CHAPTER XXI.

OF ISSUE AND DEMURRER

1. *On what are issues in pleading formed?*—314.
Either upon matter of law, or matter of fact.

2. *What is an issue upon matter of law called?*—314.
A demurrer

3. *What is the office of a demurrer?*—314, 315.
It confesses the facts to be true, as stated by the opposite party, but denies that, by the law arising upon those facts, any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse. The party, who demurs, *demoratur*, rests or abides upon the point in question.

4. *What is joinder in demurrer?*—315.
Upon either general or special demurrer, the opposite party must aver that the matter demurred to is sufficient; which is called a joinder in demurrer, and then the parties are at issue on a point of law. Which issue must be determined by the judges of the court before which the action is brought.

5. *What is an issue of fact?*—315.
It is an issue where the fact only, and not the law, is disputed.

6. *When is an issue of fact joined?*—315.
When he that denies or traverses the fact pleaded by his antagonist has tendered the issue, thus: "and this he prays may be enquired of by the country;" or, "and of this he puts himself upon the country;" it may immediately be subjoined by the other party, "and the said A. B. doth the like." Which done, the issue is said to be joined, both parties having agreed to rest the fate of the cause upon the truth of the fact in question.

7. *How is this issue of fact determined?*—315.
Generally by the country, *per pais* (in Latin, *per patriam*), that is, by jury.

8. *What is continuance?*—316.
After issue or demurrer joined, as well as in some of the previous stages of proceeding, a day is continually given and entered upon the record, for the parties to appear on from time to time, as the exigence of the case may require. The giving of this day is called the continuance.

9. *What is discontinuance?*—316.
If such continuances are omitted, the cause is thereby discontinued, and the defendant is discharged *sine die*, without a day; for, by his appearance in court, he has obeyed the command of the king's writ, and, unless he be adjourned over to a day certain, he is no longer bound to attend upon that summons, but he must be warned afresh, and the whole must begin *de novo*.

10. *When is the plaintiff nonsuited*?—316.
In the course of pleading, if the plaintiff neglects to put in his declaration, replication, &c., within the times allotted by the standing rules of the court, he is said to be nonsuit, or not to follow and pursue his complaint

11. *What is a plea* puis darrein continuance?—317.
It sometimes happens that after the defendant has pleaded, nay, even after issue or demurrer joined, there may have arisen some new matter, which it is proper for the defendant to plead; here, he is permitted to plead it in what is called a plea *puis darrein continuance*, or since the last adjournment.

CHAPTER XXII.

OF THE SEVERAL SPECIES OF TRIAL

1. *What is trial?*—330.

Trial is the examination of the matter of *fact* in issue.

2. *What are the species of trial in civil cases?*—330.

They are seven: 1. By record.
2. By inspection or examination.
3. By certificate.
4. By witnesses.
5. By wager of *battel*.
6. By wager of law.
7. By jury.

3. *In what instance is trial by record used?*—330, 331.

Only where a matter of record is pleaded in any action.

4. *When shall trial by inspection take place?*—331.

When for the greater expedition of a cause, in some point or issue, being either the principal question, or arising collaterally out of it, but being evidently the object of sense, the judges of the court, upon the testimony of their own senses, shall decide upon the point in dispute.

5. *In what cases is trial by certificate allowed?*—333.

In cases, where the evidence of the person certifying is the only proper criterion of the point in dispute.

Thus, 1. If the issue be whether A was absent with the king, in his army, out of the realm, in time of war, this shall be tried by the certificate of the mareschal of the king's host in writing under his seal, which shall be sent to his justices. 2. If, in order to avoid an outlawry, or the like, it was alleged that the defendant was in prison, *ultra mare*, at Bourdeaux, or in the service of the mayor of Bourdeaux, this should have been tried by the certificate of the mayor. 3. For matters within the realm, the customs of the city of London shall be tried by the certificate of the mayor and aldermen, certified by the mouth of their recorder, upon a surmise from the party alleging it that the custom ought to be thus tried. 4. In some cases the sheriff of London's certificate shall be the final trial; as if the issue be, whether the defendant be a citizen of London, or a foreigner, in case of privilege pleaded to be sued only in the city courts. 5. In matters of ecclesiastical jurisdiction, as marriage, and, of course, general bastardy; and also excommunication orders, these and other like matters shall be tried by the bishop's certificate. 6. The trial of all customs and practice of the courts shall be by certificate from the proper officers of those courts respectively; and what return was made on a writ, by the sheriff or undersheriff, shall be only tried by his own certificate.

