CHAPTER X.

OF THE CONSTITUTIONAL PROTECTIONS TO PERSONAL LIBERTY.

Although the people from whom we derive our laws now possess a larger share of civil and political liberty than any other in Europe, there was a period in their history when a considerable proportion were in a condition of servitude. Of the servile classes one portion were villeins regardant, or serfs attached to the soil, and transferable with it, but not otherwise,¹ while the other portion were villeins in gross, whose condition resembled that of the slaves known to modern law in America.² How these people became reduced to this unhappy condition, it may not be possible to determine at this distance of time with entire accuracy;³ but in regard to the first class, we may suppose that when a conqueror seized the territory upon which he found them living, he seized also the people as a part of the lawful prize of war, granting them life on condition of their cultivating the soil for his use; and that the second were often persons whose lives had been spared on the field of battle, and whose ownership, in accordance with the custom of barbarous times, would pertain to the persons of their captors. Many other causes also contributed to reduce persons to this condition.⁴ At the beginning of the reign of John it has been estimated that one-half of the Anglo-Saxons were in a condition of servitude, and if we go back to the time of

¹ Litt. § 181; 2 Bl. Com. 92. "They originally held lands of their lords on condition of agricultural service, which in a certain sense was servile, but in reality was not so, as the actual work was done by the thewes, or slaves... They did not pay rent, and were not removable at pleasure; they went with the land and rendered services, uncertain in their nature, and therefore opposed to rent. They were the originals of copyholders." Note to Reeves, History of English Law, Pt. I. c. 1.

² Litt. § 181; 2 Bl. Com. 92. "These are the persons who are described by Sir William Temple as 'a sort of people who were in a condition of downright servi-
tude, used and employed in the most servile works; and belonging, they and their children and effects, to the lord of the soil, like the rest of the stock or cattle upon it.'" Reeves, History of English Law, Pt. I. c. 1.

³ As to slavery among the Anglo-Saxons, see Stubbs, Const. Hist. of England, ch. V.

⁴ For a view of the condition of the servile classes, see Wright, Domestic Manners and Sentiments, 101, 102; Crabbe, History of English Law (ed. of 1829), 8, 78, 365; Hallam, Middle Ages, Pt. II. c. 2; Vaughan, Revolutions in English History, Book 2, c. 8; Broom, Const. Law, 74 et seq.
the Conquest, we find a still larger proportion of the people held
as the property of their lords, and incapable of acquiring and
holding any property as their own. Their treatment was such
as might have been expected from masters trained to war and
violence, accustomed to think lightly of human life and human
suffering, and who knew little of and cared less for any doctrine
of human rights which embraced within its scope others besides
the governing classes.

It would be idle to attempt to follow the imperceptible steps by
which involuntary servitude at length came to an end in England.
It was never abolished by statute, and the time when slavery
ceased altogether cannot be accurately determined. The causes
were at work silently for centuries; the historian did not at the
time note them; the statesman did not observe them; they were
not the subject of agitation or controversy; but the time arrived
when the philanthropist could examine the laws and institutions
of his country, and declare that slavery had ceased to be recog-
nized, though at what precise point in legal history the condition
became unlawful he might not with certainty specify. Among
the causes of its abrogation he might be able to enumerate: 1.
That the slaves were of the same race with their masters. There
was therefore not only an absence of that antipathy which is
often found existing when the ruling and the ruled are of differ-
et races, and especially of different color, but instead thereof an
active sympathy might often be supposed to exist, which would
lead to frequent emancipations. 2. The common law presumed
every man to be free until proved to be otherwise; and this pre-

3 Mr. Hargrave says, at the commence-
ment of the seventeenth century. 20 State
Trials, 40; May, Const. Hist. c. 11. And
Mr. Barrington (on the Statutes 3d ed. p.
278) cites from Rymer a commission from
Queen Elizabeth in the year 1574, directed
to Lord Burghley and Sir Walter Mild-
may, for inquiring into the lands, ten-
ements, and other goods of all her bondmen
and bondwomen in the counties of Corn-
wall, Devonshire, Somerset, and Glouce-
cster, such as were by blood in a slavish con-
tion, by being born in any of her manors,
and to compound with any or all of such
bondmen or bondwomen for their manu-
mission and freedom. And this commis-

more of this kind of servitude. And see
Crabbe, History of English Law (ed. of
1829), 574. This author says that vil-
leinage had disappeared by the time
of Charles II. Hard says in 1661. Law of
And see 2 Bl. Com. 96. Lord Campbell's
Lives of the Chief Justices, c. 5. Mac-
nulay says there were traces of slavery
under the Stuarts. History of England,
c. 1. Hume (History of England, c. 23)
thinks there was no law recognizing it
after the time of Henry VII., and that it
had ceased before the death of Elizabeth.
Froude (History of England, c. 1) says in
the reign of Henry VIII. it had practically
ceased. Mr. Christian says the last claim of
villeinage which we find recorded in
our courts was in 15th James I. Nou, 27;
11 State Trials, 342. Note to Blackstone,
Book 2, p. 96.
surnption, when the slave was of the same race as his master, and
had no natural badge of servitude, must often have rendered it
extremely difficult to recover the fugitive who denied his thrall-
don. 3 A residence for a year and a day in a corporate town
rendered the villein legally free; 1 so that to him the towns con-
stituted cities of refuge. 4 The lord treating him as a freeman
—as by receiving homage from him as tenant, or entering into
a contract with him under seal—thereby emancipated him, by
recognizing in him a capacity to perform those acts which only a
freeman could perform. 5 Even the lax morals of the times
were favorable to liberty, since the condition of the child followed
that of the father; 2 and in law the illegitimate child was nullius
filius,—had no father. And, 6 The influence of the priesthood
was generally against slavery, and must often have shielded the
fugitive and influenced emancipations by appeals to the con-
science, especially when the master was near the close of life and
the conscience naturally most sensitive. 3 And with all these in-
fluences there should be noted the further circumstance, that a
class of freemen was always near to the slaves in condition and
suffering, with whom they were in association, and between whom
and themselves there were frequent intermarriages, 4 and that
from these to the highest order in the State there were successive
grades; the children of the highest gradually finding their way
into those below them, and ways being open by which the chil-
dren of the lowest might advance themselves, by intelligence,
energy, or thrift, through the successive grades above them, until
the descendants of dukes and earls were found cultivating the

1 Crabbe, History of English Law (ed. of 1829), 79. But this was only as to
third persons. The claim of the lord
might be made within three years. Ibid.
And see Mackintosh, History of England,
c. 4.

2 Barrington on Statutes (3d ed.), 276,
note; 2 Bl. Com. 93. But in the very
quaint account of "Villeinage and Nie-
ty," in Mirror of Justice, § 28, it is said,
among other things, that "those are vil-
leins who are begotten of a freeman and
da nief, and born out of matrimoniy." The
ancient rule appears to have been that
the condition of the child followed that of
the mother; but this was changed in the
time of Henry I. Crabbe, History of
English Law (ed. of 1829), 78; Hallam,
Middle Ages, Pt. II. c. 2.

3 In 1514, Henry VIII. manumitted
two of his villeins in the following words:

"Whereas God created all men free, but
afterwards the laws and customs of na-
tions subjected some under the yoke of
servitude, we think it pious and meritari-
uos with God to manumit Henry Knight, a
tailor, and John Herle, a husbandman, our
natives, as being born within the manor
of Stoke Clymeresland, in our county of
Cornwall, together with all their issue
born or to be born, and all their goods,
lands, and chattels acquired, so as the said
persons and their issue shall from hence-
forth by us be free and of free condition."
Barrington on Statutes (3d ed.), 275. See
Mackintosh, History of England, c. 4.
Compare this with a deed of manumission
in Massachusetts, to be found in Sumner's
Speeches, II. 280; Memoir of Chief Jus-
tice Parsons, by his son, 176, note.

4 Wright, Domestic Manners and Sen-
timents, 112.
soil, and the man of obscure descent winning a place among the
aristocracy of the realm, through his successful exertions at the
bar or his services to the State. Inevitably these influences must
at length overthrow the slavery of white men which existed in
England, and no other ever became established within the realm.
Slavery was permitted, and indeed fostered, in the colonies; in
part because a profit was made of the trade, and in part also be-
cause it was supposed that the peculiar products of some of them
could not be profitably cultivated with free labor; and at times
masters brought their slaves with them to England and removed
them again without question, until in Sommersett's Case, in 1771,
it was ruled by Lord Mansfield that slavery was repugnant to the
common law, and to bring a slave into England was to eman-
cipate him.

The same opinion had been previously expressed by Lord Holt
but without authoritative decision.

In Scotland a condition of servitude continued to a later period.
The holding of negroes in slavery was indeed held to be illegal
soon after the Sommersett Case; but the salters and colliers did
not acquire their freedom until 1799, nor without an act of Par-

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1 Macaulay (History of England, c. 1) says the chief instrument of emani-
tation was the Christian religion. Mackintosh (History of England, c. 4), also,
attributes to the priesthood great influence in this reform, not only by their di-
rect appeals to the conscience, but by the judges, who were ecclesiastics, multi-
plying presumptions and rules of evidence consonant to the equal and humane spirit
which breathes throughout the morality of the Gospel. Hume (History of Eng-
land, c. 23) seems to think emancipation was brought about by selfish considera-
tions on the part of the barons, and from a conviction that the returns from their
lands would be increased by changing villeinage into socage tenures.

2 Robertson, America, Book 9; Bancroft, United States, Vol. I. c. 5.

3 Lofft, 18; 20 Howell State Trials, 1; Life of Granville Sharp, by Hoare, c. 4; Hurd,
Law of Freedom and Bondage, Vol. I. p. 189. The judgment of Lord Mansfield is said to have been delivered with evident reluctance. 20 State Trials, 79; per Lord Stow-
ell, 2 Hagg. Adm. 105, 110; Brown, Const. Law, 105. Of the
practice prior to the decision Lord Stown-

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4 "As soon as a slave comes into Eng-
land, he becomes free; one may be a
695. See also Smith v. Gould, Lt. Raym
1274; s. c. Salk. 600. There is a learned
note in Quincy's Rep. 94, collecting the
English authorities on the subject of
slavey.
liament. A previous statute for their enfranchisement through judicial proceedings had proved ineffectual.

The history of slavery in this country pertains rather to general history than to a work upon State constitutional law. Throughout the land involuntary servitude is abolished by constitutional amendment, except as it may be imposed in the punishment of crime. Nor do we suppose the exception will permit the convict to be subjected to other servitude than such as is under the control and direction of the public authorities, in the manner heretofore customary. The laws of the several States allow the letting of the services of the convicts, either singly or in numbers, to contractors who are to employ them in mechanical trades in or near the prison, and under the surveillance of its officers; but it might well be doubted if a regulation which should suffer the convict to be placed upon the auction block and sold to the highest bidder, either for life or for a term of years, would be in harmony with the constitutional prohibition. It is certain that it would be open to very grave abuses, and it is so inconsistent with the general sentiment in countries where slavery does not exist, that it may well be believed not to have been within the understanding of the people in incorporating the exception with the prohibitory amendment.

1 39 Geo. III. c. 50.
2 May's Const. Hist. c. 11.
3 Amendments to Const. of U. S. art. 18. See Story on the Constitution (4th ed.), c. 46, for the history of this article, and the decisions bearing upon it. The Maryland act for the apprenticing of colored children, which made important and invidious distinctions between them and white children, and gave the master property rights in their services not given in other cases, was held void under this article. Matter of Turner, 1 Abb. U. S. 84. This thirteenth amendment conferred no political rights, and left the negro under all his political disabilities. Marshall v. Donovan, 10 Bush, 681. See also United States v. Cruikshank, 94 U. S. 542. Contracts for personal services cannot, as a general rule, be enforced, and application to be discharged from service under them on habeas corpus is evidence that the service is involuntary. Cases of apprenticeship and cases of military and naval service are exceptional. A person over twenty-one years of age cannot bind himself as apprentice. Clark's Case, 1 Blackf. 122, 12 Am. Dec. 213.

4 The State has no power to imprison a child in a house of correction who has committed no crime, on a mere allegation that he is "destitute of proper parental care, and is growing up in mendicancy, ignorance, idleness, and vice." People v. Turner, 55 Ill. 280, 8 Am. Rep. 645. But a female child who begs in public or has no proper parental care, may be confined in an industrial school. County of McLean v. Humphrey, 104 Ill. 378; citing Milwaukee Industrial School v. Supervisors, 40 Wis. 328; Roth v. House of Refuge, 31 Ill. 320. See, further, that under proper safeguards vagrant children may be so committed, House of Refuge v. Ryan, 37 Ohio St. 197; Prescott v. State, 19 Ohio St. 184, 2 Am. Rep. 308; Farnham v. Pierce, 141 Mass. 203, 6 N. E. 890; People v. N. Y. Catholic Protectory, 101 N. Y. 195, 4 N. E. 177. [That in cases of commitment of vicious and incorrigible youth to reform schools jury trial is unnecessary, see State v. Brown, 50 Minn. 353, 52 N. W. 925, 16 L. R. A. 691, and note; also Lee v. McClelland, 157 Ind. 84, 60 N. E. 692. Court has no power in civil action for damages to person to compel
The common law of England permits the impression of seafaring men to man the royal navy; 1 but this species of servitude was never recognized in the law of America. 2 The citizen may doubtless be compelled to serve his country in her wars; but the common law as adopted by us has never allowed arbitrary discriminations for this purpose between persons of different avocations.

Unreasonable Searches and Seizures. (a)


1 There were cases of impressment in America before the Revolution, but they were never peaceably acquiesced in by the people. See Life and Times of Warren, 65.

Search made by permission of agent or servant in possession is not unreasonable, nor is the taking away of an article there found, the agent consenting thereto, a prohibited seizure. State v. Griswold, 67 Conn. 200, 31 Atl. 1046, 33 L. R. A. 227. Where a boiler exploded, killing several persons and wounding many others, and the person in charge was prosecuted for criminal negligence, the property owner may object to an order of court delivering the wreck and premises into the custody of a police officer, charged to keep them un molested until the time of trial, although it is probable that in the absence of such custody, much valuable real evidence will be lost. Newberry v. Carpenter, 107 Mich. 567, 65 N. W. 530, 31 L. R. A. 163, 61 Am. St. 546. The court cannot compel a plaintiff to submit a horse, over whose condition the controversy arises, to the inspection of a veterinary surgeon, even though the inspection is to be made in the presence of the plaintiff or his agent. Martin v. Elliott, 106 Mich. 130, 63 N.W. 998, 31 L. R. A. 169; but a statute requiring one person to submit his property to inspection of another for purpose of procuring evidence to aid that other in enforcing his rights is valid. Montana Co. v. St. Louis Mining and M. Co., 152 U. S. 160, 14 Sup. Ct. Rep. 576. With regard to inspection of person to procure evidence, see note 1, page 412, ante. In Potter v. Beale, 50 Fed. Rep. 860, the order of a court that a master should search the trunk of the president of an insolvent national bank and deliver to such president his private papers, and to the receiver all belonging to the bank, was held to be in violation of the prohibition against unreasonable searches and seizures. Money in possession of prisoner under arrest can be taken from him only when there are reasonable grounds for believing it to be connected with the crime charged or that it may be used as evidence. Er. parte Hurn, 92 Ala. 102, 9 So. 515, 15 L. R. A. 120, 25 Am. St. 23. Pawnbroker may be compelled to take out license, and to keep list of property received and persons from whom received, and to exhibit such property and list to inspection of
the person (a) is that maxim of the common law which secures to the citizen immunity in his home against the prying eyes of the government, and protection in person, property, and papers against even the process of the law, except in a few specified cases. The maxim that "every man's house is his castle," is

1 Broom's Maxims, 321; Isley v. Nichols, 12 Pick. 270; Swain v. Mizner, 8 Gray, 182; People v. Hubbard, 24 Wend. 369, 55 Am. Dec. 628; Curtis v. Hubbard, 4 Hill, 487; Bailey v. Wright, 39 Mich. 96. [That officer may not break and enter to serve a writ of replevin, see Kelley v. Schuyler, 20 R. L. 432, 39 Atl. 503, 44 L. R. A. 435. Householder may kill in defending his house against attack. Wilson v. State, 30 Fla. 234, 11 So. 666, 17 L. R. A. 654. As to when officer may enter without warrant, see Delafoile v. State, 54 N. J. L. 381, 24 Atl. 557, 16 L. R. A. 600, and note.] The eloquent passage in Chatham's speech on General Warrants is familiar: "The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be fruit; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement." And see Lieber on Civil Liberty and Self-Government, c. 6.


