he contests the plaintiff's right to recover any thing, and fails, he will be entitled only to the costs occasioned by the misdescription of the contract.—Smith *v.* Brandram. 2 Man. & G. 244.

Amendment when not allowed.

Where several defendants were sued in debt, and the evidence did not charge them all, an amendment by striking out their names was refused.—Cooper *v.* Whitehouse. 6 C. & P. 545. So by changing the demise by tenants in common from a joint demise to separate demises.—Doe Poole *v.* Errington. 1 A. & E. 750. And where the year of the demise was omitted, an amendment was refused.—Doe Parson *v.* Heather. 1 Dowl. N. S. 74. So in trespass for taking mirrors and handkerchiefs, where the defendant justified the taking the mirrors, but by mistake omitted the taking of the handker-

such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution or defence, then such court or judge shall have power to cause the same to be amended, upon payment of costs to the other party, and withdrawing the record or postponing the trial, as aforesaid, as such court or judge shall think reasonable; and after any such amendment the trial shall proceed (in case the same shall be proceeded with) in the same manner in all respects, both with regard to the liability of witnesses to be indicted for perjury, and otherwise, as if no such variance had appeared; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be endorsed on the postea, and returned together with the record; and thereupon such papers, rolls and other records of the court from which such record issued, as it may be necessary to amend, shall be amended accordingly, and the order for amendment shall

After amendment the trial to proceed as though no such variance had appeared.

On trial at Nisi Prius order for amendment to be endorsed upon the postea.

Rolls and records to be amended accordingly.

chiefs, the judge refused to allow the omission to be supplied.—John *v.* Currie. 6 C. & P. 618. So where in replevin on a taking in a public-house and brewery, there was an avowry, as to the taking in the public-house only, omitting the brewery, an amendment was refused by the insertion of the brewery in the avowry.—Bye *v.* Bower. 1 Car. & M. 262. Where the general issue is pleaded, without the words "by statute" in the margin, where it is intended to give the special matter in evidence under a statute, an insertion of those words will not be permitted at Nisi Prius.—Forman *v.* Dawes. 1 Car. & M. 127. In a variance on an issue raised under a plea of nul tiel record, a judge sitting in banc is not empowered to amend the pleadings under this statute.—Davis *v.* Dunn. 1 Dowl. N. S. 31. In an action for a libel, the judge would not order superfluous averments and inuendos to be struck out at the instance of the plaintiff at Nisi Prius.—Prudhomme *v.* Fraser. 1 M. & Rob. 435. An amendment of the award of the venire on the Nisi Prius record cannot be made.—Adams *v.* Power, 7 C. & P. 76. But where a record was taken down to trial without any issue having been joined by the addition of a similiter, the defect was allowed to be cured by adding it at the trial, but if added after the jury were sworn, they should be resworn.—Dyson *v.* Warris. 1 M. & Rob. 474. In this court, the following cases have occurred. An amendment was allowed in ejectment, where the demise laid was at a time anterior to the accruing of the title of the lessor of the plaintiff.—Doe Sinclair *v.* Arnold. H. T. 4 Vic.

be entered on the roll or other document upon which the trial shall be had; Provided that it shall be lawful for any party who is dissatisfied with the decision of such judge at Nisi Prius, respecting his allowance of any such amendment, to apply to the court from which such record issued for a new trial upon that ground; and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order as to them may seem meet. *(b)*

Party dissatisfied with the amendment may apply for new trial.

16. And be it further enacted by the authority aforesaid, That the said court or judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the record to be amended, as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record, *(c)* and notwithstanding the finding on the issue joined, the court from which the record issued shall, if they shall think the said variance immaterial to the merits of the case, and the misstatement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case. *(d)*

Instead of amendment the judge may direct the jury to find facts according to the evidence.

And if variance be immaterial, court may give judgment according to the merits.

(b) An amendment of the Nisi Prius record under this section must be made during trial and before verdict, and the judge cannot give the party power to amend on a future day. —Brazier *v.* Jackson. 6 M. & W. 549. An amendment cannot be made after verdict. Doe Bennett *v.* Long, 9 C. & P. 773.

Amendment when to be made.

(c) Where in an action against a sheriff for an escape, the proof was that the sheriff had not arrested the party when he had an opportunity, and the jury found that fact specially, the court gave judgment for the plaintiff. Sometimes instead of giving judgment, an amendment will be allowed and new trial granted, or even a nonsuit entered.—Gayler *v.* Farrant. 4 Bing, N. C. 286; Chanter *v.* Leese. 4 M. & W. 295. And the court has no power to impose terms on the party obtaining judgment.—Guest *v.* Elwes. 6 N. & M. 433. And in this court, where there was profert of a bond, and it was proved to have been lost, on the special finding of the jury to that effect, the court gave judgment for the plaintiff.—Ketchum *et al. v.* Ready. T. T. 3 & 4 Vic.

(d) If the judge at Nisi Prius has refused to amend, but has

After issue joined the parties may agree upon a special case, for the opinion of the court.

17. And be it further enacted by the authority aforesaid, That it shall be lawful for the parties in any action or information after issue joined, by consent and by order of any of the judges of the court in which the action is depending, to state the facts of the case, in the form of a special case, for the opinion of the Court, and to agree that a judgment shall be entered for the plaintiff or defendant by confession, or of nolle prosequi, immediately after the decision of the case, or otherwise as the court may think fit, and judgment shall be entered accordingly.

Interested witnesses may be examined.

18. And in order to render the rejection of witnesses on the ground of interest less frequent; be it further enacted by the authority aforesaid, that if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action on which it shall be proposed to examine him would be admissible in evidence for or against him, such witness shall nevertheless be examined; but in that case a verdict or judgment in that action in favour of the party on whose behalf he shall have been examined shall not be admissible in evidence for him, or for any one claiming under him, nor shall a verdict or judgment against the party on whose behalf he shall have been examined be admissible in evidence against him, or any one claiming under him. (*e*)

But the verdict or judgment not admissible for or against such witnesses.

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directed the facts to be found specially, and indorsed on the record, the court has no power to strike out the indorsement. —Knight *v.* McDowall. 4 Per. & D. 168. Where the facts have been found especially, the court have no power to give judgment according to the justice of the case, if the opposite party has been prejudiced by the mis-statement.—Ib.

Witness when competent.

(*e*) In an action on the case for negligence in driving by the defendant's servant, it was held that the servant might be made a competent witness by his name being indorsed on the record, without being released.—Yeomans *v.* Leigh. 2 M. & W. 419; Bowman *v.* Willis. 3 Bing. N. C. 671. So in an action by the indorsee against the acceptor of an accommodation bill, the drawer is a competent witness for the defendant under this statute.—Faith *v.* McIntry. 7 C. & P. 94. So is a tenant in an action by a reversioner for an obstruction of a private right of way beneficial to the tenant.—Adeane *v.* Mortlock. 5 Bing, N. C. 236. And one of the makers of a joint

19. And be it further enacted by the authority aforesaid, That the name of every witness objected to as incompetent, on the ground that such verdict or judgment would be admissible in evidence for or against him, shall at the trial be endorsed on the record on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court, at the request of either party, and shall be afterwards entered on the record of the judgment, and such endorsement or entry shall be sufficient evidence that such witness was examined, in any subsequent proceeding on which the verdict or judgment shall be offered in evidence.

Names of interested witnesses to be endorsed on the record.

And the name of the party on whose behalf examined.

20. And be it further enacted by the authority aforesaid, That upon all debts or sums certain, payable at a certain time, or otherwise, the jury on the trial of any

The jury may allow interest on debts in certain cases.

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and several promissory note in an action against the other, is competent to prove payment by himself.—Russell *v.* Blake. 2 Scott, N. R. 575; 2 Man & G. 374. So is one of several co-contractors competent in an action against the others.—Poole *v.* Palmer. 9 M. & W. 71. And in an action by the indorsee of a bill of exchange against the acceptor, the drawer is, under this statute, a competent witness to prove that the bill was accepted and endorsed upon an agreement which was not performed, and that it was retained in breach of the agreement.—Kelpack *v.* Major, 6 Jurist, 13

A partner is not considered a competent witness in an action by his co-partners.—Jackson *v.* Galloway. 8 C. & P. 480. Nor is a former owner who has covenanted for title, in an action for obstructing an easement.—Steers *v.* Carwardine. 8 C. & P. 570. Nor is a sheriff's officer who has given an indemnity bond, in an action against the sheriff.—Groom *v.* Bradley. 8 C. & P. 500. Nor any person who is expressly bound to indemnify the person who calls him.—Stanley *v.* Robinson. 2 M. & R. 203. And where the obligee of a bond bequeathed it to A. B. in a suit by the legatee against the executor, the obligor was held an incompetent witness to prove that the bond was, under the circumstances, irrecoverable against him.—Davies *v.* Morgan. And in this court, it has been held that a deputy sheriff is not a competent witness under this statute, for a sheriff's sureties, in an action against them, for his misconduct in the execution of writs of fieri facias delivered to him.—Roy *v.* Hamilton. H. T. 5 Vic.

Witness when incompetent.

issue, or on any assessment of damages, may, if they shall think fit, allow interest to the creditor from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment; Provided, that interest shall be payable in all cases in which it is now payable by law, or in which it has been usual for a jury to allow interest. *(f)*

Interest in trover in nature of damages.

21. And be it further enacted by the authority aforesaid, That the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give interest in the nature of damages over and above the value of the goods at the time of the conversion or seizure, in all actions of trover, or trespass de bonis asportatis, and over and above the money recoverable in all actions on policies of assurance made after the passing of this act.

22. And be it further enacted by the authority afore-

(f) The power of allowing interest under this act being given to a jury, a plaintiff has no right to arrest for such interest, unless it was expressly reserved by the terms of the contract.—Callum *v.* Leesom. 2 Crom. & M. 406. And a judge has no power to order the taxation of interest under this section; and where in an action on an attorney's bill, the plaintiff gave notice pursuant to the statute, that he should claim interest from the date of the notice; and after the writ was issued, the bill was referred to taxation at the instance of the defendant, no terms being made (these ought to have been applied for) as to the allowance of interest. Held that the plaintiff could not afterwards have an assessment of damages for the purpose of recovering the interest.—Barrington *v.* Phillips. 3 C. M. & R. 48. And semble, it is too late after verdict taken to rectify a mistake in the calculating the amount of interest.—Hilton *v.* Fowler. 5 Dowl. 312. See further as to interest and the form of demand under this statute. 3 Chit. Gen. Prac. 920. For the law relating to the allowance of interest in cases not within this statute, see Fruhling *v.* Schroder. 2 Bing. N. C. 77, and cases there cited.

said, That if any person shall sue out any writ of error or appeal upon any judgment whatsoever, given in any court in any action personal, and the Court of Error or Appeal shall give judgment for the defendant in error, then interest shall be allowed by the Court of Error or Appeal, for such time as execution has been delayed by such writ of error or appeal, for the delaying thereof.

Interest when execution delayed by writ of error.

23. And be it further enacted by the authority aforesaid, That in every action brought by any executor or administrator in right of the testator or intestate, after the time this act shall go into effect, such executor or administrator shall, unless the court in which such action is brought, or a judge thereof, shall otherwise order, be liable to pay costs to the defendant in case of being non-suited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable if the plaintiff were suing in his own right upon a cause of action accruing to himself, and the defendant shall have judgment for such costs, and they shall be recovered in like manner. (*g*)

Payment of costs by executors and administrators.

24. And be it further enacted by the authority aforesaid, That when several persons shall be made defendants in any personal action, and any one or more of them shall have a nolle prosequi entered as to him or them, or

Defendants entitled to costs after a nolle prosequi, unless the judge shall certify.

(*g*) The discretion given to the court in this section with respect to costs, is confined to those cases in which executors prior to this statute were exempted from costs.—Spence *v.* Albert. 2 A. & E. 784; Ashton *v.* Poynter. 1 C. M. & R. 738 (over-ruling Lysons *v.* Barrow. 10 Bing. 563). In order to induce the court to exercise this discretion in favor of a plaintiff, it should be shewn not merely that the executor brought the action bona fide, or even under the advice of counsel, but that due diligence was used, and proper inquiry made of the defendant before the commencement of the action, for the purpose of ascertaining whether the suit might be prosecuted to a successful result; and the mere refusal of the defendant to disclose the precise nature or ground of his defence will not suffice.—Wilkinson *v.* Edwards. 1 Bing. N. C. 518; Godson *v.* Freeman. 2 C. M. & R. 585; Engler *v.* Twysden. 2 Bing. N. C. 263. As the power of a single judge is co-extensive with the power of the court under this section, the court cannot review any order he may make exempting a plaintiff from costs.—Maddocks *v.* Phillips. 3 A. & E. 198.

upon the trial of such action shall have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless, in the case of a trial, the judge before whom such cause shall be tried shall certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant in such action. (*h*)

(*h*) This section being merely intended to remedy the defects in 8 & 9 Will. III., ch. 11, sec. 1, does not operate as a repeal of any Act of Parliament which gives to a particular class of persons, when defendants, an absolute and unqualified right to costs in the event of a verdict in their favour; and therefore a judge has no power in such a case to certify to deprive them of their costs.—Humphrey *v.* Woodhouse. 1 Bing. N. C. 506. Where several defendants are sued in trespass, and a verdict is found for the plaintiff on some of the issues against some of the defendants, and against him on all the other issues, the plaintiff is entitled to the balance only of the costs, after deduction of all the costs of all the defendants. —Starling *v.* Cozens. 3 Dowl. 782; Gougenheim *v.* Lane. 4 Dowl. 482; Allenby *v.* Proudlock. 4 A. & E. 326. Also where there are several defendants, and one of them gets a verdict, he will be entitled to all his separate costs, and also prima facie to an aliquot portion of the joint costs of the defence, unless the master is satisfied that some smaller portion should be allowed by reason of any special circumstances; and he will be thus in general entitled to his costs, although he has pleaded the same pleas, and by the same attorney as the other defendants; although formerly, in the latter case, 40*s.* only used to be allowed him.—Griffiths *v.* Jones. 4 Dowl. 159. Where two defendants in trespass severed in pleading, but pleaded the same pleas, all going to the whole action, and one succeeded upon all the issues, the other upon one only, each defendant was considered entitled to his separate costs of the issues in which he succeeded; but the defendants having appeared by separate attornies and counsel, the attornies being members of the same firm, and the briefs and evidence substantially the same, the master taxed the costs, as if the parties had appeared by the same attorney: it was admitted by the court, that the taxation of the costs in that respect could not be disturbed.—Gambrell *v.* Earl Falmouth. 5 A. & E. 403; Lees *v.* Kendall. 3 A. & E. 707. Where in trespass against two defendants, they pleaded by different attornies, but appeared by the same counsel, and a verdict was found for the one, and against the other, the defendant who obtained the verdict was allowed on taxation only half the costs of the trial, counsel's

25. And be it further enacted by the authority aforesaid, That where any nolle prosequi shall have been entered upon any count, or as to part of any declaration, the defendant shall be entitled to and have judgment for his reasonable costs in that behalf.

Costs where nolle prosequi entered as to part of declaration.

26. And be it further enacted by the authority aforesaid, That in all writs of scire facias, the plaintiff obtaining judgment on an award of execution, shall recover his costs of suit upon a judgment by default, as well as upon a judgment after plea pleaded, or demurrer joined; and that where judgment shall be given either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favor such judgment shall be given shall also have judgment to recover his costs in that behalf.

Plaintiff allowed costs on scire facias, after judgment by default, &c.

27. And be it further enacted by the authority aforesaid, That it shall be lawful for the executors or administrators of any lessor or landlord, to distrain upon the lands demised for any term, or at will, for the arrearages of rent due to such lessor or landlord in his life time, in like manner as such lessor or landlord might have done in his life time. (*i*)

Executors and administrators of a lessor may distrain for rent.

28. And be it further enacted by the authority aforesaid, That such arrearages may be distrained for after the end or determination of such term, or lease at will, in the same manner as if such term or lease had not been ended or determined: Provided that such distress be made within the space of six calendar months after the

Such arrearages of rent may be distrained for within six months after the determination of the lease.

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fees, &c.---Bartholomew *v.* Stevens. 7 Dowl. 808. And where in trespass there were three defendants, who appeared by the same attorney, and pleaded jointly, and at the trial one of them was acquitted, it was held, that the defendant's attorney was entitled to have one-third of his general bill of costs against the three defendants, set off against the plaintiff's bill, and unless there were some special circumstances in the cases, the master was bound, on taxation, to adopt this principle.---Norman *v.* Climenson. 1 Dowl. N. S. 718.

(*i*) For the law on this subject previous to the passing of this statute, see Prescott *v.* Boucher. 3 Bar. & Adol. 849—it was there held that the executor could *not distrain.*

determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due: Provided also, that all and every the powers and provisions in the several statutes made relating to distresses for rent, shall be applicable to the distresses so made, as aforesaid.

Submission to arbitration, if agreed to be made a rule of court, not revocable;

29. And whereas it is expedient to render references to arbitration more effectual: Be it further enacted by the authority aforesaid, That the power and authority of any arbitrator or umpire appointed by, or in pursuance of any rule of court, or judges' order or orders of Nisi Prius, in any action (*j*) now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference, containing an agreement that such submission shall be made a rule of his Majesty's Court of King's Bench, shall not be revocable by any party to such reference, without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge, (*k*) and

Without leave of court.

Arbitrator to proceed with reference.

(*j*) This act is confined to *civil* actions. Therefore where criminal matters are referred, the submission is still revocable at common law.—Rex *v.* Bardell. 1 N. & P. 74.

(*k*) A judge making an order for leave to revoke the arbitrators' authority is bound to hear both parties; and if he proceed upon a mere ex-parte statement, the order will be set aside.—Clarke *v.* Stocken. 2 Bing. N. C. 651. And to bring a case within the act, the reference must be complete; thus, where two arbitrators were chosen in pursuance of a clause in a deed, which directed that they should appoint an umpire before they commenced proceedings, and the arbitrators met but could not agree upon an umpire, whereupon the plaintiff revoked their authority, the case was held not to be within the act.—Bright *v.* Turnell. 1 Tyr. & G. 576. A party can revoke a submission to arbitration before award, where there is no agreement that the submission shall be made a rule of court.—Pope *v.* Dickenson. 2 Jurist 178. Where a submission has been made a rule of court, and a party to the submission revokes the authority without leave of the court, he still ought to have notice from the arbitrators to attend their meeting.—In re Kyle. 2 Jurist 760. To induce the court to permit a party to rescind his submission, strong grounds must be laid before them.—James *v.* Atwood. 7 Scott 841; Scott *v.* Vansandau. 1 Q. B. 102.

the arbitrator and umpire shall and may, and is hereby required to proceed with the reference notwithstanding any such revocation, and to make an award, although the person making such revocation shall not afterwards attend the reference; and that the court, or any judge thereof, may, from time to time, enlarge the term for any such arbitrator making his award. (*l*)

Court may enlarge time for making an award.

30. And be it further enacted by the authority aforesaid, That when any reference shall have been made by any such rule or order, as aforesaid, or by any submission containing such agreement, as aforesaid, it shall be lawful for the court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order; and the disobedience of any such rule or order shall be deemed a contempt of court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, shall also be served, either together with or after the service of such rule or order: Provided always, that every person whose attendance shall be so required shall be entitled to the like conduct money and payment of expenses, and for loss of time, as for and upon attendance at any trial: (*m*) Provided also, that

Witnesses may be compelled to attend arbitrators;

By order of the court.

On payment of their expenses.

(*l*) Semble, the power given to the court to enlarge the time for making an award is only to be exercised, where no such power is given to the arbitrators.—Doe Jones *v.* Powell. 7 Dowl. 539.

The court has power to enlarge the time for an arbitrator to make his award, where the arbitrator, having power to do so, has allowed the time limited by the submission for making the award, to elapse without doing so.—Newman *v.* Parbery. 7 M. & W. 378. Where an arbitrator enlarges the time for making his award until a particular day, the time is to be construed inclusive of that day.—Kerr *v* Jeston. 1 Dowl. N. S. 538.

(*m*) Where a cause is referred to arbitration, with power to

the application made to such court or judge for such rule or order shall set forth the place where such witness is residing at the time: Provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compelled to produce at a trial, or to attend at more than two consecutive days, to be named in such order.

Witnesses may be sworn upon arbitrations.

31. And be it further enacted by the authority aforesaid, That when in any rule or order of reference, or in any submission to arbitration containing an agreement that the submission shall be made a rule of court, it shall be ordered or agreed that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrator or umpire, or for any one arbitrator, and he or they are hereby authorised and required to administer an oath to such witnesses, or take their affirmation in cases where affirmation is allowed by law instead of an oath; and if upon such oath or affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and may be prosecuted and punished accordingly.

False swearing to be deemed perjury.

Sheriffs not entitled to poundage, except upon actual levy made.

32. And whereas in cases where writs of execution have been issued into several districts, upon which writs property, real or personal, may have been seized or advertised, which property has afterwards not been sold on account of satisfaction having been otherwise obtained,

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the arbitrator to settle all matters in difference between the parties, the submission providing also that the parties respectively are to be examined on oath, if thought necessary by him, it is in the discretion of the arbitrator to examine the parties, each in support of his own case, if he thinks fit.—Wells *v.* Benskin. 9 M. & W. 45. A partnership deed contained a clause for referring disputes to arbitration, and provided that every *award* made from time to time, should be made a rule of Court,—held, that as it did not appear that the word *award* was used by mistake for *submission*, and as there did not appear to have been any intention to make the submission a rule of court, that therefore a judge could not require the attendance of witnesses before the arbitrator.—Woodcroft and Jones. 9 Dowl. 538.

or from some other cause, it has been doubted whether a claim to poundage may not be advanced by the sheriff of each of such districts, respectively, although no money has been actually levied by them under such writ: Be it therefore enacted by the authority aforesaid, That where upon any writ of execution sued against the estate, real or personal, of the defendant or defendants, no money shall be actually levied, no poundage shall be allowed to the Sheriff; but he shall be allowed his fees for the services which may be actually rendered by him; and it shall be in the power of the court from whence such execution shall have issued, or for any judge thereof in vacation, to allow a reasonable charge to the sheriff for any service rendered in respect to such execution, for which no specific fee or allowance may be assigned in the table of costs.

Allowance of fees for services rendered.

And such further reasonable charge as a judge may order.

33. And be it further enacted by the authority aforesaid, That it shall not be necessary after the time this act shall take effect, to sue out process of execution into that district in which the venue in any action shall be laid, for the sole purpose of warranting the suing out process of execution into any other district; nor need any writ of execution be a testatum writ, merely because of its being directed to the sheriff of any other district than that in which the venue may be laid; but it shall be lawful to sue out execution into any district of this province, without regard to the venue having been laid in any other district: Provided always, that where it is now necessary to sue out process of execution against the person into any particular district, in order to charge bail, the same shall still continue to be necessary, notwithstanding any thing contained in this act.

Writ of fieri facias may issue without a testatum fi. fa.

34. And be it further enacted by the authority aforesaid, That this statute shall commence and take effect on the first day of June next after the passing thereof.

1 Vic. ch. 7.

An act to amend the law with respect to the liability of the legal Representatives of Joint Contractors, and of Defendants on Joint Judgments.

Preamble. (See 59 Geo. III. Sess. 2. ch. 25; and 7 Wm. IV. ch. 3, sec. 6.)

Whereas by the laws of this province, if one or more of several defendants against whom a joint judgment shall have been entered, or if one or more of several joint contractors, obligors or partners, shall die, the representative of such defendant, joint contractor, or obligor or partner, is not liable under such judgment, contract, obligation or promise; for the remedy whereof, Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "An Act to repeal certain parts of an Act passed in the fourteenth year of his Majesty's reign intituled, 'An Act for making more effectual provision for the Government of the Province of Quebec, in North America,' and to make further provision for the Government of the said province," and by the authority of the same, That if any one or more of any joint contractors, obligors or partners, shall die, it shall and may be lawful for the person interested in such contract, obligation or promise, entered into by such joint contractor, obligor or partner, to proceed by action against the representatives of such joint contractor, obligor or partner, in the same manner as if the said contract, obligation or promise, had been joint and several, notwithstanding there may be another person liable under such contract, obligation or promise, still living, and an action pending against such person.

Representatives of deceased joint contractor made liable, notwithstanding the other joint contractor be living.

Proceeding by writ of scire facias against representative of deceased joint contractor authorised.

2. And be it further enacted by the authority aforesaid, That if any one or more of the defendants in any action, against which a joint judgment may have been entered in any Court of Record in this province, shall die, it shall and may be lawful for the plaintiff or plaintiffs,

or the survivor or survivors of them, or the executor or administrator of such survivor, to proceed by writ of scire facias against the representatives of such defendant or defendants, respectively, so dying, notwithstanding there may be another defendant still living, and against whom the said judgment may be in force: Provided always, that nothing in this act contained shall be construed to extend to authorise the collection of a greater sum than the debt or damages justly due, with interest and costs: Provided always, that the property and effects of stock holders in chartered banks, or the members of other incorporated companies, shall not be rendered liable to a greater extent than they would have been if this act had not been passed.

No greater sum to be collected than debt and damages justly due.

Limitation of liability of stock-holders in chartered banks, or incorporated companies.

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1 Vic. ch. 15.

An Act to amend so much of an act passed in the seventh year of his late Majesty's reign, intituled, "An Act to increase the present number of the judges of his Majesty's Court of King's Bench in this Province, to alter the terms for the sitting of the said court, and for other purposes therein mentioned," as relates to Hilary Term.

Whereas it is expedient to repeal so much of an act passed in the seventh year of his late Majesty's reign, intituled, "An act to increase the present number of the Judges of his Majesty's Court of King's Bench in this province, to alter the terms for the sitting of the said court, and for other purposes therein mentioned," as relates to the sitting of Hilary Term: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "An Act to repeal certain parts of an Act passed in the fourteenth year of his Majesty's reign, intituled, 'An act for making more effectual provision for the government of the province of Quebec, in North America,'

Preamble. (7 Wm. IV. ch. 1.)

Seventh clause of act repealed.

and to make further provision for the government of the said province," and by the authority of the same, That the seventh clause of the said recited act, passed in the seventh year of His late Majesty's reign, be and the same is hereby repealed.

Times at which the several terms shall hereafter commence and end.

2. And be it further enacted by the authority aforesaid, That from and after the passing of this act, the times of sitting of the said Court of King's Bench, shall be as follows, that is to say; Trinity Term shall begin on the second Monday in June, and end on the Saturday of the following week: Michaelmas Term shall begin on the first Monday in August, and end on the Saturday of the following week: Hilary Term shall begin on the first Monday in November, and end on Saturday of the ensuing week: and Easter Term shall begin on the first Monday in February, and end on Saturday of the following week.

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2 Vic. ch. 1.

An Act to regulate the name and style of the court established under the authority of an act of the Provincial Parliament, passed in the thirty-fourth year of the reign of King George the Third, intituled "An act to establish a superior Court of Civil and Criminal Jurisdiction, and to regulate the Court of Appeal."

Preamble.

(See 34 Geo. III ch. 2; 2 Geo. IV Sess 2, ch. 1)

Whereas it is expedient and right, that the name and style of the court established in this province under the authority of an act of the Provincial Parliament, passed in the thirty-fourth year of the reign of his late Majesty King George the Third, intituled, "An act to establish a superior court of civil and criminal jurisdiction, and to regulate the court of appeal," should alter and vary according to the existing fact of the reigning Sovereign being male or female: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada constituted and assembled by virtue of and under the authority of an act passed in the Parlia-

ment of Great Britain, intituled, "An act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, 'An Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, That from and after the passing of this act, the name and style of the said court shall be, his Majesty's Court of King's Bench in and for the Province of Upper Canada, during the reign of any male sovereign; and that the said name and style shall be, her Majesty's Court of Queen's Bench in and for the Province of Upper Canada, during the reign of any female sovereign, as the case may be, any thing in the above-mentioned act to the contrary thereof in anywise notwithstanding.

Style of court to be "King's or Queen's Bench," according to the reign of a male or female Sovereign.

2. Provided always, and be it further enacted by the authority aforesaid, That nothing in this act contained shall extend, or be construed to extend, to affect any suit or action that may have been brought in any of the Courts of Law or Equity in this Province, previous to the passing of this act.

Past suits, &c. not affected by this act.

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2 Vic. ch. 2.

An Act to alter and amend the law relating to the appointment of Commissioners of the Court of King's Bench, in the several Districts of this Province.

Preamble. (See 2 Geo. IV. ch. 1, Secs. 39 & 40.)

Whereas it is expedient to alter and amend the law relating to the appointment of commissioners for taking recognizances of Bail and affidavits, in the several districts of this province, so as to authorise the justices of her Majesty's Court of King's Bench, in certain cases, to make such appointments, without the intervention of the Chief Justice: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by

virtue of and under the authority of an Act passed in the Parliament of Great Britain, intituled, "An Act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, 'An Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said Province," and by the authority of the same, That in the event of the death of the Chief Justice, for the time being, or his absence from the Province, it shall and may be lawful for any two or more of the Puisne Justices of the said court to appoint commissioners for taking recognizances of bail and affidavits in the several districts in this province, in like manner as the said Chief Justice, and other the justices of the said court, are now by law authorised to do, any thing contained in any former act or acts notwithstanding.

Puisne Judges empowered to appoint Commissioners, in the absence of the Chief Justice.

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4 & 5 Vic. ch. 5.

An Act to facilitate the Despatch of Business in the Court of Queen's Bench of Upper Canada.

Preamble.

Whereas it would facilitate the despatch of business in the Court of Queen's Bench of Upper Canada, if the said court were enabled to sit in banc out of term, for the purpose of giving judgment and making rules and orders in matters which have been moved and argued before it: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Legislative Council and of the Legislative Assembly of the province of Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of the United Kingdom of Great Britain and Ireland, and intituled An act to re-unite the Provinces of Upper and Lower Canada, and for the government of Canada, and it is hereby enacted by the authority of the same, that from and after the passing of this act it shall be lawful for the Court of Queen's Bench of Upper Canada, to

The court may sit in banc on Tuesday and Wednesday of the 2nd week after each term, to give judgment and make rules and orders only.

sit in banc on the Tuesday and Wednesday of the second week after the end of each term, for the purposes only of giving judgment, and of making rules and orders in matters which have been moved and argued in the said court, and that all judgments to be pronounced, and all rules and orders to be made, under the authority of this act, shall have the same effect to all intents and purposes as if they had been pronounced or made in term time.

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2 WILL. IV. CH. 5.

An Act to afford means for attaching the property of absconding Debtors.

Preamble (See 5 Wm. IV. ch. 5; 2 Vic. ch. 5; 3 Vic. ch. 7.)

WHEREAS it is necessary, for the protection of persons engaged in trade, to afford the means of attaching the property of absconding debtors, that the same may be taken in execution and sold for the benefit of their creditors: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "An act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, 'An act for making more effectual provision for the government of the province of Quebec, in North America,' and to make further provision for the government of the said Province," and by the authority of the same, That if any person or persons, being indebted to an inhabitant of this province, (*n*) shall, before the passing of this act, have secretly departed from this province, or if any person or persons so indebted shall, after the passing of this act, secretly depart from this province, or keep concealed within the same, (*o*) it shall and may be lawful for

(See 5 Wm. IV. ch. 5, sec. 2.) King's Bench or District Court may issue warrants for the

(*n*) An attachment may issue against an absconding debtor, although the plaintiff is not an inhabitant of this province, by 5 Will. IV. ch. 5, § 2.

(*o*) The property of a person who usually resides in the United States, but who engages in an undertaking in this

attachment of the property of absconding debtors.

any person or persons, their servants or agents, to whom such absconding or concealed person or persons is or are indebted in the sum of five pounds or upwards, to make application to the Court of King's Bench in this province, in term time, or to any judge thereof in vacation, or to any judge of the District Court in the different districts of this province, either within or without the limits of the district for which such judge is appointed, where the sum claimed is within the jurisdiction of such District Court, and there make an affidavit that the said absconding or concealed person or persons is or are indebted to him, (*p*) her or them, in the sum of five pounds or upwards, expressing the cause of action, and that he, she or they, do verily believe that the said absconding or concealed person or persons hath departed this province, or is concealed within the same, (which affidavit may also be taken before a Commissioner for taking affidavits in the King's Bench,) with intent and design to defraud him, her or them, and other creditors, (if any there be,) of their just dues, or to avoid being arrested or served with process, which departure or concealment shall also be proved to the satisfaction of such court, or judges of such court, by the oath or affidavit of at least two credible witnesses; (*q*) and upon

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country, employs persons here, and comes frequently to superintend their work, may be attached under this act.—Ford *v.* Lusher. H. T. 4 Will. IV. And where a party seeks to set aside an attachment issued against him as an absconding debtor, on the ground that he is an inhabitant of a foreign country, and has not resided in this province for many years, it must appear clearly from his affidavits that he is the defendant in the suit, and that his residence in the United States has been such as to preclude the possibility of his coming within the provisions of the act.—The Niagara Harbour and Dock Company *v.* Smith. M. T. 7 Vic.

(*p*) An attachment will not be granted against an absconding debtor for unliquidated damages.—Clark *v.* Ashfield. E. T. 7 Will. IV.

(*q*) Where the persons swearing to the departure or concealment of a debtor reside at a distance from his place of abode, they should state in their affidavits the grounds of their belief.—Bank U. C. *v.* Spafford. H. T. 2 Will. IV. The affidavit of two credible witnesses required before an attachment

such proof, the said Court of King's Bench, and District Court, respectively, in term time, or the judges thereof in vacation, or any one of them, shall forthwith direct a warrant or warrants to be issued under the seal of the said courts, respectively, and signed by the Clerk of the Crown, or the Clerk of such District Court, (as the case may be,) directed to the sheriff of the district in which such absconding or concealed person or persons has been resident, or to the sheriff or sheriffs of any or every other district within the province, commanding such sheriff or sheriffs, respectively, to attach, seize, take, and safely keep, all the estate, as well real as personal, found within his district, of the said absconding or concealed person or persons, of what kind or nature soever, together with all evidences of debt, books of account, vouchers and papers relating thereto; (*r*) upon receipt of which warrant the sheriff to whom the same may be directed shall forthwith execute the same, and with the assistance of two substantial freeholders, make a just and true inventory of all such estate and effects as he shall seize and take by virtue thereof, and shall return the same, signed by himself and the said freeholders, to such court from whence the warrant issued.

Sheriff, with the assistance of two freeholders, to make and return an inventory of property and effects seized.

2. And be it further enacted by the authority aforesaid, That immediately upon making the seizure of the estate and effects of the absconding or concealed person or persons, it shall be the duty of the sheriff making such seizure, to cause a notice to be inserted in the Upper Canada Gazette, and also in some one or more of the newspapers printed in his district, and continued therein weekly for at least three calendar months; which notice shall set forth,

Sheriff to cause a notice of such seizure to be inserted in the U. C. Gazette, and some other paper in his district, for at least three months;

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can issue is sufficient if it state their belief "that the debtor has left the province, or is concealed within the same," without stating the intent or design.—Tatten *v.* Fletcher. T. T. 2 & 3 Vic.

(*r*) An attachment against an absconding debtor may issue pendente lite; but where a defendant was arrested and gave bail, who were afterwards discharged by a reference to arbitration, and he then left the province, an attachment which had been issued against him as an absconding debtor was set aside.—Mosier *v.* McCan. H. T. 3 Will. 4.

If absconding debtor does not return, or put in bail within three months, property to be held liable for the payment of the creditor seizing the same.

that by virtue of the said writ he has seized all the estate, real and personal, of such absconding or concealed person or persons, and unless such absconding or concealed person or persons (naming the same,) return within the jurisdiction of the court from whence such warrant issued, and put in bail to the action, or cause the claim or claims of such plaintiff or plaintiffs (naming the same,) to be discharged within three calendar months after such public notice, (to be computed from the first day of publishing the same in the Upper Canada Gazette,) all his, her or their estate, real or personal, or so much thereof as may be necessary, will be held liable for the payment, benefit and satisfaction of the claim or claims of such plaintiff or plaintiffs.

Sheriff to take charge of property attached, and to be paid his disbursements.

3. And be it further enacted by the authority aforesaid, That the sheriff to whom any warrant of attachment shall issue, shall take into his charge and keeping all the property, estate and effects, of such absconding or concealed person or persons, and shall be allowed all necessary disbursements for keeping the same. (*s*)

Upon absconding debtor causing a bond to given for his not leaving the province, or for his surrender to the sheriff if judgment shall pass against him, court may award a supersedeas to the attachment.

4. And be it further enacted by the authority aforesaid, That if any person or persons against whose estate or effects such warrant or warrants of attachment may have been issued, or any person or persons on his, her or their behalf, shall at any time before the expiration of three calendar months from the first publication of the notice before mentioned, execute and tender to the creditor or creditors, who sued out such warrant or warrants, as aforesaid, a bond with good and sufficient sureties, binding the obligors, jointly and severally, with a condition in double the amount of the sum claimed, that the person or persons aforesaid shall not depart the province without satisfying the said claims, in the event of the same being proved and judgment recovered as in ordinary cases where proceedings have been commenced against

(See 5 Wm. IV. ch. 5, sec. 3.)

(*s*) When the real estate of an absconding debtor is attached, the sheriff must enter and keep possession to give operation to the attachment against strangers.—Doe Crew *v.* Clarke. M. T. 4 Vic.

the person, or that he, she or they, will render such absconding or concealed person or persons to the custody of the sheriff of the district to whom such writ shall have been directed, or that they will pay the amount of the claim of the party suing out such attachment, or the value of the property or estate so taken and seized, to the said claimants, it shall and may be lawful for such court or judge to order a supersedeas (*t*) to such warrant or warrants, and all and singular the property which may have been attached shall be restored; and if it shall appear at any trial to be subsequently had, and shall be so certified by the judge presiding at such trial, that the person or persons against whose estate or effects such warrant or attachment was issued hath not been absconding or concealed at the time of issuing such warrant, then such person or persons shall recover his, her or their costs of the person or persons sueing out the said warrant, which costs may be taxed by the court from whence the said attachment may have issued.

If it shall be proved at the trial of any cause wherein such attachment shall have issued, that the defendant had not absconded or concealed himself, plaintiff shall pay all the costs of the attachment.

5. And be it further enacted by the authority aforesaid, That if after the period of three calendar months (*u*) from the first publication of the notice above mentioned, the absconding or concealed party, or some one on his behalf, do not appear and give bonds, with sureties as before mentioned, for the payment of the claims of the party sueing out the attachment, as aforesaid, in the event of judgment being given against such absconding or concealed party, then the proceedings in the suit against the estate, property and effects, of such absconding or

If absconding debtor do not appear and give such bond as aforesaid, within three months after the issuing of the attachment, suit shall go on against him as in ordinary cases

(*t*) Where a plaintiff proceeded after a delay of more than a year from the issuing of his attachments, the proceedings were set aside and writs of supersedeas ordered to the attachments.—Bank U. C. *v.* Spafford. H. T. 3 Will. IV. The bonds required to be given by an absconding debtor to obtain a supersedeas to the attachments against him, must be in double the amount of the debt sworn to.—Heather *v.* Wallace. H. T. 5 Will. IV.

(*u*) Mesne process cannot issue until the expiration of three months from the first advertisement under the attachment.—Banker *v.* Griffin. E. T. 3 Will. IV.

(See 5 Wm. IV. ch. 5, sec. 7.)

concealed party shall be the same as if the suit had been commenced in the usual manner against the person, and judgment and execution against the goods and lands of the said party shall follow, as hath been the custom of the courts of this province previous to the passing of this act.

Process may be served at the last place of abode of any absconding debtor, and by leaving a copy at the Crown Office in the district where he was last resident, or in the office of clerk of the district court.

6. And be it further enacted by the authority aforesaid, That in order to proceed in the recovery of any debt due by the person or persons against whose property a writ of attachment shall have been ordered under this act, process may be served by leaving a copy thereof at the last place of abode of such person within this province, with any grown-up person there dwelling, and also by affixing a copy of such process in the Crown Office, or in the Office of the Deputy Clerk of the Crown in the district where the absconding or concealed person was last resident, or in the Office of the Clerk of the District Court of such District, when the proceedings shall be in the District Court, eight days before the return thereof; and all subsequent proceedings necessary to be served on the defendant in ordinary cases shall be deemed to be served upon such absconding or concealed person by filing a copy in the Crown Office, or in the Office of the Deputy Clerk of the Crown in which the declaration shall have been filed, as aforesaid, or in the Office of the Clerk of the District Court, as the case may be.

All subsequent proceedings may be left in the Crown Office, or office of clerk of district court, in which declaration shall have been filed.

Notwithstanding judgment in default may be signed, plaintiff shall prove his case in like manner as if general issue had been pleaded. If plaintiff shall not prove his case, only nominal damages shall be given, and no costs.

7. And be it further enacted by the authority aforesaid, That notwithstanding judgment by default may be signed in any action in which the process and other proceedings may have been served in the manner aforesaid, such judgment shall in no case be final: and it shall be incumbent on the plaintiff nevertheless to prove his cause of action in the same manner as if the general issue had been pleaded, or the deed denied in case the action shall have been brought on any specialty, and in case the jury at any such assessment of damages shall not find the plaintiff's demand or any part thereof proved, the verdict shall be rendered for nominal damages only, and the plaintiff shall recover no costs of suit.

Perishable goods may be appraised and sold.

8. And be it further enacted by the authority aforesaid, That in case any sheriff or sheriffs shall, by virtue of any warrant or warrants to be issued in pursuance of this act, seize and take any perishable goods or chattels, it shall and may be lawful for such sheriff to have the same appraised and valued by two substantial freeholders or competent judges, and upon the request of the person or persons sueing out such warrant or warrants, to expose and sell the same at public auction to the highest bidder, giving at least eight days' notice of the time and place of such sale, if the articles so seized will admit of such delay, but if otherwise, then the sheriff shall proceed to sell the same at such time as in his discretion may seem meet; Provided also, that it shall not be compulsory upon such sheriff to seize or sell such perishable articles, until the person or persons sueing out such warrant or warrants of attachment shall have given a bond to the defendant or defendants, with good and sufficient sureties in double the amount of the appraised value of such articles, (ascertained as aforesaid,) conditioned, that the person or persons directing such seizure and sale will re-pay the value of such articles so seized and sold to the owner thereof, together with all costs and damages that may have been incurred in consequence of such seizure and sale, in case judgment be not obtained for such person or persons so sueing out such warrant or warrants of attachment.

Upon the sale of perishable goods, plaintiff to give bond in double the amount of appraised value, to refund the value of goods seized in case judgment shall not be given for such plaintiff.

All payment of debts, or surrender of property to an absconding debtor shall be deemed fraudulent after notice.

9. And be it further enacted by the authority aforesaid, That if any person or persons being indebted to or having the custody or possession of any property or effects of any such absconding or concealed person or persons, shall after such public notice given as aforesaid, and a copy thereof duly served upon him, her or them by the said sheriff, (*v*) pay any debt or demand, or deliver any such property or effects to any such absconding or con-

(*v*) After an attachment has been issued against an absconding debtor, a rule will be granted against any party, who has property of the debtor in his possession, to deliver it up to the sheriff to whom the attachment is directed.—Mullens *v.* Armstrong. M. T. 2 Vic.

cealed person or persons, or his, her or their attorney, agents, factors or assigns, the person or persons so paying any such debt, or delivering such property or effects, shall be deemed to have paid or done the same fraudulently, and is and are hereby made liable to answer the same, or the amount or value thereof, to the person or persons sueing out such warrant of attachment, in the event of such person or persons recovering judgment and execution against such absconding or concealed person or persons; and if any such person or persons, being so indebted, or having such custody as aforesaid, shall after such public notice, and being served with a copy thereof as aforesaid, be sued by such absconding or concealed person or persons for any such debt, or property or effects, he, she or they so sued, may plead the general issue, and give this act and the special matter in evidence.

And such debtor so paying shall answer over to the creditor of such absconding debtor, and if sued for any such debt or property in his possession, may plead general issue, and give this act in evidence.

10. And be it further enacted by the authority aforesaid, That the costs of such sheriffs, either for seizing, securing, or taking charge of property and effects so attached, under and by virtue of any warrant or warrants issued in pursuance of the provisions of this act, shall be paid in the first instance by the party or parties sueing out such warrant or warrants, as aforesaid, his, her or their attorney or agent, to the sheriff to whom such writ may be directed, and may be recovered by such sheriff by action in any of his Majesty's Courts of Record in this province; and in case such person or persons recover judgment against the person or persons so absconding or concealed, the same shall be allowed with costs of suit, to be taxed by the proper officer as the ordinary disbursements of the suit.

Sheriff's expenses of executing attachment payable in the first instance by plaintiff, but to be afterwards allowed in taxed costs where judgment passes for plaintiff.

11. And be it further enacted by the authority aforesaid, that the freeholders and appraisers authorised by this act, shall be entitled to receive for each day they may be employed in carrying its enactments into effect, the sum of five shillings.

Appraisers to receive five shillings per diem.

12. And be it further enacted by the authority aforesaid, That if after judgment and execution by any plaintiff or plaintiffs against any absconding or concealed per-

son or persons, obtained under and by virtue of the provisions of this act, the goods and chattels, lands and tenements, of such absconding or concealed person or persons, taken and seized by any sheriff or sheriffs by virtue of such execution or executions, shall not be sufficient to discharge the same, it shall and may be lawful for the plaintiff or plaintiffs to sue for and recover of and from any person or persons indebted to the absconding or concealed person or persons as aforesaid, the amount of the debt so owing by them to the absconding or concealed person or persons, or so much thereof as may be necessary to satisfy the claim of such plaintiff or plaintiffs, and payment made by such person or persons to such plaintiff or plaintiffs shall be considered legal and valid to all intents and purposes, and shall operate as a discharge for the debt, or so much thereof (as the case may be) owing to the absconding or concealed person or persons: Provided always, that the declaration in such action shall contain an introductory averment to this or the like effect, that is to say:

If goods, &c., of any absconding debtor shall not be found sufficient to pay the demand against him, his debts may be collected by action in the name of his creditor.

A. B. who sues under the provisions of an act of the parliament of this province for attaching the property of absconding debtors, in order to recover from C. D. debtor to one E. F. an absconding or concealed person, such sum as C. D. may owe to the said E. F. or so much thereof as will discharge the sum of ——, being the amount due by the said E. F. to him the said A. B., complains, &c.

Form of the commencement of declaration against the debtor of an absconding debtor, by his creditor.

13. And be it further enacted by the authority aforesaid, That before execution shall issue upon any judgment obtained under this act against an absconding or concealed debtor, a bond to the defendant in double the sum to be levied, to be executed by the plaintiff and two sufficient sureties, to be approved of by some one of the judges of the court in which the action shall have been instituted, shall be filed among the papers of the cause; the condition of which bond shall be to the effect, that if the defendant, his executors or administrators, shall within the period allowed by law contest the justice of

Before execution shall issue against any absconding debtor's effects, plaintiff shall give bond to defendant, and file same in court, to answer in case judgment shall be set aside or reversed.

(See 5 Wm. IV. ch. 5, sec. 7.)

the plaintiff's demand, and succeed in reversing the recovery, the plaintiff, his executors or administrators, shall restore to the defendant, his heirs, executors or administrators, the amount that shall have been levied upon execution in such cause, with interest, and shall make good to the defendant, his heirs, executors or administrators, any further damage occasioned by the seizure and sale of real and personal estate, in order to satisfy the judgment obtained against such absconding or concealed debtor. (*w*)

Upon personal appearance of absconding debtor, he may have a re-hearing within a year, upon giving security for costs.

14. And be it further enacted by the authority aforesaid, That at any time within one year after the rendering of Judgment against an absconding or concealed debtor, such debtor may, upon his personal appearance in court in term time, apply through his counsel, or in case of his death, his executors or administrators, may within the same period, apply for a re-hearing of the cause, which re-hearing shall be granted upon giving security for costs, and the cause may be again tried upon a record to be prepared for that purpose, on which the entry of a new venire may be made after the entry of issue joined, or of judgment by default, without any continuance or alteration of the record in consequence of the death of parties; but the title of any purchaser, other than the plaintiff himself, at the sheriffs' sale upon the execution which shall have previously issued in such cause, shall not be affected by the defendant obtaining a verdict or judgment upon such subsequent proceeding.

Reversal of judgment not to affect sheriff's sale of effects.

New trials may be granted.

15. And be it further enacted by the authority aforesaid, That nothing in this act contained shall be construed to prevent one or more new trials being granted, either after the first verdict, or after the verdict rendered upon the re-hearing, when the same shall appear necessary to the ends of justice.

(*w*) The sureties required before execution can be issued, must be inhabitants of this Province.—Bradbury *v.* Loney H. T. 4 Will. IV. The affidavit of justification of the sureties required before execution must be made by the sureties themselves.—Mowat *v.* Forshee E. T. 2 Vic.

16. And be it further enacted by the authority aforesaid, That in case any re-hearing under this act, after the period shall have elapsed within which a new trial can be moved for, or in case a new trial shall be refused, the verdict shall be taken to be conclusive, so far as respects the liability of the obligors in the bond required to be filed previous to the sueing out execution; and it shall not be necessary for the defendant succeeding on such re-hearing to enter final judgment for that purpose.

After time for re-hearing or for new trial has elapsed, verdict shall be conclusive upon obligors whose bond has been filed previous to suing out execution. Defendant not bound to enter judgment.

17. And be it further enacted by the authority aforesaid, That if after the period of one month from the return day of any execution against the goods and chattels, lands and tenements, of any absconding or concealed person or persons, (the same having been satisfied,) no other warrant or warrants of attachment shall come into the hands of any such sheriff, against the property or effects of such absconding or concealed person or persons, all the property and effects then remaining in the hands of such sheriff, together with all books of accounts, evidences of debt, vouchers and papers relating thereto, shall be delivered to the person or persons in whose custody the same were found, being the factor, agent, or servant of such absconding or concealed person, and the responsibility of such sheriff as respects such property shall from thenceforth cease.

Residue of property remaining after execution satisfied, to be delivered back to the custody from whence the same was taken, unless within one month any other attachment shall be lodged with the sheriff.

18. And be it further enacted by the authority aforesaid, that this act shall continue and be in force for the period of two years, and from thence to the end of the then next ensuing session of Parliament, and no longer: Provided always, that it shall nevertheless be lawful to proceed in any matter that may be depending under this act until the same shall be brought to a final termination according to the provisions thereof.

Act to continue in force two years.

(See 5 William IV. ch. 5, which continues this act, and which is itself made perpetual by 3 Victoria, ch. 7.)

5 WILL. IV. CH. 5.

An Act to continue and amend the law for attaching the property of Absconding Debtors.

Preamble.

(See 2 Vic. ch. 5; 3 Vic. ch. 7.)

WHEREAS an Act passed in the second year of His Majesty's reign, intituled, "An Act to afford means for attaching the property of absconding debtors," will expire at the end of the present session of the Provincial Legislature; And whereas it is expedient to continue and amend the same: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "an Act to repeal certain parts of an Act passed in the fourteenth year of his Majesty's reign, intituled 'an Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, That the said recited act be and the same is hereby continued for and during the term of two years from the passing of this Act, and from thence to the end of the then next ensuing session of Parliament, and no longer, any thing herein contained to the contrary notwithstanding.

Act 2 Wm. IV. ch. 5, continued for two years.

(Made permanent by 2 Vic. ch. 5.)

Attachment for debts not due to an inhabitant of this province.

2. And whereas it is necessary to make certain amendments in the said act, and to remove doubts which have arisen respecting some of its provisions: be it therefore enacted by the authority aforesaid, That from and after the passing of this act it shall be lawful to grant an attachment in the manner provided by the first clause of the said statute, when a debt is sworn to as therein mentioned, notwithstanding the absconding or concealed debtor may not be indebted to an inhabitant of this Province.

Bond to be given to the sheriff,

Who may sue thereon.

3. And be it further enacted by the authority aforesaid, That the bond mentioned in the fourth clause of the said statute shall be given to the sheriff of the dis-

trict in which the estate has been attached, and the penalty need not be more than double the amount of the value of the estate attached, and the condition of the bond may be so framed that whatever may be the amount of the several claims against the absconding debtor, the bond shall be void upon the payment by the obligors, or any of them, of the value of the estate taken and seized; and the bond so given shall and may be put in suit by the sheriff for the benefit of any party entitled, whenever the case may require it; and the amount collected thereon shall and may be retained in his hands, to be applied by him in the same manner as it would be to apply the proceeds of the estate in respect of which the bond shall have been given.

Application of the money collected.

4. And be it further enacted and declared by the authority aforesaid, That notwithstanding any thing contained in the said act, any person who shall have commenced a suit against another by process, bailable or non-bailable, which process shall have been served before the suing out of any attachment against the same person as an absconding or concealed debtor, shall, notwithstanding the subsequent sueing out of such attachment, be allowed to proceed in the ordinary manner to judgment and execution; and in case of his obtaining execution before any person at whose suit the estate, real or personal, of such debtor shall have been attached, he shall be allowed the full advantage of his legal priority of execution, in the same manner as if the estate had not been attached, and were remaining in the possession of the debtor; and in case the goods shall have been delivered up to the absconding or concealed debtor or his agent upon security, the sheriff shall enforce the bond taken for his benefit in the same manner as in the case of a creditor suing out an attachment: Provided always, that the amount of costs incurred by the suing out and executing the attachment, or such portion thereof as the court in which the cause is pending, or a judge thereof, shall think reasonable, shall be retained for the benefit of the person who has paid the same, or who is liable

Plaintiff may proceed to judgment notwithstanding debtor's absconding.

Costs of attachment, how to be paid.

therefor, in consequence of his having taken out the attachment: And provided also, that nothing in this act contained shall prevent the court in which the action was brought, and process served upon the person against whom an attachment or attachments shall afterwards issue, from setting aside the judgment and execution in such action as fraudulent, or staying proceedings therein, when such action shall appear to have been instituted or proceeded in by collusion with the debtor, or to have been otherwise fraudulently brought for the purpose of defeating the claims of others.

Judgment may be set aside in cases of fraud.

5. And be it further enacted by the authority aforesaid, That upon the trial of any action against an absconding or concealed debtor, it shall be lawful for any other person who shall before such trial have sued out an attachment, to contest the plaintiff's demand, in the same manner as the defendant might, and to call evidence to disprove the same, or to establish a set-off: Provided, he shall have given notice of such set-off fifteen days exclusive before the trial.

Any other creditor may contest the plaintiff's demand on trial;

And establish a set-off.

6. And be it further enacted by the authority aforesaid, That when several attachments shall be placed in the sheriff's hands against the same absconding or concealed debtor, the proceeds of the estate which shall have been attached, shall not be paid over to such attaching creditor or creditors according to priority, but they shall be ratably distributed among such of the creditors suing out the said attachments as shall obtain judgment against the debtor, in proportion to the amount of the sums really due upon such judgments; and no distribution shall take place until reasonable time, in the opinion of the court, has been allowed for the several creditors to proceed to judgment: Provided always, that when the estate shall not be sufficient to satisfy the claims of all the attaching creditors, none shall be allowed to share unless he shall have sued out his attachment, and placed it in the hands of the sheriff, within six months from the issuing of the first writ of attachment.

In case of several attachments being issued, the proceeds to be applied rateably.

Subsequent attachment to be issued within six months of the first.

7. And be it further enacted by the authority aforesaid, That before execution shall be taken out in any action brought against an absconding or concealed debtor, the plaintiff shall make and file an affidavit, which shall be kept among the papers in the cause, in which he shall swear that to the best of his knowledge and belief the sum which has been allowed to him by the jury is justly and truly due to him by the defendant, and that he has given credit for all payments made to him by the defendant, and for every demand which the defendant could rightly make against him; or if the plaintiff shall in his affidavit acknowledge that the sum actually due to him is less than that which the jury have awarded, then the execution shall be endorsed accordingly, and no more shall be levied for the plaintiff than is admitted to be due: Provided always, that if the affidavit of the plaintiff cannot be obtained in due time by reason of his foreign residence, or from any other reason which shall be assigned, then an affidavit to the effect above mentioned may be received from the attorney or agent of such plaintiff.

Before execution plaintiff to make oath of his debt, &c. (See 2 Wm. IV. ch. 5.)

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51 Geo. III. ch. 9.

An Act to repeal an Ordinance of the Province of Quebec, passed in the seventeenth year of His Majesty's reign, intituled, "An Ordinance for ascertaining Damages on Protested Bills of Exchange, and fixing the rate of Interest in the Province of Quebec;" also to ascertain damages on protested Bills of Exchange, and fixing the rate of Interest in this Province.

Preamble

Whereas an ordinance passed in the Province of Quebec, in the seventeenth year of his Majesty's reign, intituled, "an Ordinance for ascertaining damages on Protested Bills of Exchange, and fixing the rate of Interest in the Province of Quebec," is in part inapplicable to this province: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament

Ordinance passed in the 17th of Geo. III. in the Province of Quebec, for ascertaining damages on protested bills of exchange, and fixing the rate of interest in that province, repealed.

of Great Britain intituled "an Act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled 'an Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, That the said ordinance, as far as it relates to or affects this province, be and the same is hereby repealed.

