FINAL REPORT

OF

THE COMMISSIONERS

APPOINTED BY THE LEGISLATURE OF MARYLAND,

TO REVISE, SIMPLIFY AND ABRIDGE

THE RULES OF

PRACTICE, PLEADINGS, FORMS OF CONVEYANCING,

AND

PROCEEDINGS

OF THE

COURTS OF THE STATE.

BALTIMORE:
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1855.

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ADVERTISEMENT.

THE Commission of the undersigned and his colleagues is, "to revise, simplify and abridge the Rules of Practice, Pleadings, Forms of Conveyancing, and Proceedings of the Courts of this State." In a former Report prepared by the undersigned, he treated of the Law of Evidence, the Law of Limitations, the Action of Ejectment, the Law of Attachment, and the Criminal Law, all of which titles, except the last named, were, as he conceived, strictly within the scope of the duties assigned him, being either parcel of the procedure of the Courts, or directly connected with it. And of the Criminal Law itself, that which is not doctrine, is necessarily procedure—the one being the law, the other, the means of applying it to use.

In his present and Final Report, he has treated of the Practice in the Court of Appeals, the Practice in the Courts of Law, the Law of Husband and Wife, the Law of Landlord and Tenant, the Law in relation to Inebriates, and certain amendments and additions which occurred to him as necessary to his former Report. These subjects are also, in his opinion, properly within his commission, with the exception only of the Law of Husband and Wife, a branch of the jurisprudence of the State, sufficiently discordant originally, but rendered almost unintelligible, by the manner more than the matter of the recent attempts, constitutional as well as legislative, to reform it. Many of the changes alluded to, were no doubt wise and salutary in themselves, but a great error was committed, if the undersigned may say so without presumption, in the omission

to prepare the way for these changes, by a removal in the first place, of the old matter, with which as the law now stands, they have been forced into a most ill assorted association. It may well be however, that after devoting to this most important and delicate subject, the best consideration in his power, he has still failed to make the law what it ought to be. But he was most unwilling to leave this part of the system in the strange state of disorder in which he found it, and if he shall have done nothing more than to point out existing defects, and to call the attention of the Legislature to them, he will, as he conceives, have rendered an important service to the public.

The restraints to which the undersigned proposes to subject the habitual drunkard, are altogether of his own suggestion, and introduced into the Report without the concurrence of his colleagues. He desires therefore to be considered wholly responsible for the determination to introduce them at all, as well as for the matter and execution of his entire Report. All of which he respectfully submits to the Legislature.

WM. PRICE.

BALTIMORE, *Dec.* 15, 1855.

To The Honorable

THE GENERAL ASSEMBLY OF MARYLAND:

The subjoined Final Report of the Commissioners appointed to revise, simplify and abridge, the Rules of Practice, Pleadings, Forms of Conveyancing, and Proceedings of the Courts of this State, is respectfully submitted to the Legislature.

WM. PRICE,
SAMUEL TYLER,
FREDERICK STONE,
Commissioners.

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PRELIMINARY REMARKS.

THE vice of modern legislation is its prolixity. Statutes are mere words, and the lexicographers the best authorities for their interpretation. Hence it is, that there are no rules for the construction of statutes, and no one having rights depending upon them can consider himself safe, until the Courts have finally decided his case. The plainest case is never free from doubt; indeed it is the plainest case that is most likely to go the wrong way. It is true that there are many rules and maxims given by Dwarris, Broom, and other writers, for the interpretation of statutes, but the Courts generally settle the construction first, and then resort to these maxims, if they happen to be in Latin it is so much the better—to support the opinion they have already formed.

In the interpretation of a statute depending as it does, upon the signification of words, what assistance can the mind derive from the maxim, that "*verba aliquid operari debent*," or "*verba generalia restringuntur ad habilitatem personæ, vel aptitudinem rei*," or "*verba cum effectu sunt accipienda*," or any other truism embalmed though it be in the mysteries of a dead tongue? In dealing with principles—in weighing the force and effect of rules, maxims like these, might have their influence in leading the mind to a sensible and proper result, but in pronouncing upon the minute meaning of words—in some instances a mere rabble of words, they can have no effect whatever.

The evil is inherent in the system. Where the meaning of a statute, depends not upon the new rule it promulgates, but upon the signification of the verbiage employed, and there are words enough to suit every condition of mental prepossession—

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every shade of moral and intellectual diathesis, it were strange indeed if any one from the reading of an act of the Legislature, should be able to say what its judicial meaning was to be.

This was not always so. The more ancient British statutes are examples many of them, of a lucid and terse legislative expression, and they were expounded by the Courts according to their plain and broad meaning, so as to give full effect to the new doctrine they introduced, with such exceptions to their application, as the Courts believed were intended by the Legislature. Buller in remarking upon this subject in Bradley *vs.* Clarke, 5 T. R. 201, uses the following language. "With regard to the construction of statutes according to the intention of the Legislature, we must remember that there is an essential difference between the expounding of modern and ancient acts of Parliament. In early times, the Legislature used, (and I believe it was a wise course to take) to pass laws in general and in few terms; they were left to the Courts to be construed so as to reach all the cases within the mischief to be remedied. But in modern times great care has been taken to mention the particular cases in the contemplation of the Legislature, and therefore the Courts are not permitted to take the same liberty in construing them as they did in expounding the ancient statutes." And Mr. Raymond in his valuable little treatise on the Bill of Exceptions, in remarking on the statute of Westminster 2 (13 Edw. 1.) observes, that, "in construing this statute, it is necessary to bear constantly in mind the difference between ancient and modern acts of parliament. The former expressed the intention of the Legislature in as few, the latter conceal it in as many words as possible. In those, every word was fraught with meaning—in these, there is an infinite deal of nothing."

We shall not stop to debate the question, whether statutes are prolix because of their literal construction by the Courts, or whether the Courts adhere to the letter because the statutes are prolix? That is to say, whether the fault lies with the Legislature or the judiciary? Buller's view of the matter, as we have seen is, that the Courts are not permitted to take the liberty of construing a statute so as to reach all the cases within the mis-

chief to be remedied, because all the cases in the contemplation of the Legislature are particularly specified in the statute. And there is force in the suggestion, that where a statute enters into minute particulars, cases not specified are not to be deemed within its intended operation. It is believed however that upon a faithful scrutiny of the subject, the diligent enquirer after truth will be compelled to say, that the first false step was with the Courts, and that the root of the evil lay in the promulgation of the rule of statutory interpretation, that the common law shall prevail, unless expressly abrogated by the Legislature.

Such a rule of construction co-operating with such a system as the English Common Law, could not fail as we believe, to result in the very kind of legislation, as well as of legislative construction, upon which we have been remarking. It must be borne in mind that the vital principle of the Common Law is, that each separate rule of which it is composed, arose by itself out of a separate decided case. The first case established the first principle; others followed as controversies arose and were settled by the Courts. The system commencing thus, grew up and expanded into its present dimensions, by the accumulation of separate cases, each principle being the result of its own case. It is this great distinguishing feature of the Common Law, which renders it a vast collection of segregated points. Hence the common jurist reasons from the case to the principle. He goes to the recorded decision, and from the character of the controversy, and the decision of the Court, gets the distinct rule it establishes. It is the reverse in this respect, of the civil law, in which principles are held to govern cases, and not cases to be the sources of principles. And apart from all experience on the subject, it might well be supposed that the Courts would require a separate enactment by the Legislature for each separate rule which it was proposed to change, or for the change of the relation of each separate principle with the other principles of the system, which it was proposed to disturb or modify; and that where nothing more was intended by a statute than the abrogation or re-adjustment of a single rule—as all the rules of the system stand segregated and apart

from each other, it might be supposed to require great particularity in the language used, to designate the precise point in the system where the change was intended to operate. Be this however as it may, with such a system to work upon, and such a rule of construction to work with, as that the Common Law shall prevail unless expressly abrogated, we can well understand how difficult it is for ordinary legislation to effect any extensive or useful improvements in the law.

The effort that is to be successful must correct the forms of legislation as well as change the rules of statutory construction. It must begin with the present mode of drafting statutes, by discarding all useless prolixity, and confining the expression to such words as are intended to be fraught with meaning, in order that the Courts may be restored to the liberty of which Buller thought they had been deprived, of expounding statutes, "so as to reach all the cases within the mischief intended to be remedied."

But in reality there is now no reason, certainly none in the character and texture of the system itself, why the Common Law should not be as susceptible of improvement as the civil or any other system of law. What though it did grow into existence as already described, by minute piece-meal, it bears at the present day none of the traces of such an origin or growth, having long since become an entire, a consistent and a connected whole. The whole ground is covered, there are no vacancies to break the connection. The entire mass of rules and principles composing the system, with their exceptions and inflexions, are as capable of scientific arrangement, and with as much order in the details, as if they had been built up from the foundation by a Papinian or a Bacon.

What we most require now is, that the habit of mind which disposes us to look upon the laws under which we live as a mass of segregated points, each standing apart from all the rest, be thrown aside, and the mind be brought to regard an act of the legislative authority as an alteration of the old doctrine, to the extent in principle of the change intended by the legislative will. A statute will then be applied to all cases coming within the reason of the new rule, or within the pro-

posed modification of the old rule, and the construction of a statute, the same being couched in appropriate terms will be a process of ethical induction—of fair manly reasoning, worthy of the law as a science as well as of the progress of the age in which we live.

Prolixity in legislation is an evil of greater magnitude than is generally supposed. It is intended to give certainty to the new rule, but its effect is the reverse of what is intended. For when the mind of the Court is drawn away from the principle intended to be promulgated, to a discussion of the niceties of the language employed, it is difficult to say what is to be the result of the examination. But if the statute be couched in general and appropriate language—if the idea, the thought be given, stript of all useless verbiage, who can mistake it that is not wilfully blind?

The Courts, it must be considered, have their own difficulties to meet and to overcome in the character of the legislation of this State. The statute book presents a mass of confused and disorderly matter, the different parts of which seem to have come into existence more by accident than design. In looking through the series of acts and their supplements, it is scarcely ever the case, that any one rule is found entire in the same place. The first enactment being in most instances immature, it is afterwards amended and modified from time to time, as occasion happens to bring to light the defects of the first attempt, and the law is to be ascertained from this concatenation of attempts, and from the decisions of the Courts upon them, both in detail and as a whole. Instances moreover are not unfrequent, of acts passed at one session, and repealed at the next. At the extra session of 1836 two separate acts were passed containing discrepant provisions in reference to the same subject matter precisely, and the Chancellor decided that the last act being the latest expression of the legislative will, was to be regarded as the law (see ch. 346 sec. 3, and ch. 380 sec. 3 of the acts of 1835.)

In executing the duties assigned them, the Commissioners have followed as nearly as might be, the example of the more ancient British Statutes, by using no words but such as are

intended to be fraught with meaning. The endless multiplication of words and phrases, has been avoided purposely, that the Courts may feel at liberty to apply the new rule to all cases comprehended within the proposed remedy, to withhold its application from such cases as are not intended to be affected by it, and to make the discrimination for themselves, by the light of reason and common sense.

APPEALS.

THERE is no portion of the laws of Maryland in greater disorder and more urgently demanding reform than that which relates to appeals. The almost universal mode of prosecuting an appeal from a Court of Law, is by bill of exceptions, in which the testimony adduced on both sides is generally written down at the trial, and this together with the documents and proceedings in the cause, are copied in an engrossed hand into a transcript in folio, in which form it is sent to the Court of Appeals. For the trial in the Appellate Court five copies of the full record are made out and also engrossed in folio for the use of the Court and the Counsel. If the case is sent back to the inferior Court, it is by another copy of the record, with the opinion of the Court of Appeals annexed. So that in the second trial below there are two records, namely, the original papers and proceedings and the *procedendo* record, which latter is a copy of the copy originally sent to the Court of Appeals. If a writ of diminution be awarded and sent to the Court below, another full engrossed copy of the record is made and transmitted to the Court of Appeals, differing from the first copy only in the insertion therein of some matter, very trivial it may be, which was omitted by the clerk, and to supply which omitted matter was the object of the diminution. By a very recent act, the return to a writ of diminution is limited to the supply of the omitted or corrected matter.

All this labor and cost, with a delay of a year, or it may be eighteen months, must be incurred, to have any point, no matter how trivial, decided in the Court below, reviewed by the Appellate Court. To have a decision of a Circuit Court, upon an objection to a single question in the examination of a witness, reviewed by the Court of Appeals, the testimony in the case is laboriously written out, the bill of exceptions signed and sealed by the Judge, in order that there may be no mistake about the precise point de-

cided—the record engrossed and certified by the Clerk, five engrossed copies made out in the Appellate Court, the *procedendo* record sent back to the Court below, when after all the intervening delay, trouble and expense, the cause is again gone through from the beginning, as if it had never been tried at all. The error of the Court in permitting or refusing to permit the question to be asked the witness, has been corrected, and that is all that has been accomplished by the appeal, the cost and the delay. Appeals from the Courts of Equity occasion as much delay and more expense than those from the Common Law tribunals.

When a cause has reached the Court of Appeals, and is regularly docketed there, the next step is to ascertain whether all preliminaries are properly attended to. There are sundry of these and they present a singular anomaly. First of all the appellant may be dismissed and turned out of Court without a hearing. He may have neglected to appeal in time, or being one of sundry joint plaintiffs or defendants, he may have omitted the formality of a summons in severance, or failed to comply with some ceremony essential to give him a standing in the tribunal of the last resort. If however he is fortunate enough to escape being dismissed, it then behooves him to look carefully into his record to ascertain what points are open for discussion. For it is not every error of the Court below, nor every such error apparent upon the record, that is properly before the Court of Appeals for revision and correction. Formerly the judgment appealed from might be reversed for any defect which the microscopic diligence of the most astute counsel might be able to detect in the whole record. To remedy this, and to prevent parties from masking their real points in the Court below, and then springing them upon their adversaries in the Court of Appeals, the act of 1825, ch. 117, was passed, which in substance provides, that the Court of Appeals shall neither reverse nor affirm any judgment brought up on appeal, or writ of error, on any point or question, which does not appear by the record, to have been raised and decided in the County Court. And by the act of 1832, ch. 302, the Court of Appeals is prohibited from entertaining objections in Appeals from the Courts of Equity, to the competency of witnesses, to the admissibility of evidence or to the sufficiency of the averments of the bill, unless those objections have been taken by way of exception in the Court below. And again by the act of 1841, ch. 163, in appeals from the Courts of Equity no objection to the jurisdiction shall be heard by the Appellate Court, unless it

shall appear by the record that the same was made in the Court below.

These latter acts are believed to work well in practice, but serious doubts are entertained whether the act of 1825, has not upon the whole been productive of more harm than good. It appeared to the Legislature to be improper, that a cause should be tried in the County Court upon one set of questions, and in the Court of Appeals upon another and a different set, and certainly when the true points of a case are ingeniously kept out of view in the trial below, and then a new battery is opened upon the adversary, of which he had neither notice nor warning of any kind until the argument in the Appellate Court, the practice was not only improper but disreputable, and did require the corrective of some remedy; and if the act applied only to cases of that description, it would be a wise and salutary law, which no one could wish to see repealed. But such is by no means the case. In the trial of causes at *nisi prius*, the points of the controversy are brought to view during the progress of the trial, at a time and under circumstances when there is no opportunity of looking into the books, or of otherwise forming a deliberate opinion upon them. And to obtain time to make this examination, an appeal is taken, which upon consideration is frequently abandoned, the counsel having become satisfied that his own first impressions were wrong.

It is just as likely to happen however, that in the further consideration of the case he may discover that he was right in his general view of the law, but wrong in the particular questions or points upon which he supposed the case to turn. The question to be considered then is: ought the party whose counsel has been honest in his purposes, to be permitted to avail himself in the Appellate Court, of the new lights which his further examinations and reflections have thrown upon his case? or ought he to be held and bound down to his first impressions, taken up in the hurry and bustle of a trial at *nisi prius*, no matter how erroneous they may prove to be? Let it be remembered that the same party is willing to abandon his appeal, when he finds his legal view of his case untenable. Is he not on the other hand entitled, should he discover new reasons to show that he was right, to the benefit of those reasons when he comes before the Court of Appeals? He asks not the privilege of making a new case, nor of changing any of the features or facts of his case as it stood at first; all he asks is to revise his first impressions, and to present such new and additional considerations to the

Court, as his further reflections may have supplied him with, although he may not have laid in the record, the foundation on which to base these considerations.

And it may well be asked, what is the use of a Court of Appeals, if it be not to afford to parties the benefit of this very consideration and examination, before a tribunal removed from the turmoil of a Court of original jurisdiction, with a full library within its reach, and ample leisure to examine and deliberate upon the law of each case coming before it? What is the worth of such a Court, if it is to be confined to the limited views which the Court below had no choice but to adopt? When counsel disguise or mask their points purposely to take their adversary by surprise, they ought to take nothing by their strategy. But it is wrong to make the trial of a cause a mere game of skill, and still worse to make the client pay the forfeit for the lack of skill in his attorney.

The Court of Appeals in their construction of the act of 1825, have declared (4 Gill, 312,) that whatever may be the character of the error in the judgment below, if no motion was made, nor the attention of the Court below called to it, the Appellate Court cannot reverse the judgment. And what a singular condition of things is introduced by the act thus construed? In the Court below, a party misconceiving his right or his remedy, is stopped and thrown out of Court, or turned back at great inconvenience and greater cost to begin anew; while in the Court of Appeals, the same misconception or mistake is regarded as of no consequence, and the case passes to final judgment, as if the right and the remedy were without a flaw from beginning to end. Certainly, if justice can be administered notwithstanding the errors which are habitually passed over by the Court of the last resort, it cannot be essential to justice to hold the same matters erroneous in the Court below. The act is wrong in principle, and ought to be repealed if this were the only objection to it, as unhappily it is not, the practical inconveniences arising out of its operation being of more serious import than the violation of principle alluded to.

The object in erecting an Appellate Court is two-fold. It is that it may decide correctly the case before it, and also declare the principle of law for all future cases. Of the two objects the latter is infinitely the most important. The rules of law propounded by the Court are for the government of the community in their future transactions. The settlement of the case in hand is the least part of the Court's duty. If the Court had no other object than merely

to adjust disputes as they arise, their duty would be to do justice regardless of law. The Court therefore in the last resort should be left free to promulgate the rule arising out of the case, and its action as little hampered by forms and ceremonies as possible. But in adminstering the law under the act of 1825, forms are first to be attended to, while law and justice are left to take their chances for just such attention as may fall to their lot.

By the act, no point is open for consideration in the Court of Appeals, which does not appear by the record to have been raised and decided by the Court below. The result is, therefore, that in the trial of the case below, neither party can omit to raise by prayer any and every point which by possibility may arise in the argument on the appeal. In making his prayers the party must frame them in such ample variety, that no point which he may desire to be heard upon in the Court of Appeals may be found to have been left out of the record. But this is not the only matter requiring his attention. His prayers must be right in substance, but it is equally essential that they be right also in form. The genius of technicality and strict rule seems to preside over all the proceedings in the Court of Appeals, in reference at least to this act of 1825, and a slip or oversight in the manner of framing a prayer, may prove as fatal to it as a defect in its matter.

A prayer for example which is good in part and bad in part, is properly rejected by the Court below. (5 Md. 448.) A party therefore may have the whole law of his case, or of his point, well embodied in his prayer, but if there be any thing in it which should not be there, he loses the benefit of the whole, unless the Court shall choose to step outside of the prayer, and give him by an independent instruction of its own, the benefit of the good law which the prayer contains. In the Court of Appeals his good law is overlooked, and he is condemned in the loss of his case, for the sin of having mixed a little alloy with his pure metal.

Again, it is essential in the framing of a prayer, to be careful that the Court in granting it shall not assume any fact, which it is the province of the jury to determine. The whole case, such is the doctrine, must be left open for the consideration of the jury, so that they may say, yea or nay, to every fact involved in it. In one case, the language of the prayer was:—"If the jury shall be of opinion that at the time the defendant made the payment, he said," &c., it was held to be erroneous, because the fact of the payment was assumed, and by such assumption that fact was withdrawn

from the consideration of the jury. In another case the prayer was: that "if the jury find from the evidence, that at the time of the rendition of the judgment and the return of the *ca sa* and entering it not called, the party was insolvent and incapable of paying his debts," &c., the whole prayer was vicious, and the Court of Appeals refused to consider it at all.

With great submission, this doctrine is believed to be neither sound nor sensible. The mere circumstance that the assumption of a fact by a prayer, is permitted by the opposite party at the trial, is proof sufficient that this assumed fact is either admitted or at least not disputed by him. The idea that such fact has been taken from the jury, is wholly gratuitous. All disputed facts will necessarily be brought to the notice of the jury, and argued before them. But if it were otherwise—if the party choose to overlook the assumption and to let it pass without objection, there is no reason why the Court of Appeals should interpose to protect his rights in a case, where he seems not to have been aware that his rights were invaded. Still it is held to be very wrong, even with the tacit approbation of the party supposed to be injured, to take any fact, whether a matter of contest at the trial or not, from the consideration of the jury; and cases are reversed, not because the Court below was wrong in the questions actually decided by it, but because some fact happened not to be recited as a disputed fact, whether the party interested chose to dispute it or not.

There is a class of cases however, in which the Court holds a different doctrine. We allude to those cases where the Court assumes the right to examine and weigh the whole testimony adduced, and where, if in its opinion the evidence shall fail to establish one or more of the many facts, all of which are indispensible to the establishment of the cause of action or defence, the whole case is taken from the jury and determined by the Court. Now these doctrines cannot both be right. If it be wrong to take from the jury, even by implication and with the tacit consent of the party interested, the determination of any fact no matter how immaterial, it cannot be right to wrest from the jury the determination of the whole case, and virtually expel them from their box. And yet this latter is the correct doctrine, for when the whole proof adduced, does not come up to the legal standard which the law fixes for the maintenance of the cause of action or defence, the Court should so tell the jury and there arrest the trial.

It has been held also that if a party raise a point by a prayer,

and the Court reject the prayer but proceed to give an opinion of its own, and the party excepts to the rejection of the prayer, without excepting also to the opinion volunteered by the Court, such opinion is not open for consideration in the Appellate Court. This must be the law because it is so decided by the Court of the last resort to be so, but it makes an addition to the act which it was intended to expound. The question is not, whether a decision was excepted to, but whether the question or point was raised and decided in the Court below. And when a party offers a prayer, and the Court, though it reject the prayer, give an opinion not within the scope of the prayer, but on the question raised by it, that opinion, if erroneous, is properly open, it is submitted, for consideration by the Court of Appeals. For it was both raised and decided by the Court below, *prout patet per recordum.*

Again it is decided that a prayer requiring the Court to say, that upon the whole evidence adduced, the plaintiff is not entitled to recover, is too general, and the Court has no right to grant it. That under such an instruction, the record would not disclose to the Appellate Court what were the points which were raised and discussed below.

Furthermore it is held that when the proof in a cause is not conclusive for either plaintiff or defendant, but is of such a character that the jury may infer the right to be in either party, it is error in the Court to consider such proof as establishing only one view of the case, and to instruct the jury absolutely upon that hypothesis. Such an instruction is erroneous for a reason independent of the act of 1825. It decides the controversy and usurps the province of the jury. In such case the usurpation is real—in the case where the prayer is held void because of the assumption of a fact, the usurpation is merely fanciful. But the Court of Appeals in its construction of the act of 1825, has not been true throughout, to its own logic. It has held that neither a demurrer nor motion in arrest of judgment is within the provisions of the act, for the reason that both a demurrer and motion in arrest bring the whole record to the view of the Court, and that in neither case is the presentation of the particular grounds of objection in the Court below, a necessary preliminary to the entertainment of the appeal.

It is impossible to perceive the good sense of this distinction. A demurrer is an objection to the legal sufficiency of the cause of action or of the defence, or of the averments in pleading, made before the trial of the facts. A motion in arrest raises the objections to

which it is competent after the trial and verdict. A demurrer confesses the facts alleged by the opposite party, and denies that by the law arising upon them, any cause of action or any defence has been shown by the party pleading them. It tests the validity of matters of form as well as of substance. It probes and tests not only the cause of action or the defence, but also the mode in which they are presented. But in the case of a motion in arrest, being in order only after trial and verdict, the law intends that every thing material though not sufficiently averred was proven to the jury during the trial. All defects therefore of mere form are cured by this intendment of law. Now the act, as we have seen, declares, that neither party in the Appellate Court shall be permitted to urge or insist upon any point or question which shall not appear by the record to have been raised and decided below.

But a case may be as full of questions and points, when disposed of upon demurrer as if tried upon issues of fact, with this difference however, that in the latter mode of trial the party is limited in making his points to those which are germain to his pleas, whereas in bringing his case up on demurrer, there is no limit to his enquiries but the nature of the action. The same may be said, measurably at least, of the motion in arrest. The mischiefs therefore, which the act was intended to correct, are of greater magnitude and more likely to arise in trials upon issues of law—the very cases to which by construction, it is held not to apply at all, than to trials before the jury upon issues of fact, the cases to which by the same construction, its application has been limited.

The Legislature intended to say to parties litigant, make your objections either to matters of form or of substance, in proper time, and while it is in the power of the adversary to correct mistakes by amendment. Let there be no finessing nor masking of points until after the record is made up, to be started for the first time, when all power of amendment has gone by. And to secure this object the act declares, that the party shall make them in the Court below or he shall not make them at all, and in expounding an act of this precise character the Court says, that in those cases where the allegations are most general, and where no notice whatever is given of the particular points or questions intended to be raised, the act meant the party to have no notice, and that it does apply and was intended to apply only to jury trials, where he is notified in a degree at least, by the pleadings and issues, of the particular grounds which must be the subject of controvery between the parties.