Statute authorizing vendors of liquors to sue out search warrants to secure bottles not returned by customers is unconstitutional. Lippman v. People, 175 Ill. 101, 61 N. E. 872.

(a) [Sheriff may take photographs, measurements, etc., of his prisoner for purposes of future identification. State v. Clausmeier, 154 Ind. 505, 57 N. E. 541, 60 L. R. A. 73. But a person cannot be lawfully arrested merely because he is a "suspicious person," and any statute which attempts to authorize such arrest is void under the clause prohibiting unreasonable seizures. Stoutenburgh v. Frazier, 16 D. C. App. 229, 48 L. R. A. 220. Prisoner discharged upon parole may be summarily arrested and recommitted. Fuller v. State, 122 Ala. 32, 26 So. 146, 45 L. R. A. 602. Arrest under warrant not supported by oath or affirmation is illegal. State v. Higgins, 51 S. C. 51, 28 S. E. 15, 38 L. R. A. 561. But witness refusing to testify before grand jury may be summarily imprisoned by a justice of the peace upon complaint of the grand jury. Re Clark, 65 Conn. 17, 31 Atl. 522, 28 L. R. A. 242. Such power to imprison is judicial however and cannot be conferred upon a county attorney. Re Sims, 54 Kan. 1, 37 Pac. 185, 25 L. R. A. 110, 45 Am. St. 201; nor upon a board of tax commissioners, Langenberg v. Decker, 131 Ind. 471, 31 N. E. 190, 16 L. R. A. 192. Statute may authorize arrest without warrant in case of misdemeanor committed in presence of officer, as well as in case of breach of peace. Burroughs v. Eastman, 101 Mich. 419, 59 N. W. 817, 21 L. R. A. 850, 45 Am. St. 410. Person cannot be surrendered to foreign government except in accordance with treaty stipulations. Ex parte McCabe, 49 Fed. Rep. 365, 12 L. R. A. 539. Chairman of board of county commissioners may be authorized by statute to remove summarily to the pauper's place of legal settlement any pauper who applies for public support. Lovell v. Seeback, 45 Minn. 465, 48 N. W. 23, 11 L. R. A. 667. Person arrested without extradition process in sister State is illegally detained and is entitled to be discharged upon habeas corpus. Re Robinson, 29 Neb. 155, 45 N. W. 267, 8 L. R. A. 398, 26 Am. St. 578; but see cases cited in note. Person brought into State by extradition proceedings and there tried or discharged cannot be arrested upon civil process until a reasonable time has elapsed in which he might have returned to the State from which he was brought. Molctor v. Sinnem, 70 Wis. 308, 44 N. W. 1999, 7 L. R. A. 817, 20 Am. St. 71. Person arrested without warrant can be detained only so long as is reasonably necessary to obtain a legal warrant. Leger v. Warren, 62 Ohio St. 500, 57 N. E. 506, 51 L. R. A. 193.]
made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen.

If in English history we inquire into the original occasion for these constitutional provisions, we shall probably find it in the abuse of executive authority, and in the unwarrantable intrusion of executive agents into the houses and among the private papers of individuals, in order to obtain evidence of political offences either committed or designed. The final overthrow of this practice is so clearly and succinctly stated in a recent work on the constitutional history of England, that we cannot refrain from copying the account in the note below.  

1 "Among the remnants of a jurisprudence which had favored prerogative at the expense of liberty was that of the arrest of persons under general warrants, without previous evidence of their guilt or identification of their persons. This practice survived the Revolution, and was continued without question, on the ground of usage, until the reign of George III, when it received its deathblow from the boldness of Wilkes and the wisdom of Lord Camden. This question was brought to an issue by No. 45 of the 'North Briton,' already so often mentioned. There was a libel, but who was the libeller? Ministers knew not, nor waited to inquire, after the accustomed forms of law; but forthwith Lord Halifax, one of the secretaries of state, issued a warrant, directing four messengers, taking with them a constable, to search for the authors, printers, and publishers; and to apprehend and seize them, together with their papers, and bring them in safe custody before him. No one having been charged or even suspected, — no evidence of crime having been offered, — no one was named in this dread instrument. The offence only was pointed at, not the offender. The magistrate who should have sought proofs of crime deputed this office to his messengers. Armed with their roving commission, they set forth in quest of unknown offenders; and, unable to take evidence, listened to rumors, idle tales, and curious guesses. They held in their hands the liberty of every man whom they were pleased to suspect. Nor were they trialers in their work. In three days they arrested no less than forty-nine persons on suspicion, — many as innocent as Lord Halifax himself. Among the number was Dryden Leach, a printer, whom they took from his bed at night. They seized his papers, and even apprehended his journeymen and servants. He had printed one number of the 'North Briton,' and was then reprinting some other numbers; but as he happened not to have printed No. 45, he was released without being brought before Lord Halifax. They succeeded, however, in arresting Kearsley, the publisher, and Bulfe, the printer, of the obnoxious number, with all their workmen. From them it was discovered that Wilkes was the culprit of whom they were in search; but the evidence was not on oath; and the messengers received verbal directions to apprehend Wilkes under the general warrant. Wilkes, far keener than the crown lawyers, not seeing his own name there, declared it 'a ridiculous warrant against the whole English nation,' and refused to obey it. But after being in custody of the messengers for some hours, in his own house, he was taken away in a chair, to appear before the secretaries of state. No sooner had he been removed than the messengers, returning to his house, proceeded to ransack his drawers, and carried off all his private papers, including even his will and his pocket-book. When brought into the presence of Lord Halifax and Lord Egremont, questions were put to Wilkes which he refused to answer; whereupon he was committed close prisoner to the Tower, denied the use of pen and paper, and interdicted from receiving the visits of his friends, or even of his professional advisers. From this imprisonment, however, he
The history of this controversy should be read in connection with that in America immediately previous to the American Revo-

was shortly released on a writ of habeas corpus, by reason of his privilege as a member of the House of Commons.

"Wilkes and the printers, supported by Lord Temple's liberality, soon questioned the legality of the general warrant. First, several journeymen printers brought action against the messengers. On the first trial Lord Chief Justice Pratt—not allowing bad precedents to set aside the sound principles of English law—held that the general warrant was illegal; that it was illegally executed; and that the messengers were not indemnified by statute. The journeymen recovered three hundred pounds damages; and the other plaintiffs also obtained verdicts. In all these cases, however, bills of exceptions were tendered and allowed. Mr. Wilkes himself brought an action against Mr. Wood, under-secretary of state, who had personally superintended the execution of the warrant. At this trial it was proved that Mr. Wood and the messengers, after Wilkes's removal in custody, had taken entire possession of his house, refusing admission to his friends; had sent for a blacksmith, who opened the drawers of his bureau; and having taken out the papers, had carried them away in a sack, without taking any list or inventory. All his private manuscripts were seized, and his pocket-book filled up the mouth of the sack. Lord Halifax was examined, and admitted that the warrant had been made out three days before he had received evidence that Wilkes was the author of the 'North Briton.' Lord Chief Justice Pratt thus spoke of the warrant: 'The defendant claimed a right, under precedents, to force persons' houses, break open escritoires, and seize their papers upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders' names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a secretary of state, and lie can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.' The jury found a verdict for the plaintiff, with one thousand pounds damages.

"Four days after Wilkes had obtained his verdict against Mr. Wood, Dryden Leech, the printer, gained another verdict, with four hundred pounds damages, against the messengers. A bill of exceptions, however, was tendered and received in this as in other cases, and came on for hearing before the Court of King's Bench in 1765. After much argument and the citing of precedents showing the practice of the secretary of state's office ever since the Revolution, Lord Mansfield pronounced the warrant illegal, saying: 'It is not fit that the judging of the information should be left to the discretion of the officer. The magistrate should judge, and give certain directions to the officer.' The other three judges agreed that the warrant was illegal and bad, 'believing that no degree of antiquity can give sanction to an usage bad in itself.' The judgment was therefore affirmed.

"Wilkes had also brought actions for false imprisonment against both the secretaries of state. Lord Egremont's death put an end to the action against him; and Lord Halifax, by pleading privilege, and intercepting other delays unworthy of his position and character, contrived to put off his appearance until after Wilkes had been outlawed, when he appeared and pleaded the outlawry. But at length, in 1793, no further postponement could be contrived; the action was tried, and Wilkes obtained no less than four thousand pounds damages. Not only in this action, but throughout the proceedings, in which persons aggrieved by the general warrant had sought redress, the government offered an obstinate and vexatious resistance. The defendants were harassed by every obstacle which the law permitted, and subjected to ruinous costs. The expenses which government itself incurred in these various actions were said to have amounted to one hundred thousand pounds.

"The liberty of the subject was further assured at this period by another remarkable judgment of Lord Camden. In November, 1762, the Earl of Halifax, as
lution, in regard to writs of assistance issued by the courts to
the revenue officers, empowering them, in their discretion, to
search suspected places for smuggled goods, and which Otis
pronounced "the worst instrument of arbitrary power, the most
destructive of English liberty and the fundamental principles of
law, that ever was found in an English law book;" since they
placed "the liberty of every man in the hands of every petty
officer." ¹ All these matters are now a long way in the past; but

secretary of state, had issued a warrant
directing certain messengers, taking a
constable to their assistance, to search for
John Entinck, clerk, the author or one
concerned in the writing of several num-
bers of the 'Monitor, or British Free-
holder,' and to seize him, together with his
books and papers, and bring him in
safe custody before the secretary of state.
In execution of this warrant, the mes-
sengers apprehended Mr. Entinck in his
house, and seized the books and papers
in his bureau, writing-desk, and drawers.
This case differed from that of Wilkes, as
the warrant specified the name of the
person against whom it was directed. In
respect of the person, it was not a general
warrant, but as regards the papers, it
was a general search-warrant,—not speci-
fying any particular papers to be seized,
but giving authority to the messengers to
take all his books and papers according
to their discretion.

"Mr. Entinck brought an action of
trespass against the messengers for the
seizure of his papers, upon which a jury
found a special verdict, with three hun-
dred pounds damages. This special ver-
dict was twice learnedly argued before the
Court of Common Pleas, where, at
length, in 1765, Lord Camden pronounced
an elaborate judgment. He even doubted
the right of the secretary of state to com-
mit persons at all, except for high treason;
but in deference to prior decisions, the
court felt bound to acknowledge the right.
The main question, however, was the
legality of a search warrant for papers.
‘If this point should be determined in
favor of the jurisdiction,’ said Lord Cam-
den, ‘the secret cabinets and bureaus of
every subject in this kingdom will be
thrown open to the search and inspection
of a messenger, whenever the secretary
of state shall see fit to charge, or even to
suspend, a person to be the author, printer,
or publisher of a seditious libel.’ ‘This
power, so assumed by the secretary of
state, is an execution upon all the party’s
papers in the first instance. His house is
rified; his most valuable papers are taken
out of his possession, before the paper,
for which he is charged, is found to be
criminal by any competent jurisdiction,
and before he is convicted either of writ-
ing, publishing, or being concerned in
the paper.’ It had been found by the
special verdict that many such warrants
had been issued since the Revolution;
but he wholly denied their legality. He
referred the origin of the practice to the
Star Chamber, which, in pursuit of libels,
had given search-warrants to their mes-
senger of the press,—a practice which,
after the abolition of the Star Chamber,
had been revived and authorized by the
licensing act of Charles II., in the person
of the secretary of state. And he con-
jectured that this practice had been con-
tinued after the expiration of that act,—
a conjecture shared by Lord Mansfield
and the Court of King’s Bench. With
the unanimous concurrence of the other
judges of his court, this eminent magis-
trate now finally condemned this danger-
ous and unconstitutional practice." May's
Constitutional History of England, c. 11.
See also Semayne's Case, 5 Coke, 91; 1
Smith's Lead. Cas. 183; Entinck v. Carrin-
gington, 2 Wils. 275, and 19 State Trials,
1030; note to same case in Broom, Const.
Law, 613; Money v. Leach, Burr. 1742;
Wilkes's Case, 2 Wils. 151, and 19 State
Trials, 1405. For debates in Parliament
on the same subject, see Hantard's De-
bates, Vol. XV. pp. 1393–1418; Vol. XV.
pp. 6 and 209. In further illustration of
the same subject, see De Lolme on the
English Constitution, c. 18; Story on
Const. §§ 1901, 1902; Bell v. Clapp, 10
Johns. 263, 6 Am. Dec. 339; Saffly v.
Smith, 11 Johns. 500.

523, 524; 2 Hildreth's U. S. 499; 4 Dan-
it has not been deemed unwise to repeat in the State constitutions, as well as in the Constitution of the United States, the principles already settled in the common law upon this vital point in civil liberty.

For the service of criminal process, the houses of private parties are subject to be broken and entered under circumstances which are fully explained in the works on criminal law, and need not be enumerated here. And there are also cases where search-warrants are allowed to be issued, under which an officer may be protected in the like action. But as search-warrants are a species of process exceedingly arbitrary in character, and which ought not to be resorted to except for very urgent and satisfactory reasons, the rules of law which pertain to them are of more than ordinary strictness; and if the party acting under them expects legal protection, it is essential that these rules be carefully observed.

1 In the first place, they are only to be granted in the cases expressly authorized by law; and not generally in such cases until after a showing made before a judicial officer, under oath, that a crime has been committed, and that the party complaining has reasonable cause to suspect that the offender, or the property which was the subject or the instrument of the crime, is concealed in some specified house or place. And the law, in requiring a showing of reasonable cause for suspicion, intends that evidence shall be given of such facts as shall satisfy the magistrate that the suspicion is well founded; for the suspicion itself is no ground for the warrant except as the facts justify it.

2 In the next place, the warrant which the magistrate issues must particularly specify the place to be searched and the object for which the search is to be made. If a building is to be

croft's U. S. 414; Quincy, Mass. Reports, 61. See also the appendix to these reports, p. 395, for a history of writs of assistance.

1 U. S. Const. 4th Amendment. The scope of this work does not call for any discussion of the searches of private premises, and seizures of books and papers, which are made under the authority, or claim of authority, of the revenue laws of the United States. Perhaps, under no other laws are such liberties taken by ministerial officers; and it would be surprising to find oppressive action on their part so often submitted to without legal contest, if the facilities they possess to embarrass, annoy, and obstruct the merchant in his business were not borne in mind. The federal decisions, however, go very far to establish the doctrine that, in matters of revenue, the regulations Congress sees fit to establish, however unreasonable they may seem, must prevail. For a very striking case, see Henderson's Distilled Spirits, 14 Wall. 44.