Damages and interest on protested bills of exchange drawn in this province on Europe or the West Indies.

2. And be it further enacted by the authority aforesaid, That from and after the passing of this act, all Bills of exchange drawn, or hereafter to be drawn by any person or persons residing in this Province, upon any person or persons in Europe or the West Indies, that may return under protest for non-payment thereof, shall be subject to ten per cent. damages, (x) and six per cent. per annum interest, upon the principal sum furnished here from the day of the date of the protest to the time of payment, which said principal sum shall be reimbursed to the holder of the bill at the par of exchange, that is to say, at the rate of one hundred and eleven pounds and one ninth currency, for one hundred pounds sterling.

Damages and interest on protested bills of exchange drawn in this province on North America, the West Indies excepted. (See 7 Wm. IV. ch. 6.)

3. And be it further enacted by the authority aforesaid, That all and every bill or bills of exchange drawn, or hereafter to be drawn by any person or persons residing in this province, on any person or persons in North America, the West Indies excepted, and shall be returned protested, shall be subject to four per cent. damages, and six per cent. per annum interest upon the principal sum furnished here, from the day of the date of the protest to the time of payment.

Interest on protested bills. orders, or mandates, drawn in this province on

4. And be it further enacted by the authority afore-

(x) A notice that a foreign bill has been returned protested and unpaid, is a sufficient notice of non-acceptance; and it is not necessary to send a copy of the protest with the notice; and ten per cent. damages cannot be recovered, under this enactment, on a foreign bill returned for non-acceptance, nor can re-exchange unless declared for specially, although postage may, on the count for money paid.—O'Neill *v.* Perrin. M. T. 3 Vic.

said, That all bills, orders or mandates, drawn after the passing hereof, by any person or persons residing in this province, on any person or persons living in the same, and notes of hand given in this province, if protested for non-payment, shall be subject to six per cent. per annum interest, from the date of the protest to the time of payment. (See 7 Wm. IV. ch. 3, sec. 20.)

persons living therein, and on notes of hand given in this province.

5. And be it further enacted by the authority aforesaid, That in all the said cases of protest, the expense of noting and protesting the bill, and the postages thereby incurred, shall be allowed and paid to the holder, over and above the said interest and damages.

Expense of noting and protesting, by whom to be paid.

6. And be it further enacted by the authority aforesaid, That it shall not be lawful upon any contract to take, directly or indirectly, for loan of any monies, wares, merchandize, or other commodities whatsoever, above the value of six pounds for the advance or forbearance of one hundred pounds for a year; and so after that rate for a greater or less sum or value, or for a longer or shorter time; and the said rate of interest shall be allowed and recovered in all cases where it is the agreement of the parties that interest shall be paid; and all bonds, contracts and assurances whatsoever, whereupon or whereby a greater interest shall be reserved and taken, shall be utterly void; and every person who shall either directly or indirectly take, accept and receive, a higher rate of interest, shall forfeit and lose for every such offence, treble of the value of the monies, wares, merchandize and other things lent or bargained for, to be recovered by action of debt in the Court of King's Bench in this Province, a moiety of such forfeiture shall be paid into the hands of his Majesty's Receiver General, for the use of his Majesty, his heirs and successors, towards the support of the Civil Government of this Province, and shall be accounted for to his Majesty, his heirs and successors, through the Lords Commissioners of his Majesty's treasury, for the time being, in such manner and form as his Majesty, his heirs and successors, shall please to direct, and the other moiety to him or them that shall sue for the same.

Interest for the loan of any monies, &c. shall not be taken above the rate of six pounds per centum for a year.

All bonds, contracts, &c. whereupon a greater interest shall be reserved shall be void.

Penalties for receiving a higher rate of interest, how recovered.

5 WILL. IV. CH. 1.

An Act to prevent the unnecessary multiplication of Law Suits and increase of Costs in Actions on Notes, Bonds, Bills of Exchange and other Instruments.

Preamble.

(See 3 Vic. ch. 8.)

WHEREAS it is expedient to make such alteration in the law as will prevent the necessity of bringing separate actions for sums not large in amount, against the several makers of a bond or other instrument, or against several persons liable to be sued upon a bill of exchange or promissory note as maker, endorser, or acceptor: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled "An act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled 'An act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, That after the first day of July next after the passing of this act, when several suits shall be brought on one bond, recognizance, promissory note, bill of exchange, or other instrument, which shall be made or entered into after the passing of this act, or when several suits shall be brought against the maker and endorser of a note, or against the drawer, acceptor, or endorsers of a bill of exchange, there shall be collected or received from the defendant the costs taxed on one suit only, at the election of the plaintiff, and in the other suits the actual disbursements only shall be collected or received from the defendant; but this provision shall not extend to any interlocutory costs in the progress of a cause.

Costs recoverable in one suit only,

And disbursements in others.

Not to extend to interlocutory costs.

2. And be it further enacted by the authority aforesaid, That it shall be lawful for the holder of any bill of exchange or promissory note hereafter to be made, for a sum not exceeding one hundred pounds, instead of bring-

Upon bills of exchange, &c., not exceeding

ing separate suits against the drawers, makers, endorsers, and acceptors of such bill or note, to include all or any of the said parties to the bill or note in one action, and to proceed to judgment and execution in the same manner as though all the defendants were joint contractors. £100, all the parties may be included in one action.

3. And be it further enacted by the authority aforesaid, That in any such action, any joint drawer or maker, endorser or acceptor, may plead in abatement the non-joinder of any other joint-drawer, maker, endorser, or acceptor, in the same manner as though this act had not been passed; and no judgment to be rendered in pursuance of this act shall be of any effect against a defendant not served with process. Defendants may plead separately.

4. (Repealed by 3 Vic. ch. 8.)

5. And be it further enacted by the authority aforesaid, That in any such action judgment may be rendered for the plaintiff against some one or more of the defendants, and also in favour of some one or more of the defendants against the plaintiff, according as the rights and liabilities of the respective parties shall appear, either upon confession, default, by pleading, or on trial; and when judgment shall be rendered in favour of any defendant, he shall recover costs against the plaintiff in the same manner as though judgment had been rendered for all the defendants. Judgment against one or more of the defendants. (See 3 Vic. ch. 8, sec. 3.) Defendant's costs.

6. } (Repealed by 3 Vic. ch. 8.)
7. }

8. And be it further enacted by the authority aforesaid, That the rights and responsibilities of the several parties to any such bill or note, as between each other, shall remain the same as though this act had not been passed, saving only the rights of the plaintiff, so far as they may have been determined by the judgment. Rights of the parties as between each other to remain.

9. And be it further enacted by the authority aforesaid, That in every suit brought pursuant to the provisions of this act, any one or more of the defendants shall be entitled to the testimony of any co-defendant, as a witness in all those cases where the defendant or defendants calling the witness would have been entitled Defendants may be witnesses in certain cases.

to his testimony had the suit been brought in the form heretofore used, and in no other case.

10. (Repealed by 3 Vic. ch. 8.)

Defendants' executors liable to be sued.

11. And be it further enacted by the authority aforesaid, That when in any case an action shall be brought against more than one defendant under this act, who must otherwise have been sued separately, and it shall happen that any one or more of the defendants shall die pending the suit, an action may nevertheless be brought against the executors or administrators of any such deceased defendant: Provided, such defendant would have been liable to be sued separately, in case this act had not been passed.

This act not to extend to notes for more than £100,

Nor to actions in several districts.

12. Provided always nevertheless, and be it further enacted by the authority aforesaid, That this act shall not apply in any case in which the sum expressed to be payable in or upon any such bond, recognizance, promissory note, bill of exchange or other instrument, shall exceed the sum of one hundred pounds, nor to any case where separate actions are brought in the District Court, against persons residing in several Districts.

Suits may proceed, though one or more defendants be absent.

13. And be it further enacted by the authority aforesaid, That when several defendants are included in one process, in pursuance of the provisions of this Act, and any one or more of them cannot be served with such process by reason that he or they is or are absent from the province, or concealed within the same, then the action may proceed as against the other defendant or defendants without prejudice; (*y*) and it shall be in the power of the plaintiff afterwards to sue such defendant or defendants separately who shall not have been served with process, and to recover costs as if this Act had not been passed.

14. [Repealed by 3 Vic. Chap. 8.]

(*y*) Where to a plea in abatement of privilege as an attorney, the plaintiff replied process issued against him and others under this act, and that the others could not be served, &c. and the defendant demurred, the court gave judgment against the demurrer.—Richmond *et al. v.* Campbell. M. T. 2 Vic.

3 Vic. ch. 8.

An Act to make perpetual certain parts of an Act passed in the fifth year of the reign of his late Majesty King William the Fourth, intituled, "an Act to prevent the unnecessary multiplication of Law Suits, and increase of costs in actions on Notes, Bonds, Bills of Exchange and other instruments," and for other purposes therein mentioned.

Preamble.

Whereas an Act passed in the fifth year of the reign of his late Majesty King William the Fourth, intituled, "an Act to prevent the unnecessary multiplication of law suits, and increase of costs in actions on notes, bonds, bills of exchange and other instruments," is about to expire, and it is expedient to continue the said act and make it permanent: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of Great Britain, intituled, "an Act, to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, 'an Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said Province," and by the authority of the same, That the fourth, sixth, seventh, tenth and fourteenth clauses of the said act be and the same are hereby repealed.

4th, 6th, 7th, 10th and 14th sections, 5 Wm. IV. ch. 1, repealed.

2. And be it further enacted by the authority aforesaid, That the plaintiff in any joint action against the drawers, makers, endorsers and acceptors, or any of them, of any bill of exchange or promissory note, may declare, in the form contained in the Schedule hereto annexed, upon such bill or note, varying the same according to the circumstances of the case.

Plaintiffs in actions against several parties to a bill or note, may declare in a given form.

3. And be it further enacted by the authority aforesaid, That in any such action the person sued shall be entitled to set off against the said plaintiff any payment, claim or demand, whether joint or several, which in its nature and circumstances arises out of or is connected

Defendants may set off several demands, when, of a particular description.

with the bill or promissory note, which is the subject of such joint action, or the consideration thereof, in the same manner and to the same extent as though such defendant had been sued in the form heretofore used; and if the jury shall allow any demand as a set off, and still find a balance in favour of the plaintiff, they shall state in the verdict the amount which they allow to each defendant as a set off against the plaintiff's demand.

Proceedings already instituted to be continued as before.

4, And be it further enacted by the authority aforesaid, That any proceedings now pending under the said recited act, shall be conducted to a final end, in the same manner as if this act had not been passed.

SCHEDULES:

1.—*On a Promissory Note.*

For that whereas the said ——, (the maker of the note,) on the —— day of ——, at ——, made his promissory note in writing, and thereby promised ——, (setting forth the note in the usual manner,) and the said ——, (the first second or other endorsers,) afterwards duly endorsed the same, and the said ——, (the last endorser) delivered the said note, so endorsed, to the said plaintiff, (aver presentment, notice, &c., where by law necessary in the particular case.) By reason whereof the said ——, (all the defendants) became jointly and severally liable to pay to the said plaintiff the said sum of money in the said note specified, and being so liable, afterwards jointly and severally promised the said plaintiff to pay him the same. (Add the usual breach.) *(z)*

2.—*On a Bill of Exchange.*

For that whereas the said ——, (the drawer,) on the —— day of ——, at ——, drew his certain bill of exchange, directed to ——, (setting forth the bill according to its tenor and effect,) and the said ——, (the drawee) afterwards duly accepted the same, and the said ——, (the first and other endorsers,) afterwards duly endorsed the said bill of exchange, and the said ——, (the last endorser,) delivered the said bill so endorsed, to

the said plaintiff, (averment, presentment, protest, notice, &c., where by law necessary in the particular case.) By reason whereof the said ——, (all the defendants) became jointly and severally liable to pay to the said plaintiff the said sum of money in the said bill specified, and being so liable, afterwards jointly and severally promised the said plaintiff to pay him the same. (Add the usual breach.) *(z)*

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7 WILL. IV. CH. 3.

An Act to amend the law respecting Bills of Exchange and Promissory Notes.

WHEREAS the present construction of law in regard to bills of exchange accepted payable at a particular place, and promissory notes made payable at a particular place, leads to much inconvenience and expense, by rendering it necessary to produce evidence of presentment at such place, and sometimes subjecting the plaintiff to be non-suited for failure of proof thereof: Be it therefore enacted by the King's most excellent majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "An Act to repeal certain parts of an Act passed in the fourteenth year of his Majesty's reign, intituled, 'An Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said Province," and by the authority of the same, That from and after the first day of June now next ensuing,

Preamble.

Acceptance of a bill payable at a bank, or other particular place,

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(z) See this form under the new rules, ante page 50. and where in an action under this statute against the maker and endorser of a promissory note, the plaintiff declared in this form, but did not aver presentment to the maker and notice to the endorser: Held on demurrer by both defendants on that ground, that the plaintiff was entitled to judgment against the maker, and that the indorser was entitled to judgment against him.—Small *v.* Rogers *et al.* M. T. 6 Vic.

to be deemed a general acceptance;

if any person shall accept a bill of exchange payable at a bank, or at any other particular place, without further expression in his acceptance; or if any person shall after that day make a promissory note payable at a bank, or at any other particular place, without further expression in that respect, such acceptance shall be deemed and taken to be to all intents and purposes a general acceptance, and such promise shall be deemed and taken to be a promise to pay generally, but if the acceptor shall in his acceptance express that he accepts the bill payable at a bank, or at any other particular place only, and not otherwise or elsewhere (*a*); or if the maker of a promissory note shall in the body of the note express that he promises to pay at a bank, or at any other particular place only, and not otherwise or elsewhere, then such acceptance or promise shall be deemed and taken to be, respectively, a qualified acceptance or promise; and the acceptor or maker shall not be liable to pay the bill or note, except in default of payment when such payment

But otherwise if the acceptance be special;

Or if the body of the note express payment at a particular place.

(*a*) If a bill of exchange be accepted, payable at a particular place "and not elsewhere", it is a special acceptance within this statute, and the word "only" is not necessary to make it special.—Higgins *v.* Nicholls. 7 Dowl 551. In an action by the indorsee of a bill against the acceptor accepted payable at a banker's, without further expression in the acceptance, the defendant demurred specially because there was no averment of presentment there, and the court set aside the demurrer as frivolous.—Skelton *v.* Holstead. 6 Jur. 961. And where the declaration in an action by the endorsee against the acceptor of a bill of exchange, stated the bill to be payable at a banker's, and alleged presentment at their banking house, and non-payment, and the bill when produced at the trial appeared to bear a general acceptance under the statute, with a memorandum making it payable at the banker's, it was held that there was no material variance between the declaration and the proof.—Blake *v.* Beaumont. 1 Dowl. N. S. 697. And in this court it has been decided, that where a bill of exchange is made payable at a particular place in a foreign country, and there is no evidence of presentment there, nor of the law of that country on the subject, the necessity for presentment must be determined by the law as it exists here. —Buffalo Bank *v.* Truscott *et al.* M. T. 2 Vic. Bradbury *v.* Doole. E. T. 4 Vic.

shall have been first duly demanded at such bank or other place.

Acceptance to be in writing.

2. And be it further enacted by the authority aforesaid, That from and after the said first day of June, no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill, or if there be more than one part to such bill, on one of the said parts.

Contracts for payment of money not to be affected in the hands of other persons by usurious consideration, without express notice.

3. And whereas by law all contracts and assurances whatsoever for payment of money made for an usurious consideration are utterly void; And whereas in the course of mercantile transactions negotiable securities often pass into the hands of persons who have discounted the same without any knowledge of the original considerations for which the same were given; and the avoidance of such securities in the hands of such bona fide endorsees, without notice, is attended with great hardship and injustice; for remedy thereof, Be it further enacted by the authority aforesaid, That no bill of exchange or promissory note that shall be drawn or made after the passing of this act shall, though it may have been given for an usurious consideration, or upon a usurious contract, be void in the hands of an endorsee, or in the case of a note transferable, by delivery, in the hands of a person who shall have acquired the same as bearer for valuable consideration, unless such endorsee or bearer had, at the time of discounting or paying such consideration for the same, actual knowledge that such bill of exchange or promissory note had been originally given for an usurious consideration, or upon an usurious contract.

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2 WILL. IV. CH. 6.

An Act to provide for making Stock held in Companies having a joint transferable Stock, liable to the satisfaction of debts.

Preamble.

WHEREAS it is just and expedient that the stock held by individuals, either in banking institutions, or in other companies lawfully created within this province, and having a joint transferable stock, should be subject to be

taken and sold in satisfaction of debts, in the same manner as other personal property: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of Great Britain, intituled, "an Act to repeal certain parts of an Act passed in the fourteenth year of his Majesty's reign, intituled, 'an Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said Province," and by the authority of the same, That the Stock held by any person in any bank, or in any corporation or company in this province having a joint transferable stock, shall be liable to be taken and sold in execution, in the same manner as other personal property of the debtor.

Stock in corporate companies rendered liable to execution for debt.

2. And be it further enacted by the authority aforesaid, That it shall and may be lawful for the cashier of any such bank, or for the proper officer of any other such corporation or company, upon the production of a certificate under the hand and seal of office of the sheriff acting upon any execution, declaring to whom any stock taken upon such execution shall have been sold by him, to transfer such stock from the name of the original Stockholder to the name of the person or persons who may be named in such certificate as the purchaser or purchasers under such execution; and that such purchaser or purchasers shall from thenceforth be entitled to receive all dividends and profits arising from such stock, and shall in all other respects be considered in the place and stead of the former stockholder.

Stock to be transferred in the books of the corporation upon sheriff's certificate of sale.

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7 Will. IV. Ch. 14.

An Act to supply by a general law certain forms of enactment in common use, which may render it unnecessary to repeat the same in Acts to be hereafter passed.

14. And be it further enacted by the authority aforesaid, That wherever by any act of the parliament of this

province hereafter to be passed, a corporation shall be created, to consist of individuals who may associate for the purpose of making or amending any highway or rail-road, or any harbour, canal, or other navigable channel, or for carrying on any art or manufacture, or for carrying on the business of banking, or of insurance, or for advancing any object of public utility, then and in every such case, unless it shall be otherwise provided in the Act, the persons composing such corporation, and their successors, shall have continued succession, and by the name given to them in the act shall be capable of contracting and being contracted with, of suing and being sued, pleading and being impleaded, answering and being answered unto, in all courts and places whatsoever, in all manner of actions, suits, complaints, matters and causes whatsoever; and they and their successors may have a common seal, and may change and alter the same at their will and pleasure; and by their corporate name shall be in law capable of purchasing, taking, having and holding, to them and their successors, any estate, real, personal or mixed, to and for the use of such corporation, and of selling, letting, or otherwise disposing of the same, for the benefit and on account of such corporation, from time to time, as they shall deem necessary or expedient: Provided always, that the real estate which any such corporation shall be allowed to hold under the provisions of this act, shall be only such as shall be necessary for carrying into effect the specific object of such corporation.

General powers granted to all corporations hereafter created.

Restrained as to extent of real estate to be held for use of corporation.

15. And be it further enacted by the authority aforesaid, That in case it shall at any time happen, that an election of directors of any such corporation shall not be made on any day, when pursuant to the act in that behalf it ought to have been made, the corporation shall not for that cause be deemed to be dissolved, but that it shall be lawful on any day thereafter to make an election of directors, in such manner as shall be prescribed by the act, or by the laws and ordinances of the said corporation.

In case election of directors of any corporation should not take place on day appointed by act, corporation not on that account to be deemed to be dissolved.

16. And be it further enacted by the authority aforesaid, That the directors for the time being of any such

Directors of corporations, or a major part of them, to have power to make rules, &c.

corporation, or a major part of them, shall have power to make and subscribe such rules and regulations as to them shall seem needful and proper, touching the management and disposition of the stock, property, estate and effects, of the corporation, and touching the duty and conduct of the officers, clerks, and servants employed by the said company, and all such other matters as appertain to the business of the said company; and shall also have power to appoint as many officers, clerks and servants, for carrying on the said business, and with such salaries and allowances, as to them shall seem meet: Provided, that such rules and regulations be not repugnant to the laws of this Province.

Corporations not to have power to enter on lands of the Crown, without consent of Governor.

17. And be it further enacted by the authority aforesaid, That it shall not be lawful for any such corporation, their agents, or servants, or any of them (unless where it is expressly authorised by the act creating such corporation) to enter upon, hold, use or enjoy, for any purpose, any lands or grounds of or belonging to his Majesty, his heirs and successors, without the license and consent of the governor, lieutenant-governor, or person administering the government of this province, signified under his hand and seal.

Corporation not to have the power of carrying on banking, unless specially authorised.

18. And be it further enacted by the authority aforesaid, That it shall not be lawful for any corporation to carry on the business of banking, unless where such power shall be expressly conferred by the act creating such corporation.

Actions brought against persons acting in pursuance of powers given to any corporation, to be brought within six months.

19. And be it further enacted by the authority aforesaid, That when it shall not be otherwise provided in any act to be hereafter passed, for any of the purposes aforesaid, and whereby powers and authority are given to be exercised over the property, real or personal, or over the person of any individual, for the promoting and securing the objects intended to be advanced by the corporation created by any such act, then if any action shall be brought against any person or persons, for any thing done in pursuance, or in execution, of the powers and authorities given by such act, such action shall be commenced within

six calendar months next after the fact committed; or in case there shall be a continuation of damage, then within six calendar months after the doing or committing such damage shall cease, and not afterwards; and the defendant or defendants in such action may plead the general issue, and give such act, and the special matter, in evidence at the trial.

Defendants may give special matter in evidence under general issue.

20. And be it further enacted by the authority aforesaid, That notwithstanding the privileges that may be conferred by any act hereafter to be passed, upon any corporation to be created for the purposes aforesaid, or any of them, the legislature may, at any time thereafter, in their discretion, make such additions to the act creating such corporations, or such alteration of any of its provisions, as they may think proper, for affording just protection to the public, or to any person or persons, body corporate or politic, in respect to their estate, property or rights, or any interest therein, or any advantage, privilege or convenience connected therewith, or in respect to any way, or right of way, public or private, that may be affected by any of the powers given to such corporation; and that unless it shall be otherwise provided in any act that shall be passed for chartering any bank, it shall be in the discretion of the legislature, at any time thereafter, to make such provisions, and impose such restrictions, with respect to the amount and description of notes which may be issued by such bank, as may to them appear expedient.

Legislature to have power to make additions and alterations in any act of incorporation.

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49 Geo. 3. ch. 4.

An Act for the more effectual preventing of frivolous and vexatious suits, and to authorise the levying of poundage upon executions in certain cases, and to regulate the sales by sheriffs and other officers.

Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the autho-

Preamble.

rity of an act passed in the Parliament of Great Britain, intituled, "an Act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, 'an act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said Province," and by the authority of the same, That in all actions to be brought in the Province of Upper Canada, from and after the passing of this act, wherein the defendant or defendants shall be arrested and held to bail,(*b*) and wherein the plaintiff or plaintiffs shall not recover the amount of the sum for which the defendant or defendants in such action shall have been so arrested and held to special bail, such defendant or defendants shall be entitled to costs of suit, to be taxed

Circumstances under which defendant, when held to special bail, shall be entitled to costs of suit.

(*b*) Quære, whether a defendant who has been arrested and imprisoned on mesne process, and is discharged in consequence of a defect in the affidavit to hold to bail, can be said to be "arrested and held to special bail" within the meaning of this section.—Edwards *v.* Jones. 2 M. & W. 414. Semble, that the giving a bail bond to the sheriff upon an arrest, is being held to special bail within the statute.—Reynolds *v.* Mathews. 2 Jurist 989, 7 Dowl. 580. Costs will not be allowed to a defendant who has not been actually arrested—James *v.* Askew. 8 A. & E. 351. The right of a defendant to costs under this statute cannot be in any way affected by what passes at the trial or before an arbitrator, but must depend upon matters brought before the court upon affidavit. —Tarleton *v.* Dumelow. 6 Scott. 687. After costs taxed and judgment signed in favor of the plaintiff, the court will not entertain an application for costs on behalf of the defendant under this act.—Rennie *v.* Yorston. 8 Dowl. 326. The defendant must be *held to special bail*, as well as arrested, to entitle him to his costs.—Bennett *v.* Burton. 9 Dowl. 492. When the defendant is allowed his costs, the plaintiff cannot tax any, and the defendant is entitled to set off his costs against the plaintiff's verdict.—Burrows *v.* Lee. E. T. 3 Vic. Where a verdict has been taken subject to a reference to arbitration, and the arbitrators award less than the amount for which the defendant was arrested, the defendant may be allowed his costs, although semble not, if the rule of reference direct that the costs shall abide the event.—Nicholson *v.* Allen. M. T. 5 Vic.; McMicking *v.* Spencer. H. T. 6 Vic., P. C. McLean J.

according to the custom of the Court, in which such action shall have been brought; provided it shall be made appear, to the satisfaction of the Court in which such action is brought, upon motion to be made in Court for that purpose, and upon hearing the parties by affidavit, that the plaintiff or plaintiffs in such action, had not any reasonable or probable cause for causing the defendant or defendants to be arrested and held to special bail, in such amount as aforesaid; and provided, that such Court shall thereupon, by rule or order of the same Court, direct that such costs shall be allowed to the defendant or defendants, and the plaintiff or plaintiffs shall, upon such rule or order being made as aforesaid, be disabled from taking out any execution for the sum recovered in any such action, unless the same shall exceed, and then in such sum only, as the same shall exceed the amount of the taxed costs of the defendant or defendants in such action, and in case the sum recovered in any such action shall be less than the amount of the costs of the defendant or defendants to be taxed as aforesaid, that then the defendant or defendants shall be entitled, after deducting the sum of money recovered by the plaintiff or plaintiffs in such action, from the amount of his, her or their costs, to be taxed as aforesaid, to take out execution for such costs in like manner as a defendant or defendants may now by law have execution for costs in other cases.

In actions on judgments, plaintiff not entitled to costs, unless by rule of court.

2. And be it further enacted by the authority aforesaid, That in all actions which shall be brought in the Province of Upper Canada after the passing of this Act, upon any judgment recovered, or which shall be recovered, in any Court of the said Province, the plaintiff or plaintiffs in such action, on the judgment, shall not recover or be entitled to any costs of suit, unless the Court in which such action on the judgment shall be brought, or some judge of the same Court, shall otherwise order. (*c*)

(*c*) If the defendant, instead of applying to stay proceedings, plead *nul tiel* record for delay, the plaintiff ought to have his costs.—5 Taunt. 254. This section does not extend to ac-

3. }
4. } (Repealed by 2nd Geo. 4, Sess. 2. ch. 1.)

Eight days' notice to be given of sale by sheriff.

5. And be it further enacted by the authority aforesaid, That no sheriff or other officer, in any district of this province, shall proceed to the sale of any effects, taken by virtue of any writ of execution, until public notice in writing thereof is given, at least eight days previous thereto, at the most public place in the town or township where such effects may have been taken in execution, and of the time and place where such effects are to be exposed to sale.

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37 GEO. III. CH. 15.

An Act to authorize the apprehending of Felons and others, escaping from any of His Majesty's Provinces and Governments in North America, into this Province.

Preamble.

(See 3 Wm. IV. ch. 7)

WHEREAS it may happen that felons, and other malefactors, having committed crimes in some of his Majesty's Provinces and Governments in North America, may escape into this province, and their offences thereby remain unpunished, for want of provision by law for apprehending such offenders in this province, and transmitting them into the province in which their offences were committed; for remedy thereof, Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled "An act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled 'An act for making more effectual provision for the government of the province of Quebec in North America,' and to make further provision for the government of the said

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tions on judgments of nonsuit or nonpros.—14 East. 343. And the application for costs under it must be made either to the court or a judge in chambers, and not to a judge at nisi prius.—Jones *v.* Lake. 8 C. & P. 395.

province," and by the authority of the same, That from and after the passing of this act, if any person or persons, against whom a warrant shall be issued by the Chief Justice of the King's Bench, or any other magistrate having competent authority in any of his Majesty's provinces or governments in North America, respectively, for any felony or other crime of a high nature, shall escape, come into, reside or be in any part of this province, it shall and may be lawful for any justice of the peace of the district, county, city, or place, where such person or persons shall escape, come into, reside or be, to endorse his name on the said warrant (due proof being first made of the hand-writing of the magistrate issuing the same,) which warrant so endorsed shall be a sufficient authority to all persons to whom such warrant was originally directed, and also to all constables of the district, county, city, or place, where such warrant shall be so endorsed, to execute the same, by apprehending the person or persons against whom such warrant is granted, and to convey him, her, or them into the province from which such warrant originally was issued, to be dealt with according to law.

Warrants issuing within his Majesty's other governments in North America against felons escaping therefrom, may be executed within this province, being duly endorsed.

2. Provided nevertheless, and be it further enacted by the authority aforesaid, That before any such warrant shall be so endorsed as aforesaid, the person applying for such endorsement shall enter into a recognizance, with sufficient sureties, for a sum not less than fifty pounds, lawful money of this province, to indemnify this province, and every part thereof, against any expense that may arise or accrue from the apprehension of such offender, and also to bring or cause the said offender to be brought to trial; and the magistrate to whom such application shall be made, is hereby authorised to take such recognizance.

Security being previously given to indemnify the Province against any expence, and to bring the offender so apprehended to trial.

40 GEO. III. CH. 1.

An Act for the further introduction of the Criminal Law of England into this Province, and for the more effectual Punishment of certain Offenders.

Preamble.

WHEREAS the criminal law of England was, by an act of the Parliament of Great Britain, passed in the fourteenth year of his Majesty's reign, intituled "An act for making more effectual provision for the government of the Province of Quebec in North America," introduced and established as the criminal law of this province: And whereas divers amendments and improvements have since been made in the same by the mother country, which it is expedient to introduce and adopt in this province; Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled "An act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled 'An act for making more effectual provision for the government of the province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, that the criminal law of England, as it stood on the seventeenth day of September, in the year of our Lord one thousand seven hundred and ninety-two, shall be and the same is hereby declared to be the criminal law of this province.

The criminal law of England introduced as it stood on the 17th day of September, 1792.

2. Provided nevertheless, that nothing herein contained shall be taken or construed to vary, repeal, or in any manner to affect any ordinance of the late Province of Quebec, which may have been made since the said fourteenth year of his Majesty's reign.

Saving of ordinances made since the 14 Geo. III.

3. And whereas the punishment of burning in the hand, when any person is convicted of felony within the benefit of clergy, is often disregarded and ineffectual, and sometimes may fix a lasting mark of disgrace and infamy

When any person is convicted of any felony for which he

on offenders, who might otherwise become good subjects and profitable members of the community; Be it therefore enacted by the authority aforesaid, That from and after the passing of this act, when any person shall be lawfully convicted of any felony within the benefit of clergy, for which he or she is liable by law to be burned or marked in the hand, it shall and may be lawful for the court before which any person shall be so convicted, or any court holden for the same place with the like authority, if such court shall think fit, instead of such burning or marking, to impose upon such offender such a moderate pecuniary fine as to the court in its discretion shall seem meet; or otherwise it shall be lawful, instead of such burning or marking, in any of the cases aforesaid, except in the case of manslaughter, to order and adjudge that such offender shall be once or oftener, but not more than three times, either publicly or privately whipt; such private whipping to be inflicted in the presence of not less than two persons besides the offender and the officer who inflicts the same; and in the case of female offenders, in the presence of females only; and such fine or whipping so imposed or inflicted instead of such burning or marking, shall have the like effects and consequences to the party on whom the same or either shall be so imposed or inflicted, with respect to the discharge from the same or other felonies, or any restitution to his or her estates, capacities and credits, as if he or she had been burned or marked as aforesaid.

is liable to be burnt in the hand, the court may, instead of such burning, impose on him a moderate fine, or except in case of manslaughter, order him to be whipped. (See 3 Wm. IV. Ch. 4 7 Wm. IV. Ch. 4; 7 Wm. IV. Ch. 6; 7 Wm. IV. Ch. 7; 1 Vic. Ch. 11.)

4. Provided always, and be it further enacted by the authority aforesaid, That nothing in this act contained shall abridge or deprive any court of the powers now vested in it by law, of detaining and keeping in prison, for any time not exceeding one year, or of committing to the house of correction or public work-house, to be kept to hard labour, for any time not exceeding one year, or of committing to the house of correction, for any time not less than six months or exceeding two years, any such offender as aforesaid; but that such offender may, if such court shall think fit, after such burning or mark-

This act not to abridge the powers vested in the said courts of imprisoning offenders.

ing, or after such whipping or fine as shall by virtue of the present act be inflicted or imposed instead thereof, be so detained or committed, and with such accumulated punishment, in case of escape from such house of correction or workhouse, as if this act had never been made.

Banishment substituted for transportation.

(See 7 Wm. IV. Ch. 7.)

5. And whereas so much of the said criminal law of England as relates to the transportation of certain offenders to places beyond the seas, is either inapplicable to this province or cannot be carried into execution without great and manifest inconvenience, Be it enacted by the authority aforesaid, That when any person shall be convicted of any crime, for which he or she shall be liable by law to be transported, the court before which such person shall be so convicted, or any court holden for the same place with the like authority, instead of the sentence of transportation, shall order and adjudge that such person be banished from this province, for and during the same number of years or term for which he or she would be liable by law to be transported, and do remove him or herself therefrom within a space of time to be then fixed and declared by the court, and which shall, in no instance, be less than two days nor more than eight, including the day on which such sentence of banishment shall be passed.

Provisions in case of return from banishment or being found at large in the province before the period is expired.

(See 3 Wm. IV. Ch. 4. Sec. 15)

6. And be it further enacted by the authority aforesaid, That if any person on whom such sentence of banishment shall have been passed as aforesaid, or to whom his Majesty, his heirs or successors, shall hereafter be graciously pleased to extend the royal mercy upon condition of his or her leaving the province for any term of years, or for life, shall be found at large in any part thereof, without some lawful cause, after the time within which he or she shall have been so banished, or shall have so consented to leave the province, and before the expiration of the term for which he or she shall have been so banished, or shall have so consented to leave the same, every such offender being thereof lawfully convicted, shall suffer death as in cases of felony, without benefit of clergy; and such offender may be tried either

before justices of assize, oyer and terminer, or gaol delivery, for the district, county or place, where such offender shall be apprehended and taken, or where he or she may have received such sentence of banishment; and the Clerk of the Crown, Clerk of the Peace, or other officer, having the custody of the records where such sentence of banishment shall have been pronounced, or the register of the province in the case of such conditional pardon, shall at the request of any person on his Majesty's behalf, and without fee or reward, make out and give a certificate in writing, signed by him the said Clerk of the Crown, Clerk of the Peace, or other officer, or by the said register, respectively, containing the effect and substance, omitting the formal part of every indictment and conviction of such offender, and of the sentence of banishment, or of such conditional pardon, respectively, to the justices of assize, Oyer and Terminer, and Gaol Delivery, where such offender shall be indicted, which certificate shall be sufficient proof of such conviction and sentence of banishment, or of such conditional pardon, respectively.

7. Provided nevertheless, That nothing herein contained shall be construed in any manner to restrain or prevent his Majesty, his heirs or successors, to grant an absolute and unconditional pardon to such offender, and to allow of his or her return to this province.

Not to restrain the power of his Majesty to pardon.

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50 Geo. III. ch. 4.

An Act for preventing the Forging and Counterfeiting of Foreign Bills of Exchange, and of Foreign Notes and Orders for the payment of Money.

Whereas it is expedient that effectual provision should be made to prevent forging and counterfeiting of foreign bills of exchange, foreign promissory notes, and foreign orders for the payment of money within this province: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the parliament of

Preamble.

(See 3 Wm. IV. ch. 4; 7 Wm. IV. ch. 6.)

Great Britain, intituled, "An act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, 'An act for making more effectual provision for the government of the Province of Quebec, in North America' and to make further provision for the government of the said province," and by the authority of the same, That if any person from and after the passing of this act, shall within this province, falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or knowingly aid or assist in the false making, forging or counterfeiting, any bill of exchange or promissory note, undertaking or order for the payment of money, purporting to be the bill of exchange, promissory note, undertaking or order for the payment of money, of any foreign prince, state or country whatsoever, or of any minister or officer intrusted by, or employed in the service of any foreign prince, state, or country, or of any person or company of persons resident in any foreign state or country, or of any body corporate and politic, or body in the nature of a body corporate or politic, created or constituted by any foreign prince or state, with intent to deceive, or to defraud his Majesty, his heirs and successors, or any such foreign prince, state, or country, or with intent to deceive or defraud any person or company of persons whomsoever, or any body corporate or politic, or body in the nature of a body corporate and politic whatsoever, whether the same be respectively resident carrying on business, constituted or being in any part of this province, or in any foreign state or country, or if any person from and after the passing of this act, shall within any part of this province, tender in payment or in exchange, or otherwise utter or publish as true, any such false, forged, or counterfeited bill of exchange, promissory note, undertaking, or order, knowing the same to be false, forged, or counterfeited, with intent to deceive or defraud his Majesty, his heirs, and successors, or any foreign prince, state, or country, or any person or company of persons, or any body corporate and politic, or in the nature of a body corporate and

Persons forging, &c. foreign bills of exchange, &c. or uttering the same, guilty of felony; punished by fine or imprisonment, not exceeding two years, &c. corporeal punishment, or banishment, or by one or more of the said punishments, at the discretion of the court.

politic as aforesaid; then every person so offending shall be deemed and taken to be guilty of felony, and being thereof lawfully convicted shall be punished by fine or imprisonment, not exceeding two years, or by other corporal punishment, not extending to life or loss of member, and also by banishment from this province, or by one or more of the said punishments, at the discretion of the court.

No person shall engrave plates for foreign bills of exchange, &c. nor print them without written authority, or have the same in his custody without lawful excuse.

2. And be it further enacted by the authority aforesaid, That no person, after the passing of this act, shall within any part of this province, engrave, cut, etch, scrape, or by any other means or device, make, or knowingly aid or assist in the engraving, cutting, etching, scraping, or by any other means or device making, in or upon any plate whatsoever, any bill of exchange, or promissory note, or undertaking, or order for the payment of money, purporting to be the bill of exchange, promissory note, or undertaking, or order of any foreign prince, state, or country, or of any minister or officer intrusted by, or employed in the service of any foreign state or country, or of any person or company of persons resident or being in any foreign state or country, or of any body corporate and politic, or in the nature of a body corporate and politic, or constituted by any foreign prince or state, or any part of such bill of exchange, promissory note, undertaking, or order, without an authority in writing for that purpose, from such foreign prince, state, or country, minister, or officer, person, company of persons, or body corporate and politic, or body in the nature of a body corporate and politic, or from some person duly authorised to give such authority, or shall in any part of this province, without such authority as aforesaid, by means of any such plate, or by any other device or means, make or print any such foreign bill of exchange, promissory note, or undertaking, or order for the payment of money, or any part thereof, or knowingly, wilfully, and without lawful excuse, (the proof whereof shall lie upon the party accused,) have in his or her custody any such plate or device, or any impression taken from

For the first offence punishment of imprisonment, not exceeding six months, fine, publicly

or privately whipped, or one or more of the said punishments.

For second offence, fine, imprisonment, not exceeding two years, or by other corporal punishment, banishment, or by one or more of the said punishments, at the discretion of the court.

the same; and if any person shall offend in any of the cases aforesaid, he shall be deemed and taken to be guilty of a misdemeanor, and being thereof convicted according to law, shall be liable for the first offence to be imprisoned for any time not exceeding six months, or to be fined, or to be publicly or privately whipped, or to suffer one or more of the said punishments; and for the second offence, shall be punished by fine or imprisonment, not exceeding two years, or by other corporal punishment, not extending to life or loss of member, and also by banishment from the said province, or by one or more of the said punishments, at the discretion of the court: Provided always, that nothing in this act contained shall extend, or be construed to extend in any manner whatsoever, to repeal or alter any law or statute now in force for the prevention and punishment of the crime of forgery in any respect whatsoever, within any part of the said province.

This act not to alter the laws in force against forgery.

Persons indicted shall not be allowed to traverse to a subsequent assizes.

3. And be it further enacted by the authority aforesaid, That no person against whom any bill of indictment shall be found at any assizes for any offence against this act, shall be entitled to traverse the same to any subsequent assizes, but the court at which such bill of indictment shall be found, shall forthwith proceed to try the person or persons against whom the same shall be found, unless he, she, or they, shall shew good cause, to be allowed by the court, why his, her, or their trial should be postponed.

Certificates of former convictions shall be evidence in trial for second offences.

4. And be it further enacted by the authority aforesaid, That if any person shall be convicted of any offence against this act, and shall afterwards be guilty of the like offence in any other district within this province, the clerk of the crown where such former conviction shall have been had, shall at the request of the prosecutor, or any other on his Majesty's behalf, certify the same by a transcript in a few words, containing the effect and tenor of such conviction, for which certificate two shillings and sixpence, and no more, shall be paid; and such certificate being produced in court, and the hand writing of such

clerk of the crown thereto being proved, shall be sufficient evidence of such former conviction.

5. And be it further enacted by the authority aforesaid, that it shall and may be lawful for any one justice of the peace, on complaint made before him upon the oath of one credible person, that there is just cause to suspect that any one or more person or persons is, or are, or hath, or have been concerned in the making, forging, or counterfeiting such foreign bills of exchange, promissory notes, undertakings, or orders for the payment of money as aforesaid, or in engraving, cutting, etching, scraping, or by any other means or device making upon any plate whatsoever, any of the said foreign bills of exchange, promissory notes, undertakings, or orders for payment of money as aforesaid, or by means of any such plate, or by any other device or means, of making or printing the same, or that the said suspected person or persons hath, or have in his, her or their custody any such plate or device for the purpose aforesaid, or any impression taken from such plate, or otherwise printed or made, of the said foreign bills of exchange, promissory notes, undertakings, or orders for the payment of money, by warrant under the hand and seal of the said justice, to cause the dwelling house, room, workshop, out-house, or other building, yard, garden, or other place belonging to such suspected person or persons, or where any such person or persons shall be suspected to carry on any such making, forging, counterfeiting, engraving, cutting, etching, scraping or printing as aforesaid, to be searched for any such false, forged, and counterfeited foreign bills of exchange, promissory notes, undertakings, or orders for the payment of money, and for the tools, plates, or devices for the making, forging, printing, or counterfeiting of the same; and if any such tools, plates, implements or devices, shall be found in any place so searched, or in the custody of any person or persons whomsoever, not having the same by some lawful authority, it shall and may be lawful to and for any person or persons whatsoever discovering the same, to seize, and he or they are hereby autho-

Houses and other premises of suspected persons may be searched, and counterfeited bills of exchange, &c. and tools, &c. seized and carried to a justice of the peace; to be produced in evidence against the person or persons to be prosecuted for said offences.

rised and required to seize, such false, forged, and counterfeited foreign bills of exchange, promissory notes, undertakings, or orders for the payment of money, tools, plates, implements and devices, and to carry the same forthwith before a justice of the peace of the district where the same shall be seized, who shall cause the same to be secured, and produced in evidence against any person or persons who shall or may be prosecuted for any of the offences aforesaid, and after the same shall have been so produced in evidence, they shall forthwith, by order of the court where such offender or offenders shall be tried, or by order of some justice of the peace, in case there shall be no trial, be defaced or destroyed, or otherwise disposed of, as such court or such justice shall direct.

Limitation for matters done under this act, three months.

6. And be it further enacted by the authority aforesaid, That if any action or suit shall be brought or commenced against any person or persons for any thing done in pursuance of this act, such action or suit shall be commenced within three months next after the matter or thing done, and not afterwards; and the defendant or

General issue.

defendants in such action or suit, may plead the general issue, and give this act and the special matter in evidence

Treble costs.

at any trial to be had thereupon; and if afterwards, judgment shall be given for the defendant or defendants, or the plaintiff or plaintiffs shall become non-suited, or discontinue his, her or their, action or suit after the defendant or defendants shall have appeared, then such defendant or defendants shall have treble costs awarded to him, her or them, against such plaintiff or plaintiffs, and have the like remedy for the same as any defendant or defendants hath or have in other cases, to recover costs at law.

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59 Geo. III. ch. 10.

An Act to authorise the inquiry and trial of Crimes and Offences committed within this Province, without the limits of any described township or county, to be had in any district thereof.

Preamble.

Whereas by an act passed in the thirty-eighth year of his Majesty's reign, intituled, "An Act for the better

division of this Province," large tracts of country are comprehended in the several districts of this province, which are not within the limits of any township or county therein: And whereas crimes and offences have been committed, and may hereafter be committed, in such tracts of country, which it might be inconvenient to try in the particular district wherein the same may have been committed; Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "An Act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, 'An Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, That all crimes and offences committed in any of the said tracts of country or parts of this province, not being within the limits of any described county or township, may be inquired of and tried within any district of this province, and may and shall be laid and charged to have been committed within the jurisdiction of the court which shall try the same, and such court may and shall proceed thereon to trial, judgment and execution, or other punishment, for such crime or offence, in the same manner as if such crime or offence had been really committed within the district where such trial may be had, any law, usage or custom, to the contrary notwithstanding.

38 Geo. III. ch. 5, recited.

(See 2 Wm. IV. ch. 2.)

Hereafter offences committed in unorganized parts of this province may be tried in any district thereof.

2. Provided always, That when and so soon as any new county or counties, township or townships, shall be laid out, described and established, in any of the tracts of country aforesaid, and shall be so declared by law or by proclamation, under the hand and seal of the governor, lieutenant-governor, or person administering the government of this province, for the time being, by and with the advice and consent of his Majesty's Executive

When such unorganized parts of the province shall be formed into townships, the provisions of this act shall not apply to them.

Council, all crimes and offences committed within the limits of any such new county or counties, township or townships, shall be inquired of, and tried in the district or districts, wherein such county or counties, township or townships, shall be respectively comprehended, in like manner as such crimes or offences would have been inquired of and tried if this present act had not been made or passed.

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7 GEO. IV. CH. 3.

Preamble.

An Act to dispense with the necessity of actually pronouncing sentence of death in certain cases of capital convictions.

(See 4 & 5 Vic. ch. 24, secs. 33 & 34.)

WHEREAS it is expedient to dispense in certain cases with the actual pronouncing of sentence of death upon prisoners capitally convicted, and to allow of the same sentence being entered of record in open court, to have the like effect as if the same had been actually pronounced; Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "An Act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, 'An Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said Province," and by the authority of the same, That whenever any person shall be convicted of any felony, except murder, and shall by law be excluded from the benefit of clergy in respect thereof, and the court before which such offender shall be convicted shall be of opinion, that under the particular circumstances of the case, such offender is a fit and proper subject to be recommended to the royal mercy, it shall and may be lawful for such court, if it shall think fit so to do, to direct the proper officer, then being present in court, to require and ask if such offender hath or knoweth any thing to say why

The sentence in certain cases of capital conviction may be entered of record, instead of being actually pronounced.

judgment of death should not be recorded against such offender, and in case such offender shall not allege any matter or thing sufficient in law to bar or arrest such judgment, the court shall and may, and is hereby authorised to abstain from pronouncing judgment of death upon such offender, and instead of pronouncing such judgment to order the same to be entered of record; and thereupon such officer, as aforesaid, shall and may, and is hereby authorised to enter judgment of death on record against such offender in the usual and accustomed forms, and in such and the same manner as is now used, and as if judgment of death had actually been pronounced in open court against such offender.

Effect of sentence so recorded.

2. And be it further enacted by the authority aforesaid, That a record of every such judgment, so entered as aforesaid, shall have the like effect to all intents and purposes, and be followed by all the same consequences, as if such judgment had actually been pronounced in open court, and the offender had been reprieved by the court.

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9 GEO. IV. CH. 1.

An Act to provide for the admission of the evidence of Quakers, Menonists, Tunkers and Moravians, in criminal cases.

Preamble.

WHEREAS the administration of the law in criminal proceedings is much impeded by reason that the evidence of persons belonging to certain religious sects, who from scruples of conscience decline taking an oath, cannot be received, to the impunity of offenders, and the consequent encouragement of crime; For remedy whereof, be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "An Act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, 'An Act for making more effectual provision for the government of the Province of Quebec, in

Quakers, Menonists, Tunkers, and Moravians admitted to give evidence in criminal cases.

North America,' and to make further provision for the government of the said Province," and by the authority of the same, That from and after the passing of this act, every Quaker, Menonist or Tunker, or person being a member of the church or congregation known by the name of "Unitas Fratrum" or the United Brethren, sometimes otherwise called the Moravian Church, in any criminal case in which an oath is required by law, or upon any lawful occasion whatever in the administration of the law for the prevention or punishment of offences wherein the oath of any persons can be admitted, may make his or her affirmation or declaration in these words following, that is to say: "I, A. B., do solemnly, sincerely and truly declare and affirm," having first made the following declaration or affirmation, viz.: "I, A. B., do solemnly, sincerely and truly declare, that I am one of the society called Quakers, Menonists, Tunkers, or Unitas Fratrum or Moravians," (as the case may be), which affirmation or declaration, as aforesaid, of any Quaker, Menonist, Tunker, or person being of the said church or congregation called Moravians or United Brethren, shall be and is hereby declared to be of the same force and effect to all intents and purposes, in all courts of law or other places where by law an oath is or shall be allowed, authorised, directed or required, for the purposes aforesaid, as an oath taken in the usual form; and all and every person and persons who is or are or shall be authorised or required to administer any oath for any of the purposes aforesaid, by any law now in force or hereafter to be made, although no express provision is made for that purpose in any such law, shall be and is or are hereby required to administer such affirmation or declaration.

Form of affirmation.

Previous declaration.

Evidence so given to have the same effect as if on oath.

All persons authorised to administer oaths in criminal cases may take affirmations.

Perjury may be assigned on false affirmation.

2. And be it further enacted by the authority aforesaid, That if any person making such affirmation or declaration shall be lawfully convicted of having wilfully, falsely and corruptly, affirmed and declared any matter or thing which, if the same had been deposed in the usual form upon oath, would have amounted to wilful and cor-

rupt perjury, every such person so offending shall incur and suffer all the pains, penalties, forfeitures and disabilities, which by the laws now in force are to be inflicted on persons convicted of wilful and corrupt perjury.

Persons admitted to affirm under this act not to serve on juries in criminal cases.

3. And be it further enacted by the authority aforesaid, That no Quaker, Menonist or Tunker, or person belonging to the society of United Brethren or Moravians, shall by virtue of this act be qualified or permitted to serve on juries in criminal cases.

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2 WILL. IV. CH. 1.

An Act to prevent the operation within this Province of an Act of Parliament made in England in the twenty-first year of the reign of King James the First, intituled, "An Act to prevent the destroying and murthering of Bastard Children," and to make other provisions for the prevention and punishment of Infanticide.

Preamble.

WHEREAS doubts have been entertained respecting the true meaning of a certain act of parliament made in England, in the twenty-first year of the reign of his late Majesty King James the first, intituled, "An act to prevent the destroying and murthering of Bastard Children," and the same has been found difficult and inconvenient to be put in practice: For remedy thereof, be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "An act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, 'An act for making more effectual provision for the Government of the Province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, That from and after the passing of this act, no clause, matter or thing, in the said act passed in the twenty-first year of the reign of King James the first, shall extend to and be in force in this province.

(See statutes of Canada, 4 & 5 Vic. ch. 27, sec. 14.)

21st James 1. not to be in force in this province.

Trials for the murder of bastard children to proceed like other trials for murder.

2. And be it further enacted by the authority aforesaid, That from and after the passing of this act, the trial of any woman charged with murder of any issue of her body, male or female, which being born alive, (*d*) would by law be bastard, shall proceed and be governed by such and the like rules of evidence and presumption, as are by law used and allowed to take place in respect to other trials for murder, and as if the said act passed in the reign of King James the first had never been made.

Concealing birth of a bastard child a misdemeanor;

Punishable by imprisonment.

3. And be it further enacted by the authority aforesaid, That if any woman shall be delivered of a child, and shall, by secret burying or otherwise disposing of the dead body of the said child, endeavour to conceal the birth thereof, every such offender shall be guilty of a misdemeanor; and being convicted thereof shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction for any term not exceeding two years, and it shall not be necessary to prove whether the child died before, at, or after its birth: Provided always, that if any woman tried for the murder of her child shall be acquitted thereof, it shall be lawful for the jury by whose verdict she shall be acquitted, to find, in

Upon an acquittal for murder, the jury may find concealment.

(*d*) It must be proved that the child was born alive; that is, that it was alive after the whole body of the child was in the world.—R. *v.* Poulton. 5 C. & P. 329; R. *v.* Crutchley 7 C. & P. 814. 850. And there must be an independent circulation in the child before it can be accounted alive—per Parke J. R. *v.* Enoch. 5 C. & P. 539. If a child be killed after it has wholly come forth from the body of the mother, but is still connected with her by means of the umbilical cord, it seems that such killing will be murder.—R. *v.* Reeves. 9 C. & P. 25. On a charge of child murder, it appeared that the child must have died before it had an independent circulation, held, that, as the child had never had an independent circulation, the charge of murder could not be sustained.—R. *v.* Wright. 9 C. & P. 754. In an indictment for the murder of a bastard child, the absence of a name is sufficiently accounted for, by the child being described as "then lately born of the body of J. H."—R. *v.* Hogg. 2 M. & Rob. 380. Such an indictment is bad, if it do not state the name of the child, or account for the omission.—R *v.* Hicks. 2 M. & Rob. 302.

case it shall so appear in evidence, that she was delivered of a child, and that she did, by secret burying or otherwise disposing of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the court may pass such sentence as if she had been convicted upon an indictment for the concealment of the birth. (*e*)

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2 WILL. IV. CH. 2.

An Act to remove doubts respecting the jurisdiction over offences committed upon the lakes and rivers in this Province.

WHEREAS in the several statutes passed for the division of this province into counties and districts, express provision has not been made respecting the navigable and other waters lying within the limits of this province, but not included within the boundaries of any surveyed township, and doubts may therefore arise respecting the jurisdiction over offences committed upon such waters, and it is expedient to remove such doubts: Be it therefore enacted by the King's most excellent Majesty, by and Preamble.

(*e*) In order to convict a woman, the body of the child must be completely disposed of; a prisoner found with the body still in her possession, though about to dispose of it, cannot be convicted.—R. *v.* Snell. 2 M. & Rob. 44. It is essential to the commission of this offence, that the prisoner should have done some act of disposal of the body, after the child was dead.—R. *v.* Turner. 8 C. & P. 755. No one but the mother can be convicted of a concealment of the birth of the child.—R. *v.* Wright. 9 C. & P. 754. If a woman endeavour to conceal the birth of her child, by placing its dead body between a bed and mattrass, this is a sufficient disposing of the body, within this section; and it is not essential to such an offence that the dead body should either be put in some place intended for its *final* deposit, or be buried or destroyed —R. *v.* Goldthorp. 1 Car. & M. 335. An indictment for concealing the birth of a child "by secretly disposing of the dead body," without shewing the mode of disposing of the dead body, is bad.—R. *v.* Hounsell. 2 M. & Rob. 292. Hiding the body in a place from which a further removal is contemplated will not support the indictment.—R. *v.* Ash. 2 M. & Rob. 294. 295.

with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "An Act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, 'An Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said Province," and by the authority of the same, That the lakes, rivers, and other waters of this Province, which are not comprehended within the defined limits of any town, township or county, shall and may be taken to be, and are hereby declared to be parts of that district respectively, within the exterior side lines of which any such lake, river, or other water would lie and be if such exterior side lines were produced in that direction, to the utmost limits of this province.

Navigable waters to be taken to be parcel of the several districts to which they are opposite.

2. And be it further enacted by the authority aforesaid, That all crimes and offences committed in or upon any of the said waters, may be enquired of and tried within any district lying adjacent to such waters, and shall and may be laid and charged to have been committed within the jurisdiction of the court which shall try the same; and such court shall and may proceed thereon to trial, judgment and execution, or other punishment for such crime or offence, in the same manner as if such crime or offence had been really committed within the district where such trial may be had, any law, usage or custom, to the contrary notwithstanding.

Crimes committed upon navigable waters may be tried in any district adjacent thereto.

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3 WILL. IV. CH. 2.

An Act relating to the bailing and commitment, removal and trial of prisoners, in certain cases. (*f*)

(*f*) See 4 & 5 Vic. ch. 24, the 1, 2, 3, 4, 5, 6, 7, and 11 clauses of which supersede all the provisions of this statute.

3 WILL. IV. CH. 3.

An Act to reduce the number of cases in which Capital Punishment may be inflicted; to provide other punishment for offences which shall no longer be capital after the passing of this Act; to abolish the privilege called benefit of clergy; and to make other alterations in certain criminal proceedings before and after conviction.