The Legislature no doubt supposed that one effect of the act would be to simplify business in the Court of Appeals. But on the contrary it has introduced into that tribunal an artificial and complicated system of procedure, neither designed nor anticipated by the law makers. It has given rise to forms and ceremonies as useless as they are embarrassing, and tending to defeat rather than promote justice. Many cases are lost because the Court are precluded from considering them—others because the proper points were not raised in the Court below—and others again because, though the right points were made, something more than was necessary found its way into the prayers. Justice has been compelled to fight her way step by step, through the Court of Appeals, and generally has had a hard and doubtful struggle for her existence. The proverbial uncertainties of the law have been greatly increased, and many have thought that the chances of success have been about equally divided between the right and the wrong. And as a consequence of this state of things, the number of appeals has increased beyond all precedent. Few cases are so iniquitous as to preclude the hope of final triumph, and every man who is unsuccessful in the Court below takes an appeal, as a matter of course, and in many cases both parties appeal.

But the evils flowing from the act of 1825, are not confined to the Court of Appeals. They are felt, in a less degree, it may be, in the Courts of original jurisdiction. Counsel are aware that they will have to stand or fall in the Appellate Court, by the prayers they shall have submitted in the Court below. They are aware that it behooves them to be wary and circumspect—to take no step without due thought, and full time must be allowed them, that nothing may be overlooked, which they might afterwards desire to have in the record. Points and prayers are therefore raised so as to meet all aspects of the case. These are elaborately discussed and the inordinate consumption of time in trials below, has become one of the most crying evils of the system.

There are vices and inconveniences in the system of practice prevailing in the Courts of Law, for which the act of 1825 is not to be held answerable, or at least but measurably so, its effect being not to create, but merely to aggravate them. The mode of prosecuting appeals from the Courts of Common Law, is as we have seen, in the great majority of instances, by bills of exceptions. In practice all the evidence adduced by both parties, is spread out in the record for the benefit of the Appellate Court. The evidence of a

series of witnesses, all proving the same facts, or the same with slight variations, is repeated in the words of each witness, without regard to their number, the object being to try the case in the Appellate Court upon the facts as well as the law, just as it was tried in the Court below. Counsel esteem it their right to expatiate in the Appellate Court upon the morality of the case as it is termed, and the merits and delinquencies of the parties, are canvassed in the same manner as in a trial before a jury. In taking the testimony at *nisi prius*, counsel write down every word, stopping the witness for each sentence, and after all, reading it over to him that he may admit it to be correct. And in the trial in the Court of Appeals each witness is called to the stand from the record, the testimony arranged and marshalled precisely as was in the Court below. Cases frequently occur where the evidence in the record makes a book of itself, and the Court have to sit patiently while the counsel read through and discuss it all.

But all this is wrong. The jurisdiction of the Court of Appeals is strictly appellate, and has reference only to questions and principles of law. It is intended to settle doctrines, with as little reference as may be to the merits or demerits of particular individuals. It is too far removed from the parties to know any thing about them as individuals, and the Court in announcing mere legal results, cannot suffer its mind to be swayed by the claims or delinquencies of the parties, as it might have the effect of accommodating the legal principle so far to the complexion of the particular case, as to create inconvenience in the application of the same principle to future cases.

Upon the whole subject therefore we remark, that there manifestly are great vices and defects somewhere in the practice, both at *nisi prius* and in the Appellate Court. The result of a controversy in Court is more uncertain—subject to more contingencies now than it ever was, while the time consumed in the transaction of business in the Courts both of original and appellate jurisdiction, has become of itself an enormous abuse. Where a cause at *nisi prius* used in former times, to last hours, it now continues for days, and the Court of Appeals, though in session from December until May, with a summer term commencing in June and rising in August, are unable to get through the business.

These evils cannot exist without adequate causes, and those causes we believe, can be no other than we have endeavoured to explain. It may seem strange to those accustomed only to the

working of our system, to be told that in England one man, and that man whoever may happen for the time to be the Lord Chancellor, with the master of the rolls, until recently his only assistant, but with the additional assistance at the present time, of the Vice Chancellor, is able to get through the entire equity jurisprudence of England, vast and complicated as it is—the entire Appellate Equity jurisdiction of Ireland—that he should in addition preside over the deliberations of the House of Lords, when assembled in Parliament, and hear Appeals from all the Courts of the United Kingdom, including Scotland—that he should furthermore be a leading member of the Queen's Ministry, exercising political functions as important as any under government, and after all should find time to retire to the country for his summer recreations. In like manner the Courts of Queen's Bench, Common Pleas and Exchequer dispatch all the Common Law and Criminal jurisprudence of the realm, both original and appellate, except in the last resort, with unexampled promptitude and ability. The judges holding their four terms at Westminster Hall, and going their circuits, including in their rounds every county in England. A system of greater simplicity has very recently been introduced in that country, but of the manner it works in practice, we are as yet uninformed.

In speaking of the remedy for these evils, the Commissioners think proper to remark, that the great object of every system of jurisprudence is to do justice. Not that refined and elaborate justice which consists in a display of attenuated dialectics, but that plain, practical every day justice, which honest men, in their dealings with each other, have respect to as the standard of right and wrong. The justice which the Courts administer, should vary as little as may be, from the sense of right which nature has implanted in the bosom of every right-minded man. If a citizen be condemned by a rule which he cannot comprehend, he will think it injustice, however learned and cultivated it may be, and his neighbours will in all probability think with him. What the community desire therefore, and what they are entitled to have, is common sense justice and speedy justice.

The most obvious remedy for the evils introduced by the act of 1825, will be the repeal of that act. This will sweep away the whole of that artificial system of prayers and points, which has grown out of the construction of that act both at *nisi prius* and in the Court of Appeals. In reference then to the mischiefs at which

that act was aimed, but which it failed to correct, it is believed that nothing more is required for their effectual cure than the simple provision that neither party in the Court of Appeals, shall be permitted to allege as error in the judgment or proceedings below, any defect either in the right or the remedy, which might have been corrected by amendment, in that Court. This will secure all the benefits intended by the act of 1825, without any of the evils introduced by it. It will be necessary next to remove all formal trammels and restrictions from the right of appeal, and then open in the Appellate Court the whole case for argument and revision. In the mode of carrying up cases to the Appellate Court, as well as in the course of proceedure in that Court, there is much room for simplification and improvement.

The Commissioners may not be so fortunate as to accomplish all the good they intend, but they feel the strongest assurance, that whatever their failures may be, they cannot well make the system of appeals worse than it is.

IN WHAT CASES AN APPEAL WILL LIE.

1. An appeal shall lie from any judgment, decision or proceeding of a Court of Law, at the instance of any party thereto or interested therein, to the Court of Appeals, after the litigation in respect to the subject matter of the appeal is ended in the Court below.

2. The litigation shall be deemed ended within the meaning of the next preceding section, when a final judgment has been rendered in the case, or a decision made or order passed, which settles the principle of the controversy between the parties, or some of them.

3. An appeal shall not lie from any judgment, decision or proceeding of a Court of Law, where the amount involved does not exceed in value the sum of one hundred dollars, unless other controversies, involving a greater amount, are to abide the event of the case in which the appeal is taken.

When the whole amount involved must necessarily, or even probably, be expended in prolonging the litigation, and when the right of appeal can only be desired for the chance it affords of success in the contest, it has been deemed wise to say, there shall be no appeal. Courts of justice are not constituted to gratify the revengeful feelings of individuals, and litigation should be made to cease the moment there is nothing of substantial value to litigate about. It was for this or for some equally satisfactory reason, that the old act of 1713 limited the right to cases involving six pounds sterling, in appeals from the county to the Provincial Court, and fifty pounds sterling in appeals from the Provincial Court to the Governor and Council. The principle of the restriction which was abolished by the act of 1826, the Commissioners have ventured to restore.

4. An appeal shall not lie from any judgment, decision or proceeding of the Courts of Law or Equity in a case of contempt of Court, nor from the same in a proceeding under a special authority, where the subject matter of the appeal is expressly within the discretion of the Court; nor from a judgment, order or decision, affecting costs only; nor from the decision of a Court of Law, granting or refusing to grant a new trial.

5. The old proceeding of summons in severance shall not be used or necessary; but in all cases, where the right to appeal could be established by such proceeding, it shall exist without it.

It was held by the Court of Appeals in a recent case not reported, that any one party to a joint judgment or decree might appeal alone, but that the appeal would be dismissed, unless formally prosecuted in the name of all the parties, or unless the party appellant had established his right to appeal alone by a proceeding of summons in severance. It is believed, however, that the summons in severance never has been used or practised in Maryland; no traces of such a proceeding being discoverable in the Courts of the State. The necessity for this quaint old proceeding arose where a judgment was pronounced against two or more joint plain-

tiffs or defendants, one only, or any number of whom less than the whole, desired to appeal. Several appeals in such cases being considered objectionable, it was required that the parties wishing to appeal should summon the others into Court, to say whether they would join in the appeal or not; and this was effected by summons in severance, where if the party summoned declared it to be his intention not to appeal, he precluded himself thereby from any appeal thereafter, and the record was transmitted in the names of the others. The summons in severance is treated in the old books in connection with the summons of the Pipe, and the summons of the Green Wax.

6. An appeal shall lie when the subject matter of the decision, not being by virtue of a special authority, is in the sound discretion of the Court, but where the discretion is not exercised according to law.

It was held in one case, that, where the subject is left by law in the discretion of the Court, an appeal will not lie. (2 H. & G. 79.) The correct doctrine, however, is understood to be in accordance with the above rule and the case mentioned in sec. 4. (11 G. & J. 147; 1 G. & J. 426.)

7. An appeal shall lie from the judgment or decision of the Court in a case referred to it by agreement of the parties.

8. An appeal shall lie from any final decree, decreetal order, decision, or proceeding in equity, where some matter of right is thereby determined between the parties, or some of them, at the instance of any party thereto, or interested therein.

9. An appeal shall not lie from any interlocutory proceeding in equity, by which no matter of right is determined.

WITHIN WHAT TIME AN APPEAL SHALL BE PROSECUTED.

10. The right to appeal to the Court of Appeals, both at law and in equity, shall be barred in all cases by the lapse of two years from the date of the judgment or decree, decision, order or proceeding, except as is hereinafter provided.

11. The right to appeal from the decision, decree or order of the Court, sitting aside a sale by a sheriff of real or personal estate, or directing the application of money in his hands, or requiring money to be brought into Court, or directing the delivery of possession of real or personal property, or appointing a receiver,—shall be barred, if the appeal be not entered within sixty days after such proceeding is at an end in the Court below, and prosecuted within sixty days thereafter, or to the next succeeding term of the Court of Appeals.

12. In appeals from final judgments or decrees, all previous orders, decisions, decrees and proceedings, shall open for revision by the Appellate Court.

The limitation to the right of appeal as at present regulated, is three years at law and nine months in equity. But the course of legislation of this State, especially of late years, seems to be a confession, that three years is too long a period to be given a party to consider whether he will appeal or not, and nine months is not long enough. There is certainly nothing in the character of the jurisdiction or proceedings of the Courts of Law and Equity respectively, to render appropriate so long a period for the one, and comparatively so short a period for the other.

The act of 1841, ch. 46, requires a full transcript of the record to be sent up in all appeals, whether at law or in equity, within nine months *after the appeal is entered.* And as the limitation of

an appeal from a judgment at law is three years from *the date of the judgment*, the effect of the act is simply to admonish the party *not to enter his appeal* until he is ready to prosecute it, as it is only such entry that can abridge his full period of three years. In regard to the right of appeal from a Court of Equity, the act has altered the law very slightly.

It is provided again by the act of 1842, ch. 288, that appeals shall be entertained by the Appellate Court, though the transcript be not sent up within the time required by law, where the delay has been occasioned by the neglect or omission of the clerk. And by the act of 1843, ch. 41, it is still further provided, that the dismissal of an appeal, because of the clerks or registers failure to transmit the record within time, shall not be a bar to a subsequent appeal, if the same be taken within the time allowed for appealing from the judgment or decree.

But what is the meaning of this? To say that a party who is dismissed for the fault of the clerk, may appeal again, is to forget the act of 1842, which declares that in such case he shall not be dismissed. If on the other hand the act has reference to cases where the party is dismissed for his own default, the act when taken in connection with that of 1841, directing the transcript to be sent up within nine months, and not after, makes a strange jumble.

The limitation in reference to decisions in equity, is nine months from *the time of making the same;* and it may be that doubts were started in regard to the conclusiveness of all orders and decisions previous to the final decree, which were not separately appealed from within the nine months. The act might bear that construction. But the doubt, if any such existed, is put at rest by the act of 1845, ch. 367, which provides that upon appeals from final decrees, all previous orders and decisions shall be open for review in the Appellate Court.

The act of 1826 limits the right of appeal from the Courts of Equity to nine months, "unless it shall be alleged on oath or affirmation, that such order or decree was obtained by fraud or through mistake," which provision, say the Court of Appeals, (11 G. & J. 137,) is gratified by the simple *allegation* of the party on oath or affirmation, or of some other person for him, without proof of the fraud or mistake, and that upon the oath or affirmation being filed, the limitation is removed, and the right of appeal becomes unlimited in respect to time.

So much tinkering is pretty good proof that three years is too long, and nine months too short a period for the right of appeal to exist. The period of two years, as recommended by the Commissioners has been thought to be a good compromise of the matter. It is at best, however, but an arbitrary adjustment, and the Legislature can very easily insert any other limitation which it may consider better.

OF THE APPEAL BOND.

13. A mere appeal shall not operate to stay execution upon, or proceedings to carry out, a judgment, decree, order or decision, in cases where an appeal bond is necessary.

14. An appeal bond shall be necessary to stay or supersede such execution or proceedings, wherever property, money, or other thing of value, is involved in the controversy, and the proceedings of the successful party in the Court below, are stayed or suspended by the appeal.

We get the idea of an appeal bond from the bail in error, required by the Stat. Jac. 1, c. 8. But the right to demand such bond or bail is by no means free from difficulty. It rests upon the assumption, that the judgment already rendered is neither mistaken nor erroneous, and that the party obtaining it is deprived of a settled right by the delay occasioned by an appeal. But the whole force of this reasoning disappears, if we suppose the judgment to be wrong, and that the object of the appeal is to relieve the party from a determination which never ought to have passed against him. Ought he to pay a price for the privilege of seeking and obtaining such relief? Certainly, in all cases where the judgment is in fact reversed, the demand of an appeal bond is shown by such reversal to have been wrong: and although it may be said that in such case the appeal bond is, by the reversal, made void and of none effect, yet this circumstance is no compensation to the party for the gratuitous hardship of being compelled to look out for sureties, and file a bond in a case when the right was on his side—still less is it an excuse for the injustice inflicted in those

cases, where the appellant is unable to give a bond, and whose property is sold, and it may be sacrificed, in consequence of such inability.

The correct view of the matter is, that the appeal is virtually but a continuation of the litigation in which the right is involved by the original institution of the suit,—and that the right cannot be considered as settled until declared so by the tribunal in the last resort; and in principle, therefore, no security ought to be required between such commencement and such final determination. Still, as the right to demand such a bond is part of our education, the Commissioners have not considered themselves warranted in striking it out of the system. But they have ventured to mitigate the rigor of the existing law in regard to appeal bonds, while by shortening the delays occasioned by appeals, the appellee will have the less right to complain of those particulars wherein his rights may be supposed to be impaired.

15. An appeal bond is not necessary from a plaintiff or other party, who by the judgment, order, decision or proceeding merely fails to recover what he sues or contends for—nor in an injunction case—nor in replevin—nor in the case of an attachment, where the party has already filed a bond which has been approved according to law—but nothing herein contained shall prevent the Court from requiring an appeal bond, if the Court shall be of opinion that the injunction, replevin or attachment bond is insufficient.

16. The penalty of an appeal bond shall be sufficient to cover the actual sum or value of the thing in dispute and costs in the Court of Appeals as well as in the Court below. If the matter in controversy be property or thing of value other than money, the value shall be ascertained by the Court below—Provided however, if the party appealing be entitled to any portion of the money, property or thing in dispute—or if any other party being entitled to any portion

thereof shall consent that the appeal shall be prosecuted without bond, such portion in either case shall be deducted from the penalty, and the bond shall be given for the residue and shall enure to the benefit of the parties not so consenting.

17. An appeal bond may be given by the party appealing, or by any other person for him and in his behalf, with surety or sureties, in either case to be approved by the Court or clerk.

18. If the party be sufficient himself in the judgment of the Court or clerk, the bond may be filed without surety, and in all cases the party's own responsibility, or ability to pay, shall be considered in judging of the sufficiency of the bond.

19. The Courts shall respectively have power to examine into and determine in regard to the sufficiency of any appeal bond already filed and approved, and may from time to time make and establish such rules for the justifying or proving the sufficiency of such bonds, and for requiring additional security as they may deem wise and proper.

20. An appeal bond filed and approved shall stay an execution already issued, or other proceeding for carrying the judgment decree or other proceeding into effect, but the costs thereof shall be paid by the party appellant.

21. Where an appeal is dismissed because the same has not been prosecuted in time, or because the appeal is premature, no forfeiture of the appeal bond shall take place nor any right of action accrue thereon.

22. An appeal bond may be taken in the name of the State as obligee therein, where the names of the complainants or parties do not appear in the proceedings, or are inconveniently numerous to be inserted in the bond.

23. No appeal bond shall be deemed void, nor its validity affected by any misrecital or other defect therein in matter of form.

ABATEMENT AND WAIVER OF APPEAL.

24. No appeal shall abate or be dismissed by reason of the death, marriage, or insolvency of any party to the suit, after the transcript has been made out by the Clerk of the Court below, or transmitted by him to the Court of Appeals, but the same shall be proceeded in and disposed of by the Appellate Court in the same manner as if no such death, marriage, or insolvency had occurred.

25. The right of appeal shall not abate by death, marriage, or insolvency occurring after the judgment, order or decree, or decision appealed from, and before the transcript is made out, but in every such case, proper parties shall be made under such rules as the Courts respectively may establish, and the appeal shall then be prosecuted in the name of such new parties.

26. Whenever any process, pleading, or proceeding has been by any decision of the Court declared defective or insufficient, and an appeal taken from such decision, any amendment of such process, pleading or proceeding, at the instance of the party appealing, shall be deemed a waiver of the right to appeal from such decision.

OF THE MODE OF SENDING UP THE APPEAL.

27. The mode now in use of making a transcript of the record for the Court of Appeals by engrossing the same in folio shall not be used. And all transcripts hereafter sent from any of the Courts of this State, shall be written in a plain legible hand on one side of the paper only, and on foolscap, which shall be separated into half sheets, and well sewed, or otherwise securely fastened at the left hand corner, at the top of the page, except as is hereinafter provided.

The above form is that used in the Supreme Court of the United States, at least in the copies made out by the Clerk of that Court, and will, it is hoped, be a great improvement upon the present unwieldy folio records, which are about as inconvenient and unmanageable as they well could be.

28. Writs, continuances, and all merely formal proceedings, such as happen in the progress of every case, shall not, unless where they form the subject of the appeal, be set out in the transcript at length, but shall be stated in short, as they generally appear in the docket entries of the case in the Court below; provided, however, that this rule shall be subject to such modifications as the Court of Appeals may from time to time prescribe.

29. It shall be lawful for the parties to any suit or controversy about to be taken to the Court of Appeals, instead of sending a transcript of the record as hereinbefore is provided, to prepare a synopsis of the whole case in such form as they may deem sufficient, showing the character of the suit, the material facts proved or admitted, and the questions of law involved

therein, or arising thereupon—the judgment and decision of the Court below, signed by the Judge thereof—and the same signed by the counsel of the respective parties, shall be filed in the Court below, and a copy thereof shall be transmitted to the Court of Appeals, and the cause shall be heard and determined upon the same in the Appellate Court—but such synopsis shall not have the effect of a case stated, but either party shall be at liberty to carry up to the Appellate Court, such and so many of the original papers as he may deem material or necessary to a more perfect understanding of the case.

Under the late reforms in England, the original roll, and not a transcript of the record is in all cases carried from the Inferior to the Appellate Court.

WHEN APPEALS SHALL BE HEARD AND DETERMINED.

30. Every case taken to the Court of Appeals from any of the Courts of this State, shall be heard and determined by the Court of Appeals at the term thereof, which shall be held next after the appeal is entered, unless the same be continued according to the rules of said Court.

31. An appeal shall be deemed entered within the meaning of the next preceding section, when the transcript, synopsis or proceedings reach the office of the Clerk of the Court of Appeals.

The present rule is, that cases stand for trial at the second term after the appeal, and when that happens to be the term held annually in June, there is in ordinary cases a continuance as of course until December, and the cases are heard some time between that and the following May. In certain cases, a delay of the hearing

to the second term was felt to be inconvenient, and acts were passed from time to time, appointing the first term for the determination of such cases. The cases mentioned in these various acts are classed together, and form what is termed the special docket, and in regard to these cases, the order for trial at the first term is peremptory.

The acts alluded to are those of 1832, ch. 197, by which injunctions were directed to be allowed by the Court of Appeals, or a Judge thereof—1832, ch. 208, in relation to decisions of the County Courts in cases of issues sent for trial from the Orphans' Courts—1834, ch. 248, in reference to petitions for freedom—1845, ch. 7, upon the subject of mandamus—1845, ch. 132, in regard to motions to set aside sales, or for the application of money arising from sales and in the hands of the Sheriff—1845, ch 367, in relation to cases from a Court of Equity determining a question of right, and directing an account—1849, ch. 88, in regard to cases arising out of the administration of the insolvent laws—1852, ch. 155, in reference to petitions to quash attachments before the return day—and other acts having a local application to which it is unnecessary to refer.

If however, as the Commissioners propose, all cases in the Court of Appeals are to stand for hearing at the first term, there will no longer be a necessity for a special docket. It is considered that unnecessary delay in the administration of justice is under any state of circumstances an evil, and if a case can be tried at the second term, the labor of trying it at any time being the same, it may as well be heard and disposed of at the first, as at any subsequent term.

But the advantages of the proposed rule will be felt in other respects. It will simplify as far as it goes the practice in the Court of Appeals—lessen costs by diminishing the number of entries—prevent many appeals which would be otherwise taken merely for delay, and lessen the procrastination attending the administration of justice.

32. When the reasons for an early hearing are very urgent, the Court of Appeals being in session, may, in its discretion, hear and determine a case immediately after the decision below, or as soon thereafter as the appeal can be prosecuted.

DISMISSAL OF APPEALS.

33. The Court of Appeals shall have power to dismiss the appeal in every case where an appeal does not lie, but in such case only.

34. Any appellant may dismiss his appeal at any time before the judgment or decree of the Court is pronounced, but a dismissal by any number of the appellants less than the whole, shall not affect the appeal of any appellant not desiring to dismiss his appeal.

It seems to be a stretch of power to turn a party out of the Appellate Court, on account of some formal omission in the manner of prosecuting the Appeal, and that omission not his own act, but that of the clerk or some of his deputies, in making out the record. Every one acquainted with the subject knows that a large portion of every transcript for the Court of Appeals, is copied by the clerk from the books of forms, and if a clerk or his deputy happen to copy the wrong form, it is none the less regarded as substance in the Appellate Court, and the Appellant, it may be, dismissed for the mistake. The judgment complained of, may be wrong—one even of the rankest injustice—no matter, the record is thrown out, and the Appellant punished by the loss of his case and the payment of all the costs, for a fault, if it be one, in which he had no agency or concern whatever. But we are so educated to forms—they enter so minutely into the very substance and body of our thoughts, that to most of us, the law would be nothing without its ceremonial. There are few among us who are able to perceive how ridiculous and absurd many of these things in reality are.

35. The Court of Appeals shall not entertain jurisdiction of any case in which the decision or judgment of the Court below has been taken merely *pro forma*, by consent of parties.

The jurisdiction of the Court of Appeals is strictly appellate, and the practice here referred to, is an attempt to convert the appellate tribunal into a Court of original jurisdiction.

See 6 How. 10, 41, Ib. 54.

OF DIMINUTION.

36. The writ of Diminution shall not be used, but the Court of Appeals whenever they deem it necessary, upon suggestion and affidavit of either party, shall have power to order the clerk or register of the Court below, to transmit forthwith copies of all such papers, proceedings or docket entries, as they may deem proper for the true understanding of the case; and the original papers may in like manner, be ordered to be sent up, whenever an inspection of the same or some of them may be thought necessary.

37. The Court of Appeals shall have power to order all such amendments, in the proceedings of the Court below, where they may deem the same necessary or proper, as would have been allowed by the Court below, and to correct all irregularities and supply all omissions in the record, which are merely formal.

OF PLEADING IN ERROR.

38. Pleadings in the Court of Appeals shall not be used or necessary.

The writ of error was at common law the ordinary mode of removing a cause from the inferior to the Appellate Courts, and an appeal in a civil suit is a proceeding unknown to the common law and wholly of statutory origin. Pleadings in error belong to the proceeding by writ of error, and are given in detail in the old books. The plaintiff in error was required to assign the errors of which he complained, the general plea to such assignment by the defendant in error was, *in nullo est erratum;* thus the issue was formed to be tried by the Court.

Questions sometimes arise in the Court of Appeals, at this day, in the discussion of which illustrations are drawn from the pleadings in error, but practically all such pleadings have fallen into disuse for a long course of years. The great use of such pleadings

was to direct the mind of the Court to the matters in dispute between the parties, and these were required to be brought out from the record with precision and certainty. It was held, for example, that *quod in omnibus erratum*, was not a good assignment of error, for the reason, that the Court was not bound to enquire of errors if the party did not show them.

In the prosecution of appeals however upon bills of exceptions, founded upon prayers in the Court below, the points and questions of dispute, are, in appeals from the Courts of Common Law, at least, as particularly specified as they could be by the most elaborate system of pleading in error. But if this were not so, the existing practice in the Court of Appeals, requiring the parties to state their points on both sides, with the authorities intended to be relied on, is substantially a system of pleading in error, and practically is found to be better than the system for which it is a substitute.

A writ of error abated by the death of the Lord Chief Justice, and in the House of Lords by the dissolution of Parliament, but not by the death of the plaintiff in error, his executor being entitled to a *scire facias ad audiendum errores*.

OF THE ARGUMENT, HEARING AND ADJUDICATION OF CAUSES.