2 Hale, P. C. 142; Bishop, Cr. Pro. §§ 716-719; Archibald, Cr. Law, 147. An officer may base a complaint upon the information of a third person. Collins v. Lean, 68 Cal. 284.

searched, the name of the owner or occupant should be given; or, if not occupied, it should be particularly described, so that the officer will be left to no discretion in respect to the place; and a misdescription in regard to the ownership, or a description so general that it applies equally well to several buildings or places, would render the warrant void in law. Search-warrants are always obnoxious to very serious objections; and very great particularity is justly required in these cases before the privacy of a man's premises is allowed to be invaded by the minister of the law. And therefore a designation of goods to be searched for as "goods, wares, and merchandises," without more particular description, has been regarded as insufficient, even in the case of goods supposed to be smuggled, where there is usually greater difficulty in giving description, and where, consequently, more latitude should be permitted than in the case of property stolen.

Lord Hale says: "It is fit that such warrants to search do express that search be made in the daytime; and though I do not say they are unlawful without such restriction, yet they are very inconvenient without it; for many times, under pretence of searches made in the night, robberies and burglaries have been committed, and at best it creates great disturbance." And the statutes upon this subject will generally be found to provide for searches in the daytime only, except in very special cases.

The warrant should also be directed to the sheriff or other proper officer, and not to private persons; though the party complainant may be present for the purposes of identification, and other assistance can lawfully be called in by the officer if necessary.

The warrant must also command that the goods or other arti-

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3 Thus a warrant to search the "houses and buildings of Hiram Ide and Henry Ide," is too general. Humes v. Tabor, 1 R. I. 464. See McGlinchy v. Barrows, 41 Me. 74; Ashley v. Peterson, 25 Wis. 621; Com. v. Intox. Liquors, 140 Mass. 287, 3 N. E. 4. So a warrant for the arrest of an unknown person under the designation of John Doe, without further description, is void. Commonwealth v. Crotty, 19 Allen, 403. For descriptions held sufficient, see Wright v. Dressel, 110 Mass. 147, 3 N. E. 6; Com.
4 Certain Liquors, 146 Mass. 509, 16 N. E. 208.
5 A warrant for searching a dwelling-house will not justify a forcible entry into a barn adjoining the dwelling-house. Jones v. Fletcher, 41 Me. 254; Downing v. Porter, 8 Gray, 539; Bishop, Cr. Pro. §§ 710–719.
8 2 Hale, P. C. 160; Archbold, Cr. Law (7th ed.), 145.
cles to be searched for, if found, together with the party in whose custody they are found, be brought before the magistrate, to the end that, upon further examination into the facts, the goods, and the party in whose custody they were, may be disposed of according to law. ¹ And it is a fatal objection to such a warrant that it leaves the disposition of the goods searched for to the ministerial officer, instead of requiring them to be brought before the magistrate, that he may pass his judgment upon the truth of the complaint made; and it would also be a fatal objection to a statute authorizing such a warrant if it permitted a condemnation or other final disposition of the goods, without notice to the claimant, and without an opportunity for a hearing being afforded him. ²

The warrant is not allowed for the purpose of obtaining evidence of an intended crime; but only after lawful evidence of an offence actually committed. ³ Nor even then is it allowable to invade one’s privacy for the sole purpose of obtaining evidence against him, ⁴ except in a few special cases where that which is the subject of the crime is supposed to be concealed, and the public or the complainant has an interest in it or in its destruc-

1 2 Hale, P. C. 150; Bell v. Clapp. 10 Johns. 263, 0 Am. Dec. 399; Hibbard v. People, 4 Mich. 120; Fisler v. McGirr, 1 Gray. 1. If the statute ordains that the warrant shall require the officer to make an inventory, one omitting this command is no protection, though in fact an inventory is made by the officer. Hussey v. Davis, 58 N. H. 317.

² The “Search and Seizure” clause in some of the prohibitory liquor laws was held void on this ground. Fisher v. McGirr, 1 Gray. 1; Greene v. Briggs, 1 Curtis. 311; Hibbard v. People, 4 Mich. 126. See also Matter of Morton, 10 Mich. 208; Sullivan v. Oneida, 61 Ill. 242; State v. Snow, 3 R. L. 64, for a somewhat similar principle. It is not competent by law to empower a magistrate on mere information, or on his own personal knowledge, to seize and destroy gaming-tables or devices without a hearing and trial. Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420. An act which declared that all nets, &c. used in catching fish in violation thereof should be forfeited, and might be seized and destroyed or sold by the peace officer, was declared void in Hey Sing Jeeck v. Anderson, 57 Cal. 251. After seizure of money and acquittal of larceny, the money must be delivered to defendant. State v. Williams, 61 Iowa, 517, 10 N. W. 586.

³ We do not say that it would be incompetent to authorize, by statute, the issue of search-warrants for the prevention of offences in some cases; but it is difficult to state any case in which it might be proper, except in such cases of attempts, or of preparations to commit crime, as are in themselves criminal.

[Slot machine to be used as a gambling device. Its seizure justified to prevent the offence. Board of Police Com’rs v. Wagner, 93 Md. 182, 48 Atl. 465, 52 L. R. A. 775.]

⁴ The fourth amendment to the Constitution of the United States, found also in many State constitutions, would clearly preclude the seizure of one’s papers in order to obtain evidence against him; and the spirit of the fifth amendment—that no person shall be compelled in a criminal case to give evidence against himself—would also forbid such seizure. [State v. Slamon, 73 Vt. 212, 50 Atl. 1007, 87 Am. St. 711. In this last case it was held a violation of the constitutional right to take a letter while searching for stolen goods by virtue of a search-warrant.]
tion. Those special cases are familiar, and well understood in the law. Search-warrants have heretofore been allowed to search for stolen goods, for goods supposed to have been smuggled into the country in violation of the revenue laws, for implements of gaining or counterfeiting, for lottery tickets or prohibited liquors kept for sale contrary to law, for obscene books and papers kept for sale or circulation, and for powder or other explosive and dangerous material so kept as to endanger the public safety. A statute which should permit the breaking and entering a man’s house, and the examination of books and papers with a view to discover the evidence of crime, might possibly not be void on constitutional grounds in some other cases; but the power of the legislature to authorize a resort to this process is one which can properly be exercised only in extreme cases, and it is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his desks broken open, his private books, letters, and papers exposed to prying curiosity, and to the misconstructions of ignorant and suspicious persons,—and all this under the direction of a mere ministerial officer, who brings with him such assistants as he pleases, and who will select them more often with reference to physical strength and courage than to their sensitive regard to the rights and feelings of others. To incline against the enactment of such laws is to incline to the side of safety. In principle they are

1 These are the most common cases, but in the following, search-warrants are also sometimes provided for by statute: books and papers of a public character, retained from their proper custody; females supposed to be concealed in houses of ill-fame; children enticed or kept away from parents or guardians; concealed weapons; counterfeit money, and forged bills or papers. See cases under English statutes specified in 4 Broom and Hadley’s Commentaries, 332.

2 Instances sometimes occur in which ministerial officers take such liberties in endeavoring to detect and punish offenders, as are even more criminal than the offenses they seek to punish. The employment of spies and decoys to lead men on to the commission of crime, e.g. the pretence of bringing criminals to justice, cannot be too often or too strongly condemned; and that prying into private correspondence by officers which has sometimes been permitted by post-masters, is directly in the face of the law, and cannot be excused. The importance of public confidence in the inviolability of correspondence through the post-office cannot well be overrated; and the proposition to permit letters to be opened at the discretion of a ministerial officer, would excite general indignation. See Ex parte Jackson, 96 U.S. 727. In Maine it has been decided that a telegraph operator may be compelled to disclose the contents of a message sent by him for another party, and that no rule of public policy would forbidd. State v. Litchfield, 58 Me. 267. The case is treated as if no other considerations were involved than those which arise in the ordinary case of a voluntary disclosure by one private person to another, without necessity. Such, however, is not the nature of the communication made to the operator of the telegraph. That instrument is used as a means of correspondence, and as a valuable, and in many cases an indispensable, substitute for the postal facilities; and the communication is made, not be-
objectionable; in the mode of execution they are necessarily
dodious; and they tend to invite abuse and to cover the commis-
sion of crime. We think it would generally be safe for the legis-
lature to regard all those searches and seizures "unreasonable"
which have hitherto been unknown to the law, and on that ac-
count to abstain from authorizing them, leaving parties and the
public to the accustomed remedies.¹

cause the party desires to put the oper-
ator in possession of facts, but because
transmission without it is impossible. It
is not voluntary in any other sense than
this, that the party makes it rather than
deprive himself of the benefits of this
great invention and improvement. The
reasons of a public nature for maintaining
the secrecy of telegraphic communication
are the same with those which protect
correspondence by mail; and though the
operator is not a public officer, that cir-
cumstance appears to us immaterial. He
fulfils an important public function, and
the propriety of his preserving inviolable
secrecy in regard to communications is
so obvious, that it is common to provide
statutory penalties for disclosures. If on
grounds of public policy the operator
should not voluntarily disclose, why do
not the same considerations forbid the
courts compelling him to do so? Or if
it be proper to make him testify to the
correspondence by telegraph, what good
reason can be given why the postmaster
should not be made subject to the process
of subpoena for a like purpose, and com-
pelled to bring the correspondence which
passes through his hands into court, and
open it for the purposes of evidence?
This decision has been followed in some
other cases. Henisler v. Freedman, 2
Par. Sel. Cas. (Pa.) 274; First National
Bank of Wheeling v. Merchants' National
Bank, 7 W. Va. 344; Ex parte Brown, 72
Mo. 83, 37 Am. Rep. 420; Woods v. Mil-
lar, 55 Iowa, 108, 7 N. W. 484; U. S. v.
Hunter, 15 Fed. Rep. 712. See Gray,
Communication by Telegraph, ch. v.

We should suppose, were it not for the
opinions to the contrary by tribunals so
eminent, that the public could not be en-
titled to a man's private correspondence,
whether obtainable by seizing it in the
mails, or by compelling the operator of
the telegraph to testify to it, or by requir-
ing his servants to take from his desks

his private letters and journals, and bring
them into court on subpoena duces tecum.
Any such compulsory process to obtain it
seems a most arbitrary and unjustifiable
seizure of private papers; such an "un-
reasonable seizure" as is directly con-
demned by the Constitution. In England,
the secretary of state sometimes issues
his warrant for opening a particular let-
ter, where he is possessed of such facts
as he is satisfied would justify him with
the public; but no American officer or
body possesses such authority, and its
usurpation should not be tolerated. Let-
ters and sealed packages subject to letter
postage in the mail can be opened and
examined only under like warrant, issued
upon similar oath or affirmation, particu-
larly describing the thing to be seized, as
is required when papers are subjected to
s. c., ch. in one's own household. Ex parte
Jackson, 96 U. S. 727. See this case for
a construction of the law of Congress for
excluding improper matter from the mails.
For an account of the former and present
English practice on opening letters in the
mail, see May, Constitutional History,
c. 11; Todd, Parliamentary Government,
Vol. I. p. 272; Broom, Const. Law, 615.

¹ A search-warrant for libels and other
papers of a suspected party was illegal at
the common law. See 11 State Trials,
313, 321; Archbold, Cr. Law (7th ed.),
141; Wilkes v. Wood, 10 State Trials,
1153. "Search-warrants were never re-
ognized by the common law as processes
which might be availed of by individuals
in the course of civil proceedings or for
the maintenance of any mere private
right; but their use was confined to the
case of public prosecutions instituted and
pursued for the suppression of crime and
the detection and punishment of crimi-
nals. Even in those cases, if we may rely
on the authority of Lord Coke, their le-
gality was formerly doubted; and Lord
Camden said they crept into the law by
CONSTITUTIONAL LIMITATIONS. [CH. X.

We have said that if the officer follows the command of his warrant, he is protected; and this is so even when the complaint proves to have been unfounded. But if he exceed the command by searching in places not described therein, or by seizing persons or articles not commanded, he is not protected by the warrant, and can only justify himself as in other cases where he assumes to act without process. Obeying strictly the command of his warrant, he may break open outer or inner doors, and his justification does not depend upon his discovering that for which he is to make search.

In other cases than those to which we have referred, and subject to the general police power of the State, the law favors the complete and undisturbed dominion of every man over his own premises, and protects him therein with such jealousy that he may defend his possession against intruders, in person or by his servants or guests, even to the extent of taking the life of the intruder, if that seem essential to the defence.

imperceptible practice. But their legality has long been considered to be established on the ground of public necessity; because without them felons and other malefactors would escape detection." Merrick, J., in Robinson v. Richardson, 13 Gray 450. "To enter a man’s house," said Lord Camden, "by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition,—a law under which no Englishman would wish to live an hour." See his opinion in Entinck v. Carrington, 19 State Trials, 1029; s. c. 2 Wils. 275, and Broom, Const. Law, 569; Huckle v. Money, 2 Wils. 205; Leach v. Money, 19 State Trials, 1001; s. c. 3 Burr. 1692; and 1 W. Bl. 655; note to Entinck v. Carrington, Broom, Const. Law, 613. [That the evidence was obtained by an unlawful search and seizure is not sufficient to make it inadmissible. Williams v. State, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269. An order compelling one to deliver his private papers to another who has no ownership in them is in violation of the constitutional provision against unwarrantable seizures. Ex parte Clarke, 126 Cal. 295, 59 Pac. 540, 77 Am. St. 176.]

1 Barnard v. Bartlett, 10 Cush. 501. After the goods seized are taken before the magistrate, the officer is not liable for them to the owner. Collins v. Lean, 68 Cal. 281, 9 Pac. 173.

2 Crozier v. Cudney, 9 D. & R. 224; Same case, 6 B. & C. 232; State v. Brennan’s Liquors, 25 Conn. 278. Where the warrant was for the search of the person, and the goods were found on the floor of the room where he was, their seizure was held lawful. Collins v. Lean, 68 Cal. 284, 9 Pac. 173.

3 2 Hale, P. C. 151; Barnard v. Bartlett, 10 Cush. 501.

4 That in defence of himself, any member of his family, or his dwelling, a man has a right to employ all necessary violence, even to the taking of life, see Shorter v. People, 2 N. Y. 193; Yates v. People, 82 N. Y. 609; Logue v. Commonwealth, 38 Pa. St. 265; Pond v. People, 8 Mich. 150; Maher v. People, 21 Ill. 211; Bohannon v. Commonwealth, 8 Bush, 481, 8 Am. Rep. 474; Bean v. State, 25 Tex. App. 346. But except where a forcible felony is attempted against person or property, he should avoid such consequences, if possible, and cannot justify standing up and resisting to the death, when the assailant might have been avoided by retreat. People v. Sullivan, 7 N. Y. 306; Carter v. State, 82 Ala. 13, 2 So. 706. But a man assaulted in his dwelling is under no obligation to retreat; his house is his castle, which he may defend to any extremity. And this means not simply the dwelling-house proper, but includes whatever is within.
Quartering Soldiers in Private Houses.