WHEREAS it is fit that it should be plainly declared in the statutes of this province for what crimes offenders shall be liable to be pnnished with death; And whereas it does not seem to be indispensable, for the security and well being of society, that the punishment of death should be inflicted in any other cases than those hereinafter mentioned: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "An act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, 'An act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, That if a person do compass or imagine the death of our lord the king, or if a person do levy war against our lord the King, in this province, or be adherent to the King's enemies in this province, giving to them aid and comfort, in this province or elsewhere, and thereof be provably attainted of open deed by people of his condition, such person so attainted shall be deemed guilty of treason, and shall suffer death.

Preamble. (See statutes of Canada, 4 & 5 Vic. chs. 24, 25, 26 & 27, which contain provisions superseding many of the enactments of this statute); (See also 7 Wm. IV. chs. 4 & 6.)

What offences shall be capital. High treason.

2. Superseded by 4 & 5 Vic. ch. 27, sec. 3.

3. Superseded by 4 & 5 Vic. ch. 27, sec. 2.

4. And be it further enacted by the authority aforesaid, that if any person or persons whatsoever shall by force set at liberty or rescue, or attempt to rescue or set at liberty, any person out of prison, who shall be committed for or found guilty of murder; or rescue, or attempt to rescue, any person convicted of murder going to

Rescuing persons convicted of murder or committed for murder.

execution, or during execution, every person so offending shall be deemed, taken, and adjudged to be guilty of felony, and shall suffer death.

5. Superseded by 4 & 5 Vic. ch. 27, sec. 16.

6. Superseded by 4 & 5 Vic. ch. 27, sec. 17.

7. Superseded by 4 & 5 Vic. ch. 27, sec. 15.

Robbery. (See 4 & 5 Vic. ch. 25, secs. 6 & 7.) Robbing the mail.

8. And be it further enacted by the authority aforesaid, that if any person shall rob any other person of any chattel, money, or valuable security; or shall rob any person carrying or conveying, or having charge of his Majesty's mail, in any part of this province, of any letter or letters, packet or packets, bag or mail of letters, every such offender, being convicted thereof, shall suffer death as a felon; and such offences shall and may be inquired of, tried, and determined, either in the district in which the offence shall be committed, or in which the offender shall or may be apprehended.

Place of trial.

9. } Superseded by 4 & 5 Vic. chap. 25, secs. 14,
10. } 15, 16.

11. Superseded by 4 & 5 Vic. ch. 26, sec. 2, 3.

Accessories before the fact. (See 4 & 5 Vic. ch. 24, secs. 37, 38, 39.)

12. And be it further enacted by the authority aforesaid, That every person being convicted of being an accessory before the fact to any of the offences made capital by this act, shall suffer death as in cases of felony.

British statute 1 Geo. I., ch. 5, commonly called "the Riot Act," recited.

13. And whereas for the preventing and suppressing of riots and tumults, and for the more speedy and effectual punishing the offenders therein, an act was passed in the Parliament of Great Britain, in the first year of the reign of King George the First, intituled "An act for preventing tumults and riotous assemblies, and for the more speedy and effectual punishing the rioters," whereby it is among other things enacted, "that if any persons to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, at any time after the last day of July, in the year of our Lord one thousand seven hundred and fifteen, and being required or commanded by any one or more justice or justices of the peace, or by the sheriff of the county, or his under-sheriff, or by

the mayor, bailiff, or bailiffs, or other head officer, or justice of the peace of any city or town corporate, where such assembly shall be, by proclamation, to be made in the King's name, in the form in the said act directed, to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, shall, to the number of twelve or more (notwithstanding such proclamation made) unlawfully, riotously, and tumultuously, remain or continue together by the space of one hour after such command or request made by proclamation, that then such continuing together to the number of twelve or more, after such command or request made by proclamation, shall be adjudged felony without benefit of clergy, and the offenders therein shall be adjudged felons, and shall suffer death as in case of felony, without benefit of clergy." And it is in the said act further enacted, that "the order and form of the proclamation which shall be made by the authority of the said act shall be as hereafter followeth, (that is to say;) That the justice of the peace, or other person authorised by the said act to make the said proclamation, shall, among the said rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded, silence to be, while proclamation is making; and after that, shall openly and with a loud voice make, or cause to be made, proclamation in these words, or like in effect:—

"Our sovereign lord the King chargeth and commandeth all persons being assembled immediately to disperse themselves, and peaceably to depart to their habitations or to their lawful business, upon the pains contained in the act made in the first year of King George, for preventing tumults and riotous assemblies. —God save the King." Proclamation for rioters to disperse.

"And every such justice and justices of the peace, sheriff, under-sheriff, mayor, bailiff, and other head officer, aforesaid, within the limits of their respective jurisdictions, are by the said act authorised, empowered, and required, on notice or knowledge of any such unlawful, riotous, and tumultuous assembly, to resort to the

place where such unlawful, riotous, and tumultuous assemblies shall be, of persons to the number of twelve or more, and there to make, or cause to be made, proclamation in manner aforesaid." And it is in the said act further enacted, that "if such persons so unlawfully, riotously, and tumultuously assembled, or twelve or more of them, after proclamation made in manner aforesaid, shall continue together and not disperse themselves within one hour, that then it shall and may be lawful to and for every justice of the peace, sheriff, or under-sheriff of the county where such assemblies shall be, and also to and for every high and petty constable, and other peace officer within such county, and also to and for every mayor, justice of the peace, sheriff, bailiff, and other head officer, high or petty constable, and other peace officer, of any city or town corporate where such assembly shall be, and to and for such other person and persons as shall be commanded to be assisting unto any such justice of the peace, sheriff or under-sheriff, mayor, bailiff, or other head officer aforesaid, (who are thereby authorised and empowered to command all his Majesty's subjects of age and ability to be assisting to them therein) to seize and apprehend, and they are thereby required to seize and apprehend such persons so unlawfully, riotously, and tumultuously continuing together, after proclamation made, as aforesaid, and forthwith to carry the persons so apprehended before one or more of his Majesty's justices of the peace of the county or place where such persons shall be so apprehended, in order to their being proceeded against for such their offences according to law; and that if the persons so unlawfully, riotously, and tumultuously assembled, or any of them, shall happen to be killed, maimed, or hurt, in the dispersing, seizing, or apprehending, or endeavouring to disperse, seize, or apprehend them, by reason of their resisting the persons so dispersing, seizing, or apprehending, or endeavouring to disperse, seize, or apprehend them, that then every such justice of the peace, sheriff, under-sheriff, mayor, bailiff, head officer, high or petty consta-

ble, or other peace officer, and all and singular persons being aiding and assisting to them, or any of them, shall be free, discharged and indemnified, as well against the King's Majesty, his heirs and successors, as against all and every other person and persons, of, for, or concerning the killing, maiming, or hurting of any such person or persons so unlawfully, riotously, and tumultuously assembled, that shall happen to be so killed, maimed, or hurt, as aforesaid." And it is in the said act further enacted, that "if any persons unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, shall unlawfully, and with force, demolish or pull down, or begin to demolish or pull down, any church, chapel, or any building for religious worship, certified and registered according to the statute made in the first year of the reign of the late King William and Queen Mary, intituled, 'An act for exempting their Majesty's Protestant subjects dissenting from the Church of England from the penalties of certain laws;' or any dwelling house, barn, stable, or other out-house, that then every such demolishing or pulling down, or beginning to demolish or pull down, shall be adjudged felony, without benefit of clergy, and the offenders therein shall be adjudged felons, and shall suffer death as in case of felony, without benefit of clergy." And it is in the said act further enacted, that "if any person or persons do, or shall with force and arms, wilfully and knowingly oppose, obstruct, or in any manner wilfully or knowingly let, hinder, or hurt any person or persons that shall begin to proclaim, or go to proclaim, according to the proclamation thereby directed to be made, whereby such proclamation shall not be made, that then every such opposing, obstructing, letting, hindering, or hurting, such person or persons so beginning or going to make such proclamation as aforesaid, shall be adjudged felony, without benefit of clergy, and the offenders therein shall be adjudged felons, and shall suffer death as in case of felony, without benefit of clergy; and that also every such person or persons so being unlawfully, riotously,

and tumultuously assembled, to the number of twelve, as aforesaid, or more, to whom proclamation should or ought to have been made, if the same had not been hindered, as aforesaid, shall likewise, in case they, or any of them to the number of twelve or more, shall continue together, and not disperse themselves within one hour after such let or hindrance so made, having knowledge of such let or hindrance so made, shall be adjudged felons, and shall suffer death as in case of felony, without benefit of clergy." And it is in the said act further enacted, that "no person or persons shall be prosecuted by virtue of the said act, for any offence or offences committed contrary to the same, unless such prosecution be commenced within twelve months after the offence committed:" Be it enacted by and with the authority aforesaid, That nothing in this act contained shall affect, or be construed to affect, or in any manner to repeal or vary any of the provisions in the said act contained, but the same shall continue and remain as if this act had not been passed: Provided nevertheless, and it is hereby enacted by the authority aforesaid, That the provisions in the fourth clause of the same act shall apply and extend to all churches or chapels, or places for religious worship, in this province, notwithstanding the same, or any of them, shall not be certified or registered, as provided in the said act.

The provisions of 1 G. I. ch. 5 (Riot Act) not to be repealed or affected by this act.

Churches and places of worship to be within Riot Act, though not registered.

14. And whereas by a certain act of the Parliament of Great Britain, passed in the twelfth year of the reign of King George the Third, intituled, "An Act for the better securing and preserving his Majesty's dock yards, magazines, ships, ammunition and stores," it is enacted, that, "if any person or persons shall within the realm, or in any of the islands, countries, forts or places thereunto belonging, wilfully and maliciously set on fire or burn, or otherwise destroy or cause to be set on fire or burnt, or otherwise destroyed, or aid, procure, abet or assist, in the setting on fire or burning, or otherwise destroying, of any of his Majesty's ships or vessels of war, whether the said ships or vessels of war be on float or building,

British statute, 12 Geo. III. ch. 24, respecting the burning his Majesty's ships, naval arsenals, &c., recited.

or begun to be built, in any of his Majesty's dock yards, or building or repairing by contract in any private yard, for the use of his Majesty, or any of his Majesty's arsenals, magazines, dock yards, rope yards, victualling offices, or any of the buildings erected therein or belonging thereto, or any timber or materials there placed, for building, repairing or fitting out of ships or vessels, or any of his Majesty's military, naval, or victualling stores, or other ammunition of war, or any place or places where any such military, naval, or victualling stores, or other ammunition of war, is, are, or shall be kept, placed or deposited, that then the person or persons guilty of any such offence, being thereof convicted in due form of law, shall be adjudged guilty of felony, and shall suffer death, as in cases of felony, without benefit of clergy:" And whereas also, by a certain other act of the Parliament of Great Britain, passed in the second and third years of the reign of Queen Anne, intituled, "An Act for punishing mutiny, desertion, and false musters, and for better paying of the army and quarters, and for satisfying divers arrears, and for a further continuance of the powers of the five commissioners for the examining and determining the accounts of the army," it is enacted, that, "if any officer or soldier in her Majesty's army, shall either upon land out of England, or upon the sea, hold correspondence with any rebel, or enemy of her Majesty, or give them advice or intelligence, either by letters, messages, signs or tokens, or any manner of way whatsoever, or shall treat with such rebels or enemies, or enter into any condition with them without her Majesty's license, or license of the general, lieutenant-general, or chief commander, then every such person so offending shall be deemed and adjudged to be guilty of high treason, and suffer such pains and penalties as in case of high treason:" Be it therefore enacted, That nothing in this act contained shall be construed or taken to affect in any manner the provisions of the above in part recited acts, or either of them.

British statute, 2 & 3 Anne, ch. 20, making it high treason for an officer or soldier to correspond with the enemy beyond the sea, recited.

The above acts of 12 Geo. III. ch. 24, and 2 & 3 Anne, ch. 20, not to be affected by this act.

15. And be it further enacted by the authority aforesaid, That so much of an act of the parliament of this

Statutes of Upper Canada, 36 Geo. III. ch. 1; 38 Geo. III. ch. 1; 40 Geo. III. ch. 1, so far as they make any offence named in them capital, repealed;

province, passed in the thirty-sixth year of the reign of King George the Third, intituled, "An Act for the better regulation of certain coins current in this province;" and of an act passed in the parliament of this province, in the thirty-eighth year of the reign of King George the Third, intituled, "An Act to establish on a permanent footing the boundary lines of the different townships of this province;" and of an act passed in the parliament of this province, in the fortieth year of the reign of King George the Third, intituled, "An Act for the further introduction of the criminal law of England in this province, and for the more effectual punishment of certain offenders;" and of the several acts of the parliament of this province, passed for the authorising the issuing of government debentures, as provides that any offence in any of those statutes respectively mentioned, shall be punishable with death, shall be and the same is hereby repealed; and that such offences shall continue to be of the degree of felony, and the persons convicted thereof shall be liable to the punishments, or any of them, which are by this act provided in respect to felonies generally, which are not punishable with death.

And also so much of any statute as makes it capital to forge any government debenture, or utter any forged debenture, &c.

Persons confessing, or outlawed, to be punished in the same manner as if convicted by verdict.

16. And be it further enacted by the authority aforesaid, That if any person shall be indicted for any offence made capital by this or any other statute made or to be made, such person shall be liable to the same punishment, whether he or she shall be convicted by verdict or confession, or shall be outlawed upon indictment; and this as well in the case of accessories as of principals.

17. Superseded by 4 & 5 Vic. ch. 24, sec. 14.

18. Superseded by 4 & 5 Vic. ch. 24, sec. 16.

Sentence in certain cases of high treason mitigated.

19. And whereas in certain cases of high treason, as the Law now stands, the sentence or judgment required by law to be pronounced or awarded against any persons convicted or adjudged guilty of the said crime in such cases is, that they should be drawn on a hurdle to the place of execution, and there be hanged by the neck, but not until they are dead, but that they should be taken down again, and that when they are yet alive their bowels

should be taken out, and burnt before their faces; and that afterwards their heads should be severed from their bodies, and their bodies divided into four quarters, and their heads and quarters to be at the King's disposal: And whereas it is expedient in the said cases of high treason to alter the sentence or judgment now required by law: Be it therefore enacted, by the authority aforesaid, That in all cases of high treason in which, as the law now stands, the sentence or judgment to be pronounced or awarded from and after the passing of this act against any person convicted or adjudged guilty shall be, that such person shall be drawn on a hurdle to the place of execution, and be there hanged by the neck until such person be dead; and that afterwards the body of such person shall be dissected and anatomized.

Persons convicted of murder. (See 4 & 5 Vic. ch. 27, sec 4, 5.)

20. And be it further enacted by the authority aforesaid, That whenever any person shall be convicted of murder and executed therefor, the body of such murderer shall be delivered by the sheriff, or his deputy, and his officers, to a surgeon, for the purpose of being dissected and anatomised.

To be dissected.

Sentence when to be passed. (See 4 & 5 Vic. ch. 27, sec. 4, 5.)

21. And be it further enacted by the authority aforesaid, That sentence shall be pronounced in open Court, immediately after the conviction of such murderer, and before the court shall proceed to any other business, unless the court shall see reasonable cause for postponing the same; in which sentence shall be expressed, not only the usual judgment of death, but also the time appointed for the execution thereof, and the mark of infamy hereby directed for such offenders; in order to impress a just horror in the mind of the offender, and on the minds of such as shall be present, of the heinous crime of murder. *(g)*

Terms of the sentence.

22. Provided always, and be it enacted by the autho-

(g) By 4 & 5 Vic. ch. 26, sec. 4, sentence of death after a conviction for murder, may be pronounced in the same manner, and the court before which the conviction may be had shall have the same power in all respects, as after convictions for other capital offences.

Respite.

rity aforesaid, That after such sentence pronounced, as aforesaid, in case there shall appear reasonable cause, it shall and may be lawful to and for such judge or justice, before whom such criminal shall have been so tried, to stay the execution of the sentence, at the discretion of such judge or justice, regard being always had to the true intent and purpose of this act: Provided also, that it shall be in the power of any such judge or justice to appoint the body of any such criminal to be dissected and anatomized.

Judge may order the body to be dissected.

How persons sentenced to be executed for murder shall be kept after sentence. (See 4 & 5 Vic. ch. 27, sec. 5.)

23. And be it further enacted by the authority aforesaid, That from and after such conviction, and judgment given thereupon, the gaoler or keeper to whom such criminal shall be delivered for safe custody, shall confine such prisoner to some cell or other proper and safe place within the prison, separate and apart from the other prisoners; and that no person or persons whatsoever, except the gaoler or keeper, or his servants, shall have access to any such prisoner, without licence being first obtained for that purpose, under the hand of such judge or justice before whom such offender shall have been tried, or under the hand of the sheriff, his deputy or under sheriff; Provided always, that in case any such judge or justice shall see cause to respite the execution of such offender, so condemned as aforesaid, such judge or justice may relax or release any or all of the restraints or regulations hereinbefore or hereinafter directed to be observed by the gaoler or keeper of the prison where such prisoner shall be confined, by any license in writing, signed by such judge or justice for that purpose, for and during the time of such stay of execution, any thing hereinbefore contained to the contrary thereof notwithstanding.

In case of respite, regulations may be relaxed.

Further regulations. Food of convict. Attendance of physician or surgeon. (See 4 & 5 Vic. ch. 27, sec. 5.)

24. And be it further enacted by the authority aforesaid, That after sentence passed, as aforesaid, and until the execution thereof, such offender shall be fed with bread and water only, except in case of any violent sickness, or wound, in which case some known physician, surgeon or apothecary may be admitted by the gaoler or keeper of the said prison, to administer necessaries, the

christian and surname of such physician, surgeon or apothecary, and his place of abode, being first entered in the books of such prison or gaol, there to remain and in case such gaoler or prison keeper shall offend against, or neglect to put in execution, any of the directions or regulations hereby enacted to be observed, such gaoler or prison keeper shall for such offence forfeit his office, and be imprisoned for a time not exceeding three months, upon conviction thereof, by indictment.

Punishment of gaoler for disregarding these regulations.

25. And be it further enacted by the authority aforesaid, That from and after the passing of this act, benefit of clergy in this province shall be abolished, and that the same need not in any case be prayed, and shall not in any case be allowed, any law, statute or usage, to the contrary notwithstanding; and that in all cases of crimes made punishable by this act with death, the effect of such provision shall be the same as in the case of any offence which, before the passing of this act, was made punishable with death without benefit of clergy; and that all persons who may hereafter be duly convicted of any offence not specified in this act, and which before the passing thereof was punishable in this province with death, with or without benefit of clergy, shall be liable to be banished, or to be transported beyond the seas for life, or for such term not less than seven years, as the court before which such person shall be convicted shall adjudge, or shall be liable, in case such court shall think fit, to be imprisoned only, or to be imprisoned and kept to hard labour, or in solitary confinement in the common gaol, or in any penitentiary or house of correction that may be provided for such purposes, for any term not exceeding fourteen years, except persons convicted of returning from transportation or from banishment, with respect to whom the term of imprisonment, with or without hard labour, or by solitary confinement, may, if the court shall think fit, be extended to the term of his or her natural life; and that in case of manslaughter, the offender shall be liable to be fined or imprisoned, or both, in the discretion of the court; Provided that such imprisonment shall not exceed twelve

Benefit of clergy abolished.

(See 4 & 5 Vic. ch. 24, sec. 19, 20.)

General provision for the punishment of offences not specified in this act, which, before this act, were punishable with death, either with or without benefit of clergy.

(See 4 & 5 Vic. chs. 24. 25, 26, 27.)

Banishment; Transportation; Imprisonment; Hard labour; Solitary confinement; Returning from transportation.

Manslaughter.

(See 4 & 5 Vic. ch. 27, sec. 7.

calendar months: And provided, that the offence of manslaughter shall be punishable by such fine and imprisonment only, and not by all or any of the other descriptions of punishment in this clause before mentioned.

For what felonies offenders may be whipped or set in the pillory.

(See 4 & 5 Vic. ch. 24, sec. 31.)

26. And be it further enacted by the authority aforesaid, That if any person shall be convicted after the passing of this act of forgery, or of uttering any forged deed, will, instrument, note, bill or writing, or of falsely personating any person or persons, which forgery, or which uttering, or which false personating was before the passing of this act punishable with death in this province, the court before which such person shall be convicted may, if they shall think fit, adjudge such person, (unless in case of a female) to be set in the pillory (*h*) once or oftener, or to be once or oftener publicly or privately whipped, at such time or times, and at such place or places as they may direct; which punishment shall either be in addition to any other punishment which the court according to law may award, or otherwise as may to them appear proper.

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3 WILL. IV. CH. 6.

An Act to provide for the apprehending of fugitive offenders from foreign countries, and delivering them up to justice.

Preamble.

(See 37 Geo. III. ch. 15.)

WHEREAS it is expedient to provide by law for the apprehending and delivering up of felons and other malefactors, who, having committed crimes in foreign countries, have sought, or may hereafter seek, an asylum in this province: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "An Act to repeal certain parts of an act passed in the fourteenth year of his

(*h*) The punishment of pillory is abolished in all cases by 4 & 5 Vic. ch. 24, sec. 31.

Majesty's reign, intituled, 'An Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, That the governor, lieutenant-governor, or person administering the government of this province, shall have power, and he is hereby authorised at his discretion, and by and with the advice of the Executive council, on requisition being made by the government of any country, or its ministers or officers authorised to make the same, within the jurisdiction of which country the crimes hereinafter mentioned shall be charged to have been committed, to deliver up to justice any person who may have fled to this province, or who shall seek refuge therein, being charged with murder, forgery, larceny, or other crime, committed without the jurisdiction of this province, which crimes if committed within this province would by the laws thereof be punishable by death, corporeal punishment, by pillory or whipping, or by confinement at hard labour, to the end that such person may be transported out of this province to the place where such crime shall have been charged to have been committed: Provided always, that this shall only be done upon such evidence of criminality as, according to the laws of this province, would, in the opinion of the governor, lieutenant-governor, or person administering the government, and of the Executive Council, warrant the apprehension and commitment for trial of such fugitive from justice, or person so charged, if the offence had been committed within this province.

Government authorised to deliver up to justice persons who may have fled from other countries into this province, charged with heinous offences.

2. And be it further enacted by the authority aforesaid, That for preventing the escape of any person so charged, before any order for his apprehension can be obtained from the governor, lieutenant-governor, or person administering the government of this province, it shall be lawful for any judge, or for any justice of the peace in this province, acting within his jurisdiction, to issue his warrant for the apprehension, and for the commitment of any such person charged as aforesaid, in order

Persons charged with offences committed in foreign countries may be committed until an application can be made to the government for delivering up such offender.

that he may be detained in secure custody until application can be made to the governor, lieutenant-governor, or person administering the government, under the provisions of this act, and until an order can be made thereon; which warrant shall, nevertheless, only be granted upon such evidence on oath as shall satisfy such judge or justice that the person accused stands charged with some crime of the description hereinbefore specified, or that there is good ground to suspect him to have been guilty thereof.

This act not to affect the provisions of 37 Geo. III. ch. 15, or to make it incumbent on the government to deliver up persons charged as aforesaid, or to prevent their discharge on a habeas corpus, if too long detained in custody.

3. And be it further enacted by the authority aforesaid, That nothing in this act contained shall be construed to affect the provisions of a certain act of the parliament of this province, passed in the thirty-seventh year of the reign of King George the Third, intituled, "An Act to authorise the apprehending of felons and others escaping from any of his Majesty's provinces and governments in North America, into this province," or to make it incumbent upon the governor and council of this province to deliver up any person charged, if for any reason they shall deem it inexpedient so to do, or to prevent the discharge of any person upon habeas corpus who, having been committed under this act, shall be detained in custody beyond the time that may be reasonably required, under the circumstances of the case, for carrying the provisions of this act into effect.

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6 WILL. IV. CH. 44.

An Act to allow persons indicted for felony a full defence by counsel, and for other purposes therein mentioned.

1. Superseded by 4 & 5 Vic. ch. 24, sec. 9.

Copy of indictment to be delivered to prisoner, on payment of certain charges.

2. And be it further enacted by the authority aforesaid, That whenever any person shall be indicted in any of his Majesty's courts of this province for any felony or misdemeanor, and shall apply to such court for a copy of the said indictment, the same shall, with all convenient expedition, be made out and delivered to the person so applying: Provided nevertheless, that the clerk or officer

shall be entitled to demand and receive for the same of such person the following and no other fee, that is to say: at the rate of nine-pence for every hundred words contained in said indictment: Provided always, that such copy shall not be received in evidence upon any trial for a malicious prosecution.

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7 WILL. IV. CH. 4.

An Act to abolish the distinction between Grand and Petit Larceny, and to enable the Courts of General Quarter Sessions of the Peace to try all cases of simple Larceny, under certain restrictions, and to amend the law respecting the punishment of Larceny.

Preamble. (See 40 Geo. III. ch. 1; 7 Wm. IV. ch. 6 & 7; Statutes of Canada, 4 & 5 Vic. ch. 25.)

WHEREAS it is expedient to abolish the distinction between grand and petit larceny, and to allow the Courts of Quarter Sessions of the Peace to entertain jurisdiction in cases of simple larceny, under certain restrictions, by which means persons charged with larceny will be more speedily brought to trial.

1. Superseded by 4 & 5 Vic. ch. 25, sec. 2.

Courts of Quarter Sessions may try every case of simple larceny; (See 4 & 5 Vic. ch 25 sec. 2.) Restriction when presiding Justice is not a barrister.

2. And be it further enacted by the authority aforesaid, That the Courts of General Quarter Sessions of the Peace in the several districts of this Province, shall have power to try every case of simple larceny, and also to try all accessories to such larceny: Provided always, that unless the justice presiding in any such court shall be a barrister, duly admitted to practise at the bar in this province, then it shall not be lawful for such court to try any case of larceny, when the goods charged to have been stolen shall exceed in value the sum of twenty pounds.

Power of courts in respect to punishment. (See 4 & 5 Vic. ch. 25.)

3. And be it further enacted by the authority aforesaid, That no court whose jurisdiction in cases of larceny is extended by this act, shall have power to sentence a person convicted of larceny to be transported for any period, or to be banished for a longer period than seven years, or to be imprisoned in a common gaol for a longer period than eight months, or to be imprisoned and kept to hard labour in any penitentiary or house of correction for a longer period than two years.

Banishment. (See 4 & 5 Vic. ch. 25.)

4. And be it further enacted by the authority aforesaid, That it shall be lawful for any court having jurisdiction in cases of larceny, if they shall think fit, to sentence any person convicted thereof to be banished from the province, for any number of years not exceeding seven, to commence from the expiration of the term for which the same person may, upon the same conviction, be sentenced to be imprisoned in the common gaol, or imprisoned and kept to hard labour in a penitentiary or house of correction.

Court of Quarter Sessions may leave cases for the assizes.

5. And be it further enacted by the authority aforesaid, That notwithstanding any thing contained in this act, it shall not be necessary for any court of Quarter Sessions to deliver the gaol of all prisoners who may be confined upon charges of simple larceny, but it shall be in the discretion of such court to leave such case to be tried at the next Court of Oyer and Terminer and General Gaol delivery, if by reason of the difficulty or importance of the case, or for any cause, it shall appear to them proper so to do.

Value of the goods being above £20, not to affect jurisdiction of the court. (See 4 & 5 Vic. ch. 25.)

6. And be it further enacted by the authority aforesaid, That if upon the trial of any case of larceny, in which the value of the goods stolen shall be stated in the indictment at a sum not exceeding twenty pounds, it shall appear in evidence that the value of such goods was in reality greater than twenty pounds, such trial may nevertheless proceed, and no legal exception to the jurisdiction of the court shall lie on that account; but the provision of this act restraining such court to cases where the value of the goods shall not exceed twenty pounds, shall be deemed and taken merely to be a direction to such court, but shall not be construed to affect their legal jurisdiction.

7 WILL. IV. CH. 6.

An Act to provide more effectually for the punishment of certain offences, and to enable the governor, lieutenant-governor, or person administering the government of this province, to commute the sentence of death, in certain cases, for other punishment in this act mentioned.

Preamble. (See 3 Wm. IV. ch. 3; Statutes of Canada, 4 & 5 Vic. chs. 24, 25, 26 & 27.)

WHEREAS it is expedient to make further provision for the effectual punishment of certain offences hereinafter mentioned: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled "An act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled 'An act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, that in case of the conviction of any person after the passing of this act of any larceny; or of manslaughter; or of any assault with intent to commit any felony; or of felonious rescue; or of assaulting with any weapon a sheriff, or other peace officer, in the execution of his duty; or of any forgery which before the passing of this act was not punishable with death, with or without benefit of clergy; or of perjury; or of fraud; or cheating; or conspiracy; or of being accessory, before or after the fact, to larceny or any other felony; or of receiving stolen goods; or of embezzlement; or of uttering or tendering in payment false or counterfeit money, resembling any of the gold or silver coins current in this province, knowing the same to be false or counterfeit; or of any offence against a certain statute of this province, passed in the fiftieth year of the reign of his late Majesty King George the Third, intituled "An act for preventing the forging and counterfeiting of foreign bills of exchange, and of foreign notes and orders for the payment of money;" or of assisting in or at-

Larceny and other offences to be punished as heretofore;

tempting to effect the escape of a prisoner confined for a felony or other crime, before or after conviction—the person convicted of such offence may be sentenced to such punishment as is now provided by law for any such offence; or if the court which is to pass sentence on such convict shall think fit, may be sentenced to be imprisoned only, or imprisoned and kept to hard labour, or in solitary confinement in the common gaol, or in any penitentiary or house of correction that hath been or may be provided in this province for such purpose, for any term not exceeding seven years: Provided always, that where for any of the offences above mentioned a specified term of imprisonment is now assigned by law, no person shall be sentenced for such offence to be imprisoned in a penitentiary, or other place of confinement, for a longer period than such specified term: And provided also, that in case a conviction shall take place of any of the offences hereinbefore enumerated, except the offence of manslaughter, which before the passing of this act would have subjected the offender to any punishment provided by the act of the parliament of this province, passed in the third year of his present Majesty's reign, intituled "An act to reduce the number of cases in which capital punishment may be inflicted; to provide other punishments for offences which shall no longer be capital after the passing of this act; to abolish the privilege called benefit of clergy; and to make other alterations in certain criminal proceedings before and after conviction"—such punishment shall in no case be altered or affected by this act.

Or by imprisonment only, with or without hard labour.

In the common gaol or penitentiary, &c.

Term not exceeding seven years.

Convictions for offences (except manslaughter) punishable under 3 Wm. IV. ch. 3, not to be affected by this act.

2. And be it further enacted by the authority aforesaid, That no Court of General Quarter Sessions of the Peace, or court having the like jurisdiction, shall have power to sentence any person convicted before them to be imprisoned in a penitentiary for a longer period than two years.

Quarter Sessions not empowered to sentence any person to the penitentiary for more than two years.

(See 4 & 5 Vic. chs. 24, 25, 26 & 27.)

3. And be it further enacted by the authority aforesaid, That it shall and may be lawful for the governor, lieutenant-governor, or person administering the govern-

ment of this province, to commute the sentence of death which may be passed upon any person convicted of a capital crime, other than high treason or murder, and with authority from his Majesty, upon any person convicted of high treason or murder, for transportation for life or term of years, to such place in his Majesty's dominions as may be assigned for the reception of convicts; or for banishment from this province for life or any term of years; or for solitary confinement; or confinement with or without hard labour in any penitentiary or house of correction that may be appointed for such purposes, either during life or for any term of years; and that an instrument under the hand and seal of the governor, lieutenant-governor, or person administering the government of this province, declaring such commutation of sentence, shall be sufficient authority to any of his Majesty's judges or justices in this province, having jurisdiction in such cases, to make such orders, and give such directions, under his hand and seal, as may be requisite for the change of custody of such convict, and for his conduct to and delivery at any penitentiary or house of correction in this province, and his detention therein, according to the terms on which his sentence may have been commuted.

Sentence of death may be commuted by governor, &c., except for murder and high treason.

4. And be it further enacted by the authority aforesaid, That the time during which any offender shall have continued in any common gaol, under sentence of transportation, or under sentence of confinement in the penitentiary, shall be reckoned in discharge, or part discharge, of the term which shall be appointed by such sentence.

Imprisonment after sentence to be reckoned in the term of transportation.

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7 WILL. IV. CH. 7.

An Act respecting the transportation of convicts.

WHEREAS it is expedient to facilitate the transportation of offenders to such place or places in his Majesty's dominions as may be assigned for the reception of convicts,

Preamble.

(See 40 Geo. III. ch. I; Statutes of Canada, 4 & 5 Vic. chs. 24, 25, 26 & 27.)

and to make further provision in respect to the punishment of transportation: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "An Act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, 'An Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, That notwithstanding any thing contained in a certain act of the parliament of this province, passed in the fortieth year of the reign of his late Majesty King George the Third, intituled, "An Act for the further introduction of the criminal law of England in this province, and for the more effectual punishment of certain offenders," it shall be lawful after the passing of this act, to sentence offenders to transportation, not only in such cases where by any law now in force, or hereafter to be passed, it is expressly provided that such offenders may be transported, but also in every case in which by the provisions of the said act passed in the fortieth year of the reign of his late Majesty King George the Third, the person convicted would be liable to be banished from this province: Provided always nevertheless, that no offender shall under the authority of this act be sentenced to be transported, except by such court, and in such cases, and for such term of time, as the same offender might, according to the said act, be banished from this province; and that nothing in this act contained shall extend, or be construed to take away or affect the power of sentencing offenders to be banished according to the act hereinbefore recited, when it shall appear proper to pass such sentence.

Transportation may be substituted for banishment.

2. And be it further enacted by the authority aforesaid, That all and singular the provisions now in force

which are contained in the said act of the parliament of this province, passed in the fortieth year of the reign of his late Majesty King George the third, respecting persons returning to this Province before the expiration of the period for which they have been banished by sentence of a Court, or have consented to be banished according to the terms of any conditional pardon, granted to a convict sentenced to suffer death, shall equally extend to and be in force with respect to any person returning from transportation after this act, whether such person shall have been sentenced to be transported, or having been capitally convicted, shall have been pardoned on condition of being transported. Punishment for returning from transportation.

3. And be it further enacted by the authority aforesaid, That the sentence in case of transportation shall be, that the offender shall be transported for a time to be mentioned in such sentence, or for life, where that may be lawful, and shall in the opinion of the court passing such sentence appear proper, to such place as the governor, lieutenant-governor, or person administering the government of this province, by and with the advice of the executive council thereof, shall appoint. Form of sentence to transportation.

4. And be it further enacted by the authority aforesaid, That it shall and may be lawful for the governor, lieutenant-governor, or person administering the government of this province, by and with the advice of the executive council thereof, to determine, upon reference to his Majesty's government in England, to what foreign possession of his Majesty convicts shall be transported from this province under the provisions of this act. Place of transportation to be determined by governor, &c., in council.

5. And be it further enacted by the authority aforesaid, That an instrument under the sign manual of the governor, lieutenant-governor, or person administering the government of this province, and directed to the judges of the court of king's bench, declaring to what colony or place it has been determined to transport any convict, shall be sufficient authority for the judge who passed Judge's warrant.

sentence on such convict, or in his absence, for any other judge of the said court, to make his warrant, authorising any person or persons to carry and secure such convict in and through this province, towards the sea-port or place from whence he or she is to be transported; and if any person or persons shall rescue such convicts, or any of them, or assist them, or any of them, in making their escape from such person or persons as shall have them in their custody, as aforesaid, such offence shall be punishable in the same manner as if such convict had, at the time it was committed, been confined in a gaol or prison, in the custody of the sheriff or gaoler, after sentence for the crime of which he shall have been convicted.

Imprisonment to be reckoned as part of the term of transportation.

6. And be it further enacted by the authority aforesaid, That the time during which any offender shall have continued in gaol under sentence of transportation, shall be taken and reckoned in part discharge or satisfaction of the term of his transportation.

Expenses of removing convicts to be laid before parliament.

7. And be it further enacted by the authority aforesaid, That the expenses of carrying this act into execution, so far as respects the removal of convicts in order to their being transported, shall be annually laid before both houses of the legislature.

Provision in case sentence of transportation cannot be carried into effect.

8. And be it further enacted by the authority aforesaid, That if by reason of any difficulty occurring, which may prevent the transportation or reception of any convict in any colony or possession of his Majesty, the sentence which shall have been passed on any such convict cannot be carried into effect, such convict may be detained in prison, for a period not longer than that for which he shall have been sentenced to be transported, unless it shall appear expedient to pardon such convict; in which case it may be made a condition of such pardon, that the convict shall banish himself from this province, for a period not exceeding the residue of the time for which he was to have been transported.

4 & 5 Vic. ch. 24.

An Act for improving the administration of Criminal Justice in this Province.

Whereas it is expedient, with a view to improve the administration of justice in criminal cases in this province, to define under what circumstances persons may be admitted to bail in cases of felony; and to make better provision for taking examinations, informations, bailments, and recognizances, and returning the same to the proper tribunals; and to relax in some instances the technical strictness of criminal proceedings, so as to insure the punishment of the guilty without depriving the accused of any just means of defence; and to abolish the benefit of clergy and some matters of form which impede the due administration of justice; and to make better provision for the punishment of offenders in certain cases; Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of the Province of Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of the United Kingdom of Great Britain and Ireland, and intituled "An act to re-unite the provinces of Upper and Lower Canada, and for the government of Canada," and it is hereby enacted, by the authority of the same, that where any person shall be taken on a charge of felony, or suspicion of felony, before one or more justice or justices of the peace, and the charge shall be supported by positive and credible evidence of the fact, or by such evidence as, if not explained or contradicted, shall, in the opinion of the justice or justices, raise a strong presumption of the guilt of the person charged, such person shall be committed to prison by such justice or justices in the manner hereinafter mentioned; but if there shall be only one justice present, and the whole evidence given before him shall be such as neither to raise a strong presumption of guilt, nor to warrant the dismissal of the charge, such justice

Preamble.

Who may be admitted to bail on a charge of felony, and who may not.

shall order the person charged to be detained in custody, and such person shall be taken before two justices at the least; and where any person so taken, or any person in the first instance taken before two justices of the peace, shall be charged with felony or on suspicion of felony, and the evidence given in support of the charge, shall, in the opinion of such justices, not be such as to raise a strong presumption of the guilt of the person charged, and to require the committal of such person, or such evidence shall be adduced on behalf of the person charged as shall in the opinion of such justices, weaken the presumption of guilt, but there shall, notwithstanding, appear to such justices, in either of such cases, to be sufficient ground for judicial inquiry into the guilt of the person charged, such person shall be admitted to bail by such two justices in the manner hereinafter mentioned: Provided always, that nothing herein contained shall be construed to require any such justice or justices to hear evidence on behalf of any person so charged as aforesaid, unless it shall appear to such justice or justices to be meet and conducive to the ends of justice to hear the same.

Before any person charged with felony, &c., shall be bailed or committed, the justice shall take down in writing the examination, &c., and bind witnesses to appear at trial.

2. And be it enacted, that two justices of the peace, before they shall admit to bail, and one or more justice or justices, before he or they shall commit to prison, any person arrested for felony, or on suspicion of felony, shall take the examination of such person, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing, in the presence of the party accused, if he be in custody, who shall have full opportunity afforded him of cross-examining such witnesses, if he shall think proper so to do, and the two justices admitting to bail shall certify the bailment in writing; and every such justice shall have authority to summon any person within his jurisdiction, whom he shall have reason to consider capable of giving material evidence concerning any such felony or suspicion of felony, and to examine such person on oath, touching the same, and to bind by recognizance all such persons as

know or declare any thing material touching any such felony, or suspicion of felony, to appear at the next court of Oyer and Terminer, or gaol delivery, or other court at which the trial of such offence is intended to be had, then and there to prosecute and give evidence against the party accused; and such justices and justice, respectively, shall subscribe all such examinations, informations, bailments, and recognizances, and deliver, or cause to be delivered the same to the proper officer of the court in which the trial is to be, before, or at the opening of the court; and in case any person so summoned shall refuse to submit to such examination or to enter into such recognizance, it shall be lawful for the justice or justices to commit (*i*) such person to the common gaol of the district, county, city, or town, until such person shall submit to such examination, or shall enter into such recognizance, or be discharged by due course of law: Provided that no such examination shall subject the party examined to any prosecution or penalty, or be given in evidence against such party, save on any indictment for having committed wilful and corrupt perjury in such examination.

Examinations, &c., to be delivered to the court.

3. And be it enacted, that every justice of the peace, before whom any person shall be taken on a charge of misdemeanor, or suspicion thereof, shall take the examination of the person charged, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing, before he shall commit to prison or require bail from the person so charged; and in every case of bailment, shall certify the bailment in writing, and shall have authority to bind all persons by recognizance to appear to prosecute or give evidence against the party accused in like manner as in cases of felony; and shall subscribe all examinations, informations, bailments, and recognizances, and deliver

Duty of justices on charges of misdemeanor.

(*i*) See Evans *v.* Rees. 12 A. & E. 55; for power of a justice to commit a witness for not appearing to enter into a recognizance, to give testimony.

or cause to be delivered the same to the proper officer of the court in which the trial is to be, before, or at the opening of the court, in like manner as in cases of felony, and that no traverse or other postponement of any trial thereupon had, shall be allowed except upon special cause shewn to the satisfaction of the said court or by consent of the prosecutor.

No traverse allowed.

4. And be it enacted, That every coroner, upon any inquisition taken before him, whereby any person shall be indicted for manslaughter or murder, or as an accessory to murder before the fact, shall, in presence of the party accused, if he can be apprehended, put in writing the evidence given to the jury before him, or as much thereof as shall be material, giving the party accused full opportunity of cross-examination; and shall have authority to bind by recognizance all such persons as know or declare any thing material touching the said manslaughter or murder, or the said offence of being accessory to murder, to appear at the next court of oyer and terminer, or gaol delivery, or other court at which the trial is to be, then and there to prosecute or give evidence against the party charged; and every such coroner shall certify and subscribe the same evidence, and all such recognizances, and also the inquisition before him taken, and shall deliver the same to the proper officer of the court in which the trial is to be, before, or at the opening of the court.

Duty of Coroner.

5. And be it enacted, That when and so often as any person shall be committed for trial by any justice or justices, or coroner as aforesaid, it shall and may be lawful for such prisoner, his counsel, attorney or agent, to notify the said committing justice or justices, or coroner, that he will so soon as counsel can be heard, move her Majesty's Court of Superior Jurisdiction for that part of the province in which such person stands committed, or one of the judges thereof, for an order to the justices of the peace, or coroner for the district where such prisoner shall be confined, to admit such prisoner to bail, whereupon it shall be the duty of such committing justice or justices, or coroner, with all convenient expedition, to

When party committed wishes to be bailed, the justices on notice thereof to forward all informations to Clerk of the Crown.

transmit to the office of the Clerk of the Crown, close under the hand and seal of one of them, a certified copy of all informations, examinations and other evidences, touching the offence wherewith such prisoner shall be charged, together with a copy of the warrant of commitment and inquest, if any such there be, and that the packet containing the same shall be handed to the person applying therefor, in order to such transmission, and it shall be certified on the outside thereof to contain the information touching the case in question.

Same orders to be made as in Habeas Corpus.

6. And be it enacted, That upon any application to her Majesty's Court of Superior Criminal Jurisdiction, for that part of the province within which such person stands committed, or to any judge thereof, the same order touching the prisoner being bailed or continued in custody, shall be made as if the party were brought up upon a habeas corpus.

Penalty on justices and Coroners.

7. And be it enacted, That if any justice or coroner shall neglect or offend in any thing contrary to the true intent and meaning of any of the provisions of this act, it shall be lawful for the court to whose officer any such examination, information, evidence, bailment, recognizance, or inquisition ought to have been delivered, and such court is hereby authorised and required, upon examination and proof of the offence, in a summary manner, to set such fine upon every such justice or coroner, as the court shall think meet.

Provisions to apply to all justices and coroners.

8. And be it enacted, That the provisions of this act relating to justices and coroners, shall apply to the justices and coroners, not only of districts and counties at large, but also of all other jurisdictions.

Persons tried for felony to have benefit of counsel.

9. And be it enacted, That all persons tried for felonies shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto by counsel, learned in the law, or by attorney in the courts where attornies practise as counsel. (*j*)

(*j*) If, in a case of felony, the prisoner's counsel has addressed the jury, the prisoner himself will not be allowed to ad-

Same in cases of summary conviction.

10. And be it enacted, that in all cases of summary conviction, persons accused shall be admitted to make their full answer and defence, and to have all witnesses examined and cross-examined by counsel or attorney. (*k*)

Orders for delivery of prisoners to be tried at Assizes.

11. And be it enacted that when and so often as the attendance of any person confined in any gaol or prison in this province, or upon the limits thereof, shall be required in any Court of Assize and Nisi Prius, or Oyer and Terminer or General Gaol Delivery, or other court, it shall and may be lawful for the court before whom such prisoners shall be required to attend, in its discretion to make order upon the sheriff, gaoler, or other person having the custody of such prisoner, to deliver such prisoner to the person named in such order to receive him, which person shall thereupon instantly convey such prisoner to the place where the court issuing such order shall be sitting, there to receive and obey such further order as to the said court shall seem meet: Provided always, that no prisoner confined for any debt or damages in any civil suit shall be thereby removed out of the district where he shall be confined.

Proviso.

Prisoners entitled to copies of depositions against them

12. And be it enacted, That all persons who, after the passing of this act, shall be held to bail or committed to prison for any offence against the law, shall be entitled to require and have on demand (from the person who shall have the lawful custody thereof, and who is hereby required to deliver the same) copies of the examinations of the witnesses, respectively, upon whose depositions they have been so held to bail, or committed to prison, on payment of a reasonable sum for the same, not exceeding three pence for each folio of one hundred words: Provided always, that if such demand shall not be made

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dress them also.—R. *v.* Boucher. 8 C. & P. 141; R. *v.* Rider. 8 C. & P. 531.

(*k*) As to the right of an attorney to be present on behalf of a prisoner on a preliminary examination on a charge of felony, before magistrates—See R. *v.* Borron. 3 B. & Ald. 432; Cox *v.* Coleridge. 1 B. & C. 37.

before the day appointed for the commencement of the assize or sessions at which the trial of the person on whose behalf such demand shall be made, is to take place, such person shall not be entitled to have any copy of such examination of witnesses, unless the judge or other person to preside at such trial shall be of opinion that such copy may be made and delivered without delay or inconvenience to such trial, but it shall, nevertheless, be competent for such judge or other person so to preside at such trial, if he shall think fit, to postpone such trial on account of such copy of the examination of witnesses not having been previously had by the party charged. (*l*)

Persons under trial may inspect all depositions.

13. And be it enacted, That all persons under trial shall be entitled, at the time of their trial, to inspect without fee or reward all depositions (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had.

14. And be it enacted, That if any person whatever,

(*l*) A magistrate is not bound by law to return all that is stated by the witnesses on a charge of felony, but only all what is material to the case; and though they ought to contain what was stated, that the prisoner may know what he has to answer, there is a difference between a witness at the trial adding to his deposition and contradicting it, and it seems that the chief object in granting the prisoner the depositions, was to guard against an attempt at such contradiction.—R. *v.* Coveney. 7 C. & P. 667, 817, 650. Where depositions are taken and returned by a coroner, the prisoner may obtain a copy of them. —R. *v.* Greenacre. 8 C. & P. 82. A prisoner is not entitled to a copy of his own statement returned by the magistrate, as made before him, but only to a copy of the depositions of the witnesses against him.—R. *v.* Aylett. 8 C. & P. 669. The depositions taken before a magistrate against a prisoner cannot be read against him, where the witness has died since the examination, unless the depositions in cross examination have been correctly taken and returned to court. Depositions taken in cross examination at a subsequent time to those in chief, and not signed by the committing magistrates, are so irregular as to prevent the whole depositions being read against the prisoner; and this although both are proved by one of the committing magistrates to have been correctly taken.—R. *v.* France. 2 M. & Rob. 207.

A plea of not guilty without more shall put the prisoner on his trial by jury.

being arraigned upon any indictment for treason, felony, or piracy, shall plead thereto a plea of "not guilty," such person shall by such plea, without any further form, be deemed to have put himself or herself upon the country for trial, and the court shall, in the usual manner, order a jury for the trial of such person accordingly. (*m*)

If he refuse to plead, the court may order a plea of "not guilty" to be entered.

15. And be it enacted, That if any person, being arraigned upon or charged with any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information, in every such case, it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of "not guilty" on behalf of such person; and the plea so entered shall have the same force and effect as if such person had actually pleaded the same.

Every challenge beyond the legal number shall be void.

16. And be it enacted, That if any person indicted for any treason, felony, or piracy, shall challenge peremptorily a greater number of the men returned to be of the jury than such person is entitled by law so to challenge, in any of the said cases, every peremptory challenge beyond the number allowed by law in any of the said cases, shall be entirely void, and the trial of such shall proceed as if no such challenge had been made. (*n*)

(*m*) A prisoner who has pleaded guilty to a charge of larceny, cannot, after sentence has been passed, be allowed to withdraw his plea, and plead not guilty.—R. *v.* Selbe. 9 C. & P. 346.

(*n*) If on the trial of a case of felony, the prisoner peremptorily challenge some of the jurors, and the counsel for the prosecution also challenge so many that a full jury cannot be had, the proper course is to call over the whole of the panel in the same order as before, only omitting those who have been peremptorily challenged by the prisoner: and as each juror then appears, for the counsel for the prosecution to state their cause of challenge, and if they have sufficient cause, and the prisoner does not challenge, for such juror to be sworn.—R. *v.* Geach. 9 C. & P. 499. It is no cause of challenge of a juror by the counsel for the prosecution, in a case of felony, that the juror is a client of the prisoner, who is an attorney. —*Ib.* In a case of felony, after a prisoner has challenged 20

17. And be it enacted, That no plea setting forth any attainder shall be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment. Attainder of another crime not pleadable.

18. And be it enacted, That where any person shall be indicted for treason or felony, the jury impanelled to try such person shall not be charged to enquire concerning his lands, tenements or goods, nor whether he fled for such treason or felony. Jury shall not inquire of prisoner's lands &c., nor whether he fled.

19. And be it enacted, That benefit of clergy with respect to persons convicted of felony shall be abolished; but that nothing herein contained shall prevent the joinder in any indictment of any counts which might have been joined before the passing of this act. Benefit of clergy abolished.

20. And be it enacted, That no person convicted of felony shall suffer death, unless it be for some felony which was excluded from the benefit of clergy by the law in force in that part of this province in which the trial shall be before the commencement of this act, or which shall be made punishable with death by some act passed after that day. What felonies only shall be capital.

21. And whereas it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital, who have undergone the punishment to which they were adjudged; Be it therefore enacted, that where any offender had been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effects and consequences as a pardon under the great seal as to the felony whereof the offender was so convicted: Provided always, that nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced, on a subsequent conviction for any other felony. Every punishment for felony after it has been endured shall have the effect of a pardon under the great seal.

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of the jurors peremptorily, he may still examine any others of the jurors who are subsequently called, as to their qualification.—*Ib.*

No misdemeanor (except perjury) shall render a party an incompetent witness after he has undergone the punishment.

22. And whereas there are certain misdemeanors which render the parties convicted thereof incompetent witnesses, and it is expedient to restore the competency of such parties after they have undergone their punishment; be it therefore enacted, that where any offender hath been or shall be convicted of any such misdemeanor (except perjury or subornation of perjury) and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, such offender shall not, after the punishment so endured, be deemed to be by reason of such misdemeanor an incompetent witness in any court or proceeding civil or criminal.

Clerk to be paid fees from public funds.

23. And be it enacted, that in all cases in which any person shall be charged with felony, the officers of the court before which such person shall be tried, or any proceeding had with regard to such charge, and who shall render any official services in the matter of such charge, or in the course of such trial, to the person so charged with felony, shall be paid their lawful fees for all such services out of the public funds, in the same manner as other fees due and payable to them in respect of official services by them rendered to the crown, in the conduct of public prosecutions, are now paid, and no such fees shall in any case be demanded of or payable by the person charged with such felony.

Felonies not capital, punishable under the Act relating thereto, otherwise under this Act.

24. And be it enacted, that every person convicted of any felony not punishable with death, shall be punished in the manner prescribed by the statute or statutes specially relating to such felony; and that every person convicted of any felony for which no punishment hath been or hereafter may be specially provided, shall be deemed to be punishable under this act, and shall be liable, at the discretion of the court, to be imprisoned at hard labour in the provincial penitentiary for any term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years.*

* See 5 & 6 Vic. ch. 5.

Persons returning from transportation may be tried where found, &c.

25. And be it enacted, that if any person sentenced or ordered, or hereafter to be sentenced or ordered, to be transported, or who shall have agreed or shall agree to transport or banish himself or herself on certain conditions, either for life or for any number of years, shall be afterwards at large within any part of this province, contrary to such sentence, order, or agreement, without some lawful cause, before the expiration of his or her term of transportation or banishment, every such offender shall be guilty of felony, and shall be liable to be transported beyond the seas, for his or her natural life, and previously to transportation, shall be imprisoned for any term not exceeding four years; and every such offender may be tried either in the district, county, or place where such offender shall be found at large, or in the district, county, or place in or at which such sentence or order of transportation or banishment was passed or made.

Allegation of sentence, &c. of transportation sufficient, without reference to indictment.

26. And be it enacted, that in any indictment or information against any offender for being at large in this province contrary to the provisions of this act, or of any other act hereafter to be in force in this province, it shall be sufficient to allege the sentence or order of transportation or banishment of such offender, without alleging any indictment, information, trial, conviction, judgment, or other proceeding, or any pardon or intention of mercy, or signification thereof, of or against or in any manner relating to such offender.

Certificate of the sentence, by the clerk of the court, sufficient evidence, &c.

27. And be it enacted, that the clerk of the court or other officer having the custody of the records of the court where any such sentence or order of transportation or banishment shall have been passed or made, or his deputy, shall, at the request of any person on behalf of her Majesty, make out and give a certificate in writing, signed by him, containing the effect and substance only (omitting the formal part) of any indictment, information, and conviction of such offender, and of the sentence or order for his or her transportation or banishment, (not taking for the same more than the sum of five shillings,) which certificate shall be sufficient evidence of the con-

viction and sentence or order for the transportation or banishment of such offender; and every such certificate shall be received in evidence, upon proof of the signature of the person signing the same.

The court may order hard labour or solitary confinement as part of the sentence of imprisonment.

28. And be it enacted, that where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour in the common gaol, or house of correction, and also to direct that the offender shall be kept in solitary confinement, for any portion or portions of the term of such imprisonment or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court, in its discretion, shall seem meet.

If a person under sentence for another crime is convicted of felony the court may pass a second sentence to commence after the expiration of the first.

29. And be it enacted, that whenever sentence shall be passed for felony on a person already imprisoned under sentence for another crime, it shall be lawful for the court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced; and where such person shall be already under sentence of imprisonment, the court may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced, although the aggregate term of imprisonment may exceed the term for which such punishment could be otherwise awarded.

Punishment for a subsequent offence.

30. And whereas it is expedient to provide for the more exemplary punishment of offenders who commit felony after a previous conviction for felony, whether such conviction shall have taken place before or after the commencement of this act; be it therefore enacted, that if any person shall be convicted of any felony not punishable with death, committed after a previous conviction for felony, such person shall on such subsequent conviction be liable, at the discretion of the court, to be imprisoned at hard labour in the provincial penitentiary for any

term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years; and in any indictment for any such felony committed after a previous conviction for felony, it shall be sufficient to state that the offender was at a certain time and place convicted of felony, without otherwise describing the previous felony; and a certificate containing the substance and effect only, (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings and no more, shall be demanded or taken,) shall upon proof of the identity of the person of the offender be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same; and if any such clerk, officer, or deputy shall utter any false certificate of any indictment and conviction for a previous felony, or of any sentence or order of transportation or banishment, or if any person, other than such clerk, officer, or deputy, shall sign any such certificate as such clerk, officer or deputy, or shall utter any such certificate with a false or counterfeit signature thereto, every such offender shall be guilty of felony, and being lawfully convicted thereof, shall be liable, at the discretion of the court, to be imprisoned at hard labour in the provincial penitentiary for any term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years.

Punishment of the pillory abolished.

31. And whereas it is expedient to abolish the punishment of the pillory; Be it therefore enacted, That from and after the commencement of this act, judgment shall not be given and awarded against any person or persons convicted of any offence, that such person or persons do stand in or upon the pillory, any law, statute or usage to the contrary notwithstanding: Provided, that nothing herein contained shall extend or be construed to extend

in any manner to change, alter or affect any punishment whatever, which may now be by law inflicted in respect of any offence, excepting only the punishment of the pillory.

No report to be made to the Governor of the case of any capital convict.