6. *What is trial by witnesses?*—336.

It is a trial without the intervention of a jury. It is very rarely used in our law, which prefers the trial by jury before it in every instance but one, viz., when a widow brings a writ of dower, and the tenant pleads that the husband is not dead; this being looked upon as a dilatory plea, is in favor of the widow, and, for greater expedition, allowed to be tried by witnesses examined before the judges.

7. *What is trial by wager of battel?*—337–341.

It is in the nature of an appeal to providence, under an apprehension and hope that heaven would give the victory to him who had the right.

8. *In what cases was it used?*—337, 338.

In only three: 1. In the court martial. 2. In appeals of felony. 3. Upon issue joined in a writ of right.

9. *What is trial by wager of law?*—341–348.

Wager of law, *vadiatio legis*, is where the defendant put in sureties, or *vadios*, that at such a day he would make his law, that is, take the benefit which the law had allowed him. It was considered that there were many cases where an innocent man, of good credit, might be overborne by a multitude of false witnesses, and, therefore was established this species of trial by the oath of the defendant himself, for if he will absolutely swear

himself not chargeable, and appears to be a person of reputation, he shall go free and forever acquitted of the debt, or other cause of action.

10. *When is it allowed?*—345.

Only in actions in debt upon simple contract, or for amercement, in actions of detinue, and of account, where the debt may have been paid, the goods restored, or the account balanced, without any evidence of either; so that wager of law does not lie but when the debt groweth by word only. In England it is never required, and is then only admitted where an action is brought upon such matters as may be supposed to be privately transacted between the parties, and wherein the defendant may be presumed to have made satisfaction without being able to prove it.

CHAPTER XXIII.

OF THE TRIAL BY JURY.

1. *How ancient is trial by jury?*—349.

It has been used time out of mind in England.

2. *Of what kinds are trials by jury in civil cases?*—351.

Of two kinds: extraordinary and ordinary.

3. *What is extraordinary trial by jury?*—351.

That of the grand assise, which was instituted by way of alternative offered to the choice of the tenant or defendant in a writ of right, instead of the custom of duelling.

4. *What is the grand jury in attaint?*—351.

A species of extraordinary jury to try an attaint, which is a process commenced against a former jury for bringing in a false verdict.

5. *What is the writ of* venire facias?—352.

It is a writ commanding the sheriff to summon twelve free

and lawful men; and is awarded by the court, after issue of fact joined, to try that issue.

6. *What if the sheriff be not indifferent as between the parties?*—354.

In such case the *venire* shall be directed to the coroners.

7. *If the plaintiff intend to try the cause, what notice is he bound to give the defendant?*—358.

Eight days, if the defendant lives within forty miles of London; and if he lives a greater distance, then fourteen days' notice; and if the plaintiff then changes his mind, and does not countermand the notice six days before the trial, he shall be liable to pay costs to the defendant for not proceeding to trial.

8. *Of what sorts are jurors contained in the panel?*—357.

Either special or common jurors.

9. *How may the trial be deferred?*—357.

Either party, upon good cause shown to the court above, as sickness, or upon absence or sickness of a material witness, may obtain leave, upon motion, to defer the trial till the next assises.

10. *What is a special jury?*—357.

It was originally introduced, in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders; or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him.

11. *What is the sheriff's duty, upon motion in court, and rule granted thereupon for a special jury?*—357.

In such case, it is his duty to attend the prothonotary, or other proper officer, with his freeholder's book; and the officer is to take indifferently forty-eight of the principal freeholders, in the presence of the attorneys on both sides, who are each of them to strike off twelve, and the remaining twenty-four are returned upon the panel.

12. *What is a common jury?*—358.

A common jury is one returned by the sheriff according to

the directions of the statute, which appoints one and the same panel for every cause to be tried at the same assises, containing not less than forty-eight, nor more than seventy-two jurors.

13. *Of what sorts are challenges of jurors?*—358.