39. The argument of causes in the Court of Appeals shall be in print and in pamphlet form, under such rules and regulations as the Court shall prescribe: and the Court may in all cases where they shall deem the same necessary or proper, require an additional argument to be made orally by the parties or their counsel, provided, that the Court may change or modify this section, and the matters herein contained, as they may from time to time deem expedient.

Formerly there was no limit to the number of counsel entitled to be heard, nor to the time they were permitted to occupy the Court of Appeals, and the trial of causes consumed an unreasonable length of time. It was not an unusual thing in the case of one gentleman of the very highest distinction, for him to occupy an entire day in his exordium. At length a speech was made of four days con-

tinuance, and thereupon, the Court made a rule limiting arguments in all cases to six hours. But one effect of the rule was, that speeches of six hours became the fashion, and no gentleman considered that he had acquitted himself respectably, unless he filled up his whole allowance of time. The present rule limits the number of counsel to two of a side, and the time to two hours and a half each. But discussions in cases where there is neither novelty nor difficulty to justify the consumption of time, are still tedious and discursive, but few counsel being prepared to give the Court credit for any legal knowledge at all: the general opinion being that the Court require instruction in all cases whatsoever, and instruction the Court is sure to receive in almost every case argued before it.

The rule of practice proposed by the above section, should it prove acceptable to the Court and the profession, will correct some of the existing evils, especially the great length of time consumed in getting through the business of the Court. There is, moreover, no reason to apprehend that cases will not be as thoroughly considered, and as well decided as under the present practice. For it must be remembered that during the early part of each day, that is to say, from ten until three o'clock, when the minds of the judges are fresh and unwearied, the Court are occupied in *hearing the arguments* of counsel, and it is only after dinner and at night, after the regular labors of the day are over, and both the mind and body are entitled to rest, that the judges have to go to work, read the authorities cited in previous arguments, and write out their opinions. And after this routine in Court and out of Court has continued for seven months without intermission, it were not to be wondered at, if the Court in the performance of its duties, exhibited at times, some slight symptoms of bodily and mental exhaustion. We make this remark because judges are men and not made of iron.

It seems reasonable to suppose therefore, that if all the causes on the docket, and constituting the business of the term, were argued in print, the chances of having sound law, and well considered opinions, would be better than at present. The first duty of the Court would be to establish the order of proceeding. The cases would be arranged under their appropriate heads, and according to their kindred subjects. Then devoting the best hours of the day to the examination of the printed arguments and authorities, the great mass of the business could be disposed of in a

manner perfectly satisfactory to the Court and the public. Such cases however, as from their importance and difficulty required an oral hearing, would be made up into a docket for argument, and public notice given that on a certain day, the Court would meet to take up this docket. The Court would not be in session more than half the time occupied at present, and the business would be as well done. If, however, the rule were found not to work well in practice, the judges could under the power reserved to them, modify or change it, or bring it back to what it now is. The experiment is, at all events, worth the trial.

40. In hearing and adjudicating causes before it, the Court of Appeals shall not be restricted to the points or questions which were raised and decided by the Court below, but the whole law of the case and all points and questions arising in it shall be open for revision and adjudication by the Appellate Court, and the act of Assembly passed at December session, in the year one thousand eight hundred and twenty-five, chapter one hundred and seventeen, by which it was enacted in substance, that neither party in the Court of Appeals should be permitted to urge or insist upon any point or question which should not appear by the record to have been raised or made in the County Court, and upon which that Court may have rendered judgment, be, and the same is hereby repealed.

41. It shall be the duty of the Court of Appeals to hear and determine the questions or matters of law involved in the suit or controversy, disregarding matters of mere form, so as to prevent the necessity as far as practicable, where the case is to be returned to the inferior Court upon procedendo, or with instructions, of a second appeal.

42. Where the appeal is from the judgment of the Court below, in a case referred to it by agreement of

the parties, the Court of Appeals in their review and adjudication of the case, shall be limited to the questions of law arising therein.

43. In appeals from the Courts of Equity, from the Orphans Courts, and from the Courts of Law, in cases of insolvency, of mandamus, of petitions for freedom, of decisions upon rules to show cause, and upon motions where appeals properly lie, the Court may either affirm or reverse the decision, or remand the cause without either affirming or reversing the decision, but with its opinion upon the law of the case, and directions to the Court below in what manner to proceed, in the settlement of the controversy.

The act of 1849, ch. 88, provides that in appeals from the County Courts in cases of insolvency, the Court may either affirm the decision or direct in what manner it may be changed or amended. The provision is similar to that of the act of 1832, ch. 302, sec. 6, by which in appeals from the Courts of Equity, the Appellate Court where the substantial merits of the case require it, are directed neither to affirm nor reverse the decree, but to send back the record with directions to the inferior Court how to proceed in the case. Both acts are copied from the act of 1798, ch. 101, sub ch. 15, sec. 18, which provides that in appeals from the Orphans Courts the Court of Appeals shall either affirm the decree, order or decision of the Court below, or direct in what manner it shall be changed or amended. The act of 1849, ch. 88, sec. 4, contains a provision which directs that in certain appeals therein specified, it shall be the duty of the Court below immediately upon the entry of the appeal, to certify and state the points or questions made or raised below, to which the attention of the Court of Appeals shall, in its revision of the case, be confined. This is the first and only instance in the legislation of this State, in which the Court below has been trusted with the specification of the legal questions made and decided in the trial. In this view of it, it is an important innovation. It is believed that in no other instance have the legal questions involved in a case, been raised otherwise than by bill of exceptions, or rule to show cause or motion, or in some other manner originating with the party.

44. In all appeals where the decision or decisions below affect only one cause of action, or any number of causes of action less than the whole, or any separate part of the same cause of action, the reversal of the judgment or decision below shall be limited in its effect to the scope of the decision or decisions below, and final judgment for the appellee shall be given upon all parts or portions of the case in which the decision or decisions below are not reversed or affected by the opinion of the Court of Appeals.

It is a very great evil constantly occurring in practice, that a decision of the Court of Appeals but seldom limits the scope of enquiry upon a second trial of the cause in the Court below. An action of ejectment, for example, for sundry tracts of land is tried, and exceptions are taken upon points affecting but one tract, or affecting each tract, and the Court of Appeals affirm all the decisions but one. Now when the case comes back upon procedendo, the whole enquiry is opened anew, and the plaintiff is compelled to reiterate all his proof, even in regard to those tracts in reference to which he obtained the verdict of the jury, the judgment of the Court and the affirmation of that judgment by the Court in the last resort; and if in any of the proof he was able to adduce in the first trial, he may not be prepared to adduce now, he must lose his cause or a material portion of it.

The action of Ejectment is only mentioned by way of example, but under the new system of practice and pleading, which not only allows but requires the joinder of as many causes of action as are germain to the same suit, and under which in an action of contract, may be united, a bond for the payment of money,—another bond with a collateral condition, an agreement to build a house, a promissory note and an account,—the number of cases in which the same inconveniences will occur, must be greatly multiplied.

Under the law as it now exists, a trial is had and the case is taken to the Court of Appeals, where the judgment is reversed and the case sent back. Another trial takes place, another appeal and the judgment again reversed and the cause sent back a second time. A third trial is had and the same course of proceeding is continued, until the cause is finally affirmed upon all the points

reserved, and the controversy is closed because the powder is exhausted and the litigation can procced no further. Now the most remarkable feature of the proceeding is, that no one trial, nor all of them put together, until an affirmation upon all the points reserved is obtained, closes the enquiry upon any part of the case, but in each successive trial below, the cause is to be proved and gone through from the beginning as if no trial had ever taken place. The questions of law already decidcd are considered settled, and that is all that has been accomplished.

In a trial where ten witnesses are examined and an exception is taken to some unimportant expression, it may be of one of them, and upon appeal the decision below is reversed, the cause is sent back upon procedendo and is tried over from the beginning, all the witnesses are to be examined anew, and all the rights of the party succeeding in the first trial are again put to hazard. In regard to this inconvenience the remedy is by no means free from embarrassment from the difficulty which the Appellate Court must experience in saying what influence the testimony improperly admitted may have had upon the mind of the jury.

But the Court can say whether the testimony was of such a character as ought to have had any influence upon the mind of the jury. And it will be proposed to vest in the Court of Appeals the power to refuse a procedendo when a case is reversed for the improper admission or rejection of evidence, in all cases where the Court shall be of opinion the evidence considered in connection with the other proofs in the case, was of so light and inconclusive a character that no rational mind could be supposed to have been influenced by it. The power of the Courts to judge of the legal sufficiency of evidence is no new thing in Maryland, (Cole vs. Hebb, 7 G. & J. 20.) The solemn verdicts of juries are often set aside and new trials granted, in cases where such verdicts are against the weight of the evidence.

The Commissioners have been mainly solicitous to correct those peculiarities of the system of practice prevailing in the Courts of Maryland, which have a tendency to lead to appeals in detail or repeated appeals from the separate points of a case. The trial below stops for example, whenever one point covering the whole ground of a plaintiff's claim is decided against him. If that decision is reversed, the case goes back and the trial proceeds until another point going to the whole ground of the action is ruled against the plaintiff when another appeal is had, and so on, a sepa-

rate appeal is taken until each separate objection to the plaintiff's demand is disposed of in succession. Thus the litigation is prolonged until the costs amount to more than the subject in dispute, and all parties are worn out with the delays of justice. The act of 1825 is responsible in a great degree for these evils, the Court of Appeals but seldom deciding more of the law of a case than that which is presented to them by the points reserved. The repeal of that act will do much towards the correction of the evils alluded to. And the new rules and principles of practice herein proposed, will, it is sincerely hoped, be so construed and applied, as to render any additional changes hereafter unnecessary. There is one case pending in the Court of Appeals at the present time, which has been twice decided by that Court, and is now there for the third time.

45. The Court may pronounce final judgment, and refuse to award a procedendo, notwithstanding the reversal of the judgment, decree, order or decision below, in the following and in all similar cases:—

1. Where the Court is of opinion that the appellant will gain nothing by a new trial in the Court below.

2. Where by reason of some bar pleaded to the plaintiff's cause of action, or objection alleged against the defence of the defendant, it would be fruitless to proceed further with the suit or defence, though the cause of action or defence might in other respects be maintained.

3. Where the appellant was not prejudiced by the instruction or decision below.

4. Where if the instruction excepted to, had been granted, it would not have enabled the party to maintain his cause of action or defence to a greater extent, than the jury would be otherwise authorized to allow him.

5. Where the judgment, order or decision below, though erroneous, did not effect the substantial merits of the controversy.

6. Where the testimony either erroneously admitted or rejected, could not have conducted the minds of the jury to a different result.

46. The Court may award a procedendo in the following, and in all similar cases:—

1. Where the case below has been decided upon demurrer or motion in arrest of judgment, and where, by affirming or reversing the judgment or decision below, the parties, or one of them, will be shut out from the benefit of his cause of action or defence.

2. Where the substantial merits of the case require that a new trial shall be had.

In case of demurrer to a declaration in matter of form, the Court rules the demurrer good. The plaintiff elects to appeal and not to amend, will the Court of Appeals after affirming the judgment send back the case that the plaintiff may have a hearing of his case upon the facts? But suppose the demurrer overruled, and judgment below for the plaintiff—the defendant appeals and judgment affirmed, is not the judgment final against him, although his defence upon the facts is shut out? The above section is intended to give a new trial in either case, although it savors of encouragement to the practice of appeals in detail.

47. Where an appeal is taken from the decision of the Court below on a motion in arrest of judgment, all points and questions which have been made during the trial, and which appear upon bills of exceptions, or otherwise, shall be sent up upon the appeal, and shall be considered and disposed of by the Court of Appeals.

In one case where instructions had been granted adversely to a party, who had nevertheless arrested the judgment, and an appeal by his opponent, the decision was reversed, a procedendo was awarded to afford the defendant an opportunity to appeal upon the instructions. (1 Gill, 32.) That the system of practice now prevailing in the Courts of this State, leads to such a result, may be admitted, but the case is nevertheless an extraordinary one. The instructions of the Court below were in the record, the Court could not help seeing them, nay, they recognize their presence by their course of proceeding, which is to send back the case, that the defendant may bring the same case, and same instructions before the Court by a distinct appeal.

It is observable that by the Act of 1831, ch. 319, the Court of Appeals in cases taken up from the Courts of certain enumerated counties, are required to decide upon all the bills of exceptions taken in the trial below, whether appealed from or not.

48. Where the record has been encumbered by either party with unnecessary matter, or with unnecessary testimony taken in detail the Court may make such party though successful in the suit, pay such portion of the costs as may be due to such excess of matter or testimony.

49. All cases originating in the Courts of Common Law, which upon appeal have been heard and sent back upon procedendo or otherwise, shall be tried at the first term thereafter of the Court below, provided notice of such trial be given by the party desiring the same to the adverse party, at least thirty days prior to the sitting of the Court, and provided the said trial can be had with justice to the parties, otherwise the cause shall be continued.

50. Courts of Equity in which cases have originated, and been removed to the Court of Appeals, shall officially take notice of the return of such cases, as well as of the decision of the Appellate Court,

and shall proceed therein to a final decree or other disposition of the same, in accordance with such decision.

51. Any party who by the judgment, decree or order of the Court of Appeals shall become entitled to costs therein, shall have his execution from the Court of Appeals for such costs, whether the suit or controversy out of which such costs arose have come to an end or not.

52. The writ of error shall not hereafter be used.

APPEALS FROM THE ORPHANS COURTS.

53. There shall be an appeal to the Court of Appeals as of right from every judgment, decree, order, or decision of any Orphans Court of this State, or by agreement of the parties, to the Circuit Court for the County, or to the Superior Court of the City of Baltimore.

54. In respect to the right of appeal, there shall be no difference between a plenary and a summary proceeding.

55. The right of appeal shall be barred unless the appeal shall be entered within thirty days from the date of the judgment, decree, order, or decision complained of, and the transcript of the proceedings shall be made out, and transmitted to the Appellate Court, within sixty days after such entry. Provided, that no party shall be deprived of his right of appeal by the neglect, either wilful or otherwise of the register, or by accident in the transmission of the transcript.

56. Any notice of the intention to appeal, entered on the minutes of the Court, shall be an entry of an appeal within the meaning of the next preceding section.

57. An appeal from the Orphans Court shall not stay further proceedings therein, in regard to the matter appealed from, which may with propriety be carried on before the appeal is decided, provided the Orphans Court can provide for conforming to the decision of the Appellate Court, whether the same be for or against the appellant.

58. All appeals from the Orphans Court shall be heard and determined by the Court of Appeals, at the term thereof, next after the transcript shall be filed therein; and when the right of administration is in controversy, or in cases where the settlement of the estate must be delayed by the pendency of the appeal, the same shall be heard and determined by the Court of Appeals then in session.

59. The Court of Appeals shall either affirm or reverse the judgment, decree, order or decision appealed from, or direct how it shall be modified, or what further proceedings shall be had by the Court below.

60. If the transcript or record be defective, the Court of Appeals shall direct how the defect shall be supplied.

PRACTICE IN THE COURTS OF LAW.

An entire new code of practice for the Courts of Law of this State—new in all its parts and details, is not desirable. Portions only of the existing practice require amendment. Other, and by far the largest and most important portions, are not only well enough as they are, but have the merit of constituting the frame-work and body of that system of procedure, to which both the people and the profession have been accustomed, and which they have no wish to see subverted, even to be replaced by what might be deemed a better system. It is by no means therefore the intention of the Commissioners to destroy, or even materially to disturb the identity of the present practice. There are, however, many rules and proceedings, either in whole or in part, of statutory regulation, which have failed to work well in practice, and which may be so amended and remodeled, as that the new matter and the old shall blend well together, and form a consistent and harmonious whole.

The changes already proposed in the practice of the Court of Appeals, render it necessary that corresponding changes be made in the practice of the Courts below. No useful improvement can be affected in either jurisdiction, that is not carried through both. The business of preparing a case for an appeal must be conducted in the Court below—the trial of the appeal is in the Appellate Court, and the procedure in the one Court must correspond with and be a part of the procedure in the other. And there is no branch of the jurisprudence of the State in which more real good can be affected, than by a successful reform of the system of appeals both above and below.

RULES OF CONSTRUCTION.

1. The rule that the Common Law shall prevail, unless expressly abrogated, shall not be used or applied in the interpretation of any of the provisions herein contained, but in all cases effect shall be given to the new rule, to the full extent of the principle thereof, even though the Common Law may thereby be abrogated by implication.

2. No provision shall be retroactive unless so expressly declared.

3. "Insane person" shall be construed to mean every person who is an idiot, lunatic, *non compos mentis*, or deranged.

OF BRINGING SUITS.

1. The time of issuing the summons or other mesne process shall be deemed the commencement of the suit, and tests giving effect to process by relation to a time prior to the date thereof, shall not be used.

2. More than one suit shall not be brought on any joint, or joint and several contract, unless the defendants reside in different Counties, or only part of the defendants reside in this State, when suits may be brought against all of the defendants in as many Counties wherein any of them reside, or in each County against as many defendants as reside therein, at the option of the plaintiff: and parties absent from the State may be sued either jointly or separately, on their return to this State.

3. If one or more joint, or joint and several contractors be dead, separate suits may be brought against

their executors or administrators; and all parties who are joined as defendants in the first suit, and not found, may be sued again whenever found.

4. The assignor of a contract may sue in his own name, but without prejudice to any set-off or other defence which might have been allowed or made if the action had been brought in the name of the assignor.

5. Married women, infants and insane persons, may sue in their own names.

6. No insane person, after being so found by the inquisition of a jury, shall be sued in a Court of Law, and any judgment against an insane person, after being so found, shall be void.

In New York the Courts of Common Law are ousted by statute of jurisdiction, in all cases where persons *non compos mentis* are parties defendants. A judgment therefore in that State against an idiot or lunatic after office found, is void. But in Maryland the statute of 1785, ch. 75, has been construed to give to the Court of Chancery concurrent jurisdiction only in such cases with the Courts of Law. The Courts of Equity are the proper tribunals to deal with this unfortunate class of persons and their concerns. A Court of Law acts separately upon each isolated suit brought against the lunatic, and the judgments obtained against him will be liens upon his real estate, according to their priority as to date. But a Court of Equity having once obtained the care and custody of the person and estate of the lunatic, if there be debts, will order them to be paid *pari passa*, and will be more astute in scrutinizing the justice of the claims presented against him.

7. A co-partnership or firm, doing business in this State or elsewhere, under a particular name and style, may be sued in the name of the firm, but only to affect the assets of the firm.

8. The clerk shall issue a duplicate of the summons or other mesne process, in all cases where the plaintiff may require it.

OF THE SERVICE OF MESNE PROCESS.

9. The summons or other mesne process may be served by delivering a copy thereof, or by reading the same to the party if he be found, or if not found, by delivering a copy to his wife or general agent; but service by delivery of the copy to the wife or agent, shall not be good if the party at the time, be absent from the County, and do not return to the County before the return day thereof.

10. Service upon a corporation, the office or place of business of which is within the County in which the suit is brought, shall be by delivering a copy of the summons or other mesne process to any officer or general agent of the corporation, and service upon a corporation when the suit is brought in any County other than that in which the office or place of business is held, shall be by delivering a copy as above at least fifteen days before the return day thereof, to be proved by the affidavit of some disinterested person.

11. Service upon a partnership or firm shall be by the delivery of a copy of the process upon any member of the firm, if the suit be brought against such partnership by the name of the firm.

12. Service of mesne process shall be upon each individual named as a defendant therein.

OF ATTORNEYS.

13. The entry on the docket of the name of an attorney for any party, to a suit or other proceeding, in the manner now practised, shall be *prima facie* proof of the employment of such attorney by such party.

14. When an attorney intends to appear for any single party, or any number of parties less than the whole, the parties for whom he appears shall be designated on the record, in such manner and form as the Courts by their rules respectively, shall prescribe.

15. A party shall be bound by the act of his attorney, within the scope of the attorney's authority.

16. A party shall not be bound by the act of an attorney, to whom he has given no authority express or implied—nor for acts not done by his attorney nor with his knowledge nor assent.

17. Every case in which the fact of the employment of an attorney, or the fact of his having acted for his client, is disputed, shall be tried by the Court under such rules and regulations as the Court may prescribe.

The rule that the party shall be bound by the acts of his attorney, is one of necessity. The business of the Court is all transacted through its attorneys, by whom all judicial proceedings are had, and through whom parties litigant are heard in Court. To permit the solemn judgments and proceedings of Courts to he set aside, upon the mere allegation of the party, that the attorney was not authorized to do the act complained of, would lead to the most pernicious consequences. The entry of the attorney's name to the suit therefore, should be *prima facie* proof of his employment, and whenever employed at all, his authority should be held to extend to every act which an attorney is competent to do in Court.

But there is a limit to the principle of necessity, upon which the rule is founded. An attorney may thrust himself unbidden into a cause, or having been regularly employed, acts or proceedings may be had in his name, without his knowledge or authority. A party may be ruined in the one case by an attorney whom he never employed, or in the other, by a stranger in the name of the attorney whom he did employ. Is there any reason why the Court should not in either case, hear all the facts, and rectify what has been done amiss?

It may be admitted as a sound and conservative rule, that the judgments of Courts should not be disturbed upon slight grounds, but we cannot go the length of saying with some of the authorities, that they should not be disturbed at all. All merely artificial rules on the subject are unwise. Surely the Courts may trust themselves with a reasonable discretion in this, as in other cases. That the subject is both delicate and difficult may be admitted, but it does not therefore follow, that the hands of the Court should be tied up by a rule in advance, forbidding their interference in any case, no matter what the circumstances.

OF THE TRIAL CALENDAR.

18. To avoid the consumption of time in useless debates—to prevent the unnecessary attendance of parties and their witnesses in cases not really for trial—to promote the despatch of business and save costs, a trial calendar comprising a list of the causes appointed for trial at each term of the respective Courts of law, shall be settled on a day prior to the term, to be fixed by rule of Court for that purpose.

19. All parties and their counsel shall be held to take notice of the day so fixed, and all causes entered upon the calendar, shall be for trial at the said term in the order they occupy on the list; and all causes not entered upon the said calendar, shall, at the option of either party, be continued generally to the succeeding term. Provided, that parties shall in the cases last

mentioned, make their election to try or continue, in such time and manner as the Courts shall by their rules respectively prescribe. And provided, that causes upon the trial calendar may be continued for the want of testimony which the party has been unable to procure, and for other urgent cause as heretofore.

20. In every case where the declaration is not filed by the calendar day, such case may, at the option of the defendant, be excluded from the trial calendar, and in every case where the declaration is so filed, and the pleas are not filed by the first day of the term, the omission to file the pleas by such first day, shall, at the option of the plaintiff, be cause of continuance. Provided, that all general issue pleas may be put in at the trial as heretofore.

21. A plaintiff having filed his declaration before the calendar day, shall, in no case be compelled to take issue upon, or reply to a special plea filed after the first day of the term—and the omission of the defendant to plead specially until after the first day of the term, shall be deemed a waiver of the right to file a special plea in the case, and the plaintiff may insist upon a general issue plea being put in, and a trial had of the cause in its order.

22. Nothing herein contained shall be construed to prevent amendments in pleadings and proceedings as heretofore.

23. Demurrers and pleas in abatement shall be filed within such times, and under such regulations as the Courts shall prescribe.

24. Nothing herein contained in relation to a trial calendar, shall apply to the City of Baltimore.

25. Special demurrers shall not be used nor entertained by the Courts of this State.

No evil incident to the present system of practice has been more generally and justly complained of in the community, than the great length of time which is consumed in determining whether causes on the trial docket are really for trial or not, and it is the right of the public to insist that some regulation such as that proposed above, shall be adopted by the Courts. By the present course of proceeding, the cases on the trial docket are regularly called over in their order, but until a case is called up for trial it is not known whether the parties design trying it or not. It is then only that they are required to answer the question, whether they are ready for trial. It may be that one party desires to stave off the trial and therefore asks for a continuance. This he does by insisting that an important witness is absent, of which fact he files an affidavit, or he demurs, or pleads in abatement, or, as is now a usual device, files a string of long special pleas, at the moment of trial. All these matters are debated at length, and while the debates last, and in their aggregate they consume a large portion of the term, all the parties to all the causes on the docket which have not been tried, with all their witnesses, are waiting for their turn to be heard. Every hour's delay thus occasioned adds its costs to all the untried cases. One cause delayed unnecessarily for one day, adds one day's delay and costs, to forty cases it may be, that remain for trial after it. But a trial calendar will, at all events, determine, at the commencement of the term, what cases are not for trial, which will obviate in a great measure, the evil alluded to, and a proper administration of the rules proposed, will, it is believed, remove all just ground of complaint on the score of unnecessary delay. But the Commissioners deem it their duty to report, that under the present rules of practice, the community are not fairly dealt with. In many of the Counties, it is not an uncommon thing for parties to attend with all their witnesses, for two, three and even four weeks, and then have to return home without a trial. Such cases can and ought to be prevented. In the City of Baltimore, where the Courts are in session the greater portion of the year, and where the parties

and their witnesses are always at hand when a case is called up, the machinery of a trial calendar is not called for.

OF BILLS OF PARTICULARS.

26. The object of a bill of particulars is to furnish a party more precise information of the cause of action, or of the defence, than is given by the pleadings in the case.

27. The mode of demanding a bill of particulars, shall be by an entry on the docket, of such demand, with the day of such entry, and a service thereof on the party to be affected thereby.

28. A bill of particulars shall be deemed an amplification of the plaintiff's declaration or defendant's pleas or other defence, and the other party shall be deemed under rule to plead, only from the time the bill of particulars is furnished.

29. If no bill of particulars be furnished after regular demand made therefor, in cases where a bill of particulars is the right of the party demanding it, the Court shall enter against the party so in default, a judgment of *non pros*, or upon *nil dicit*, as the case may be.

30. A bill of particulars shall be deemed sufficient if not erroneous in any material item, or if the party demanding it have not probably been misled by it. But when the particulars vary so materially from the evidence as to render it probable that the party has not been apprized of the real claim or defence intended to be made by the party furnishing them, he shall be precluded from going into that part of his demand or defence.