32. And be it enacted, That from and after the commencement of this act, it shall not be necessary that any report should be made to the governor, lieutenant-governor, or person administering the government, in the case of any prisoner convicted before any court and now under sentence of death, or who may be hereafter convicted before any court and sentenced to the like punishment, previously to such sentence being carried into execution; any law, usage orcustom to the contrary notwithstanding.

The court may abstain from pronouncing judgment on persons convicted of crimes liable to the punishment of death; and order the same to be entered of record.

33. And be it enacted, That whenever any offender shall hereafter be convicted before any court of criminal judicature, of any crime for which such offender shall be liable to the punishment of death, and the court shall be of opinion that, under the particular circumstances of the case, such offender is a fit and proper subject to be recommended for the royal mercy, it shall and may be lawful for such court, if it shall think fit so to do, to direct the proper officer, then being present in the court, to require and ask (whereupon such officer shall require and ask), whether such offender hath or knoweth any thing to say why judgment of death should not be recorded against such offender, and in case such offender shall not allege any matter or thing sufficient in law to arrest or bar such judgment, the court shall and may, and is hereby authorized to abstain from pronouncing judgment of death upon such offender, and instead of pronouncing such judgment to order the same to be entered of record, and thereupon such proper officer as aforesaid shall and may and is hereby authorised to enter judgment of death on record against such offender in the usual and accustomed form, and in such and the same manner as is now used, and as if judgment of death had actually been pronounced in open court against such offender by the court.

34. And be it enacted, That a record of every such

judgment, so entered as aforesaid, shall have the like effect to all intents, and be followed by all the same consequences as if such judgment had actually been pronounced in open court. Such record to have the same effect as if pronounced.

35. And be it enacted, That whenever any offender shall hereafter be convicted before any court of criminal judicature, of any offence for which such offender shall be liable to and shall receive sentence of death, and the court shall be of opinion that, under the circumstances of the case, the judgment of the law ought to be carried into effect, it shall be lawful for the said court, and such court is hereby required, to order and direct execution to be done on such offender in the same manner as any court is empowered to order and direct execution by the law as it stood before the passing of this act. Court to direct execution in certain cases.

36. Provided always, and be it enacted, that nothing in this act contained shall affect her Majesty's royal prerogative of mercy. Not to affect the royal prerogative.

37. And for the more effectual prosecution of accessories before the fact to felony, Be it enacted, that if any person shall counsel, procure or command any other person to commit any felony, whether the same be a felony at common law, or by virtue of any statute or statutes made or to be made, the person so counselling, procuring, or commanding, shall be deemed guilty of felony, and may be indicted and convicted as an accessory before the fact to the principal felony, either together with the principal felon, or after the conviction of the principal felon, (*o*) or may be indicted for and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if Accessory before the fact may be tried as such, or as a substantive felon, by any court which has jurisdiction to try the principal felon, although the offence be committed on the seas or abroad.

(*o*) This statute only applies where the accessary might at common law have been indicted with or without the conviction of the principal, and therefore where a defendant was indicted as accessary before the fact to the murder of S. N., she having by his procurement killed herself, it was holden that the statute did not apply.—R. *vs.* Russell, 1 Mood. C. C. 356.

convicted as an accessory, may be punished; and the offence of the person so counselling, procuring, or commanding, howsoever indicted, may be inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if such offence had been committed at the same place as the principal felony, although such offence may have been committed either on the high seas or at any place on land, whether within her Majesty's dominions or without; and in case the principal felony shall have been committed within the body of any district or county, and the offence of counselling, procuring, or commanding shall have been committed within the body of any other district or county, the last mentioned offence may be inquired of, tried, determined, and punished in either of such districts or counties: Provided always, that no person who shall be once duly tried for any such offence, whether as an accessory before the fact, or as for a substantive felony, shall be liable to be again indicted or tried for the same offence.

If the offence be committed in different districts and counties, accessory may be tried in either.

38. And for the more effectual prosecution of accessories after the fact of felony, Be it enacted, that if any person shall become an accessory after the fact to any felony, whether the same be a felony at common law, or by virtue of any statute or statutes made or to be made, the offence of such person may be inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if the act by reason whereof such person shall have become an accessory had been committed at the same place as the principal felony, although such act may have been committed either on the high seas, or at any place on land, whether within her Majesty's dominions or without; and in case the principal felony shall have been committed within the body of any district or county, and the act by reason whereof any person shall have become accessory, shall have been committed within the body of any other district or county, the offence of such accessory may be enquired of, tried, determined, and punished in either of such districts or counties; Provided always, that

Accessory after the fact may be tried by any court which has jurisdiction to try the principal felon.

If the offence be committed in different districts or counties, accessory may be tried in either.

no person who shall be once duly tried for any offence of being an accessory shall be liable to be again indicted or tried for the same offence.

Accessory may be prosecuted after conviction of the principal, though the principal be not attainted.

39. And in order that all accessories may be convicted and punished in cases where the principal felon is not attainted, Be it enacted, that if any principal offender shall be in anywise convicted of any felony, it shall be lawful to proceed against any accessory either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon shall die, or be pardoned, or otherwise delivered before attainder; and every such accessory shall suffer the same punishment, if such accessory be in anywise convicted, as such accessory should have suffered if the principal had been attainted.

Offences committed on the boundaries of districts and counties may be tried in either.

40. And for the more effectual prosecution of offences committed near the boundaries of districts or of counties, or partly in one district or county and partly in another, Be it enacted, that where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more districts or counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one district or county and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any of the said districts or counties, in the same manner as if it had been actually and wholly committed therein. *(p)*

(p) This enactment, with respect to boundaries, means a distance of 500 yards measured in a direct line from the border, and not 500 yards by the nearest road.—Reg. *vs.* Wood. 5 Jur. 225. An indictment against a constable of the borough of Stamford, preferred at the quarter sessions for the borough, charged "that F. M. late of &c. in the county of Northampton, and within the borough of Stamford, constable, &c. with force and arms, at the parish aforesaid, in the borough aforesaid," did make an assault. The defendant traversed, and subsequently removed the indictment by certiorari into the Court of Queen's Bench; and a venire was awarded to the sheriff of Lincolnshire. At the trial, the defendant objected, that the indictment could not be tried by a jury of the county of Lincoln. The judge allowed the trial to proceed, reserving to

Offences committed during a journey or voyage, may be tried in any county or district through which the coach, &c. passed.

41. And for the more effectual prosecution of offences committed during journies from place to place, Be it enacted, that where any felony or misdemeanor shall be committed on any person, or on or in respect of any property, in or upon any coach, waggon, cart, or other carriage, whatever, employed in any journey, or shall be committed on any person, or on or in respect of any property, on board any vessel whatever employed in any voyage or journey upon any navigable river, canal, or inland navigation, such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any district or county through any part whereof such coach, waggon, cart, carriage, or vessel shall have passed in the course of the journey or voyage, during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such district or county; and in all cases where the side, centre or other part of any highway, or the side, bank, centre or other part of any such river, canal, or navigation, shall constitute the boundary of any two districts or counties, such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in either of such districts or counties, through or adjoining to or by the boundary of any part whereof such coach, waggon, cart, carriage, or vessel shall have passed in the course of the journey or voyage, during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such district or county.

When sides, &c. of highway constitute boundary, offender may be tried in either district or county.

42. And in order to remove the difficulty of stating the names of all the owners of property, in the case of partners and other joint owners, Be it enacted, that in any indictment or information for any felony or misde-

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the defendant the benefit of the objection in the court above, and the jury found the defendant guilty. It appeared that the assault was committed within 500 yards of the boundary of the counties of Northampton and Lincoln. Held, that the indictment stated the offence to have been committed in the county of Northampton; that the trial was therefore had without jurisdiction; and that the judgment must be arrested.—Reg. *vs.* Mitchell. 2 Gale & D. 274.

meanor, wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to or be in the possession of more than one person, whether such persons be partners in trade, joint tenants, parceners or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named and another or others, as the case may be; and whenever in any indictment or information for any felony or misdemeanor, it shall be necessary to mention for any purpose whatsoever, any partners, joint tenants, parceners, or tenants in common, it shall be sufficient to describe them in the manner aforesaid; and this provision shall be construed to extend to all joint-stock companies and trustees. (*q*)

In indictments for offences committed on the property of partners, it may be laid in any one partner by name, and others.

43. And be it enacted, that in any indictment or information for any felony or misdemeanor committed in, upon, or with respect to any church, chapel, or place of religious worship, or to any bridge, court, court-house, gaol, house of correction, penitentiary, infirmary, asylum, or other public building, or any canal, lock, drain or sewer erected or maintained in whole or in part at the expense of the Province, or of any division or sub-division thereof, or on or with respect to any materials, goods, or chattels, whatsoever, provided for or at the expense of the Province, or of any division or sub-division thereof, to be used for making, altering or repairing any bridge or highway, or any court or other such building, canal, lock, drain, or sewer as aforesaid, or to be used in or with any such court or other building, canal, lock, drain, or sewer, it shall not be necessary to state such church, chapel, or place of religious worship, or such bridge, court, court-house, gaol, house of correction, penitentiary, infirmary, asylum, or other building, or such canal, lock, drain, or sewer, or any such materials, goods, or chattels to be the property of any person.

In indictments for felonies, &c. relating to churches, bridges, or public buildings, property need not be stated as being in any person.

(*q*) If the property be laid in "A. B. and others," and A. B. be proved to be in partnership with one other only, the defendant must be acquitted.— Arch. Crim. Law. 30.

Property of turnpike trustees may be laid in trustees, &c.

44. And with respect to property under turnpike trusts, Be it enacted that in any indictment or information for any felony or misdemeanor, committed on or with respect to any house, building, gate, machine, lamp, board, stone, post, fence or other thing erected or provided, in pursuance of any act in force in this Province, for making any turnpike road, or of any conveniences or appurtenances thereunto respectively belonging, or any materials, tools or implements provided for making, altering, or repairing any such road, it shall be sufficient to state any such property to belong to the trustees or commissioners of such road, and it shall not be necessary to specify the names of any such trustees or commissioners.

Indictments not to abate by dilatory plea of misnomer, &c.

45. And for preventing abuses from dilatory pleas, Be it enacted, that no indictment or information shall be abated by reason of any dilatory plea of misnomer, or of want of addition, or of wrong addition of any party offering such plea, if the court shall be satisfied, by affidavit or otherwise, of the truth of such plea; but in such case the court shall forthwith cause the indictment or information to be amended according to the truth, and shall call upon such party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded.

What defects shall not vitiate an indictment after verdict or otherwise.

46. And in order that the punishment of offenders may be less frequently intercepted in consequence of technical niceties, Be it enacted, that no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved, nor for the omission of the words, "as appears by the record," or of the words, "with force and arms," or of the words "against the peace," nor for the insertion of the words "against the form of the statute," instead of the words "against the form of the statutes," or vice versa, nor for that any person or persons mentioned in the indictment or information is or are designated by a name of office or other descriptive appellation, instead of

his, her or their proper name or names, nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or exhibiting the information, or on an impossible day, or on a day that never happened, nor for a want of a proper or perfect venue, where the court shall appear by the indictment or information to have had jurisdiction over the offence.

Certain formal defects shall not stay or reverse judgment after verdict.

47. And be it enacted, that no judgment after verdict upon any indictment or information for any felony or misdemeanor, shall be stayed or reversed for want of a similiter, nor by reason that the jury process has been awarded to a wrong officer upon an insufficient suggestion, nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors, nor because any person has served upon the jury who has not been returned as a juror by the sheriff or other officer; and that where the offence charged shall be an offence theretofore created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy, by any statute, the indictment or information shall after verdict be held sufficient if it describe the offence in the words of the statute creating the offence, or prescribing the punishment, or excluding the offender from the benefit of clergy.

Effect of a free or conditional pardon of a convict.

48. And be it declared and enacted, that where the Queen's Majesty, or the Governor, Lieutenant Governor, or person administering the government of this province for the time being, shall be pleased to extend the royal mercy to any offender convicted of any felony, punishable with death or otherwise, and by warrant under the royal sign manual, countersigned by one of the principal secretaries of state, or by warrant under the hand and seal at arms of such governor, lieutenant-governor, or person administering the government as aforesaid, shall grant to such offender either a free or a conditional pardon, the discharge of such offender out of custody, in case of a

free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon under the great seal for such offender, as to the felony for which such pardon shall have been granted: Provided always, that no free pardon, or any such discharge in consequence thereof, nor any conditional pardon, nor the performance of the condition thereof, in any of the cases aforesaid, shall prevent or mitigate the punishment to which the offence might otherwise be lawfully sentenced, on a subsequent conviction for any felony committed after the granting of any such pardon.

Recognizances in certain cases not to be estreated without a judge's order.

49. And whereas the practice of indiscriminately estreating recognizances for the appearance of persons to prosecute or give evidence, or to answer for a common assault, or in the other cases hereinafter specified, has been found in many instances productive of hardship to persons who have entered into such recognizances: Be it therefore enacted, that in every case where any person bound by recognizance for his or her appearance (or for whose appearance any other person shall be so bound) to prosecute or give evidence in any case of felony or misdemeanor, or to answer for any common assault, or to articles of the peace, shall therein make default, the officer of the court by whom the estreats are made out, shall, and such officer is hereby required to prepare a list in writing, specifying the name of every person so making default, and the nature of the offence in respect of which every such person, or his or her surety was so bound, together with the residence, trade, profession, or calling of every such person and surety, and shall in such list distinguish the principals from the sureties, and shall state the cause, if known, why each such person has not appeared, and whether by reason of the non-appearance of such person, the ends of justice have been defeated or delayed; and every such officer shall, and such officer is hereby required, before any such recognizance shall be estreated, to lay such list, if at a court of oyer and terminer or gaol delivery in any district or county, or at any of her Majesty's superior courts of record in this pro-

vince, before one of the justices of those courts, respectively, or if at a session of the peace, before two of the justices of the peace, who shall have attended such courts, who are respectively authorised and required to examine such list, and to make such order touching the estreating or putting in process any such recognizance as shall appear to them, respectively, to be just; and it shall not be lawful for the officer of any court to estreat or put in process any such recognizance without the written order of the justice or justices of the peace before whom respectively such list shall have been laid.

Rule for the interpretation of this and all criminal acts.

50. And be it enacted, that wherever in this act or in any other act relating to any offence, whether punishable upon indictment or summary conviction, in describing or referring to the offence or the subject matter on or with respect to which it shall be committed, or the offender or the party affected or intended to be affected by the offence, any word or words have been or shall be used or employed importing the singular number or the masculine gender only, every such act shall be understood to include several matters of the same kind, as well as one matter, and several persons as well as one person, and females as well as males, and bodies corporate as well as individuals, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction; and wherever any forfeiture or penalty is or shall be made payable to a party aggrieved, it shall be payable to a body corporate in every case where such a body shall be the party aggrieved.

All acts repugnant to this act repealed.

51. And be it enacted, that all acts or parts of acts or provisions of law in force in this province, or any part thereof, immediately before the time when this act shall come into force, which shall be inconsistent with or contradictory to this act, or which make any provision in any matter provided for by this act, other than such as is hereby made in such matter, shall from and after the time when this act shall come into force, be and they are hereby repealed, except in so far as may relate to any offence committed before the commencement of this act,

which shall be dealt with and punished as if this act had not been passed.

From what period the imprisonment is to be reckoned.

52. And be it enacted, that the period of imprisonment in the provincial penitentiary, in pursuance of any sentence passed under this act or under any other act relating to the punishment of offences by confinement and imprisonment in the provincial penitentiary, shall be held to commence from the period of passing such sentence, whether the convict upon whom such sentence shall be passed shall be removed to the said Provincial Penitentiary forthwith, or be detained in custody in any other prison or place of confinement, previously to such removal.

Commencement of this act.

53. And be it enacted, that this act shall commence and take effect from and after the first day of January one thousand eight hundred and forty two.

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4 & 5. Vic. ch. 25.

An Act for consolidating and amending the laws in this province, relative to larceny and other offences connected therewith (r).

Preamble.

Whereas it is expedient to amend and consolidate the provisions contained in various statutes now in force in this province, relative to larceny and other offences of stealing, and to burglary, robbery, and threats for the purpose of robbery or extortion, and to embezzlement, false pretences, and receipt of stolen property; Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Legislative Council and of the Legislative Assembly of the Province of Canada, constituted and assembled by virtue of and under the authority of an act passed in the parliament of the United Kingdom of Great Britain and Ireland, intituled an act to re-unite the provinces of Upper and Lower Canada, and for the government of Canada; and it is hereby enacted by the authority of the same, that

Commencement of this act.

(r) The act 5 & 6 Vic. ch. 5. changes the punishment directed to be inflicted in many cases by this act.

this act shall commence from and after the first day of January, one thousand eight hundred and forty two.

Distinction between grand and petty larceny abolished; all larceny shall be considered as grand larceny.

2. And be it enacted, that the distinction between grand larceny and petty larceny shall be abolished; and every larceny, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects, as grand larceny was before the commencement of this act; and every court whose power as to the trial of larceny was, before the commencement of this act, limited to petty larceny, shall have power to try every case of larceny, the punishment of which cannot exceed the punishment hereinafter mentioned for simple larceny, and also to try all accessories to such larceny. (*s*)

Punishments for simple larceny, or felony punishable as such.

3. And be it enacted, that every person convicted of simple larceny, or of any felony hereby made punishable like simple larceny, shall (except in cases hereinafter otherwise provided for) be liable, at the discretion of the court, to be imprisoned at hard labour in the Provincial Penitentiary for any term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years.

For all offences under this act, hard labour or solitary confinement may be added to imprisonment.

4. And with regard to the place and mode of imprisonment for all indictable offences punishable under this act;—Be it enacted, that where any person shall be convicted of any felony or misdemeanor punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be im-

(*s*) There is such an unity of interest between husband and wife, that ordinarily the wife cannot steal the goods of the husband, nor can an indifferent person steal the goods of the husband by the delivery of the wife: and if the wife deliver the goods of the husband to an indifferent person, for that person to convert them to his own use, this is no larceny, but if the person to whom the goods are delivered by the wife, be an adulterer, it is otherwise, and an adulterer can be properly convicted of stealing the husband's goods, though they be delivered to him by the wife; and it is as much a larceny to steal her clothes, which are her husband's property, as it would be to steal any thing else that is his property—R. *vs.* Tollett. 1 Car. & M. 112.

prisoned, or to be imprisoned and kept to hard labour, in the common Gaol, or House of Correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet.

Stealing public or private securities for money, or warrants for goods, &c. shall be felony, punishable according to the circumstances, as stealing goods.

5. And be it enacted, that if any person shall steal any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this Province or of the United Kingdom of Great Britain and Ireland, or of any British colony, or of any foreign state or colony, or in any fund of any body corporate, company or society, or to any deposit in any Savings Bank, or shall steal any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever, for money or for payment of monies, whether of this province or of Great Britain, or of any British Colony, or of any foreign state or colony, or shall steal any warrant or order for the delivery or transfer of any goods or valuable thing, every such offender shall be deemed guilty of felony, of the same nature and in the same degree, and punishable in the same manner, as if he had stolen any chattel of like value with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing mentioned in the warrant or order; and each of the several documents hereinbefore enumerated, shall, throughout this act, be deemed for every purpose to be included under, and denoted by the words "valuable security."

Rule of interpretation.

Punishment of robbery attended with cutting, &c.

6. And be it enacted, that whosoever shall rob any person, and at the time of or immediately before or immediately after such robbery, shall stab, cut, or wound any person, shall be guilty of felony, and being convicted thereof shall suffer death.

Of Robbery attended with violence.

7. And be it enacted, that whosoever shall, being armed with any offensive weapon or instrument, rob, or assault with intent to rob any person, or shall, together with one or more person or persons, rob, or assault with intent to rob any person, or shall rob any person, and at the time of or immediately before or immediately after such robbery, shall beat, strike, or use any other personal violence to any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned at hard labour in the Provincial Penitentiary for the term of his natural life, or for any term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years.

Punishment for obtaining property by threat of accusing of unnatural crimes.

8. And be it enacted, that whosoever shall accuse or threaten to accuse, any person of the abominable crime of buggery, committed either with mankind or with beast, or of any assault with intent to commit the said abominable crime, or of any attempt or endeavour to commit the said abominable crime, or of making or offering any solicitation, persuasion, promise, or threat to any person whereby to move or induce such person to commit or permit the said abominable crime, with a view or intent in any of the cases aforesaid, to extort or gain from such person, and shall by intimidating such person by such accusation or threat, extort or gain from such person, any property, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned at hard labour in the Provincial Penitentiary for the term of his natural life, or for any term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years.

Punishment of stealing from the person.

9. And be it enacted, that whosoever shall rob any person, or shall steal any chattel, money, or valuable security from the person of another, shall be liable, at the discretion of the court, to be imprisoned at hard labour in the Provincial Penitentiary for any term not exceeding

fourteen years nor less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years.

Punishment for assault with intent to rob.

10. And be it enacted, that whosoever shall assault any person with intent to rob, shall be guilty of felony, and being convicted thereof shall (save and except in cases where a greater punishment is provided by this act) be liable to be imprisoned for any term not exceeding three years.

Attempting to obtain property by menaces.

11. And be it enacted, that whosoever shall, with menaces or by force, demand any chattel, money, or valuable security, of any person with intent to steal the same, shall be guilty of felony, and being convicted thereof, shall be liable to be imprisoned for any term not exceeding three years.

Sending letter containing menacing demands, to extort money, &c.

12. And be it enacted, that if any person shall knowingly send or deliver any letter or writing, demanding of any person with menaces, and without any reasonable or probable cause, any chattel, money, or valuable security; or if any person shall accuse, or threaten to accuse, or shall knowingly send or deliver any letter or writing, accusing or threatening to accuse any person of any crime punishable by law with death, or transportation, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit rape, with a view or intent to extort or gain from such person any chattel, money or valuable security, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned at hard labour at the Provincial Penitentiary for any term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years.

Sacrilege when capital.

13. And be it enacted, that if any person shall break and enter any church or chapel, and steal therein any chattel, or having stolen any chattel, money, or valuable security in any church or chapel shall break out of the same, every such offender being convicted thereof, shall be liable to be imprisoned at hard labour at the Provin-

cial Penitentiary for any term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years. (*t*)

14. And be it enacted, that whosoever shall burglariously break and enter into any dwelling house, and shall assault with intent to murder any person being therein, or shall stab, cut, wound, beat, or strike any such person, shall be guilty of felony, and being convicted thereof shall suffer death. Burglars using violence to suffer death.

15. And be it enacted, that whosoever shall be convicted of the crime of burglary shall be liable, at the discretion of the court, to be imprisoned at hard labour in the Provincial Penitentiary for the term of his natural life, or for any term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years. Punishment of burglars.

16. Provided always, and be it enacted, that so far as the same is essential to the offence of burglary, the night shall be considered and is hereby declared to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day: And it is hereby declared that if any person shall enter the dwelling house of another with intent to commit felony, or being in such dwelling house, shall commit any felony, and shall in either case break out of the said dwelling house in the night time, such person shall be deemed guilty of burglary. When breaking into a house considered burglary. Burglary.

17. And be it enacted, that whosoever shall steal any chattel, money or valuable security in any dwelling house, and shall by any menace or threat put any one, being therein, in bodily fear, shall be guilty of felony, and being convicted thereof, shall be liable to be imprisoned at hard labour in the Provincial Penitentiary for any term not Stealing in a dwelling house with menaces.

(*t*) The vestry of a parish church was broken open and robbed. It was formed out of what before had been the church porch, but had a door opening into the church yard, which could only be unlocked from the inside: Held, that this vestry was part of the fabric of the church, and within the meaning of an indictment for sacrilegiously breaking and entering the church. R. *vs.* Evans, 1 C. & M. 298.

exceeding fourteen years nor less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years.

What buildings only are part of a house for capital purposes.

18. Provided always, and be it enacted, that no building, although within the same curtilage with the dwelling house, and occupied therewith, shall be deemed to be part of such dwelling house for the purpose of burglary, or for any of the purposes aforesaid, unless there shall be a communication between such building and dwelling house, either immediate, or by means of a covered and inclosed passage leading from the one to the other.

Robbery in any building within the same curtilage as the house, but not privileged as part of the house.

19. And be it enacted, that if any person shall break and enter any building, and steal therein any chattel, money, or valuable security, such building being within the curtilage of a dwelling house, and occupied therewith, but not being part thereof, according to the provision hereinbefore mentioned, every such offender, being convicted thereof, (either upon an indictment for the same offence, or upon an indictment for burglary, house breaking, or stealing to the value of five pounds sterling, in a dwelling house, containing a separate count for such offence,) shall be liable to be imprisoned at hard labour in the Provincial Penitentiary for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years.

Robbery in a shop, warehouse, &c.

20. And be it enacted, that if any person shall break and enter any shop, warehouse, or counting house, and steal therein any chattel, money, or valuable security, every such offender, being convicted thereof, shall be liable to any of the punishments which the court may award as hereinbefore last mentioned.

Stealing goods from a vessel in a port, river, or canal, &c.

21. And be it enacted, that if any person shall steal any goods or merchandize in any vessel, barge, or boat of any description whatsoever, in any port of entry or discharge, or upon any navigable river or canal, or in any creek belonging to or communicating with any such port, river, or canal, or shall steal any goods or merchandize from any dock, wharf, or quay, adjacent to any such port,

river, canal, or creek, every such offender, being convicted thereof, shall be liable to any of the punishments which the court may award as hereinbefore last mentioned.

Punishment for wrecking.

22. And be it enacted, that whosoever shall plunder or steal any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandize, or articles of any kind belonging to such ship or vessel, and be convicted thereof, shall be liable, at the discretion of the court, to be imprisoned at hard labour in the Provincial Penitentiary for any term not exceeding fourteen years nor less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years.

Persons in possession of shipwrecked goods, not giving a satisfactory account, shall pay a penalty.

23. And be it enacted, that if any goods, merchandize, or articles of any kind, belonging to any ship or vessel in distress, or wrecked, stranded, or cast on shore, as aforesaid, shall, by virtue of a search-warrant, to be granted as hereinafter mentioned, be found in the possession of any person, or on the premises of any person with his knowledge, and such person being carried before a justice of the peace, shall not satisfy the justice that he came lawfully by the same, then the same shall, by order of the justice, be forthwith delivered over to, or for the use of, the rightful owner thereof; and the offender, on conviction of such offence before the justice, shall forfeit and pay such sum of money, not exceeding twenty pounds, as to the justice shall seem meet.

If any person offer shipwrecked goods for sale, the goods may be seized, &c.

24. And be it enacted, that if any person shall offer or expose for sale any goods, merchandize, or articles whatsoever, which shall have been unlawfully taken, or reasonably so suspected so to have been, from any ship or vessel in distress, or wrecked, stranded, or cast on shore as aforesaid, in every such case any person to whom the same shall be offered for sale, or any officer of the customs, or peace officer, may lawfully seize the same, and shall with all convenient speed carry the same, or give notice of such seizure, to some justice of the peace; and if the person who shall have offered or exposed the same for sale, being duly summoned by such justice, shall not appear and satisfy the justice that he came law-

fully by such goods, merchandize, or articles, then the same shall, by order of the justice, be forthwith delivered over to, or for the use of the rightful owner thereof, upon payment of a reasonable reward, (to be ascertained by the justice,) to the person who seized the same; and the offender, on conviction of such offence by the justice, shall forfeit and pay such sum of money not exceeding twenty pounds, as to the justice shall seem meet.

The stealing, &c., of records and other proceedings of courts of justice, &c.

25. And be it enacted, that if any person shall steal or shall for any fraudulent purpose take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterate, injure, or destroy any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or any original document whatsoever, of or belonging to any court of justice, or relating to any matter, civil or criminal, begun, depending or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order or decree, or any original document whatsoever, of or belonging to any court, or relating to any cause, or matter begun, depending, or terminated in any such court, or any notarial minute, or the original of any other authentic act, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned at hard labour in the provincial penitentiary for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; and it shall not in any indictment for such offence be necessary to allege that the article, in respect of which the offence is committed, is the property of any person, or that the same is of any value.

The stealing, &c., of wills.

26. And be it enacted, that if any person shall, either during the life of the testator or testatrix, or after his or her death, steal, or for any fraudulent purpose destroy or conceal, any will, codicil, or other testamentary instru-

ment, whether the same shall relate to real or personal estate, or to both, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to any of the punishments which the court may award, as hereinbefore last mentioned; and it shall not in any indictment for such offence be necessary to allege that such will, codicil, or other instrument, is the property of any person, or that the same is of any value.

The stealing of writings relative to real estates.

27. And be it enacted, that if any person shall steal any original paper or parchment, written or printed, or partly written and partly printed, being evidence of the title, or of any part of the title to any real estate, every such offender shall be deemed guilty of a misdemeanor, and, being convicted thereof, shall be liable to any of the punishments which the court may award, as hereinbefore last mentioned; and in any indictment for such offence, it shall be sufficient to allege the thing stolen to be evidence of the title, or of part of the title, of the person or of some one of the persons having a present interest, whether legal or equitable, in the real estate to which the same relates, and to mention such real estate or some part thereof; and it shall not be necessary to allege the thing stolen to be of any value.

These provisions as to wills and writings shall not lessen any other remedy.

28. Provided always, and be it enacted, that nothing in this act contained relating to either of the misdemeanors aforesaid, nor any proceeding, conviction or judgment, to be had or taken thereupon, shall prevent, lessen or impeach any remedy at law or equity, which any party aggrieved by any such offence, might or would have had if this act had not been passed; but, nevertheless, the conviction of any such offender shall not be received in evidence in any action at law or suit in equity against him; and no person shall be liable to be convicted of either of the misdemeanors aforesaid, by any evidence whatever, in respect of any act done by him, if he shall at any time previously to his being indicted for such offence, have disclosed such act, on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have

Conviction shall not be evidence in actions against offender.

Offender shall not be convicted by evidence disclosed by himself.

been *bona fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt.

Stealing horses, cows, sheep, &c.

29. And be it enacted, that if any person shall steal any horse, mare, gelding, colt or filly, or any bull, cow, ox, heifer or calf, or any ram, ewe, sheep or lamb, or shall wilfully kill any of such cattle with intent to steal the carcase, or skin, or any part of the cattle so killed, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned at hard labour in the provincial penitentiary for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years.

Stealing dogs, or stealing beasts or birds ordinarily kept in confinement, and not the subjects of larceny.

30. And be it enacted, that if any person shall steal any dog, or shall steal any beast or bird ordinarily kept in a state of confinement, not being the subject of larceny at common law, every such offender, being convicted thereof before a justice of the peace, shall for every such offence forfeit and pay, over and above the value of the dog, beast or bird, such sum of money not exceeding five pounds, as to the justice shall seem meet.

Stealing trees, shrubs, &c. wheresoever growing.

31. And be it enacted, that if any person shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the stealing of such article or articles, or the injury done, being to the amount of a shilling at the least, every such offender, being convicted before a justice of the peace, shall for every such offence forfeit and pay over and above the value of the article or articles stolen, or the amount of the injury done, such a sum of money, not exceeding five pounds, as to the justice shall seem meet.

Stealing, &c. any live or dead fence, wooden fence, stile or gate.

32. And be it enacted, that if any person shall steal, or shall cut, break, or throw down with intent to steal any part of any live or dead fence, or any wooden post, pale, or rail, set up or used as a fence, or any stile or gate,

or any part thereof, respectively, every such offender, being convicted before a justice of the peace, shall for every such offence forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet.

Suspected persons in possession of wood, &c., not satisfactorily accounting for it.

33. And be it enacted, that if the whole or any part of any tree, sapling, or shrub, or any underwood, or any part of any live or dead fence, or any post, pale, rail, stile, or gate, or any part thereof, being of the value of two shillings at the least, shall, by virtue of a search warrant, to be granted as hereinafter mentioned, be found in the possession of any person, or on the premises of any person with his knowledge, and such person, being carried before a justice of the peace, shall not satisfy the justice that he came lawfully by the same, he shall on conviction by the justice, forfeit and pay, over and above the value of the article or articles so found, any sum not exceeding two pounds.

Stealing, &c. of any vegetable production in a garden, &c., punishable on summary conviction.

34. And be it enacted, that if any person shall steal, or shall destroy, or damage with intent to steal any tree, sapling, shrub, bush, plant, root, fruit, or vegetable production growing in any garden, orchard, nursery-ground, hot-house, green-house, or conservatory, every such offender being convicted thereof before a justice of the peace, shall forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny.

Stealing, &c. vegetable productions not growing in gardens, &c.

35. And be it enacted, that if any person shall steal, or shall destroy or damage, with intent to steal, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land open or enclosed, not being a garden, orchard or nursery-

ground, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money, not exceeding twenty shillings, as to the justice shall seem meet, and in default of payment thereof, together with the costs, if ordered, shall be committed to the house of correction for any term not exceeding one calendar month, unless payment be sooner made.

Stealing glass, woodwork or fixtures of any kind from buildings, and metal fixtures from grounds.

36. And be it enacted, that if any person shall steal or rip, cut or break with intent to steal, any glass or wood-work belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, respectively, fixed in or to any building whatsoever, or any thing made of metal fixed in any land, being private property, or for a fence to any dwelling house, garden or area, or in any square, street, or other place, dedicated to public use or ornament, every such offender shall be guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and in case of any such thing fixed in any square, street, or other like place, it shall not be necessary to allege the same to be the property of any person.

Tenants and lodgers stealing any property from houses or apartments let to them.

37. And for the punishment of depredations committed by tenants and lodgers; Be it enacted, that if any person shall steal any chattel or fixture let to be used by him or her, in or with any house or with any house or lodging, whether the contract shall have been entered into by him or her, or by her husband, or by any person on behalf of him or her, or her husband, every such offender shall be guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and in every such case of stealing any chattel, it shall be lawful to prefer an indictment in the common form as for larceny, and in every such case of stealing any fixture, to prefer an indictment in the same form as if the offender were not a

tenant or lodger, and in either case to lay the property in the owner or person letting to hire.

38. And for the punishment of depredations committed by clerks and servants, in cases not punishable capitally; Be it enacted, that if any clerk or servant shall steal any chattel, money, or valuable security belonging to or in the possession or power of his master, every such offender, being convicted thereof, shall be liable at the discretion of the court, to be imprisoned at hard labour in the provincial penitentiary for any term not exceeding fourteen years, nor less than seven years, or to imprisoned in any other prison or place of confinement for any term not exceeding two years.

Clerks and servants stealing property of their masters.

39. And for the punishment of embezzlements committed by clerks and servants: Be it declared and enacted, that if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall by virtue of such employment receive or take into his possession any chattel, money or valuable security for, or in the name or on the account of his master, and shall fraudulently embezzle the same or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel, money or security was not received into the possession of such master otherwise than by the actual possession of his clerk, servant, or other person so employed; and every such offender being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned.

Clerks or servants receiving any money, &c. on their master's account, and embezzling it, shall be deemed to have feloniously stolen it.

40. And for preventing the difficulties that have been experienced in the prosecution of the last mentioned offenders; Be it enacted, that it shall be lawful to charge in the indictment and proceed against the offender for any number of distinct acts of embezzlement, not exceeding three, which may have been committed by him against the same master within the space of six calendar months from the first to the last of such acts; and in every such indictment, except where the offence shall

Distinct acts of embezzlement may be charged in same indictment.

As to allegation and proof of property embezzled.

relate to any chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or, if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly.

Agents embezzling money intrusted to them to be applied to any special purposes;

41. And for the punishment of embezzlements committed by agents entrusted with property, Be it enacted, that if any money or security for the payment of money shall be intrusted to any banker, merchant, broker, attorney, or other agent, with any direction in writing to apply such money or any part thereof, or the proceeds or any part of the proceeds of such security for any purpose specified in such direction, and he shall in violation of good faith, and contrary to the purpose so specified, in any wise convert to his own use or benefit such money, security, or proceeds, or any part thereof, respectively, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned at hard labour in the Provincial Penitentiary, for any term not less than seven years, or imprisoned in any other prison or place of confinement for any term not exceeding two years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; and if any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of this province or of the United Kingdom of Great Britain and Ireland, or of Great Britain or of Ireland, or of any British colony or foreign state or colony, or in any fund of any body corporate, company, or

Or embezzling any goods or valuable security entrusted to them for safe custody, or for any special purpose, guilty of a misdemeanor.

society, shall be intrusted to any banker, merchant, broker, attorney, or other agent for safe custody, or for any special purpose, without any authority to sell, negociate, transfer, or pledge, and he shall in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been entrusted to him, sell, negociate, transfer, pledge, or in any manner convert to his own use or benefit such chattel or security, or the proceeds of the same or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate or any part thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned.

Not to affect trustees or mortgagees.

42. Provided always, and be it enacted, that nothing hereinbefore contained relating to agents, shall affect any trustee in or under any instrument whatever, or any mortgagee of any property real or personal, in respect of any act done by such trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage; nor shall restrain any banker, merchant, broker, attorney, or other agent from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security according to the tenor and effect thereof, in such manner as he might have done if this act had not been passed; nor from selling, transferring, or otherwise disposing of any securities or effects in his possession, upon which he shall have any lien, claim, or demand, entitling him by law so to do; unless such sale, transfer, or other disposal shall extend to a greater number or part of such securities or effects, than shall be requisite for satisfying such lien, claim, or demand.

Nor bankers, &c. receiving money due on securities,

Or disposing of securities on which they have a lien.

Factors pledging for their own use any goods,

43. And be it enacted, that if any factor or agent, intrusted for the purpose of sale with any goods or merchandize, or intrusted with any bill of lading, warehouse keeper's or wharfinger's certificate or warrant or order for

or documents relating to goods entrusted to them for the purpose of sale, guilty of a misdemeanor.

delivery of goods or merchandize, shall for his own benefit and in violation of good faith, deposit or pledge any such goods or merchandise, or any of the said documents as a security for any money, or negociable instrument borrowed or received by such factor or agent, at or before the time of making such deposit or pledge, or intended to be thereafter borrowed or received, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned at hard labour in the Provincial Penitentiary for any term not less than seven years, or to be imprisoned in any other prison or place of confinement, for any term not exceeding two years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award, but no such factor or agent shall be liable to any prosecution for depositing or pledging any such goods or merchandize, or any of the said documents, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which at the time of such deposit or pledge was justly due and owing to such factor or agent from his principal, together with the amount of any bill or bills of exchange drawn by or on account of such principal, and accepted by such factor or agent.

Not to extend to cases where the pledge does not exceed the amount of their lien.

These provisions as to agents shall not lessen any remedy which the party aggrieved now has.

44. Provided always, and be it enacted, that nothing in this act contained, nor any preceding conviction or judgment to be had or taken thereupon against any banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall prevent, lessen or impeach any remedy at law or in equity, which any party aggrieved by such offence might or would have had if this act had not been passed; but, nevertheless, the conviction of any such offender shall not be received in evidence in any action at law or suit in equity against him; and no banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall be liable to be convicted by any evidence whatever as an offender against this act, in respect of any act done by him, if he shall at any time previously to his being indicted for such offence have disclosed such

act on oath, in consequence of any compulsory process of any court of law or equity in any action, suit or proceeding which shall have been *bona fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt.

45. And whereas a failure of justice frequently arises from the subtle distinction between larceny and fraud: for remedy thereof, be it enacted, that if any person shall by any false pretence, obtain from any other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned at hard labour in the Provincial Penitentiary for any term not exceeding fourteen years, nor less than seven years, or imprisoned in any other prison or place of confinement for any term not exceeding two years, or to suffer such other punishment, by fine or imprisonment, or by both, as the court shall award: Provided always, that if upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no such indictment shall be removeable by certiorari; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts.

Obtaining money under false pretences a misdemeanor.

No acquittal on the ground that the case proved amounts to larceny.

46. And with regard to receivers of stolen property, Be it enacted, that if any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing or taking whereof shall amount to a felony, either at common law or by virtue of this Act, such person knowing the same to have been feloniously stolen or taken, every such receiver shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact, or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amena-

Where the original offence is felony, the receiver of stolen property may be tried either as an accessory after the fact, or for a substantive felony.

ble to justice; and every such receiver howsoever convicted, shall be liable, at the discretion of the court, to be imprisoned at hard labour in the Provincial Penitentiary for any term not exceeding fourteen years, nor less than seven years, or imprisoned in any other prison or place of confinement for any term not exceeding two years; Provided always, that no person howsoever tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence.

Where the original offence is a misdemeanor, receivers may be prosecuted for a misdemeanor.

47. And be it enacted, that if any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, or converting whereof is made an indictable misdemeanor by this act, such person knowing the same to have been unlawfully stolen, taken, obtained, or converted, every such receiver shall be guilty of a misdemeanor, or may be indicted and convicted thereof, whether the person guilty of the principal misdemeanor shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice; and every such receiver shall on conviction, be liable, at the discretion of the court, to be imprisoned at hard labour in the provincial penitentiary for any other term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years.

All receivers may be tried where the property is found in their possession, as well as where the receiving takes place.

48. And be it enacted, that if any person shall receive any chattel, money, valuable security, or other property whatsoever, knowing the same to have been feloniously or unlawfully stolen, taken, obtained or converted, every such person whether charged as an accessory after the fact to the felony, or with a substantive felony, or with a misdemeanor only, may be dealt with, tried, and punished in any district, county or place in which he shall have or shall have had any such property in his possession, or in any district, county, or place in which the party guilty of the principal felony or misdemeanor may by law be tried, in the same manner as such receiver may be dealt with, indicted, tried, and punished in the district, county, or place where he actually received such property.

49. And to encourage the prosecution of offenders, be it enacted, that if any person guilty of any such felony or misdemeanor as aforesaid, in stealing, taking, obtaining, or converting, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for any offence by or on the behalf of the owner of the property, or his heir, curator, executor, or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and the court before whom any such person shall be so convicted, shall have power to award from time to time writs of restitution for the same property, or to order the restitution thereof in a summary manner: Provided always, that if it shall appear, before any award or order made, that any valuable security shall have been bona fide paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument, shall have been bona fide taken or received by transfer or delivery by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, or converted as aforesaid, in such case the court shall not award or order the restitution of such security.

The owner of stolen property prosecuting thief or receiver to conviction shall have restitution of his property.

Exception.

50. And be it enacted, that every person who shall corruptly take any money or reward, directly or indirectly, under pretence or on account of helping any person to any chattel, money, valuable security, or other property whatsoever, which shall by any felony or misdemeanor have been stolen, taken, obtained, or converted, as aforesaid, shall (unless he cause the offender to be apprehended and brought to trial for the same) be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned at hard labour in the provincial penitentiary for any term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years.

Taking a reward for holding to the recovery of stolen property without bringing the offender to trial.

51. And be it enacted, that if any person shall publicly

Advertising a reward for the return of stolen property without inquiry.

advertise a reward for the return of any property whatsoever, which shall have been stolen or lost, and shall in such advertisement use any words purporting that no question will be asked, or shall make use of any words in any public advertisement, purporting that a reward will be given or paid for any property which shall have been stolen or lost, without seizing or making any inquiry after the person producing such property, or shall promise or offer in any such public advertisement to return to any pawnbroker or other person who may have bought or advanced money by way of a loan upon any property stolen or lost, the money so paid or advanced, or any other sum of money or reward for the return of such property, or if any person shall print or publish any such advertisement in any of the above cases, every such person shall forfeit the sum of twenty pounds for every such offence, to any person who will sue for the same, by action of debt to be recovered with full costs of suit.

Receivers of property where the original offence is punishable on summary conviction.

52. And be it enacted, that where the stealing or taking of any property whatsoever is by this act punishable on summary conviction, either for every offence, or for the first and second offence only, or for the first offence only, any person who shall receive any such property, knowing the same to be unlawfully come by, shall on conviction thereof before a justice of the peace, be liable for every first, second or subsequent offence of receiving, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence of stealing or taking such property is by this act made liable.

Principals in the second degree and accessories.

53. And be it enacted, that in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act (except only a receiver of stolen property), shall on conviction be liable to be imprisoned for any term not exceeding two years; and every person who

Abettors in misdemeanors.

shall aid, abet, counsel or procure the commission of any misdemeanor punishable under this act, shall be liable to be indicted and punished as a principal offender.

Abettors in offences punishable on summary conviction.

54. And be it enacted, that if any person shall aid, abet, counsel, or procure the commission of any offence which is by this act punishable on summary conviction, either for every time of its commission or for the first and second time only, or for the first time only, every such person shall, on conviction before a justice or justices of the peace, be liable for every first, second or subsequent offence of aiding, abetting, counselling, or procuring, to the same forfeiture and punishment to which a person guilty of a first, second or subsequent offence as a principal offender is by this act made liable.

A person in the act of committing any offence may be apprehended without a warrant.

55. And for the more effectual apprehension and discovery of all offenders punishable under this act, Be it enacted, that any person found committing any offence punishable either upon indictment, or upon summary conviction, by virtue of this act, may be immediately apprehended without a warrant, by any peace officer, or by the owner of the property on or with respect to which the offence shall be committed, or by the servant of any person authorized by such owner, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law; and if any credible witness shall prove upon oath, before a justice of the peace, that there is reasonable cause to suspect that any property whatsoever, on or with respect to which any such offence shall have been committed, is in any dwelling-house, out-house, garden, yard, croft, or other place or places, the justice may granta warrant to search such dwelling-house, out-house, garden, yard, croft, or other place or places, for such property, as in the case of stolen goods; and any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed, on or with respect to such property, is hereby authorized, and if in his power is required to apprehend and forthwith to carry before a justice of the peace the party offering the same,

A justice, upon good ground of suspicion, proved on oath, may grant a search warrant.

Any person to whom stolen property is offered, may seize the party offending.

together with such property, to be dealt with according to law.

Limitation as to summary proceedings.

56. And be it enacted, that the prosecution of every offence punishable on summary conviction under this act, shall be commenced within three calendar months after the commission of the offence, and not otherwise; and the evidence of the party aggrieved shall be admitted in proof of the offence.

Mode of compelling the appearance of persons punishable on summary conviction.

57. And for the more effectual prosecution of all offences punishable on summary conviction under this act, Be it enacted, that where any person shall be charged, on the oath of a credible witness, before any justice of the peace, with any such offence, the justice may summon the person charged to appear at a time and place to be named in the summons; and if he shall not appear accordingly, then (upon proof of the due service of the summons upon such person by delivering the same to him personally, or by leaving the same at his usual place of abode) the justice may either proceed to hear and determine the case ex parte, or issue his warrant for apprehending such person and bringing him before himself, or some other justice or justices of the peace; or the justice before whom the charge shall be made, may (if he shall so think fit) without any previous summons (unless when otherwise specially directed) issue such a warrant; and the justice or justices before whom the person charged shall appear or be brought, shall proceed to hear and determine the case.

Application of forfeitures and penalties on summary convictions.

58. And with regard to the application of all forfeitures and penalties upon summary convictions under this act, Be it enacted, that every sum of money which shall be forfeited for, or as the value of any property stolen or taken, or for or as the amount of any injury done (such value or amount to be assessed in each case by the convicting justice or justices), shall be paid to the party aggrieved, if known, except where such party shall have been examined in proof of the offence, and in that case, or where the party aggrieved is unknown, such sum shall be applied in the same manner as a penalty: Provided

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always, that where several persons shall join in the commission of the same offence, and shall, upon conviction thereof, each be adjudged to forfeit a sum equivalent to the value of the property, or to the amount of the injury done, in every such case no further sum shall be paid to the party aggrieved than that which shall be forfeited by one of such offenders only, and the corresponding sum or sums, forfeited by the other offender or offenders, shall be applied in the same manner as any penalty imposed by a justice of the peace is hereinbefore directed to be applied.

59. And be it enacted, that in every case of a summary conviction under this act, where the sum shall be forfeited for the value of the property stolen or taken, or for the amount of the injury done, or which shall be imposed as a penalty by any justice or justices, together with the costs, if awarded, (which costs such justice or justices is and are hereby authorized to award, if he or they shall think fit, in any case of a summary conviction under this act), shall not be paid either immediately after the conviction, or within such period as the justice or justices shall at the time of the conviction appoint, which he or they is and are hereby authorized to appoint, it shall be lawful for the convicting justice or justices (unless where otherwise specially directed) to commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, according to the discretion of the justice or justices, for any term not exceeding two calendar months, where the amount of the sum forfeited, or of the penalty imposed, or of both, as the case may be, together with the costs, shall not exceed five pounds; and for any term not exceeding six calendar months, where the amount with costs shall exceed five pounds, and shall not exceed ten pounds; the commitment to be determinable in each of the cases aforesaid, upon payment of the amount and costs.

If a person summarily convicted shall not pay, &c. the justice may commit him.

Scale of imprisonment.

60. Provided always, and be it enacted, that where any person shall be summarily convicted, before a justice

Justice may discharge the offender in certain cases.

or justices of the peace, of any offence against this act, and it shall be a first conviction, it shall be lawful for the justice or justices, if he or they shall so think fit, to discharge the offender from his conviction, upon his making such satisfaction to the party aggrieved, for damages and costs, or either of them, as shall be ascertained by such justice or justices.

Pardon for non-payment of money.

61. And be it enacted, that it shall be lawful for the Queen's Majesty, and for the governor, lieutenant governor, or person administering the government of this province, to extend the royal mercy to any person imprisoned by virtue of this act, although he shall be imprisoned for non-payment of money to some party other than the crown.

A summary conviction shall be a bar to any other proceeding for the same offence.

62. And be it enacted, that in case any person convicted of any offence punishable upon summary conviction by virtue of this act, shall have paid the sum adjudged to be paid, together with costs, if awarded, under such conviction, or shall have received a remission thereof from the crown, or shall have suffered the imprisonment awarded for non-payment thereof, or the imprisonment adjudged in the first instance, or shall have been discharged from his conviction in the manner aforesaid, in every such case he shall be released from all further or other proceedings for the same cause.

Form of conviction.

63. And be it enacted, that the justice or justices before whom any person shall be convicted of any offence against this act, may cause the conviction to be drawn up in the following form of words, or in any other form of words to the same effect, as the case shall require, videlicet: "Be it remembered, that on the —— day of —— in the year of our Lord —— at —— in the district of —— (as the case may be) A. O. is convicted before me, J. P. one of her Majesty's justices (or before us J. P. and S. L. justices) of the peace for the said district, for that he, the said A. O. did (specify the offence and the time and place when and where the same was committed, as the case may be, and on a second conviction state the first conviction) and I, the said J. P.

(or, we the said J. P. and S. L.) adjudge the said A. O, for his said offence to be imprisoned in the —— (or to be imprisoned in the —— and there kept to hard labour) for the space of —— (or, to forfeit and pay —— here state the penalty actually imposed, or state the penalty and also the value of the articles stolen, embezzled, or taken, or the amount of the injury done, as the case may be) and (in any case where costs shall be awarded) also to pay the sum of —— for costs, and in default of immediate payment of the said sum (or sums,) to be imprisoned in the —— (or to be imprisoned in the —— and there kept to hard labour,) for the space of —— unless the said sum (or sums,) shall be sooner paid (or, and I or we) order that the said sum (or sums) shall be paid by the said A. O. on or before the —— day of —— that the said sum of —— (i e. the penalty only) shall be paid to me (or us the convicting justice or justices,) and that the sum of —— (i. e. the value of the articles stolen, or the amount of the injury done) shall be paid to C. D. (the party aggrieved, unless he is unknown or has been examined in proof of the offence, in which case state that fact, and dispose of the whole like the penalty as before) and (if the justice or justices shall think proper to award the complainant his costs) I (or we) order that the said sum of —— for costs shall be paid to C. D. (the complainant). Given under my hand and seal, (or our hands and seals) the day and year first above mentioned."

64. And be it enacted, that in all cases where by this act two or more justices of the peace are authorised and required to hear and determine any complaint, one justice shall be competent to receive the original information or complaint, and to issue the summons or warrant requiring the parties to appear before two or more justices of the peace; and after examination upon oath into the merits of the said complaint, and the adjudication thereupon by any such two justices being made, all and every the subsequent proceedings to enforce obedience thereto, or otherwise, whether respecting the penalty, fine, impri-

One justice may receive original information, &c. where two or more justices are empowered to hear and determine.

sonment, costs, or other matter or thing relating to the offence, may be enforced by either of the said justices, or by any other justice of the peace for the same district, county, city, town or place, in such and the like manner as if done by the same two justices who so heard, and adjudged the said complaint; and where the original complaint or information shall be made to any justice or justices of the peace, different from the justice or justices before whom the same shall be heard and determined, the form of conviction shall be made conformable and according to the fact.

Appeal.

65. And be it enacted, that in all cases where the sum adjudged to be paid upon any summary conviction, shall exceed five pounds, or the imprisonment adjudged shall exceed one calendar month, or the conviction shall take place before one justice only, any person who shall think himself aggrieved by any such conviction, may appeal to the next court of general, or quarter sessions, which shall be holden not less than twelve days after the day of such conviction, for the district, county, or place wherein the cause of complaint shall have arisen: Provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions; and shall also either remain in custody until the sessions, or enter into recognizance with two sufficient sureties before a justice of the peace, conditioned personally to appear at the said sessions, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; and on such being given, and such recognizance being entered into, the justice before whom the same shall be entered into, shall liberate such person, if in custody; and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet; and in case of the dismissal of the appeal or the affirmance of the conviction, the court shall order and adjudge the offen-

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der to be punished according to the conviction, and to pay such costs, if any, as shall be awarded, and shall, if necessary, issue process for enforcing such judgment.

Convictions to be returned to quarter sessions.

66. And be it enacted, that every justice of the peace before whom any person shall be convicted of any offence against this act, shall transmit the conviction to the next court of general or quarter-sessions, which shall be holden for the district, county or place wherein the offence shall have been committed, there to be kept by the proper officer among the records of the court, (*u*) and upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence, and the conviction shall be presumed to have been unappealed against, until the contrary be shewn.

How far evidence in future cases.

Venue in proceedings against persons acting under this act.

67. And for the protection of persons acting in the execution of this act; Be it enacted, that all actions and prosecutions to be commenced against any person for any thing done in pursuance of this act, shall be laid and tried

(*u*) Magistrates having convicted a party, drew up a conviction and returned it to the clerk of the peace; and on an action being brought against them, they put in the conviction returned to the clerk of the peace, which was open to some formal objection, and also another conviction drawn up afterwards in a more formal shape; *Semble*, that there is no impropriety in this course of proceeding, provided the latter conviction is according to the truth, and supported by the facts of the case.—Selwood *vs.* Mount. 9 C. & P. 75. Whether or not a justice of the peace may draw up a corrected record of a summary conviction, after he has returned one record of it to the quarter sessions, he cannot do so in a case where the first conviction has been brought up by certiorari and quashed. Where a prisoner has been brought up on habeas corpus, and discharged on the ground of the insufficiency of the conviction, as appearing by the recital in the warrant of commitment, the conviction itself not having been brought up by the crown, and the certiorari having been taken away from the prisoner by statute, such proceeding is equivalent to a quashing of the first conviction, and a justice of the peace cannot afterwards draw up another formal one. —Chancy *vs.* Payne. 1 Gale & D. 348.—1 Q. B. 712.

in the district, county, or place where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action and of the cause thereof, (*v*) shall be given to the defendant, one calendar month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence in any trial to be had thereupon, and no plaintiff shall recover in any such action, if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought by or on behalf of the defendant; and if a verdict shall pass for the defendant, or the plaintiff shall become non-suit, or discontinue any such action, after issue joined, or if upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases; and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be had shall certify his approbation of the action and of the verdict obtained thereupon.

Notice of action.

General issue, &c.

This act to extend to offences committed out of this Province in certain cases.

68. And be it enacted, that if any person having stolen or otherwise unlawfully taken any chattel, money, valuable security, or other property whatsoever, the stealing or unlawfully taking whereof is made punishable by indictment, by any of the provisions of this act, in any part of her Majesty's dominions, shall afterwards have the same property in his possession in any part of this province, he may be dealt with, indicted, tried and punished for such offence under this act, in that part of this province where he shall so have such property, in the same

(*v*) A notice of action is insufficient, if the place where the fact was committed, which is made the subject of the action, is not stated.—Kimble *vs.* McGarry. Mich. Term, 1843.—Martins *vs.* Upcher. 6 Jurist, 582.

manner as if he had actually stolen or unlawfully taken it in that part; and if any person in any part of this province shall receive or have any chattel, money, valuable security, or other property whatsoever, which shall have been stolen or otherwise unlawfully taken in any other part of her Majesty's dominions, such person knowing the said property to have been stolen or otherwise unlawfully taken, he may be dealt with, indicted, tried, and punished for such offence in that part of this province where he shall so receive or have the stolen property, in the same manner as if it had been originally stolen or unlawfully taken in that part of this province as aforesaid.

All sums to be currency.