A provision is found incorporated in the constitution of nearly every State, that "no soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law." To us, after four-fifths of a century have passed away since occasion has existed for complaint of the action of the government in this particular, the repetition of this declaration seems to savor of idle form and ceremony; but "a frequent recurrence to the fundamental principles of the Constitution" can never be unimportant, and indeed may well be regarded as "absolutely necessary to preserve the advantages of liberty, and to maintain a free government." It is difficult to imagine a more terrible engine of oppression than the power in the executive to fill the house of an obnoxious person with a company of soldiers, who are to be fed and warmed at his expense, under the direction of an officer accustomed to the exercise of arbitrary power, and in whose presence the ordinary laws of courtesy, not less than the civil restraints which protect person and property, must give way to unbridled will; who is sent as an instrument of punishment, and with whom insult and outrage may appear quite in the line of his duty. However contrary to the spirit of the age such a proceeding may be, it may always be assumed as possible that it may be resorted to in times of great excitement, when party action is generally violent; and "the dragesonades of Louis XIV. in France, of James II. in Scotland, and those of more recent and present date in certain countries, furnish sufficient justification for this specific guaranty." The clause, as we find it in the national and State constitutions, has come down to us through the Petition of Right, the Bill of Rights of 1688, and the Declaration of Independence; and it is

the curtilage as understood at the common law. Pond v. People, 8 Mich. 150; State v. Middleham, 62 Iowa, 150, 17 N. W. 440; State v. Scheele, 57 Conn. 307, 18 Atl. 256; Parrish v. Com., 61 Va. 1; Bledsoe v. Com., 11 S. W. 84, 7 S. W. Rep. 881 (Ky.). And in deciding what force it is necessary to employ in resisting the assault, a person must act upon the circumstances as they appear to him at the time; and he is not to be held criminal because on a calm survey of the facts afterwards it appears that the force employed in defence was excessive. See the cases above cited; also Schnier v. People, 23 Ill. 17; Patten v. People, 18 Mich. 314; Hinton v. State, 24 Tex. 464; People v. Flanagan, 60 Cal. 2. But the belief must be bona fide and upon reasonable grounds. State v. Peacock, 40 Ohio St. 323.

1 Constitutions of Massachusetts, New Hampshire, Vermont, Florida, Illinois, and North Carolina. See also Constitutions of Virginia, Nebraska, and Wisconsin for a similar declaration.

2 Lieber, Civ. Lit. Liberty and Self-Government, c. 11.
but a branch of the constitutional principle, that the military shall in time of peace be in strict subordination to the civil power.¹

Criminal Accusations.

Perhaps the most important of the protections to personal liberty consists in the mode of trial which is secured to every person accused of crime. At the common law, accusations of felony were made in the form of an indictment by a grand jury; and this process is still retained in many of the States,² while others have substituted in its stead an information filed by the prosecuting officer of the State or county. The mode of investigating the facts, however, is the same in all; and this is through a trial by jury, surrounded by certain safeguards which are a well-understood part of the system, and which the government cannot dispense with.

¹ Story on the Constitution, §§ 1899, 1900; Rawle on Constitution, 123. In exceptional cases, however, martial law may be declared and enforced whenever the ordinary legal authorities are unable to maintain the public peace and suppress violence and outrage. Todd, Parliamentary Government in England, Vol. I. p. 342; 1 Bl. Com 413-415. As to martial law in general, see Ex parte Milligan, 4 Wall. 120.

² The accusation, whether by indictment or information, must be sufficiently specific fairly to charge the respondent of the nature of the charge against him, so that he may know what he is to answer, and so that the record may show, as far as may be, for what he is put in jeopardy. Whitney v. State, 10 Ind. 491; State v. O'Flaherty, 7 Nev. 153; State v. McKenna, 10 R. I. 308, 17 Atl. Rep. 51. The legislature may allow simplification of old forms of indictment. Com. v. Freelow, 150 Mass. 66, 22 N. E. Rep. 435. As to amendment of indictments, see p. 327. A law authorizing commitment without examination, upon summary arrest, of a pardoned convict for violating the condition of his pardon, is invalid. People v. Moore, 62 Mich. 490, 29 N. W. 89. The indictment for a State offence can only be by the grand jury of the county of offence. Ex parte Slater, 72 Mo. 102; Weyrich v. People, 89 Ill. 90. The fourteenth amendment to the federal Constitution is not violated by disallowing with a grand jury. Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. Rep. 111, 222; Kalloch v. Superior Court, 66 Cal. 229; State v. Boswell, 104 Ind. 141, 4 N. E. 675. [Prosecution by "information" is due process. Ball v. Nebraska, 176 U. S. 83, 20 Supt. Ct. Rep. 287.] Nor does it forbid a grand jury of seven, if a State law so provides. Hansenfluck v. Com., 85 Va. 702, 8 S. E. Rep. 683. In the federal courts infamous crimes must be prosecuted by indictment, and they are held to be such as are punished by imprisonment in a penitentiary with or without hard labor. Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. Rep. 935; Mackin v. United States, 117 U. S. 318, 6 Sup. Ct. Rep. 777; United States v. De Walt, 128 U. S. 393, 9 Sup. Ct. Rep. 111. See State v. West, 42 Minn. 147, 43 N. W. 845. Compare State v. Nolan, 16 R. I. 520, 10 Atl. 481. [Re Butler, 84 Me. 25, 24 Atl. 496, 17 L. R. A. 764, and note on infamous crimes; that the judge in charging the grand jury must be temperate in his language, see Chair v. State, 40 Neb. 531, 59 N. W. 118, 28 L. R. A. 357, and note. Upon number of jurors necessary or proper to act on grand jury, see State v. Belved, 89 Iowa, 405, 50 N. W. 545, 27 L. R. A. 846, and note; organization of grand jury, State v. Noyes, 87 Wis. 310, 58 N. W. 386, 27 L. R. A. 776, and note, 41 Am. St. 45. Concurrence of nine cannot be made sufficient by statute where constitution does not so provide. State v. Barker, 107 N. C. 913, 12 S. E. 115, 10 L. R. A. 59, and note.]
First, we may mention that the humanity of our law always presumes an accused party innocent until he is proved to be guilty. This is a presumption which attends all the proceedings against him, from their initiation until they result in a verdict, which either finds the party guilty or converts the presumption of innocence into an adjudged fact.1

If there were any mode short of confinement which would, with reasonable certainty, insure the attendance of the accused to answer the accusation, it would not be justifiable to inflict upon him that indignity, when the effect is to subject him, in a greater or less degree, to the punishment of a guilty person, throughout upon the prosecution to establish all the conditions of guilt; and the presumption of innocence that all the while attends the prisoner entitles him to an acquittal, if the jury are not reasonably satisfied of his guilt. See State v. Marler, 2 Ala. 48; Commonwealth v. Myers, 7 Met. 500; Polk v. State, 19 Ind. 170; Chase v. People, 40 Ill. 352; People v. Schryver, 42 N. Y. 1; Stevens v. State, 31 Ind. 485; State v. Pike, 49 N. II. 399; State v. Jones, 50 N. II. 349; People v. McCunn, 10 N. Y. 68; Commonwealth v. Kimball, 24 Pick. 373; Commonwealth v. Dana, 2 Met. 340; Hoppv v. People, 31 Ill. 385; People v. Garbutt, 17 Mich. 23; State v. Kliger, 43 Mo. 127; State v. Hundley, 46 Mo. 414; State v. Lowe, 93 Mo. 617, 5 S. W. 889; Pallard v. State, 19 Neb. 609, 23 N. W. 271; State v. Crawford, 11 Kan. 82; Brockett v. People, 75 N. Y. 150; O'Connell v. People, 87 N. Y. 377; Pollard v. State, 53 Miss. 410; Cunningham v. State, 55 Miss. 203, 31 Am. Rep. 360. But the prosecution may rely upon the presumption of sanity which exists in all cases, until the defence puts in evidence which creates a reasonable doubt. People v. Finley, 38 Mich. 482. And see cases v. State, 66 Ind. 94, 32 Am. Rep. 99. A statute may require insanity to be specially pleaded. Bennett v. State, 57 W. Va. 69, 14 N. W. 912. [Accused is entitled to appear without manacles unless he is violent and disorderly. Keeping him manacled at trial will cause a reversal of a judgment against him. State v. Williams, 18 Wash. 47, 50 Pac. 580, 29 L. R. A. 821, 63 Am. St. 809. Upon this right, see note to this case in L. R. A.]

while as yet it is not determined that he has committed any crime. If the punishment on conviction cannot exceed in severity the forfeiture of a large sum of money, then it is reasonable to suppose that such a sum of money, or an agreement by responsible parties to pay it to the government in case the accused should fail to appear, would be sufficient security for his attendance; and therefore, at the common law, it was customary to take security of this character in all cases of misdemeanor; one or more friends of the accused undertaking for his appearance for trial, and agreeing that a certain sum of money should be levied of their goods and chattels, lands and tenements, if he made default. But in the case of felonies, the privilege of giving bail before trial was not a matter of right; and in this country, although the criminal code is much more merciful than it formerly was in England, and in some cases the allowance of bail is almost a matter of course, there are others in which it is discretionary with the magistrate to allow it or not, and where it will sometimes be refused if the evidence of guilt is strong or the presumption great. Capital offences are not generally regarded as bailable; at least, after indictment, or when the party is charged by the finding of a coroner's jury; and this upon the supposition that one who may be subjected to the terrible punishment that would follow a conviction, would not for any mere pecuniary considerations remain to abide the judgment. And where the death penalty is abolished and imprisonment for life substituted, it is believed that the rule would be the same notwithstanding this change, and bail would still be denied in the case of the highest offences, except under very peculiar circumstances. In the case of other felonies it is not usual to refuse bail, and in some of the State constitutions it has been deemed important to make it a matter of right in all cases except on capital charges "when the proof is evident or the presumption great."

1 Matter of Barronet, 1 El. & Bl. 1; Ex parte Tylor, 5 Cow. 39. In homicide it is said bail should be refused if the evidence is such that the judge would sustain a capital conviction upon it. Ex parte Brown, 65 Ala. 440.

2 State v. Summons, 19 Ohio, 139.

3 The courts have power to bail, even in capital cases. United States v. Hamilton, 3 Dall. 17; United States v. Jones, 3 Wash. 293; State v. Rockafellow, 6 N. J. 362; Commonwealth v. Semmes, 11 Leith, 665; Commonwealth v. Archer, 6 Gratt. 705; People v. Smith, 1 Cal. 9; People v. Van Horne, 8 Barb. 168. In England when all felonies were capital it was discretionary with the courts to allow bail before trial. 4 Bl. Com. 297, and note.

4 The constitutions of a majority of the States now contain provisions to this effect. And see Foley v. People, 1 Ill. 81; Ullery v. Commonwealth, 8 B. Monr. 3; Shore v. State, 0 Mo. 640; State v. Summons, 19 Ohio, 139; Ex parte Wray, 30 Miss. 679; Moore v. State, 36 Miss.
When bail is allowed, *unreasonable bail* is not to be required; but the constitutional principle that demands this is one which, from the very nature of the case, addresses itself exclusively to the judicial discretion and sense of justice of the court or magistrate empowered to fix upon the amount. That bail is reasonable which, in view of the nature of the offence, the penalty which the law attaches to it, and the probabilities that guilt will be established on the trial, seems no more than sufficient to secure the party’s attendance. In determining this, some regard should be had to the prisoner’s pecuniary circumstances; that which is reasonable bail to a man of wealth being equivalent to a denial of right if exacted of a poor man charged with the like offence. When the court or magistrate requires greater security than in his judgment is needful to secure attendance, and keeps the prisoner in confinement for failure to give it, it is plain that the right to bail which the constitution attempts so carefully to secure has been disregarded; and though the wrong is one for which, in the nature of the case, no remedy exists, the violation of constitutional privilege is aggravated, instead of being diminished, by that circumstance.  

The presumption of innocence is an absolute protection against conviction and punishment, except either, *first*, on confession in open court; or, *second*, on proof which places the guilt beyond any reasonable doubt. Formerly, if a prisoner arraigned for felony stood mute wilfully, and refused to plead, a terrible mode was resorted to for the purpose of compelling him to do so; and this might even end in his death:  but a more merciful proceeding is now substituted; the court entering a plea of not guilty for a party who, for any reason, fails to plead for himself.

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1 Ex parte Banks, 23 Ala. 80; Ex parte Dykes, 83 Ala. 114, 8 So. 306; Ex parte Kendall, 100 Ind. 599; In re Malisom, 29 Kan. 725, 14 Pac. 144; Matter of Troia, 64 Cal. 152, 23 Pac. 231. [Re Losasso, 15 Col. 103, 24 Pac. 1060, 10 L. R. A. 847, and note.]

2 The magistrate in taking bail exercises an authority essentially judicial. Regina v. Badger, 4 Q. B. 468; Linford v. Fitzroy, 13 Q. B. 249. As to his duty to look into the nature of the charge and the evidence to sustain it, see Barronet’s Case, 1 Bl. & Bl. 1. See Carmody v. State, 105 Ind. 540, 5 N. E. 679, as to fixing amount of bail in advance for different classes of cases.

3 4 Bl. Com. 324. In treason, petit felony, and misdemeanors, wilfully standing mute was equivalent to a conviction, and the same punishment might be imposed; but in other cases there could be no trial or judgment without plea; and an accused party might therefore sometimes stand mute and suffer himself to be pressed to death, in order to save his property from forfeiture. Poor Giles Corey, accused of witchcraft, was perhaps the only person ever pressed to death for refusal to plead in America, 2 Bancroft’s U. S. 93; 2 Hildreth’s U. S. 100. For English cases, see Cooley’s Bl. Com. 325, note. How in England the court enters a plea of not guilty for a prisoner refusing to plead, and the trial proceeds as in other cases.
Again, it is required that the trial be speedy; and here also the injunction is addressed to the sense of justice and sound judgment of the court. In this country, where officers are specially appointed or elected to represent the people in these prosecutions, their position gives them an immense power for oppression; and it is to be feared they do not always sufficiently appreciate the responsibility, and wield the power with due regard to the legal rights and privileges of the accused. When a person charged with crime is willing to proceed at once to trial, no delay on the part of the prosecution is reasonable, except only that which is necessary for proper preparation and to secure the attendance of witnesses. Very much, however, must be left to the judgment of the prosecuting officer in these cases; and the court would not compel the government to proceed to trial at the first term after indictment found or information filed, if the officer who represents it should state, under the responsibility of his official oath, that he was not and could not be ready at that time. But further delay would not generally be allowed without a more specific showing of the causes which prevent the State proceeding to trial, including the names of the witnesses, the steps taken to procure them, and the facts expected to be proved by them, in order that the court might judge of the reasonableness of the trial under the belief that certain witnesses for the State were absent, when in fact they were present and kept in concealment by this functionary. Curtis v. State, 6 Cold. 9.

1 Speedy trial is said to mean a trial so soon after indictment as the prosecution can, by a fair exercise of reasonable diligence, prepare for trial; regard being had to the terms of court. United States v. Fox, 3 Mont. 512; Creston v. Nye, 74 Iowa, 309, 37 N. W. 777. If it becomes necessary to adjourn the court without giving trial, the prisoner should be bailed, though not otherwise entitled to it. Ex parte Caplis, 58 Miss. 558.

2 It is the duty of the prosecuting attorney to treat the accused with judicial fairness; to inflict injury at the expense of justice is no part of the purpose for which he is chosen. Unfortunately, however, we sometimes meet with cases in which these officers appear to regard themselves as the counsel for the complaining party rather than the impartial representatives of public justice. But we trust it is not often that cases occur like one in Tennessee, in which the Supreme Court felt called upon to set aside a verdict in a criminal case, where by the artifice of the prosecuting officer the prisoner had been induced to go to trial under the belief that certain witnesses for the State were absent, when in fact they were present and kept in concealment by this functionary. Curtis v. State, 6 Cold. 9.

3 See this discussed in Ex parte Stanley, 4 Nev. 113; and In re Begerow, 133 Cal. 349, 66 Pac. 228, 85 Am. St. 178. A valuable monographic note to this case discussing the law of this clause of the constitution is found at pages 187 to 204 inclusive of 85 Am. St.