31. A bill of particulars may be amended under such rules and regulations as the Court may prescribe.

32. Nothing herein contained shall be construed to prevent the Courts of Law of this State, from making such rules and regulations in regard to bills of particulars, as they may deem wise and proper.

OF SPECIAL JURIES.

33. Whenever either party to any trial in Court, civil or criminal, or to issues sent from any other Court for trial, shall upon his own oath, or upon that of his agent or attorney, suggest to the Court, that in his opinion a fair and unprejudiced trial cannot be had thereof, with a panel from the list of petit jurors summoned by the sheriff for the term, the Court shall forthwith order a venire to be issued to an elisor to be named by the parties, or in case they cannot agree, by the Court, who shall summon twenty jurors to attend on a day named in the venire for the trial of such cause, and both parties shall strike from the said list, and the panel to try the cause shall be settled and sworn according to the existing practice. Provided, that a party exercising his right to a special venire, under this rule, shall be deemed to have thereby waived his right to remove his case to another County for trial.

The condition of things in many portions of the State, requires the correction of such a rule as the above. Sheriffs are nominated, run and elected as political partisans, and jurors are often all whig or all democratic, according to the political bias of the officer who selects them. With a whig jury a democratic suitor is unwilling to trust his cause, and *vice versa*. The distrust in such cases, whether well or ill founded, is almost as bad as the reality. It is a great misfortune that those who are called to administer justice, either as judges or jurors, should be suspected.

But political are not the only influences which operate to prevent sheriffs from discharging this the most important of their duties, in good faith. While candidates are before the people these persons find it convenient to make interest among the voters, by profuse promises to a particular class of people—those of course to whom the distinction is a flattering one, to put them upon the jury, and it thus happens that after the election, the sheriff has no choice left as to whom he is to summon as jurors, but has simply to perform his promises; and hence it is that the suitor is so often compelled to submit the determination of questions, involving his property, his reputation, or it may be, his life, to a class of persons, who have neither the intelligence to comprehend his rights, nor the moral elevation to vindicate, if they did comprehend them.

There being no remedy under existing laws, for the evil; no mode of superceding the regular list of jurors summoned for the term, parties are driven, by the impossibility of avoiding the adjudication of their rights by men whom they cannot and will not trust, to remove their cases to other Counties for trial. This is the true secret of most of the removals that occur. But this right of removal is regarded as a high and sacred privilege, one which the people of the State in their Constitution, and also through their representatives, by a series of laws, beginning with the present century, have asserted in the most solemn forms, and guarded with the most jealous care. Thus we see that to entitle a party to remove his cause, and to drag after him to a distant Court, the opposite party and all the witnesses and counsel on both sides, he is not required to prove any facts or adduce any testimony, but his own oath of his own belief that he cannot have a fair and impartial trial in the County where the case is pending, entitles him of right to have it removed; upon the suggestion and affidavit being filed, the judge has no choice, but remove the cause he must, to another County for trial.

There can be no doubt that a large portion of the removals occurring under the existing practice, never would be thought of, if the party had the alternative of a trial by an unexceptionable jury of his own County, and that if a plain and facile mode were provided, of obtaining a special venire, without the necessity of impeaching by any specific charges, the fairness of the regular jury list, but simply upon affidavit, such as is required for the removal of a cause, but comparatively few cases of change of venue would be resorted to.

It ought moreover to be considered, that a power given to parties in Court to discredit his jury, by substituting another for it, would operate powerfully to keep the sheriff to a faithful and conscientious discharge of his duty. He would be extremely careful that his jury lists should be composed of men above all exception; and the probability is, that after the proposed power was given to suitors, they would seldom find it necessary to exercise it. Upon the whole it may be safely assumed, that a special *venire* under the proposed rule, would not be as often resorted to, as a change of venue on account of the character of the jury summoned by the sheriff is, under the present practice.

Apart however from these considerations, great and growing evils are known to exist under the present system, and some remedy ought to be provided for them. The old Common Law proceeding of a challenge to the array, the only corrective in such cases known to the law, amounts in practice to no corrective at all, for independent of the difficulty of quashing the array, if that were all, there is no practice established in this State, in regard to the proceedings consequent upon setting aside the jury of the sheriff. Is the coroner to summon the new jury? If so, how many is he to summon? And what is the law in such case as to the striking and swearing of the panel? Again, would the jury thus summoned by the coroner or elisor, take the place of the regular jury for the term? Or would the regular jury try all the cases on the docket, except the one in which the array was quashed? Those questions, it is believed, have never been settled, because they have never arisen. And they have never arisen because, although the evils incident to the existing system are very great, yet the remedy, if there be one, is encompassed with too many difficulties to be put in practice.

The arrangement proposed may possibly be objected to on the score of expense, but it should be remembered that the cheapest judicial remedies are rarely the best. But the subject is one of the very highest importance, and the matter of a little more or a little less cost, should not be permitted to claim a moment's consideration. Besides, even in reference to the expense, if that needs must be the question, it is by no means certain that the proposed change would not upon the whole be more economical than the present system—for that it will prevent a great portion of the removals that would otherwise take place, cannot be doubted, and it is as little to be doubted that the prevention of one removal to another County, would save the cost of many special *venires*.

OF THE REMOVAL OF CAUSES.

34. Either party shall have the right to remove the cause to an adjoining County for trial, whether such County be in the same judicial district or not, upon suggestion and affidavit as heretofore practised, at any time before trial, or after a new trial granted, or after the jury have been discharged upon their failure to agree of their verdict, or after a juror has been withdrawn, but after the jury or any part of it has been sworn, the party shall be deemed to have determined his election as to *that* trial, and the same shall proceed to a verdict or disagreement, as the case may be.

See the remarks of the Commissioners in their report on the Criminal Law, chap. xxi. See also the case of Wright vs. Hamner, 5 Md. Rep. 370. This case has been decided since the preparation of the report on the Criminal Law, and the principle so clearly stated by Mason, J. is the law both as it is and as it ought to be, "that the clause in the Constitution upon the subject of the removal of causes, was designed to secure to parties, beyond the control of the Legislature, the general right to remove their causes under certain specified circumstances, but it was not the design of the Constitution to prohibit the Legislature from enlarging the right, at any time."

35. Upon the order of the Court being made to remove a cause at the instance of one party, the Court may, upon a like suggestion of the other party, that he cannot have a fair trial in the County to which the cause has been ordered to be removed, order it to be removed to another County, as under all the circumstances, the Court shall deem most likely to promote the ends of justice.

On account of the prejudices which every party must expect to encounter, who is willing to swear that he cannot have justice

among those who know him best—his own neighbours—a removal would rarely be resorted to, if the party had the choice of an alternative. A party removes his case only when he must do so, and there are few parties in Court, it is confidently believed, who would not willingly give the right of removal in exchange for a special *venire*.

OF OYER.

36. Any deed, contract or other instrument of writing, described or referred to in pleading, by either party, shall, upon demand of the opposite party, be produced in Court.

37. Where the copy of a deed, contract, or other instrument is made evidence by statute, the copy may be produced instead of the original, unless the genuineness of the original be disputed—or an alteration or erasure thereof is alleged—or where from any cause an inspection of the original is desired, in all which cases the original shall be produced.

38. The production of a paper may be enforced whether profert of it be made in pleading or not, and a paper produced upon demand, shall remain in Court, subject to the Court's order, until after the trial.

39. Where a paper is a public record, and not in the power of the party, and the original is required, the Court may issue its order for the production of the same, and the keeper or custodiary thereof, shall, in obedience to the order, deliver the same to some officer of the Court, whom the Court shall designate, to be subject to the Court's further order until after the trial.

40. The mode of demanding the production of a paper, shall be by notice on the record, and where the

original is demanded the notice shall so specify, with the reason for the demand of the original.

41. The Courts shall respectively have power to regulate by their own rules, the form of demanding the production of papers, the manner and time of producing the same, and may establish such further regulations in reference thereto, as they may deem expedient and proper.

As a general rule, a party who counts upon an instrument of writing will, from choice, produce it at the trial, and it is always a suspicious circumstance that a party holds back his deed or contract, and seeks to avoid the exhibition of it, after oyer has been craved. It is probable therefore, that the authority of the Court will not be called into requisition to enforce the production of a paper, but in cases where there is some strong necessity for the production. For these reasons the power of the Court, wherever it is required to interfere at all, should be ample.

The production of books and papers not described or referred to in pleadings, is already provided for in a former report. See Report on Evidence, sec. 40.

OF THE REFERENCE TO THE AUDITOR.

42. In all actions grounded either in whole or in part upon an account, or in suits against executors, administrators, guardians or agents, or others, where the liability of the defendant depends upon receipts and payments, or charges and credits, involving the statement of an account between the parties, the Court may order the case to be referred to the auditor, or to such special auditor as may be named by the parties.

In suits comprising several causes of action, some grounded upon accounts and dealings between the parties and others not, the reference should be limited to such causes of action, as were appropriate to the services of the auditor. So far as the action

was grounded upon a bond, note, or other written contract, apart from an account, the reference to an auditor would be unnecessary.

43. The auditor shall appoint, unless the parties can agree upon, a day and place to appear before him, he shall state the account upon the evidence and vouchers adduced—and at the request of the parties or either of them, and upon their instructions respectively, shall state such further accounts as the parties or either of them may desire for the purpose of presenting the case in its various aspects, to the Court and jury, according to the diverse hypotheses of the parties or either of them.

44. The auditor shall report his own statement or account, with the reasons on which the same is founded, to the Court. He shall report also the accounts stated at the instance of the parties, or either of them, and under whose instructions they are severally reported.

45. Evidence objected to, shall be received by the auditor, and the testimony with the objections reported to the Court.

46. Exceptions to the auditor's report may embrace objections, both in law and fact, and shall be filed and heard under such rules and regulations as the Court shall prescribe.

47. The report of the auditor, if not excepted to, or to the extent that it is not excepted to, shall be conclusive upon the parties.

48. Witnesses examined before the auditor, shall not be again heard in Court, unless under special cir-

cumstances and by the allowance of the Court, but such evidence as could not be had before the auditor, due diligence having been used to obtain it, may be adduced at the trial of the cause.

49. The auditor shall issue summonses for such witnesses as the parties may name to him, and shall have power to enforce their attendance by attachment and fine.

50. The auditor shall have power also to order a commission to be issued by the Clerk in a cause referred to him, to take the testimony of witnesses residing out of the County, City or State.

51. The parties may, by agreement, submit the case upon the report and statements of the auditor to the Court, in which case it shall be heard and determined by the Court without the intervention of a jury.

52. A cause may be remanded to the auditor, either with or without instructions, whenever the Court shall be of opinion that the purposes of justice require it.

53. When a cause is remanded to the auditor, the parties shall not be precluded by any thing which has previously occurred in the case, from re-examining, discussing, and adducing further evidence in relation to any point or question of law or fact, involved in the case.

54. The reference of cases to the auditor, the proceedings of the auditor upon such reference, and the proceedings of the Court upon the report of the auditor, shall be subject to such modifications and further regulations as the respective Courts of law shall by their rules prescribe.

By the act of 1785, ch. 80, sec. 12, the Court may in actions grounded upon account, order the accounts and dealings of the parties to be referred to an auditor, and the act then provides that "there shall be such proceedings therein as in cases of actions of account." But this adoption by the act of the old and obsolete action of account, has been the reason why proceedings under the act have seldom if ever been resorted to, the action of account with all its peculiar proceedings being nearly forgotten.

But the trial of long and complicated accounts before a jury, is known by experience to be a very slow, laborious and unsatisfactory proceeding. One good accountant would do more in an hour to clear up the difficulties between the parties, than any jury would accomplish in a day. It is believed in fact that the only way of reaching the real justice of such cases is by referring them to an auditor.

In the action of account there were two judgments, the first of which was *quod computet*, after which the Court appointed the auditors. But it has not been deemed necessary to embarrass the proceedings with these quaint old forms.

OF THE ACTION FOR SEDUCTION AND THE ACTION FOR A BREACH OF A PROMISE OF MARRIAGE.

55. The right of action for seduction and for a breach of a promise of marriage, by or on behalf of a female shall be in the alternative—and the prosecution of either action to a verdict and judgment for the plaintiff, shall operate to extinguish the right to maintain the other action.

56. It shall not be essential to the maintenance of the action for seduction, to allege or prove, either service or the loss of service.

57. The action for seduction may be maintained by and in the name of the parent or guardian of the party aggrieved, or in the name of such party by a next friend, and whether she be an infant or of full age.

58. It shall be competent for the plaintiff in an action for seduction to prove a promise of marriage, and a breach thereof, and in an action for a breach of promise of marriage, to prove a seduction with all the attendant circumstances in either case.

The loss of service is a mere fiction seized upon by the Courts originally as a plausible foundation for the action of seduction. It is high time it were abolished. Whether in an action for seduction, evidence of a promise to marry is admissible is doubtful, but the doubt arises from the existence of the right to sue also for the breach of promise. By placing the rights in the alternative, and making the election to maintain either an extinguishment of the other, all difficulty about the evidence is removed. It enables the plaintiff moreover by selection of either remedy, to recover for the whole injury.

59. A party sued for seduction or for a breach of a promise of marriage, shall be held to bail both to the sheriff and to the action in the manner heretofore practised, and may be arrested upon a *capias ad satisfaciendum* and imprisoned until the damages and costs are fully paid.

The clause of the Constitution which declares that no person shall be imprisoned for debt, is likely to give rise to some nice questions. What were the debts to which the provision was intended to apply? An action is brought by a father for the seduction of his child—the case turns out to be one of peculiar aggravation, and the jury give a verdict of heavy damages for the plaintiff. Now as soon as the verdict is rendered and the judgment entered upon it, it is in one sense a debt, but was such a debt in the mind of the Convention, as one of those in reference to which imprisonment should no longer exist as a means of recovery? Before the verdict, it is certainly no debt, and the verdict is the legal result of the remedy afforded by the law to punish a villain for his iniquity. And the reason why such a case resolves itself at last into a question of money is, that a Court of Law, except in certain cases of proceedings *in rem*, has no other means of redress than money.

The judgment being the legal result of a remedy for a wrong, ought to follow the nature of the wrong, and be considered as a penalty for the recovery of which the old remedy was intended by the Convention to be left in full force.

The Commissioners have propounded the question, in order that it may be judicially determined, what meaning we are to attach to this clause of the Constitution.

OF THE WRIT OF REVIVOR.

60. The proceedings for the revival of judgments and other proceedings, by and against persons not parties to the record, shall be as follows:

61. During the lives of the parties to a judgment, and within three years from the recovery of the judgment, execution may issue without a revival of the judgment.

62. In cases where it shall become necessary to revive a judgment by reason either of lapse of time or of a change, by death or otherwise, of the parties entitled or liable to execution, the party alleging himself to be entitled to execution, shall sue out a writ of revivor, in form following, or to the like effect, viz:

STATE OF MARYLAND to ——— Greeting:

We command you that on the —day of —— next (*here insert the first day of the term of the Court next after the issuing of the writ*) you appear in the —— Court of —— to show cause why —— (*or —— as executor, or administrator of —— deceased,*) should not have execution against you (*or if against him in a representative character, here insert, as executor or administrator of —— deceased,*) of a judgment whereby the said —— (*or as the case may be*) on the —— day of —— in the said Court recovered against you, (*or as the case may be*) $——. And take notice that in default of your so doing, the said —— may proceed to execution.

63. The writ of revivor shall be directed to the party called upon to show cause why execution should not

be awarded, and may be served in any County of the State.

64. Execution shall in no case be awarded, where the writ of revivor shall not have been served at least fifteen days before Court. And the date of the service shall in all cases be made a part of the return thereof.

The writ of scire facias is directed to the sheriff and not to the party, and can only be served within the County where the same is issued.

65. Upon a writ of revivor being returned "served" the proper length of time before Court, and upon failure of the party to whom the same was directed, to appear within the first four days of the term to which the writ is returnable, or upon the appearance of the party, and upon no sufficient cause to the contrary being shown during the term to which the said writ is returnable, the Court shall enter judgment that the party have his execution in the form at present used in cases of revival by *scire facias*, who may proceed to execution forthwith.

66. Lands aliened by the judgment debtor, and affected by the lien of the judgment, may be seized and sold to satisfy the judgment under execution issued at any time within three years after the recovery or rendition of the judgment. If more than three years had elapsed before the alienation, the proceeding to execution shall be by writ of revivor against the purchaser or alienee.

67. It shall be sufficient cause why execution should not go against the lands of such alienee or purchaser, that there are other lands, or personal property of the

judgment debtor, still held and owned by him, or that there are other lands affected by the lien of the judgment which were aliened by the judgment debtor, at a period subsequent to the alienation to the party showing cause.

The question whether a judgment creditor shall be compelled to proceed by execution, first against such lands of the debtor, subject to the judgment lien as remain unsold, has been settled by the Court of Appeals, in the case of Doub vs. Barnes, 4 Gill 21, adversely to the claim of the purchaser to hold his lands exempt from execution until the unsold lands of the judgment debtor were first applied and had failed to satisfy the debt. A different rule is understood to prevail in England and also in New York, where the real property of the judgment debtor remaining in his hands, are first to be proceeded against, and then should it be necessary to subject the aliened lands to the satisfaction of the judgment, they are to be proceeded against in the inverse order of their alienations, that is to say, the last sold lands to be liable first, and the first last. Such a rule must have been established in accordance with what was conceived to be a great principle of natural justice, namely: that a purchaser of real estate bound by a judgment lien, shall have a clear title, provided there be real property of the debtor still in his hands sufficient to satisfy the debt. The judgment creditor's right is that his debt shall be paid, and it matters little to him, whether the money to pay it, be produced by the sale of one tract of land or another. There may be great force in the reasoning of the Court of Appeals, which led their minds to a doctrine the direct opposite of this, but we cannot perceive it.

Besides, a person who is deeply involved in debt, who is willing and anxious to pay every one his due, and who depends upon the sale of his property to extricate himself from embarrassment, is entitled to such facilities to enable him to accomplish this object, as the law may throw in his way, doing no injustice to others. Indeed the interests of his creditors, other than those having prior judgment liens, are identical with his own. Both he and they are sacrificed, if purchasers are frightened away by the creation of difficulties in regard to titles, which are merely gratuitous. If the creditor is compelled to consume a little more time in collecting his debt, it is but a small matter. The laws are not made wholly for

the creditor portion of the community, as seems to be the spirit of too many of the decisions.

68. The aliened lands of the judgment debtor shall be liable to sale for the satisfaction of the judgment in the inverse order of their alienation, namely,—the last aliened lands shall be liable first, and the first last.

69. The writ of revivor against the alienee of the judgment debtor shall be in the form already given, and shall, in addition, recite the alienation and describe the lands sought to be subjected to the payment of the judgment.

70. The death of either party between the verdict and judgment, shall not affect the validity of the judgment, so as such judgment be entered within two terms after such verdict.

71. The marriage of a woman plaintiff or defendant, shall not cause the action to abate, but the action may, notwithstanding, be proceeded with to judgment, and such judgment may be executed against the property of the wife; or in case of a judgment for the wife, execution may be issued thereupon without any writ of revivor.

72. The insolvency of the plaintiff in any action which the trustee of such insolvent might maintain for the benefit of the creditors, shall not be pleaded in bar to such action,—but the trustee may prosecute the action to judgment, and proceed by execution thereon.

* A portion of the above provisions in relation to the revival of judgments and other proceedings, have been suggested by the new

system of Common Law procedure in England, established by act of Parliament of 1852. They could not be followed precisely—the system in that country being so different from our own.

73. No judgment against an executor or administrator shall be absolute or otherwise, than to affect assets in hand at the time, and as they come to hand thereafter, unless so expressed on the record; and when assets are alleged to have come to hand since the recovery of the judgment, the plaintiff may have a writ in the nature of a writ of revivor, alleging the coming to hand of such assets, and such proceedings as are authorized by existing laws to ascertain the existence and amount of assets, shall be had at the first term after issuing the writ.

OF INTEREST.

74. Where there is a note or other written contract for the payment of money on the one side, and payments, or credits in the nature of payments, on the other, the interest shall be computed up to the date of the first payment or credit, and the payment or credit then deducted from the principal and interest added together. The interest shall then be computed on the balance, after such deduction up to the date of the next payment or credit, and so on through the whole series of payments or credits. But where the interest to the date of any payment or credit, shall exceed the amount of such payment or credit, no rest shall be made at the date thereof, nor shall any rest be made, unless where the payments and credits exceed the whole amount of the interest; and if there be no case of such excess, the credits and payments shall be deducted from the whole amount of the interest due, without rests.

This rule applies each payment or credit as it occurs to the payment of the interest accrued on the debt, and the excess beyond the interest is alone applied to the principal; that is to say, the rule accords to the creditor the right of applying the payment first to the satisfaction of that part of his demand which is unproductive, leaving the excess only to go towards the productive portion, as is obviously just.

75. Where there are notes or other written contracts for the payment of money on both sides, interest shall be allowed on both sides.

76. No interest shall be allowed on an unsettled account unless, under all the circumstances, the jury or Court, as the case may be, shall think proper to allow it.

77. In cases of controverted demands, or of protracted litigation, and in regard to claims of long standing, where the party claimant has slept upon his rights, interest shall not be allowed after the lapse of ten years from the time the claim or demand accrued, unless the jury or Court, as the case may be, shall, under all the circumstances, think proper to allow it: and the jury or the Court may, in their discretion, allow for the time after the lapse of ten years, a less rate of interest than that allowed by law.

78. Interest on a controverted claim shall, in no case, be computed against sureties, infants or insane persons, after the lapse of ten years, unless the jury or Court shall deem it just to allow it or a portion thereof, less than the legal rate of interest.

It does not follow that because a party has become entitled by the judgment of a Court to recover a sum of money, he is therefore entitled to interest upon it. Interest arises from the default of payment at the day; but there can be no default where there

is an honest denial of the claim and the Courts are resorted to in good faith, that it may be seen whether the demand is legal or otherwise; and certainly, no right to interest is established where the claimant has succeeded upon a nice, and it may be, a still doubtful question of law.

The idea that money is always worth its interest, or that if a person had his money, he could always make the interest upon it, has been adopted without due consideration, and been productive of a vast amount of positive injustice. The doctrine promulgated in the case of Ringgold *vs.* Ringgold, 1 H. & G. 11, makes a trustee, who in that case was not morally in default, accountable for interest beyond what any man could make with his own money. To say that money is worth its interest is a mere truism, that has no sensible application to the subject. The use which the Court in the case referred to make of the maxim, supposes all men to be usurers. But it is not true that every man, or even the majority of men, having money, make their interest upon it. Most persons use it to increase their comforts in life. But the usurer, himself, must be very cautious and diligent, and grinding withal, if in a course of years, he shall be able to say, that all his investments have been safe and prosperous; that he has met with no losses, paid no Counsel fees nor Court charges, evaded all taxes and government dues, and found ready investments, without a moment's delay, for every dollar of his capital. And yet this is the rule of accountability fixed in this State as the standard of justice in those Courts especially, which administer the law according to the principles of equity and conscience.

Interest is the greatest of all spendthrifts. It eats out a man's substance before he is aware of it. It works while he sleeps, and is busy in all weathers. It keeps no Sabbath, and never quits work, either for times of festivity or of mourning. It makes the rich richer, and the poor poorer. It is the great secret of thrift in the world,—and he who has found it out, needs no assistance from the laws; he is amply able to take care of himself. If the law takes sides in such a case at all, it should be with the weaker party.

But the question is one of abstract justice. Is it just then that interest should be allowed upon old and stale demands? Whose fault is it that a claim has become old and stale? It is the fault of the claimant certainly. But it is the policy of the law to promote short settlements. Acts of limitation are passed with this

object alone. They declare that if a party do not sue within a certain period, he shall not recover at all. Mere lapse of time is made a bar to the debt. It is proposed that six years shall be the period to bar all debts, and that interest shall cease to accrue after the lapse of ten years, unless the jury shall think it just to allow it, either in whole or part, beyond that period. Is it right or just, therefore, to shut the Courts against a claim, simply because it has stood six years without suit, and yet compel the debtor to pay the debt, and full interest upon it, after it has remained unsettled for ten years?

The payment of an old debt, no matter under what circumstances, is always felt to be a hardship. The sense of obligation has passed away from the mind of the debtor. Upon the minds of his children, where the debt is enforced against them, it never existed; and it falls with accumulated weight when the interest is added to the principal, perhaps doubled the debt. At all events, if a creditor will not bring his suit within a reasonable time, let him know the penalty, and he will have only himself to blame if he loses his interest.

EQUITY POWERS OF THE COURTS OF LAW.

79. A judgment or other proceeding of a Court of Law, may be set aside by the Court in which such judgment was rendered or proceeding had, for fraud, mistake, deceit, collusion, surprise or irregularity, in obtaining or procuring the same,—provided the application to set the same aside, be made within three years from the date thereof.

The act of 1787, ch. 9, sec. 6, provides that where a judgment shall be set aside for fraud, deceit, surprise or irregularity in obtaining the same, the Court may direct the continuances to be entered from the term when the judgment was rendered to that at which it shall be set aside. The act supposes the rule of practice to be well settled, that a judgment will be set aside for the causes recited, and merely declares that whenever it is so set aside, the continuances shall be entered on the record. The act assumes, moreover, that the lapse of several terms before the application to set the judgment aside, is no reason why the Court

should not interfere. But the act does not in positive terms promulgate any rule of practice on the subject. What the law is, is not declared, and the same has remained in doubt from that day to the present. There is doubt about the cases in which the Court ought to interfere—there is doubt about the time within which the application should be made—there is doubt in reference to the whole subject: and for these reasons, there is scarcely a case in the books in which a Court, after the term at which the judgment was rendered had passed, has ever set it aside.

The act of 1798, ch. 101, sub ch. 5, sec. 4, in one of its provisions, assumes by implication that a Court of Law may set aside a judgment of its own, upon a suggestion of fraud, either upon an examination in a summary way, or by directing an issue to try the same. But it is not known that the Courts have ever interfered to set aside a judgment under the act; and the Commissioners, in deference to these repeated indications of the Legislative will, have deemed it proper to provide a positive rule on the subject.