69. And be it enacted, that all fines, forfeitures and penalties imposed by this act, and all sums expressed as the value of any goods, chattels or other property herein mentioned, shall be deemed and taken to be current money of this province.

All acts repugnant to this act repealed.

70. And be it enacted, that all acts or partsof acts or provisions of law in force in this province, or any part thereof immediately before the time when this act shall come in force, which shall be inconsistent with or contradictory to this act, or which make any provision in any matter provided for by this act other than such as is hereby made in such matter, shall, from and after the time when this act shall come into force, be and they are hereby repealed, except in so far as may relate to any offence committed before the said time, which shall be dealt with and punished as if this act had not been passed.

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4 & 5 Vic. ch. 26.

An Act for consolidating and amending the Laws in this Province relative to malicious injuries to property.

Preamble.

Whereas it is expedient to amend and consolidate the provisions contained in various statutes now in force in this province relative to malicious injuries to property; Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Legislative Council and of the Legislative Assembly of the

Province of Canada, constituted and assembled by virtue of and under the authority of an act passed in the parliament of the United Kingdom of Great Britain and Ireland, intituled, "An Act to Re-unite the Provinces of Upper and Lower Canada and for the government of Canada;" and it is hereby enacted by the authority of the same, that this act shall commence from and after the first day of January one thousand eight hundred and forty-two.

Commencement of this act.

2. And be it enacted, that whosoever shall unlawfully and maliciously set fire to any dwelling-house, any person being therein, shall be guilty of felony, and being convicted thereof shall suffer death. (*w*)

Setting fire to a dwelling house, &c.

3. And be it enacted, that whosoever shall unlawfully and maliciously set fire to any church, chapel or meeting house for the exercise of any mode or form of religious worship whatever, or shall unlawfully and maliciously set fire to any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them, respectively, shall then be in the possession of the offender, or in the possession of any other person, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned at hard labour in the provincial penitentiary for the term of his natural life, or for any term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years.

Setting fire to a church or chapel, house, warehouse, &c.

4. And be it enacted, that if any person shall unlawfully and maliciously cut, break or destroy, or damage with intent to destroy, or to render useless, any goods or article of silk, woollen, linen or cotton, or of any one or more of those materials, mixed with each other or mixed

Destroying silk, woollen, linen, or cotton goods

(*w*) In a case of arson, it was proved that the floor near the hearth was scorched. It was charred in a trifling way. It had been at a red heat, but not in a blaze. Held, that this would be a sufficient burning to support an indictment for arson.—R. *vs.* Parker. 9 C. & P. 45.

with any other material, or any frame-work-knitted piece, stocking, hose or lace, respectively, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture; or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any warp or shute of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any loom, frame, machine, engine, rack, tackle, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles: or shall by force enter into any house, shop, building, or place, with intent to commit any of the offences aforesaid, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned at hard labour in the provincial penitentiary for any term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years.

in the loom, &c. or any machinery belonging to those manufactures, &c.

5. And be it enacted, that if any person shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any thrashing machine, or any machine or engine, whether fixed or moveable, prepared for or employed in any manufacture whatsoever (except the manufacture of silk, woollen, linen, or cotton goods, or goods of any one or more of those materials mixed with each other, or mixed with any other material, or any frame-work-knitted piece, stocking, hose, or lace) every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned at hard labour in the Provincial Penitentiary for any term not less than seven years, or in any other prison or place of confinement for any term not exceeding two years.

Destroying threshing or other machines in any other manufacture than the foregoing.

6. And be it enacted, that if any persons, riotously and tumultuously assembled together to the disturbance

Riotously demolishing &c. a church, chapel, house, or certain buildings, or any machinery used in any manufacture.

of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy any church, chapel, or meeting house, for the exercise of any mode or form of religious worship, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned at hard labour in the Provincial Penitentiary for the term of his natural life, or for any term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years. (*x*)

Setting fire to ships or vessels with intent to commit murder.

7. And be it enacted, that whosoever shall unlawfully and maliciously set fire to, cast away, or in any wise destroy any ship or vessel, either with intent to murder any person, or whereby the life of any person shall be endan-

(*x*) If rioters attack a house and have begun to demolish it, but leave off of their own accord after having gone a certain length, and before the act of demolition is completed, this is evidence from which a jury might infer that they did not intend to demolish the house: but if the mob were prevented from going on by the interference of the police or any other force, that would be evidence to shew that they were compelled to desist from that which they had designed, and it would be for the jury to infer that they had begun to demolish within the statute.—R. *vs.* Howell. 9 C. & P. 437. Destroying moveable shutters is not a beginning to demolish, as they are not a part of the freehold, but a destruction of the house by fire is a demolishing, and it makes no difference if part of the object of the rioters in demolishing the house was to injure a person who had taken refuge there.—*Ib.* The jury cannot find persons guilty on an indictment under this section, unless they think that their intention was so to destroy the house, as in fact to leave it no house at all; and no injury, however extensive, short of the actual demolition of the very walls of the building, is contemplated by the provisions of the act.—R. *vs.* Adams. 1 Car. & M. 299.

gered, shall be guilty of felony, and being convicted thereof shall suffer death.

Hanging out false lights to cause shipwreck.

8. And be it enacted, that whosoever shall unlawfully exhibit any false light or signal, with intent to bring any ship or vessel into danger, or shall unlawfully and maliciously do any thing to the immediate loss or destruction of any ship or vessel in distress, shall be guilty of felony, and being convicted thereof shall suffer death.

Setting fire to ships or vessels with intent to destroy the same.

9. And be it enacted, that whosoever shall unlawfully and maliciously set fire to, or in any wise destroy any ship or vessel, whether the same be completed or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in any wise destroy any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned at hard labour in the Provincial Penitentiary for the term of his natural life, or for any other term not less than seven years, or to be imprisoned in any other prison or place of confinement for any time not exceeding two years.

Impeding any person endeavouring to save life from any ship wrecked, &c.

10. And be it enacted, that whosoever shall by force prevent or impede any person endeavouring to save his life from any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore (whether he shall be on board or shall have quitted the same,) shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned at hard labour in the Provincial Penitentiary for the term of his natural life, or for any term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years.

Destroying wrecks or any articles belonging thereto.

11. And be it enacted, that whosoever shall unlawfully and maliciously destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast

on shore, or any goods, merchandise, or article of any kind belonging to such ship or vessel, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned at hard labour in the Provincial Penitentiary for any term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years.

Destroying any sea bank, &c. or works on any river or canal, felony.

12. And be it enacted, that if any person shall unlawfully and maliciously break down or cut down any sea bank or sea wall, or the bank or wall of any river, canal, or marsh, whereby any land shall be overflowed or damaged, or shall be in danger of being so, or shall unlawfully and maliciously throw down, level, or otherwise destroy any lock, sluice, flood-gate, or other work on any navigable river or canal, every such offender shall be guilty of felony, and being convicted thereof, shall be imprisoned for any term not exceeding four years; and if any person shall unlawfully and maliciously cut off, draw up or remove any piles, chalk, or other materials fixed in the ground and used for securing any sea bank or sea wall, or the bank or wall of any river, canal, or marsh, or shall unlawfully and maliciously open or draw up any flood-gate, or do any other injury or mischief to any navigable river or canal with intent, and so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof, every such offender shall be guilty of felony, and being convicted thereof shall be imprisoned for any term not exceeding two years.

Removing the piles of any sea-bank &c. or doing any damage to obstruct the navigation of a river or canal.

Injury to a public bridge.

14. And be it enacted, that if any person shall unlawfully and maliciously pull down, or in any wise destroy any public bridge, or do any injury with intent, and so as thereby to render such bridge or any part thereof dangerous or impassable, every such offender shall be guilty of felony, and being convicted thereof, shall be imprisoned for any term not exceeding four years.

Destroying a turnpike gate, toll-house, &c.

14. And be it enacted, that if any person shall unlawfully and maliciously throw down, level, or otherwise destroy, in whole or in part, any turnpike gate, or any

wall, chain, rail, post, bar, or other fence belonging to any turnpike gate, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any act or acts, ordinance or ordinances, relating thereto, in force in this province, or any house, building, or weighing engine erected for the better collection, ascertainment, or security of any such toll, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be punished accordingly.

Breaking down the dam of a fishery, &c. or mill dam.

15. And be it enacted, that if any person shall unlawfully and maliciously break down or otherwise destroy the dam of any fish pond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish therein, or shall unlawfully and maliciously break down or otherwise destroy the dam of any mill pond, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be punished accordingly.

Killing or maiming cattle.

16. And be it enacted, that if any person shall unlawfully and maliciously kill, maim, or wound any cattle, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned at hard labour in the Provincial Penitentiary for any term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years.

Setting fire to agricultural produce.

17. And be it enacted, that whosoever shall unlawfully or maliciously set fire to any stack of corn, grain, pulse, peat, coals, charcoal, or wood, or any steer of wood, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned at hard labour in the Provincial Penitentiary for the term of his natural life, or for any term not less than seven years, or to be imprisoned in any other

prison or place of confinement for any term not exceeding two years.

Destroying hop-binds.

18. And be it enacted, that if any person shall unlawfully and maliciously cut or otherwise destroy any hop-binds, growing on poles in any plantation of hops, every such offender shall be guilty of felony, and being convicted thereof, shall be imprisoned for any term not exceeding four years.

Destroying or damaging trees, shrubs, &c. growing in certain situations.

19. And be it enacted, that if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any under-wood, respectively growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be punished accordingly; and if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood respectively, growing elsewhere than in any of the situations hereinbefore mentioned, every such offender (in case the amount of the injury done shall exceed the sum of one pound) shall be guilty of a misdemeanor, and being convicted thereof, shall be punished accordingly.

The like as to trees, &c. growing elsewhere, if the damage exceed one pound.

Destroying or damaging trees, shrubs, or under-wood, &c. wheresoever growing, to the amount of damage punishable on summary conviction.

20. And be it enacted, that if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the injury done being to the amount of one shilling at the least, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding one pound as to the justice shall seem meet.

Destroying any fruit or vegetable production in a garden &c.

21. And be it enacted, that if any person shall unlawfully and maliciously destroy, or damage with intent to destroy any plant, root, fruit or vegetable production, growing in any garden, orchard, nursery ground, hot-

house, green-house, or conservatory, every such offender being convicted thereof before a justice of the peace, shall forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding two pounds, as to the justice shall seem meet.

Destroying &c. vegetable production not growing in gardens

22. And be it enacted, that if any person shall unlawfully and maliciously destroy, or damage with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or enclosed, not being a garden, orchard, or nursery ground, every such offender being convicted thereof before a justice of the peace, shall forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding twenty shillings, as to the justice shall seem meet.

Destroying &c. any fence, wall, stile or gate.

23. And be it enacted, that if any person shall unlawfully and maliciously cut, break, throw down, or in anywise destroy any fence of any description whatsoever, or any wall, stile, or gate, or any part thereof respectively, every such offender, being convicted, before a justice of the peace, shall forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding one pound, as to the justice shall seem meet.

Persons committing damage to property in any case not previously provided for, may be compelled by a justice to pay compensation not exceeding £5.

24. And be it enacted, that if any person shall wilfully or maliciously commit any damage or injury or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no remedy or punishment is hereinbefore provided, every such person being convicted thereof, before a justice of the peace, shall forfeit and pay such sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury or spoil so committed, not exceeding the sum of five pounds; which sum of money shall in case of private property, be paid to the party aggrieved, except where such party shall have been examined in proof of the offence; and in such case, or in the case of property of a public nature, or wherein any public right is concerned, the money shall be applied in such manner as every pen-

alty imposed by a justice of the peace under this act, is hereinafter directed to be applied: Provided always, that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of.

Malice at the owner not essential to any offence under this act.

25. And be it enacted, that every punishment and forfeitute by this act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment, or upon summary conviction, shall equally apply and be enforced, whether the offence be committed from malice conceived against the owner of the property in respect of which it shall be committed or otherwise.

Principals in the second degree and accessories.

26. And be it enacted, that in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act, shall, on conviction, be liable to be imprisoned for any term not exceeding two years, and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor, punishable under this act, shall be liable to be indicted and punished as a principal offender.

Abettors in misdemeanors.

The court may, for all offences within this act, order hard labour or solitary confinement.

27. And be it enacted, that where any person shall be convicted of any indictable offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction; and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year; as to the court in its discretion shall seem meet.

28. And for the more effectual apprehension of all offenders against this act; Be it enacted, that any person

found committing (*y*) any offence against this act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace officer or the owner of the property injured, or his servant or any person authorized by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law. Persons in the act of committing any offence may be apprehended without a warrant.

29. And be it enacted, that the prosecution for every offence punishable on summary conviction under this act, shall be commenced within three calendar months after the commission of the offence, and not otherwise; and the evidence of the party aggrieved shall be admitted in proof of the offence, and also the evidence of any inhabitant of the district, county, or place in which the offence shall have been committed, notwithstanding any forfeiture or penalty incurred by the offence may be payable to any public fund of such district, county, or place. Limitation as to summary proceedings. Competency of witnesses.

30. And for the more effectual prosecution of all offences punishable on summary conviction under this act; Be it enacted, that where any person shall be charged on the oath of a credible witness, before any justice of the peace, with any such offence, the justice may summon the person charged to appear at a time and place to be named in such summons, and if he shall not appear accordingly (then upon proof of the due service of the summons upon such person, by delivering the same to him personally, or by leaving the same at his usual place of abode) the justice may either proceed to hear and determine the case ex parte, or issue his warrant for apprehending such person, and bringing him before himself or some other justice of the peace; or the justice before whom the charge shall be made, may, if he shall so Mode of compelling the appearance of persons punishable on summary conviction.

(*y*) If under this clause a party has arrested another, as being found committing an offence against this act, under circumstances which afford reason for thinking that he was at the time committing such offence, though in reality he was not, and an action is brought for the arrest, the defendant is entitled to notice of action under sec. 40.—Cann *v.* Clipperton, 10 A. & E. 582.

think fit, without any previous summons (unless where otherwise specially directed) issue such warrant; and the justice before whom the person charged shall appear or be brought, shall proceed to hear and determine the case.

Abettors in offences punishable on summary conviction.

31. And be it enacted, that where any offence is by this act punishable on summary conviction, any person who shall aid, abet, counsel, or procure the commission of such offence, shall on conviction before a justice of the peace, be liable for every such offence of aiding, abetting, counselling, or procuring, to the same forfeiture and punishment to which a person guilty of such offence as a principal offender is by this act made liable.

Application of forfeitures and penalties upon summary convictions.

32. And with regard to the application of all forfeitures and penalties upon summary convictions under this act; Be it enacted, that every sum of money which shall be forfeited for the amount of any injury done, (such amount to be assessed in each case by the convicting justice) shall be paid to the party aggrieved, if known, except where such party shall have been examined in proof of the offence; and in that case, or where the party aggrieved is unknown, such sum shall be applied in the same manner as a penalty; and every sum which shall be imposed as a penalty by any justice of the peace, whether in addition to such amount or otherwise, shall be paid to the convicting justice: Provided always, that where several persons shall join in the commission of the same offence, and shall, upon conviction thereof, each be adjudged to forfeit a sum equivalent to the amount of the injury done, in every such case no further sum shall be paid to the party aggrieved than that which shall be forfeited by one of such offenders only, and the corresponding sum or sums forfeited by the other offender or offenders, together with all penalties, shall be applied in the same manner as any penalty is by law directed to be applied.

Proviso.

If a person summarily convicted shall not pay, &c. the justice may commit him.

33. And be it enacted, that in every case of a summary conviction under this act, where the sum which shall be forfeited for the amount of the injury done, or which shall be imposed as a penalty by the justice, shall not be

paid, either immediately after the conviction, or within such period as the justice shall, at the time of conviction, appoint, it shall be lawful for the convicting justice, (unless where otherwise specially directed) to commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, according to the discretion of the justice, for any term not exceeding two calendar months, where the amount of the sum forfeited or of the penalty imposed, or of both (as the case may be) together with the costs, shall not exceed five pounds; and for any term not exceeding four calendar months where the amount with costs shall exceed five pounds, and not exceed ten pounds; and for any term not exceeding six calendar months where the amount with costs shall exceed ten pounds; the commitment to be determinable in each of the cases aforesaid upon the payment of the amount and costs.

Scale of imprisonment.

34. Provided always, and be it enacted, that where any person shall be summarily convicted before a justice of the peace of any offence against this act, and it shall be a first conviction, it shall be lawful for the justice, if he shall so think fit, to discharge the offender from his conviction, upon his making such satisfaction to the party aggrieved for damages and costs, or either of them, as shall be ascertained by the justice.

The justice may discharge the offender in certain cases.

35. And be it enacted, that it shall be lawful for the Queen's Majesty, or for the governor, lieutenant-governor, or person administering the government of this province for the time being, to extend the royal mercy to any person imprisoned by virtue of this act, although he shall be imprisoned for non-payment of money to some party other than the crown.

Pardon for non-payment of money.

36. And be it enacted, that in case any person convicted of any offence punishable upon summary conviction by virtue of this act, shall have paid the sum adjudged to be paid together with costs, under such conviction, or shall have received a remission thereof from the crown, or shall have suffered the imprisonment awarded for non-payment thereof, or the imprisonment adjudged in the

A summary conviction shall be a bar to any other proceeding for the same cause.

first instance, or shall have been discharged from his conviction in the manner aforesaid, in every such case he shall be released from all further or other proceedings for the same cause.

Form of conviction.

37. And be it enacted, that the justice before whom any person shall be convicted of any offence against this act, may cause the conviction to be drawn up in the following form of words or in any other form of words to the same effect, as the case may require, videlicet:

"Be it remembered that on the —— day of —— in the year of our Lord —— at —— in the district (or city, &c. —— as the case may be) A. O. is convicted before me J. P. one of her majesty's justices of the peace for the said district (or city, &c.) for that he the said A. O. did (specify the offence, and the time and place when and where the same was committed, as the case may be,) and I the said J. P. adjudge the said A. O. for his said offence to be imprisoned in the —— (or to be imprisoned in the —— and there kept to hard labour), for the space of —— (or,) I adjudge the said A. O. for his said offence to forfeit and pay —— (here state the penalty actually imposed, or state the penalty and also the amount of the injury done as the case may be,) and also to pay the sum of —— for costs, and in default of immediate payment of the said sums, to be imprisoned in the —— (or, to be imprisoned in the —— and there kept to hard labour) for the space of —— unless the said sums shall be sooner paid; (or, and I order that the said sums shall be paid by the said A. O. on or before the —— day of ——) and I direct that the said sum of —— (i. e. the penalty only) shall be paid to me the convicting justice, and that the said sum of —— (i. e. the sum for the amount of the injury done) shall be paid to C. D. (the party aggrieved, unless he is unknown, or has been examined in proof of the offence, in which case state that fact and dispose of the whole like the penalty as before); and I order that the said sum of —— for costs shall be paid to —— (the complainant.)

Given under my hand and seal the day and year first above mentioned.

38. And be it enacted, that in all cases where the sum adjudged to be paid on any summary conviction shall exceed five pounds, or the imprisonment adjudged shall exceed one calendar month, or the conviction shall take place before one justice only, any person who shall think himself aggrieved by any such conviction, may appeal to the next court of general or quarter sessions, which shall be holden not less than twelve days after the day of such conviction for the district, inferior district, county or place wherein the cause of complaint shall have arisen; provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall also either remain in custody until the sessions, or enter into a recognizance, with two sufficient sureties, before a justice of the peace, conditioned personally to appear at the said sessions, and to try such appeal and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; and upon such notice being given, and such recognizance being entered into, the justice before whom the same shall be entered into, shall liberate such person if in custody; and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein with or without costs to either party, as to the court shall seem meet; and in case of the dismissal of the appeal or the affirmance or the conviction, shall order and adjudge the offender to be punished according to the conviction; and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment. Appeal.

39. And be it enacted, that every justice of the peace, before whom any person shall be convicted of any offence against this act, shall transmit the conviction to the next court of general or quarter sessions which shall be holden for the district, or inferior district, county or place, wherein the offence shall have been committed, there to be kept by the proper officer among the records of the court; and Convictions to be returned to the quarter sessions.

upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence, and the conviction shall be presumed to have been unappealed against until the contrary be shown.

How far evidence in future cases.

40. And, for the protection of persons acting in the execution of this act; be it enacted, that all actions and prosecutions to be commenced against any person for any thing done in pursuance of this act, shall be laid and tried in the district or inferior district where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing, of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action; (z) and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon; and no plaintiff

Limitation of time, and venue in proceedings under this act.

(z) A party having apprehended another, and proceeded against him before a justice, under the statute for a malicious injury to property, the justice dismissed the complaint, being of opinion, that the party charged had acted under a reasonable supposition of right, according to the proviso of sec. 24. An action being brought for the arrest: Held, that the defendant, if he acted under a bona fide belief that the case fell within the statute, was entitled to notice of action; and that in default of notice, the jury, on the trial, might properly be directed to find for the defendant, if they thought that he had acted bona fide.—Read *v.* Cowmeadow. 6 A. & E. 661. To entitle a defendant to notice of action under this act, he must have acted both with bona fides, and also have had probable cause for believing that he was acting under the statute.—Cann *v.* Clipperton. 10 A. & E. 582. The notice should shew where the act complained of was done.—Martins *v.* Uppcher. 6 Jurist, 582. The witness, who served a notice of action, did not know the handwriting of the plaintiff, whose signature the notice purported to bear, and no evidence was given of the plaintiff's handwriting: Held sufficient without such proof, as it was enough that the notice should have been served on behalf of the plaintiff.—Forman *v.* Dawes. 1 Car. and M. 127.

shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought by or on behalf of the defendant; and if a verdict shall pass for the defendant, or the plaintiff shall become non-suit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same, as any defendant hath by law in other cases; and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be shall certify his approbation of the action, and of the verdict obtained thereupon.

Notice of action.

General issue.

41. And be it enacted, that all fines, forfeitures and penalties imposed by this act, and all sums expressed as the value of any goods, chattels, or other property herein mentioned, shall be deemed and taken to be current money of this province.

Fines, &c. to be in current money.

42. And be it enacted, that all acts or parts of acts, or provisions of law in force in this province or any part thereof, immediately before the time when this act shall come into force, which shall be inconsistent with or contradictory to this act, or which make any provision in any matter provided for by this act, other than such as is hereby made in such matter, shall, from and after the time when this act shall come into force, be, and they are hereby repealed, except in so far as may relate to any offence committed before the said time, which shall be dealt with and punished as if this act had not been passed.

4 & 5 Vic. ch. 27.

An Act for consolidating and amending the Statutes in this Province relative to offences against the person.

Preamble.

WHEREAS it is expedient to amend and consolidate the provisions contained in various statutes now in force in this province, relative to offences against the person; Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Legislative Council and of the Legislative Assembly of the Province of Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of the United Kingdom of Great Britain and Ireland, intituled, "An Act to Re-unite the Provinces of Upper and Lower Canada, and for the government of Canada," and it is hereby enacted by the authority of the same,

Commencement of this act.

that this act shall commence and take effect from and after the first day of January, one thousand eight hundred and forty-two.

Petty treason to be treated in all respects as murder.

2. And be it enacted, that every offence, which before the commencement of this act, would have amounted to petit treason, shall be deemed to be murder only, and no greater offence; and all persons guilty thereof, whether as principals or as accessories, shall be dealt with, indicted, tried, and punished as principals and accessories in murder.

Punishment of principals and accessories in murder.

3. And be it enacted, that every person convicted of murder, or of being an accessory before the fact to murder, shall suffer death as a felon; and every accessory after the fact to murder, shall be liable, at the discretion of the court, to be imprisoned at hard labour in the provincial penitentiary for the term of his natural life, or for any term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years.

4. And be it enacted, that from and after the passing of this act, sentence of death may be pronounced after convictions for murder in the same manner, and the court before which the conviction may be had shall have the

same power in all respects as after convictions for other capital offences.

Prison regulations as to murderers under sentence.

5. And be it enacted, that every person convicted of murder, shall, after judgment, be confined in some safe place within the prison, apart from all other prisoners, and shall be fed with bread and water only, and with no other food or liquor, except in case of receiving the sacrament, or in case of any sickness or wound, in which case the surgeon of the prison may order other necessaries to be administered; and no person but the gaoler and his servants, and the chaplain and surgeon of the prison, shall have access to any such convict, without the permission, in writing, of the court or judge before whom such convict shall have been tried, or of the sheriff or his deputy.

Provision for the trial of murder and manslaughter where the death, or the cause of death only, happens in this province.

6. And be it enacted, that where any person, being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of this province, shall die of such stroke, poisoning, or hurt, in this province, or being feloniously stricken, poisoned, or otherwise hurt at any place in this province, shall die of such stroke, poisoning, or hurt, upon the sea, or at any place out of this province, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory before the fact to murder, or after the fact to murder, or manslaughter, may be dealt with, enquired of, tried, determined, and punished, in the district, county, or place in this province, in which such death, stroke, poisoning, or hurt shall happen, in the same manner, in all respects, as if such offence had been wholly committed in such district, county or place.

Punishment of manslaughter.

7. And be it enacted, that every person convicted of manslaughter, shall be liable, at the discretion of the court, to be imprisoned at hard labour in the provincial penitentiary for the term of his natural life, or for any term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years, or to pay such fine as the court shall award.

As to homicide not felonious.

8. Provided always, and be it enacted, that no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in his own defence, or in any other manner without felony.

Punishment for administering poison, &c. with intent to commit murder.

9. And be it enacted, that whosoever shall administer or cause to be taken by any person, any poison or other destructive thing, or shall stab, cut or wound any person, or shall by any means whatsoever cause to any person any bodily injury, dangerous to life, with intent, in any of the cases aforesaid, to commit murder, shall be guilty of felony, and being convicted thereof, shall suffer death.

Punishment for offences with intent to commit murder though no injury effected.

10. And be it enacted, that whosoever shall attempt to administer to any person any poison or other destructive thing, or shall shoot at any person, or shall by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate, or strangle any person, with intent in any of the cases aforesaid to commit the crime of murder, shall, although no bodily injury shall be effected, be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned at hard labour in the provincial penitentiary for the term of his natural life, or for any term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years.

Punishment for cutting and maiming with intent to disfigure.

11. And be it enacted, that whosoever unlawfully and maliciously shall shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall stab, cut or wound any person, with intent in any of the cases aforesaid to maim, disfigure, or disable such person, or to do some other grievous bodily harm to such person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned at hard labour in the provincial penitentiary for the term of his natural life, or for any term not less than seven years, or to be imprisoned

in any other prison or place of confinement for any term not exceeding two years. (*a*)

Punishment for sending explosive substances or throwing destructive matter with intent to do bodily harm.

12. And be it enacted, that whosoever shall unlawfully and maliciously send or deliver to or cause to be taken, or received by any person, any explosive substance, or any other dangerous or noxious thing, or shall cast or throw upon or otherwise apply to any person, any corrosive fluid, or other destructive matter, with intent in any

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(*a*) To constitute a wound within this section, the external surface of the body must be divided.—R. *v.* Beckett. 1 M. & Rob. 526. An indictment for cutting and wounding, which charges the offence to have been committed "feloniously, wilfully and maliciously," is bad, the words of the statute being "unlawfully and maliciously."—R. *v.* Ryan. 7 C. & P. 854. The fact of firing a gun into a room in A. B.'s house, with intent to shoot A. B., the prisoner supposing him to be in the room, will not support a charge of shooting at A. B. if he be not shewn to be in the room, and within reach of the shot.—R. *v.* Lovel. 2 M. & Rob. 39. In a case of wounding with intent to do some grievous bodily harm, it is not essential, that if death had ensued, the offence of the prisoner should be murder, therefore if it appear that, had death ensued, the offence would have been manslaughter only, this is no ground of acquittal of the felony.—R. *v.* Griffiths. 8 C. & P. 248.—R. *v.* Nicholls. 9 C. & P. 267. If a person intending to shoot another put his finger on the trigger of a loaded pistol, but is prevented from pulling the trigger, this is not an attempt to discharge loaded arms "by drawing a trigger or in any other manner" within this statute, as the words "in any other manner" mean something analogous to drawing the trigger, which is the proximate cause of the loaded arm going off.—R. *v.* St. George. 9 C. & P. 483. A broker and his man having levied a distress for rent, the man left in possession was ejected. The owner of the goods was not in the room at the time of the levy, and it was not proved that he was a party to the turning out of the man, or that he knew of the distress being levied, but on the broker and his assistants breaking open the outer door to re-enter, the prisoner struck one of the assistants with an axe on the forehead. Held that under these circumstances, the prisoner must at least be found guilty of an assault: and also that although he might be found guilty of wounding with intent to murder, or to do grievous bodily harm, yet he could not be found guilty of wounding, with intent to maim and disable.—R. *v.* Sullivan. 1 Car. & M. 209.

of the cases aforesaid, to burn, maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, and whereby in any of the cases aforesaid any person shall be burnt, maimed, disfigured or disabled, or receive some other grievous bodily harm, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned at hard labour in the Provincial Penitentiary for the term of his natural life, or for any term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years.

Punishment for trying to procure abortion.

13. And be it enacted, that whosoever, with intent to procure the miscarriage of any woman, shall unlawfully administer to her, or cause to be taken by her, any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned at hard labour in the Provincial Penitentiary for the term of his natural life, or for any term not less than seven years, or to be imprisoned in any other place of confinement for any term not exceeding two years.

A woman secreting the dead body of her child, to conceal the fact of its birth, guilty of misdemeanor.

Proviso.

14. And be it enacted, that if any woman shall be delivered of a child, and shall, by secret burying or otherwise disposing of the dead body of the said child, endeavour to conceal the birth thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned for any term not exceeding two years; and it shall not be necessary to prove whether the child died before, at, or after its birth: Provided always, that if any woman, tried for the murder of her child, shall be acquitted thereof, it shall be lawful for the jury, by whose verdict she shall be acquitted, to find, in case it shall so appear in evidence, that she was delivered of a child, and that she did, by secret burying or otherwise disposing of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the court may pass such sentence as if she had been

convicted upon an indictment for the concealment of the birth. (*b*)

15. And be it enacted, that every person convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall suffer death as a felon. Sodomy.

16. And be it enacted, that every person convicted of the crime of rape, shall suffer death as a felon. Rape.

17. And be it enacted, that if any person shall unlawfully and carnally know and abuse any girl under the age of ten years, every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon; and if any person shall unlawfully and carnally know and abuse any girl, being above the age of ten year, and under the age of twelve years, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned for such term as the court shall award. (*c*) Carnal knowledge of a girl under 10; the like of a girl above 10 and below 12.

18. And whereas upon trials for the crime of buggery,

(*b*) Ante page 193.

(*c*) Attempting to carnally know and abuse a girl between the ages of ten and twelve is not an assault, if the girl consent to all that is done, but is a misdemeanor, and the person making the attempt is not indictable for an assault, but is indictable for the misdemeanor of attempting to commit the misdemeanor of carnally knowing and abusing her.—R. *v.* Martin. 9 C. & P. 213. On an indictment for attempting to carnally know and abuse a girl under 10 years of age, with a count for a common assault, the attempt was proved; but it could not be shewn that the child was under ten years of age; and it also appeared that no violence was used by the prisoner, and no actual resistance made by the girl. Held, that although consent on the part of the girl would put an end to the charge of assault, yet that there was a great difference between consent and submission; and that although, in the case of an adult, submitting quietly to an outrage of this kind would go far to shew consent, yet that, in the case of a child, the jury should consider whether the submission of the child was voluntary on her part, or was the result of fear under the circumstances in which she was placed.—R. *v.* Day. 9 C. & P. 722. An indictment is good which charges that A. committed a rape, and that B. was present aiding and assisting him in his commission of the felony.—R. *v.* Crisham. 1 Car. & M. 187.

What shall be sufficient proof of carnal knowledge in the four preceding cases.

and of rape, and of carnally abusing girls under the respective ages hereinbefore mentioned, offenders frequently escape by reason of the difficulty of the proof which has been required of the completion of those several crimes; for remedy thereof, be it enacted, that it shall not be necessary, in any of those cases, to prove the actual emission of seed in order to constitute a carnal knowledge, but that the carnal knowledge shall be deemed complete upon proof of penetration only.

Forcible abduction of a woman on account of her fortune, with intent to marry her, &c.

19. And be it enacted, that where any woman shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be an heiress presumptive or next of kin to any one having such interest, if any person shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person, every such offender, and every person counselling, aiding or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be imprisoned at hard labour in the Provincial Penitentiary, for any term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years. (*d*)

Unlawful abduction of a girl from her parents or guardians.

20. And be it enacted, that if any person shall unlawfully take, or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to suffer such punish-

(*d*) On an indictment for abduction under this section, the jury ought not to convict the prisoner, unless they are satisfied that he committed the offence from motives of lucre; but evidence of expressions used by him, respecting the property of the lady, such as his stating that he had seen the will of one of her relations (naming him), and that she would have £220 a year, are important for the consideration of the jury, in coming to a conclusion whether the prisoner was actuated by motives of lucre or not.—R. *v.* Barrett. 9 C. & P. 387.

ment, by fine or imprisonment, or by both, as the court shall award. (*e*)

21. And be it enacted, that if any person shall maliciously, either by force or fraud, lead or take away, or decoy, or entice away or detain, any child under the age of ten years, with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong; or if any person shall, with any such intent as aforesaid, receive or harbour any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away or detained as hereinbefore mentioned; every such offender, and every person counselling, aiding or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be imprisoned at hard labour in the Provincial Penitentiary for any term not less than seven years, or to be imprisoned in any other prison or place of confinement, for any term not exceeding two years: Provided always, that no person who shall have claimed to be the father of an illegitimate child, or to have any right to the possession of such child, shall be liable to be prosecuted by virtue hereof, on account of his getting possession of such child, or taking such child out of the possession of the mother, or any other person having the lawful charge thereof. Child stealing. Not to extend to fathers taking their illegitimate children.

22. And be it enacted, that if any person, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in this province or elsewhere, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony; and being convicted thereof, shall be liable to be imprisoned at hard Bigamy.

(*e*) Semble, that where a man, by false and fraudulent representations, induced the parents of a girl, between ten and eleven years of age, to allow him to take her away, such taking away of the girl is an abduction within this statute.—R. *v.* Hopkins. 1 Car. & M. 254.

labour in the Provincial Penitentiary for any term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years; and any such offence may be dealt with, enquired of, tried, determined, and punished in the district or county where the offender shall be apprehended or be in custody, as if the offence had been actually committed in that district or county: Provided always, that nothing herein contained shall extend to any second marriage contracted out of this province by any other than a subject of her majesty, resident in this province, and leaving the same with intent to commit the offence, or to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time; or shall extend to any person, who, at the time of such second marriage, shall have been divorced from the bond of the first marriage; or to any person, whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.

Place of trial.

Exceptions.

23. And be it enacted, that if any person shall arrest any clergyman or minister of the gospel, upon any civil process, while he shall be performing divine service, or shall, with the knowledge of such person, be going to perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanor; and being convicted thereof, shall suffer such punishment, by fine or imprisonment, or by both, as the court shall award.

Arresting a clergyman during divine service.

24. And be it enacted, that if any person shall assault and strike or wound any magistrate, officer, or other person whatsoever, lawfully authorized, on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water, every such offender, being convicted thereof, shall be liable to be imprisoned at hard labour in the Provincial Penitentiary for any term not less than seven years, or to

Punishment for assaults on officers, &c. for their endeavours to save shipwrecked property.

be imprisoned in any other prison or place of confinement for any term not exceeding two years.

25. And be it enacted, that where any person shall be charged with and convicted of any of the following offences as misdemeanors, that is to say, of any assault with intent to commit felony; of any assault upon any peace officer or revenue officer in the due execution of his duty, or upon any person acting in aid of such officer; of any assault upon any person with intent to resist or prevent the lawfu lapprehension or detainer of the party so assaulting, or of any other person, for any offence for which he or they may be liable by law to be apprehended or detained; or of any assault committed in pursuance of any conspiracy to raise the rate of wages: in any such case, the court may sentence the offender to be imprisoned for any term not exceeding two years, and may also (if it shall so think fit) fine the offender, and require him to find sureties for keeping the peace.

Assaults with intent to commit felony; assaults on peace officers; or to prevent the arrest of offenders; or in pursuance of a conspiracy to raise wages; punishable with hard labour.

26. And be it enacted, that if any person shall, unlawfully and with force, hinder any seaman from working at or exercising his lawful trade, business, or occupation, or shall beat, wound, or use any other violence to him, with intent to deter or hinder him from working at or exercising the same; or if any person shall beat, wound, or use any other violence to any person, with intent to deter or hinder him from selling or buying any wheat or other grain, flour, meal, or malt, in any market or other place, or shall beat, wound, or use any other violence to any person having the care or charge of any wheat or other grain, flour, meal, or malt, whilst on its way to or from any city, market-town, or other place, with intent to stop the conveyance of the same, every such offender may be convicted thereof before two justices of the peace, and imprisoned and kept to hard labour in the common gaol or house of correction, for any term not exceeding three calendar months: Provided always, that no person, who shall be punished for any such offence, by virtue of this provision, shall be punished for the same offence by virtue of any other law whatsoever.

Assault on any seaman, &c. to prevent him from working; assaults with intent to obstruct the buying or selling of grain, or its free passage; punishable before two magistrates, with imprisonment not exceeding three months.

Persons committing any common assault or battery may be compelled by a magistrate to pay fine and costs not exceeding £5.

27. And whereas it is expedient that a summary power of punishing persons for common assaults and batteries should be provided under the limitations hereinafter mentioned; Be it therefore enacted, that where any person shall unlawfully assault or beat any other person, it shall be lawful for any justice of the peace, upon complaint of the party aggrieved, praying him to proceed summarily under this act, to hear and determine such offence; and the offender, upon conviction thereof before him, shall forfeit and pay such fine as shall appear to him to be meet, not exceeding together with costs (if ordered) the sum of five pounds, which fine shall be paid to the treasurer of the municipal district, or place in which the offence shall have been committed, and make part of the funds of such district, or if the conviction be had in any place not within any municipal district, then such fine shall be paid over to such officer, and be applicable to such purposes as other fines and penalties by law are; and the evidence of any inhabitant of the municipal district shall be admitted in proof of the offence, notwithstanding such application of the fine incurred thereby; and if such fine as shall be awarded by the said justice, together with the costs (if ordered), shall not be paid, either immediately after the conviction, or within such period as the said justice shall at the time of the conviction appoint, it shall be lawful for him to commit the offender to the common gaol or house of correction, there to be imprisoned for any term not exceeding two calendar months, unless such fine and costs be sooner paid; but if the justice, upon hearing of any such case of assault or battery, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, he shall forthwith (*f*) make out a certificate under his hand, stating the fact of such dismissal, and shall deliver

Application of the fine.

Commitment on non-payment.

If the magistrate dismisses the complaint, he shall make out a certificate to that effect.

(*f*) A complaint was heard and dismissed, on the 29th of November, and the justices made out and delivered a certificate on the 10th of January following. Held, that the cer-

such certificate to the party against whom the complaint was preferred; and if such costs shall not be paid immediately upon dismissal, or within such period as such justice shall, at the time of such dismissal, appoint, it shall be lawful for him to issue his warrant to levy the amount of such costs within a certain time, to be in the said warrant expressed, and in case no distress sufficient to satisfy the amount of such warrant, shall be so found, to commit the party by whom such costs shall be so ordered to be paid, as aforesaid, to the common gaol of the district, county, or division, where such offence shall be alleged to have been committed, there to be imprisoned for any term not exceeding ten days, unless such costs shall be sooner paid.

Such certificate or conviction shall be a bar to any other proceedings.

28. And be it enacted, that if any person against whom any such complaint shall have been preferred for any common assault or battery, shall have obtained such certificate as aforesaid, or having been convicted shall have paid the whole amount adjudged to be paid under such conviction, or shall have suffered the imprisonment awarded for non-payment thereof, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause. (*g*)

Magistrate may discharge offender on his satisfying aggrieved party.

29. And be it enacted, that when any person shall be summarily convicted before a justice of the peace of any offence against this act, it shall be lawful for such justice, if he shall so think fit, to discharge the offender from his conviction upon his making such satisfaction to the

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tificate was not made out in sufficient time.—R. *v.* Robinson. 5 Jurist, 244.

(*g*) Trespass for assault and battery: plea as to the assault, that the defendant was summoned by the plaintiff before two justices of the peace, who dismissed the complaint, and made out their certificate, stating the fact, and delivered the same to the defendant. Held upon special demurrer, first, that the plea need not allege that the assault was committed within the jurisdiction of the justices; and secondly, that the plea was bad, for not stating the grounds on which the complaint was dismissed.—Skuse *v.* Davis. 7 Dowl. 774.

party aggrieved for damages and costs, or either of them, as shall be ascertained by the said justice.

Where felony intended, magistrate not to adjudicate, but refer the case to the tribunals.

30. Provided always, and be it enacted, that in case the justice shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstance, a fit subject for a prosecution by indictment, he shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as he would have done before the passing of this act: Provided also, that nothing herein contained shall authorize any justice of the peace to hear and determine any case of assault or battery, in which any question shall arise as to the title to any lands, tenements or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice.

31. And be it enacted, that if any person shall wilfully disturb, interrupt or disquiet any assemblage of persons met for religious worship, by profane discourse, by rude, or indecent behaviour, or by making a noise, either within the place of worship, or so near it as to disturb the order, or solemnity of the meeting, such person shall, upon conviction thereof before any Justice of the Peace, on the oath of one, or more, credible witness, or witnesses, forfeit and pay such a sum of money, not exceeding five pounds, as the said Justice shall think fit.

Fines, how levied.

32. And be it enacted, That in default of payment of any fine imposed under the authority of this Act, on a summary conviction before any justice of the peace, together with the costs attending the same, within the period specified for the payment thereof, at the time of conviction by the justice before whom such conviction may have taken place, it shall and may be lawful for such justice to issue his warrant directed to any constable to levy the amount of such fine and costs, within a certain time to be in the said warrant specified, and in case no distress sufficient to satisfy the amount shall be found, it shall and may be lawful for him to commit the offender

to the common gaol of the district, wherein the offence was committed, for any term not exceeding one month, unless the fine and costs shall be sooner paid.

33. And be it enacted, that any person who shall think himself aggrieved by any summary conviction, or decision, under this act as aforesaid, may appeal to the next court of general or quarter sessions, which shall be holden not less than twelve days after the day of such conviction or decision for the district wherein the cause of complaint shall have arisen: Provided always, that such person shall give to the other party a notice, in writing, of such appeal, and of the cause and matter thereof, within three days after such conviction or decision, and seven days at the least before such sessions, and shall also, either remain in custody until the sessions, or enter into a recognizance with two sufficient sureties before a justice of the peace, conditioned personally to appear at the said sessions and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded, and upon such notice being given, and such recognizance being entered into, the justice before whom the same shall be entered into, shall liberate such person, if in custody, and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs, to either party, as to the court shall seem meet; and in case of dismissal of the appeal, or the affirmance of the conviction, shall order and adjudge the offender to be punished according to the conviction, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment.

Appeal against convictions to Quarter Sessions.

34. And be it enacted, that whenever an appeal shall be made from the decision of any justice under this act as aforesaid, the court of general or quarter sessions shall have power to empannel a jury to try the matter on which such decision may have been made, and the court, on the finding of such jury, under oath, shall thereupon give such judgment as the circumstances of the case may require: Provided always, that such court shall not in any case

Appeals, triable by jury.

adjudge the payment of a fine exceeding five pounds in addition to the costs, or to order the imprisonment of the person so convicted, for any period not exceeding one month, and all fines imposed, and recovered, by the judgment of such court, shall be applied and disposed of in the same manner as other fines recovered under the provisions of this act.

Punishment of accessories.

35. And be it enacted, that in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act, shall, on conviction, be liable to be imprisoned for any term not exceeding two years.

Offences punishable by imprisonment.

36. And be it enacted, that when any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet.

Jury may acquit of felony and convict of assault, in certain cases.

37. And be it enacted, that on the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault, against the person indicted, if the evidence shall warrant such finding; and when such verdict shall be found, the court shall have power to imprison the person so found guilty of an assault, for any term not exceeding three years. (*h*)

(*h*) The offence of carnally knowing and abusing a female child under ten years of age, is not a felony which includes an

38. Provided always, and be it enacted, that nothing herein contained shall alter or affect any of the laws relating to the Government of her Majesty's land or naval forces. Not to affect the laws relating to the forces.

39. And be it enacted, that it shall be lawful for the Queen's Majesty, and for the governor, lieutenant governor or person administering the government of this province, to extend the royal mercy to any person imprisoned by virtue of this act, although he shall be imprisoned for non-payment of money to some party, other than the crown. Persons imprisoned may be pardoned.

40. And for the more effectual prosecution of offences punishable upon summary conviction by virtue of this act;

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assault within this section, even though it be stated in the indictment for the felony that the prisoner made an assault on the child.—R. *v.* Banks. 8 C. & P. 574. A person who puts a deleterious drug into coffee in order that another may take it, is, if it be taken, guilty at common law of an assault upon the person who takes it.—R. *v.* Button. 8 C. & P. 660. An attempt to commit the misdemeanour of having carnal knowledge of a girl between the ages of ten and twelve, is not an assault, as the consent of the girl puts an end to the charge of assault.—R. *v.* Meredith. 8 C. & P. 589. On the trial of an indictment for a rape, if it appear that the prisoner was under fourteen years of age at the time he committed the offence, he must be acquitted of the rape ; but the jury may convict him of an assault under this section.—R. *v* Brimilow. 9 C. & P. 366. On an indictment for a felony which includes an assault, the prisoner ought not to be convicted of an assault, which is quite distinct from the felony charged: and on such an indictment the prisoner ought only to be convicted of an assault, which is included in the felony itself.—R. *v.* St. George. 9 C. & P. 483 ; R. *v.* Cuttridge. 9 C. & P. 471. A. presented a loaded pistol at B., but was prevented from pulling the trigger. Held, that A. could be properly convicted of this assault, on an indictment for attempting feloniously to discharge loaded arms at B.—R. *v.* St. George. 9 C. & P. 483. On an indictment for abduction under this statute, if the jury should not be satisfied that the prisoner was actuated by motives of lucre, but if they be satisfied that he used force to the person of the lady in taking her away, and that he took her away against her consent, they may convict him of an assault under this section.—R. *v.* Barratt. 9 C. & P. 387.

Provisions for offences against this act punishable on summary conviction.

Be it enacted, that where any person shall be charged on the oath of a credible witness, before any justice of the peace, with any such offence, the justice may summon the person charged, to appear at a time and place to be named in such summons, and if he shall not appear accordingly, then (upon proof of the due service of the summons upon such person, by delivering the same to him) the justice may either proceed to hear and determine the case ex parte, or may issue his warrant for apprehending such person and bring him before himself or some other justice of the peace, or the justice before whom the charge shall be made may (if he shall so think fit) issue such warrant in the first instance, without any previous summons.

Time for summary proceedings.

41. Provided always, and be it enacted, that the prosecution for every offence punishable on summary conviction by virtue of this act, shall be commenced within three calendar months after the commission of the offence, and not otherwise.

Form of conviction.

42. And be it enacted, that the justice before whom any person shall be summarily convicted of any offence against this act, may cause the conviction to be drawn up in the following form of words, or in any other form of words to the same effect, as the case shall require; (that is to say,) "Be it remembered, that on the —— day of —— in the year of our lord —— at —— in the county of —— (or riding, division, district, city, &c. as the case may be,) A. O. is convicted before me, (naming the justice,) one of her Majesty's justices of the peace for the said county, (or riding, &c.) for that he the said A. O. did (specify the offence, and the time and place when and where the same was committed, as the case may be;) and I the said justice adjudge the said A. O. for his said offence to be imprisoned in the ——(or to be imprisoned in the —— and there kept at hard labour) for the space of —— (or I adjudge the said A. O. for his said offence, to forfeit and pay the sum of ——) (here state the amount of the fine imposed) and also to pay the sum of —— for costs; and in default of imme-

diate payment of the said sums, to be imprisoned in the —— for the space of —— unless the said sums shall be sooner paid; (or, and I order that the said sum shall be paid by the said A. O. on or before the —— day of ——) and I direct that the said sum of —— (i. e. the amount of the fine,) shall be paid to —— of ——aforesaid, in which the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided; (or as the case may be;) and I order that the said sum of —— for costs shall be paid to C. D. (the party aggrieved). Given under my hand, the day and year first above mentioned."

Not to repeal any act relating to high treason or the revenue.

43. Provided always, and be it enacted, that nothing in this act contained, shall affect or alter any act, so far as it relates to the crime of high treason, or to any branch of the public revenue.

All acts repugnant to this act repealed.

44. And be it enacted, that all acts, or parts of acts, or provisions of law in force in this province, or any part thereof, immediately before the time when this act shall come into force, which shall be inconsistent with, or contradictory to this act, or which make any provision in any matter provided for by this act, other than such as is hereby made in such matter, shall from and after the time when this act shall come into force, be, and they are hereby repealed, except in so far as may relate to any offence committed before the said time, which shall be dealt with and punished, as if this Act had not been passed.

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6 Vic. ch. 5.

An Act for better proportioning the punishment to the offence, in certain cases, and for other purposes therein mentioned.

Preamble.

Whereas it is expedient to enable the courts, before whom offenders may be convicted in certain cases, better to proportion the punishment of such offenders to the guilt of the offence; Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Legislative Council and of the Legis-

lative Assembly of the Province of Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of the United Kingdom of Great Britain and Ireland, intituled, "An Act to Re-unite the Provinces of Upper and Lower Canada, and for the government of Canada," and it is hereby enacted by the authority of the same, that so much of a certain act passed in the session held in the fourth and fifth years of her Majesty's reign, and intituled, "An Act for improving the administration of criminal justice in this province," or of a certain other act passed in the same session, and intituled, "An Act for consolidating and amending the laws in this province, relative to larceny and other offences connected therewith," or of a certain other act passed in the same session, and intituled, "An Act for consolidating and amending the laws in this province, relative to malicious injuries to property," or of a certain other act passed in the same session, and intituled, "An Act for consolidating and amending the statutes in this province relative to offences against the person," or of any other act or law, as shall be repugnant to or inconsistent with the enactments of this act, shall be and is hereby repealed.

4 & 5 Vic. ch. 24, cited.

4 & 5 Vic. ch. 25.

4 & 5 Vic. ch. 26, cited.

4 & 5 Vic. ch. 27, cited.

Provisions inconsistent with this act repealed.

2. And be it enacted, that for each and every offence for which by any of the acts hereinabove cited, the offender is liable on conviction to be punished by imprisonment in the provincial penitentiary, but may instead thereof and in the discretion of the court, be punished by imprisonment in any other prison or place of confinement for any term not exceeding two years, the offender may, if convicted after the passing of this act, be punished in the discretion of the court, by imprisonment in the provincial penitentiary, for any term not less than three years and not exceeding the longest term for which such offender might have been so imprisoned if this act had not been passed, or by imprisonment in any other prison or place of confinement for any term not exceeding two years, in the manner prescribed by such act; Provided always, that nothing in this act shall prevent such offender from being

Cases in which offenders may be committed to the provincial penitentiary for any term not less than three years.

punished by imprisonment in the provincial penitentiary for life, if he might have been so punished if this act had not been passed.

Other cases in which offenders may be so committed.

3. And be it enacted, that for each and every offence, for which by any of the said acts, the offender may on conviction be punished by imprisonment for such term as the court shall award, or for any term exceeding two years, such imprisonment, if awarded for a longer term than two years, shall be in the provincial penitentiary.

Instead of being punished by transportation, offenders may be imprisoned for a like term in the penitentiary.

4. And be it enacted, that for each and every offence for which by any of the said acts or by any other act or law, the offender might, if this act had not been passed, have been punished by transportation beyond seas, such offender may, if convicted after the passing of this act, be punished by imprisonment in the provincial penitentiary for any term for which he might have been tranported beyond seas if this act had not been passed, or by imprisonment for life, if without this act he might have been punished by transportation for life.

Assault with intent to commit rape or abominable crime, how punished.

5. And whereas it is necessary to determine the punishment to be inflicted upon certain offenders, not provided for by the said before recited act, intituled, "An Act for consolidating and amending the statutes in this province relating to offences against the person," be it enacted, that where any person shall be charged with and convicted of any assault, with intent to commit rape, or of any assault with intent to commit the abominable crime of buggery, either with mankind or with any animal, the court in any such case may sentence the offender to be imprisoned at hard labour in the provincial penitentiary for any term not exceeding three years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years.

3 Vic. ch. 3.

An Act to repeal an act passed in the forty-fourth year of the reign of his late Majesty King George the Third, intituled, "An Act for the exemplary punishment of all and every person and persons who shall seduce, or attempt to seduce, or aid or assist, or attempt to aid or assist, any soldier to desert his Majesty's service, or who shall harbor, conceal, receive or assist, any deserter from such service," and to make further provision for the punishment of such offenders.

Preamble.

WHEREAS the laws now in force in this province for the punishment of persons concerned in enticing soldiers to desert her Majesty's service, or who may harbor deserters from her said Majesty's service, are found insufficient to prevent or restrain such unlawful and pernicious practices: And whereas it is necessary to extend punishment to such persons as shall persuade, or attempt to persuade sailors engaged in the naval service of her Majesty to desert, or who shall harbor deserters from the said naval service: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the parliament of Great Britain, intituled, an "act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, an 'act for making more effectual provision for the government of the province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, that an act passed in the forty-fourth year of the reign of his late most gracious Majesty George the Third, intituled, "an act for the exemplary punishment of all and every person and persons who shall seduce, or attempt to seduce, or aid or assist, or attempt to aid or assist, any soldier to desert his Majesty's service, or who shall harbor, conceal, receive or assist any deserter from such service," be and the same is hereby repealed.

44 Geo. III. ch. 2. repealed.

2. And be it further enacted by the authority aforesaid, That from and after the passing of this act, if any person other than enlisted soldiers in her Majesty's service, or sailors engaged in the naval service of her Majesty, shall by words or with money, or by any ways, methods or means whatsoever, directly or indirectly, prevail upon, procure, persuade or encourage, any such soldier or sailor to desert or leave her Majesty's naval or military service, as aforesaid, and shall be thereof lawfully convicted before any court of Oyer and Terminer and general gaol delivery in this province, such person so offending shall be deemed guilty of a misdemeanor, and upon conviction shall be liable to be punished by imprisonment in the common gaol of the district in which such conviction shall happen, or by imprisonment in the Provincial Penitentiary in this province, for such period as the court before which such trial shall take place, shall in their discretion adjudge, and shall be further liable to the payment of such fine as the said court shall impose upon and require to be paid by such offender.

Anyperson procuring soldiers or sailors to desert, to be liable to imprisonment in the common gaol or penitentiary, and to a fine, in the discretion of the court.

3. And be it further enacted by the authority aforesaid, that if any person other than an enlisted soldier, or sailor engaged in the naval service of her said Majesty, shall after the passing of this act harbor, conceal, receive or assist, any deserter from her majesty's naval or military service, knowing him to be a deserter, such person so offending shall be deemed guilty of a misdemeanor, and upon conviction shall be liable to the same penalties and punishments as are mentioned and set forth in the preceding clause of this act.

Any person harbouring a deserter liable to the same penalties.

Imperial Act, 6 & 7 Vic. ch. 76.

An Act for giving effect to a Treaty between her Majesty and the United States of America for the apprehension of certain Offenders.

Whereas by the tenth article of a treaty between her Majesty and the United States of America, signed at Washington on the ninth day of August in the year one

thousand eight hundred and forty-two, the ratifications whereof were exchanged at London on the thirteenth day of October in the same year, it was agreed that her Majesty and the said United States should, upon mutual requisitions by them or their ministers, officers, or authorities respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either of the high contracting parties, should seek an asylum, or should be found within the territories of the other; provided that this should only be done upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged should be found, would justify his apprehension and commitment for trial, if the crime or offence had been there committed, and that the respective judges and other magistrates of the two governments, should have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, so that he might be brought before such judges or other magistrates respectively, to the end that the evidence of criminality might be heard and considered; and if, on such hearing, the evidence should be deemed sufficient to sustain the charge, it should be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant might issue for the surrender of such fugitive, and that the expense of such apprehension and delivery should be borne and defrayed, by the party making the requisition and receiving the fugitive; and it is by the eleventh article of the said treaty further agreed, that the tenth article, herein-before recited, should continue in force until one or other of the high contracting parties should signify its wish to terminate it, and no longer: And whereas it is expedient that provision should be made for carrying the said agreement into effect; be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords

Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That in case requisition shall at any time be made by the authority of the said United States, in pursuance of and according to the said treaty, for the delivery of any person charged with the crime of murder, or assault with intent to commit murder, or with the crime of piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of the United States of America, who shall be found within the territories of her Majesty, it shall be lawful for one of her Majesty's principal secretaries of state, or in Ireland for the chief secretary of the Lord Lieutenant of Ireland, and in any of her Majesty's colonies or possessions abroad for the officer administering the government of any such colony or possession, by warrant under his hand and seal to signify that such requisition has been so made, and to require all justices of the peace and other magistrates and officers of justice, within their several jurisdictions, to govern themselves accordingly, and to aid in apprehending the person so accused, and committing such person to gaol, for the purpose of being delivered up to justice, according to the provisions of the said treaty; and thereupon it shall be lawful for any justice of the peace, or other person having power to commit for trial persons accused of crimes against the laws of that part of her Majesty's dominions in which such supposed offender shall be found, to examine upon oath any person or persons touching the truth of such charge, and upon such evidence as according to the laws of that part of her Majesty's dominions would justify the apprehension and committal for trial of the person so accused if the crime of which he or she shall be so accused had been there committed, it shall be lawful for such justice of the peace, or other person having power to commit as aforesaid, to issue his warrant for the apprehension of such person, and also to commit the person so accused to gaol, there to remain until delivered pursuant to such requisition as aforesaid.