They are of two sorts: challenges to the array and challenges to the polls.

14. *What are challenges to the array?*—359.

Challenges to the array are at once an exception to the whole panel.

15. *Upon what account may challenge to the array be made?*—359.

Upon account of partiality, or some default, in the sheriff, or his under officer who arrayed the panel.

16. *When, now, is the jury* de medietate linguæ *allowed?*—361.

Only upon trials for felonies or misdemeanor.

17. *Can judges and justices be challenged?*—361.

They cannot.

18. *What are challenges to the polls?*—361.

Challenges to the polls, *in capita*, are exceptions to particular jurors.

19. *To what heads are challenges to the polls reduced?*—361–363.

To four heads: *propter honoris respectum; propter defectum; propter affectum; and propter delictum.*

20. *With regard to what causes of challenge may a juror be examined on oath of* voir dire?—364.

With regard to such causes of challenge as are not to his dishonor or discredit; but not with regard to any crime, or anything which tends to his disgrace or disadvantage.

21. *Are there exemptions from serving on juries?*—364.

Besides challenges to the polls, which are exceptions against the fitness of jurors, and whereby they may be excluded from serving, there are also other causes to be made use of by the

jurors themselves, which are matter of exemption, whereby their service is excused, and not excluded.

22. *Who are excused from serving as jurors?*—364.

Sick and decrepit persons, persons not commorant in the county, and men above seventy years old; infants under twenty-one; physicians, and other medical persons; counsel, attorneys, officers of the courts, and the like; clergymen.

23. *What is a tales?*—364.

If by means of challenges, or other cause, a sufficient number of unexceptionable jurors doth not appear at trial, either party may pray a tales; that is, a supply of such men as are summoned upon the first panel, in order to make up the deficiency.

24. *To what are the jurors sworn?*—365.

Well and truly to try the issue between the parties, and a true verdict to give according to the evidence.

25. *What is the course of proceedings in a trial?*—366, 367.

When the jury are ready to hear the merits, to fix their attention the closer to the facts which they are impanelled and sworn to try, the pleadings are opened to them, by counsel on that side which holds the affirmative of the question in issue. For the issue is said to lie, and proof is always first required, upon that side which affirms the matter in question. The opening counsel briefly informs them what has been transacted in the court above; also, as to the parties, the nature of the action, the declaration, the plea, the replication, and other proceedings, and lastly, upon what point the issue is joined, which is there sent down to be determined. The nature of the case, and the evidence intended to be produced, are next laid before them by counsel, also, on the same side; and when their evidence is gone through, the advocate on the other side opens the adverse case, and supports it by evidence, and then the party which began is heard by way of reply.

26. *What is evidence?*—367.

Evidence signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on

the one side, or on the other; and no evidence ought to be admitted to any other point.

27. *Of what kinds is the evidence in the trial by jury?*—367.

Of two kinds; either that which is given in proof, or that which the jury may receive by their own private knowledge.

28. *Of what sorts is the former, proof or proofs?*—367.

Either written, or *parol*, that is, by word of mouth.

29. *What are written proofs?*—367, 368.

Written proofs, or evidence, are, 1. Records, and, 2. Ancient deeds of thirty years' standing, which prove themselves; 3. Modern deeds, and, 4. Other writings, which must be attested and verified by parol evidence of witnesses.

30. *Is the best available evidence always required?*—368.

One general rule runs through all the doctrine of trials, viz., that the best evidence the nature of the case will admit of shall always be required, if possible to be had.

31. *What witnesses are admissible?*—369.

All witnesses, of whatever religion or country, that have the use of their reason, are to be received and examined, except such as are infamous, or such as are interested in the event.

32. *May the jury judge of the credibility of competent witnesses?*—369.

It may.

33. *Is one credible witness sufficient?*—370.

One witness, if credible, is sufficient evidence to a jury of any single fact, though undoubtedly the concurrence of two or more corroborates the proofs.

34. *When is positive proof required; and when is circumstantial evidence admitted?*—371.

Positive proof is always required where, from the nature of the case, it appears it possibly might have been had. But, next to positive proof, circumstantial evidence, or the doctrine of presumptions, must take place; for when the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact, is the proof of such circumstances which either necessarily or usually attend such facts; and these are called presumptions, which are only to be relied upon till the contrary be actually proved.