80. The fraud, mistake, deceit, collusion, surprise or irregularity, shall be of such a character and so established by proof, as to warrant a decree of a Court of Equity vacating the judgment.

81. Courts of Law may entertain suits for contribution, and may ascertain the amount which each party defendant is bound to contribute, by reference to those of the sureties or parties liable, who are responsible and able to pay, and excluding from the calculation such as are insolvent, in the same manner that a Court of Equity may.

In the case of Winchelsea *vs.* Deering, 2 B. & P. the leading case on the subject of contribution, the doctrine is established, that although contribution as between sureties may be recovered at law, yet that the party seeking contribution can recover only the aliquot part of the whole debt when divided by the whole number of sureties, but that a Court of Equity only has power to divide the loss among such of the sureties as are solvent, excluding those who are insolvent: the result being, that a Court of Law may safely be

trusted to ascertain the loss due by each by reference to all the sureties, that is, by dividing the whole sum to be made up by the whole number of sureties, but that to divide the same sum by a reduced number is totally beyond the power of such Court, and the party is sent to a Court of Equity for his remedy. The idea is based upon the assumption that a Court of Law is incompetent to try the question of the insolvency of any of the parties. But the Courts do so habitually in other cases. In the case of the assignee against the assignor of a note, where the liability of the assignor depends upon the insolvency of the maker, that question is tried and found by the jury without embarrassment of any kind.

82. A party holding a judgment against one to whom he is indebted upon judgment, shall not be permitted to enforce payment of the judgment due to him, leaving the judgment against him unsatisfied, but the Court shall have power upon petition and hearing of the parties, rule to show cause, or upon motion in a summary way as the Court may direct, to extinguish the smaller judgment, leaving the larger in force only to the amount of the excess thereof over the other judgment, or to extinguish both judgments in case of their being equal in amount.

83. An assigned judgment shall be within the provisions contained in the next preceding section, provided that in case one judgment has been purchased or procured with the view of its being used as the means of satisfying in whole or in part another judgment, it shall be in the sound discretion of the Court to permit such use of it, or not.

In directing a set-off of judgments, Courts of Law proceed upon the equity of the statute authorizing set-offs, for confessedly the case is not within the letter of the act. The power consists in the authority they hold over sureties in their Courts, and it has been fitly said, that the exercise of the power, is the exertion of the Courts of Law, rather than any known express and delegated

power. Sureties may ask the interference of the Courts of Law, in affecting a set-off not *ex debeto justiciæ*, but *ex gratia curia*. In a Court of Equity it is otherwise. It is a power incidental to that Court, and has been long exercised exclusively; for it is only within a few years, that Courts of Law have undertaken to set-off one judgment against another. Per Spencer, J., Simpson *vs.* Hart, 14 Johns. Rep. 63. There is a *dictum* in the Maryland Reports to the same effect, that of Magruder, J., in Annan *vs.* Houck, 4 Gill, 333, but the object is to confer upon the Courts of Law the direct power to interfere, in cases of mutual judgments, as the Courts of Equity may.

84. A defendant against whom a judgment has been rendered, or any person interested therein, having some good matter of discharge, which has arisen since the judgment, may, upon motion in a summary way, have the same discharged, either in whole or in part according to the circumstances.

85. The Court shall have power to enquire into the facts and circumstances attending or connected with the assignment of a judgment, or the entry of the same to the use of any party, and to strike out such use, or to declare such assignment void, either in whole or in part, wherever such assignment or use shall appear to be inequitable or fraudulent, or in bad faith.

86. The Court shall have power to notice and protect all equities arising between assignors and assignees of debts or contracts in the same ample manner, as a Court of Equity may.

SET-OFF.

87. Unliquidated damages arising out of contract, may be set-off against unliquidated damages arising out of contract.

88. Unliquidated damages arising out of contract, may be set-off against liquidated damages, a debt, or a sum certain, and liquidated damages, a debt, or sum certain, may be set-off against unliquidated damages arising out of contract.

89. It is not essential that mutual debts or damages, or the debt or sum certain on the one side, against the damages on the other, shall be due in the same right, it shall be sufficient if either or both parties derive their right to the subject of the suit or set-off by assignment or in any other derivative manner, so it be not a right of a fiduciary or representative character on the one side, against a personal right on the other. Provided the assignment be made, or the right otherwise acquired before suit brought.

There is no mystery about unliquidated damages. If the jury can assess them for one party, is there any reason why they should not do the same thing for the other, or if the occasion require it, for both? In the whole body of the law there is nothing quite so absurd, as different suits, separate juries, trials and judgments upon the same contract between the same parties, in reference to the same subject matter. A man covenanted to marry a woman on a certain day, and her father covenanted to pay him £1000. Before the day he married another woman, and then coolly brought suit for the £1000. And the Court held that he was entitled to recover. And that the remedy for the breach of the covenant to marry was by a cross action for damages. The Court admitted that if the payment of the £1000, had been expressed to be "*for the consideration aforesaid*" it had been different. The same thing in effect occurs frequently under the present doctrine of set-off which is not a common law proceeding, but one of statutory regulation. One man is permitted to recover judgment against another to whom he is confessedly indebted at the time, to a larger amount, it may be, than the sum he recovers. And to consummate the iniquity he sells and assigns his judgment, and when pay day comes for his own debt, he is insolvent, and cannot pay a dollar of it.

These strange results are brought about by the old notion of the Courts, that juries are incompetent upon a contract sounding in damages, to assess them for the defendant, or at all events, for both parties. Their competency to assess damages for the plaintiff was from the Common Law, but when it comes to their doing the same thing for the defendant *there* is the mystery. There was a time when the mind of a jury might be supposed incapable of holding more than one thing at once, but the world has changed materially in regard to these matters. Juries can read and write, are acquainted with figures and accounts, and whatever judgment they have, can be applied to two cases almost with the same facility as to one. Besides, if the two cases grow out of the same transaction, or are even remotely connected with it, there is a manifest propriety in having them tried by the same jury, otherwise different measurers of justice—or standards of right and wrong will be applied to them. The plaintiff in one suit would be compensated by one moral standard, and the plaintiff in the other by a diverse standard. The greatest inconvenience would seem to follow in all cases from separating the remedies.

OF THE COVENANT OF WARRANTY.

90. The covenant of general warranty in a conveyance of real estate, shall afford to the covenantee a remedy for all defects of title, of whatsoever kind or nature the same may be, and against incumbrances upon the land by judgment, mortgage, or otherwise.

91. Where the land conveyed and warranted, is in the possession of a stranger under superior title at the time of the conveyance, there is a breach of the warranty the moment the covenant is made. Where the possession is delivered to the grantee at the date of the conveyance, and is afterwards recovered from him under paramount title, the breach of the covenant is at the time of the eviction.

92. The covenantee is not bound to stand out against a suit by the party claiming the title paramount, but may yield peaceably to a dispossession under it, but in such case the burthen of proof will be upon him, that the dispossession was by one having the superior title.

93. A judgment in ejectment at the suit of a stranger against the covenantee, with proof of due notice to the covenantor of the pendency of the action, and a request by the covenantee that he should defend it, will be sufficient evidence of a breach of the covenant.

94. When a suit is brought against a covenantor, who is protected by the warranty of his own or of any previous grantor, he may notify such grantor of the suit, with a request that he will defend the title so by him warranted, and the judgment shall be sufficient evidence of the breach of such prior warranty, but not of the amount of damages.

95. Where a grantor conveys land over without warranty, who has no title at the time, any after acquired title to such land by such grantor, shall enure to the benefit of such grantee.

The doctrine now is understood to be, that if a party convey *with warranty*, and has no title, any after acquired title shall enure to his previous grantor, by force of the warranty. This doctrine rests it is said, upon the ground of estoppel. (4 Pet. 85.) But there is a higher ground to put it upon, which is the ground of honesty; in reference to which, there is no difference, whether there be a warranty in the case or not. It would be a great reproach to any system of laws, which would allow a party to sell land, receive a full consideration for it, and afterwards recover the same land from his own grantee, under a title purchased by him from a stranger.

MISCELLANEOUS RULES.

96. Parties may by agreement refer a suit or controversy to the Court, in which case the Court shall hear and determine both the law and the facts of the case, without the intervention of a jury, and shall render judgment; which shall have the same effect as if rendered upon the verdict of a jury.

A similar provision has been found both in England and New York, to promote the dispatch of business, more than any other of the recent reforms in either.

97. That the Court has determined such case, shall of itself be sufficient proof of the reference to the Court by the agreement of the parties.

98. A writ of enquiry shall be executed at the bar: the verdict of the jury taken and recorded by the clerk, as in other cases of verdicts rendered in Court, without the formality of an inquisition signed and sealed by the jurors as heretofore.

99. An injunction issued to restrain proceedings in any action, suit or proceeding in a Court of Law, shall be produced to the Court or the Judge thereof, in which such suit, action or proceeding is had or pending, and thenceforth all further proceedings in Court, contrary to such injunction, shall be null and void. Provided, that nothing herein contained shall be held to diminish or vary the liability of any person or persons, commencing, suing or prosecuting any such action, suit or proceeding, contrary to such injunction, to any attachment, punishment or other proceeding for contempt in regard to the same.

Under the law as it now stands, an injunction has no direct operation on proceedings at law; the Court will not notice it nor stay proceedings at law in obedience to it. (5 B. & Ad. 835.) But the Court of Equity issuing the injunction would punish the parties who commenced or continued proceedings at law contrary to its mandate, and thus indirectly the proceedings at law were stayed. The above section is therefore intended to act directly on the Court of Law, which will stay all further proceedings in Court in obedience to the injunction.

100. A demurrer shall be deemed an admission of the facts set forth in the pleading demurred to, only for the purpose of testing the legal principle involved in it, and no inference shall be drawn from such demurrer against the honesty or the morality of the case confessed by such demurrer.

A demurrer is a mere affirmation of a legal principle. It addresses the opposite party in terms like these—"Admit your facts be true, and the law is against you." The admission is therefore made simply to test the law of the case, and such admissions are habitually made of facts, known to have no foundation in truth. Yet how often do we hear learned counsel at the bar, and even learned judges on the bench, commenting upon facts admitted by demurrer as a confession by the party, of his own fraud or turpitude. The tendency of this practice is to discourage demurrers, which on the contrary ought to be encouraged, for they promote the dispatch of business, and save labor.

101. It shall be a sufficient defence to a suit or proceeding against a surety, that he requested the creditor to sue or proceed against the principal debtor, and that the money might have been made out of the principal debtor, if suit had been brought or proceedings had against him, according to such request.

The principle seems to be well settled, that no mere neglect of the creditor to enforce payment of the debt will exonerate the surety; and the reason assigned is, that it is at all times within

the power of the surety, by paying the debt himself to the creditor, to become the creditor himself, when it will be in his power to sue or not, as he pleases. But is such a reason satisfactory? The sum may be a large one, and the surety unable to raise it unless by a sale, and perhaps, a sacrifice of his own property;—or the surety may be largely indebted himself, and unable to raise the sum at all. Cases happen where all a man's property is taken to pay other men's debts, whilst his own are left unpaid. Whenever this happens, the feeling of every mind is, that injustice is done.

It is said as another reason for the existing rule, that the surety may file a bill in equity against the creditor, praying that a decree may be passed compelling him to sue the principal debtor, when, if he fail to sue, the surety will be released. But it is a strange anomaly, that a suit should be required to effect such an object. The true, the sensible, the just rule, is that given above: and whenever it can be shown that the debt has been lost by the creditor's own neglect after request to sue, the surety ought to be exonerated. If a creditor choose to give indulgence to his debtor, he should do so upon his own responsibility, and not upon that of the surety. If the rule proposed should be substituted for the one now prevailing, we should not hear of so many instances of men being broken up and their families reduced to want for the debts of others, as we now do.

OF THE PROCEEDINGS LEADING TO AN APPEAL.

102. The Clerk shall make full entries upon the docket of all the steps and proceedings in the cause, with the dates of every such step or proceeding.

103. Where an appeal is prayed from the judgment of the Court in a case referred to it by agreement of the parties, a statement of such facts as may be deemed material to a proper understanding of the case by the Appellate Court, shall be made out under the direction of the Court below, to which the opinion of the Court, signed by the judge, shall be appended.

104. The transcript to be sent to the Court of Appeals in the case mentioned in the next preceding

section, shall comprise the docket entries, the pleadings, and such of the proceedings and documents filed in the case, as the parties shall deem material.

105. In all suits comprising different causes of action, or one cause of action, devisable into different parts, where a separate sum of money, amount of damages, or thing, is claimed for each cause of action, or each part thereof,—and where any opinion or instruction of the Court may affect but one or more causes of action, part thereof, or thing, without affecting the rest, it shall be lawful for the jury to separate in their verdict their finding upon each separate cause of action, or each separate part of the same cause of action, or each separate thing, and the findings of the jury, with the several opinions or instructions of the Court applicable to each, shall be distinctly shown in the record or transcript thereof, sent to the Court of Appeals.

This rule is the correlative of the 44th section of the Report on the Practice of the Court of Appeals. In addition to the object of settling each case finally that is taken to the Court of Appeals, or at least of limiting the scope of litigation by the action of the Appellate Court, it will be found that some provision like the above, has been rendered necessary by the new rules of pleading, by which the plaintiff is required to join in the same action, various and independent demands or causes of action. It would be a great inconvenience, especially in cases where either party appealed, to delay the litigation in reference to each subject of dispute, until all were determined.

106. Any decision or instruction of the Court in favor of either party, may be abandoned by such party at any time before the case is committed to the jury, unless to do so would be to the disadvantage of the opposite party.

107. The abandonment of a decision or instruction of the Court within the meaning of the next preceding section, shall be deemed to be to the disadvantage of the opposite party, whenever testimony calculated to influence the minds of the jury has been admitted or rejected, or wherever the opposite party cannot be placed in the same situation he would have occupied had such decision or instruction not been given.

The party who has justice on his side, and a fair jury to try his case, will naturally feel desirous to have as few points in the record as possible; so that when he has obtained the verdict of the jury, there may be no danger of its being taken from him by a reversal in the Appellate Court, upon some little point or crotchet, it may be, which was no help to him when he obtained it by the instruction of the Court, and which, therefore, he would have acted more wisely to have left out of the trial. But the party who is in Court resisting a just claim, and who has made up his mind to get out of it if he can, will naturally seek to cram the record with all sorts of points, that if he cannot reverse the judgment upon one, he may upon another, and harass his adversary with a new trial, and the payment of all the costs of the old.

108. A bill of exceptions shall be in the following form or to the like effect, viz:

A. B.
vs. } Action of —— in —— Court, —— Term 18 —.
C. D.

At the trial of this cause, the evidence for the plaintiff was, (*Here insert the plaintiff's proof in substance—oral and documentary.*)

For the defendant. (*Here insert defendant's proof.*)

The plaintiff prayed the Court to instruct the jury—

1. That, &c.
2. That, &c.
3. That, &c.

The defendant prayed the Court to instruct the jury—

1. That, &c.
2. That, &c.
3. That, &c.

The Court refused the instructions prayed by the ——, and granted the —— instructions prayed by the —— (*or state the instructions and opinion of the Court, if any, according to the truth.*)

Whereupon the plaintiff (*or defendant, or plaintiff and defendant, as the case may be,*) except, and the Court sign these, the exceptions, this —— day of ———, 18—.

109. The exceptions shall be understood as taken by the parties to the decisions against them respectively, without its being so expressed.

It is said of Lord Mansfield, that he presided in the Court of King's Bench for more than thirty years; and that during all that time, only two of his decisions were reversed, and that there never were a bill of exceptions tendered to his direction. (Campbell's Lives of the Chief Justices, 395.) From the manner in which this statement is made, it would seem that the tender of a bill of exceptions implied in England some little distrust of the entire fairness of the judge. Such an implication would be wholly inadmissible here, where it is the common mode of carrying a case from an Inferior to the Appellate Court.

That a bill of exceptions is an unusual proceeding in the English Courts, would appear from the acknowledgment of one, in the Court of King's Bench in the time of Lord Mansfield. The ceremonies observed on the occasion are recorded by Burrows, after the following manner:—

On the 17 May, 1765, the proceedings took place in the Court of King's Bench, Lord Mansfield being the Chief Justice. "Soon after the Court sat the Lord Chief Justice Pratt (of the Common Pleas,) came personally into Court to confess (*ore tenus*) his seal put to a bill of exceptions, pursuant to the requisition of a writ of error," which is there given at length.

"N. B. The bill of exceptions sealed by Lord Chief Justice Pratt had been previously brought into Court, and was now in the hands of Mr. Owens, as Secondary of the Office of Pleas. And all the proceedings down to and including the writ of error, were entered upon the rolls of this Court."

"The Lord Chief Justice Pratt being now come into this Court, pursuant to the command contained in the said writ, delivered it to the Lord Chief Justice of this Court, Mr. Owen, at the same time delivering the original bill of exceptions into Lord Mansfield's hand. Whereupon Lord Mansfield showing to Lord Chief Justice Pratt the seal thereto affixed, asked him whether that was his Lordship's seal or not? To which question, his Lordship answering in the affirmative, Lord Mansfield re-delivered the bill of exceptions to Mr. Owen, at the same time delivering to him the above mentioned writ, with orders that it should be filed."

"The Lord Chief Justice of the Common Pleas immediately retired without sitting down, and the Lord Chief Justice of this Court attended him till he got past the puisne judge, but not quite to the door of the Court." Of course, if his Lordship had gone past the puisne judge, it would have spoiled the whole thing.

The origin of the bill of exceptions was this:—when the pleadings were *ore tenus*, and either party alleged any matter by way of plea, replication or other pleading, which the Court thought insufficient, they overruled it, and required the party to allege some other matter. In this manner, several successive allegations might be overruled before some matter was pleaded, which the Court thought fit to allow the party to rest upon.

These oral proceedings were carefully drawn up by an officer of the Court on a parchment roll, which was called the record, and when completed, it was preserved as containing the only admissible testimony of all the judicial transactions it comprised. The record was, moreover, the only foundation upon which a writ of error could be brought,—it being a rule that no error could be assigned but in respect of matters appearing on the record roll.

But as it was a rule of the Courts to allow no entry to be made upon the record, of matters which they had overruled or disallowed, it followed that none of their decisions could be reviewed or corrected by the Appellate Court, but in respect of such allegations or matters whereof the Court approved. In respect of all pleadings and allegations overruled or disallowed by the Court, the party had no appeal, and was wholly without redress.

The existence of a power so arbitrary in the Courts, and one so liable to abuse, became in time an intolerable grievance, which the Legislature was compelled to remedy, and the remedy is contained in the Statute of Westminster the 2d (13 Edw. 1) which enacts,

that where any one impleaded before any of the Justices, alleges an exception, and prays that the Justices will allow it, if he who alleged that exception, writes that exception and prays the Justices to put their seals to it for a witness, the Justices shall put their seals to it. If one will not, another of the company shall.

The bill of exceptions thus ordained was originally tacked to the record, and was considered by the Court in error as part of the record. It is now added to the record of proceedings by way of memorandum. By virtue therefore of the Statute, and the bill of exceptions authorized by it, every matter which would of right be on the record, if allowed by the Court below, shall be brought virtually on the record, if disallowed by bill of exceptions.

The bill of exceptions therefore was devised for the purpose of enlarging the right of appeal. It was intended to affect a class of cases, in reference to which as the law stood before the statute, the decisions of the Courts below were final, and the object was to render all the opinions expressed by the Court below, instead of a part thereof, subject to revision and correction by appeal. There being no officer under the present organization of our Courts, to draw up the oral proceedings in a cause, the bill of exceptions is tendered alike whether the Court allow or disallow an allegation or pleading.

110. The facts proved shall be stated substantially, in the bill of exceptions.

111. In trials where bills of exceptions are intended, all the evidence on both sides, so far as the same is practicable shall be adduced first, and then the points shall be raised and the exceptions taken.

Owing to the peculiar system of practice prevailing in Maryland under which the Courts never interfere in a trial before a jury, unless specially called upon for instructions, and then only in response to the questions raised by the parties, it will be perhaps impossible to prevent entirely, causes from being taken to the Court of Appeals by piece-meal—a part at one time, and a part at another, by which practice not only double costs but also double delay is incurred. The above rule is intended to prevent this mischief as far as practicable, by compelling parties to bring out all their points during the first trial below.

The Commissioners are aware that there are inconveniences on both sides, and that by the course here recommended, the trial of a cause may be prolonged in the Court below, by the discussion of many points, in cases where one would be sufficient to put an end to it. But this evil is a light one in comparison with an appeal, a reversal and a re-trial of the whole case.

112. A prayer asking the opinion or instruction of the Court to the jury, that upon all the evidence in the cause the plaintiff or defendant is, or is not entitled to recover, or to the verdict, shall be good and valid in law, and the Court may simply grant or refuse such prayer, or may give its opinion granting the instruction in a qualified manner, or the Court may give independent instructions of its own, and upon the appeal the whole law of the case shall be open for the consideration and adjudication of the Appellate Court.

A general prayer that a party is or is not entitled to recover, is allowed, to enable the Court of Appeals to express its views upon the general legal merits of the case, and is worthy therefore of every encouragement by the Courts. If either party however have a fancy for a technical point, or a more limited view of the case, let him bring it out by a prayer of his own. But as the general prayer would include all minor points, even this precaution would be unnecessary, unless to keep the counsel in mind, that there is such a point in his case.

113. It shall be no objection to a prayer, that it assumes facts which it is the province of the jury to determine.

OF ARREST OF JUDGMENT.

114. Upon any motion made in arrest of judgment, or for judgment *non obstante veredicto*, by reason of the non averment of some alleged material fact or allegation or other cause, the party whose pleading is alleged

or adjudged to be therein defective, may suggest the existence of the omitted facts or other matter, which if true would remedy the alleged defect, and such suggestion may be pleaded to by the opposite party within such time as the Court may allow; and the proceedings for trial of any issues joined upon such pleadings shall be the same as in an ordinary action.

115. If the facts suggested be admitted or found to be true, the party suggesting the same shall be entitled to such judgment as he would have been entitled to if such facts or allegations had been originally stated in such pleading and proved or admitted on the trial, together with the costs of, and occasioned by, the suggestions or proceeding thereon—but if such facts be found untrue, the opposite party shall be entitled to his costs of, and occasioned by, the suggestion and proceedings thereon, in addition to any other costs to which he may be entitled.

The two preceding sections have been suggested by similar provisions in the new system of Common Law procedure in England. They propose a mode of amending the proceedings after verdict. It is not probable under the new system proposed for adoption in this State, that they will often be resorted to in practice.

OF NEW TRIAL.

116. A new trial may be granted where the verdict is plainly contrary to law, and where the jury have been led into their mistake of the law by the opinion or instruction of the Court to the jury.

117. It shall be no objection to the granting of a new trial that a bill of exceptions has been taken.

That the verdict is against the law is rarely made the foundation for a new trial in Maryland, on account of the peculiar system of

practice prevailing in this State. The Court never charges the jury. Where such is the practice and the Court mislead the jury by a charge which can be shown to be against law, the judge corrects his own mistake by granting a new trial. In Maryland, if either party desire the opinion of the Court upon a question of law, he brings the distinct point before the Court by a prayer for its instruction to the jury. If either party is dissatisfied with the opinion declared by the Court, he takes his bill of exceptions, and carries the point for revision, to the Appellate Court.

But if the party chooses to pass by the Court and take his chances with the jury upon both law and fact, it is too late after the verdict is against him, to insist in a motion for a new trial, that the verdict is against law. To grant a new trial in such a case, would be to deprive the other party of his right of having the decision reversed by appeal.

Where the Court however being called upon by the prayer of either party mistakes the law in its instruction to the jury, it is due to the Court that it should have the opportunity of correcting its own mistake by granting a new trial. It is due also to the parties that they should be saved the delay and expense of an appeal, in a case where the law is clear.

118. A new trial may be granted where the verdict is against the evidence, as also, where the evidence is insufficient to warrant the verdict.

The practice in Maryland on this subject is not settled upon satisfactory principles. The doctrine is, that no fact tending to prove the issue can be taken from the jury, and a prayer which does this by implication, is rejected for that reason alone. The Court cannot take a case from a jury before verdict upon the ground that the proof is not sufficient to warrant the jury in basing a verdict upon it, the jury having a right to take the case and decide it. But it must frequently happen in practice, that in the very case where a Court will refuse before hand to take a case for deficiency of proof from the jury, the same Court will, after verdict, set it aside for want of sufficient proof—or which is the same thing, because the verdict is against the evidence.

It sometimes happens that a new trial is granted for defect of proof upon one point alone. When however the case comes again

before the jury, the party who obtained the verdict before, is not relieved from the necessity of adducing proof upon all the other points which the verdict ought strictly to be considered as having closed. But the party begins again at the beginning, and goes regularly through with all his proof, and having made the point which was defective in the first trial, secure, he may lose his case before the jury upon some other point. This inconvenience is incident to the practice of granting new trials. Could a rule be adopted restricting the enquiry on the second trial to the single point upon which the proof was defective on the first, this anomaly might be corrected. But to do so would be to shut out the whole case with the exception of one point, from the mind of the second jury, which is evidently impracticable.

The demurrer to evidence recommended by the Commissioners in a former Report, will obviate some of the discrepancies in this branch of the law, and bring the practice somewhat nearer to the standard of common sense.

119. The Court may determine to grant a new trial unless certain terms or conditions named by the Court, shall be agreed to by the opposite party; in the event of his agreement to which, the terms or conditions named shall be entered on the record, and no new trial shall be granted—if the party refuse to agree to the terms or conditions, a new trial shall be awarded.

In a case for example, where the amount for which the verdict ought to be rendered, is a mere matter of calculation, and the jury have evidently made a mistake as to the amount, the Court may say to the party, reduce or increase the verdict to the correct sum, or a new trial must be had. Such a rule is obviously just for the additional reason, that if the party obtaining the verdict is willing to correct it he should not be put to the risk of another trial, in reference to those points which the first verdict ought to be considered as having closed.