2. Provided always, and be it enacted, that in every

such case copies of the depositions upon which the original warrant was granted, certified under the hand of the person or persons issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended.

3. And be it enacted, that upon the certificate of such justice of the peace, or other person having power to commit as aforesaid, that such supposed offender has been so committed to gaol, it shall be lawful for one of her Majesty's principal secretaries of state, or in Ireland for the chief secretary of the lord-lieutenant of Ireland, and in any of her Majesty's colonies or possessions abroad for the officer administering the government of any such colony or possession, by warrant under his hand and seal to order the person so committed to be delivered to such person or persons as shall be authorized in the name of the said United States to receive the person so committed, and to convey such person to the territories of the said United States, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly, and it shall be lawful for the person or persons authorized as aforesaid to hold such person in custody, and take him or her to the territories of the said United States, pursuant to the said treaty; and if the person so accused shall escape out of any custody to which he or she shall be committed, or to which he or she shall be delivered as aforesaid, it shall be lawful to retake such person in the same manner as any person accused of any crime against the laws of that part of her Majesty's dominions to which he or she shall so escape may be retaken upon an escape.

4. And be it enacted, that where any person who shall have been committed under this act, to remain until delivered up pursuant to requisition as aforesaid, shall not be delivered up pursuant thereto, and conveyed out of her Majesty's dominions within two calendar months after such committal, over and above the time actually required to convey the prisoner from the gaol to which he or she

was committed by the readiest way out of her Majesty's dominions, it shall in every such case be lawful for any of her Majesty's judges in that part of her Majesty's dominions in which such supposed offender shall be in custody, upon application made to him or them by or on behalf of the person so committed, and upon proof made to him or them that reasonable notice of the intention to make such application has been given to some or one of her Majesty's principal secretaries of state, or in Ireland to the chief secretary of the lord-lieutenant of Ireland, and in any of her Majesty's colonies or possessions abroad for the officer administering the government of any such colony or possession, to order the person so committed to be discharged out of custody, unless sufficient cause shall be shown to such judge or judges why such discharge ought not to be ordered.

5. And be it enacted, that if by any law or ordinance to be hereafter made by the local legislature of any British colony or possession abroad, provision shall be made for carrying into complete effect within such colony or possession the objects of this present act, by the substitution of some other enactment in lieu thereof, then it shall be competent to her Majesty, with the advice of her Privy Council, (if to her Majesty in council it shall seem meet, but not otherwise), to suspend the operation within any such colony or possession of this present act, so long as such substituted enactment shall continue in force there, and no longer.

6. And be it enacted, that this act shall continue in force during the continuance of the tenth article of the said treaty.

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3 Vic. ch. 5.

An Act to provide for the continuation of suits and process, in cases of formation of new districts.

Whereas in cases where new districts have been erected by acts of the Provincial Parliament, much inconvenience has been found to arise from the want of legal authority

Preamble.

Recital of inconvenience to suits from the formation of new districts.

in the respective sheriffs of the districts, of which the new districts formed a part, to continue to execute legal process already issued, and to execute process in suits already commenced: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "an act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, 'An act for making more effectual provision for the government of the province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, that all suits commenced in any of the district courts of this province, and all suits commenced in her Majesty's court of Queen's Bench, at the time of the division of any district of this province, shall continue to final judgment and execution as if no such division had taken place; and all process, whether mesne or final, directed to the sheriff of the district in which the suit shall have been commenced, shall be considered legal and regular, notwithstanding the erection of any new district; and the sheriffs of the district to which such process shall have been or shall be addressed, shall have the execution of such process, and the custody of all persons and property taken or seized under the same, and shall be subject to the same liabilities respecting the same, as if no such new district had been erected, any thing in the several acts for the erection of new districts to the contrary thereof in any wise notwithstanding.

All suits commenced at the time of dividing any district, to be carried on as if no such division had taken place.

Sheriffs to execute processes, &c., as if such new district had not been formed.

2. Provided always, and be it further enacted by the authority aforesaid, That nothing in this or any other act contained shall extend, or be construed to extend, to prevent the court of Queen's Bench, or a judge thereof, from ordering the trial of any cause pending, as aforesaid, to be had in such new district: Provided also, that the provisions of this act shall extend to any case arising from any division of districts which may hereafter take place.

Not to prevent trials being ordered to take place in the new district.

This act to extend to districts to be hereafter formed.

59 Geo. III. ch. 14.

12. And be it further enacted by the authority aforesaid, That if any action of ejectment shall be brought against any person or persons, who after these lines have been established by virtue of this act, shall be found, in consequence of unskilful surveyors, to have improved on land not his, her, or their own, it shall and may be lawful for the judge of assize, before whom such action is tried, to direct the jury to assess such damages for the defendant or defendants for any loss he, she, or they may sustain in consequence of any improvement made before such action is commenced, and also assess the value of the land to be recovered, and if a verdict shall be found for the plaintiff or plaintiffs, no writ of possession shall issue, until such plaintiff or plaintiffs have tendered or paid the amount of such damages, as aforesaid, or shall release the said land to the defendant, provided the said defendant shall pay or tender to the plaintiff the value of the land so assessed, before the fourth day of the ensuing term.

What proceedings shall be had when actions of ejectment are brought for land improperly occupied in consequence of erroneous surveys.

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2 Vic. ch. 17.

An Act to extend the provisions of an act passed in the fifty-ninth year of the reign of his late Majesty King George the Third, intituled, "An Act to repeal an ordinance of the province of Quebec, passed in the twenty-fifth year of his late Majesty's reign, intituled, 'An ordinance concerning land surveyors, and the admeasurement of lands;' and also to extend the provisions of an act passed in the thirty-eighth year of his late Majesty's reign, intituled, 'An Act to ascertain and establish on a permanent footing the boundary lines of the different townships in this province,' and further to regulate the manner in which lands are hereafter to be surveyed."

Whereas it is expedient to extend the provisions of an act passed in the fifty-ninth year of the reign of his late Majesty King George the Third, chapter fourteen, intituled, "an act to repeal an ordinance of the province of Quebec, passed in the twenty-fifth year of his Majesty's reign, intituled, 'an ordinance concerning land surveyors and the admeasurement of lands,' and also to extend the

Preamble.

59 Geo. III. ch. 14, recited.

provisions of an act passed in the thirty-eighth year of his Majesty's reign, intituled, 'an act to ascertain and establish on a permanent footing the boundary lines of the different townships in this province,' and further to regulate the manner in which lands are hereafter to be surveyed," so as to protect persons who have made improvements upon lands not their own, in consequence of unskilful surveys previously to the lines of any township, concession or lot in this province being established under the authority of the aforesaid act, from costs of vexatious law-suits: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the parliament of Great Britain, intituled, "an act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled 'an act for making more effectual provision for the government of the province of Quebec, in North America,' and to make further provision for the government of the said province, and by the authority of the same, that from and after the passing of this act, in all cases in which the jury before whom any action of ejectment shall be tried, shall assess damages for the defendant, as is provided for in the twelfth clause of the aforesaid act, for improvements made upon land not his own, in consequence of unskilful surveys; and when it shall be satisfactorily made to appear that the defendant does not contest the plaintiff's action for any other purpose than to obtain the value of the improvements made upon the land previous to the alteration and establishing of the lines in the manner pointed out in the aforesaid act, it shall and may be lawful for the judge before whom such action shall be tried to certify such fact upon the record, and thereupon the defendant shall be entitled to the costs of the defence, in the same manner as if the plaintiff had been non-suited on the trial, or a verdict rendered for the defendant.

Defendant entitled to costs, when defending the action only for purpose of obtaining value of his improvements, &c.

2. Provided always, and be it further enacted by the

authority aforesaid, That it shall be incumbent upon the defendant, at the time of entering into the consent rule, to give notice in writing to the lessor or lessors of the plaintiff in such ejectment, or to his attorney, named on the writ or declaration, of the amount claimed for such improvements, on payment of which sum the defendant, or person in possession, will surrender the possession to such lessor or lessors, and that the said defendant does not intend at the trial to contest the title of the lessor or lessors of the plaintiff; and without such notice shall on the trial be found to have been given, as aforesaid, or if the jury shall assess for the defendant a less sum than that claimed in the notice, or shall find that the defendant has refused to surrender possession of the land claimed, after tender shall have been made of such amount claimed, then in either of such cases the judge shall not certify, and the defendant shall not be entitled to the costs of the defence, but shall pay costs to the plaintiff, any thing herein contained to the contrary thereof notwithstanding.

Defendant to give notice of amount of claim for improvements, and willingness to surrender possession;

Without which notice, or if smaller sum shall be assessed, &c. judge not to certify in his favour.

3. Provided nevertheless, and be it further enacted by the authority aforesaid, That upon the trial of any such cause, no evidence shall be required to be produced in proof of the title of the lessor or lessors of the plaintiff.

When evidence not necessary in favour of claimant's title.

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7 WILL. IV. CH. 10.

An Act for the more convenient recovery of Estreats.

WHEREAS it is expedient to provide for the more summary and convenient collection of fines, issues, amerciaments, and sums due upon recognizances forfeited to his Majesty: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "An act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, "An Act for making more

Preamble.

(See Statutes of Canada, 4 & 5 Vic. ch. 24, sec. 49.)

Fines, issues and amerciaments, and forfeited recognizances (except such as by law are otherwise to be levied, &c.) imposed &c. by or before any court of oyer and terminer, general gaol delivery, assize and nisi prius, within 21 days of adjournment, to be entered and extracted on a roll by clerk of assize, or in case of his death or absence, by any other person under direction of the judge who presided at such court, in duplicate, to be signed by clerk of assize, or in case of his death or absence, by the judge.

effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, That from and after the first day of June next ensuing the passing of this act, all fines, issues, amerciaments and forfeited recognizances, save and except such as shall, by virtue of any act or acts of the parliament of this province, made or to be made, be directed to be otherwise levied, recovered, appropriated or disposed of, which shall be set, imposed, lost or forfeited, by or before any court of oyer and terminer, or general gaol delivery, or before any court of assize and nisi prius, shall, within twenty-one days from the adjournment of such court, be fairly entered and extracted on a roll, by the Clerk of Assize, or in case of his death or absence, by any other person under the direction of the judge who presided at such court; which roll shall be made in duplicate, and shall be signed by the Clerk of Assize, or such judge, as aforesaid, in case of his death or absence.

One copy of roll to be sent to clerk of the crown within time mentioned, &c. the other to sheriff of the district in which fine &c. occurred, Mode of proceeding to levy fine, &c.

2. And be it further enacted by the authority aforesaid, That one of the said rolls shall be transmitted to the office of the Clerk of the Crown, on or before the first day of the term next succeeding such court, and that the other of such rolls shall, so soon as the same shall be prepared, be sent by the Clerk of Assize, or in case of his death or absence, by such judge, as aforesaid, with a writ of fieri facias and capias, according to the form in the schedule to this act annexed, marked A, to the sheriff of the district in or for which such court was holden; which writ shall be authority to such sheriff for proceeding to the immediate levying and recovering of such fines, issues, amerciaments and forfeited recognizances, or any of them, as remain to be levied and recovered, on the goods and chattels, lands and tenements of such several persons; or for taking into custody the bodies of such persons, in case sufficient goods and chattels, lands or tenements, shall not be found, whereof the same can be made; and every person so taken shall be lodged in the common gaol of the

district until satisfaction be made, or until the Court of King's Bench shall, upon cause shewn by the party as hereinafter mentioned, make an order in the case, and until such order shall be fully complied with.

Relief of party committed by court of king's bench.

3. And be it further enacted by the authority aforesaid, That from and after the first day of June next after the passing of this act, all fines, issues, amerciaments and forfeited recognizances, save and except such as shall, by virtue of any act or acts of the parliament of this province, made or to be made, be directed to be otherwise levied, recovered, appropriated or disposed of, which shall be set, imposed, lost or forfeited, by or before any court of general quarter sessions of the peace, shall, within twenty-one days after the adjournment of such court, be fairly entered and extracted on a roll by the Clerk of the Peace, which roll shall be made out in duplicate, and shall be signed by the Clerk of the Peace.

Fines, &c. incurred at general quarter sessions, to be entered and extracted on a roll in duplicate.

4. And be it further enacted by the authority aforesaid, That one of the said rolls shall remain deposited in the office of the Clerk of the Peace, and that the other of such rolls shall, so soon as the same shall be prepared, be sent by the Clerk of the Peace, with a writ of fieri facias and capias, according to the form in the schedule to this act annexed, marked B, to the sheriff of the district in which such court of quarter sessions shall have been holden; which writ shall be authority to such sheriff for proceeding to the immediate levying and recovering of such fines, issues, amerciaments and forfeited recognizances, or any of them, as remain to be levied and recovered, on the goods and chattels, lands and tenements, of such several persons, or for taking into custody the bodies of such persons, in case sufficient goods and chattels, lands or tenements, shall not be found, whereof the same can be made; and every person so taken shall be lodged in the common gaol of the district until satisfaction be made, or until the court of general quarter sessions of such district shall, upon cause shewn by the party as hereinafter mentioned, make an order in the case, and until such order shall be fully complied with.

Manner of proceeding to compel payment of fines, &c. imposed by court of general quarter sessions.

Relief by court of general quarter sessions to party fined, &c.

Court may forbear estreating recognizances, under certain circumstances.

5. And whereas the estreating indiscriminately of all recognizances for the appearance of persons to prosecute or give evidence, or to answer to criminal charges, would in many instances be productive of hardship; Be it enacted by the authority aforesaid, That in every case of default, whereby a recognizance may be forfeited, if the cause of absence be made known to the court in which the party shall be bound to appear, the court, on consideration of such cause, and considering also whether by the non-appearance of such person the ends of justice have been defeated or delayed, may forbear to order the recognizance to be estreated; and that with respect to all recognizances which shall be estreated in any court, and also with respect to all fines which may be imposed by any court for the non-attendance of any juror (*i*) or constable, or of any public officer, bound to attend at such court, it shall be in the power of the judge who presided at such court, or in the case of proceedings before any court of general quarter sessions of the peace, for the chairman and for any two of the justices who presided at such court, to make an order directing that the sum forfeited upon such estreated recognizance, or the fine imposed in any such case, as aforesaid, shall not be levied, provided it shall appear to the satisfaction of such judge, or of the chairman and justices, as aforesaid, that the absence of the person for whose appearance any recognizance was entered into, or of any person fined for non-attendance, was owing to circumstances which rendered such absence justifiable; and for such purpose, it shall be necessary for the Clerk of Assize, or Clerk of the Peace, respectively, before sending to the sheriff any roll, with a writ of fieri facias and capias, as directed by this act, to submit the same to the judge who presided at the assizes, or to the chairman who presided at the court of quarter sessions, respectively, for his revision; and that

Court or justices may direct sheriff to forbear levying fines, &c. under certain circumstances.

(*i*) By a liberal construction of this act, the court in term time will sometimes relieve jurors from fines imposed upon them at nisi prius, after the fine has been levied by the sheriff.—In re Cole. Trin. Term. 1842.

the judge, or the chairman of the court of quarter sessions, taking to his assistance two of the justices who presided with him at the sessions, shall and may make a minute on the said roll and writ of such forfeited recognizance and fines as they may think fit to direct not to be levied; and the sheriff shall observe the direction in such minute, written upon such roll and writ, or endorsed thereon, and shall forbear accordingly to levy any such forfeited recognizance or fine.

Mode of proceeding where lands are seized for payment of fines, &c.

6. And be it further enacted by the authority aforesaid, That if upon any writ to be issued under this act, the sheriff shall take lands or tenements in execution, he shall advertize the same in like manner as he is required to do before the sale of lands in execution in other cases; and no sale shall take place in less than twelve calendar months from the time the writ shall come into the hands of the sheriff.

Oath to be taken and subscribed at foot of roll by clerks of assize, or clerk of the peace.

7. And be it further enacted by the authority aforesaid, That the Clerk of Assize, or Clerk of the Peace, shall, at the foot of each roll made out as herein directed, make and take an affidavit in the following form, (that is to say:) I, A. B. (describing his office,) make oath that this roll is truly and carefully made up and examined, and that all fines, issues, amerciaments, recognizances and forfeitures, which were set, lost, imposed or forfeited, at or by the court therein mentioned, and which in right and due course of law ought to be levied and paid, are, to the best of my knowledge and understanding, inserted in the said roll; and that in the said roll are also contained and expressed all such fines as have been paid to or received by me, either in court or otherwise, without any wilful discharge, omission, misnomer or defect, whatsoever—so help me God: which oath any justice of the peace for such district is hereby authorized to administer.

Certificate to be given by justice of the peace before whom recognizance is entered into, to the party entering into the same.

8. And be it further enacted by the authority aforesaid, That each and every justice of the peace before whom any recognizance shall be entered into or taken, shall give, or cause to be given, at the time of entering into such recognizance, to the person or persons so en-

tering into the same, and to each of his sureties, a written or printed paper or notice, in the form or to the effect stated in the schedule marked C to this act annexed, adapting the same to the particular circumstances of the case; and each and every such justice shall, in such recognizance, state and specify particularly the profession, art or trade, of every person so entering into such recognizance, together with the christian name and surname, and also the place of his or her residence. (*j*)

Conditions upon which goods seized by sheriff, &c., may be released.

9. And be it further enacted by the authority aforesaid, that if any person on whose goods and chattels such sheriff, bailiff, or other officer, shall be authorised to levy any such forfeited recognizance, shall give security to the said sheriff or other officer, for his appearance at the return day mentioned in the writ, in the court into which such writ shall be returnable, then and there to abide the decision of such court, and also to pay such forfeited recognizances, or sum of money to be paid in lieu or satisfaction thereof, together with all such expenses as shall be adjudged and ordered by the court, it shall be lawful for such sheriff or officer to discharge such person so giving such security out of custody: Provided, that in case such party so giving such security shall not appear in pursuance of his undertaking, it shall be lawful for the court forthwith to issue a writ of fieri facias and capias, against the surety or sureties of the person so bound, as aforesaid.

Court, under certain circumstances, may discharge forfeited recognizances, &c.

10. And be it further enacted by the authority aforesaid, That the Court of King's Bench, or Court of General Quarter Sessions, into which any writ of fieri facias and capias to be issued under this act, shall be returnable, is authorised by this act to inquire into the circumstances of the case, and may, in its discretion, order the discharge of the whole of the forfeited recognizance, or sum of money paid or to be paid in lieu or satisfaction thereof,

(*j*) It is no ground for discharging the estreat of a recognizance to appear as a witness, that the magistrate who bound the witness over, did not give him a notice of the time he was to appear under this section.—R. *v.* Thorp. Hil. Term. 1842.

and make such order thereon as may to them appear just; which order shall accordingly be a discharge to the sheriff, or to the party, according to the circumstances of the case. (*k*)

Manner of return by sheriff, &c.

11. And be it further enacted by the authority aforesaid, That the sheriff to whom any writ shall be directed under this act, shall return the same on the day on which the same is made returnable, and shall state on the back of the roll attached to such writ, what shall have been done in the execution of such process; which return shall be filed in the court, respectively, into which such return is made; and that a copy of such roll and return, certified by the clerk of the peace, or by the clerk of the crown (as the case may be,) shall be forthwith transmitted to the receiver-general of this province, with a minute thereon of any of the sums therein mentioned, which may have been remitted by order of the court, in the whole or in part, or directed to be foreborne, under the authority of this act.

Copy of roll and return to be sent to receiver general.

Sheriff to pay over money to receiver general.

12. And be it further enacted by the authority aforesaid, That the sheriff shall, without delay, pay over all monies by him collected to the receiver-general of this province, for the time being.

SCHEDULE A.

William the Fourth, by the Grace of God, &c. To the sheriff of ——, Greeting: You are hereby commanded to levy of the goods and chattels, lands and tenements, of all and singular, the persons in the roll or extract to this writ annexed mentioned, all and singular the debts and

(*k*) Where the recognizance of a witness has been estreated for his non-appearance, the court will not interfere after the payment of the estreat, and return of the writ by the sheriff, although grounds are shewn, which would probably have been considered satisfactory to a judge presiding at the criminal court.—R. *v.* Le Clerc. Hil. Term. 1840. And if the recognizance of a person charged with a criminal offence has been estreated for his non-appearance to take his trial, the court, on an application to discharge the estreat, will act only on the grounds set forth in the statute.—R. *v.* Matthews, *et. al.* Trin. Term. 1841.

sums of money upon them severally imposed and charged, as therein is specified; and if any of the said several debts cannot be levied, by reason of no goods or chattels, lands or tenements, being to be found belonging to the said parties, respectively, then and in all cases, that you take the bodies of the parties respectively, and keep them safely in the gaol of your district, there to abide the judgment of our Court of King's Bench, upon any matter to be shewn by them, or otherwise to remain in your custody, as aforesaid, until such debt shall be satisfied, unless any such person shall give sufficient security for his or her appearance at the said court on the return day hereof, for which you will be held answerable; and what you shall do in the premises make appear before us, in our Court of King's Bench, at Toronto, on the —— day of —— term next, and have then there this writ. Witness, &c. A. B. clerk of assize, at the last assizes for the district of ——, this —— day of ——, 18—.

SCHEDULE B.

William the Fourth, by the Grace of God, &c. To the sheriff of ——, greeting: You are hereby commanded to levy of the goods and chattels, lands and tenements, of all and singular, the persons in the roll or extract to this writ annexed mentioned, all and singular the debts and sums of money upon them respectively imposed and charged, as therein is specified; and if any of the said several debts cannot be levied, by reason of no goods or chattels, lands or tenements, being to be found belonging to the parties, respectively, then and in all cases, that you take the bodies of the parties, respectively, and keep them safely in the gaol of your district, there to abide the judgment of the court of general quarter sessions for the said district, upon any matter to be shewn by them, or otherwise to remain in your custody, as aforesaid, until such debt shall be satisfied, unless any such person shall give sufficient security for his or her appearance at the said court on the return day hereof, for which you will be held answerable; and what you shall do in

the premises make appear at the next court of general quarter sessions of the peace for the said district, on the first day of the said court, and have then there this writ. Witness, C. D., clerk of the peace for the district of ——, this —— day of ——, 18—.

SCHEDULE C.

—— District, } Take notice, that you, ——, are bound
to wit: } in the sum of —— pounds, and your sureties, ——, in the sum of —— pounds each, to appear at ——, to be holden at ——, and unless you personally make your appearance accordingly, the recognizance entered into by yourself and your sureties will be forthwith levied on you and your bail. Dated this —— day of ——, 18 —. A. B., justice of the peace, for the —— district.

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11 Geo. IV. ch. 3.

An Act to repeal and amend the laws now in force respecting the limits of the respective gaols in this Province.

Whereas it is expedient to assign certain enlarged limits to the several gaols within this province, in which debtors may have the greater benefit of exercise and air, without subjecting the sheriff, or other officer in whose custody the debtor may be, to any action at law for an escape; and also, to render more efficient and summary the remedies to be continued on behalf of creditors against any debtor or debtors availing themselves of the provisions of this act; Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the parliament of Great Britain, intituled "an act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, 'an act for making more effectual provision for the government of the province of Quebec, in North America,' and to make further provision for the

Preamble.

(See 4 Will. IV. ch. 10.)

2 Geo. IV. ch. 6. 7 Geo. IV. ch. 7. 8 Geo. IV. ch. 9. 11 Geo. IV. ch. 2. repealed.

government of the said province," and by the authority of the same, that the whole of a certain act passed in the second year of the reign of King George the Fourth, intituled, "an act for assigning limits to the respective gaols in this province;" and also a certain other act passed in the seventh year of the reign of King George the Fourth, intituled, "an act to continued and amend an act passed in the second year of the reign of King George the Fourth, intituled, 'an act for assigning limits to the respective gaols in this province;'" and also a certain other act passed in the eighth year of the reign of King George the Fourth, intituled, 'an act to repeal part of and amend the law now in force assigning limits to the gaols in this province;" and also a certain other act passed in the eleventh year of his Majesty's reign, and during the present session of parliament, intituled, "An Act to continue the laws now in force for establishing the limits to the respective gaols in this province," be and the same are hereby wholly repealed.

(See 4. Wm. IV. ch. 10. secs. 1 & 2.) Sixteen acres of ground contiguous to the several gaols in the province, to be assigned as limits within which debtors confined in gaol may be permitted to reside, upon giving security to the sheriff.

2. And be it further enacted by the authority aforesaid, That it shall and may be lawful for the justices in general quarter sessions of the peace assembled, in each and every district of this province, other than the district of Niagara, and they are hereby authorized and required, at the first session of the general quarter sessions of the peace held after the passing of this act, to assign and mark as limits to the respective gaols in each district of the province, other than the district of Niagara, not more than sixteen acres of ground, contiguous to the said gaols; and that after the establishment of such limits, it shall and may be lawful for any debtor or debtors (*l*) confined, or to be confined in such gaols, to be and remain at any part or place within such limits, without subjecting the sheriff, or other officer in whose custody such debtor or debtors may be, to any action or suit for

(*l*) A prisoner in custody on an attachment for contempt, may have the benefit of the limits.—Rex *v.* Kidd. Hil. Term. 6 Will. IV. And so also debtors in custody on mesne process. —Montgomery *v.* Howland. Easter Term. 2 Vic.

any escape from such gaol limits: (*m*) Provided, however, that it shall not be incumbent upon such Sheriff, or other officer, to allow any debtor or debtors the use and benefit of such limits, unless such debtor or debtors shall furnish good and satisfactory security that he, she or they, shall not at any time during his, her or their confinement, go or remove beyond such established limits; Provided, nevertheless, that during such time as any debtor in execution shall have the liberty of such limits, as aforesaid, such debtor shall not be entitled to receive from the plaintiff in the action any weekly maintenance, by reason of any statute for the benefit of insolvent debtors.

Debtors having the liberty of gaol limits not to be entitled to weekly allowance.

3. And whereas from the peculiar local situation of the gaol of the district of Niagara, owing to the greater distance thereof from the town, it is expedient that the area assigned as limits thereto should be more extensive than to others; Be it further enacted by the authority aforesaid, that the justices of the said district of Niagara shall and may, in manner and form aforesaid, assign as limits to the said gaol, any extent of ground not exceeding twenty-six acres.

The limits of the gaol in Niagara may be extended to twenty-six acres.

4. And be it further enacted by the authority aforesaid, That if any debtor or debtors who may be confined in any gaol within this province, and who may have given security to entitle himself, herself or themselves, to the benefit of such limits, shall withdraw or depart from or out of the said limits, it shall and may be lawful for the sheriff, or other officer from whose custody such debtor or debtors may so withdraw, to sue for and recover from the prisoner, or person or persons giving such security, or either of them, such sum or sums of money as such debtor or debtors may have been confined for in such

Sheriffs may recover debt, damages, and costs against debtors, withdrawing from the limits, or their bail.

(*m*) When a new sheriff is appointed, the old sheriff ought to assign over by indenture the debtors on the limits, and the new sheriff is not liable for the escape of a debtor on the limits at the time of his appointment, without such assignment.—McPherson *et. al. v.* Hamilton. Easter Term. 7 Will. IV.

gaol or limits, together with all such costs and damages as he may have sustained by reason of such debtor or debtors withdrawing from and out of the said limits. (*n*)

Bond for the limits may be assigned.

5. And be it further enacted by the authority aforesaid, That the sheriff or other officer, on such debtor or debtors so withdrawing or departing, shall be bound to assign over the security to the plaintiff, if required by him; and that the sheriff upon so doing shall be discharged from any claim the plaintiff may have on him, the said sheriff, for or on account of such debtor or debtors.

This act not to extend to persons in custody for any criminal charge.

6. And be it further enacted by the authority aforesaid, That this act shall not extend, or be construed to extend to any person or persons confined for debt, who may at the same time be in custody for any criminal charge.

Assignee of bond for the limits may maintain an action thereon, which shall not be released by the sheriff.

7. And be it further enacted by the authority aforesaid, That upon such assignment of the security to the plaintiff, or his legal representatives, he, she or they may, as assignee or asignees, sue therefor, in his, her, or their own name; and that it shall not be in the power of the sheriff, in whose name such security was taken, to release such action.

(*n*) In an action by a sheriff on a bond to the limits, if the defendants plead that the debtor left the limits, but afterwards returned to them, and always remained on them after his return, the sheriff may take issue upon the subsequent remaining, and need not new assign, but he cannot do so if the defendants by their plea do not admit the bond to have been broken before the debtor's return, as the plea would then amount to the general issue. And where the plaintiff declared that the debtor left the limits in February, and the defendant pleaded that the plaintiff as sheriff removed him in November, and that the debtor returned, and always afterwards remained thereon, and the plaintiff replied that he did not always afterwards remain, on which issue was joined, and the plaintiff obtained a verdict, the court refused to arrest the judgment, the verdict according to the time stated being consistent with the plaintiff's right, and the issue having been in fact on the subsequent remaining only.—Cameron *v.* Mc Leod *et. al.* Mich. Term. 4 Vic.

8. And be it further enacted by the authority aforesaid, That it shall and may be lawful for any person or persons having given security to the sheriff for any prisoner to enjoy the limits of the gaol, to surrender such prisoner into the hands of the sheriff, or his deputy or gaoler; and upon such surrender the sheriff shall, and he is hereby required to deliver up the bond or security given to him by such person or persons, and that he, she or they, shall be wholly discharged therefrom. Provided always, that nothing in this clause contained shall extend, or be construed to extend, to prevent the sheriff of any district from renewing such security, in the same manner as if such prisoner had not enjoyed the limits of such gaol.

Bail for the limits may surrender their principal.

Surrender not to prevent fresh security being given.

9. And be it further enacted by the authority aforesaid, That whenever any person or persons shall be in execution upon a capias ad satisfaciendum, at the suit of any creditor or creditors, and shall have obtained leave, under the provisions of this act, to reside upon the limits of the gaol where he shall have been confined, it shall and may be lawful for such creditor or creditors to sue out any other species of execution, notwithstanding such person or persons may have been charged in execution as aforesaid: Provided always, that his, her or their household furniture, not exceeding twelve pounds ten shillings in value, together with the tools and implements of trade used by such person or persons in any trade or handicraft, shall not be liable to any such subsequent execution so to be sued out as aforesaid.

Creditors may sue out any other species of execution against debtors charged upon ca. sa.

Household furniture and tools of such debtors not to be seized on subsequent execution.

10. And be it further enacted by the authority aforesaid, That it shall and may be lawful for any such creditor or creditors as last aforesaid, to tender such and the like interrogatories to any such debtor or debtors, so residing on the limits of any gaol, as aforesaid, in like manner as may now be tendered to any insolvent debtor charged in execution; and in case such debtor or debtors shall refuse or neglect to answer such interrogatories for the space of twenty days next after a copy thereof shall have been delivered to such debtor or debtors, he, she or

Creditors may tender interrogatories to debtors confined on the limits, in like manner as to insolvent debtors.

If debtors neglect to answer interrogatories tendered, for twenty days, they shall stand committed to close custody

they shall no longer be entitled to the benefit of such limits, but shall be re-committed to the gaol of the district where he, she or they shall be confined.

False swearing subjects offenders to the penalties of perjury.

11. And be it further enacted by the authority aforesaid, That if any person or persons shall upon any answer or answers to such interrogatories swear falsely, he, she or they shall be liable to all the pains and penalties of wilful and corrupt perjury.

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4 WILL. IV. CH. 10.

An Act to extend the limits assigned to the respective gaols in this province, and to afford to plaintiffs the means in some cases of more effectually compelling the payment of debts due to them by defendants in execution.

Preamble.

(See 11 Geo. IV. ch. 3.)

WHEREAS it is expedient to extend the limits of the several gaols throughout this province; Be it therefore enacted, by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "an act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, 'an act for making more effectual provision for the government of the province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, that the limits to the respective district gaols situate in any town in this province shall be co-extensive with the limits of the several towns in which such gaols respectively are situate, any law to the contrary thereof in any wise notwithstanding.

Limits of district gaols co-extensive with limits of the towns in which situate.

When gaol not erected in towns.

2. And be it further enacted by the authority aforesaid, That the limits to those district gaols which are not situate in any town shall and may be extended by the magistrates of the district, in quarter sessions assembled, to the distance of half a mile on each side of the several gaols so situated.

3. And be it further enacted by the authority aforesaid, That such extension of gaol limits hereby established or authorised to be made, shall not in any manner affect or make void any of the securities already given for the enjoyment of the present gaol limits, but the same shall continue in force and extend to the said newly assigned limits.

Existing securities for enjoyment of limits not affected by this act.

4. And whereas it is expedient to afford to plaintiffs more effectual means of compelling defendants to a just application of their effects in satisfaction of their debts than are now provided by law; Be it therefore further enacted by the authority aforesaid, that whenever the plaintiff in any action shall have reason to believe that the defendant, being a debtor in execution and admitted to the limits before or after the passing of this act, hath the means at his disposal or within his control of satisfying the debt for which he is in execution, or a considerable portion thereof, it shall be competent to him to apply to the court of King's Bench in term, or to a judge thereof in vacation, or to the district court, or a judge thereof, in like manner, when such execution shall have issued from a district court, shewing his grounds for such belief upon affidavit; and if upon the return of any summons or rule to shew cause that may thereupon issue, which summons or rule shall be served personally upon the debtor, it shall appear to the satisfaction of the court or judge that the debtor has the means at his disposal or within his control of satisfying the debt, or a considerable portion thereof, or that he had such means at the time of the service upon him of any notice by the plaintiff of an intended application under this act, it shall be competent to such court or judge, upon a view of the facts disclosed, and upon a consideration of any other matters which such court or judge thereof may require to have stated upon affidavit in relation to such application, either by way of answers by either party to such interrogatories as the other party may desire, or the court may direct to be filed or otherwise, to make an order or rule upon the sheriff directing him to apprehend the de-

Debtors in execution enjoying the limits, and having means of satisfying the debt, may be committed to close custody.

fendant and keep him in custody within the walls of the gaol of his district, and such defendant shall, when committed upon such order, remain imprisoned in execution in the same manner as if he had not before obtained the benefit of the limits.

Privilege of applying for benefit of the limits revives to defendant after having made reasonable satisfaction.

5. Provided always nevertheless, and be it further enacted by the authority aforesaid, That it shall nevertheless be competent to the defendant, after he shall have been so imprisoned in close custody under this act, to apply to the court from which the execution issued, or to a judge thereof in vacation, for a rule or summons upon the plaintiff to shew cause why he should not be allowed the benefit of the limits upon giving the security required by law, which application shall be supported by affidavit shewing that such defendant has made or tendered just and reasonable satisfaction to the plaintiff in respect to the grounds upon which he was taken from the limits and committed to close custody; and that the court or judge upon the return of such rule or order served on the plaintiff or his attorney, or otherwise, as under the circumstances such court or judge shall direct or shall deem sufficient, may make a rule or order allowing to the defendant the benefit of the limits, upon his giving the security required by law, if it shall appear reasonable and just so to do under all the circumstances of the case.

Liability of defendant applying for re-admission to benefit of the limits.

6. Provided always, and be it further enacted by the authority aforesaid, That upon the occasion of such an application as last herein mentioned, the court or judge may require information upon affidavit, or by way of answers to interrogatories, in the same manner as herein directed in respect to any application to be made for depriving a defendant of the benefit of the limits; And provided also, that after such second admission, or any future admission of a defendant to the limits under the authority of this act, similar proceedings may be adopted by reason of any new facts discovered for again depriving the defendant of the benefit of the limits, or for again admitting him to the limits as the case may require.

7. And be it further enacted by the authority aforesaid, That when a defendant in execution, and upon the limits, shall refuse or neglect, upon demand made by the plaintiff or his attorney, either verbally or in writing, to deliver to him,(o) within such time as shall appear reasonable under the circumstances to the court or judge to whom application shall be made under this act, an account or schedule in writing under the hand of such defendant, and verified by his oath, of all his real and personal estate, debts and effects of every description, such refusal or neglect, if not accounted for to the satisfaction of the court or judge, may, in their or his discretion, be taken as a sufficient ground for making a rule or order as in this act mentioned for committing such defendant to close custody within the gaol as aforesaid.

Defendant on the limits withholding account of his effects may be committed to close custody

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11 GEO. IV. CH. 4.

An Act for the Relief of Indigent Debtors.

WHEREAS it is expedient that not only the bed and bedding of debtors should be exempt from being seized and sold in execution of judgment, but also that their necessary wearing apparel, and the bed and bedding of their family, should in like manner be exempt from such seizure and sale: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "An act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, 'An act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provi-

Preamble.

(See 11 Geo. IV. ch. 3, sec. 9.)

(o) The demand on a debtor on the limits for a statement of his effects, if in writing, must be signed by the plaintiff or his attorney, and the rule nisi for his commitment personally served.—Meighan *v.* Reynolds. Mich. Term. 5 Will. IV.

sion for the government of the said province," and by the authority of the same, that in all cases wherein a writ of execution shall be issued upon any judgment obtained in any court in this province, it shall not be lawful for the sheriff, or other officer executing such writ, to seize the necessary wearing apparel of the debtor or debtors against whom such judgment shall have been obtained, or of his, her or their family, nor the bed or bedding in actual use by the members of his, her or their family, in satisfaction of such judgment, any law, usage, or custom to the contrary notwithstanding.

Wearing apparel and bedding in actual use, not to be seized under execution.

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45 GEO. III. CH. 7.

An Act for the Relief of Insolvent Debtors.

Preamble.

(See 2 Geo. IV. sess. 2, ch. 8; 8 Geo. IV. ch. 8; 11 Geo. IV. ch. 4; 4 Wm. IV. ch. 3; 5 Wm. IV. ch. 3; 3 Vic. ch. 6.)

WHEREAS no special provision has been made by law, since the division of the province of Quebec, for the support of insolvent debtors, detained in execution; And whereas it is inexpedient that the support of such, should depend upon the district, or the precarious charity of individuals, Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "An act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled 'An act for making more effectual provision for the government of the province of Quebec in North America,' and to make further provision for the government of the said province," and by the authority of the same, that if any prisoner in execution for debt shall apply to the court, whence such execution issued, and make oath that he or she is not worth five pounds, the plaintiff at whose suit he or she is detained, shall be ordered by the said court, by rule, to be served on the plaintiff or the attorney, to pay to the defendant in execution the sum of five shillings weekly maintenance,

Prisoner in execution for debt, not worth five pounds, shall receive from the plaintiff five shillings weekly, so long as he shall be detained in prison for such debt.

(See 8 Geo. IV. ch. 8.)

so long as he or she shall be detained in prison at the suit of the plaintiff, and that such payment shall be made in advance to the prisoner or gaoler, for his or her use, on Monday in every week;(*p*) on failure of which, the court from whence the execution issued, shall order the defendant to be released: Provided always, That the plaintiff shall not be obliged to make such payment, if he can prove to the satisfaction of the court, that the defendant has secreted or conveyed away his or her effects, to defraud his or her creditors.(*q*)

2 Geo. IV. CH. 8.

An Act to make further regulation respectiug the weekly maintenance of Insolvent Debtors.

Preamble.

(See 45 Geo. III. ch. 7; 8 Geo. IV. ch. 8· 11 Geo. IV. ch. 4; 4 Wm. IV. ch. 3; 5 Wm. IV. ch. 3; 3 Vic. ch. 6.)

WHEREAS it is necessary for the prevention of fraudulent conveyances of property by insolvent debtors claiming the weekly allowance granted by law, to compel the said debtors, when required to answer such interrogatories as shall be filed by the plaintiff at whose suit he shall be confined; Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the parliament of Great Britain, intituled, "an act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled 'an act for making more effectual provision for the government of the province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, that when and so often as any prisoner or prisoners in custody, and charged in execution for debt in any civil suit, shall apply to the court whence such process or execution issued, either to be

Plaintiff may tender interrogatories to insolvent debtors claiming weekly allowance, touching their solvency.

(*p*) On the third Monday after service of the rule.—8 Geo. IV. ch. 8.

(*q*) Interrogatories may be tendered by the plaintiff.—2 Geo. IV. sec. 2; ch. 8. secs. 1 & 2.

discharged or allowed a weekly maintenance, by reason of any alleged insolvency, it shall and may be lawful for the plaintiff or plaintiffs at whose suit such prisoner is detained, his, her or their attorney, to file such interrogatories (*r*) as he, she or they, shall be advised or think expedient, touching or concerning, or for the purpose of discovering any property or credits which the said prisoner may be possessed of, or which he or she may be suspected for having secreted or fraudulently parted with; which interrogatories the said prisoner is hereby required to answer upon oath, before some person authorised to receive and take affidavits in the court in which such suit shall be depending, who is hereby authorised to administer the same.

Answer may be sworn before commissioners for taking affidavits.

2. And be it further enacted by the authority aforesaid, That after any interrogatories shall have been filed, as aforesaid, and a copy thereof delivered to the said prisoner, his or her attorney, the said prisoner shall not receive any further benefit from his or her application, and the orders and other proceedings thereon shall be stayed, until the said prisoner shall have fully (*s*) answered the same, and filed such answer or answers thereto, in the court from whence the writ on which he or she shall be confined shall have issued, and given notice thereof to the plaintiff or his attorney in such suit.

Debtors to receive no benefit from any order for a weekly allowance, until he has answered the said interrogatories.

(*r*) The plaintiff may file interrogatories, after he has made default in the payment of the weekly allowance, and before the defendant has made any application for his discharge.—Elwood *v.* Monk; Butler *v.* Thomas. Mich. Term, 3 Vic.

(*s*) Where interrogatories have been put, and answers filed thereto, affidavits may be read to shew that the answers are untrue, and the court must be *satisfied* with the answers, before they will order the discharge of the debtor.—Montgomery *v.* Robinet. Easter Term, 2 Will. IV. Payment of the weekly allowance after answers have been filed to the interrogatories put by the plaintiff, is a waiver of any objections to the answers, and the plaintiff cannot file further interrogatories without leave of the court.—Malone *v.* Handy. Trin. Term, 6 & 7 Will. 4. The answers of the debtor to interrogatories, must not only be full, but satisfactory.—Sanderson *v.* Cameron. Easter Term, 2 Vic.

4 WILL. IV. CH. 3.

An Act to afford relief to Persons confined on Mesne Process.

WHEREAS in many cases arrests are made upon mesne process, of persons not having the power of procuring bail, who are thereby kept in close confinement, and being destitute of the means of support, it is expedient to afford relief: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled "An act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, 'An act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, That from and after the passing of this act, it shall and may be lawful for any person or persons arrested on mesne process issued from his Majesty's court of King's Bench, or from any of the district courts of this province, being in actual and close custody, to make an affidavit before any person having authority to administer the same, that he, she or they, is or are in close custody, is or are unable to procure bail, and is or are not worth the sum of five pounds; and upon the production of such affidavit to the court from whence the writ issued, in term time, or to any judge thereof in vacation, it shall and may be lawful for such court, or judge of such court, to make an order upon the plaintiff or plaintiffs in any such suit or action, to pay to the defendant the weekly allowance in the same manner as if the defendant were in custody upon final process; and upon due service of a copy of such order upon the plaintiff, or his attorney, and in the default of the payment of such weekly allowance, such court, respectively, in term time, or any judge thereof in vacation, shall issue an order to the sheriff of the

Preamble.

Persons arrested not worth five pounds, and unable to procure bail, entitled to weekly allowance.

On default of payment by plaintiff, defendant to be discharged on filing common bail.

district in which such defendant shall be in custody, to discharge such defendant upon filing common bail.

Course of proceeding to judgment and execution not interrupted by this act.

2. Provided always, and be it further enacted by the authority aforesaid, That nothing in this act contained shall extend to prevent any such plaintiff or plaintiffs from proceeding to final judgment and execution, in the same manner as if the party had entered special bail, and as if this act had not been passed; And provided also,

Plaintiff may tender interrogatories.

that the plaintiff shall be at liberty to tender interrogatories to the defendant in like manner as if he were charged in execution, and such defendant shall not be discharged for want of the payment of the weekly allowance unless he shall answer such interrogatories to the satisfaction of the said court, or to any judge thereof in vacation.

Amount of allowance paid to form part of plaintiff's costs.

3. And be it further enacted by the authority aforesaid, That any sum or sums of money paid by the plaintiff or plaintiffs in any suit or action towards the weekly allowance directed to be paid under the provisions of this act, shall be taxed as part of the costs of the suit, and be allowed to the plaintiff in his bill, to be taxed by the proper officer.

No allowance payable during delay occasioned by defendant

4. And be it further enacted by the authority aforesaid, That the defendant shall not be entitled to a weekly allowance under this act for any time during which the plaintiff shall be delayed in his proceeding in consequence of any indulgence granted to the defendant by rule of court or order of a judge; nor shall any order be made

Or without affidavit that plaintiff's demand is resisted bona fide.

for such weekly allowance unless the defendant shall make an affidavit, to be filed among the papers in the cause, that he does not believe the demand of the plaintiff to be just, and that for that cause, and no other, he resists payment of the same, and refuses to confess judgment for the sum sworn to.

Persons in custody for debts not exceeding ten pounds, on certain conditions, may be discharged on filing common bail.

5. And whereas it is expedient to afford further relief in respect to destitute persons arrested for small sums: Be it therefore further enacted by the authority aforesaid, That when the sum sworn to shall not exceed ten pounds, it shall and may be lawful for the defendant, at

the expiration of thirty days after having been committed to prison, to apply to the court from whence the process issued, in term time, or a judge thereof in vacation, setting forth on affidavit that he is not worth the sum for which he has been arrested, and that he hath not directly or indirectly sold or otherwise disposed of any goods, debts, monies, or other personal estates, in order to defraud his creditors, or any of them; and that if upon the return of a summons, or of a rule to shew cause, which may be thereupon issued, and upon answers to any interrogatories which the plaintiff shall be at liberty to file, no good cause shall appear to the contrary, the court or judge shall discharge such defendant from imprisonment upon his filing common appearance, and the plaintiff may proceed in his action as in non-bailable actions where the defendant has appeared. (See 5 Wm. IV. ch. 3, sec. 2.)

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8 GEO. IV. CH. 8.

An Act for the further relief of Insolvent Debtors.

WHEREAS by the third section of an act, intituled, "an act to make further regulations respecting the weekly maintenance of insolvent debtors," it is enacted, "that in default of payment of the sum of five shillings weekly allowance, pursuant to any rule or rules of court, under the provisions of an act passed in the forty-fifth year of his late Majesty's reign, intituled, 'an act for the relief of insolvent debtors,' the first payment of which said sum of five shillings is declared by the said clause to become due and payable on Monday next after the service of such rule on the plaintiff, or his attorney, within the district where such defendant shall be imprisoned, the prisoner, upon application to the court from which such execution issued, in term time, or a judge thereof in vacation, shall, by order of the said court or judge, be discharged out of custody. Provided nevertheless, that such discharge shall not be construed as a release or satisfaction of the subsisting judgment, or to deprive the plaintiff or Preamble. (See 2 Geo. IV. ch. 8.)

plaintiffs of his, her or their, remedy thereafter against the goods and chattels, land and tenements, of such prisoner so discharged;" And whereas it is expedient that prisoners in execution for debt should be enabled to take the benefit of the said act, although the plaintiff or his attorney should not be residing within the district where such defendant shall be imprisoned: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled, "an act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, 'an act for making more effectual provision for the government of the province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, that the said clause be repealed; and that in default of payment (*t*) of the sum of five shillings weekly allowance, pursuant to

3d clause of 2 Geo. IV. ch. 8, repealed.

(*t*) Payment to a person acting as turnkey in the gaol, is a good payment to the insolvent debtor.—Hyde *v.* Barnhart. Hil. Term. 10 Geo. IV. Where a defendant, after obtaining the weekly allowance, takes the benefit of the limits, he must give the plaintiff notice of his return to close custody, before he is entitled to further payments. Ib. Trinity Term. 11 Geo. IV. The court refused to discharge a defendant in execution, where the plaintiff died, and the weekly allowance was tendered by the person who had usually paid it, although no administration had been granted.—Beard *v.* Orr. Mich. Term. 1 Will. IV. A defendant rendered by his bail, after the return of non est inventus to the capias ad satisfaciendum, is not in custody on mesne process, nor is he charged in execution, so as to obtain the weekly allowance.—Lyman *et. al. v.* Vandecar. Mich. Term. 2 Vic. It is not a sufficient excuse for the non-payment, that the defendant is in custody in other suits, in which he receives the allowance, or that a co-defendant has put in bail, after the order for the allowance was granted.—Truscott *et. al. v.* Walsh *et. al.* Hil. Term. 6 Will. IV. An insolvent debtor in custody on a criminal charge cannot obtain a rule for the allowance in a civil suit.—Thompson *v.* Hughson. Mich. Term. 1842. P. C. Jones, J.

any rule or rules of court under the provisions of an act passed in the forty-fifth year of his late Majesty's reign, intituled "an act for the relief of insolvent debtors," the first payment of which said sum of five shillings is hereby directed to become due and payable on the third Monday next after the service of such rule upon the plaintiff or his attorney, the prisoner, upon application to the said court from which such execution issued, in term time, or a judge thereof in vacation, shall, by order of the said court or judge, be discharged out of custody: Provided nevertheless, that such discharge shall not be construed as a release or satisfaction of the subsisting judgment, or to deprive the plaintiff or plaintiffs of his, her, or their remedy thereafter, against the goods and chattels, lands and tenements, of such prisoner so discharged.

Court in term time, or judge in vacation, may order prisoners to be discharged on non-payment of their weekly allowance.

Such discharge not to operate as a release of the debt.

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5 WILL. IV. CH. 3.

3. And whereas it might tend greatly to the relief of certain debtors in execution for small debts, and at the same time occasion no material prejudice to trade and public credit, if such debtors should, after a limited period of imprisonment, be allowed to be discharged, saving to their creditors their remedy against the property of the debtor so discharged; be it therefore enacted by the authority aforesaid, That from and after the passing of this act, all persons in execution upon any judgment rendered in this province in a civil suit for any debt or damages, not exceeding the sum of twenty pounds, (*u*) exclusive of the costs recovered by such judgment, and who shall have lain in prison thereupon for the space of three calendar months, or being confined under such execution upon the gaol limits of any district in this province for the

Debtors in execution for sums not exceeding £20, who shall have been three months imprisoned, may apply for discharge.

(*u*) A defendant in custody for a debt not exceeding £20, is entitled to his discharge under this section, on satisfying the court that he has been three months imprisoned, but the rule is not absolute in the first instance.—King *v.* Keogh. Mich. Term. 7 Will. IV.

space of twelve calendar months before the time of their application to be discharged as hereinafter mentioned, may make his, her or their application, in term time, to the court from whence such execution shall have issued, to be discharged from custody upon such execution, and shall thereupon make and file an affidavit to the effect hereinafter mentioned, and if the court shall be satisfied upon cause shewn, that the prisoner in custody is entitled to relief under this act, or if no cause to the contrary shall be shewn, then such court shall forthwith make a rule or order for discharging the party or parties from custody, as to such execution: Provided always, that notwithstanding the discharge of any debtor or debtors by virtue of this act, the judgment against him or them shall continue and remain in full force to all intents and purposes, except as to the taking in execution the person or persons of such debtor or debtors thereupon; and it shall be lawful for the creditor to take out execution against the lands and tenements, or goods and chattels of any such debtor so discharged, or to bring any action on any such judgment against such debtor, or to bring any such action or use any such remedy for the recovery of his demand against any other person or persons, liable to satisfy the same, in the same manner as such creditor could have done in case such debtor had never been discharged in execution upon such judgment: Provided also, that no debtor so discharged shall be liable to be arrested or taken in execution upon the same judgment, or in any action or proceeding to be afterwards instituted thereupon.

Court may order discharge.

Liability of future estate;

Defendant not to be again arrested.

4. And be it further enacted by the authority aforesaid, That from and after the passing of this act, all persons in execution upon any judgment rendered in this province in a civil suit, for any debt or damages exceeding the sum of twenty pounds, exclusive of costs, and who shall have lain in prison thereupon for the space of six calendar months before the time of their application to be discharged as hereinafter mentioned, when the debt shall not exceed one hundred pounds, or twelve calen-

Debtors in execution for sums exceeding £20 and under £100, when entitled to discharge;

dar months (*v*) when the debt shall exceed one hundred pounds, may, upon giving thirty days' notice (*w*) in writing, to the opposite party or his attorney, of his intention to make such application as hereinafter mentioned, apply for his discharge in term time, to the court from whence the execution shall have issued; and that such application shall be founded on an affidavit of the person in custody, as aforesaid, to the effect hereinafter mentioned.

notice to the opposite party.

5. And be it further enacted by the authority aforesaid, That the opposite party, upon being called upon to shew cause against such application, may disclose to the court upon affidavit of himself or of any other person or persons, any facts in answer to such application, and such court may examine into the same, and may require further statements upon oath from or in behalf of either party in their discretion, and that when, in the opinion of the court, the party at whose suit the debtor is in custody shews no reasonable ground whatever (and in such case only) for expecting benefit from the further detention of the debtor in execution, it shall be lawful for the court to make an order for discharging such debtor forthwith: Provided always, that such discharge shall have the same and no other effect as to any other remedy upon the same judgment, or in consequence thereof, as a discharge ordered under this act in cases where the debt shall not exceed twenty pounds.

Court authorised to examine the matter and order discharge;

Effect thereof.

6. And be it further enacted by the authority aforesaid, That the application made by any debtor for his discharge from custody under this act, whether the sum for which he is so detained shall be under or above twenty pounds, shall be founded upon an affidavit made by such

Affidavit of certain facts to be made by debtor applying for discharge.

(*v*) A defendant in execution, for a sum exceeding £100, applying for his discharge, must shew that he has been twelve calendar months *in gaol*.—Denham *v.* Talbot. Hil. Term. 6 Will. IV.

(*w*) This notice may be given before the full period of his imprisonment, according to this act, has expired.—McPherson *v.* Campbell. Trin. Term. 1841. P. C. Macaulay, J. This notice must always be given.—Averill *et. al. v.* Baker. Mich. Term. 1841. P. C. Jones, J.

debtor in the cause in which he is in custody, to be afterwards filed among the papers of such cause, in which affidavit shall be set forth the time that he has been in custody upon such execution, and the amount for which he is detained; and stating further that he is not possessed, nor any person or persons in trust for him, or to his use, of lands or tenements, monies, goods, chattels or effects of any description, besides his necessary wearing apparel or bedding, to the amount of five pounds; that since judgment in the cause was rendered against him he has not made any disposition or conveyance of his property or effects in order to defeat the remedy under the said judgment; that he has not the means within his power or under his control, excepting his necessary wearing apparel and bedding, of satisfying the debt for which he is in execution, or any part thereof; that he was guilty of no fraud, deceit or dishonest practice, in contracting the said debt, and that to the best of his knowledge and belief, the party at whose suit he is in custody can derive no benefit from his the said debtor's being longer imprisoned under such execution.

Debtor obtaining discharge by fraud liable to be again taken in execution.

7. And be it further enacted by the authority aforesaid, That if it shall happen that any discharge granted under this act, shall have been unduly or fraudulently obtained upon any false allegation of circumstances, which if true, might have entitled the prisoner to be discharged by virtue of this act, such prisoner shall, upon the same being made appear to the satisfaction of the court by whose rule or order the said prisoner had been so discharged, be liable to be again taken in execution, and remanded to his former custody, by the rule or order of the same court: Provided always, that no sheriff or gaoler shall be liable as for the escape of any such prisoner, in respect of his enlargement, during such time as he shall have been at large by means of such his undue discharge, as aforesaid.

Fraudulent assignment of property to be a misdemeanor.

8. And be it further enacted by the authority aforesaid, That any person who shall assign, remove, conceal or dispose of any of his property, with intent to defraud

his creditors, (*x*) and any person who shall receive such property with such intent, shall, upon conviction, be deemed guilty of a misdemeanor, and such offence may be tried before any court of Oyer and Terminer or general gaol delivery, and may be punished by fine or imprisonment: Provided always, that no person convicted, as aforesaid, shall be fined in a greater sum than one hundred pounds, nor be imprisoned for a longer period than six months. Punishment.