5 The Habeas Corpus Act, 31 Ch. II. c. 2, § 1, required a prisoner charged with crime to be released on bail, if not indicted the first term after the commitment, unless the king's witnesses could not be obtained; and that he should be brought to trial as early as the second term after the commitment. The principles of this statute are considered as having been adopted into the American common law. Post, p. 490. See In re Garvey, 7 Cal. 502, 4 Pac. 758; In re Edwards, 35 Kan. 99, 10 Pac. 539.
application, and that the prisoner might, if he saw fit to take that course, secure an immediate trial by admitting that the witnesses, if present, would testify to the facts which the prosecution have claimed could be proved by them. 1

It is also requisite that the trial be public. By this is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials; because there are many cases where, from the character of the charge and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of portions of the community would be of the worst character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity which the trial must necessarily bring to light. The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether. 2

1 Such an admission, if made by the prisoner, is binding upon him, and dispenses with the necessity of producing the witnesses. United States v. Sacramento, 2 Mont. 230, 25 Am. Rep. 742; Hancock v. State, 14 Tex. App. 392; State v. Fooks, 65 Iowa, 452, 21 N. W. 773. But in general the right of the prisoner to be confronted with the witnesses against him cannot be waived in advance. Bell v. State, 2 Tex. App. 216, 28 Am. Rep. 429. Nor can he be forced to admit what an absent witness would testify to. Wills v. State, 75 Ala. 362. A statute forbidding a continuance if the prosecutor admits that defendant's absent witness would testify as stated in the affidavit for continuance, is void. State v. Berkley, 92 Mo. 41, 4 S. W. 24.

2 See People v. Kerrigan, 73 Cal. 222, 14 Pac. 849; People v. Swafford, 65 Cal. 223, 3 Pac. 809; Grimmert v. State, 22 Tex. App. 36, 2 S. W. 631; State v. Brooks, 92 Mo. 642, 5 S. W. 257, 330. [Right to a public trial is violated where citizens and taxpayers are excluded from court room to such an extent that only a very few are admitted, while there is ample room for them in the court room, and many apply for admission and are refused. People v. Murray, 89 Mich. 276, 60 N. W. 905, 14 L. R. A. 506, and note, 28 Am. St. 294. Not only is the accused entitled to a public trial, but also, that such trial shall be in a court in which each step shall be in the presence of the presiding judge of the court who has full authority to protect his every legal right. Where the judge calls an attorney to the bench and leaves him in charge while the judge absent himself from the court room for a quarter of an hour, the trial going on in the meantime, there is a dissolution of the court, and the trial is void, and a new trial will be ordered. Ellerbee v. State, 75 Miss. 622, 22 So. 906, 41 L. R. A. 609, and see note to this case in L. R. A. upon when temporary absence of judge is fatal to the trial.]

But a far more important requirement is that the proceeding to establish guilt shall not be inquisitorial. A peculiar excellence of the common-law system of trial over that which has prevailed in other civilized countries, consists in the fact that the accused is never compelled to give evidence against himself. Much as there was in that system that was heartless and cruel, it recognized fully the dangerous and utterly untrustworthy character of extorted confessions, and was never subject to the reproach that it gave judgment upon them.\(^1\)

\(^1\) See Licher's paper on Inquisitorial Trials, Appendix to Civil Liberty and Self-Government. Also the article on Criminal Procedure in Scotland and England, Edinb. Review, Oct., 1858 [and one in 13 Harv. L. Rev. 610, on the History of the Privilege against Self-Crimination. See also an article on "Physical Examinations in Divorce Cases" in 35 Am. L. Rev. 608, and one on "Physical Examinations in Personal Injury Cases" in 1 Mich. L. Rev. 193, 277.\(^3\)] And for an illustration of inquisitorial trials in our own day, see Trials of Truppman and Prince Pierre Bonaparte, Am. Law Rev., Vol. V. p. 14. Judge Foster relates from Whiteocke, that the Bishop of London having said to Felton, who had assassinated the Duke of Buckingham, "If you will not confess you must go to the rack," the man replied, "If it must be so, I know not whom I may accuse in the extremity of my torture,—Bishop Laud, perhaps, or any lord of this board." "Sound sense," adds Foster, "in the mouth of a enthusiast and ruffian." Laud having proposed the rack, the matter was shortly debated at the board, and it ended in a reference to the judges, who unanimously resolved that the rack could not be legally used. De Lomme on Constitution of England (ed. of 1897), p. 181, note; 4 Bl Com. 225; Broom, Const. Law, 118; Trial of Felton, 3 State Trials, 308, 371; Fortescue De Laud, c. 22, and note by Amos; Brodie, Const. Hist. e. 8. A legislative body has no more right than a court to make its examination of parties or witnesses inquisitorially. Emery's Case, 107 Mass. 172. See further, Horatman v. Kaufman, 97 Pa. St. 147; Blackwell v. State, 67 Ga. 76; State v. Lurch, 12 Oreg. 95, 6 Pac. 405. [The right to refuse to answer any question, the answer to which might incriminate the witness, is not sufficiently preserved by a statute which provides merely that such answer shall never be given against the witness in any trial to which he may be subjected. If it is desired to compel him to answer such question, he must be made absolutely exempt from trial and punishment for any offence thus disclosed in pertinent response to the question which he is compelled to answer. This applies to proceedings before grand juries and legislative committees as well as trial juries. See Counselman v. Hitchcock, 142 U. S. 517, 12 Sup. Ct. Rep. 185, where the subject is fully discussed by Mr. Justice Blatchford. See review of Counselman v. Hitchcock, 6 Harv. L. Rev. 24; In re Walsh, 104 Fed. Rep. 518; In re Scott, 95 Fed. Rep. 816, and In re Rossier, 96 Fed. Rep. 305, are decided on authority of Counselman v. Hitchcock, supra; Mackel v. Rochester, 102 Fed. Rep. 314, seems opposed to the doctrine of that case. And where he is made absolutely exempt from trial and punishment for any offence thus disclosed, he is compellable to answer. Brown v. Walker, 161 U. S. 601, 16 Sup. Ct. Rep. 644, 5 Inter. Com. Rep. 369; Ex parte Cohen, 101 Cal. 624, 38 Pac. 304, 20 L. R. A. 423, 43 Am. St. 127; Re Buskett, 106 Mo. 502, 17 S. W. 753, 14 L. R. A. 407, and note, 27 Am. St. 378; Bradley v. Clarke, 123 Cal. 106, 55 Pac. 395. For a case where the court was extremely tender of the recalcitrant witness, see Ex parte Miskimine, 8 Wyo. 392, 58 Pac. 411, 40 L. R. A. 501, and see also the dissenting opinion of Knight, J. Property of the accused, other than his papers, even though seized upon his own premises without authority and by a trespass, may be introduced in evidence against him. State v. Griswold, 67 Conn. 290, 31 Atl. 1010, 33 L. R. A. 227. Witness is privileged not to be com-
It is the law in some of the States, when a person is charged with crime, and is brought before an examining magistrate, and the witnesses in support of the charge have been heard, that the prisoner may also make a statement concerning the transaction charged against him, and that this may be used against him on the trial if supposed to have a tendency to establish guilt. But the prisoner is to be first cautioned that he is under no obligation to answer any question put to him unless he chooses, and that whatever he says and does must be entirely voluntary.\(^1\) He is also to be allowed the presence and advice of counsel; and if that privilege is denied him it may be sufficient reason for discrediting any damaging statements he may have made.\(^2\) When, however, the statute has been complied with, and no species of coercion appears to have been employed, the statement the prisoner may have made is evidence which can be used against him on his trial, and is generally entitled to great weight.\(^3\) And in any other case except treason\(^4\) the confession of the accused may be received in evidence to establish his guilt, provided no circumstance accompanies the making of it which should detract from its weight in producing conviction.


\(^2\) It should not, however, be taken on oath, and if it is, that will be sufficient reason for rejecting it. Rex v. Smith, 1 Stark. 242; Rex v. Webb, 4 C. & P. 564; Rex v. Lewis, 6 C. & P. 161; Rex v. Rizer, 7 C. & P. 177; Regina v. Pikesley, 9 C. & P. 124; People v. McMahon, 16 N. Y. 384.

\(^3\) "The view of the English judges, that an oath, even where a party is informed he need answer no questions unless he pleases, would, with most persons, overcome that caution, is, I think, founded on good reason and experience. I think there is no country — certainly there is none from which any of our legal notions are borrowed — where a prisoner is ever examined on oath." People v. Thomas, 9 Mich. 314, 318, per Campbell, J. A person compelled to testify before the grand jury cannot be indicted upon evidence so secured. State v. Gardiner, — Minn., —, 92 N. W. 529 (Dec. 19, 1902). See upon the general subject, Greenleaf on Evidence, ed. 16, § 333 s., and notes.

\(^4\) In treason there can be no conviction unless on the testimony of two witnesses to the same overt act, or on confession in open court. Const. of United States, art. 3, § 3.
But to make it admissible in any case it ought to appear that it was made voluntarily, and that no motives of hope or fear were employed to induce the accused to confess. The evidence ought to be clear and satisfactory that the prisoner was neither threatened nor cajoled into admitting what very possibly was untrue. Under the excitement of a charge of crime, coolness and self-possession are to be looked for in very few persons; and however strongly we may reason with ourselves that no one will confess a heinous offence of which he is not guilty, the records of criminal courts bear abundant testimony to the contrary. If confessions could prove a crime beyond doubt, no act which was ever punished criminally would be better established than witchcraft; and the judicial executions which have been justified by such confessions ought to constitute a solemn warning against the too ready reliance upon confessions as proof of guilt in any case. As "Mr. Justice Parke several times observed," while holding one of his circuits, "too great weight ought not to be attached to evidence of what a party has been supposed to have said, as it very frequently happens, not only that the witness has misunderstood what the party has said, but that by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party really did say." And when the admission is full and positive, it perhaps quite as often happens that it has been made under the influence of the terrible fear excited by the charge, and in the hope that confession may ward off some of the consequences likely to follow if guilt were persistently denied.

A confession alone ought not to be sufficient evidence of the corpus delicti. There should be other proof that a crime has actually been committed; and the confession should only be allowed for the purpose of connecting the defendant with the


2 See Mary Smith's Case, 2 Howell's State Trials, 1042; Case of Essex Witches, 4 Howell's State Trials, 817; Case of Suffolk Witches, 6 Howell's State Trials, 647; Case of Devon Witches, 8 Howell's State Trials, 1017. It is true that torture was employed freely in cases of alleged witchcraft, but the delusion was one which often seized upon the victims as well as their accusers, and led the former to freely confess the most monstrous and impossible actions. Much curious and valuable information on this subject may be found in "Superstition and Force," by Lea; "A Physician's Problems," by Elam; and Lecky, History of Rationalism.

3 Note to Earle v. Picken, 5 C. & P. 542. See also 1 Greenl. Ev. § 214, and note; Commonwealth v. Curtis, 97 Mass. 574; Derby v. Derby, 21 N. J. Eq. 36; State v. Chambers, 39 Iowa, 179.
offence. And if the party's hopes or fears are operated upon to induce him to make it, this fact will be sufficient to preclude the confession being received; the rule upon this subject being so strict that even saying to the prisoner it will be better for him to confess, has been decided to be a holding out of such inducements to confession, especially when said by a person having a prisoner in custody, as should render the statement obtained by means of it inadmissible. If, however, statements have been made before

1 In Stringfellow v. State, 20 Miss. 157, a confession of murder was held not sufficient to warrant conviction, unless the death of the person alleged to have been murdered was shown by other evidence. In People v. Hennessy, 15 Wend. 147, it was decided that a confession of embezzlement by a clerk would not warrant a conviction where that constituted the sole evidence that an embezzlement had been committed. So on an indictment for blasphemy, the admission by the defendant that he spoke the blasphemous charge, is not sufficient evidence of the uttering. People v. Porter, 2 Park. Cr. R. 14. And see State v. Guild, 10 N. J. 103, 18 Am. Dec. 404; Long's Case, 1 Hayw. 521; People v. Lambert, 5 Mich. 349; Ruloff v. State, 18 N. Y. 179; Hector v. State, 2 Mo. 166, 22 Am. Dec. 454; Roberts v. People, 11 Col. 213, 17 Pac. 637; Winslow v. State, 70 Ala. 42.

2 Rex v. Enoch, 5 C. & P. 530; State v. Bostick, 4 Harr. 663; Boyd v. State, 2 Humph. 300; Morehead v. State, 9 Humph. 655; Commonwealth v. Taylor, 5 Cush. 606; Rex v. Partridge, 7 C. & P. 561; Commonwealth v. Curtis, 97 Mass. 574; State v. Staley, 14 Minn. 150; Frain v. State, 40 Ga. 629; Austine v. State, 51 Ill. 236; People v. Phillips, 42 N. Y. 200; State v. Brokman, 40 Mo. 586; Commonwealth v. Mitchell, 117 Mass. 431; Commonwealth v. Sturivant, 117 Mass. 122; Corley v. State, 50 Ark. 305, 7 S. W. 255. Mr. Phillips states the rule thus: "A promise of benefit or favor, or threat or intimidation of disfavor, connected with the subject of the charge, held out by a person having authority in the matter, will be sufficient to exclude a confession made in consequence of such inducements, either of hope or fear. The prosecutor, or the prosecutor's wife or attorney, or the prisoner's master or mistress, or a constable, or a person assisting him in the apprehension or custody, or a magistrate acting in the business, or other magistrate, has been respectively looked upon as having authority in the matter; and the same principle applies if the inducement has been held out by a person without authority, but in the presence of a person who has such authority, and with his sanction, either express or implied." 1 Phil. Ev. by Cowen, Hill, and Edwards, 544, and cases cited. But we think the better reason is in favor of excluding confessions where inducements have been held out by any person, whether acting by authority or not. Rex v. Simpson, 1 Mood. C. C. 410; State v. Guild, 10 N. J. 103, 18 Am. Dec. 404; Spears v. State, 2 Ohio St. 588; Commonwealth v. Knapp, 9 Pick. 496; Rex v. Clewes, 4 C. & P. 221; Rex v. Kingston, 4 C. & P. 387; Rex v. Dunn, 4 C. & P. 643; Rex v. Walkley, 6 C. & P. 175; Rex v. Thomas, 6 C. & P. 353. "The reason is, that in the agitation of mind in which the party charged is supposed to be, he is liable to be influenced by the hope of advantage or fear of injury to state things which are not true." Per Morton, J. in Commonwealth v. Knapp, 9 Pick. 496, 502; People v. McMahon, 15 N. Y. 387. There are not wanting many opposing authorities, which proceed upon the idea, that "a promise made by an indifferent person, who interfered officiously without any kind of authority, and promised without the means of performance, can scarcely be deemed sufficient to produce any effect, even on the weakest mind, as an inducement to confess." 1 Greenl. Ev. § 223.