The Court may impose such other terms and conditions as under the circumstances, it may deem just and reasonable—as the admission of certain facts upon the second trial—or the payment of the costs before a new trial is had.

120. A new trial may be granted as well where the damages are too small as where they are excessive.

This provision is taken from the Virginia code, and certainly as rank injustice may be done by giving too little, as by giving too much.

121. In case a new trial is granted, judgment shall nevertheless be entered upon the first verdict, and shall stand until the second verdict is rendered, and judgment rendered thereon, when the first verdict and judgment shall be set aside.

122. Execution may be issued, or other proceedings had or taken upon a judgment entered on the first verdict, as is mentioned in the next preceding section, if the Court shall think proper to order it.

The object of entering a judgment on the verdict when a new trial is granted, is of course to secure to the party the benefit of his lien, and to prevent the party obtaining the new trial from abusing the indulgence of the Court, by putting his property beyond the reach of his adversary before the second trial comes round.

The other branches of the doctrine of new trial, as recognized in Maryland, such as newly discovered evidence—misconduct of the jury, the sheriff or the party, the Commissioners have not thought proper to disturb. Their purpose has been throughout their labors, to leave the law as it is, except where they think it requires amendment.

OF SALES UNDER EXECUTION.

123. In all cases where real property has been sold under execution, and where the sale is of all the real property of the defendant within his bailiwick, the sheriff or other officer making the sale shall make return of his writ as heretofore, with a description of the property sold, and shall also bring into Court the money arising from the sale, to be applied under the Court's direction.

124. Where the property sold shall appear from the records of the Court or otherwise, to be largely incumbered with judgments or other liens, the fund shall be retained in Court to be applied to the payment of all the liens in the order of priority to which by law they are entitled.

125. If no objection be made to the sale, or if the objections made are overruled, the sale shall be ratified by the Court, and the deed of the sheriff to the purchaser, shall vest in him a title free, clear, and discharged of all liens and incumbrances, except such as belong to, and are a part of the title of the defendant.

When the property of a defendant is known to be heavily incumbered with mortgages, judgments, and other liens, it is a difficult matter to sell it at all—more difficult to obtain a fair price for it. Nothing so effectually frightens away a purchaser from a sheriff's sale, as the apprehension of trouble about the title. He may purchase on speculation, when the difference between the price he gives, and the real value of the land, may be sufficient to compensate him for the cost and vexation of a law suit or two, about the right he has bought.

It is a matter therefore of great importance to all persons concerned—to the debtor, that his means may be made to reach to their fair value in the liquidation of his debts—to those creditors who, unless the property can be made to sell for its value, are to get nothing, that a good title be offered to the purchaser, by a proceeding enabling the Court to take possession of the fund, and make that the subject of litigation instead of the land.

Cases will happen no doubt under the proposed rules, where the plaintiff in the execution under which the property is sold, will receive no part of the proceeds of sale, but his chances of doing so will be greatly enhanced by the change. Under the existing practice, a purchaser buying under a junior judgment takes the property, subject to all prior liens. He has to fight his way through these, and although it may happen that the prior liens are

more than the property is worth, they may not on the other hand, amount to more than half its value. The evil is in the uncertainty and the removal of this, is the object of the proposed change.

126. If it shall appear to the Court that the judgments, or other liens against the property sold, are inconsiderable compared with its value, the Court shall order the sheriff to pay the money brought into Court, to the plaintiff in the execution.

The difficulty of notifying the holders of liens to appear and exhibit their claims—the hardship of excluding those who may fail to appear—the delay in the application of the fund, may all be urged as objections to the changes proposed, but it should be remembered, that the object to be attained, is worth all the troublo and delay, as well as the hardship it may occasion. But there is nothing in the objections. The same course of proceeding occurs every day in the Courts of Equity, where land is sold under a creditor's bill, and no difficulties of the kind alluded to, nor any unreasonable delay is complained of there. The truth is, that we may safely rely upon the natural watchfulness of the creditor, especially when doubts exist as to the sufficiency of the property to pay all claims against it, to protect his own interests. The probability is, that if the proposed rules be adopted, the creditors will all be in Court, either in person or by attorney, by the time the money is there.

127. In all cases where the amount of the liens shall be sufficient to raise a doubt, whether the fund in Court will be sufficient to pay them all, the Court shall refer the case to the auditor, who shall give notice in such newspapers, and for such length of time as the Court shall direct, to all persons holding judgments, mortgages, or other liens against the property of the defendant to appear and produce their claims and liens with the evidences thereof, and upon their failure to appear, they shall be excluded from all claim to the fund, and to the land sold to produce it.

128. After the expiration of the time limited by the notice, the auditor shall, upon the documents and evidence laid before him, make application of the fund to the satisfaction of the liens, according to their legal order of priority, and shall report the same to the Court, with the vouchers and evidence on which the same is founded. Provided, that any creditor failing to appear before the auditor, may still be permitted to participate in the fund, upon showing to the Court a reasonable excuse for such failure, at any time before the fund is actually paid over.

129. In case any particular lien is clearly entitled to a priority of payment out of the fund, the Court may order the same to be paid, without awaiting the adjustment of the other claims.

130. If several judgments have been rendered against the defendant on the same day, they shall be entitled to payment rateably out of the fund.

131. Limitations may be insisted on against any lien, by any one of the creditors.

THE LAW OF HUSBAND AND WIFE.

MARRIAGE is of divine institution. Its essential requisites are, that it shall be an union between one man and one woman—that the man shall be the head of the family, and shall govern and provide for it—that he shall protect, cherish and keep his wife—and that she shall love, honor and obey him. "But she was not intended" says Jeremy Taylor, "to be his menial, nor his dependant. When Adam made that fond excuse for his folly in eating the forbidden fruit, he said, 'the woman whom thou gavest *to be with me*, she gave me.' He says not, 'the woman which thou gavest *to* me.' No such thing. She is none of his goods, none of his possessions, not to be reckoned among his servants. God did not give her to him so. But the woman thou gavest to be with me—that is, to be my partner—the companion of my joys and sorrows." These are the great and essential elements of the personal union of man and wife in holy wedlock. In the view of Milton, they are the true source of human offspring, and of all the charities and relations dear, of father, son and brother. As God established the marriage tie, and as Saints and Patriarchs used, so let it remain. We presume not to meddle with it.

But in reference to property, and the adjustment of the rights and liabilities of husband and wife, in regard to it, the laws of different countries may vary, as they do in point of fact, throughout Christendom, and these may be changed without affecting the conditions of the marriage contract itself, or impairing the solemnity of its sanctions. In England indeed, whence we derive our own law upon the subject, marriage settlements are almost universal. The provisions of the general law are not satisfactory, and therefore, as a preliminary to almost every marriage, where there is any property to settle, the parties take it out of the operation of that law, and subject it to a law which they make for themselves. By this private law which is found in the deeds or articles of set-

tlement, is the property of the married couple, and their reciprocal rights to it, as well as the rights of their children, defined and regulated. The marriage tie, the bands of wedlock remain always the same, the arrangements as to property vary according to the varying ideas, or caprices of individuals.

In what we have to say of the law of husband and wife, we have reference simply to matters of right. The domestic government must depend upon itself. We have nothing to say to it, our concern being to provide something to appeal to when rights are in dispute, and the law must needs be called in to settle them.

Marriage settlements are not common in this State, and it is only now and then, and in cases where some particular family exigency requires it, that we hear of such a thing being resorted to. But the general law of husband and wife, in reference to property has failed, at least of recent years, to command the respect of the people of this State, and various attempts have been made to improve it. That these changes to a considerable extent were wise and salutary, no one will doubt, but upon a subject of so much delicacy and importance, we must be careful lest the spirit of innovation may carry us too far.

The maxim of the Common Law is, that man and wife are one, and one of the consequences of this maxim is, that the power over her property conferred upon the husband, was not unfrequently abused to her ruin. She was compelled in many instances to see her substance wasted—squandered perhaps before her eyes, in the most profligate excesses, and herself and children reduced to want, without the power to prevent it. And these abuses have no doubt given rise to the innovations which have been effected by statute in reference to conjugal rights.

The subject, however, as we have already intimated, is one of great importance, of great delicacy and still greater difficulty. While changes, some of them material, are admitted to be proper, if not necessary, it cannot be deemed wise or safe to render the wife wholly independent of the husband—to give to the same family two distinct heads—to require husband and wife to keep separate books, separate accounts, separate agents and separate every thing. Shall the wife have the power to go where she pleases—come when she pleases, do as she pleases, as long as she has the means of paying her own way in the world? When she runs through her means is she to apply for her discharge like other insolvents? Shall the husband then be compelled to support her?

These are supposable results of what seems to be the tendency of things in some of the States around us, and may be greatly magnified if applied to our own State, but it is well enough to look at them, as the possible consequences of what may be attempted among ourselves with very different views.

The present position of woman belongs to that structure of society which has grown up in the world since the dark ages. It began with the crusades, was nurtured under the institutions of chivalry, and is intimately blended with the whole form and body of modern civilization, softened, sanctified and refined by the religion of Jesus Christ. Woman has no political rights—no voice in the enactment of the laws—yet she is bound to obey the laws, and punished for their violation, the same as the man. Her rights both of person and of property, are just what those laws declare them to be. But these anomalies, if such they be, are not considered as derogating from her equality with man. What is denied to her as of right, is more than conceded to her as of grace. No man sits while she is standing. Her presence alone is a restraint upon the profane or the licentious tongue. The man who offers her an incivility, loses cast, to say nothing of the risk he incurs of being punished for it. But if her legal and political rights and capacities were at once brought up to the standard of the other sex—if she were a voter at the polls—a competitor for office—if her voice were equally potential with the man's in the making of the laws—it might be doubtful how long she would retain the *ex gratia* immunities and distinctions now so cheerfully accorded to her.

Is she not unfitted by nature for the rough, out-of-door contests and employments of life? She could not be a politician, treating at gin shops, addressing crowds from the hustings, or wrangling in the newspapers, much less could she be a sailor climbing the mast, nor a soldier scaling the ramparts sword in hand. She is just as God made her, it being ordained by infinite wisdom, that the man should be endowed with capabilities, physical and moral, which did not belong to the woman, and that the woman should possess other gifts which did not enter into the elements of his nature—that she should need something to lean upon in the world, and that he should afford the support she required. There seems to be a beautiful fitness in these arrangements of that mysterious union which blends their separate natures into one. It is not without reason therefore that the law has declared them to be one person.

It but follows the higher authority of the Gospel, which declares them to be "one flesh."

But the law of husband and wife in reference to property, is the subject which claims our attention here, and this law, or at least many of its really obnoxious provisions, we may change or modify without disturbing the personal union of the man and the woman, as Heaven has ordained it. The law as it affects property therefore is not what it ought to be. There are too many rules—the distinctions are almost endless and not founded in reason. In regard to personal estate the marriage operates as an absolute gift to the husband, of all the wife's personal chattels, in possession. They all belong to him, to be disposed of by him, as his own property. In regard to her outstanding chattels, he acquires by the marriage the right to reduce them into possession. But this right is merely potential, the wife's property in them not being divested by the marriage. On the contrary it remains in her during the coverture, and survives to her after the husband's death, unless in his life time he have reduced them into possession. The wife's negotiable securities go to the husband like her chattels in possession. He alone can endorse them and recover on them by suit, during the coverture, and in case he survive her. Still if she survive him, leaving negotiable securities not actually reduced into possession, they survive to her.

In reference to the right of administration, the rule of Doctors Commons is understood to be, that the wife's next of kin will be entitled to administer *de bonis non* on her estate, not recovered by the husband during his life. But should the husband after the wife's death, himself die before her outstanding personal chattels are recovered, his next of kin will be entitled to them in equity.

The reason upon which the husband's right to the wife's personal property is founded, is, that the law subjects him by virtue of the marriage to the payment of her debts. For these debts he is liable throughout the coverture, though he have received no money or property by his wife. But after the death of the wife the liability of the husband ceases. If he have received an immense fortune by her, he can retain it all after her death, appropriate it to his own use, and bid defiance to her creditors. The debts of the wife therefore must be enforced against him during the coverture, or they cannot be enforced against him at all.

These rules are capricious, they tend to confuse the boundaries between right and wrong—they engender litigation, and ought at

the least to be simplified. If it be right to give the husband all the wife's personal estate, in consideration of his liability to pay her debts, it is wrong to limit his liability to the period of her death, releasing him from all liability thereafter, but permitting him to retain her property. If he have received the consideration, let him pay the debts. If the rule be wise, carry it out. If not wise, abolish it. Her death does not affect his right to recover her choses in action—he may recover them in England as her administrator—here without letters. Why should his liability be put an end to by her death, and the right which is the correlative of the liability continue after her death.

In regard to real estate, the lands of the wife belong to the husband during the coverture, at all events, and during his life, if there be a child of the marriage. But the husband's interest in his wife's real estate, may be sold for the payment of his debts either during the coverture or after her death, the husband surviving. The wife is entitled to dower in the husband's real estate, in derogation of the rights of his creditors. She is entitled to one-third, and in some cases, to a half of his personal estate, but subject to the prior claims of his creditors. But there is one marked difference between these reciprocal rights of husband and wife, in this, that his rights both to her real and personal property, commence from the marriage, while hers never attach until after his death. So that all her rights to his property are contingent upon her surviving him.

Although the right of the husband to the wife's real estate, is at most but a life estate, yet if by proceedings in equity, instituted for the purpose, her lands be sold and converted into money, the money is personal property, and is the husband's, absolutely. At what point in the proceedings, the equitable conversion from real to personal estate takes place, so as to vest the proceeds in the husband, is not perhaps distinctly settled. In one case it was held that the sale and the ratification thereof by the Court, completed the change, (Hammond *vs.* Stein, 2 G. 281.) In another case it was decided that the conversion was complete by the sale alone, before its ratification. The husband in such case, without the consent of the wife, and even against her wishes, steps in and pockets her entire patrimony, or which is a much harder case, his creditors step in and seize upon it for the payment of his debts, to the exclusion of herself and children.

The condition of the wife during the marriage, is called her *coverture*. She is said to be *covert-baron*, or under the protection

and influence of her husband, baron or lord. As Blackstone explains it, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection or *cover*, she performs every thing. The old books insist upon the wife's subjugation, or its equivalent, the husband's supremacy, both creating what are called her disabilities. And these, as Blackstone insists, are intended for her benefit, and prove "how great a favorite is the female sex, of the laws of England." Mr. Christian however, is not so much in love with his subject, as to agree with Blackstone in the justice of the compliment; and certainly when we remember some of the principal differences made by the English law between the sexes, it will be difficult to assent to the conclusion that the woman is a favorite of that law.

We know that by the Common Law, if the baron killed the feme, it was simply murder, as if he had killed another person, but if the feme killed the baron—her lord, it was petit treason and doomed her to the same punishment as if she had killed the king. His punishment was to be hanged—hers to be drawn and burnt alive. Again, all women were denied the benefit of clergy, merely because their sex precluded them from taking holy orders. Hence for the first offence in simple larceny, bigamy, robbery, manslaughter or the like, however learned they were, they received sentence of death, and were executed, while men who read, were for the same offences subject only to burning in the hand, and a few months imprisonment.

The husband also might give his wife moderate correction, and though it is said, that in the polite reign of Charles the Second, this power of correction began to be doubted, yet the old law was maintained by Buller, in the latter part of the last century, to be still in full vigor, and that a husband had the undoubted right to administer reasonable domestic chastisement to his wife. It happened in describing the size of the rod which the husband might properly use in castigating his wife, the judge expressed the opinion that a rod of the size of his own thumb would not be of unreasonable dimensions, and immediately applications came pouring upon the unlucky magistrate from the matrons of England, praying that he would be graciously pleased to favor them with the exact dimensions of his lordship's thumb.

There is in truth nothing in the spirit of the English law, partaking of gallantry towards the female sex. On the contrary the

sex is more or less disparaged in every branch of that law. The reason given for the distinctions in favor of males, by the law of descent is, "that the man is the worthier of the blood," and for this some of the old black letter lawyers give us the authority of Scripture, (1 Sam. xxv, 22, 1 Kings, xvi, 11) and the law of Maryland following the uncourteous example, still gives to males a preference over females, in the right of election to take real estate, when divided for partition among the heirs, and also in the right of administration.

By the civil and canon laws of medieval Europe, the evidence of women was not in general received in the Courts of justice, and the reason given was, "*varrium et mutabile semper famina.*" In some States the testimony of two women was required to counterbalance that of one man—in others, a virgin was held to be entitled to more weight than a widow. The old English judges occasionally rejected the evidence of women, on the ground that they were *frail.* And Sir Edward Coke writes, that in some cases women are by law, wholly excluded to bear testimony. Even in Maryland up to the year 1839, female virtue was left perfectly exposed to the slanders of malignity and falsehood. Female honor which is dearer to the sex than life, might be assailed with impunity by every abandoned calumniator, while the credit of every male shop keeper was scrupulously guarded and protected by the law.

In this State, such as we have attempted to describe it, was the law of husband and wife—derived to us in part from the quaint and rude notions of former times—in part from the gallant spirit of chivalry—and in part from the mild and humanizing precepts of Christianity, all however mixed up in ill-assorted confusion, when the Legislature of Maryland first essayed an effort towards its improvement. That the law on this important subject can be improved, and ought to be improved, must be apparent to the most superficial observer, but it is conceived that no permanent and valuable melioration can be effected in it otherwise than by resolving the system into its elements, and building it up anew. Mere patching on the surface will do no good. It is doubtful whether the recent changes in Maryland, including the provision contained in the new Constitution, on the subject, can be called improvements. It is certain that without additional legislation, the law is worse than before any changes were attempted.

The first of these changes was by the act of 1841, ch. 161, which in substance provides, that the real estate of the wife, shall not be

taken during her life, for debts due by her husband. This act therefore merely secures to the wife as against her husband's creditors, the exemption of her lands from sale for his debts, *during her life*, leaving her children exposed to the chances of being turned out of it the moment she is dead; for it is perfectly clear that the act does not affect in any manner, her husband's right to her lands as tenant by the curtesy.

The act of 1842, chap. 293, regulates the property of the wife in her slaves, which are protected from the debts of the husband both during the coverture and after her death. If there be children of the marriage, the negroes belong to the children after the death of the husband, who has the use of them, exempt from the claims of his creditors during his life. If the wife leave no children, the right of the husband to the slaves is absolute, and in that case the slaves are of course subject to the claims of his creditors. The act does not affect her real estate otherwise than by enabling her to receive and hold it without the intervention of a trustee. It permits her to make a will, but fetters the right with so many conditions as to render it of no value. She is permitted to give all she has to her husband, but cannot give it to others without his consent. The will is moreover to be of no validity unless made sixty days prior to her death, nor even then, without a privy examination, to be conducted by the witnesses to the will, out of the presence and hearing of her husband. There never was, it is believed, any real protection afforded to the wife by a privy examination, but to couple such a ceremony with a power in the wife, to give all she has to her husband, but nothing to any other person without his consent, seems to be unmeaning, if not incongruous. A married woman may without the consent of her husband, by the general law, dispose by will, of property settled upon her to her separate use, because in reference to such property she is regarded as a *feme sole*. But lastly, the act permits the wife to hold, of her own earnings, either in money or any kind of property, to the value of one thousand dollars, which is to be to her separate use, with power to use, invest, sell and dispose of the same, with its increase. And the act makes her liable for claims against her to be recovered by attachment.

The Constitution which went into operation on the 4th of July, 1851, directed that the General Assembly shall pass laws necessary to protect the property of the wife from the debts of the husband during her life, and for securing the same to her issue after her

death. And to carry into effect this provision of the Constitution was the purpose of the act of 1853, ch. 245, which enacts in substance:—That the property of the wife, real and personal, at the time of her marriage, or acquired thereafter, except what may be obtained from her husband in prejudice of his creditors, shall be protected from the debts of her husband. That a trustee to hold property for the benefit of the wife, shall be unnecessary, and that all contracts in contemplation of marriage shall, after the marriage, remain in full force.

The command of the Constitution is distinct and imperative, that the Legislature shall pass laws necessary to protect the property of the wife from the debts of the husband *during her life*, and "*for securing it to her issue, after her death.*" And the Legislature in execution of this duty, pass a law simply declaring that the property of the wife shall be protected from the debts of her husband during her life, and there stop. No provision is made "for securing the same to her issue." How it is to be secured—what are to be her remedies, are left blank, unless the remedies now existing by law, be sufficient for her protection, and to these she could have had recourse without the aid of the statute.

"Property" is the term used in the Constitution, which must mean, there being nothing to restrict it, all the property of the wife real, personal and mixed. And this by the Constitution, is to be protected from his debts and secured to her issue after her death. We do not enquire whether this arrangement be a wise one—the time for such enquiries has passed by—the command is in the Constitution and must be obeyed. There may and no doubt will be difficulty in adjusting the conditions of the new arrangement, so as to make the various rules of law regulating the rights and liabilities of husband and wife, square with the requirements of the Constitution.

The thing to be done is, to protect the property of the wife from the debts of the husband, and to secure it to her issue after her death. One thing is clear, that when this is done, the husband will have no "property" in either the real or personal estate of his wife. It is a sweeping change in very few words.

The strangest part of the arrangement is, that while he is deprived of his wife's property, he is still left to pay her debts. She may have a large fortune, and he barely enough to pay his own creditors—no matter, his property is to be burthened with her debts, and the remedy of her own creditors against her own prop-

erty, under the existing rules of law is not so clear. It is true the husband is not deprived of the use of her property during her life, it is only to be protected from his debts. It gains him therefore no credit with the world. Men cannot trust him on the faith of it. But after her death his right even to the usufruct of all or any portion of her property immediately ceases. On the other hand the wife still retains her right to dower in her husband's real estate, even in derogation of the claims of his creditors. She has the first right to administer on his personal estate where there are no children, and where there are children, an equal right with them. She has moreover a share of his personal estate, it may be one-half after the payment of his debts. Is it intended that she shall retain all these valuable rights, make her husband pay all her debts, and keep to herself all her own property?

We suppose that a settlement upon the wife was intended—a legislative settlement upon all the women of the State. But it should be remembered, that where a woman has provided for herself by a marriage settlement, she has no dower. If she accept a provision made for her by the will of her husband, it is to be taken as in lieu of her legal share in his personal estate. In making a settlement which is to be of universal application, it is important that it should be grounded upon just principles.

The business in hand is to carry out the command of the Constitution. That instrument has reversed a principle lying at the foundation of this whole subject, at the very point where all reasoning on the subject begins, and the effect is to throw the whole existing system out of sorts. For when we take away the right of the husband to his wife's property—absolutely after her death, leaving him a stewardship during her life, his liability for her debts ought to cease at the same time. We are required to secure the wife's property from her husband's debts—not from her own debts. It is just therefore that her own property should be made applicable to the payment of her own debts.

If the husband is stript of all "property" in his wife's estate, real, personal or mixed, then that entire branch of the law of husband and wife, the knowledge of which cost many of us so much trouble to attain—and which regulates his rights to her real estate after her death—to her chattels out-standing and in possession—to her choses in action—with her right and his right to administration, each upon the estate of the other—all the complex rules as modified by this or that circumstance, which belonged to the sub-

ject, have all passed silently away. We must build upon the ruins of the old system—the Constitution has given us part of a new system, and we must needs build up to that.

In doing this, shall the disabilities of the wife as incident to coverture remain? If not in whole, shall they remain to any extent, and to what extent? Is the existence of the wife to be merged in that of the husband? Is the husband to be sued for her debts, but to be liable only to the extent of her property? In what manner, should disputes arise as to the value or extent of her property, are these facts to be tried and ascertained? Is she to be sued for her own debts, or is a proceeding *in rem* to be provided for reaching her property? Shall she be competent to make contracts, or to execute a release or receipt for money paid or property delivered? Or shall her husband be required to join her? Shall she be competent to convey her real estate? or sell her personal property? These matters must all be attended to.

But furthermore—her property, that is all her property, is to be "secured to her issue after her death." The husband, therefore, when she leaves issue, is not to have his curtesy, as in that case her issue might never be able to touch her real estate, which must therefore go to her issue immediately after her death. But our duty is to protect the property of the wife from the debts of her husband "during her life." Suppose the husband have no debts, to what purposes and to what extent shall the husband have control over it in that contingency? The property must be secured to her issue after her death, therefore his use of it during her life, must not be inconsistent with this purpose of the Constitution, whatever it is. Is it to be presumed during and throughout the coverture that she may have issue, and while possibility of issue is not extinct, is he to keep his hands off her personal and real property during her life?

What is to be the condition of things when the husband has no debts, and the wife no issue? Is any change made by the Constitution and Acts of Assembly in such case? And how is it varied when the husband is indebted and the wife have no issue? If the wife have issue there can be no curtesy in the husband. The most that can be said is, that in some cases he might have his curtesy and in others not. But there is no mode by which the wife's right to dower can be made subject to the same precise conditions, as that of the husband to his curtesy. The subject therefore must be

recast and the rights of the married couple be adjusted in such manner as may upon the whole be sensible and just.

It will be convenient to divide the subject into three heads.

1. What the law shall be where there is no necessity for its interference to protect the wife against the acts of the husband.

2. What the law shall be where there is a necessity for such interference.

3. What it shall be after the death of either husband or wife.

WHAT THE LAW SHALL BE WHERE THERE IS NO NECESSITY FOR ITS INTERFERENCE TO PROTECT THE WIFE.

1. The right of the widow to dower in the lands of her deceased husband, shall no longer exist.

2. The right of the husband to an estate in the lands of his deceased wife, as tenant by the curtesy, shall no longer exist.

3. The husband shall not be answerable for the debts of the wife, existing at the time of the marriage.

4. The personal property of the wife shall be primarily answerable for her debts existing at the time of the marriage—her real estate shall be answerable in the event of the insufficiency of her personal estate.

5. The creditors of the wife may subject her property, personal and real, to the payment of her debts, by process of attachment in the usual form.