9. And be it further enacted by the authority aforesaid, That this act shall continue in force for four years, and from thence to the end of the then next ensuing session of parliament. Act limited to four years (Made perpetual by 3 Vic. ch. 6.)

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4 WILL. IV. CH. 1.

An Act to amend the law respecting real property, and to render the proceedings for recovering possession thereof in certain cases less difficult and expensive.

WHEREAS it is expedient to amend the law relating to real estates, by making certain alterations in the law of inheritance, and respecting the conveyance of real property by devise and by deed, and in regard to dower, and the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto; Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled "An Act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled 'An Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provi- Preamble.

(*x*) The assignment of a lease, by the lessee, to a trustee for a bona fide creditor of the assignor, with the intention of thereby evading the claims of the creditors of the cestui que trust, is not a fraudulent assignment within this section. Doe Biggar *v.* Millard. Easter Term. 1840.

sion for the government of the said province," and by the authority of the same, That in every case descent shall be traced to the purchaser; and to the intent that the pedigree may never be carried farther back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall for the purposes of this act be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited, shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same.

Descent shall always be traced from the purchaser, but the last owner shall be considered to be the purchaser, unless the contrary be proved.

2. And be it further enacted by the authority aforesaid, That when any land shall have been devised by any testator, who shall die after the first day of July, one thousand eight hundred and thirty-four, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee and not by descent; and when any land shall have been limited by any assurance, executed after the said first day of July, one thousand eight hundred and thirty-four, to the person, or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser, by virtue of such assurance, and shall not be considered to be entitled thereto, as of his former estate or part thereof. (*y*)

Heir entitled under a will shall take as devisee, and a limitation to the grantor or his heirs shall create an estate by purchase.

(*y*) This section is against two ancient rules of law respecting descent and purchase. A title by descent is vested in a man by the single operation of law, and by purchase by his own act or agreement. Co. Lit. 186. 2 Bl. Com. 200. The latter is thus described by Littleton, s. 12. "Purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh, not by title of descent from any of his ancestors or cousins, but by his own deed." The difference between the acquisition of an estate by descent and purchase is, that by purchase the estate

3. And be it further enacted by the authority aforesaid, That when any person shall have acquired any land by purchase, under a limitation to the heirs, or to the heirs of the body of any of his ancestors, contained in an assurance executed after the said first day of July, one thousand eight hundred and thirty-four, or under a limitation to the heirs, or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator, who shall depart this life after the said first day of July, one thousand eight hundred and thirty-four, then and in any of such cases, such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land. (*z*)

When heirs take by purchase under limitations to the heirs of their ancestor, the land shall descend as if the ancestor had been the purchaser.

4. And be it further enacted by the authority aforesaid, That no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent. (*a*)

Brothers and sisters shall trace descent through their parent.

5 And be it further enacted by the authority aforesaid, That every lineal ancestor shall be capable of being heir to any of his issue, and in every case where there shall be no issue of the purchaser, his nearest lineal

Lineal ancestor may be heir in preference to collateral persons claiming through him.

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acquires a new inheritable quality, and is descendible to the owner's blood in general, as a feud of indefinite antiquity, and that the person who takes by purchase is not answerable for the acts of his ancestors, as he would be if he took by descent. Cruise. tit. 30, sec. 4.

(*z*) When the words "heirs male of the body," &c., operate as words of purchase, that is, when they do not attach in the ancestor, but vest in the person answering the description of such special heir, they appear to have a mixed effect. For though they give the estates to the special heir originally, and not through or from his ancestor, yet the estate which he so takes has such a reference to the ancestor, as to pursue the same course of succession, in the same extent of duration or continuance through the same persons, as if it had attached in, and descended from, the ancestor. Fearne. Con. Rem. 80.

(*a*) Formerly, in making out the title between brothers and sisters, the descent was considered immediate, and the common father, though living, need not have been named. Watk. Descent. 111. *n.*

ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue. (*b*)

The male line to be preferred.

6. And be it further enacted and declared by the authority aforesaid, That none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants shall be capable of inheriting, until all his male paternal ancestors and their descendants shall have failed, and that no female maternal ancestor of such person, nor any of her descendants shall be capable of inheriting, until all his male maternal ancestors and their descendants shall have failed. (*c*)

The mother of the more remote male ancestor to be preferred to the mother of the less remote male ancestor.

7. And be it further enacted and declared, That where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and when there shall be a failure of male paternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants,

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(*b*) It was an old legal maxim, that estates might lineally descend, but not ascend, and a parent could not take immediately from his child, but the land would escheat.—Cowper *v.* Cowper. 2 P. Wms. 666. But though the parents could not *immediately* inherit, yet either of them might have taken as *cousin* to their child. 2 P. Wms. 613.

(*c*) The heir on the part of the great-grandfather has a prior claim to the heir on the part of the maternal grandfather. —Davis *v.* Lowndes. 5 Bing. N. C. 161.

shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor and her descendants. (*d*)

8. And be it further enacted by the authority aforesaid, That any person related to the person from whom the descent is to be traced by the half blood, shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood and his issue, where the common ancestor shall be a male, and next after the common ancestor when such common ancestor shall be a female, so that the brother of the half blood on the part of the father, shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother, shall inherit next after the mother. (*e*)

Half-blood, if on the part of a male ancestor, to inherit after the whole blood of the same degree; if on the part of a female ancestor, after her.

9. And be it further enacted by the authority afore-

(*d*) This section adopts Blackstone's rule, 2 Comm. 238. Where a person seised of an estate *ex parte maternâ* died without issue, the descendants of his maternal grandfather must all be extinct before any descendant of a remoter maternal ancestor could inherit, however nearly related to the *propositus ex parte maternâ*.—Hawkins *v.* Shewen. 1 Sim. & Stee. 257.

(*e*) Where a testator devised all his lands to S. A. (his son by his first wife) when he should come to the age of twenty-one years, but if he should die before twenty-one years, and D. A. (the testator's daughter by his second wife) should be then living, he gave the same to her, when she should attain twenty-one years. The testator died, and then S. A. died under age, and without issue. It was held that on the death of S. A. the inheritance vested in D. A., his sister of the half blood, in preference to his uncle of the whole blood, because S. A. did not die seised of such an estate in fee, as would descend upon his heir of the whole blood, but only of an estate expectant on the life estate of his sister.—Doe ex dem. Andrew *v.* Hatton. 3 B. & P. 643, 15 East. 174, 3 Wils. 516. From these cases, the necessity will be apparent, in cases not within this new law, of inquiring on the investigation of titles, where any children of the half blood have been passed over, in favor of the collateral relations of children of the whole blood, whether the latter were *actually seised* or not.

After the death of a person attainted, his descendants may inherit.

said, That when the person from whom the descent of any land is to be traced shall have had any relation who having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same by tracing his descent through such relation if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the first day of July, one thousand eight hundred and thirty-four.

Entry by the heir shall not be necessary to complete a title by descent.

10. And be it further enacted by the authority aforesaid, That after the passing of this act proof of entry by the heir after the death of the ancestor shall in no case be necessary in order to prove title in such heir, or in any person claiming by or through him. (*f*)

This act not to extend to any descent before first July, 1834.

11. And be it further enacted by the authority aforesaid, That this act shall not extend to any descent which shall take place on the death of any person who shall die before the first day of July, one thousand eight hundred and thirty-four.

Limitations made before the 1st of July 1834, to the heirs of a person then living, shall take effect as if this act had not been made.

12. And be it further enacted by the authority aforesaid, That where any assurance executed before the said first day of July, one thousand eight hundred and thirty-four, or the will of any person who shall die before that day, shall contain any limitation or gift to the heir or heirs of any person under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this act had not

(*f*) This section is not in the British statute 3 & 4 Will. IV. ch. 106, relating to descents, and by the wording of section 59 of the above act, its introduction would seem to be unnecessary, as that section declares that the expression "the person last entitled to land" shall extend to the last person who had a right thereto, whether he did or did not obtain the possession, or the receipt of the rents and profits thereof, which would clearly make the title of the heir and those claiming under him, good without any entry by him after his ancestor's death, and enable them to maintain ejectment, &c., under section 17, which prescribes the times of limitation.

been made, shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said first day of July, one thousand eight hundred and thirty-four.

Widows to be entitled to dower out of equitable estates

13. And be it further enacted by the authority aforesaid, That where a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in joint tenancy,) then his widow shall be entitled in equity to dower out of the same land. (*g*)

Seisin shall not be necessary to give title to dower.

14. And be it further enacted by the authority aforesaid, That when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband shall not have recovered possession thereof; Provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced. (*h*)

Certain descriptions of dower abolished.

15. And be it further enacted by the authority aforesaid, That no widow shall hereafter be entitled to dower ad ostium ecclesiæ, or dower ex assensu patris.

No land or rent to be recovered but within twenty years after the

16. And be it further enacted by the authority aforesaid, That after the first day of July, one thousand eight hundred and thirty-four, no person shall make an entry or distress, or bring an action to recover any land or

(*g*) The legal estate of a property being vested in A., for the benefit of himself and B., in equal moieties, he mortgaged it without B.'s knowledge. B. afterwards paid off the mortgage, and had the legal estate conveyed to him, subject to such equity of redemption as the lands were subject to: Held, that there was not such a perfect union of the legal and equitable interest in B.'s moiety of the estate, as to give his widow a title to dower. Knight *v.* Frampton, 4 Beav. 10.

(*h*) By 2 Vic. ch. 6, sec. 3, a wife is barred of her dower, by joining with her husband in a conveyance containing a release of her dower.

right of action accrued to the claimant, or some person whose estate he claims.

rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same. (*i*)

When the right shall be deemed to have accrued.

17. And be it further enacted by the authority aforesaid, That in the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say:

In the case of an estate in possession.

when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in the receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; (*j*) and when the

On dispossession.

(*i*) By this and the next section, the doctrine of non adverse possession is done away with, and an ejectment must be brought within 20 years after the original right of entry of the plaintiff, or the party under whom he claims, accrued, whatever be the nature of the defendant's possession. Nepean *v.* Doe ex dem. Knight. 2 M. & W. 894. A., 45 years ago, enclosed a piece of ground from the waste common, and built a cottage on it, and died 16 years afterwards, and his widow and daughter continued to live on the premises, till the death of the former, a month before the trial: Held in ejectment by A.'s eldest son, that his claim was barred, unless the jury were satisfied that his mother held the premises by permission, and not adversely. Doe ex dem. Pritchard *v.* Janney. 8 C. & P. 99.

(*j*) Where the lessor of the plaintiff in ejectment, had purchased the reversion subject to a lease for years, at a rent of £4, and to an annuity of £4, and the tenant in possession un-

person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt, in respect of the same estate or interest, until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; (*k*) and when the person claiming such land or rent shall claim in respect of an estate or interest in possession, granted, appointed, or otherwise assured by any instrument other than a will, to him or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming, as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent, in respect of such estate or in-

On abatement or death.

On alienation.

In case of future estates.

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der the lease had paid the sum of £4 yearly, for upwards of 20 years, to the annuitant, until his death in 1830; and subsequently, to his widow—Held, that it was for the jury to consider in what character the tenant made such annual payment; and if as agent for his landlord, the possession was not adverse, nor the right of the person entitled to the reversion, barred. Doe Newman *v.* Godsill. 5 Jurist. 170.

(*k*) A. was possessed of lands for more than twenty years, and died in 1817. His widow had possession from that time till her death in 1838. B. was the eldest son. Held, that though B. could not recover in ejectment as the heir of his father, because more than twenty years had elapsed since his father's death, yet that the jury might infer that the property belonged to B.'s mother, and survived to her on the death of his father, and descended to B., as heir, on her death, in 1838. —Doe ex dem. Bennett *v.* Long. 9 C. & P. 773.

terest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; (*l*) and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled, by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition broken: Provided always, that until the person deriving title to land in this province as the grantee of the crown, or his heirs or assigns, or some or one of them, by themselves, their servants or agents, shall have taken actual possession of the land granted, by residing thereupon or by cultivating some portion thereof, the lapse of twenty years shall not bar the right of such grantee, or any person claiming by, under or through him, to bring an action for the recovery of such lands, unless it can be shown that such grantee, or person claiming by, under or through him, while entitled to the land, had knowledge of the same being in the actual possession of some other person not claiming to hold by, from or under the grantee of the crown, (such possession having been taken while the said lot was in a state of nature,) in which case, the right to bring such action shall be deemed to have accrued from the time that such knowledge was obtained: Provided also, that when any right to make an entry or distress, or to bring an action to recover any land or rent, by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or in-

In case of forfeiture or breach of condition.

In case of lands granted by the crown, and not yet cultivated or improved.

Where advantage of forfeiture is not taken by remainder man, he shall have a new right when his estate comes into possession.

(*l*) Where a tenant has been in possession under a lease, for which he has not paid rent to any person for upwards of twenty years previous to the expiration, the right of the person entitled to the reversion is not barred until twenty years from the expiration of the lease; but if the tenant has paid rent to a person wrongfully claiming an estate in remainder or reversion, expectant on the determination of the lease, then the party rightfully entitled must make his claim within twenty years from such payment.—Doe Davy *v.* Oxenham. 7 M. & W. 131; Chadwick *v.* Broadwood. 3 Beav. 308.

terest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possesion, as if no such forfeiture or breach of condition had happened: Provided also, that a right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held or the profits thereof, or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or receipt of such rent. (*m*)

Reversioner to have a new right.

18. And be it further enacted by the authority aforesaid, That for the purposes of this Act, an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration.

An administrator to claim as if he obtained the estate without interval after death of deceased.

19. And be it further enacted by the authority aforesaid, That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to

In case of a tenant at will, the right shall be deemed to have accrued at the end of one year.

(*m*) See ante page 352.

have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: (*n*) Provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will within the meaning of this clause to his mortgagee or trustee.

Case of mortgagor or cestui que trust.

20. And be it further enacted by the authority aforesaid, That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received, (which shall last happen.)

No person after a tenancy from year to year to have any right but from the end of the first year or last payment of rent.

21. And be it further enacted by the authority aforesaid, That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or

Where rent amounting to twenty shillings reserved by a lease in writing shall have been wrongfully received, no right to accrue on the determination of the lease, but at the time the rent was wrongfully received.

(*n*) Where A. in 1817 let B. into possession of lands as tenant at will; and in 1827 A. entered upon the lands without B.'s consent, and cut and carried away stone therefrom: Held that this entry amounted to a determination of the estate at will, and that B. thenceforth became tenant at sufferance, until by agreement express or implied, a new tenancy was created between the parties; and therefore that unless the fact of such new tenancy were found by the jury, an ejectment brought by A in 1839 was too late, inasmuch as his right of action first accrued at the expiration of one year after the commencement of the original tenancy at will in 1817.—Doe dem. Bennett *v.* Turner. 7 M. & W. 226.

A person let into possession under an agreement to purchase is a tenant at will within the meaning of this section, and such a tenancy at will is determined by the death of the person in possession, and no demand of possession need subsequently be made.—Doe dem. Stanway *v.* Rock. 6 Jur. 266.

upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion, immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming, as aforesaid, and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled. (*o*)

A mere entry not to be deemed possession.

22. And be it further enacted by the authority aforesaid, That no person shall be deemed to have been in possession of any land within the meaning of this Act, merely by reason of having made an entry thereon.

23. And be it further enacted by the authority

(*o*) Where property is under lease, adverse possession runs against the reversioner from the expiration of the lease, or from the time when the tenant pays rent to one claiming wrongfully to be entitled in immediate reversion. A bill of discovery filed in aid of an action of ejectment filed in 1840, stated that in 1776, A. B., being seised in fee, granted leases of the property, which expired in 1825, and that the plaintiff, as heir of A. B., was now entitled to the property, for the recovery of which he was now about to bring an action of ejectment. The defendant pleaded this statute, and averred that the plaintiff had not been in possession, or received rents for more than twenty years, before the bill was filed, that the defendant had entered into possession as purchaser in fee simple in 1819, and had ever since remained in peaceable possession as tenant in fee. Held, that this plea could not in law be sustained, for there being no allegation that the rent had been paid to any one wrongfully claiming to be entitled in reversion immediately expectant on the determination of the lease, the plaintiff's right did not accrue until the expiration of the lease in 1825, or within twenty years from the filing of the bill.—Chadwick *v.* Broadwood. 3 Beav. 308.

No right to be preserved by continual claim.

aforesaid, That no continual or other claim upon or near any land shall preserve any right of making an entry or distress, or of bringing an action.

Possession of one coparcener, &c. not to be the possession of the others.

24. And be it further enacted by the authority aforesaid, That when any one or more of several persons entitled to any land or rent as co-parceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last mentioned person or persons, or any of them. (*p*)

Possession of a younger brother, &c. not to be the possession of the heir.

25. And be it further enacted by the authority aforesaid, That when a younger brother or other relation of the person entitled, as heir to the possession, or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.

Acknowledgment in writing given to the person entitled or his agent, to be equivalent to possession or receipt of rent.

26. Provided always, and be it further enacted by the authority aforesaid, That when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such

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(*p*) This section has relation back, as far as relates to the period of the act, and makes the possession of one co-parcener, joint-tenant, or tenant in common, who has been in possession of the entirety, separate from the time of his coming into possession. Therefore, where one tenant in common has been out of possession for twenty years prior to the passing of the act, he is barred from bringing his action. —Culley *v.* Doe dem. Taylerson. 3 P. & D. 539.

acknowledgment shall have been given, shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given. (*q*)

Where possession is not adverse at the time of passing this act, the right shall not be barred until the end of five years afterwards.

27. Provided also, and be it further enacted by the authority aforesaid, That when no such acknowledgment, as aforesaid, shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or interest, at any time within five years next after the passing of this act.

(*q*) Whether a writing is an acknowledgment of title within this section, is a question for the court, and not for the jury to decide. And where a party in possession of land adversely, being applied to by the party claiming title to it, to pay rent, and offered a lease of it, wrote as follows:—"Although, if matters were contested, I am of opinion that I should establish a legal right to the premises, yet, under all the circumstances, I have made up my mind to accede to the proposal you made, of paying a moderate rent, on an agreement for twenty-one years." The bargain having subsequently gone off, no rent being paid, or lease executed, held, that the letter was not an acknowledgment of title.—Doe Curzan *v.* Edmonds. 6 M. & W. 295. Where an estate is devised to a trustee in trust to sell and pay the testator's debts, and subject thereto in trust for A., an acknowledgment of a debt in writing, signed by the trustee or his agent, is sufficient to preserve the creditors of suit for twenty years after the acknowledgment.—Lord St. John *v.* Bewghton. 9 Sim. 319.

Persons under disability of infancy, lunacy, coverture, or absence from the province, and their representatives, to be allowed ten years from the termination of their disabillty or death.

28. Provided always, and be it further enacted by the authority aforesaid, That if at the time at which the right of any person to make an entry or distress or bring an action to recover any land or rent, shall have first accrued, as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, that is to say: infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence from this Province, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within ten years next after the time at which the person to whom such right shall have first accrued, as aforesaid, shall have ceased to be under any such disability, or shall have died, (which shall have first happened.)

But no action &c. shall be brought beyond forty years after the right of action accrued.

29. Provided nevertheless, and be it further enacted by the authority aforesaid, That no entry, distress or action, shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.

No further time to be allowed for a succession of disabilities.

30. Provided always, and be it further enacted by the authority aforesaid, That when any person shall be under any of the disabilities hereinbefore mentioned, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent beyond the said period of

twenty years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person.

When the right to an estate in possession is barred, the right of the same person to future estates shall also be barred.

31. And be it further enacted by the authority aforesaid, That when the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession, shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall, at any time during the said period, have been entitled to any other estate, interest, right or possibility, in reversion, remainder or otherwise, in or to the same land or rent, no entry, distress or action, shall be made or brought by such person, or any person claiming through him, to recover such land or rent in respect of such other estate, interest, right or possibility, unless in the mean time such land or rent shall have been recovered by some person entitled to an estate, interest or right, which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.

No suit in equity to be brought after the time when the plaintiff, if entitled at law, might have brought an action.

32. And be it further enacted by the authority aforesaid, That after the said first day of July, one thousand eight hundred and thirty-four, no person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which by virtue of the provisions hereinbefore contained he might have made an entry or distress, or brought an action to recover the same, respectively, if he had been entitled at law to such estate, interest or right, in or to the same, as he shall claim therein in equity.

In cases of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser.

33. Provided always, and be it further enacted by the authority aforesaid, That when any land or rent shall be vested in a trustee upon any express trust, the right of the cestui que trust, or any person claiming through him, to bring a suit against the trustee, or any person

claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before, the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.

In cases of fraud no time shall run whilst the fraud remains concealed.

34. And be it further enacted by the authority aforesaid, That in every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at, and not before the time at which such fraud shall, or with reasonable diligence might have been first known or discovered: Provided, that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any bonâ fide purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who, at the time that he made the purchase did not know, and had no reason to believe that any such fraud had been committed.

Saving the jurisdiction of equity on the ground of acquiescence or otherwise.

35. Provided always, and be it further enacted by the authority aforesaid, That nothing in this act contained shall be deemed to interfere with any rule or jurisdiction of Courts of Equity in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring a suit may not be barred by virtue of this act.

Mortgagor to be barred at the end of twenty years from the time when the mortgagee took possession, or from the last written acknowledgment.

36. And be it further enacted by the authority aforesaid, That when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the mean time

an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by the mortgagee or the person claiming through him; (*r*) and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but when there shall be more

(*r*) W. B., being seised in fee of land, by indentures of lease and release, bearing date respectively 2nd and 3rd September, 1819, and executed by himself only, conveyed the same to T. K. in fee, with the proviso, that on the payment by him to T. K. of £200, with interest, on 25 March, 1820, the latter should re-convey the premises. The deed then contained a covenant, that in the event of default being made in the payment of the above sum, or any part thereof, the mortgagee and his heirs might peaceably and quietly enter, have, hold, possess, and enjoy the premises, without disturbance, &c.: and that therefore the mortgagor would execute any further assurance that might be necessary, &c. Held, that an estate in fee simple passed to the mortgagee immediately on the execution of this deed: and no interest having been paid on the mortgage money, nor any other act recognizing the title of the mortgagee done for twenty years from that date, his remedy to recover the land by ejectment was barred.—Doe dem. Roylance *v.* Lightfoot. 8 M. & W. 553. What amounts to a written acknowledgment by a mortgagee of the mortgagor's right to redeem, sufficient to prevent a twenty years' bar under this section.—Trulock *v.* Robley. 5 Jurist. 1101. The acknowledgment having been given to the grandfather of the infant mortgagor, though the grandfather was not authorised to act as the agent of the mortgagor: Held, that such was within the meaning of this section, which directs that the acknowledgment shall be given to the mortgagor, "or to the agent of such mortgagor."—Ib.

than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money, or land or rent, by, from or under, him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money, or land or rent; and when such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent, on payment with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

At the end of the period of limitation, the right of the party out of possession to be extinguished.

37. And be it further enacted by the authority aforesaid, That at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, distress, action or suit, respectively, might have been made or brought within such period, shall be extinguished.

Receipt of rent to be deemed receipt of profits.

38. And be it further enacted by the authority aforesaid, That the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him,

but subject to the lease, be deemed to be the receipt of the profits of the land for the purposes of this Act.

Real and mixed actions abolished after 1st July, 1835.

39. And be it further enacted by the authority aforesaid, That no writ of right patent, writ of right quia dominus remisit curiam, writ of right close, writ of right de rationabili parte, writ of right upon disclaimer, writ of right of ward, writ of cessavit, quod permittat, formedon in descender, remainder, or in reverter, writ of Assize of novel disseisin, nuisance, or mort d'ancestor, writ of entry sur desseisin in the quibus, in the per, in the per and cui, or in the post, writ of entry sur intrusion, writ of entry sur alienation, dum fuit non compos mentis, dum fuit infra etatem, dum fuit in prisona, ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium, or sur cui ante divortium, writ of entry sur abatement, writ of entry quare ejecit infra terminum, or ad terminum qui præteriit, or causa matrimonii prælocuti, writ of aiel, besaiel, tresaiel, cosinage, or nuper obiit, writ of waste, writ of partition, except such as is or shall be authorised by any Statute of this Province; writ of disceit, writ of quod ei deforceat, writ of covenant real, writ of warrantia chartæ, writ of curia claudenda, and no other action, real or mixed, except a writ of dower, or writ of dower unde nihil habet, or an ejectment; and no plaint in the nature of any such writ or action, except a plaint for dower, shall be brought after the first day of July, one thousand eight hundred and thirty-five.

Except for dower and ejectment.

Real actions may be brought until the 1st January, 1836.

40. Provided always, and be it further enacted by the authority aforesaid, That when on the said first day of July, one thousand eight hundred and thirty-five, any person who shall not have a right of entry to any land shall be entitled to maintain any such writ or action, as aforesaid, in respect of such land, such writ or action may be brought at any time before the first day of January, one thousand eight hundred and thirty-six, in case the same might have been brought if this Act had not been made, notwithstanding the period of twenty years hereinbefore limited shall have expired.

Saving the rights of persons entitled to real actions only at the commencement of the Act, &c.

41. Provided also, and be it further enacted by the authority aforesaid, That when on the said first day of January, one thousand eight hundred and thirty-six, any person whose right of entry to any land shall have been taken away, by any descent, cast, discontinuance or warranty, might maintain any such writ or action, as aforesaid, in respect of such land, such writ or action may be brought after the said first day of January, one thousand eight hundred and thirty-six, but only within the period during which, by virtue of the provisions of this Act, an entry might have been made upon the same land by the person bringing such writ or action, if his right of entry had not been so taken away.

No descent, warranty, &c. to bar a right of entry.

42. And be it further enacted by the authority aforesaid, That no descent, cast, discontinuance or warranty which may happen or be made after the said first day of July, one thousand eight hundred and thirty-four, shall toll or defeat any right of entry or action for the recovery of land.

Money charged upon land and legacies to be deemed satisfied at the end of twenty years, if there shall be no interest paid or acknowledgment in writing in the mean time.

43. And be it further enacted by the authority aforesaid, That after the said first day of July, one thousand eight hundred and thirty-four, no action or suit or other proceedings shall be brought to recover any sum of money secured by any mortgage, (*s*) judgment or lien, or otherwise charged upon or payable out of any land (*t*) or rent at law or in equity, or any lega-

(*s*) Where a bond is entered into as collateral security for money secured by mortgage, and the interest being in arrear, the mortgagee takes possession, and remains in possession twenty years, without taking interest otherwise than by receipt of rents and profits, quære, whether his remedy on the bond is not barred in equity, as well as at law, by the statute of limitations.—White *v.* Hillacres. 3 You. & C. 597. This statute may be pleaded to a bill of foreclosure, a foreclosure suit being in fact a suit for the recovery of the money secured by mortgage.—Dearman *v.* Whyche. 9 Sim. 370.

(*t*) An action of debt on a covenant in an indenture, granting an annuity or rent charge to issue out of land, may be brought within the period of twenty years limited by this section, and is not barred by section 45, which limits the recovery of arrears of rent within six years. Strachan *v.*

cy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the mean time some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought, but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given: Provided always, that in respect to persons now entitled to an equity of redemption, or to any legacy, the right to bring an action, or to pursue a remedy for the same, shall not be deemed to be extinguished or barred by lapse of time, until the expiration of five years from the time that an equitable jurisdiction shall be established in this Province, and in the exercise of its powers: Provided that shall happen within ten years from the passing of this Act.

No arrears of dower to be recovered for more than six years.

44. And be it further enacted by the authority aforesaid, That after the said first day of July, one thousand eight hundred and thirty-four, no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit.

No arrears of rent or interest to be recovered for more than six years.

45. And be it further enacted by the authority aforesaid, That after the said first day of July, one thousand eight hundred and thirty-four, no arrears of rent, or of interest in respect of any sum of money

Thomas. 4 P. & D. 229.—Sims *v.* Thomas. 12 A. & E. 536. The construction of this section fully discussed, with reference to the right of the grantee of an annuity charged on land, to take proceedings to recover his annuity, after twenty years' possession and receipt of the rents and profits by the grantor, punctual payment of the annuity, and no acknowledgment in writing of the grantee's title.—Searle *v.* Colt. 1 You. & C. N. C. 36.

charged upon or payable out of any land or rent, (*u*) or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt, as aforesaid, although such time may have exceeded the said term of six years.

Corporations aggregate may convey by bargain and sale.

46. And be it further enacted by the authority aforesaid, That any Corporation aggregate in this Province, capable of taking and conveying land, shall be deemed to have been and shall be deemed to be capable of taking and conveying land by deed of bargain and sale, in like manner as any person in his natural capacity, subject nevertheless to any general limitations or

(*u*) Turnpike tolls are not within this section, and more than six years' arrears of interest may be recovered on a mortgage of turnpike tolls.—Mellish *v.* Brook. 3 Beav. 22. But where a canal company mortgaged their canal and works until repayment of certain money borrowed and interest, and there was no covenant to repay: Held, that his remedy for arrears of interest was limited to six years.—Hodges *v.* Croydon Canal Company. 3 Beav. 86. This section does not apply to a case, where the person having the estate in land, out of which the charge is to be raised, is a trustee for the person having the charge.—Young *v.* Waterpark. 6 Jurist. 656.

restrictions as to holding or conveying real estate which may be applicable to such Corporation.

47. And be it further enacted by the authority aforesaid, That after the passing of this Act, a deed of bargain and sale of land in this Province shall not be held to require enrolment or to require registration to supply the place of enrolment for the mere purpose of rendering such bargain and sale a valid and effectual conveyance for passing the land thereby intended to be bargained and sold: Provided always nevertheless, that the necessity of registering such deed of bargain and sale in the Register of the county in which the land is situated, in order to guard against a subsequent purchaser of the same lands obtaining title by prior registry, shall continue as before the passing of this Act.

Deed of bargain and sale shall not require enrolment to render it a valid conveyance.

But the necessity for registering, to prevent a subsequent purchaser from gaining priority, shall continue as before.

48. And be it further enacted by the authority aforesaid, That whenever by any letters patent, assurance or will, made and executed after the first day of July, one thousand eight hundred and thirty-four, land shall be granted, conveyed or devised, to two or more persons, other than executors or trustees, in fee simple, or for any less estate, it shall be considered that such persons take as tenants in common, and not as joint tenants, unless an intention sufficiently appears on the face of such letters patent, assurance or will, that they shall take as joint tenants. (*v*)

Grantees, devisees, &c. shall not take as joint tenants, unless such intention be expressed.

49. And be it further enacted by the authority aforesaid, That when the will of any person who shall die after the passing of this act shall contain a devise in any form of words, of all such real estate as the

Estates acquired after the making of a will, may pass by the will where such intention is expressed.

(*v*) There cannot be a joint demise by tenants in common in ejectment, and mortgagees are not trustees within the meaning of the exception in this clause, so as to take jointly, where the deed is silent as to the tenancy created.—Doe Shuter *et. al. v.* Carter. Hil. Term. 2 Vic. Where a mortgage is made to several persons jointly, they are in equity tenants in common of the mortgage money; and the representatives of such of them as may be dead are necessary parties, with the survivors, to a bill for foreclosure or redemption.—Vickers *v.* Cowell. 1 Beav. 529.

testator shall die seized or possessed of, or of any part or proportion thereof, such will shall be valid and effectual to pass any land that may have been or may be acquired by the devisor after the making of such will, in the same manner as if the title thereto had been acquired before the making thereof.

A devise of land shall be taken to carry as large an estate as the testator had in the land, unless a contrary intention be expressed.

50. And be it further enacted by the authority aforesaid, That whenever land is or shall be devised in a will made by any person who shall die after the passing of this act, it shall be considered that the devisor intended to devise all such estate as he was seized of in the same land, whether fee simple or otherwise, unless it shall appear upon the face of such will that he intended to devise only an estate for life, or other estate less than he was seized of at the time of making the will containing such devise.

Not more than two witnesses shall be necessary to a will.

51. And whereas by the adoption in this Province of the law of England, it is made necessary that a will of real estate shall be executed in the presence of three witnesses, which provision there is reason to believe operates in many instances injuriously in this Province, by reason that lands are held in small portions by persons of all conditions and degrees of intelligence, many of whom, not aware of this positive provision of the law, are only careful to provide two witnesses, as is customary with respect to sealed instruments in general, and in all such cases the intentions of the testator fail of their effect, frequently to the great injury of families: Whereas, on the other hand, it is doubtful whether any intended fraud is in fact prevented by requiring an attestation by three witnesses: Be it therefore enacted by the authority aforesaid, That any will affecting land executed after the passing of this act, in the presence of and attested by two or more witnesses, shall have the same validity and effect as if executed in the presence of and attested by three witnesses, any former law to the contrary notwithstanding; and that it shall be sufficient if such witnesses subscribe their names in pre-

And they need not subscribe in the presence of the testator.

sence of each other, although their names may not be subscribed in presence of the testator.

52. And whereas plaintiffs in actions of ejectment brought against persons who are merely intruders, are subject to be defeated in the recovery of land to which they have just claim, as purchasers or heirs, on account of some want of technical form in their title, or some imperfection not affecting the merits of their case, and of which it is desirable that mere strangers to the title, having no claim, or colour of legal claim, to the possession, should not be encouraged or permitted to take advantage: Be it therefore enacted by the authority aforesaid, That it shall and may be lawful for the lessor of the plaintiff, or his attorney, in any action of ejectment hereafter to be brought, to serve a notice upon the defendant in such ejectment in these words:

Defendants in ejectment setting up no title shall not be allowed to take formal exceptions to the title of the lessor of the plaintiff, against the merits of the case.

"Take notice, that I claim the premises for which this action is brought as the bonâ fide purchaser thereof, from A. B. ———, or as heir-at-law of A. B., of ———, (or otherwise as the case may be,) and that you will be required to show upon the trial of this cause what legal right you have to the possession of the premises,"

Defendant may be called upon to shew what title he has to the possession.

or a notice in any other form of words to the same effect; and that if upon the trial of such ejectment to be afterwards had, the evidence of title given by the lessor of the plaintiff shall shew to the satisfaction of the Court and Jury that he is entitled in justice to be regarded as the proprietor of the land, or is entitled to the immediate possession thereof for any term of years, but that he cannot shew a perfect legal title by reason of some want of legal form in any instrument produced, or by reason of the defective registration of any will or instrument produced, or from any cause not within the power of the lessor of the plaintiff to remedy by using due diligence, it shall be competent to the Jury, under the direction of the Court, to find a verdict for the plaintiff, unless the defendant, or his counsel, upon being required by the other party so to do, shall give such evidence of title as shall shew that he is the person legally en-

titled, or does bonâ fide claim to be the person legally entitled to the land, by reason of the defect in the title of the lessor of the plaintiff, or that he holds, or does bonâ fide claim to hold, under the person so entitled: (*w*) Provided always nevertheless, that when a verdict shall be rendered under the authority of this provision, it shall be endorsed as given under this act, and it shall be stated in the postea and entry of the judgment to have been so given; and in any action which may thereafter be brought for the mesne profits, such judgment in ejectment shall not be evidence to entitle the plaintiff to recover.

Provision respecting action for mesne profits.

53. And whereas the wrong committed by tenants in holding over vexatiously and without colour of right, after their term has expired, (*x*) requires a more speedy and less expensive remedy than is now provided by law: Be it therefore further enacted by the authority aforesaid, That it shall and may be lawful for any landlord, or the agent of any landlord, whose tenant shall, after the expiration of his term, (whether the same was created by writing or parol,) wrongfully refuse, upon demand made in writing, to go out of possession of the land demised to him, to apply to the Court of King's Bench in term, or to a judge thereof in vacation, setting forth, on affidavit, the terms of the demise, if by parol, and annexing a copy of the instrument containing such demise, if the same were in writing, and also a copy of the demand made for the delivering up possession, and stating

More easy remedy against tenants who wrongfully hold over.

Application to the Court of King's Bench, or a Judge in vacation.

Affidavit.

(*w*) Where it is necessary to leave the question of adverse possession in the defendant for twenty years, as a doubtful point to the jury in an action of ejectment, it is not a case in which a plaintiff can be allowed to remedy legal defects in his title, by availing himself of the provisions contained in this section, and giving notice to the defendant as an intruder, or one having no claim or colour of claim to the possession.—Doe Lyons *v.* Crawford. Easter Term. 1842.

(*x*) This section applies only to tenants holding over after the expiration of a *term*, and not to a tenancy *at will*.—Adnerant *v.* Shriver. Trin. Term. 6 & 7 Will. IV. Where a tenant holds over after the expiration of his lease, his landlord has a right to take possession, if he can without a breach of the peace.—Boulton *v.* Murphy *et. al.* Easter term. 2 Vic.

also the refusal of the tenant to go out of possession, and the reason given for such refusal, (if any were given,) adding such explanation in regard to the ground of refusal as the truth of the case may require; and if upon such affidavit it shall appear to the court or judge that such tenant does wrongfully hold over, without colour of right, it shall be lawful for such court or judge to order a writ to issue in the name of the King, and tested in the name of the chief justice or senior puisne judge of such court on the day that the same shall actually issue, directed to such person as the court or judge shall appoint, and commanding him to issue his precept to the sheriff of the district in which the land is situated, for the summoning of a jury of twelve men, to come before the commissioner at a day and place by such commissioner to be named, to inquire and say upon their oaths whether such person complained of was tenant to the complainant for a term which has expired, and whether he does wrongfully refuse to go out of possession, having no right, or colour of right, to continue in possession, or how otherwise, which writ shall be made returnable whensoever the same shall be duly executed, before any one of the judges of the said court; and that notice in writing of the time and place of holding such inquisition shall be served upon the tenant, or left at his place of abode, at least three days before the day appointed, to which notice shall be annexed a copy of the affidavit on which the writ was obtained, and of the papers attached thereto; and that the commissioners shall have power to administer an oath to the persons summoned on such jury, well and truly to try, and a true verdict to give, upon the matters and things in the said writ contained, according to the evidence; and shall also have power to administer an oath to the witnesses produced by either party; and that the jurors shall, under their hands, either with or without their seals, endorse their finding upon the back of the writ, or return the same upon a paper attached thereto by such commissioner; and if it shall appear to

Writ to issue.

Notice of holding Inquisition.

Jury to be sworn.

Witnesses.

Verdict.

Evidence to be returned with Commission.

the court, or any judge thereof, upon the return of the said writ made by the said commissioner, and upon a consideration of all the evidence, which shall also be certified and returned by such commissioner, to be filed with such commission and proceedings thereupon in the office of the clerk of the crown and pleas, that the case is clearly one coming within the true intent and meaning of this act, then it shall be lawful for such court or judge to issue a precept to the sheriff, in the King's name, commanding him forthwith to place the landlord in possession of the premises in question.

Landlord to be placed in possession.

Court of King's Bench may revise the proceeding.

54. And be it further enacted by the authority aforesaid, that when such precept shall have been made by a judge, the court shall have power, on motion before the end of the second term after such precept shall have been issued, to examine into the proceedings, and, if they shall find cause, to set aside the same, and to issue their precept to the sheriff, if it be necessary, commanding him to restore the tenant to his possession, in order that the question of right, if any appear, may be tried as heretofore by ejectment.

And, if proper, order tenant to be restored to possession.

The Judges of the King's Bench may devise forms of proceedings, and make orders respecting costs, and enforce their payment.

55. And be it further enacted by the authority aforesaid, That the judges of the Court of King's Bench, in term time or in vacation, shall have power to devise, and from time to time to alter and amend the form of the writ, inquisition, and return, and of the precepts to be issued under the authority of this act, and to make such orders respecting costs as to them may seem just, and to issue a writ to the sheriff, commanding him to levy such costs of the goods and chattels, or to issue an attachment for the non-payment thereof, against the landlord or tenant, or person described as landlord or tenant, as to them shall seem just.

Commissioners to be sworn.

56. And be it further enacted by the authority aforesaid, That before any commissioner shall hold an inquisition under this act, he shall take the following oath, before some one of the justices of the peace in and for the district in which the inquisition shall be holden,

which oath shall be indorsed on the said writ, that is to say:—

"I, A. B., do solemnly swear, that I will impartially, and to the best of my judgment, discharge my duty as commissioner under this writ. So help me God."

Witnesses swearing falsely may be convicted of perjury.

57. And be it further enacted by the authority aforesaid, That if any witness sworn and examined before a commissioner holding an inquisition under this act shall wilfully swear falsely, he shall on conviction thereof be liable to the penalties of wilful and corrupt perjury; and that if any person upon being required by notice from such commissioner to attend as a witness upon the inquisition, shall refuse or wilfully omit to attend, he shall be liable to be committed upon the warrant of such commissioner to the common gaol of the district for a time not exceeding one calendar month.

Punishment of witnesses for not attending.

This Act not to take away any other remedy which landlords have by law.

58. And be it further enacted by the authority aforesaid, That the remedy afforded under this act shall not be construed to take away or interfere with any other remedy, action, or right of action, which a landlord might have or bring under the laws in force before the passing of this act.

Meaning of words in this act.

59. And be it further enacted by the authority aforesaid, That the words and expressions in this act mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows, that is to say: the word "land" shall extend to messuages, and all other hereditaments, whether corporeal or incorporeal, and to money to be laid out in the purchase of land, (and to chattels and other personal property transmissible to heirs,) and also to any share of the same hereditaments and properties, or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles and interests, or any

"Land."

of them, shall be in possession, reversion, remainder or contingency; and the words "the purchaser" shall mean the person who last acquired the land otherwise than by descent or than by any partition, by the effect of which the land shall have become part of or descendible, in the same manner as other land acquired by descent; and the word "descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue; and the expression "descendants of any ancestor," shall extend to all persons who must trace their descent through such ancestor; and the expression "the person last entitled to land" shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof; and the word "assurance" shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity; and the word "rent" shall extend to all annuities and periodical sums of money charged upon or payable out of any land; and the "person through whom another person is said to claim," shall mean any person by, through or under, or by the act of whom the person so claiming became entitled to the estate or interest claimed, as heir, issue, in tail, tenant by the courtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee or otherwise; and every word importing the singular number only, shall extend and be applied to several persons or things, as well as one person or thing; and every word importing the masculine gender only, shall extend and be applied to a female, as well as a male.

"The purchaser."

"Descent."

"Descendants."

"Person last entitled."

"Assurance."

"Rent."

"Person through whom another claims."

Number and gender.

60. And be it further enacted by the authority aforesaid, That this act shall not have operation retrospectively, so as by force of any of its provisions to render any title valid, which in regard to any particular estate has been adjudged, or may in any suit now depending be adjudged invalid, on account of any defect, imperfection, matter or thing, which is by this act altered, sup-

This act not to operate retrospectively in certain cases.

plied or remedied; but that in every such case the law in regard to any such defect, imperfection, matter or thing, shall, as applied to such title, be deemed and taken to be as if this act had not been passed.

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4 WILL. IV. CH. 7.

An Act to facilitate the remedy by Replevin.

Preamble. WHEREAS it is expedient to facilitate the remedy of replevin: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled "An Act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled 'an act for making more effectual provision for the government of the province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, that any person complaining of a wrongful distress in a case in which by the law of England replevin might be made, may, on filing a præcipe, obtain from the office of the clerk of the crown and pleas in this province, or from the office of any of his deputies, a writ of replevin, which may be in the form given in the schedule to this act marked A.

Remedy by replevin same as by the law of England.

Proceedings by Sheriff upon writ of replevin.

2. And be it further enacted by the authority aforesaid, That before the sheriff shall proceed to replevy upon any such writ, he shall take pledges from the plaintiff according to the law of England in that behalf, and the bond to be entered into for that purpose may be in the form given in the schedule to this act annexed marked B; and the assignment thereof to be made to the defendant may be according to the form given in the same schedule.

When capias in withernam may issue.

3. And be it further enacted by the authority aforesaid, That upon the sheriff making such return of the

goods distrained having been eloigned, as would warrant the issuing of a capias in withernam by the law of England, a writ of capias in withernam shall issue, upon the filing of such return, from the office of the clerk of the crown and pleas in this province, or from the office of any of his deputies, which writ may be in the form given in the schedule to this act annexed marked C; and that before executing such writ the sheriff shall take pledges according to the law of England in that behalf.

By whom, and how writs to be executed.

4. And be it further enacted by the authority aforesaid, That the sheriff may make his warrant to any bailiff or bailiffs, jointly and severally, to execute either of the writs aforesaid to him directed, according to the law and custom of England in that behalf.

Proceedings after appearance.

5. And be it further enacted by the authority aforesaid, That upon the appearance of the defendant being entered in the office from whence any writ of replevin or capias in withernam shall issue, the plaintiff may declare, and may proceed in his action of replevin according to the law of England in that behalf.

Notice in case of non-appearance by defendant.

6. And be it further enacted by the authority aforesaid, That if the defendant shall not appear at the return of the writ, or within eight days thereafter, (*y*) the plaintiff shall cause a notice to be put upon the door of the court house of the district in which such writ shall have issued, according to the form in the schedule to this act annexed marked D; and that if at the expiration of twenty-one days after the said notice shall have been put up, as aforesaid, the defendant shall not have appeared, it shall be lawful for the plaintiff, upon filing an affidavit of the due publication of such notice, in manner aforesaid, to enter appearance for the defendant, and to proceed thereupon as if the defendant had appeared.

(*y*) Personal service of the summons in replevin is in no case necessary, and after the goods have been replevied, if the defendant do not appear, the plaintiff may proceed by notice under this section, and he must declare, as in other cases, within a year after the return of the writ, or he will be out of court.—Zavitz *v.* Hoover *et. al.* Mich. Term. 1 Vic.

7. And be it further enacted by the authority aforesaid, That when the value of the goods distrained shall not exceed the sum of fifteen pounds, and where the title to lands shall not come in question, the writ of replevin may issue from the District Court of any district in this Province within which the distress shall have been made, and such proceedings may be thereon had as shall be agreeable to the practice of the Court of King's Bench in this Province in actions of replevin. When distress not exceeding £15, writ may issue from district court.

8. And be it further enacted by the authority aforesaid, That the Court of King's Bench may by rule or rules from time to time make such provision for rendering the remedy of replevin easy and effectual as such Court may deem conducive to the ends of justice, as well by regulating the practice to be observed in actions of replevin, as by prescribing or changing the forms of writs and proceedings to be used in such actions, or for advancing the remedy by replevin; and that to that end the forms give to the several schedules annexed to this act, or any of them, may by rule of the said Court be modified and altered. Rules of practice and forms to be framed by Court of King's Bench.

9. Provided always, and be it further enacted by the authority aforesaid, That in the absence of any provision in this act, or in any rule of the Court of King's Bench to the contrary, the practice in England in cases of replevin shall be pursued, so far as the same can be applied to the jurisdiction having cognizance of the case, and to the circumstances of this Province. How far practice of Court of King's Bench in England to prevail.

SCHEDULE A.

——— District, } William the Fourth, by the Grace of
to wit: } God, &c.

To the Sheriff of ———, Greeting:

We command you, that without delay you cause to be replevied to A. B. his cattle, goods and chattels, which C. D. hath taken and unjustly detains, as it is said, in order that the said A. B. may have his just remedy in that behalf; and that you summon the said Writ of replevin.

C. D. to appear before us, in our Court of King's Bench, at York, on the ——— day of ——— term, to answer to the said A. B. in a plea of taking and unjustly detaining his cattle, goods and chattles; and what you shall do in the premises make appear to us in our Court of King's Bench, at York, on the day and at the place aforesaid, and have there then this writ.

Witness the honourable ———, Chief Justice of our said Province, this ——— day of ———, &c.

SCHEDULE B.

Replevin bond.

Know all men by these presents, that we A. B., of ———, W. G. of ———, and J. S., of ———, are jointly and severally held and firmly bound to W. P., esquire, Sheriff of the district of ———, in the sum of ———, of lawful money of Upper Canada, to be paid to the said Sheriff, or his certain attorney, executors, administrators or assigns, for which payment to be well and truly made we bind ourselves, and each and every of us in the whole, our and each and every of our heirs, executors and administrators, firmly by these presents, sealed with our seals.

Dated this —— day of ——, one thousand eight hundred and ——.

Condition.

The condition of this obligation is such, that if the above bounden A. B. do prosecute his suit with effect and without delay against C. D. for the taking and unjustly detaining of his cattle, goods and chattles, to wit: (here set forth the cattle or goods distrained,) and do make a return of the said cattle, goods and chattles, if a return thereof shall be adjudged, that then this present obligation shall be void and of none effect, or else to be and remain in full force and virtue.

Sealed and delivered in the presence of }

Assignment by sheriff.

Know all men by these presents, that I, W. P., esq., sheriff of the district of ——, have at the request of the

within named C. D., the avowant (or person making cognizance) in this cause, assigned over this replevin bond unto him the said C. D., pursuant to the Statute in such case made and provided.

In witness whereof I have hereunto set my hand and seal of office, this ——— day of ———, one thousand eight hundred and ——— .

Sealed and delivered in the presence of }

SCHEDULE C.

——— District, to wit: } William the Fourth, by the Grace of God, &c.

To the Sheriff of ———, Greeting:

Writ of capias in withernam

Whereas we lately commanded you, that without delay you should cause to be replevied to A. B. his cattle, goods and chattles, to wit, &c. (setting out the cattle and goods,) which C. D. had taken and unjustly detained, as it is said, according to our writ to you afore directed, and that you should make appear to us in our Court of King's Bench, at York, on the ——— day of ——— term, what you should do in the premises; and you at that day returned to us that the cattle, goods and chattels, aforesaid, were eloigned by the said C. D. out of your bailiwick to places to you unknown, so that you could in no wise replevy the same to the said A. B.

Therefore, we command you, that you take in withernam the cattle, goods and chattels, of the said C. D. in your bailiwick, to the value of the cattle, goods and chattles, by him the said C. D. before taken, and deliver them to the said A. B., to be kept by him until the said C. D. will deliver the aforesaid cattle, goods and chattles, to the said A. B.; and in what manner you shall have executed this our writ make appear to us, on the ——— day of ———, term, in our Court of King's Bench, that we may cause to be further done thereupon what of right and according to the laws of our Province of Upper Canada we shall see meet to be done.

We also command you, that if the said A. B. shall make you secure of prosecuting his claims, and of returning the cattle, goods and chattles, aforesaid, if a return thereof shall be adjudged, then that you put by gages and safe pledges the said C. D. that he be before us, at the time last aforesaid, to answer to the said A. B. of the taking and unjustly detaining of his cattle, goods and chattles, aforesaid, and have then there this writ.

Witness ———.

SCHEDULE D.

Form of notice.

Take notice, that unless A. B. who has distrained the cattle, goods and chattels, of C. D., shall enter his appearance in an action brought against him on account of the said distress, the said A. B. will on or after the ——— day of ———, being twenty-one days exclusive after this notice was put up, enter appearance for him to the said action, and proceed therein as if the said C. D. had appeared.

Dated ———, A. B. in person, (or by his attorney) E. F.

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7 WILL. IV. CH. 8.

AN ACT to make the Remedy in Cases of Seduction more Effectual, and to render the Fathers of illegitimate Children liable for their support.

Preamble.

WHEREAS in some cases the law fails in affording redress to parents whose daughters have been seduced: And whereas, the law makes no provision in this province for compelling the fathers of illegitimate children to contribute to their support: Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, entitled "an act to repeal certain parts of an act passed in the fourteenth year of His Majesty's reign, entitled 'an act

for making more effectual provision for the government of the Province of Quebec in North America, and to make further provision for the government of the said province," and by the authority of the same, that the father, or in case of his death, the mother of any unmarried female who may be seduced after the passing of this act, and for whose seduction such father or mother could sustain an action, in case such unmarried female were at the time dwelling under his or her protection, shall be entitled to maintain an action for seduction, notwithstanding such unmarried female was, at the time of her seduction, serving or residing with any other person, upon hire or otherwise, any former law or statute to the contrary notwithstanding.

Action, when maintainable.

Proof of service not necessary.

2. And be it further enacted by the authority aforesaid, That upon the trial of any action for seduction brought by the father or mother, it shall not be necessary to give proof of any act or acts of service performed by the person seduced, but the same shall be in all cases presumed, and no proof shall be received to the contrary : (z) Provided always nevertheless, that in case the father or mother of such female who shall be seduced shall, before the seduction, have abandoned her, and refused to provide for or retain her as an inmate, then any other person, who before the passing of this act might have maintained an action for such seduction, shall be entitled to such action in the same manner as the father or mother would otherwise have been.

Who may maintain the action in the father's or mother's absence.

3. And be it further enacted by the authority aforesaid, That notwithstanding any thing contained in this act, any person, other than the father or mother, who by reason of the relation of master, or otherwise, would have been entitled, if this act had not been passed, to maintain an action for the seduction of an unmarried

(z) In case by a father for the seduction of his daughter, who is not living with him at the time of the seduction, it is not necessary to aver in the declaration that the action is brought under this statute.—Mc Lean *v.* Ainslie. Mich. Term 1842.

female, shall be entitled to maintain such action notwithstanding this act, if the father or mother who might sue according to this act, shall not be resident in this province at the time of the birth of the child, which shall take place in consequence of such seduction, or being resident within the province, shall not bring any action for the seduction within six months from the birth of such child.

The father of an illegitimate child liable to be sued for necessaries.

4. And in order that some check may be imposed upon the unfeeling conduct of persons who refuse to make provision for the support of their illegitimate children—Be it further enacted by the authority aforesaid, That any person who shall furnish food, clothing, lodging, or other necessaries, to any child who shall be born after the passing of this act not in lawful wedlock, shall be entitled to maintain an action for the value thereof, against the father of such illegitimate child; Provided, such illegitimate child shall have been a minor at the time of such necessaries found, and shall not have been then residing with his or her reputed father, and maintained by him as a member of his family: And

Evidence in such cases.

provided also, that where the person suing for the value of such necessaries shall be the mother of such child, or any person to whom the mother has become accountable for such necessaries, then the fact of the defendant being the father of such child, must be proved by other testimony than that of the mother: And provided also, that no action shall be sustained under this act, unless it shall be shown upon the trial thereof, that while the mother of such child was pregnant, or within six months after the birth of her child, she did voluntarily make an affidavit in writing, (*a*) before some one of His Majesty's justices of the peace for the district in which she shall be residing, declaring that the person who may be afterwards charged in such action, is really the father of

(*a*) In an action by a father for the seduction of his daughter, while living away from him, it is not necessary to prove that an affidavit of the seduction was made by the daughter according to this section.—Gill *v.* Brown, Easter Term. 1841.

such child, and unless she has deposited such affidavit, within the time aforesaid, in the office of the clerk of the peace of the district, there to remain filed: which affidavit shall nevertheless not be evidence of the fact of the defendant being the father of such child, but such fact must be proved by legal evidence, independently of such affidavit.

5. And be it further enacted by the authority aforesaid, That this act shall not be construed to take away or abridge any right of action, or any remedy which without this act might have been had and maintained against the father of an illegitimate child; but the same may be pursued in the same manner as if this act had not been passed. Former remedies not to be affected by this act.

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3 WILL. IV. CH. 8.

An Act to make certain regulations relating to the office of Sheriff in this Province, and to require the several Sheriffs of this Province to give security for the due fulfilment of the duties of their office. (b)

WHEREAS from the tenure of the office of sheriff in this province, and the nature of the security exacted for the due performance of its duties, sufficient indemnity is not afforded against damages that may arise from the misprisions or defaults of sheriffs: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, intituled "An Act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled 'An Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said province," and by the authority of the same, That the sheriff of each and every district of this pro- Preamble.

(b) See ante pages, 72, 73, 76, 78, 89, 90, 138.

On or before 1st of August, all sheriffs to enter into bonds to the King, with two sureties, conditioned to account for all public monies received by them.

vince shall, on or before the first day of August next after the passing of this act, enter into a bond to his Majesty, his heirs and successors, in the penal sum of one thousand pounds, together with two sureties, to be approved of by the inspector general of public accounts, in the sum of five hundred pounds each, with a condition that he shall well and faithfully account for and pay over all such monies as he shall receive for his Majesty, his heirs and successors; which bond and condition shall be in the form given in the schedule to this act annexed, marked A, or in words to the like effect.

Sheriffs to give security for the due performance of their duty in private suits, by entering into a covenant with sufficient sureties.

2. And be it further enacted by the authority aforesaid, That the sheriff of each and every district of this province shall also, on or before the same first day of August, provide either two or four sufficient persons, who, together with himself, shall enter into a covenant under their seals, joint and several, according to the form given in the schedule to this act annexed, marked B, or in words to the same effect; which covenant shall be available to, and may be sued upon by any person suffering damages by the default or wilful misconduct of any such sheriffs, respectively.

Sureties to be approved of by justices in sessions.