No supposition could be more fallacious; and, in point of fact, a case can scarcely occur in which some one, from age, superior wisdom, or experience, or from his relations to the accused or to the prosecutor, would not be likely to exercise more influence upon his mind than some
the confession which were likely to do away with the effect of the inducements, so that the accused cannot be supposed to have

of the persons who are regarded as "in authority" under the rule as stated by Mr. Phillips. Mr. Greenleaf thinks that, while as a rule of law all confessions made to persons in authority should be rejected, "promises and threats by private persons, however, not being found so uniform in their operation, perhaps may, with more propriety, be treated as mixed questions of law and fact; the principle of law, that a confession must be voluntary, being strictly adhered to, and the question, whether the promises or threats of the private individuals who employed them were sufficient to overcome the mind of the prisoner, being left to the discretion of the judge under all the circumstances of the case." 1 Graeln. Ev. § 223. This is a more reasonable rule than that which admits such confessions under all circumstances; but it is impossible for a judge to say whether inducements, in a particular case, have influenced the mind or not; if their nature were such that they were calculated to have that effect, it is safer, and more in accordance with the humane principles of our criminal law, to presume, in favor of life and liberty, that the confessions were "forced from the mind by the flattery of hope, or by the torture of fear" (per Eyre, C. B., Warickshull's Case, 1 Leach, C. C. 299), and exclude them altogether. In case of doubt as to the fact that the confession was voluntary, the judge should be left to exclude it, if they think it involuntary. Com. v. Precce, 140 Mass. 276, 5 N. E. 494; People v. Barker, 60 Mich. 277, 27 N. W. 650. In Ellis v. State, 55 Miss. 44, 5 So. 188, it is held the duty of the court to decide whether it was voluntary, and that the judge may or may not believe it true, if admitted. This whole subject is very fully considered in note to 2 Leading Criminal Cases, 182. And see Whart. Cr. Law, § 690 et seq. The cases of People v. McMahon, 15 N. Y. 383, and Commonwealth v. Curtis, 97 Mass. 574, have carefully considered the general subject. In the second of these, the prisoner had asked the officer who made the arrest, whether he had better plead guilty, and the officer had replied that "as a general thing it was better for a man who was guilty to plead guilty, for he got a lighter sentence." After this he made statements which were relied upon to prove guilt. These statements were not allowed to be given in evidence. Per Foster, J.: "There is no doubt: that any inducement of temporal fear or favor coming from one in authority, which preceded and may have influenced a confession, will cause it to be rejected, unless the confession is made under such circumstances as show that the influence of the inducement has passed away. No cases require more careful scrutiny than those of disclosures made by a party under arrest to the officer who has him in custody, and in none will sligheter threats or promises of favor exclude the subsequent confessions. Commonwealth v. Taylor, 5 Cal. 610; Commonwealth v. Tuckerman, 10 Gray, 193; Commonwealth v. Morey, 1 Gray, 401. 'Saying to the prisoner that it will be the worse for him if he does not confess, or that it will be the better for him if he does, is sufficient to exclude the confession, according to constant experience.' 2 Hale, P. C. 659; 1 Greenl. Ev. § 219; 2 Bennett and Heard's Lead. Cr. Cas. 164; Ward v. State, 50 Ala. 120. Each case depends largely on its own special circumstances. But we have before us an instance in which the officer actually held out to the defendant the hope and inducement of a lighter sentence if he pleaded guilty. And a determination to plead guilty at the trial, thus induced, would naturally lead to an immediate disclosure of guilt." And the court held it an unimportant circumstance that the advice of the officer was given at the request of the prisoner, instead of being volunteered. A voluntary confession obtained by artifice is admissible. State v. Brooks, 92 Mo. 542, 5 S. W. 287, 390; Heldt v. State, 20 Neb. 492, 30 N. W. 626. So, if made in response to a simple request by the officer in charge of the person. Ross v. State, 67 Md. 286, 10 Atl. 218. Statements made to the grand jury as individuals in the jury room are admissible. State v. Coffin, 56 Conn. 399, 16 Atl. 151. But not those made to a coroner by an ignorant foreigner, without counsel, or knowledge of his rights. People v.
acted under their influence, the confession may be received in evidence; but the showing ought to be very satisfactory on this point before the court should presume that the prisoner’s hopes did not still cling to, or his fears dwell upon, the first inducements.

Before prisoners were allowed the benefit of assistance from counsel on trials for high crimes, it was customary for them to make such statements as they saw fit concerning the charge against them, during the progress of the trial, or after the evidence for the prosecution was put in; and upon these statements the prosecuting officer or the court would sometimes ask questions, which the accused might answer or not at his option. And although this practice has now become obsolete, yet if the accused in any case should manage or assist in his own defence, and should claim the right of addressing the jury, it would be difficult to confine him to “the record” as the counsel may be confined in his argument. A disposition has been manifested of late to allow the accused to give evidence in his own behalf; and statutes to that effect are in existence in some of the States, the operation of which is believed to have been generally satisfactory. These statutes, however, cannot be so construed as to authorize compulsory process against an accused to compel him to disclose more than he chooses; they do not so far change the old system as to establish an inquisitorial process for obtaining evidence; they confer a privilege, which the defendant may use at his option. If he does not choose to avail himself of it, unfavorable inferences are not to be drawn to his prejudice from that circumstance; and if he does testify, he is at liberty to stop at any

Mondon, 103 N. Y. 211, 8 N. E. 496. The rule does not cover statements of facts not involving guilt, but which in connection with other facts may tend to show it. People v. Le Ray, 55 Cal. 613, 4 Pac. 640. See, upon the general subject of admissibility of confessions with reference to their voluntary character, Greenleaf on Evidence, ed. 16, §§ 219-230.


3 See American Law Register, Vol. V. n. s. pp. 129, 705; Ruloff v. People, 46 N. Y. 218. As such statutes do not compel, even morally, a defendant to testify, they are valid. People v. Courtney. 54 N. Y. 490. In Tennessee, the prisoner’s statement is not, in a legal sense, testimony, but the jury may nevertheless believe and act upon it. Wilson v. State, 3 Heisk. 312.

4 People v. Tyler, 36 Cal. 522; State v. Cameron, 40 Vt. 555. For a case rest-
point he chooses, and it must be left to the jury to give a statement, which he declines to make a full one, such weight as, under
the circumstances, they think it entitled to; otherwise the statute must have set aside and overruled the constitutional maxim which protects an accused party against being compelled to testify against himself, and the statutory privilege becomes a snare and a danger.

Brandon v. People, 42 N. Y. 265; Connors v. People, 50 N. Y. 240; Stover v. People, 50 N. Y. 315; Calkins v. State, 18 Ohio St. 306.

In Devries v. Phillips, 63 N. C. 63, the Supreme Court of North Carolina held it not admissible for counsel to comment to the jury on the fact that the opposite party did not come forward to be sworn as a witness as the statute permitted. In Michigan the wife of an accused party may be sworn as a witness with his consent; but it has been held that his failure to call her was not to subject him to inferences of guilt, even though the case was such that, if his defence was true, his wife must have been cognizant of the facts. Knowles v. People, 15 Mich. 408.

When a defendant in a criminal case takes the stand in his own behalf, he is subject to impeachment like other witnesses. Fletcher v. State, 49 Ind. 124; 10 Am. Rep. 673; Mershon v. State, 51 Ind. 14; State v. Beal, 68 Ind. 346; Morrison v. State, 76 Ind. 335; Commonwealth v. Bonner, 97 Mass. 587; Commonwealth v. Gallagher, 128 Mass. 54; State v. Hardin, 46 Iowa, 623, 26 Am. Rep. 174; Gifford v. People, 87 Ill. 211. As to the extent to which a prisoner may be cross-examined, see Hanoff v. State, 87 Ohio St. 178; People v. Noeke, 94 N. Y. 137; State v. Clinton, 67 Mo. 380; State v. Saunders, 14 Oreg. 300, 12 Pac. 411; People v. O'Brien, 66 Cal. 602, 6 Pac. 635. [That cross-examination may be full and searching, see Fitzpatrick v. United States, 178 U. S. 304, 20 Sup. Ct. Rep. 944.]

On the whole subject of the accused as witness, see 4 Crim. Law Mag. 923.

1 In State v. Ober, 52 N. II. 450, 13 Am. Rep. 88, the defendant was put on trial for an illegal sale of liquors; and having offered himself as a witness, was asked on cross-examination a question directly relating to the sale. He declined to answer, on the ground that it might tend to criminate him. Being convicted, it was alleged for error that the court suffered the prosecuting officer to comment on this refusal to the jury. The Supreme Court held this no error. This ruling is in entire accord with the practice which has prevailed without question in Michigan, and which has always assumed that the right of comment, where the party makes himself his own witness, and then refuses to answer proper questions, was as clear as the right to exemption from unfavorable comment when he abstains from asserting his statutory privilege.

The case of Conners v. People, 50 N. Y. 240, is different. There the defendant, having taken the stand as a witness, objected to answer a question; but was directed by the court to do so, and obeyed the direction. This was held no error because he had waived his privilege. If the defendant had persisted in refusing we are not advised what action the court would have deemed it proper to take, and it is easy to conceive of serious embarrassments in such a case. Under the Michigan practice, when the court had decided the question to be a proper one it would have been left to the defendant to answer or not at his option, but if he failed to answer what seemed to the jury a proper inquiry, it would be thought surprising if they gave his imperfect statement much credence. On this point see further State v. Wentworth, 65 Me. 294, 29 Am. Rep. 688; State v. Witham, 72 Me. 591.

As to extent to which comment may be made upon the defendant's testimony or his failure to make it full, see Heldt v. State, 20 Neb. 452, 90 N. W. 220; Watt v. People, 120 Ill. 9, 18 N. E. 310; State v. Graves, 55 Mo. 510, 8 S. W. 739; State v. Ward, 61 Vt. 153, 17 Atl. Rep. 483.

2 The statute of Michigan of 1861, p. 169, removed the common-law disabilities of parties to testify and added, "Nothing in this act shall be construed as giving the right to compel a defendant in criminal cases to testify; but any such
The testimony for the people in criminal cases can only, as a general rule, be given by witnesses who are present in court. 1

defendant shall be at liberty to make a statement to the court or jury, and may be cross-examined on any such statement." It has been held that this statement should not be under oath. People v. Thomas, 9 Mich. 314. That its purpose was to give every person on trial for crime an opportunity to make full explanation to the jury, in respect to the circumstances given in evidence which are supposed to have a bearing against him. Annis v. People, 13 Mich. 511. That the statement is evidence in the case, to which the jury can attach such weight as they think it is entitled to. Mahler v. People, 10 Mich. 212. That the court has no right to instruct the jury that, when it conflicts with the testimony of an unimpeached witness, they must believe the latter in preference. Durant v. People, 13 Mich. 351. And that the prisoner while on the stand, is entitled to the assistance of counsel in directing his attention to any branch of the charge, that he may make explanations concerning it if he desires. Annis v. People, 13 Mich. 511. The prisoner does not cease to be a defendant by becoming a witness, nor forfeit rights by accepting a privilege. In People v. Thomas, 9 Mich. 321, Campbell, J., in speaking of the right which the statute gives to cross-examine a defendant who has made his statement, says: "And while his constitutional right of declining to answer questions cannot be removed, yet a refusal by a party to answer any fair question, not going outside of what he has offered to explain, would have its proper weight with the jury." See Commonwealth v. Mullen, 97 Mass. 547; Commonwealth v. Curtis, 97 Mass. 574; Commonwealth v. Morgan, 107 Mass. 199. In Florida under a similar statute the prisoner may make his statement even after the evidence is closed. Higginbotham v. State, 19 Fla. 557. 1Defendant may be compelled to testify against his interest in civil cases. Levy v. Superior Court of San Francisco, 105 Cal. 600, 38 Pac. 965, 29 L. R. A. 811, and note in L. R. A. And in criminal cases the accused may be compelled to stand up before the jury for identification. People v. Gardner, 144 N. Y. 113, 38 N. E. 1003, 28 L. R. A. 690, 43 Am. St. 741, and note in L. R. A. Where accused offers himself as witness he may be cross-examined. People v. Tice, 131 N. Y. 651, 30 N. E. 494, 16 L. R. A. 939, and note. The constitutional maxim which protects one from testifying against himself is available to one though he is not on trial. Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. Rep. 196.] 1 State v. Thomas, 64 N. C. 74; Goodman v. State, Meigs, 197; Jackson v. Commonwealth, 19 Grat. 655. See Skaggs v. State, 108 Ind. 56, 8 N. E. 935. By the old common law, a party accused of felony was not allowed to call witnesses to contradict the evidence for the Crown; and this seems to have been on some idea that it would be derogatory to the royal dignity to permit it. Afterwards, when they were permitted to be called, they made their statements without oath; and it was not uncommon for both the prosecution and the court to comment upon their testimony as of little weight because unsworn. It was not until Queen Anne's time that they were put under oath.

The rule that the prisoner shall be confronted with the witnesses against him does not preclude such documentary evidence to establish collateral facts as would be admissible under the rules of the common law in other cases. United States v. Benner, Baldwin, 234; United States v. Little, 2 Wash. C. C. 169; United States v. Ortega, 4 Wash. C. C. 631; People v. Jones, 24 Mich. 215. But the corpus delicti — e. g. the fact of marriage in an indictment for bigamy — cannot be proved by certificates. People v. Lamberti, 5 Mich. 319. Compare Patterson v. State, 17 Tex. App. 102. [On right to be confronted with witnesses, see Motes v. United States, 178 U. S. 455, 20 Sup. Ct. Rep. 993; also Gore v. State, 52 Ark. 285, 12 S. W. 561, 5 L. R. A. 832, and note. Jury may view the premises where the crime was committed, and the prisoner has no right to be present. People v. Thorn, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368; upon view by jury, see note to this case in L. R. A.]
The defendant is entitled to be confronted with the witnesses against him;¹ and if any of them be absent from the Commonwealth, so that their attendance cannot be compelled, or if they be dead, or have become incapacitated to give evidence, there is no mode by which their statements against the prisoner can be used for his conviction.² The exceptions to this rule are of cases which are excluded from its reasons by their peculiar circumstances; but they are far from numerous. If the witness was sworn before the examining magistrate, or before a coroner, and the accused had an opportunity then to cross-examine him, or if there were a former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or is insane, or sick and unable to testify, or has been summoned but appears to have been kept away by the opposite party.³ So, also, if a person is prisoner the right to take depositions out of the State upon condition that the State shall have the like right. ⁴ Butler v. State, 97 Ind. 378.

¹ Bell v. State, 2 Tex. App. 216, 23 Am. Rep. 429. It has been held competent, even in a criminal case, to make the certificate of the proper official accountant prima facie evidence of an official delinquency in the tax collector. Johns v. State, 55 Md. 350. [So a statute making evidence that a bank failed and that deposits were received by an officer of the bank shortly before the failure, prima facie evidence of a taxing with knowledge of insolvently is valid. State v. Buck, 120 Mo. 473, 25 S. W. 673. See also, People v. Cannon, 139 N. Y. 32, 34 N. E. 769, 36 Am. St. 609.]

² It is not competent for the legislature to make reputation evidence against an accused of a public offence,—e. g. of keeping a place for the sale of liquors,—which the jury are bound to follow. State v. Beswick, 13 R. I. 211; contra, State v. Thomas, 47 Conn. 516, 36 Am. Rep. 98. It may be made sufficient evidence, provided the jury, while free to convict upon it, are not bound to do so. State v. Wilson, 15 R. I. 180, 1 Atl. 415.

³ The prisoner must be allowed to see witness's face and to be near enough to hear what witness says and to watch its effect upon jury. State v. Mannion, 19 Utah, 505, 57 Pac. 642, 45 L. R. A. 658. Record which does not show the prisoner present during the entire trial is fatally defective. French v. State, 85 Wis. 400, 55 N. W. 656, 21 L. R. A. 402, 30 Am. St. 855.]

⁴ People v. Howard, 50 Mich. 239, 15 N. W. 101. But a statute may give the
on trial for homicide, the declarations of the party whom he is charged with having killed, if made under the solemnity of a conviction that he was at the point of death, and relating to matters of fact concerning the homicide, which passed under his own observation, may be given in evidence against the accused; the condition of the party who made them being such that every motive to falsehood must be supposed to have been silenced, and the mind to be impelled by the most powerful considerations to tell the truth. Not that such evidence is of very conclusive character; it is not always easy for the hearer to determine how much of the declaration related to what was seen and positively known, and how much was surmise and suspicion only; but it is admissible from the necessity of the case, and the jury must judge of the weight to be attached to it.