It is necessary to provide for all contingencies, but it will be a rare thing that a woman upon her marriage will be found to be very deeply involved in debt. As a general rule women are more wary, and less liable to involve themselves in debt and difficulties

than men. The same woman who as a wife with a husband to lean upon and supply her occasions, will scatter his money in all manner of extravagancies, as a widow with no one to look up to for guidance and support, will pinch, and save, and mend stockings, and never exceed her means, be they never so narrow. They make the best of administrators. Understanding but little of business matters, they are prone to be suspicious, and uniformly think themselves cheated when they fail to have things their own way. No money is lost to the estate for lack of effort to collect it. The debtor who can stand out against her importunities, may congratulate himself upon possessing a degree of patience which can stand anything. Going security is their abomination. Paying debts for others, is what no woman can comprehend, and the man who owes a debt to the estate, or who leaves the estate to pay a debt for him, is a rogue to all intents and purposes.

6. If the wife be not indebted at the time of the marriage, or being indebted, if the husband shall assume her debts, in either case the husband shall take possession, use and dispose of her personal estate, and shall receive, use, and enjoy the rents, issues, and profits of her real estate, without accountability, except as is hereinafter provided.

It is observable that the husband may make any, and every use of his wife's property during her life, but that of applying it to the payment of his debts. After her death, the property belongs to her issue. If she have no issue, it may be disposed of as the Legislature may deem expedient and proper.

7. The wife's property shall in no case be sold, or otherwise subjected to the payment of the debts of the husband, without the consent of the wife.

8. Husband and wife may join in a contract for the sale of the wife's real estate, which contract signed by the wife shall be valid in law, as if she were a *feme sole*. Husband and wife may also join in a conveyance of the wife's real estate, and any disposition of

the proceeds made by the husband and wife, or by the husband alone, with the wife's approbation and consent, shall be good and valid in law.

9. The husband may, in the name of himself and wife, reduce her outstanding chattels, and choses in action into possession, and in the event of his death during her life, all pending suits and proceedings so by them instituted, shall survive to the wife.

10. In case of the sale of real estate belonging to the wife, or in which she has an interest as co-heir or otherwise, under proceedings in equity or otherwise, the conversion of the same from real to personal estate, shall give the husband no right to the said proceeds, unless the wife in writing shall so direct and consent; in the absence of such direction and consent in writing, the wife shall alone be competent to receive the same.

11. The wife shall be competent, notwithstanding her coverture to give and execute receipts and releases for money due her, and to accept the delivery of property belonging to her, and to give discharges therefor.

12. All the property of the wife, real, personal and mixed, subject to such limited control and use thereof, as is herein given to the husband, shall be deemed in law as settled upon her to her own separate use.

The object of this provision is to vest in the wife the ultimate right to her own property, and to give color and direction to the legal reasoning on the subject of her rights, should those rights unfortunately become the subject of litigation between herself and husband.

13. The wife may apply such portion of her property to the establishment in life, or to the education and maintenance of her children by a former marriage as she may deem reasonable and just.

14. The wife shall have full power to dispose of her property by will, without her husband's consent, and a privy examination shall not be necessary to the validity of the will.

15. It shall be essential to the validity of the will of a married woman, that she be at the time of executing the same, of sound mind and capable in law of executing a valid deed or contract—that she shall sign the same in the presence of at least two witnesses, who in her presence and at her request shall sign their names as witnesses thereto.

16. A wife may by her will give or devise all her property or any part thereof to her husband.

17. It shall not be essential to the validity of the will of a married woman that it be made within any particular period before her death.

18. Agreements made between husband and wife prior to marriage, and founded upon that consideration shall be valid and binding in law, according to the intention of the parties.

19. Agreements between husband and wife made after marriage, making family dispositions of their property or the property of either, or directing what disposition shall be made of the same after their deaths, or the death of either, shall, if not in derogation of the rights of creditors, be supported in law according to the intention of the parties.

WHAT THE LAW SHALL BE WHEN THERE IS A NECESSITY FOR ITS INTERFERENCE.

20. A Court of Equity shall have power in all cases of complaint made by or on behalf of a married woman, and upon being satisfied that her husband is wasting her means or property, to interfere and restrain the husband, his assignees or creditors, from collecting the legal or equitable choses in action of the wife, or from using or appropriating her property, and by the appointment of a trustee for her benefit, to secure the same to her separate use, and to that of her issue.

The Court of Appeals in the case of Wiles *vs.* Wiles, 3 Miller 1, have settled the existing law, and correctly settled it according to the adjudged cases, that if the husband can acquire possession of his wife's personal property or choses in action without a suit at law or in equity, or by a suit at law without the aid of equity (except perhaps as to her legacies or portions by will or distribution,) he will not be disturbed by a Court of Equity in the exercise of his right—in other words, that all the property of the wife which he can lay his hands on, without the aid of equity, is his own absolutely. But when the husband or his assignee asks the assistance of a Court of Equity to obtain such possession, the Court will require him to do what is equitable, by making a suitable provision for her maintenance and support out of it.

It is observable that the doctrine is made to depend upon the respective powers and jurisdictions of the Courts and not upon the nature of the rights involved. The husband should have a right to her personal property, or he should have no such right. It is any thing but satisfactory to say, that if his remedy be in one Court, he shall have her property, but if the remedy happen to be in another Court, he shall have no such right. Or inversely, that the property shall be the wife's, if the husband's proceeding to recover it be of one description, but not hers, but his, if that proceeding be of another description. Certainly, right must have an independent existence of its own.

21. A Court of Equity shall have power to interfere for the wife's protection, as is provided for in the last preceding section, where the husband is involved in pecuniary difficulties, and there is reason for believing that his own property and means will prove insufficient for the payment of his debts.

22. Where the husband has been divorced by a Court of competent jurisdiction for the adultery of the wife, and where the care and custody of the children of the marriage have been adjudged to the husband, a Court of Equity shall have power to secure to the husband, for the support and maintenance of himself and the children of the marriage, and for the education of the children, such portion of the wife's property as under all the circumstances shall seem wise and expedient, the Court taking care that the same shall not be applied either in whole or in part to the debts of the husband.

23. Where the husband and wife are so divorced for the adultery of the husband, or for his cruel or other mal-treatment of his wife, and where the care and custody of the children of the marriage or some of them, are adjudged to her, a Court of Equity shall have power in addition to that of securing to her all her own property, to compel the husband to make such provision out of his own property, for the support of the wife, and the education and maintenance of the children as under all the circumstances the Court may deem wise and expedient.

WHAT THE LAW SHALL BE IN THE EVENT OF THE DEATH OF HUSBAND OR WIFE.

24. Upon the death of the husband, without leaving children or the descendants of children, his wife surviving shall be entitled to one-half of his personal estate, after payment of his debts, and to the use of one-third of his real estate, also after payment of his debts.

25. Upon the death of the wife without leaving children or the descendants of children, her surviving husband shall be entitled to her personal property absolutely, and to the use and enjoyment of her real estate during his life, such personal and real estates being subject in his hands, to the payment of her debts.

The Constitution declares that the property of the wife shall be protected from the husband's debts *during her life*, and after her death shall be *secured to her issue*. The above section does not intrench therefore upon the Constitution, for it has no application to what may be the state of things *during her life*, and it supposes her to die without issue.

26. The wife's use of a third of the husband's real estate during her life, shall in no case interfere with the sale of his real estate, for the payment of his debts, or for a division of the proceeds thereof amongst his heirs at law—nor with the application of the rents and profits thereof towards the payment of his debts.

27. In all cases where the lands of the husband are sold for the payment of his debts, the widow shall be entitled to a portion of the surplus of the proceeds thereof after payment of his debts of from one-seventh to one-tenth, according to her age—and where the

lands are sold for distribution among the heirs, she shall be entitled to the same portion of the whole proceeds.

28. Upon the death of the wife leaving children, or the descendants of children, her property, real and personal, shall vest in her children and their descendants.

This is in conformity with the positive command of the Constitution. A provision giving to the husband any share of the wife's property, who had died, leaving issue, would be repugnant to that instrument and void.

29. Upon the death of the husband leaving children, his property, real and personal, shall vest in his children and their descendants.

30. Upon the death of the wife, the husband surviving shall be entitled to the guardianship of the children of the marriage, and shall be allowed for his trouble and care in their support, education and maintenance, a commission not exceeding twenty-five per cent. on the amount of their property, and upon the rents and profits of their real estate, coming into his hands.

31. Upon the death of the husband, the wife surviving, shall be entitled to the guardianship of the children of the marriage, and shall be allowed for her care and trouble in their support and maintenance, a commission not exceeding twenty-five per cent. upon the amount of their personal property and upon the rents and profits of their real estate, coming into her hands.

OF THE CUSTODY OF MINOR CHILDREN.

There is a distressing uncertainty in the existing law in reference to the disposal of minor children, where the parents from any cause are unfortunately living separate. This is owing, says Judge Story, to the extreme delicacy of the subject, and to the fact, that in any state of the law, much of necessity, must be left to the discretion of the Court, which varies according to the circumstances of each particular case. In the great case of Wellesby *vs.* the Duke of Beaufort, (2 Russ. 1. 3 Cond. Eng. Ch. Rep. 1.) Lord Elden observed that, "notwithstanding all the doubts that may exist as to the origin of this jurisdiction, it will be found to be absolutely necessary that such a jurisdiction should exist, subject to correction by appeal, and subject to the most scrupulous and conscientious conviction of the judge, that he is to look most strictly into the merits of every case of this kind, and with the utmost anxiety to be right."

When the stat. of 2 and 3 Victoria, generally known as Mr. Justice Talford's Act, was before the House of Lords, Lord Lyndhurst made some remarks, which well exhibits the state of the law as it existed before the passage of that act, and as it exists at present with us. He said, that by the law of England, the father had an absolute right to the custody of his children, and to take them from the mother. However pure might be her conduct—however amiable, however correct in all the relations of life, the father might, if he thought proper, exclude her from all access to her children, and might do this from the most corrupt motives. He might be a man of the most profligate habits—for the purpose of extorting money, or in order to induce her to accede to his profligate conduct, he might exclude her from all access to their common children, and the course of the law would afford her no redress. Need he say that it was a cruel law—that it was unnatural—that it was tyranous—that it was unjust.

The arguments urged against these views of Lord Lyndhurst, were, if possible, more disreputable than the law which it was his object to reform. There is a certain class of men who have a horror at seeing the law touched for any purpose. Men of this character did not scruple to urge, that when unhappy differences separated the father and mother, to give the custody of the child to the father, *and to allow access to it by the mother*, was to injure the

child. For it was natural to expect that the mother would not instil into the latter any respect for the husband whom she might hate or despise. It was in support of the law as it then existed—a law which gave the custody of the children to the father, irrespective of his character, or the circumstances of the case, that such reasoning was employed. And it is a marvel that it did not occur to such men, to look for a moment, to the other side of the picture. Was it supposed that in no case could a father teach his children to hate and despise their mother?

The difficulties alluded to are inherent in the subject, and may be alleged with equal propriety against the father and mother. They cannot be adduced either for or against either, as they equally attach themselves to both. After much opposition however, the statute passed, but after all it is but a partial and very meagre remedy for the evils so feelingly portrayed by Lord Lyndhurst. It still concedes that the natural right to the custody of the children over seven years of age, is with the father during his life, with the power to appoint a guardian for them after his death, but it provides, and this is all it does, that the mother, all other things being equal, shall have the right to their custody until the age of seven years, and that the Lord Chancellor, upon the petition of the mother and hearing, shall, if he shall see fit, make order for the access of the mother, (when the children are over seven years of age,) at such times, and subject to such regulations as he shall deem convenient and just.

The act contains however, the proviso, that no order shall be made by virtue of this act, whereby, any mother against whom adultery shall be established by judgment in an action of *crim. con.* or by the sentence of an ecclesiastical Court, shall have the custody of, or access to any infants." The proviso includes children under seven years of age.

But adultery—open, flagrant adultery, is no bar to the custody of his children by the father. In the case of Ball *vs.* Ball, (2 Sim. 35, 2 Cond. Eng. Ch. Rep. 299,) Sir John Leach said with emphasis—"This Court has nothing to do with the father's adultery, unless the father brings his child into contact with the woman. All the cases on this subject go upon that distinction, when adultery is the ground of a petition for depriving the father of *his common law right*, over the custody of his children."

That the questions arising under this branch of the law, are delicate, embarrassing and responsible, is no reason why their

should be an absence of any sensible, and just law upon the subject—much less is it a reason why the old arbitrary, and quaint doctrines of the common law should be permitted to disfigure the little law there is. What moral foundation can there be for the common law right, as it is called of the father, to the custody of the children under all circumstances whatever? Why is the mother passed over as if she were not in existence, or as if her feelings were not worthy of the slightest consideration? When the children are of tender years, especially if at the breast, what can the father do with them, but hand them over to the custody of some other woman, whilst their own mother returns to her childless bed. Is this just? Is it to be borne, that such a right, whether of common law origin or not, should exist in a civilized land?

32. A Court of Equity shall have power in its sound discretion, and where the morals, or the safety, or the well being of any infant child requires it, to withdraw such child from the custody of its father, and place the care and custody of it in the hands of its mother—or to withdraw it from the custody of the mother, and place the care and custody of it in the hands of the father—or to withdraw it from the custody, of either father or mother, or both, and place the care and custody of it elsewhere.

33. There shall be no superior right on the part of the father to the custody of the child, but in all cases where the Court is called upon to interfere in regard to such custody, as between father and mother, their rights to such custody shall be equal, except as in the next succeeding section is provided.

34. The mother shall have the superior right to the custody of her child under the age of seven years, provided, however, that any mother against whom adultery has been established by the judgment of any

Court of competent jurisdiction, shall not be entitled to the care and custody of her child, even under the age of seven years.

35. The father who is living in adultery, whether separate from his wife or not, shall not be entitled to the care and custody of his child of any age.

36. Neither the father nor the mother who is living in habits of excessive drunkenness, or of open lewdness, or of any species of moral depravity, rendering it probable that by their intercourse with their child, its mind may be poisoned, or its morals debased, shall have the care and custody of their child of any age.

37. The Court shall have power to compel the father or the mother, having the means, to pay such sum annually or otherwise, to be applied under the Court's direction, to the maintenance and education of the child, as under all the circumstances, the Court shall deem expedient and proper.

38. It is not essential to the jurisdiction and powers hereby vested in the Courts, that a suit shall be pending relative to the minor or his estate, or that there be property for the Court to act upon.

Lord Elden in Wellesby *vs.* The Duke of Beaufort said, "If any one will turn his mind attentively to the subject, he must see that this Court has not the means of acting, except where it has property to act upon." On this account, it is usual in England to give a small sum to the child, in order that the Court may have jurisdiction in reference to its care and custody. But as the interference of the Court is mainly for the personal welfare of the child, it is not an admissible reason for ousting the jurisdiction of the Court, at least in this country, that the child is poor. All children are equally entitled to the protection of the Court.

39. If property be settled, or a fund provided for an infant upon condition that either, or both parents shall surrender their right to the care and custody of the child, and the parents, or either of them by acquiescing for a time, and permitting the child to be educated in a manner conformably to the gift, bequest or provision, encourage in it corresponding expectations, the parent, or parents shall not be allowed to resume the custody of the child, and disappoint such expectations, but the care and custody of the child shall remain unchanged, or the Court shall make order in relation thereto, as to it may seem expedient and proper.

This is the settled English law, and seems to be eminently reasonable and just. The principle of the rule is very well put by Lord Eldon in Lyons *vs.* Blenkin. Jac. 245, 4 Eng. Cond. Ch. Rep. 115.

40. A Court of Common Law shall have power to issue the writ of *habeus corpus* directed to any persons who may be alleged to have possessed themselves by fraud, or force, or otherwise improperly of the persons of infants—or where infants are alleged to be the subjects of cruel or personal ill usage on the part of parents, guardians or others—or where it is alleged to be necessary to protect infants from vicious connections formed by parents or others, by which their morals are in danger of being contaminated.

41. A Court of Common Law shall have power not only to deliver the persons of infants from illegal or improper restraint, but also to protect them from the like restraint in future.

42. The powers of the Courts of Equity and of Common Law, as is herein provided, shall apply to illegitimate children.

43. In all questions of custody, a liberty of choice shall be permitted to a female infant of the age of twelve years, or a male infant of the age of fourteen years, as to the person to whom the custody of such infant shall be committed, provided the Court shall perceive no moral or other serious objection to the object of such choice.

44. Either parent to whom the care and custody of the child shall not be adjudged, shall nevertheless have by order of the Court, access to such child, at such times and under such regulations as the Court shall deem expedient and just.

45. The Court shall have power to protect the persons of infants from violence, seizure or interruption, while coming to, remaining in, or returning from Court.

THE LAW OF LANDLORD AND TENANT.

A CONTRACT for the hire of a house or a farm for a certain period at a stipulated price, is a plain transaction, one would think, which every person ought to be able to understand. It happens every day, and every head of a family in the land has an immediate interest in it. Certainly, upon such a subject, the law ought to be simple and well settled. Those however who happen to be involved in a suit in Court, involving the right to recover rent, by distress or otherwise, are very soon convinced that the law of rents is full of all sorts of unmeaning crotchets, having but a very remote, if any connection at all, with the motives or inducements of men in their dealings with each other at the present day.

If the right of distress be the subject of the suit, and the owner of the land who rented the property have conveyed it to a stranger, the Court will inform him that the rent is incident to the reversion, and that having parted with his reversion, his right to distrain for the rent is gone. Nothing could be more lucid and logical than the exposition of the law by the learned judge, upon this important and interesting subject. The party will hear, for the first time perhaps, in his life, of Bracton, Britton, Fleta, Glanville and Vigellius—of men who lived many hundred years ago, in countries distant three thousand miles from our shores—who wrote in Latin or in the Old Norman French—from whose writings it will plainly appear, that the process of distress, was a remedy given to the lord to compel the tenant to perform the services which the tenant obliged himself by his feudal contract, to render by way of retribution for his farm. That these services, according to Lord Chief Baron Gilbert, were, when the feudal tenures prevailed, chiefly of two sorts, either military, as attending on the lord in war, or ministerial, as attending his Courts in time of peace, and there assisting him in the distribution of justice, or ploughing and tilling his demesne. He will further be given to understand, that the non-

performance of these services was by the feudal law a forfeiture of the feud, and that the rigor of this law was greatly mitigated, and the feudal forfeitures changed into distresses, by the adoption of the pignorary theory of the civil law. That it was therefore by seizing the chattels of the tenant and holding them as pledges, that the lord obliged his tenant to perform the feudal services. That in process of time however, these services came to be commuted into a money return or retribution for the enjoyment of the demesne, and hence is deduced the money rent of the present day. He will further hear that as the services were due to the owner of the land, the right to seize the tenant's goods and hold them as pledges, for the performance of the services, ceased the moment the lord aliened the feud—that the feudatory, though he still held the land, became by the alienation exempt from the remedy by distress—which could not now be used against him—not by his former lord, because he had aliened the land—not by the purchaser of the land, because with him there was no feudal contract for the render of the services. The result, whether satisfactory to the mind of the landlord or not, would be very clear, that his remedy was gone, and that he must lose his rent.

There are many quaint old rules besides these alluded to, still belonging to the doctrine of rents, but the reasoning upon which they are founded, though satisfactory to the mind as historical explanations, have no connection with the rights and liabilities of landlord and tenant at the present day. That a party who has rented land and enjoyed the full benefit of this contract on his side, should be able to defend himself in Court against a distress for the rent, upon the ground that his lessor has aliened the reversion—or that the rent was not granted out of land, but out of a piscary, or a common, or a franchise, or other incoporeal hereditament—that he should be allowed to admit in open Court that he made the contract, received the benefit of the consideration, and at the same time, refused to pay the rent for such reasons as these, however sensible and satisfactory they may have been in the semi-barbarous times in which they originated, are anything but sensible or satisfactory at the present day.

There is a vast deal of this ancient lore displayed at times in the Courts, where it passes for legal learning, and is characterized by such phrases as legal erudition,—great ability and the like, but the party who is reasoned out of his honest dues by it, will be dis-

posed to prefer a little less learning, and more common sense, upon a subject which ought to be intelligible to every man in the community.

Whether the process of distress for the recovery of the rent be as old as the common law—or whether it was adopted from the "pignorary method" of the civil law, or introduced as a more indulgent substitute for the absolute forfeiture of the feud, occasioned by the non-performance of the feudal services, is of no sort of importance in the present age of the world. Writers on the subject of rents expend much useless learning upon these matters, but what the community want is, that the rubbish of a former and forgotten age shall be thrown aside, and that a plain practical set of rules, based upon common sense and common justice, be substituted in their place.

1. A grantee or assignee of any land let to lease, or of the reversion thereof, and his personal representatives or assigns, shall have against the lessee, his heirs, personal representatives or assigns, the like advantage by action or entry for any forfeiture, or by action upon any covenant or promise in the lease, which the grantor, assignor, or lessor, or his heirs might have enjoyed.

2. A lessee, his personal representatives or assigns, may have against a grantee, or alienee of the reversion, or of any part thereof, his heirs, or assigns, the like benefit of any condition, covenant, or promise in the lease, as he could have had against the lessor himself, or his heirs and assigns, except the benefit of any warranty in deed or in law.

3. In conveyances or demises of rents in fee, with powers of distress and re-entry or either of them, such powers shall pass to the grantee, or devisee, without express words. A grant or devise of a rent, or of a reversion or remainder, shall be good and effectual

without attornment of the tenant; but no tenant who before notice of the grant or devise, shall have paid the rent to the grantor, shall suffer any damage thereby.

4. The attornment of any tenant to a stranger shall be void, unless it be with the consent of the landlord of such tenant, or pursuant to, or in consequence of the judgment, order, or decrée of a Court.

5. Rent of every kind may be recovered by distress or action. A landlord may also by action recover (where the agreement is not by deed,) a reasonable satisfaction for the use and occupation of lands; on the trial of which action, if any parol demise or any agreement, (not being by deed,) whereon a certain rent was reserved, shall appear in evidence, the plaintiff shall not therefore be non-suited, but may use the same as evidence of the amount of his debt or damages. In any action for rent, or for such use and occupation, interest shall be allowed as on other contracts.

6. He to whom rent or compensation is due, whether he have the reversion or not, his personal representative or assignee, may recover it, as provided in the preceding section, whatever the estate of the person owing it, or though his estate in the land be ended. And where the owner of real estate in fee, or holder of a term yielding him rent, dies, the rent thereafter due shall be recoverable by such owner's heir, or devisee, or such term-holder's personal representative. And if the owner or holder, alien or assign his estate or term, or the rent thereafter, to fall due thereon, his alienee, or assignee may recover such rent.

7. Rent may be recovered from the lessee, or other person owing it or his assignee, or the personal representatives of either. But no assignee is to be liable for rent, which became due before his interest began. Nothing herein shall impair or change the liability of heirs, or devisees for rent, or for other debts of their ancestor or devisor.

8. Where distress shall be made for rent justly due, and any irregularity, or unlawful act shall be afterwards done, by the party distraining or his agent, the distress itself shall not be deemed to be unlawful, nor the party making it be therefore a trespasser *ab initio;* but the party aggrieved by such irregularity or unlawful act, may, by action, recover full satisfaction for the special damage he shall have sustained thereby.

The aforegoing sections are borrowed from the Code of Virginia, and express in concise, and appropriate terms, what the Commissioners think the law ought to be, on the subject to which they relate.

9. The property of a stranger shall not in any case, though found upon the premises, be taken, or otherwise made liable for the rent.

The act of 1813, ch. 135, protected spinning wheels and looms, loaned or hired out, from seizure by distress for rent. The act of 1823, ch. 151, exempts slaves hired to the tenant, and another act protects stoves hired to the tenant, from seizure by the landlord. The principle of these acts is, that one man's property shall not be taken to pay another man's debt, and it is strange that when the attention of the Legislature was, in these instances, called directly to the subject, they did not by a general law protect all property not belonging to the tenant, from seizure by the landlord.

10. Slaves shall not be distrained or levied upon for rent without the consent of the lessee or his assignee,

when there are goods and chattels of such lessee or his assignee sufficient to pay the rent, which are shown to the baliff or officer, and which it is in his power to take.

11. The goods and chattels of the lessee or his assignee, which may be removed from the premises within sixty days either before or after the rent becomes due, may be pursued by the lessee or his assignee, and seized under a distress wherever found, provided the goods and chattels shall not have been sold to a *bona fide* purchaser.

The statute of 8 Ann, c. 14, gives to the landlord the right to follow goods fraudulently and clandestinely removed from the premises to avoid a distress, within five days after such removal. The statute 11 Geo. 2 ch. 19, extends the period within which the goods may be followed, to thirty days. The act of 1826, ch. 266, declares that all removals within thirty days before rent becomes due, shall be deemed clandestine, and the property may be followed and distrained, if not sold to a *bona fide* purchaser. And the act of 1842, ch. 208, provides that property removed from the premises within sixty days prior or subsequent to the expiration of the lease or tenancy, may be followed, seized and sold by the landlord, in all cases where a landlord would, under existing laws, have a right to seize under distress. The latter clause preserves the saving of the rights of *bona fide* purchasers, under the act of 1826. Surely it cannot be said that under the Laws of Maryland the rights of landlords are not well and sufficiently protected.

12. The lessee or his assignee shall be entitled to the process of distress for the recovery of his rent, as well where the land is rented for a share of the crop or a specific amount of grain, produce, stock or other thing in kind, as in cases where the rent is payable in money.

13. In levying a distress for the landlord's share of the crop, amount of grain, produce or other thing, the mode of proceeding shall be substantially as follows, viz:—The bailiff or officer to whom the distress warrant is directed, shall summon two disinterested appraisers, who shall, upon oath appraise the share of the crop, specific quantity of grain or produce, stock or other thing due and coming to the landlord, and the bailiff or officer shall seize and levy the distress upon the property of the tenant or his assignee, for the sum so ascertained by the appraisers, in the same manner as for a money rent in arrear.

The act of 1831, ch. 171 prescribes the mode of levying a distress for a share of the crop, or specific portion of grain or produce, which is the same as is proposed in the above section.