3. And be it further enacted by the authority aforesaid, That such sureties shall not be accepted as sufficient, unless a majority of the justices of the peace at a court of general quarter sessions of the peace for the district in which any such sheriff is serving, shall ascertain and determine that they are good and sufficient, and unless a certificate shall be given in pursuance of such determination, under the hand and seal of the chairman of such quarter sessions, declaring that the court are satisfied that the persons named in the certificate are responsible persons to the full amount to which they are required to become surety; which certificate shall be produced and filed at the time of the delivering and filing of the said covenant, as hereinafter provided.

Bond to his Majesty to be deposited with inspector general.

4. And be it further enacted by the authority aforesaid, That the bond to his Majesty, required by this act, shall be deposited with the inspector general of public

accounts in this province; and that the covenant required by this act shall be made in duplicate, each part of which shall be marked duplicate, but shall be considered and received as original, one of which parts shall be filed in the office of the secretary of the province, and the other part thereof shall be filed in the office of the clerk of the peace of the district for which such sheriff shall be appointed; for which filing the said clerk of the peace shall be entitled to demand and receive from the sheriff the sum of two shillings and sixpence, and no more.

Covenants to be executed in duplicate, one part to be filed with the secretary of the province, and the other with the clerk of the peace.

Fee to clerk of the peace, two shillings and sixpence.

5. And be it further enacted by the authority aforesaid, That all and every person or persons shall be authorized to search and examine any such covenant, and shall and may demand and have from any clerk of the peace of any district of this province a copy of such covenant as may be filed as aforesaid in pursuance of this act; and it shall and may be lawful for such clerk of the peace to demand and receive for every such search and examination, one shilling and three pence, and for every such copy five shillings, and no more.

Any person may examine covenant, and require a copy, upon payment of one shilling and three pence for the search, and five shillings for the copy.

6. And be it further enacted by the authority aforesaid, That the sheriff of every district of this province, now appointed or hereafter to be appointed, shall at or before the expiration of every period of four years from the date of the bond and covenant given by him and his sureties according to this act, renew his bond and covenant in the same sums respectively, either with the same or with other sureties, whose sufficiency shall be certified in the manner hereinbefore provided; and all the provisions of this act, in respect to the bond and the covenant first required to be given, shall apply to such renewed bond and covenant.

Bonds and covenants to be renewed every four years.

7. And be it further enacted by the authority aforesaid, That at any time, and at all times hereafter, when the office of sheriff of any district of this province shall become vacant, it shall not be lawful for the governor, lieutenant-governor, or person administering the government of this province, to appoint any person to the said office of sheriff until such person shall have

No sheriff to be appointed until bonds and covenants have been regularly given and filed according to this act.

given and filed a covenant with sureties, and shall also have given a bond with sureties, in the same manner and to the same tenor and effect as are by this act required from the several persons now holding commissions and executing the said office of sheriff.

No person to be appointed sheriff who shall not be possessed of real estate to the value of £750, ascertained by his own affidavit.

8. And be it further enacted by the authority aforesaid, That no person shall hereafter be appointed to the office of sheriff in any district who shall not be possessed of real estate in this province of the actual value of seven hundred and fifty pounds, above incumbrances, and who shall not before he receives his commission file an affidavit to that effect in the office of the secretary of this province; which affidavit shall be sworn before the chairman of the quarter sessions of the district, in open sessions, who is hereby authorised and required to take the same.

In case of the death, absence or insolvency of any surety, new sureties to be given.

9. And be it further enacted by the authority aforesaid, That if any person who shall have become an obligor in any such bond, or surety in any such covenant, shall die, or shall become resident out of this province, or shall become insolvent, the person holding such office of sheriff, for whom the person so dying, leaving this province, or becoming insolvent, shall have become such obligor or surety, shall, within four months after such death or departure, or after such insolvency shall be certified in the manner herein provided, give anew the like bond and security, and in the same manner as hereinbefore required. Provided always, that nothing herein contained shall extend, or be construed to extend, to discharge all or any of the parties to such former bond or covenant from their liability, on account of any matter or thing which shall have been done or omitted before the renewal of the security as herein directed.

New security being given not to avoid former liability.

Sureties apprehensive of the insolvency of their principal may notify the government thereof, whereupon new sureties may be required.

10. And be it further enacted by the authority aforesaid, That if during the period for which any such covenant, as aforesaid, shall be given, the sureties executing the same, or any of them, shall apprehend that the sheriff for whom such surety was given is insolvent, or has not property to the amount of seven hundred and fifty pounds, over and above all incumbrances and debts,

and shall transmit to the governor, lieutenant-governor, or person administering the government of this province, an affidavit made by him or them to that effect, and sworn to before a commissioner for taking affidavits in the Court of King's Bench, the sheriff for whom the security was given shall be thereupon officially notified by the secretary to His Excellency the Lieutenant-Governor, or person administering the government of this province, that he must forthwith furnish new security in the manner pointed out by this act, or must on affidavit deny that he is insolvent, or that he is worth less than the sum of seven hundred and fifty pounds, over and above all incumbrances and debts, and that if such requisition is not complied with within one month after the sitting of the then ensuing quarter sessions of the district, he shall for that cause be removed from office.

New sureties being given not to discharge former defaults.

11. And be it further enacted by the authority aforesaid, That when any new surety or sureties shall be given, either at the expiration of any stated period, or by way of substitution for any other surety within the period, the former surety shall only be discharged as to defaults or misfeasances suffered or committed after the perfecting of such new security, and not as to any previous defaults or misfeasances.

Actions brought on sheriff's covenant not to discharge subsequent actions brought on the same covenant for other causes.

12. And be it further enacted by the authority aforesaid, That after the covenant required to be entered into by this act shall have been sued upon, by any person having or alleging a claim upon the parties to the same, by reason of the default or misfeasance of the sheriff, it shall notwithstanding be in the power of any person, or of the same person, to bring an action upon the same covenant for any other default or misfeasance, and such subsequent action shall not be barred by reason of any prior recovery, or of any judgment for the defendant rendered in a former action, or of any other action being depending upon the same covenant for any distinct cause of action.

Any surety having paid the full amount for which he became liable, shall be thereby discharged, whereupon

13. And be it further enacted by the authority aforesaid, that if any person or persons who shall or may

sheriff shall procure other surety instead of the one so discharged.

have become such surety, shall have paid, or shall be liable to pay any sum or sums equal to the sum for which he or they shall have become security, the said bond or covenant shall as to such person or persons be taken and deemed to be discharged and satisfied, as to any claim or demand thereon beyond the amount of such payment or liability; and such sheriff shall, within four months after such person or persons shall have become so discharged, give anew such securities as are required by the provisions of this act.

If damages recovered against any surety, and paid, shall not be equal to the amount for which he shall have become surety, such amount, so paid, shall be deducted from the covenant, and the judge, in any subsequent action thereon, restrained to the residue.

14. And be it further enacted by the authority aforesaid, That if the amount of any damages so recovered, which such security has been obliged to pay, is not equal to the amount for which he shall have become security, as aforesaid, then the court shall, after deducting such sums therefrom, render judgment against such security, for any amount not exceeding the residue of the sum for which such security shall have become responsible as aforesaid (*c*).

If covenant shall have become discharged, or sureties insolvent, quarter sessions may notify sheriffs to furnish new sureties in lieu thereof.

15. And be it further enacted by the authority aforesaid, That if it shall be made appear by affidavit, or other sufficient proof, to the general quarter sessions of the peace of any district, that any such covenant has been or may be discharged as aforesaid, or that the securities therein mentioned, or any or either of them, have become insolvent, it shall and may be lawful for the said quarter sessions to give notice thereof to the sheriff of such district, and such sheriff shall, and he is hereby

(*c*) The court will not stay proceedings, in an action against the surety of a sheriff *after judgment*, on the ground that he has already paid to the full amount of his liability, unless such payment were after plea pleaded; and the costs of actions brought against the surety, cannot be included in making up the amount for which he is liable under his covenant.—Hixon *v.* Hamilton. Trin. Term. 1841. Relief was refused to a sheriff's surety, who had suffered judgment to go by default, after damages had been assessed against him, by allowing him to plead, that he had already paid or become liable to pay the amount of his covenant.—Scott *v.* McDonald. *et. al.* Mich. Term. 1841.

required, to give anew the like covenant as hereinbefore required by the provisions of this act, within four months after such notice.

Executions against sheriffs and their sureties to be levied first on sheriffs.

16. And be it further enacted by the authority aforesaid, That upon the issuing of any writ of execution upon any judgment recovered on such covenant, the plaintiff in such suit, or his attorney, shall, by an indorsement on such writ, direct the coroner to levy the amount thereof upon the goods and chattels of the sheriff in the first place, and in default of goods and chattels of such sheriff to satisfy the amount, then that the same, or the residue thereof, shall be made of the goods and chattels of the other defendants in such suit, and so in like manner with any writ which shall issue against the lands and tenements in any judgment upon such covenant as is required by this act.

Sheriffs liable to pay the costs of all rules upon them, unless the court shall otherwise order.

17. And be it further enacted by the authority aforesaid, That upon application for or granting of by any of the courts of this province any rule or rules upon any sheriff for the return of any writ or writs, or for the performance of any other duty or matter relating to the said office of sheriff, such sheriff shall be liable to and pay to the party making such application or obtaining such rule or rules all taxable costs thereon, (*d*) unless the court shall otherwise order: Provided always, that if such application shall be made, or any such rule granted previous to the day next after which such return should have been made, or such duty or matter performed, the sheriff against whom such application shall be made or such rule granted, shall not be liable for any costs or charges which may arise or occur upon the same: And provided also, that if upon such application for a rule or rules it shall appear to the said judge or judges of the said courts, respectively, that the same is frivolous or vexatious, the

In vexatious applications, costs may be awarded to the sheriffs.

(*d*) A sheriff cannot be attached for the non payment of the costs of a rule to return a writ, unless there has been a rule calling on him specially to pay them.—Marcy *v.* Butler. Hil. Term. 2 Vic.; Doe McGregor *v.* Grant. Trin. Term. 2 & 3 Vic.

said judge or judges of the said courts, respectively, may, upon discharging such application, order that all taxable costs and expenses for opposing the same be paid to the said sheriff.

Where sheriffs not entitled to fees on writs placed in their hands fifteen days before the return.

18. And be it further enacted by the authority aforesaid, That no sheriff shall be entitled to any fees on any writ placed in his hand fifteen days before the return day mentioned therein, if he does not return the same to the attorney from whom he received it within four days after the return thereof, or enclose the same by post within that time to the attorney, unless delayed by an order in writing from the party, his attorney or agent, placing the same in his hands.

Sheriffs neglecting to give security shall be removed from office.

19. And be it further enacted by the authority aforesaid, That if any sheriff now appointed, or hereafter to be appointed, shall neglect or omit to give and perfect such security as this act requires, within the period limited by this act, in any case, then upon such neglect or omission being officially notified in writing to the governor, lieutenant-governor, or person administering the government of this province, either by the inspector general, the secretary of the province, or the chairman of the quarter sessions of the peace in the district in which such sheriff shall be serving, and they are hereby severally required officially to notify the same, such sheriff shall for that cause be removed from his office, and a new commission shall issue, with as little delay as possible, for supplying the vacancy; Provided always, that nothing herein contained shall extend, or be construed to extend, to prevent the governor, lieutenant-governor, or person administering the government of this province, from re-appointing any person to the said office, upon his duly fulfilling the provisions of this act.

Inspector-general, secretary of the province, or chairman of quarter sessions, to report such neglect.

Sheriffs may be re-appointed.

20. And be it further enacted by the authority aforesaid, That the covenant to be entered into with the sheriffs of the several districts, respectively, shall specify the following sums as the extent to which the several parties thereto shall be considered as covenanting to afford indemnity, that is to say: The sheriff of the Home

District, one thousand pounds; two sureties five hundred pounds each, or four sureties two hundred and fifty pounds each. The sheriff of the District of Niagara, one thousand pounds; two sureties five hundred pounds each or four sureties two hundred and fifty pounds each. The sheriff of the District of Gore, one thousand pounds; two sureties five hundred pounds each, or four sureties two hundred and fifty pounds each. The sheriff of the District of London, one thousand pounds; two sureties five hundred pounds each, or four sureties two hundred and fifty pounds each. The sheriff of the Western District, five hundred pounds; two sureties two hundred and fifty pounds each, or four sureties one hundred and twenty-five pounds each. The sheriff of the District of Newcastle, one thousand pounds; two sureties, five hundred pounds each, or four sureties two hundred and fifty pounds each. The sheriff of the Midland District, one thousand pounds; two sureties five hundred pounds each, or four sureties two hundred and fifty pounds each. The sheriff of the District of Johnstown, one thousand pounds; two sureties five hundred pounds each, or four sureties two hundred and fifty pounds each. The sheriff of the District of Bathurst, five hundred pounds; two sureties two hundred and fifty pounds each, or four sureties one hundred and twenty-five pounds each. The sheriff of the District of Ottawa, five hundred pounds; two sureties two hundred and fifty pounds each, or four sureties one hundred and twenty-five pounds each. The sheriff of the Eastern District, one thousand pounds; two sureties five hundred pounds each, or four sureties two hundred and fifty pounds each. And that the sheriff of any new district hereafter to be formed shall give such security, himself in one thousand pounds, two sureties five hundred pounds each, or four sureties two hundred and fifty pounds each.

Sums to be specified in the different covenants for the several districts.

21. And be it further enacted by the authority aforesaid, That the persons entering into any such covenant as sureties, shall be held liable to indemnify against any omission or default of the sheriff in not paying over

Nature of the liability of sureties.

monies received by him, (*e*) and against damages sustained by the parties to any legal proceeding, in consequence of his wilful or negligent misconduct in his office; (*f*) and that the sheriff shall be joined in any action to

(*e*) In covenant against a sheriff's surety, it is a sufficient breach to allege, that money was received by the sheriff, "as sheriff," without stating "by virtue of his office," but if the declaration omit to aver that the receipt of the money by the sheriff was after the execution of the covenant by the surety, the declaration will be bad on general demurrer.—D. Davis *v.* Hamilton. Hil. Term. 1840. Such a breach is good without specifying how or on what account the money was received. —Com. Bank *v.* Jarvis. *et. al.* Mich. Term. 1842.

(*f*) Where in an action against a sheriff's surety, the plaintiff set out in his declaration a judgment and execution against himself in a former suit, and that the sheriff had levied the debt, but falsely returned nulla bona to the writ, by means of which return, the plaintiff was obliged to pay the debt again. Held on general demurrer that the declaration was bad, in not shewing how the plaintiff was compelled to pay a second time, the levy on the execution having discharged him from the debt.—H. Davis *v.* Hamilton. Hil. Term. 1840. In an action against a surety, for a false return of nulla bona by the sheriff, the plaintiff alleged as a breach, that the sheriff had levied and made the money, and the defendant pleaded, that the sheriff had levied and made £282., a part thereof, and no more, which part he paid over. Held on special demurrer, a sufficient answer to the declaration, and that the defendant need not also state, that there were no more goods or chattels, whereby the sheriff could make the residue.—Watson *et. al. v.* Hamilton. Hil. Term. 1840. In an action by the defendant in a writ of execution, against the sureties of a sheriff, for misconduct in the sheriff in the execution of the writ, it is not necessary that the judgment in the suit against himself should be set forth in the declaration, and it is a good breach, that the sheriff sold the defendant's property for more than sufficient to satisfy the debt, and afterwards wrongfully re-sold it at a reduced price, causing a loss to the defendant of the difference.—Sanderson *v.* Hamilton. Easter Term. 1840. No profert of the covenant of the sureties is necessary to be made in a declaration against them.—McCrae *v.* Hamilton. Trin. Term. 1841. The return by a sheriff of money made is equally conclusive against his sureties, as against himself, in a joint action against them, and the sureties cannot relieve themselves from the consequences of such return, by shewing that the money was not in fact made, even although

be brought on the covenant against all or any of the sureties. (*g*)

22. And be it further enacted by the authority aforesaid, That notwithstanding the sheriff of any district may forfeit his office and become liable to be removed therefrom, by reason of his failing to comply with the provisions of this act, he shall nevertheless be continued in his office to all intents and purposes, and the liability of himself and of his securities shall remain until a new sheriff shall be appointed and sworn in his stead.

Notwithstanding any forfeiture of office, sheriffs to continue in office until successor appointed.

23. And be it further enacted by the authority aforesaid, That when any sheriff in this province shall die, the under-sheriff or deputy-sheriff by him appointed shall nevertheless continue in his office, and shall execute the same, and all things belonging thereunto, in the name of such deceased sheriff, until another sheriff be appointed for the same district and sworn into office; (*h*) and the

Upon the death of any sheriff, his deputy shall continue to execute the office in his name, until the appointment of a successor.

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an issue be raised upon the pleadings, whether the money was actually made or not.—Phelp *v.* McDonell. Hil. Term, 1841. It is no plea to a breach of a sheriff's covenant, shewing a false return of nulla bona to a writ of execution after levy of the money, that the sheriff paid the amount indorsed on the writ to the plaintiff, before the action was brought against him on the covenant—Com. Bank *v.* Jarvis *et. al.* Mich. Term. 1842.

(*g*) In a joint action against a sheriff and his sureties, it is a good plea in abatement that there is another action pending against the sheriff alone.—Com. Bank *v.* Jarvis *et al.* Hil. Term. 1841.

In a *joint* action against a sheriff and his sureties, the sureties may plead in abatement that there is a *separate* action pending against them for the same cause.—Com. Bank *v.* Jarvis. *et. al.* Mich. Term. 3 Vic. After a sheriff's death his personal representatives cannot be joined with his sureties, in an action on their covenant for a default by the sheriff in his life time.—Boulton *v.* Hamilton. Hil. Term. 3 Vic.

(*h*) On the death of a sheriff, his deputy is charged with the execution of his office until a new sheriff is appointed, and he must assign over by indenture to the new sheriff, as well the debtors on the limits, as those in close custody, and the new sheriff is not liable for the escape of a debtor on the limits at the time of his appointment without such assignment.—McPherson *et. al. v.* Hamilton. Easter

Deputy sheriff and his sureties to be responsible for the execution of the office in the interval.

said under-sheriff or deputy-sheriff shall be answerable for the execution of the said office, in all things, and to all respects, intents and purposes whatsoever, during such interval, as the sheriff so deceased would by law have been if he had been living; and the security given to the sheriff so deceased by the said under-sheriff, and his pledges, shall stand, remain, and be a security to the King, his heirs and successors, and to all persons whatsoever, for such under-sheriff's due performance of his office during such interval.

SCHEDULE A.

Form of bond to the King.

Know all men by these presents, that we, A. B., sheriff of the district of ———, C. D. of ———, in the district of ———, esquire, and E. F. of ———, in the district of ———, are held and firmly bound to our sovereign Lord the King, his heirs and successors, in the several sums following, that is to say: The said A. B. in the sum of one thousand pounds; the said C. D. in the sum of five hundred pounds; and the said E. F. in the sum of five hundred pounds: to be paid to our sovereign Lord the King, his heirs and successors; for which payments to be well and truly made, we bind ourselves severally and respectively, and each of us, his heirs, executors and administrators, firmly by these presents, sealed with our seals and dated this ——— day of ———, in the year of our Lord ———.

The condition of this obligation is such, that if the above bounden A. B., his executors or administrators, shall well and faithfully account for and pay over to his majesty's receiver-general of this province, or to such person as may be authorised to receive the same, all

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Term, 7 Will. IV. A deed executed by a deputy sheriff, of lands sold under an execution, after the death of the sheriff to whom the writ was directed, must be in the name of the deceased sheriff, and not of the deputy, and if a sale be made by the deputy, after he has received notice of the appointment of a new sheriff, it will be invalid, and the deed void, as the writ should then be executed by the new sheriff.—Doe Campbell *v.* Hamilton. Easter Term, 3 Vic.

such sum and sums of money as he shall receive as such sheriff, as aforesaid, for our said Lord the King, his heirs or successors, from the date of this obligation until the ——— day of ———, in the year of our Lord ———, (four years,) then this obligation to be void, otherwise to remain in full force and virtue.

[L. S.]
[L. S.]
[L. S.]

Signed and delivered in presence of

SCHEDULE B.

Form of covenant.

Know all men by these presents, that we, A. B., sheriff of the district of ———, C. D. of ———, in the district of ———, and E. F. of ———, in the district of ———, (when four sureties are given, the names of the other two to be inserted in like manner,) do hereby jointly and severally, for ourselves and for each of our heirs, executors and administrators, covenant and promise, that A. B., as sheriff of the said district, shall well and duly pay over to the person or persons entitled to the same, all such monies as he shall receive by virtue of his said office of sheriff, from the date of this covenant to the expiration of four years thence next ensuing, and that neither he nor his deputy shall, within that period, wilfully misconduct himself in his said office, to the damage of any person being a party in any legal proceedings; nevertheless, it is hereby declared, that no greater sum shall be recovered under this covenant, against the several parties thereto, than as follows, that is to say:

Against the said A. B., in the whole ———.
Against the said C. D. ———.
Against the said E. F. ———.

(If other sureties, add them in like manner.)

In witness whereof, we have to these presents set our hands and seals, this ——— day of ———, in the year of our Lord ———.

[L. S.]
[L. S.]
[L. S.]
[L. S.]

Signed, sealed and delivered in the presence of

PRACTICAL POINTS.

AFFIDAVITS.

Title.] If there be a cause in court, all affidavits used in it must either be entitled *in the court*, or shew that they have been sworn in the court. (*a*) They must also be entitled *in the cause*, if a suit has been commenced, stating the christian and surnames of all the parties (*b*) at length, (*c*) and shewing clearly who are plaintiffs and who defendants, (*d*) and if the affidavit be in verification of a plea in abatement, and be defective in any of these respects, the plaintiff may sign interlocutory judgment—(*e*) but if the plea in abatement be itself correctly entitled, the affidavit of verification need not be entitled at all. (*f*) An affidavit in a cause entitled "G. Shrimpton *v.* Wm. Carter, the elder, sued as Wm. Carter," the cause being "G. Shrimpton *v.* Wm. Carter," has been rejected as badly entitled. (*g*) But where in all the proceedings in the cause, the addition of "the elder" had been attached to one of the parties' names, and an affidavit in the cause was sworn, terming the parties "plaintiff" and "defendant," but without that

(*a*) Molling *v.* Polland. 3 M. & Sel. 187; Rex. *v.* Hare. 13 East. 189; Perrin *v.* West. 5 N. & M. 291; Rolfe *v.* Burke. 4 Bing. 101.

(*b*) Fores *v.* Diemar. 7 T. R. 661; Bullman *v.* Callow. 1 Chit. Rep. 727; Anderson *v.* Baker. 3 Dowl. 107; Tomkins *v.* Geach. 5 Dowl. 509.

(*c*) Masters *v.* Carter. 4 Dowl. 577.

(*d*) Harris *v.* Griffiths. 4 Dowl. 289.

(*e*) Poole. *v.* Pembrey. 1 Dowl. 693.

(*f*) Prince *v.* Nicholson. 5 Taunt. 333; Thorpe *v.* Hook. 1 Dowl. 494.

(*g*) Shrimpton *v.* Carter. 3 Dowl. 648.

addition, the affidavit was held sufficient, the court considering that "the elder" must be meant, unless the contrary was expressed. (*h*) And where in an action which was described in the writ of summons as Wm. Jones *v.* John Elridge, the defendant applied to set aside the service of the writ for irregularity, on an affidavit, which was entitled "Wm. Jones *v.* John Adams Elridge, sued as John Elridge," the court held the affidavit sufficient. (*i*) Where a cause had been carried to judgment and execution, in which one of the parties was designated by the initial only of his christian name, an affidavit, in the title of which the christian name was in full, was not allowed to be read. (*j*) If there be no cause in court, and *plaintiff* and *defendant* are improperly introduced in the entitling, those words may be rejected as surplusage. (*k*) An affidavit entitled "C. D. ats. A. B." is bad. (*l*) An affidavit in a non bailable action against two *before declaration*, may it seems be entitled "A. *v.* B." (the defendant who makes the application,) (*m*) or "A. *v.* B. sued with C." (the other defendant.) (*n*) The affidavit should also shew in its title, the character in which the parties sue or are sued. Therefore styling the plaintiff "assignee, &c" without saying of whom, is defective. (*o*) So also entitling an affidavit "A. *v.* B. executor" is bad (*p*) or "A. administrator." (*q*) But where in a declaration in ejectment the lessors of the plaintiff are described to be executors, the affidavit of service need not, it seems, in stating the name of the cause, notice the character of the lessors

(*h*) Singleton *v.* Johnson. 9 M. & W. 67; Young *v.* Young. 1 Dowl. N. S. 865.

(*i*) Jones *v.* Elridge. 1 Dowl. N. S. 710.

(*j*) Reg. *v.* Surrey (Sheriff). 8 Dowl. 510.

(*k*) In re Arbitration between Imeson & Horner. 8 Dowl. 651.

(*l*) Richard *v.* Isaac. 1 C. M. & R. 136. 2 Dowl. 710.

(*m*) Dand *v.* Barnes. 6 Taunt. 5.

(*n*) McKenzie *v.* Martin. 6 Taunt. 286.

(*o*) Phillips *v.* Hutchinson. 3 Dowl. 23; Steyner *v.* Cottrell. 3 Taunt. 377.

(*p*) Clark *v.* Martin. 3 Dowl. 222.

(*q*) Fletcher Admx. *v.* Lechmere. 2 Dowl. N. S. 848.

stated in the declaration, (*r*) nor where there are joint and several demises, distinguish the joint from the several. (*s*) If there are several defendants, and they are not all in court, the affidavit may be entitled in the names of those only, who are in court. (*t*) On an application against a claimant under the interpleader act for costs, the affidavits should be entitled in the original action. (*u*) On moving for a rule nisi for a certiorari, the affidavits should not be entitled in any cause, (*v*) and the same in moving for a criminal information, (*w*) or for a writ of prohibition. (*x*) An affidavit to set aside a ca. sa. for misnomer should be entitled in the name in which the party was sued. (*y*) An affidavit to support a rule nisi for staying proceedings on a bail bond may be entitled in the action against the bail; (*z*) or in the original action; (*a*) and where the bail apply to set aside proceedings in the original action, as well as against themselves, the proceedings may be entitled in both actions. (*b*) *Qu.* whether one affidavit entitled in two actions, can be used on the same ground of application, on behalf of the same plaintiff. (*c*) On an application against an attorney to pay over money, &c. received in a cause, the affidavits may be entitled in the cause though judgment has been signed and execution issued. (*d*) Where a submission to arbitration is made a rule of court, and no action is pending, the affidavits in support of an ap-

(*r*) Doe Jenks. *v.* Roe. 2 Dowl. 55.

(*s*) Doe *v.* Roe. 5 Dowl. 447.

(*t*) Dand *v.* Barnes. 6 Taunt. 5. 826; but see Bullman *v.* Callow. 2 Chit. Rep. 727, 728. *a.*

(*u*) Elliott *v.* Sparrow. 1 H. & W. 370.

(*v*) Ex parte Nobro. 1 B. & C. 267.

(*w*) R. *v.* Harrison, 6 R. 60; R. *v.* Robinson, 6 R. 642.

(*x*) Ex parte Evans. 2 Dowl. N. S. 410.

(*y*) Thorpe *v.* Hook, 1 Dowl. 494.

(*z*) Roberts *v.* Giddings, 1 B. & P. 337; Kelly *v.* Mother, 2 Chit. Rep. 109.

(*a*) Stride *v.* Hill, 4 Dowl. 709; Lines *v.* Chetwoode. 2 Tyr. 177.

(*b*) Pocock *v.* Cockerton. 7 Dowl. 21.

(*c*) Pitt *v.* Evans. 2 Dowl. 226; Contra Harper *v.* Mount. 2 Jurist. 990.

(*d*) Simes *v.* Gibbs. 6 Dowl. 310.

plication to set aside the award, or for an attachment for not performing it, need not be entitled, (*e*) although the affidavits in shewing cause must, (*f*) but these latter are not to style the parties "plaintiff" and "defendant." (*g*) If however the cause is referred under an order of Nisi Prius, the affidavits must be entitled in the action. (*h*) In our own court, affidavits entitled in two causes, where the same application was made in each, on behalf of the same plaintiff, have been held sufficient. (*i*) After an attachment has been ordered, although it has not issued, affidavits used to set aside the rule for it, must be entitled on the crown side. (*j*)

Deponent's abode and addition.] (*k*)

Jurat.] If an affidavit be made by two or more persons their names must be mentioned in the jurat, (*l*) but if omitted an amendment will be allowed by the insertion of their names (*m*); if sworn before a commissioner, the place should be stated (*n*) though the court of common pleas have considered the omission immaterial. (*o*) If the affidavit be sworn by an illiterate person, the *jurat* must contain the certificate of the commissioner that the affidavit was read in his presence to the party making the same, and that such party seemed perfectly to understand it, and wrote his signature in the presence of the commissioner, and without such certificate the affidavit cannot be read. (*p*) No erasure or interlinea-

(*e*) Bainbrigge *v.* Houlton. 5 East. 21.

(*f*) Bevan *v.* Bevan. 3 T. R. 601. In re Houghton. 2 Moo. & P. 425.

(*g*) In re Arbitration between Imeson and Horner. 8 Dowl. 651.

(*h*) Doe Clarke *v.* Stilwell. 6 Dowl. 305.

(*i*) Com. Bank *v.* VanNorman, Trin. Term, 1840, P. C. Macaulay J.

(*j*) Garland *v.* Barrows. Tr. Term, 1840, P.C. Macaulay J.

(*k*) Chit. Arch. Prac. 7 Ed. 1211, 1212, 1213.

(*l*) R. M. 37 Geo. III. r. 1. 7 T. R. 82. In our court, Nicholson dem. Spafford *v.* Roe. Hil. Term, 3 Will. IV.

(*m*) In our court, Fisher *v.* Thayer. Trin. Term 7 Will. IV.

(*n*) Rex *v.* Cockshaw. 2 N. & M. 278, 3 M. & Sel. 493; Boyd *v.* Straker. 7 Price 662.

(*o*) Symmers *v.* Mason. 1 B. & P. 105.

(*p*) Rex *v.* Sheriff of Mid-

tion is permitted in the jurat, by rule M. T. 37 Geo. III. —and a line drawn through two words in the jurat, leaving them however perfectly legible, is an erasure within this rule, and vitiates the affidavit though the omission or retention of the words would not alter the sense. (*q*) But striking out a figure in the jurat, and writing another over it, will not vitiate (*r*) nor striking out the words "before me," and introducing "by the court." (*s*) But if the jurat be defective, and the rule which has been obtained on it, be discharged in consequence, it will be discharged with costs. (*t*)

Before whom to be sworn.] By R. E. 15 Geo. II. r. 11, affidavits sworn before the attorney or solicitor in a cause cannot be read, and this rule extends to all affidavits, except affidavits to hold to bail, (*u*) and to affidavits made before a commissioner who acts as attorney for the party, even *before* appearance is entered, (*v*) and to affidavits made before the *partner* of the attorney, (*w*) but it must be clearly shown that he acted as such attorney at the time of taking the affidavit, and it is not sufficient to shew that he is so at the time of making the objection. (*x*)

DEMURRER.

Marginal Note.] By rule 14 of the new rules, ante page 23, "in the margin of every demurrer before it is filed, some matter of law intended to be argued shall be stated; and if any demurrer shall be filed or delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the court or a judge,

dlesex. 4 Dowl. 765. In our court, Moore *v.* James. Mich. Term, 1 Will. IV.

(*q*) Williams *v.* Clough. 1 A. & E. 376; Houlden *v.* Fassen. 6 Bing 236.

(*r*) Jacob *v.* Hangate. 3 Dowl. 456.

(*s*) Austin *v.* Grange. 4 Dowl. 576.

(*t*) Frost *v.* Hayward. 2 Dowl. N. S. 566.

(*u*) Goodtitle dem. Pye *v.* Badtitle. 8 T. R. 638.

(*v*) Kidd *v.* Davis. 5 Dowl. 568.

(*w*) In our court, Hadley *v.* Hearns *et al.* Trinity Term 1842, P. C. Macaulay J.

(*x*) Beaumont *v.* Dean. 4 Dowl. 354.

and leave may be given to sign judgment as for want of a plea." This rule must be substantially complied with; therefore where the marginal note of a demurrer to a plea of justification of a libel merely stated as cause "that it is no justification of the libel" it was held insufficient. (*y*) But if the demurrer be *special*, a reference to the special causes is sufficient. (*z*) If several grounds be stated, it need not also be stated on which of them the party intends to rely. (*a*) A demurrer omitting the words "in the year of our Lord" in the date will be set aside as irregular. (*b*)

Frivolous Demurrer.] A demurrer will not be set aside unless it be palpably frivolous. In moving to set aside the demurrer, there must be an affidavit stating the substance of the pleadings, or with a copy of them annexed, or the rule must be drawn up on reading the pleadings. A rule for setting aside a demurrer to a replication as frivolous, ought to be drawn up on reading the pleas, as well as the other pleadings in the cause. (*c*) The rule is only *nisi* in the first instance (*d*), and it is too late to apply to set the demurrer aside, after joining in demurrer. (*e*) The following demurrers have been held frivolous: that a plea was dated 1832, instead of 1833; (*f*) a general demurrer to a replication de injuriâ (to a plea of gaming in an action on a bill); (*g*) to second count of declaration by surviving partner, because it did not state the decease of the other, which had been already averred in the first count; (*h*) to a declaration on a bill of exchange and account stated, with one promise "to pay the last mentioned several monies on request"

(*y*) Ross *v.* Robeson. 3 Dowl. 779.

(*z*) Beveridge *v.* Priestley. 5 Dowl. 306; Lindus *v.* Pound. 2 M. & W. 240; Verbecke *v.* Pearse. 6 Scott 406.

(*a*) Whitmore *v.* Nicholls. 5 Dowl. 521.

(*b*) Holland *v.* Tealdi. 8 Dowl. 320.

(*c*) Homer *v.* Anderton. 9 Dowl. 119; Daniel *v.* Lewis. 1 Dowl. N. S. 542.

(*d*) Kinnear *v.* Keane. 3 Dowl. 154.

(*e*) Norton *v.* McIntosh. 7 Dowl. 529.

(*f*) Neal *v.* Richardson. 2 Dowl. 89.

(*g*) Curtis *v.* Headfort. 6 Dowl. 496.

(*h*) Underhill *v.* Fuller. 3 Dowl. 495.

on the ground that there was no promise to the count on the bill; (*i*) a demurrer, to a count on a bill of exchange stating that I. and C. made their bill, &c., and thereby required the defendant to pay to the drawer's order, &c., and that J. and S. indorsed the bill to plaintiff, on the ground that the declaration did not allege who the drawers were, was set aside as frivolous; (*j*) a demurrer, to a declaration in debt "for goods sold and delivered to the defendant by the plaintiff, at his request" on the ground of its being ambiguous, was set aside as frivolous; (*k*) and where an acceptance was made "payable at Messrs. Cunleffe & Co., bankers, London," and the declaration in an action against the acceptor was demurred to specially, because it was not alleged to have been presented for payment at the bankers, the demurrer was set aside as frivolous, the acceptance being a general acceptance. (*l*) Demurrer that form of action should have been *covenant*, and not *assumpsit*, set aside as frivolous, where there was a new consideration from which the promise arose. (*m*) And where the plaintiff declared upon a bill, and in his declaration stated that "one J. Banks" made his bill, and the defendant demurred on the ground that the initial only of the first name of the drawer was given, and not his name in full, the demurrer was set aside as frivolous.(*n*) But the court will not set aside a demurrer as frivolous, when the point raised fairly admits of argument. (*o*).

Demurrer Book.] By rule 21, new rules, ante page 28, "four days before the day appointed for argument, the party setting down the case for argument, shall deliver a copy of the demurrer book, special case or special verdict, to each of the judges, otherwise the cause shall not be considered as standing for argument." In England, the

(*i*) Chevers *v.* Parkington. 6 Dowl. 75.

(*j*) Knill *v.* Stockdale. 8 Dowl. 772.

(*k*) Derremer *v.* Fenna. 7 M. & W. 439; S. P. Pigeon *v.* Osborne. 9 Dowl. 511.

(*l*) Skelton *v.* Halsted. 2 Dowl. N. S. 69.

(*m*) Twight *v.* Prescott. 2 Dowl. N. S. 4.

(*n*) Braithwaite *v.* Harrison. 7 Jurist. 888.

(*o*) Dalton *v.* McIntyre. 1 Dowl. N. S. 76.

demurrer books are furnished in equal proportions by both parties, and if one party neglects to furnish his portion, the other furnishes them for him on the following day, and the party neglecting has to pay for the other party's additional demurrer books, before he can be heard.—Rule 17, H. T. 4 Will. IV. If demurrer books are not delivered to all the judges, the case will be struck out of the paper. (*p*) Though, where the defendant does not intend to support his pleadings, the court will give judgment for the plaintiff, though all the books have not been delivered. (*q*) By rules E. 2, J. 2, M. 38 Geo. III., in B. R., "in all books to be delivered to the judges, the exceptions intended to be insisted on in argument shall be marked by the party, who objects to the pleadings in the margin of the books he delivers;" and if each party intends to take objection to the other's pleadings, he should state his objections in the margin also, otherwise he cannot enter into them upon the argument. (*r*) But it is not necessary that he should point out his objections specifically, it is sufficient if a plea be objected to "as affording no answer to the action, and being bad in substance;" (*s*) and per Maule J. "I do not think that the marginal note was intended for the advantage of the parties, but of the court. The practice has been for the parties to state their points, for the information of the court, and for the opposite parties to go to the judge's chambers to ascertain what they are." (*t*) Where there are several counts in a declaration, some of which are good and some bad, and the defendant demurs to the *whole* declaration, it has been generally the practice to *overrule* the demurrer, and give judgment for the plaintiff, on the ground that the demurrer is *too large*, but the propriety of this has been questioned of late in a note to a case in which all the authorities on

(*p*) Abraham *v.* Cook. 3 Dowl. 315.

(*q*) Scott *v.* Robson. 5 Tyr. 717.

(*r*) Darling *v.* Gurney. 2 Dowl. 101; Arbouin *v.* Anderson. 1 Q. B. 498.

(*s*) Scott. *et. al.* Chappelow. 2 Dowl. N. S. 78.

(*t*) Ib.

the subject seem to have been collected; (*u*) and also in a later case, in which Parke B. says, "There has been a case in the Queen's Bench, and another in the Common Pleas, where demurrers have been overruled as being too large; and the question is, is that practice right or not, and ought not the court, on such demurrers, to give judgment on the whole record, according to the truth? If there be a general demurrer to two counts, one of which is good and the other bad, the plaintiff ought to have judgment on the good count and not on the bad. In short, the courts should look on the whole record, and see what is the proper judgment to give upon the whole, otherwise considerable difficulty may arise in the assessment of damages." (*v*)

IRREGULARITIES.

How irregular proceeding set aside.] It is not the intention here to shew in what cases irregular proceedings will be set aside, or what proceedings will be deemed irregular, as that would lead to a range too extensive for these pages, but simply to meet the inquiry as to the manner of setting irregular proceedings aside, and the consequences of any defect in the materials of the party objecting to the irregularity, or of his objection not being made in due time. The motion to the court must be made upon affidavit, stating the irregularity complained of, and if the irregularity be in the terms or wording of any process or paper, a copy thereof should be annexed to the affidavit. The objections to the proceeding complained of, should be correctly stated in the rule nisi, or pointed out by a reference in the rule nisi to the grounds disclosed in the affidavits, which, however, will not be sufficient, unless the objection appear clearly on the face of the affidavits themselves, and the proceeding objected to should also be correctly stated. Therefore where the service of the writ was irregular, but the writ itself was regular, a rule to set aside the writ, was discharged with

(*u*) Hinde *v.* Gray. 1 M. & G. 202.

(*v*) Briscoe *v.* Hill. 2 Dowl. N. S. 556.

costs (*w*) and vice versâ (*x*) but where the service only is complained of, a rule nisi to set aside the writ *or* the service, or the copy and service, is good. (*y*) A rule to set aside the copy served is nugatory. (*z*) And where the rule was to set aside a judgment for irregularity, and the real objection was, that it was signed against good faith, the court held that the applicant was bound by the form of the rule, and accordingly discharged it, but without costs. (*a*) The affidavit in support of a motion to set aside the service of an irregular writ, need not show that the defendant has not been served with any regular process. (*b*) But where the party seeks to set aside proceedings for want of service of any writ, he must state distinctly that the writ never came to his knowledge. (*c*) A motion to set aside a judge's order can only be made on producing a copy of the order. (*d*) Where a motion is made to set aside proceedings for irregularity, and the irregularity is mentioned specifically, neither in the rule nisi, nor in the affidavit on which it was moved, nor pointed out in the rule by reference to the grounds disclosed in the affidavit, the rule will be discharged. (*e*) And where a rule nisi was obtained to set aside service of process, for defects in the notice to appear, and the defect intended to be relied on was, that the notice was to appear in the *King's Bench*, instead of the *Queen's Bench*, the rule was discharged because the irregularity was not sufficiently pointed out. (*f*) And a rule nisi to set aside an arrest

(*w*) Haggitt *v.* Parkin. 1 Bing. 65; Truelove *v.* Whitchurch. 1 M. & G. 426.

(*x*) Edwards *v.* Danks. 4 Dowl. 357.

(*y*) Dawson *v.* Mills. 10 M. & W. 662; Argent *v.* Reynolds. 6 Dowl. 480.

(*z*) Kenny *v.* Bishop. 9 Dowl. 57; Crow *v.* Field. 8 Dowl. 231.

(*a*) Smith *v.* Clarke. 2 Dowl. 218.

(*b*) Patterson *v.* Busby. 5 M. & W. 521: Wintle *v.* Hogg. 7 Dowl. 623.

(*c*) Clayton *v.* Phillips. 3 Jurist. 42.

(*d*) Hoby *v.* Pritchard. 5 Dowl. 300.

(*e*) Hamilton *v.* Howcutt. Trin. Term. 1842. P. C. Macaulay J.

(*f*) Matthie *v.* Lewis. Trin. Term. 1842. P. C. Macaulay J.

"for a defect in the affidavit to hold to bail" was discharged, because the defect was not specifically pointed out in the rule. (*g*) So also was a rule nisi to set aside a writ and arrest "on grounds disclosed in affidavits filed," where the defect was not apparent in the affidavits, but could only be ascertained by a reference to the writ which was annexed to them. (*h*) By rule of court, ante page 3, in moving to set aside an award, the several objections to the award must be specified in the rule nisi.

Stay of Proceedings.] The rule nisi when it states "that all proceedings shall be in the meantime stayed" suspends the proceedings for all purposes until the rule be discharged (*i*) and pending the rule the plaintiff cannot move even to enlarge another rule in the cause. (*j*) A distinction has been taken between rules moved by a plaintiff and defendant; when a plaintiff moves, the defendant has the same time to take his next proceeding after the rule is disposed of, that he had when the rule nisi was served upon him, but when the defendant moves, and his rule is afterwards discharged, then he must take his next step the same day at his peril, and he has the whole day for that purpose; but if the time in which he had to take the next step, when he moved his rule nisi, has not expired when his rule is discharged, he need not proceed until that time has expired. The defendant may also sometimes have it expressly provided in his rule, that he shall have the same time to take the next step, that he had when he obtained his rule, after the rule is disposed of. (*k*) A rule nisi however does not operate as a stay of proceedings, unless it is so expressly declared in the rule. (*l*)

Time of application, and how irregularity waived.] In

(*g*) McGan *v.* Howison. Hil. Term. 1843. P. C. Mc Lean J.

(*h*) McGan *v.* Howison *et. al.* Hil. Term. 1843. P. C. Mc Lean J.

(*i*) Swayne *v.* Cramond. 4 T. R. 176.

(*j*) Wyatt *v.* Preble. 5 Dowl. 268.

(*k*) Hughes *v.* Walden. 5 B. & C. 771; Vernon *v.* Hodgens. 1 M. & W. 151.

(*l*) Hastings *v.* Champion *et. al.* Mich. Term. 3 Vic.

England, by rule 33 of all the courts, of H. T. 2 Will. IV. "no application to set aside process or proceedings for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity," and although in this court there is no such rule in force, yet the practice of the court has been lately to require almost the same promptness in moving against irregularities, that is required by express rule in England. The rule applies to the party's own acts only, and not to acts done by the opposite party for him. (*m*) It has been held in England, that if the irregularity occur in vacation, the party complaining of it, must apply to a judge in chambers in all cases, if there be time in the vacation, (*n*) and that if dissatisfied with his decision, he may apply to the court on the first day of the next term, though the judge refuses to give time for that purpose, and steps necessarily taken in the interim will not amount to a waiver of the irregularity, (*o*) but this practice has not been followed in this court, and parties have never been held to the strictness of applying in vacation to a judge in chambers to set aside the service of process, or any other proceeding upon which no further step could be taken until the following term, although a prompt application in chambers is always considered necessary, where the next step after the one complained of can be taken in vacation—and where the party applies to the court, and the application is primâ facie too late, but he relies upon a previous similar application having been made to a judge in chambers within the proper time, the rule should be drawn up on reading the summons and order of the judge, or upon an affidavit of the fact, otherwise it will be discharged with costs. (*p*) An irregularity in an

(*m*) Per Parke, B. Chalkley *v.* Carter. 4 Dowl. 480; Davies *v.* Sherlock. 7 Dowl. 530.

(*n*) Cox *v.* Tullock. 2 Dowl. 47; Hinton *v.* Stevens, 4 Dowl. 283. 3 Dowl. 439.

(*o*) Woodcock *v.* Killby. 1 M. & W. 41.

(*p*) Shugars *v.* Concannon. 7 Dowl. 391; Goren *v.* Tate. 4 Jurist 1017, 8 Dowl. 868.

arrest must be taken advantage of within the time for putting in bail, (*q*) or before an undertaking to put in bail, (*r*) or obtaining time to put in bail. (*s*) An irregularity in non bailable process, or in the copy served, or in the service, must be taken advantage of within the time for entering an appearance, (*t*) and before appearance, or an undertaking to appear. (*t*) In general a defendant's asking for time does not in itself waive an irregularity in the plaintiff's last proceeding. (*u*) An irregularity in an appearance entered by a plaintiff for the defendant must be moved against, as soon as such steps are taken by the former as shew his intention to proceed on the appearance (*v*) and at all events before judgment by default. (*w*) An irregularity in the service of the declaration should be taken advantage of, before the time for pleading has expired, or at all events before plea. (*x*) If a plaintiff proceeds to judgment and execution on an appearance entered by him for the defendant under the statute, by mistake, one having been previously entered by the defendant himself, it is an irregularity only, and a notice of declaration having been served on the defendant personally, was held to have given him sufficient knowledge of the irregularity, to make it incumbent on him to move immediately to set aside the appearance entered by the plaintiff. (*y*) If a defendant conducts his cause in person, it is no reason for delay in moving to set aside proceedings for irregularity. (*z*) Application may be made to set aside an

(*q*) Shugars *v.* Concannon. 7 Dowl. 391; Goren *v.* Tate. 4 Jurist. 1017, 8 Dowl. 868.

(*r*) Holliday *v.* Larnes. 3 Bing. N. C. 541.

(*s*) More *v.* Stockwell. 6 B. & C. 76.

(*t*) Hompay *v.* Kenning. 2 Chit. Rep. 236, 240; Child *v.* Marsh. 3 M. & W. 433; Crow *v.* Field. 8 Dowl. 231.

(*u*) Anon. 1 Dowl. 23.

(*v*) Strange *v.* Freeman. 5 Dowl. 407.

(*w*) Williams *v.* Strahan. 1 N. R. 309.

(*x*) Newnham *v.* Hanny. 6 Dowl. 263; Smith *v.* Clark. 2 Dowl. 218; Minister *v.* Coles. 2 Chit. Rep. 237.

(*y*) Alsager *v.* Crisp. 9 Dowl. 353; Holmes *v.* Russell. 9 Dowl. 487.

(*z*) Currey *v.* Bowker. 9 Dowl. 523.

interlocutory judgment for irregularity the day after notice has been given of executing a writ of inquiry, (*a*) but on an application to set aside an interlocutory judgment it must distinctly appear that interlocutory judgment is signed. (*b*) The defendant must come to the court within a reasonable time after he has become aware that the interlocutory judgment has been signed, and cannot wait until a rule to compute is served. (*c*) But where a plaintiff has signed an irregular judgment, and gives notice of his intention to abandon it, but does not actually strike it out, the defendant need not come to the court to set it aside : but the court discharged a rule for that purpose without costs. (*d*) Where a defendant has obtained time to plead on condition of taking short notice of trial for the sittings in, or after a particular term, he is not thereby obliged to take short notice of trial for the sittings in or after any subsequent term. (*e*) Where an irregular notice of trial has been given, the court will set it and all subsequent proceedings aside, even after verdict ; and although before the trial an application for the purpose had been made to a judge in chambers, who refused to interfere on the ground that the application had not been made promptly. (*f*) An irregularity in, or omitting to give a demand of plea, is waived by the defendant pleading, even although his plea be a nullity upon which the plaintiff signs judgment (*g*) and obtaining time to declare, is a waiver of a rule to declare (*h*) and time to plead, of a demand of plea. (*h*) An irregularity in pleading by a new attorney without an order to change the former one is waived by the plaintiff's attorney accepting and keeping the plea. (*i*) But the

(*a*) Amoz *v.* Smith. 7 Dowl. 866.

(*b*) Classer *v.* Drayton. 8 Dowl. 184.

(*c*) Grant *v.* Flower. 5 Dowl. 419.

(*d*) Robinson *v.* Stoddart. 5 Dowl. 266.

(*e*) Slatter *v.* Painter . 1 Dowl. N. S. 35.

(*f*) Cotton *v.* Thompson. 5 Jurist. 270.

(*g*) Perry *v.* Fisher. 6 East. 549.

(*h*) Towers *v.* Powell. 1 H. Bl. 87.

(*i*) Margarem *v.* Makilwaine. 2 N. R. 509.

plaintiff's demanding a particular of set-off will not waive the right to sign judgment, where the plea is a nullity. (*j*) Attending and defending at the trial will of course waive any irregularity in the notice of trial—an application for time to reply, will be a waiver of objection to a plea on the ground that it is not issuable. (*k*) Where a defendant pleaded to a scire facias, pending a rule he had obtained to set it aside for irregularity, the court held he waived the irregularity by his plea. (*l*) But where pending a rule to set aside a sci. fa. which did not operate as a stay of proceedings, the defendant appeared to the sci. fa. in order to prevent judgment, it was held to be no waiver. (*m*) So pleading to an action on a bail bond, after demand and refusal of oyer, in order to prevent judgment being signed, is no waiver of the right to oyer. (*n*) The rule is the same as to the prisoners. (*o*) A prisoner who is supersedable for not being declared against in time, waives the irregularity by afterwards pleading. (*p*) In general there can be no waiver without a knowledge of the irregularity. (*q*) The rule as to time of application is well laid down by Patteson J. in Esdaile *v.* Davis. (*r*) "The rule is, when a party knows of the irregularity, he must apply promptly. What is meant by the rule that he is bound to come promptly is, that he is bound to come promptly after he knows of the proceedings in which the supposed irregularity exists, and not after he knows of the irregularity itself. A man is bound to know of every proceeding taken against him, and if there be any error in it, he ought to ascertain that error; he cannot be heard to say that he did not know

(*j*) Ford *v.* Bernard. 6 Bing. 534; Garratt *v.* Hooper. 1 Dowl. 28.

(*k*) Trott *v.* Smith. 2 Dowl. N. S. 278.

(*l*) Sloman *v.* Gregory. 1 D. & R. 181.

(*m*) 5 East. 462.

(*n*) Goodwicke *v.* Turley. 4 Dowl. 431.

(*o*) Robertson *v.* Douglass. 1 T. R. 191; Primrose *v.* Baddeley. 2 Dowl. 350.

(*p*) Pearson *v.* Rawlings. 1 East. 77.

(*q*) Cox *v.* Tullock. 2 Dowl. 47.

(*r*) 6 Dowl. 465.

of it;" and this is fully recognized as "the sound rule" in a subsequent case. (*s*) But an irregularity is not waived by agreeing to terms, where the party is under a misapprehension occasioned by the mistake of a judge in point of law. (*t*) It rests, however, upon the party complaining of the irregularity to shew, that he had no knowledge of it. (*u*) These cases are, however, applicable to irregularities only, for if a proceeding be a nullity, the defect is not waived by any delay, or any subsequent proceeding of the opposite party. (*v*) A waiver is doing something after an irregularity committed, where the irregularity might have been corrected before such act done. (*w*) And if the application in any case be *primâ facie* too late, and there are any peculiar circumstances to account for the delay, they must be clearly established by the party applying. (*x*)

Confessing irregularity.] If the party whose proceedings are complained of as irregular, find clearly that he cannot sustain them, he should immediately give notice to the party complaining, of his intention to abandon them, and his willingness to pay any costs that may have been incurred in consequence, and should offer to pay such costs; and where, after service of the rule nisi to set aside a declaration irregularly delivered, the plaintiff's attorney offered to pay the costs, which the defendant refused, the rule was made absolute, on the terms that the defendant should pay all the costs subsequent to the offer, (*y*) and the attorney refusing may

(*s*) Weedon *v.* Garcia. 2 Dowl. N. S. 64.

(*t*) Whalley *v.* Barnett. 1 Dowl. 607. Woodcock *v.* Killey. 4 Dowl. 730.

(*u*) Anderdon *v.* Alexander. 2 Dowl. 267; Herbert *v.* Darly. 4 Dowl. 726.

(*v*) Mortimer *v.* Piggott. 2 Dowl. 615; Roberts *v.* Spurr. 3 Dowl. 551; Moore *v.* Stockwell. 6 B. & C. 76.

(*w*) Stevenson *v.* Danvers. 2 B. & P. 110.

(*x*) Anderdon *v.* Alexander. 2 Dowl. 267; Herbert *v.* Darley. 4 Dowl. 726; Orton *v.* France. 4 Dowl. 598; Esdaile *v.* Davis. 6 Dowl. 465.

(*y*) Briscow *v.* Beckett. 4 M. & R. 100.

be made to pay the subsequent costs; (z) and where the plaintiff signed an irregular judgment, and on the defendant taking out a summons to set it aside, he informed the defendant that the judgment was withdrawn, it was held, that the defendant had no right to get an order drawn up for setting aside the judgment, and that therefore he should pay the expense of it. (a)

Costs and terms.] By rule M. T. 37 Geo. III., rules setting aside proceedings for irregularity are to be made absolute with costs, unless some strong ground be shewn to the contrary; and if discharged, they are to be considered as discharged with costs, unless the court expressly direct otherwise. But a rule nisi moved, silent as to costs, will be made absolute, if no cause shewn, without costs; (b) but a rule nisi moved, with costs, will, almost invariably, if discharged, be discharged with costs. (c) Where proceedings are set aside in chambers costs may be given, (d) though the practice as to giving them is not certain; (e) and quære, whether a judge in chambers can make a plaintiff pay the costs of an application for the delivery of his particulars, when he has omitted to deliver them with his declaration, in pursuance of rule 7, ante page 19. (f) Rules obtained on affidavits defective in the jurat, will always be discharged with costs. (g) Where a rule asks too much, the general practice is to discharge it with costs; but sometimes, although the party moving is in part successful, no costs will be allowed on either side; (h) and though in general the successful party is entitled to his costs, still the court will not give them if they think the matter one on which

(z) Halton *v.* Stocking. 1 Dowl. 296.

(a) Wintle *v.* Hogg. 7 Dowl. 623.

(b) Rex *v.* Sheriff of Middlesex. 2 Dowl. 5.

(c) Tilley *v.* Henley. 1 Chit. Rep. 136; Huggitt *v.* Parkin, 1 Bing. 65.

(d) Doe Prescott. *v.* Roe. 1 Dowl. 274. 9 Bing. 104.

(e) Davy *v.* Brown. 1 Scott. 384.

(f) Clement *v.* Weaver. 1 Dowl. N. S. 193.

(g) Frost. *v.* Haywood. 2 Dowl. N. S. 801.

(h) Rising *v.* Dolphin. 4 Jurist. 193.

doubts might fairly have existed. (*i*). A party who shews cause in the first instance is not entitled to costs. (*j*) The court will in general impose the terms, upon the party setting aside a proceeding, of bringing no action, or will refuse him the costs of the application if he will not accede to these terms, and the distinction as to the power of the court seems to be, that where the party is not entitled to set aside the proceedings as a matter of right, terms may be imposed; but where he must be successful in his application, the court can only refuse him costs, if he will not accede to the terms. (*k*)

(*i*) Jones *v.* Smith. 3 M. & W. 526.

(*j*) Read *v.* Speer. 5 Dowl. 330.

(*k*) Stockbridge *v.* Sussams. 6 Jurist. 437.

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