In cases of felony, where the prisoner’s life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial, and until the final judgment. If he be absent, either in prison or by escape, there is a want of jurisdiction over the person, and the court cannot proceed with the trial, or receive the verdict, or pronounce the final judgment. But misdemeanors may be tried in the absence of the accused.

3 Am. Cr. R. 78. See People v. Sligh, 48 Mich. 54, 11 N. W. 782. Whether evidence that the witness cannot be found after diligent inquiry, or is out of the jurisdiction, would be sufficient to let in proof of his former testimony, see Bul. N. P. 239, 242; Rex v. Hagan, 8 C. & P. 167; Sills v. Brown, 9 C. & P. 601; People v. Chung Ah Chue, 57 Cal. 507. Evidence of a witness at a former trial, alive but out of the State, is inadmissible. Owens v. State, 63 Miss. 450.


2 See Andrews v. State, 2 Sneed. 660; Jacobs v. Cone, 5 S. & R. 335; Witt v. State, 5 Cold. 11; State v. Alman, 64 N. C. 364; Gladden v. State, 12 Fla. 577; Maurer v. People, 43 N. Y. 1; note to Winchell v. State, 7 Cow. 525; Hoep v. Utah, 110 U. S. 574, 4 Sup. Ct. Rep. 202; Smith v. People, 8 Cal. 457, 8 Pac. 929; State v. Kelly, 97 N. C. 401, 2 S. E. 185. In capital cases the accused stands upon all his rights, and waives nothing. Nomaque v. People, Breese, 142; Dempsey v. People, 47 Ill. 225; People v. McKay, 18 Johns. 217; Burley v. State, 1 Neb. 385. The court cannot make an order changing the venue in a criminal case in the absence of and without notice to the defendant. Ex parte Bryan, 41 Ala. 401. Nor in the course of the trial allow evidence to be given to the jury in his absence, even though it be that of a witness which had been previously reduced to writing. Jackson v. Commonwealth, 19 Gratt. 650; Wade v. State, 12 Ga. 25. See People v. Bragle, 88 N. Y. 585. And in a capital case the record
The Traverse Jury.

Assumptions of criminal conduct are tried at the common law by jury; and wherever the right to this trial is guaranteed by the constitution without qualification or restriction, it must be understood as retained in all those cases which were triable by jury at the common law, and with all the common-law inci-

must affirmatively show the presence of the accused at the trial, and when the verdict is received and sentence pronounced. Dougherty v. Commonwealth, 69 Pa. St. 286. As to right to be present, at a view of the locus in quo, see People v. Lowery, 70 Cal. 193, 11 Pac. 605; State v. Congdon, 14 R. I. 458; Schular v. State, 105 Ind. 289, 4 N. E. 870; People v. Thorn, 156 N. Y. 286, 50 N. E. 947, 4 L. R. A. 308, and note in L. R. A., at argument of motion for a new trial: People v. Orrmby, 48 Mich. 494, 12 N. W. 671; State v. Jeconia, 20 S. C. 383; Bond v. Conn., 83 Va. 581, 3 S. E. 140; when jury view is held for further instructions: Shipp v. State, 11 Tex. App. 46; Roberts v. State, 111 Ind. 340, 12 N. E. 500; State v. Myrick, 38 Kan. 238, 10 Pac. 330; State v. Jones, 29 S. C. 201, 7 S. E. Rep. 206. Whether any of the steps in the trial can be taken in the defendant's absence if he is under bail, see Barton v. State, 67 Ga. 663; Saliinger v. People, 102 Ill. 241; State v. Smith, 30 Mo. 37, 1 S. W. 763; Gore v. State, 52 Ark. 296, 12 S. W. 504, 5 L. R. A. 832. [If the accused willfully absents himself pending the trial, it may proceed in his absence.] Gore v. State, 52 Ark. 296, 12 S. W. 504, 5 L. R. A. 832, and note.

1 See in general Thompson and Merritt on Juries. It is worthy of note that all that is extant of the legislation of the Plymouth Colony for the first five years, consists of the single regulation, "that all criminal facts, and also all manner of trespasses and debts between man and man, shall be tried by the verdict of twelve honest men, to be impaneled by authority, in form of a jury, upon their oath." 1 Palfrey's New England, 340. 


2 Cases of contempt of court were never triable by jury; and the object of the power would be defeated in many cases if they were. The power to punish contempt summarily is incident to courts of record. King v. Almon, 8 St. Trials, 63; Respublica v. Osvald, 1 Dall. 310, 1 Am. Dec. 246; Mariner v. Dyer, 2 Mo. 165; Morrison v. McDonald, 21 Mo. 550; State v. White, T. U. P. Charl. 130; Yates v. Lansing, 9 Johns. 305, 6 Am. Dec. 200; Sanders v. Metcalf, 1 Tenn. Ch. 419; Clark v. People, 1 Ill. 240, 12 Am. Dec. 177; People v. Wilson, 64 Ill. 125, 16 Am. Rep. 628; State v. Morris, 10 Ark. 384; Gorham v. Luckett, 6 B. Monr. 688; State v. Woodfin, 5 Ind. 109; Ex parte Adams, 37 Miss. 863; State v. Cogh, 15 N. H. 212; State v. Mathews, 37 N. H. 450; Neal v. State, 9 Ark. 259; State v. Tipton, 1 Blackf. 106; Middlebrook v. State, 48 Conn. 259; Garrigus v. State, 93 Ind. 239; Chace v. Quinlinc Co., 13 R. I. 442. [Tinsley v. Anderson, 171 U. S. 101, 18 Sup. Ct. Rep. 805. Upon powers of court to punish for contempt, see note to 22 L. ed. U. S. 205; limits to rule of no review of contempt proceedings, note to 22 L. ed. U. S. 354. Also, Smith v. Speed, — Okla. —, 55 L. R. A. 402. A court of review may cut down an excessive verdict and give judgment for the modified amount without violating the right to a jury trial. Burdick v. Missouri Pacific Ry. Co. 123 Mo. 221, 27 S. W. 459.] This is true of the federal courts. United States v. Hudson, 7 Cranch, 32; United States v. New Bedford Bridge, 1 Wood. & M. 401. See Ex parte Robinson, 19 Wall. 505; Ex parte Terry, 129 U. S. 259, 9 Sup. Ct. Rep. 77. The legislature may designate the cases in which a court may punish summarily. In re Oldham, 89 N. C. 23; State v. McClaugherty, 33 W. Va. 250, 10 S. E. Rep. 407. Whether justices of
CONSTITUTIONAL LIMITATIONS.

the peace may punish contempt in the absence of any statute conferring the power, will perhaps depend on whether the justice's court is or is not deemed a court of record. See Lining v. Bentham, 2 Bay. 1; Re Cooper, 32 Vt. 253; Ex parte Kerrigan, 33 N. J. 345; Rhinehart v. Lance, 43 N. J. 311, 29 Am. Rep. 592. But court commissioners have no such power. In re Remington, 7 Wis. 645; Haight v. Luch, 39 Wis. 356; Ex parte Perkins, 29 Fed. Rep. 990: nor notaries; Burtt v. Pyle, 89 Ind. 393; but see Dogge v. State, 21 Neb. 272, 31 N. W. 929. Nor can the legislature confer it upon municipal councils. Whitcomb's Case, 20 Mass. 118. As the courts in punishing contempt are dealing with cases which concern their own authority and dignity, and which are likely to suggest, if not to excite, personal feelings and animosities, the case should be plain before they should assume the authority. Bacheelder v. Moore, 42 Cal. 415. See Storey v. People, 79 Ill. 45; Hollingsworth v. Dun-an, Wall. C. C. 77; Ex parte Bradley,

1 See note to p. 569, post. A citizen not in the land or naval service, or in the militia in actual service, cannot be tried by court-martial or military commission, on a charge of discouraging volunteer enlistments or resisting a military conscription. In re Kemp, 16 Wis. 359. See Ex parte Milligan, 4 Wall. 2. The constitutional right of trial by jury extends to newly created offences. Plipton v. Somerset, 33 Vt. 283; State v. Peterson, 41 Vt. 594. Contra, Timms v. State, 29 Ala. 165 [case of an inferior offence]. But not to offences against city by-laws. McGregor v. Woodruff, 33 N. J. 215. Ex parte Schmidt, 24 S. C. 303; Wong v. Astoria, 13 Oreg. 538, 11 Pac. 296; Lieberman v. State, 20 Neb. 461, 42 N. W. 419; Man-kato v. Arnold, 36 Minn. 62, 30 N. W. 305. [Ogdén v. City of Madison, 111 Wis. 413; 87 N. W. 598, 55 L. R. A. 600.] Otherwise if the offence is a crime. In re Rolfs, 30 Kan. 768, 1 Pac. 625; Creston v. Nye, 74 Iowa, 369, 37 N. W. 777. A provision in an excise law, authorizing the excise board to revoke licenses, is not void as violating the constitutional right of jury trial. People v. Board of Commissioners, 59 N. Y. 32. See LaCroix v. Co. Com'r's, 60 Conn. 321. [A jury may by statute be dispensed with where the defendant pleads guilty, and the court may be empowered to examine witnesses and determine from their testimony what is the degree of the offence. This is true even in capital cases. Hallinger v. Davis, 146 U. S. 314; 13 Sup. Ct. Rep. 105; and see note to 36 L. ed. U. S. 990; State v. Almy, 67 N. H. 274, 28 Atl. 372, 22 L. R. A. 744; Craig v. State, 49 Ohio St. 415, 30 N. E. 1159, 18 L. R. A. 328. The jury may by law be required to be drawn from a special list secured by a special commissioner by eliminating unfit persons from the general list. People v. Dunn, 157 N. Y. 528, 52 N. E. 572, 43 L. R. A. 247. Fixing of period of sentence is no part of constitutional function of jury of which it cannot be deprived. Miller v. State, 149 Ind. 607, 49 N. E. 894, 46 L. R. A. 109. Statute authorizing dismissal of part of jury and receipt of verdict from remainder is void. McRae v. Grand Rapids, L. & D. R. Co., 58 Mich. 399, 53 N. W. 591, 17 L. R. A. 759. Where the Constitution gives right to trial by jury in civil cases, it is a violation of that right for the court to take the question of negligence from the jury though the facts are undisputed if different inferences may be drawn from such facts. Shubert v. May, — Oreg. —, 69 Pac. 466, 55 L. R. A. 810. The power of a court to set aside the verdict of a jury as against the weight of evidence is not in conflict with the constitutional right to trial by jury. Hintz v. Mich. Cent. Ry. Co., — Mich. —, 53 N. W. 631.]

(a) [But any State is competent to establish through its constitution a jury of fewer than twelve persons for the trial of criminal charges, and it may probably provide that less than the whole number of jurors may render a verdict. Maxwell v. Dow, 170 U. S. 681, 20 Sup. Ct. Rep. 448, 494. M. was tried upon an information filed by the prosecuting attorney of a Utah county, charging him with robbery. He
A petit, petty, or traverse jury is a body of twelve men, who are sworn to try the facts of a case, as they are presented in

7 Wall. 364. If the contempt is in the presence of the court, it may be punished without notice or opportunity for defence. Ex parte Terry, 128 U. S. 280, 9 Sup. Ct. Rep. 77. See State v. Gibson, 38 W. Va. 97, 10 S. E. Rep. 68. A libellous publication as to a pending cause may be punished as a contempt. Cooper v. People, 13 Col. 373, 22 Pac. Rep. 700. [The power to punish a party for contempt of court cannot be so used as to deprive him of his right to a defense upon the merits in the principal case. A decree pro confesso entered after striking a party’s answer from the files as a punishment for his refusal to obey an order of the court is void for want of due process. Hovey v. Elliott, 167 U. S. 409, 17 Sup. Ct. Rep. 841, aff. 145 N. Y. 126, 39 N. E. 841. See the whole subject of contempt very fully discussed by Mr. Justice White in delivering the opinion of the court in this case. See, also, Carter v. Commonwealth, 30 Va. 701, 32 S. E. 780, 46 L. R. A. 310; Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294, 62 N. E. 446, 44 L. R. A. 159, 70 Am. St. 280; Dahnke v. People, 108 Ill. 102, 48 N. E. 137, 39 L. R. A. 197; Dixon v. People, 105 Ill. 179, 48 N. E. 108, 39 L. R. A. 116; State v. Circuit Court, 97 Wis. 1, 72 N. W. 103, 33 L. R. A. 554, 65 Am. St. 90; Re Huron, 58 Kan. 152, 48 Pac. 574, 36 L. R. A. 822, 62 Am. St. 614, and note in L. R. A.];

Coleman v. Roberts, 113 Ala. 323, 21 So. 440, 30 L. R. A. 84, 59 Am. St. 111; Ex parte Senior, 37 Fla. 1, 19 So. 652, 32 L. R. A. 138; Dailey v. Superior Court of San Francisco, 112 Cal. 94, 44 Pac. 488, 22 L. R. A. 273, 53 Am. St. 160; Clair v. State, 40 Neb. 534, 60 N. W. 118, 28 L. R. A. 307; Mullin v. People, 15 Col. 437, 24 Pac. 880, 9 L. R. A. 566, and note, 22 Am. St. 414; Thomas v. People, 14 Col. 254, 23 Pac. 826, 9 L. R. A. 569. Court has no inherent power to prohibit the publication of testimony given before it. Re Shortridge, 99 Cal. 526, 34 Pac. 227, 21 L. R. A. 755, 37 Am. St. 78.] Charges of vagrancy and disorderly conduct were never triable by jury. See full review by Hovey, J., in State v. Glenn, was tried before a jury composed of but eight jurors, was convicted, sentenced to imprisonment in the State prison, and duly committed.

Section 13, Article I, of the Constitution of Utah provides: "Offences heretofore required to be prosecuted by indictment shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The grand jury shall consist of seven persons, five of whom must concur to find an indictment; but no grand jury shall be drawn or summoned unless in the opinion of the judge of the district public interest demands it." Section 10, Article 1, of that Constitution is as follows: "In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction, a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded."

M. after incarceration "applied to the supreme court of the State for a writ of habeas corpus, and alleged in his sworn petition that he was a natural-born citizen of the United States, and that his imprisonment was unlawful because he was prosecuted under an information instead of by indictment by a grand jury, and was tried by a jury composed of eight instead of twelve jurors. He specially set up and claimed (1) that to prosecute him by information abridged his privileges and immunities as a citizen of the United States, under Article 5 of the Amendments to the Constitution of the United States, and also violated section 1 of Article 14 of those Amendments; (2) that a trial by jury of only eight persons abridged his privileges and immunities as a citizen of the United States, under Article 6, and also violated section 1 of Article 14 of such Amendments; (3) that a trial by such a jury, and his subsequent imprisonment by reason of the verdict of that jury, deprived him of his
the evidence placed before them. Any less than this number of
fifteen would not be a common-law jury, and not such a jury

54 Md. 572. Also State v. Anderson, 40 N. J. 224. Petty offences need not be so
tried. Ex parte Wooten, 62 Miss. 174; Inwood v. State, 42 Ohio St. 185; Ex
parte Marx, 85 Va. 40, 9 S. E. 617.

[Nor are breaches of the rules pre-
scribed for the discipline of the national
guard. State v. Wagener, 74 Minn. 618,
77 N. W. 424, 42 L. R. A. 749. Nor is
a summary proceeding for a restraining
order. Ex parte Keefer, 45 S. C. 537, 23
S. E. 865, 31 L. R. A. 675, 55 Am. St. 785.