35. *What weight have, severally, violent presumption, probable presumption, and light presumption?*—371.

Violent presumption is, many times, equal to full proof.

Probable presumption, arising from such circumstances as usually attend the fact, hath also its due weight.

Light, or rash, presumptions have no weight or validity at all.

36. *Must the witness tell all he knows of the matter, whether interrogated or not?*—372.

He is not to conceal any part of what he knows.

37. *What if the judge, either in his directions or decisions, misstates the law by ignorance, inadvertence or design?*—372.

The counsel on either side may oblige him publicly to seal a bill of exceptions, stating the point wherein he is supposed to err.

38. *What is a demurrer to evidence?*—372.

It happens where a record or other matter is produced in evidence, concerning the legal consequences of which there arises a doubt in law; in which case the adverse party may, if he pleases, demur to the whole evidence; which admits the truth of every fact that has been alleged, but denies the sufficiency of them all, in point of law, to maintain or overthrow the issue.

39. *Are demurrers to evidence, and bills of exceptions, as much in use as formerly?*—373.

They are not, since the more frequent extension of the discretionary powers of the court in granting a new trial, which is now very commonly had for the misdirection of the judge at *nisi prius*.

40. *What are the advantages of testimony* viva voce?—373.

The occasional questions of the judge, the jury, and the counsel, propounded to the witness on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled; and the confronting of adverse witnesses, is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial.

41. *Might jurors formerly give their verdict according to their own knowledge?*—374.

As to such evidence as the jury had in their own consciences, by their private knowledge of facts, it was an ancient doctrine, that this had as much right to sway their judgment, as the written or parol evidence which is delivered in court.

42. *What practice now obtains as to this?*—375.

If a juror knows anything of the matter in issue, he may be sworn as a witness, and give his evidence publicly in court.

43. *How is the verdict accelerated?*—375.

To avoid intemperance and causeless delay, the jury are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed.

44. *Must the plaintiff be present at the delivery of the verdict?*—376.

If he does not appear, no verdict can be given, and he is said to be *nonsuit*, *non sequitur clamorem suum.* Therefore, it is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or withdraw himself.

45. *What circumstances will set aside the verdict?*—375, 376.

If the jurors eat or drink at all, or have any eatables about them, at his charge for whom they afterward find, it will set aside the verdict. Also, if they speak with either of the parties, or their agents, after they are gone from the bar; or if they receive any fresh evidence in private; or if, to prevent disputes, they cast lots for whom they shall find; any of these circumstances will entirely vitiate the verdict.

46. *What is the form of a voluntary nonsuit?*—376, 377.

The crier is ordered to call the plaintff, and if neither he, nor any body for him, appears, he is nonsuited. It is more eligible for the plaintiff than a verdict against him; for after a nonsuit, which is only a default, he may commence the same suit again for the same cause of action; but after a verdict had, and judgment consequent thereupon, he is forever barred from attacking the defendant upon the same ground of complaint.

47. *How are verdicts distinguished?*—377.

They are either privy, or public.

48. *What is a special verdict?*—377.

It is a verdict wherein the jurors state the naked facts as they do find them to be proved, and pray the advice of the court thereon. Another species of special verdict is when the jury find generally for the plaintiff, subject, nevertheless, to the opinion of the judge or the court above upon a special case, stated by the counsel on both sides, with regard to a matter of law.

49. *What, also, is the jury to do, if they find for the plaintiff?*—377.

Assess the damages sustained by the plaintiff, in consequence of the injury upon which the action is brought.

50. *What are the principal defects in the system of trial by jury?*—382, 383.

They seem to be: 1. The want of a complete discovery by the oath of the party. 2. Want of a compulsive power for the production of books and papers belonging to the parties. 3. Want of powers to examine witnesses abroad, and to receive their depositions in writing, where the witnesses reside, and especially when the cause of action arises in a foreign country. 4. The liability of the jury to prejudice, in local actions.

51. *What indirect method is there to obtain change of* venue *in local actions?*—383, 384.

The parties are driven to a court of equity; where, upon making out a proper case, it is done upon the ground of being necessary to a fair, impartial, and satisfactory trial.