14. To every distress warrant, an account of the rent due and in arrear, or share of the crop or amount of produce or other thing, reserved and not delivered, with the oath or affirmation of the lessee, his assignee or other person entitled to the rent, that the same is just and true, shall be annexed.

The act of 1834, ch. 192, required an account of the rent due, to be stated, and the oath of the landlord, that it was just and true, and that the landlord had not received any part or parcel of the rent or produce, or any security or satisfaction for the same. It was found however that the act operated as a denial of the right of landlords who had taken personal or other security for the rent, to recover the same by distress, and to correct the oversight, the act of 1842, ch. 208, provides that landlords who have taken security for the rent may distrain as if no security had been given, and that the affidavit need not contain the averment that no security has been received for the rent.

15. Privity of estate shall not be essential to the right of distress for rent, but any person entitled to

the rent shall be entitled also to the remedy by distress for its recovery.

16. The relation of landlord and tenant shall be created by any agreement, either written or verbal, by which the tenant agrees to take possession of the land and to pay a stipulated consideration therefor, either in money, in kind, or in any other manner, and all remedies provided by law for the recovery of rent, shall attach to such a relation.

17. The lessee or his assignee shall not be answerable, under a covenant, to deliver up the premises in good order, or the like, for casualties occasioned by the elements or other inevitable accident, but he shall be answerable for the rent.

18. Taxes and other public assessments upon the land, shall be chargeable to the landlord, and if paid by, or collected from the tenant by levy or otherwise, shall be deducted by him from the rent, unless the tenant be bound by express contract to pay the taxes.

19. The acceptance of a deed for land reserving a ground rent, or rent in fee, shall be deemed a covenant to pay the rent, and shall operate to charge the land therewith, according to the terms of the reservation.

20. The tenant shall be entitled to the away going crop, and to the right of ingress, egress and regress, to cut, and secure the crop, and to carry it away, but the tenant shall not in the exercise of such right, carry away the straw from the land.

21. Rents may be apportioned in respect to time in all cases of sales—by private contract—by trustee, under a decree of a Court of Equity—by an executor, or by the Sheriff or other officer under execution. And where the rent is so apportioned, the purchaser shall be entitled to the rent accruing after the time, when by the terms of the contract of sale, he is entitled to the possession.

The rule of the English law is, that rent is never apportioned in respect to time. The purchaser of land is entitled to the rent becoming due after the purchase—if a year's rent become due the day after the purchase, he is entitled to the whole of it. The rule is founded upon the consideration, that to divide or apportion the rent, would make the tenant liable to two creditors instead of one, and subject him to the harsh proceeding by distress, at the instance of each. But the same thing happens where the rent is apportioned in other respects than as to time. In case of a grant of the reversion of part of the land out of which the rent issues—that is, where the fee is separated into two ownerships, the rent is apportioned between the owners, and the tenant pays to each his separate part. It is apportioned also where part of the rent is granted to one person, and part to another. A person, observes Chancellor Kent, has a right to sell the whole or any part of his reversionary interest in land. It may be necessary to divide his whole estate out on rent, among his children, or to sell part to answer the exigencies of the family, and it would be intolerable if such a necessary sale worked an extinguishant of the whole rent. But if the rent may be apportioned in respect of its separation into several parts, there seems to be no good reason why the same thing should not be allowed when it is separated in respect to time.

OF THE NOTICE TO QUIT.

22. A tenancy for one year—for a term of years—from year to year, or at will, may be terminated by either party giving notice in writing, at least two months prior to the end of the year, term or tenancy,

of his intention to terminate the same. Provided that no notice shall be necessary where by express agreement the same is dispensed with.

The act of 1793, ch. 43, gives the lessor a summary remedy for recovering possession of the leased premises from the tenant who holds over after regular notice to quit. The act applies to cases where lands are let "for one or more years, or at will," and has been held not to apply to the case of a tenancy from year to year. The strictness of this construction is the more remarkable, that a tenancy from year to year is virtually but a tenancy for one year at a time. A tenant holding a second year under an agreement for the first, and that merely by reason of the omission of a notice to quit, is a tenant from year to year. And the Courts have held that the holding in such case for the second year, or for all years subsequent to the first, is to be deemed but a continuation of the first year's holding, the terms and stipulations of the agreement for the first year, being carried by implication from the first through the subsequent years. Yet the notice to quit for the first year is thirty days, but for all subsequent years six months, under the English rule which prevailed before the act was passed. So that by construction thirty days is sufficient warning for the first year, but six months is required for every subsequent year of the same lease.

The case of a tenancy from year to year is supposed not to have been provided for by the act, and to supply the omission the act of 1845, ch. 209 enacts, that the act of 1793 shall be applicable to tenancies from year to year, but that a notice in writing of six months prior to the expiration of the current year, be given to the tenant. The latter act by implication admits the correctness of the construction given to the act of 1793, for it provides that a verbal notice from the tenant to the landlord, of his intention to quit, if given one month before the expiration of the tenancy, in all cases comprehended within the act of 1793, or six months in all cases within the act of 1845, shall dispense with a notice from the landlord and give him in either case the benefit of the means of getting possession under the act of 1793. The Commissioners are of opinion, that the notice to quit should be in writing, and that sixty days prior to the expiration of the tenancy, should be the rule in all cases, and is about a fair compromise between the different notices now required by law.

23. A tenant from year to year having received no notice to quit, nor given any notice of his intention to terminate his tenancy at the end of the year, shall be understood is intending to hold the premises for another year, and shall be answerable for the rent of such year, whether he quit the premises or not.

24. In case any tenant from year to year, shall quit the premises under the circumstances mentioned in the last preceding section, and leave them vacant, the landlord may resume the possession, or rent the same to another tenant, and the tenant so having quit without notice, shall be answerable for any damage the landlord may sustain thereby.

Under the existing law the tenant cannot be required to leave the premises and provide himself with a new home, without timely notice that he can hold the property no longer, but the same tenant may hold to the last day of the year, and then move out without any warning to the landlord that such was his intention, who has his property thrown upon his hands when the season for renting is passed, and no tenant is to be had. There is no good reason why the rule should not be mutual. Certainly if the landlord is required to make up his mind within a reasonable time before the expiration of the year, there is no reason why the tenant should not be required to do the same thing.

25. If a landlord accept a third person as his tenant, such acceptance shall operate as a surrender in law, of the first tenant's term or tenancy.

26. If a tenant abandon his possession in pursuance of a parol agreement with the landlord, and the landlord take possession of the premises, the liability of the tenant for rent subsequent thereto, shall be extinguished.

See Lamar *vs.* McNamee, 10 G. and J. 116.

27. Where land has been let to lease and the tenant has taken possession under a written agreement which is void or defective, there shall be implied by law a parol agreement between the parties upon the same terms and stipulations.

See Anderson *vs.* Cutchen, 11 G. and J. 450.

OF THE LAW OF FIXTURES.

28. The question of fixture or no fixture, shall not be determined by reference to the fact that the erection, building or other thing is or is not let into the ground—or that it has or has not become a part of the freehold—but by reference to the character of the erection, building or thing, and the purposes and uses for which it was intended.

In one case a tenant in agriculture erected at his own cost, and for the more necessary and convenient occupation of his farm, a beast house, carpenter's shop, fuel house, cart house, pump house and fold-yard wall, which buildings were of brick and mortar, and tiled, *and let into the ground*, and it was held that he could not remove them even during the term, although he had left the premises in the same state as he found them. In another case the property consisted of certain stills which were set on brick work *and let into the ground*—also of some vats or worm-tubs which were supported by and rested upon brick work and timber but were not fixed in the ground—and also of some other vats which stood on horses or frames of wood which were not let into the ground but stood upon the floor, and it was held that those vats which were fixed to the freehold could not be removed, while such as were not so fixed could be removed as personal property. It is submitted, that a rule of property which declares that if a building or erection be let into the ground it shall belong to one person, if not let into the ground it shall belong to another, is a rule without any moral foundation, and ought to be abolished.

29. The question of fixture or no fixture shall be determined by the further question, whether the removal of the building, erection or thing can be effected by the tenant leaving the premises substantially in the same state as he found them. If the removal can be so effected, the right of removal shall exist.

30. Where the right of removal does exist, it may be exercised as well after as before the expiration of the tenancy, provided the removal shall not be delayed beyond six months after the termination of the tenancy.

31. Where the right of removal does exist the landlord shall have the right to take the buildings, erections or things, at the valuation of two disinterested persons to be chosen by the parties—the persons so chosen, should they be unable to agree, to call in a third person, and then the valuation shall be determined by any two of the said three persons. Provided that the election of the landlord to take the buildings, erections or things, shall be made within sixty days after the termination of the tenancy.

It is said that a tenant may avoid the operation of the law in relation to fixtures by erecting barns, granaries, sheds and mills, upon blocks, rollers, pattens, pillars or plates, resting on brick work. It is very certain that no rule of property, founded itself in substantial justice, could be evaded by so shallow a contrivance. But it is because the rule as to fixtures is itself senseless, that the Courts permit it to be evaded by a contrivance equally senseless.

32. The rule as to the right of removal shall be the same, whether it arise between the personal representative and the heir of the owner of the fee, or between tenant for life and remainder man or reversioner, or between landlord and tenant.

In the first of the cases mentioned in the above section, the rule of law in reference to fixtures, is applied with the most rigor in favor of the inheritance—in the second case the degree of rigor is considerably mitigated, while in the third and last case, the greatest latitude and indulgence have always been shown in favor of the claim to have the particular buildings or erections considered as personal property. It will, however, simplify the law, and do no injustice to any one, to provide one rule for all cases.

33. Erections for mere ornament or domestic use, which have been put upon the premises, by the tenant, such as furnaces, pictures, glasses, hangings, chimney pieces, tapestries, stoves, grates, cupboards and such like, may be removed by the tenant, who shall nevertheless be answerable for all damage to the premises, occasioned by such removal.

34. All buildings, erections, or things which may be removed as is herein before provided, may be seized by the sheriff, under execution, as the personal property of the tenant—the landlord in such case, having the right to take the same, at a valuation, as is hereinbefore provided.

OF INEBRIATES.

DRUNKENNESS is a vice and a very dark one, but it is no crime. And no law in Maryland has yet provided that the mere fact of habitual intemperance, no matter how gross, shall subject a party to any species, even of civil disability, unless it have reached the point of actual insanity, in which case the disability is occasioned by the insanity, not by the drunkenness.

These views however, are justly considered too narrow at the present day, and doctrines more in accordance with the dictates of common sense and the enlightened spirit of the age, have begun to prevail extensively in this country, and have already given rise to the passage of laws in many of the States, which are likely to be followed in others, making provision for placing the habitual drunkard under guardianship, both as to person and property.

In New Hampshire, Wisconsin and Michigan, it is provided by statute, that a party who by excessive drinking, gaming, idleness, debauchery or vicious habits of any kind, shall so waste or lessen his estate, or so neglect to attend to any useful calling or business, for which he may be capable, as thereby to expose himself or family to want or suffering, shall be deemed a spendthrift, and placed under guardianship. But these provisions aim at too much, and for that reason, are not likely to accomplish anything.

We propose to make specific provision for the single case of drunkenness, and to leave it with society at large to find some other cure for gaming, idleness, debauchery and other vicious habits. Drunkenness is well marked, easily defined, and susceptible of distinct proof. And unhappily its consequences are just as distinctly marked. They are seen at a glance, in the subdued and worn and broken-hearted wife—in the neglected, thriftless, and yet anxious children—in the cold hearth and disordered household. It will not do therefore to say, as it has been said, that the drunkard is his own worst enemy, as if his vicious

habits affected himself alone, and there were none besides himself who had any right to complain of them.

The truth is, drunkenness correctly viewed is a disease. The habit when once fixed and fastened upon the victim, is as little under the dominion of the will as a fever or cold. And the power of resistance regularly diminishes as the habit grows and strengthens. The man shall see and know that he is going to perdition, and yet to perdition he goes. He will weep over the wreck and loss of his own manhood, "resolve and re-resolve—and do the same." He would change his habits and amend his life, but he cannot. The power to do so is gone. If there be a remedy, such a man is entitled to it, just as much as he would be entitled to assistance to rescue him from drowning.

There is a remedy, and it is very simple. It is to arrest and lock him up, and detain him under bolts and bars until his disease is gone, and his manhood is restored to him. This is to be done at the instance of the wife, the parent, the brother, the child or any friend or relative of the party. But the whole remedy is to lock him up. The putting it in motion, the manner of its administration, its duration, are mere matters of regulation, which may be varied and re-adjusted without affecting the character of the remedy itself.

And who can complain that such a remedy shall be provided by law, and applied promptly, to high and low—to all alike, wherever it may be needed? The object of it cannot complain. It is to save him from himself. It is at the same time, to rescue his family from the depths of shame and degradation into which he alone has plunged them. It is to restore the father, the brother, the son, who is worse than dead to the kindred whom he loves. And many is the wife, the parent, the child, who at this moment would humbly thank God to have such a remedy in their power. Even the poor inebriate himself, will ackowledge his gratitude to those by whose instrumentality his restoration has been effected.

1. A drunkard may at the instance and upon the application as hereinafter is provided, of a wife, a husband, parent, child, or other friend or relative, be taken up, and confined in any hospital or other proper place of safe keeping in this State, and there detained under treatment, until the habit of intemperance is broken up, after which he shall be set at liberty.

2. A person who is addicted to excessive drinking, either continuously or at intervals—who is apparently unable or unwilling to correct his vicious habits, and who from the effects of intemperance is endangering his health, or impairing his mind or constitution, or is thereby rendered less capable of meeting the responsibilities or discharging the duties of his station in life, shall be deemed a drunkard within the meaning of the last preceding section.

3. Upon the application in writing of any of the parties mentioned in the first section hereof, to any Judge of this State, alleging that ——— is a drunkard, and that it is necessary, with a view to the correction of his habits, that he should be confined and placed under treatment, and upon such proof as shall satisfy the Judge that the party is a drunkard, within the meaning of the last preceding section, it shall be the duty of the Judge to issue his warrant to the sheriff of the County in which the said ——— shall reside, to take him into custody, and convey him to the Maryland Hospital, or other place which, with the approbation of the Judge, the family and friends of the said ——— may select for his detention and treatment. And the sheriff in the execution of such warrant, shall convey and deliver the said ——— to the Hospital or other place selected, without delay.

4. The person having charge of the said hospital or other place, shall have power to detain the said party, and subject him to such treatment as his case may require, until his restoration to sound health, sound mind and correct habits, when the said party shall be entitled to his discharge.

5. During the detention of the said ——— from his family and business, the Court may, if it shall deem it necessary, appoint a curator of the estate and business of the said ——— and may require of the curator, a bond in such penalty and with such security as the Court may prescribe, conditioned for the faithful discharge of his trust.

ADDITIONS AND AMENDMENTS.

STRIKE out the 28th Section of the Report on the Action of Ejectment, and in lieu thereof, insert the following sections.

28. An exclusive and uninterrupted possession of land by actual enclosure, with claim of title thereto, for twenty years and upwards, shall be necessary to bar the recovery of the rightful owner, where the entry was without color of title.

29. An exclusive and uninterrupted possession of land, by acts of user and ownership without actual enclosure, but with claim of title thereto for twenty years and upwards, shall be sufficient to bar the recovery of the rightful owner, where the entry was with color of title. Provided, that nothing herein contained, shall apply where the whole of the tract or parcel of land in controversy, is wild or in wood, and uncultivated, and not adjoining or adjacent to other lands of the defendant, of which he had possession either in whole or in part, by cultivation or enclosure, for twenty years and upwards.

30. Color of title within the meaning of the two next preceding sections, shall be a deed describing the land by definite boundaries, duly acknowledged and recorded.

31. Acts of user and ownership within the meaning of the 29th section hereof, shall be such open and continuous proprietory acts, as imply a claim of title to the land, such as the cutting of timber upon the same, keeping off trespassers, paying taxes, and the like.

32. Where such exclusive and adversary possession, either by actual enclosure where the entry has been without color of title, or by acts of user and ownership, where such entry has been with color of title, hath passed in succession through a number of persons, each conveying to the next in succession, by deed regularly executed, acknowledged and recorded, and containing a definite description of the land, the recovery of the land by the lawful owner, shall be barred in the same manner as if the possession had been for the whole period in one person instead of several, provided, the aggregate of the whole series of possessions, shall have continued for twenty years and upwards.

33. The heir of a person claiming or entitled to land by adversary possession, shall succeed in all respects, to the right of the ancestor.

34. When two or more parties are in mixed possession of the same tract or parcel of land, the one by title, the other by wrong, the constructive possession of the whole, shall be in him who has the right, but in cases of mixed possession, an actual enclosure of the possession of him who is in by wrong, for twenty years and upwards, shall be essential to bar the recovery of the lawful owner.

35. A title by possession which shall be sufficient to bar the recovery of the rightful owner, shall also confer a title upon which ejectment may be maintained.

The Commissioners had prepared and published their Report upon the action of ejectment, before the cases of Hoye *vs.* Swan, and Armstrong *vs.* Resteau, reported in the 5 Maryland Reports were decided by the Court of Appeals. In that report the law, though considered unsettled in some of its leading features, was given as the Commissioners thought it ought to be. In the cases referred to however, the whole doctrine of adversary possession is ably reviewed by Tuck, J. and the law upon this important subject, placed upon its true and only sound basis. The Commissioners therefore cheerfully withdraw what they had recommended, to give place to the better matured views of the Court of Appeals. The doctrine of adversary possession being thus satisfactorily settled, the Commissioners believe that the whole ejectment law recommended in their Report as thus corrected, will be sound and require no further amendment.

The alternative rules recommended in the note at page 106 of the Report, on the action of ejectment, are to be understood as also withdrawn, their substance being incorporated in the text as amended.

THE LAW OF EVIDENCE.

Strike out the 5th section of the Report on the Law of Evidence, and insert in lieu thereof, the following section.

5. A party to a suit, or other proceeding in any Court of law or equity, shall be a competent and admissible witness to prove his own cause of action, or defence, or other matter or thing in controversy—and any party to a suit or other proceeding may be examined at the instance of the adverse party, or other person or party interested, to whose testimony the same and no greater effect shall be allowed than to that of other witnesses, and process may be had as of right, to compel the attendance of the opposite or any other party as a witness, or a commission may issue to take his testimony as in other cases.

The Commissioners were very distrustful of the rule lately adopted in England, and also in several of the States of the Union, permitting parties in Court to become witnesses in their own behalf. The extent to which they were willing to go was, to permit either party to call up the other party and examine him in the face of the jury and the public, and for the rule thus limited they gave in their former Report, their reasons at length. And apart from the high evidence recently given to the public, of the practical working of the rule permitting parties to be sworn as volunteer witnesses in their own behalf, it is probable that the opinions expressed by the Commissioners in their former Report would have remained unchanged. But having seen the English Judges who were known to have been almost without exception pointedly opposed to the introduction of what they did not hesitate to denounce as a startling novelty, now that they have fairly subjected it to the great test of experience—after having seen such men under such circumstances, coming forward in their places of high authority, and declaring that their apprehensions were not only groundless, but that the rule has proved itself to be an instrument of controlling efficacy in the evisceration of fraud and in the discovery of truth—after having seen testimony of the same character borne in its favor, wherever the rule has been tried on this side of the Atlantic, the Commissioners feel that they would be sinning against the light of truth, were they to submit their present Report without making the English rule in all its length and breadth, a part of it.

INSOLVENT DEBTORS.

1. The property of an insolvent debtor, acquired by gift, descent, or in his own right by bequest, devise, or in course of distribution, shall not be liable to the payment of his debts, contracted, due or owing before his application for relief, but shall enure to his own benefit, like property acquired by him in any other manner.

It seems to have been about the hardest lesson which the world has had to learn, that the inability to pay a debt is not a crime. The natural sentiment seems to be that expressed in the law of the

Twelve Tables, that the body of the debtor ought to be cut in pieces, or that he should be sold to Barbarians beyond the Tiber. As late as the year 1813, a bill passed the English House of Lords after a strenuous opposition to it from Lord Ellenborough, for the relief of insolvent debtors, and to reform the law by which a creditor had the power to keep his debtor in prison for life, notwithstanding he might be willing to give up every thing he had in the world for the satisfaction of his debts. Prior to that period, Parliament was in the practice, periodically and at short intervals, of passing occasional insolvent debtors' acts, which for the time, as it was said, abrogated the law, cancelled men's contracts, and turned loose a crowd of insolvent debtors at a time.

The bill alluded to, erected a new Court, consisting of a single judge, before whom debtors who had been three months confined in execution, might upon giving up all their property on oath, claim the discharge; their subsequently acquired property however, still to be subject to the payment of their debts; and on proof to the satisfaction of the judge that such property had been acquired by the debtor and not applied by him to the payment of his debts, or that a false account had been given by him of his property, the Court to have the power to recall the discharge.

The bill which first passed the House of Lords, in the above shape, was so amended in the Commons as to punish with death all insolvent debtors who should give in a false account of their property, and to limit the benefit of the act to such debtors as had been six months prisoners in execution. But these amendments were stricken out at the suggestion of Sir Samuel Remilly, and it is hoped the Commons became ashamed of them. But while the measure was pending, the Common Council of London declared themselves inimical to the bill, and appointed a committee to oppose it, and the opposition of this committee finally defeated it altogether. It was a strange anomaly in the law of England at the time referred to, that while it pursued with unchristian severity, the person of the debtor, it exempted his freehold and copyhold estates, as well as his money in the public funds from liability for his debts in any shape.

The position which has been attained after many struggles, by the civilization of the present day is, that a person who is unable to pay his debts, shall have the hands of his creditors stayed, and shall be entitled to the use of his future acquisitions of property for the benefit of himself and his family, upon the simple condition

that he surrender in good faith all his property, to be applied as far as it will go, towards the satisfaction of his debts. The right to his future acquisitions should be without qualification; but least of all should the property he may acquire by gift, devise or in course of distribution be selected as that alone which should remain liable to the demands of his creditors. It is neither right nor just to except from the operation of his discharge, the property which may come into his hands from the bounty of others, because such property never could have been looked to by the creditor, as constituting even a contingent provision for the payment of his debt. He gave no credit to the debtor upon the expectation or faith of such means. He could not allege that he was disappointed, if they were placed by the law beyond his reach.

But the great objection to the exception is, that it disappoints the intention of the donor, devisor or intestate. A gift to one man never can be intended to be immediately taken out of his hands by strangers, and such a perversion of his bounty, could it be known to the donor before hand, would in all cases defeat the gift. The law therefore deceives the donor, by depriving the person intended to be benefitted by the gift, and by giving it to those who never were intended to enjoy it. It is applying his kind feelings to those for whom he had no kindness.

It may be said also of cases of intestacy, where the insolvent acquires property in course of distribution, that such property could only pass into the hands of the insolvent, and thence into those of his creditors, by the accident of the omission of the ancestor to make a will, or his inability from insanity, mental imbecility, or some other cause, to do so. For no man with the ability to make a will, and his senses about him, will voluntarily suffer his property to pass from his children into the hands of strangers. Were our system like the English, which vests the future estate and effects of the bankrupt at once in the assignees, it would be still right to exempt such property as the debtor might acquire by gift or descent from the demands of his creditors, because as to that they have no claim whatever.

THE CRIMINAL LAW.

Under the head of "Cheats, and other like fraudulent practices," p. 229, add the following sections.

11. Whosoever shall, in the course of his trade or business, sell, or offer for sale, any unsound, adulterated or drugged provisions, or any unsound, adulterated or drugged material or substance, entering into the manufacture or preparation of human food, whether as condiments, seasoning or culinary preparation thereof, knowing of such unsoundness, adulteration or drugging, shall, if the same be deleterious to health, be imprisoned not exceeding six months, or fined, or both, at the discretion of the Court.

12. Whosoever shall, in the course of his trade or business, sell, or offer for sale, any unsound, adulterated or drugged wine, cordial, spirit distilled or fermented liquors, knowing of such unsoundness, shall, if the same be deleterious to health, be imprisoned not exceeding six months, or fined, or both, at the discretion of the Court.

13. Whosoever shall, in the course of his trade or business, sell, or offer for sale, any unsound or adulterated medicines, or any unsound, adulterated or simulated material, entering into the preparation of medicines, knowing of such unsoundness, adulteration or simulation, shall, if the same be deleterious to health, or if the specific effect due to such medicines, be thereby prevented or frustrated, be imprisoned not exceeding six months, or fined, or both, at the discretion of the Court.

14. Whosoever shall, in the course of his trade or business, sell, or offer for sale, any unsound or vitiated

butchers' meat, or shall sell, or offer for sale, the meat of any animal not used for human food, falsely representing the same as the meat of some animal used for human food—or shall sell, or offer for sale, to be used as human food, the meat of any animal which died a natural death, or which was diseased at the time it was killed, knowing of such facts, shall be imprisoned not exceeding six months, or fined, or both, in the discretion of the Court.

Recent investigations in England have brought to light the startling fact, that almost every thing entering into human food or drink, in that country is either drugged or poisoned, and there is reason to believe, that the same frauds are practised, with a respectable approach the same universality in this country.

OF THE VERDICT.

At the end of the Report on the Criminal Law, p. 356, add the following.

1. It shall be sufficient, if the verdict in a criminal case, specify in positive terms, the offence of which the accused is guilty, without negativing any other offence, or any other grade, or degree of the same offence.

The Court of Appeals in the case of the State *vs.* Sutton, 4 Gill, 494, held, that a verdict in a criminal case ought to find specifically not guilty of the higher, and guilty of the inferior charge, otherwise the verdict is a nullity. The decision introduced a new rule into the practice of Maryland, and a rule it is believed against the reason of this case. Out of respect, however, for the opinion of the late Court of Appeals, the present Court in the State *vs.* Flannigan, 6 Md. Rep. 171, held a similar verdict to be void, remarking however, at the same time, that the reason of the case was against the decision, as upon an indictment involving different grades of homicide, "a conviction of manslaughter, or of murder of the second degree, necessarily implies a finding of not guilty of the higher offence."