But an offence triable by jury at time of
adoption of Constitution cannot subse-
quently be made triable without jury in
the first instance. Miller v. Conn., 88 Va.
618, 14 S. E. 101, 342, 670, 15 L. R. A. 441,
and note. The provision being consid-
ered does not require trial by jury of
offences before consuls under the au-
thority of treaty stipulations, though such
offence was committed on the deck of an
American vessel. Ross v. McIntyre, 140
U. S. 463, 11 Sup. Ct. Rep. 897. Nor can
one order issued to leave this country under
the Chinese exclusion act object that he
was not given a jury trial of his claimed
right to remain. Fong Yue Ting v.
United States, 149 U. S. 398, 15 Sup. Ct.
Rep. 1016. The procedure in equity to
enforce a mechanics' lien is not in con-
flict with the constitutional right to trial
by jury. Hathorne v. Panama Park Co.,
Fla. - 32 So. 812.] But one may
not be imprisoned for two years as an
habitual drunkard upon a chamber order.
State v. Ryan, 70 Wis. 676, 36 N. W. 823.

[And a commitment until further
order of court is void for indefiniteness.
Ex parte Curtis, 10 Okla. 660, 63 Pac.
903. That right to jury extends to trial
of issues of fact in quo warranto proceed-
ings, see Buckman v. State, 34 Fla. 48,
15 So. 897, 24 L. R. A. 803, and note.
But not to actions of book-account. Hall
v. Armstrong, 65 Vt. 421, 26 Atl. 592, 20
L. R. A. 306. Nor to assessment of dam-
ages for negligence on default of answer.
Dean v. Willmott Bridge Co., 22 Oreg.
107, 29 Pac. 140, 15 L. R. A. 614.]

liberty without due process of law, in violation of section 1 of Article 14, which pro-
vides that no State shall deprive any person of life, liberty, or property without due
process of law."

"The supreme court of the State, after a hearing of the case, denied the petition
for a writ, and remanded the prisoner to the custody of the keeper of the State
prison to undergo the remainder of his sentence; and he then sued out a writ of
error and brought the case" before the Supreme Court of the United States.

Said that court, speaking by Mr. Justice Prentiss: "The objection that the pro-
ceeding by information does not amount to due process of law has been here-
fore overruled, and must be regarded as settled by the case of Hurtado v. California,
110 U. S. 516, 4 Sup. Ct. Rep. 111, 292. The case has since been frequently ap-

"But the plaintiff in error contends that the Hurtado case did not decide the
question whether the State law violated that clause in the Fourteenth Amendment
which provides that no State shall make or enforce any law which shall abridge the
privileges or immunities of citizens of the United States. . . . In a Federal court no
person can be held to answer for a capital or otherwise infamous crime unless by
indictment by a grand jury, with the exceptions stated in the Fifth Amendment.
Yet this amendment was held in the Hurtado case not to apply to a prosecution for
murder in a State court pursuant to a State law. The claim was made in that case
(and referred to in the opinion) that the adoption of the Fourteenth Amendment
provided an additional security to the individual against oppression by the States
themselves, and limited their powers to the same extent as the amendments there-
fore adopted had limited the powers of the federal government. By holding that
the conviction upon an information was valid, the court necessarily held that the
as the Constitution guarantees to accused parties, when a less

indictment was not necessary; that exemption from trial for an infamous crime, excepting under an indictment, was not one of those privileges of a citizen of the United States which a State was prohibited from abridging. The whole case was probably regarded as involved in the question as to due process of law. The particular objection founded upon the privileges and immunities of citizens of the United States is now taken and insisted upon in this case."

That the first ten Amendments to the Constitution of the United States "were intended as restraints and limitations upon the powers of the general government, . . . and did not have any effect upon the powers of the respective States . . . has been many times decided," citing Spies v. Illinois, 123 U. S. 60, 130, 150, 6 Sup. Ct. Rep. 21; Holden v. Hardy, 160 U. S. 356, 382, 387, 18 Sup. Ct. Rep. 383; Brown v. New Jersey, 175 U. S. 172, 174, 17 Sup. Ct. Rep. 77. These cases cite many others to the same effect. That the Fourteenth Amendment did not extend these restrictions to the States was decided in the Slaughter-House Cases, 16 Wall. 36. In conclusion, Mr. Justice Peckham says: "It appears to us that the questions whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors, and whether in case of an infamous crime a person shall only be liable to be tried after presentment or indictment of a grand jury, are eminently proper to be determined by the citizens of each State for themselves, and do not come within the clause of the amendment under consideration, so long as all persons within the jurisdiction of the State are made liable to be proceeded against by the same kind of procedure and to have the same kind of trial, and the equal protection of the laws is secured to them. Caldwell v. Texas, 137 U. S. 692, 11 Sup. Ct. Rep. 224; Leeper v. Texas, 130 U. S. 462, 11 Sup. Ct. Rep. 577. It is emphatically the case of the people by their organic law providing for their own affairs, and we are of opinion they are much better judges of what they ought to have in these respects than any one else can be. The reasons given in the learned and most able opinion of Mr. Justice Matthews, in the Hurtado case, for the judgment therein rendered, apply with equal force in regard to a trial by a jury of less than twelve jurors. The right to be proceeded against only by indictment, and the right to a trial by twelve jurors, are of the same nature, and are subject to the same judgment, and the people in the several States have the same right to provide by their organic law for the change of both or either. Under this construction of the amendment there can be no just fear that the liberties of the citizen will not be carefully protected by the States respectively. It is a case of self-protection, and the people can be trusted to look out and care for themselves. There is no reason to doubt their willingness or their ability to do so, and when providing in their Constitution and legislation for the manner in which civil or criminal actions shall be tried, it is in entire conformity with the character of the Federal government that they should have the right to decide for themselves what shall be the form and character of the procedure in such trials, whether there shall be an indictment or an information only, whether there be a jury of twelve or a lesser number, and whether the verdict must be unanimous or not. There are matters which have no relation to the character of the Federal government. As was stated by Mr. Justice Brewer, in delivering the opinion of the court in Brown v. New Jersey, 175 U. S. 172, 20 Sup. Ct. Rep. 77, the State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. The legislation in question is not, in our opinion, open to either of these objections.

"Judged by the various cases in this court, we think there is no error in this record, and the judgment of the Supreme Court of Utah must therefore be affirmed." To this there was a vigorous dissenting opinion by Mr. Justice Harlan, chiefly upon the ground that the holding of the court made the amendment clause in question only declaratory of the earlier law. [\]
number is not allowed in express terms (a); and the necessity of a full panel could not be waived—at least in case of felony—even by consent. The infirmity in case of a trial by jury of less than twelve, by consent, would be that the tribunal would be one

1 Work v. State, 2 Ohio St. 290; Cancemi v. People, 18 N. Y. 128; Brown v. State, 8 Blackf. 661; 2 Lead. Cr. Cas. 337; Hill v. People, 16 Mich. 551. And see State v. Cox, 3 Eng. 430; Murphy v. Commonwealth, 1 Met. (Ky.) 365; Tyzec v. Commonwealth, 2 Met. (Ky.) 1; State v. Mansfield, 41 Mo. 470; Brown v. State, 16 Ind. 496; Opinions of Judges, 41 N. H. 550; Lincoln v. Smith, 27 Vt. 328; Dowling’s Case, 13 Miss. 604; Tillmann v. Ariles, 13 Miss. 373; Vaughan v. Seade, 30 Mo. 600; Kleinschmidt v. Dumphry, 1 Mont. 118; Allen v. State, 51 Ind. 461; State v. Everett, 14 Minn. 447; State v. Lockwood, 49 Wis. 405; State v. Davis, 66 Mo. 684; Williams v. State, 12 Ohio St. 623; Allen v. State, 54 Ind. 401; Swart v. Kimball, 45 Mich. 443, 5 N. W. 635; Mays v. Comm., 82 Va. 560; Harris v. People, 128 Ill. 585, 21 N. E. 663; State v. Stewart, 80 N. C. 503. In Commonwealth v. Dailey, 12 Cush. 80, it was held that, in a case of misdemeanor, the consent of the defendant that a verdict might be received from eleven jurors was binding upon him, and the verdict was valid. See also State v. Borowski, 11 Nev. 119; Murphy v. Commonwealth, 1 Met. (Ky.) 365; Connelly v. State, 60 Ala. 89, 31 Am. Rep. 34; State v. Sackett, 39 Minn. 69, 38 N. W. 773. No distinction is made in the last case between felony and misdemeanor in this regard. In Iowa the right to jury trial is regarded as a personal privilege which may be waived. State v. Polson, 29 Iowa, 138; State v. Kaufman, 61 Iowa, 578, 2 N. W. 275, 33 Am. Rep. 148. But not in case of homicide. State v. Carman, 68 Iowa, 130, 18 N. W. 691. And in Connecticut and Ohio, under statutes permitting a defendant in a criminal case to elect to be tried by the court, his election is held to bind him. State v. Warden, 46 Conn. 349, 33 Am. Rep. 27; Dillingham v. State, 5 Ohio St. 280. Such a statute is valid: Edwards v. State, 45 N. J. L. 419; except as to a capital case. Murphy v. State, 97 Ind. 579. In Hill v. People, 16 Mich. 550, it was decided that if one of the jurors called was an alien, the defendant did not waive the objection by failing to challenge him, if he was not aware of the disqualification; and if the court refused to set aside the verdict on affidavits showing these facts, the judgment upon it would be reversed on error. The case of State v. Quarrel, 2 Bay, 156, is contra. The case of State v. Stone, 3 Ill. 326, in which it was held competent for the court, even in a capital case, to strike off a jurymen after he was sworn, because of alienage, affords some support for Hill v. People. [“Struck” juries are permissible. Lommen v. Minneapolis Gaslight Co., 65 Minn. 190, 68 N. W. 53, 33 L. R. A. 437, 60 Am. St. 460.]

(a) [That a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment to the Federal Constitution, see Thompson v. Utah, 170 U. S. 343, 349, 18 Sup. Ct. Rep. 629; and that their verdict shall be unanimous in all Federal courts where a jury trial is held, see American Pub. Co. v. Fisher, 166 U. S. 461, 17 Sup. Ct. Rep. 618, and Springville v. Thomas, 166 U. S. 707, 17 Sup. Ct. Rep. 717. See also Capital Traction Co. v. Hof, 174 U. S. 1, 19 Sup. Ct. Rep. 550. Upon number of jurymen necessary to jury, etc., see note to 14 L. ed. U. S. 334. With regard to grand jury, and that it must, unless otherwise expressly stated in constitution, consist of not less than twelve, whose verdict must be concurred in by twelve, see State v. Hartley, 22 Nev. 342, 40 Pac. 372, 28 L. R. A. 33, and note. Under the constitution of Wyoming providing that the right to a jury trial in criminal cases shall remain inviolate, but that in civil cases a jury may consist of less than twelve, it is held that a statute providing that a verdict might be found in civil cases by an agreement of three-fourths of the jurors is void. First Nat’l Bank of Rock Springs v. Foster, 9 Wyo. 167, 61 Pac. 402, 53 Pac. 1066, 54 L. R. A. 549.]
unknown to the law, created by mere voluntary act of the parties; and it would in effect be an attempt to submit to a species of arbitration the question whether the accused has been guilty of an offence against the State. But in those cases which formerly were not triable by jury, if the legislature provide for such a trial now, they may doubtless create for the purpose a statutory tribunal, composed of any number of persons, and no question of constitutional power or right could arise.

Many of the incidents of a common-law trial by jury are essential elements of the right. The jury must be indifferent between the prisoner and the Commonwealth; and to secure impartiality challenges are allowed, not only for cause, 1 but also peremptory without assigning cause. The jury must also be summoned from the vicinage where the crime is supposed to have been committed; 2 and the accused will thus have the benefit on his trial

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2 Offences against the United States are to be tried in the district, and those against the State in the county in which they are charged to have been committed: Swart v. Kimball, 43 Mich. 443, 5 N. W. 635; but courts are generally empowered, on the application of an accused party, to order a change of venue, where for any reason a fair and impartial trial cannot be had in the locality. See Hudson v. State, 3 Cold. 555; Rowan v. State, 29 Wis. 129; State v. Momney, 10 Iowa, 567; State v. Read, 49 Iowa, 86; Wayrick v. People, 83 Ill. 49; Manly v. State, 52 Ind. 215; Gut v. State, 9 Wall. 35; State v. Allice, 61 N. H. 423. State v. McCurry, 52 Ohio St. 303, 39 N. E. 1041, 27 L. R. A. 334. It has been held incompetent to order such a change of venue on the application of the prosecution. Kirk v. State, 1 Cold. 344. See also Wheeler v. State, 24 Wis. 52; Osborn v. State, 24 Ark. 629. People v. Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 765. And in another case in Tennessee it was decided that a statute which permitted offences committed near the boundary line of two counties to be tried in either was an invasion of the constitutional principle stated in the text. Armstrong v. State, 1 Cold. 398. See also State v. Denton, 6 Cold. 630. Contr. v. State v. Robinson, 14 Minn. 447; Willis v. State, 10 Tex. App. 409. [Statute providing that where the blow is struck outside the state and the stricken one dies within the state, the crime shall be deemed to have been committed at the place of death was sustained in Ex parte McNeely, 59 W. Va. 84, 14 S. E. 438, 15 L. R. A. 226, 32 Am. St. 831. Jury cannot be summoned from country districts to exclusion of residents of city in which crime occurred. Zanone v. State, 97 Tenn. 101, 35 S. W. 711, 35 L. R. A. 556.]

The case of Dana decided by Judge Blatchford, when U. S. District Judge for the southern district of New York, is of interest in this connection. The "New York Sun," of which Mr. Charles A. Dana was editor-in-chief, published an article reflecting upon the public conduct of an official at Washington. This article was claimed to be a libel. The actual offence, if any, was committed in New York; but a technical publication also took place in
of his own good character and standing with his neighbors, if these he has preserved; and also of such knowledge as the jury may possess of the witnesses who may give evidence against him. He will also be able with more certainty to secure the attendance of his own witnesses. The jury must unanimously concur in the verdict (a). This is a very old requirement in the English common law, and it has been adhered to, notwithstanding very eminent men have assailed it as unwise and inexpedient. And the jurors must be left free to act in accordance with the dictates of their judgment. The final decision of the facts is to rest with them, and interference by the court with a view to coerce them into a verdict against their convictions is unwarrantable and irregular. A judge is not justified in expressing his conviction to the jury that the defendant is guilty upon the evidence adduced. Still

Washington, by the sale of papers there. The offended party chose to have his complaint tried summarily by a police justice of the latter city, instead of submitting it to a jury required to be indifferent between the parties. A federal commissioner issued a warrant for Mr. Dana's arrest in New York for transportation to Washington for trial; but Judge Blackford treated the proceeding with little respect, and ordered Mr. Dana's discharge. Matter of Dana, 7 Ben. 1. It would have been a singular result of a revolution where one of the grievances complained of was the assertion of a right to send parties abroad for trial, if it should have been found that an editor might be seized anywhere in the Union and transported by a federal officer to every territory into which his paper might find its way, to be tried in each in succession for offences which consisted in a single act not actually done in any of them. [Upon right of accused to object to local judge for prejudice, see State v. Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 680.]

1 For the origin of this principle, see Forsyth, Trial by Jury, c. 11. The requirement of unanimity does not prevail in Scotland, or on the Continent. Among the eminent men who have not approved it may be mentioned Locke and Jeremy Bentham. See Forsyth, supra; Lieber, Civil Liberty and Self-Government, c. 20. [Unanimity necessary. American Publishing Co. v. Fisher, 166 U. S. 464, 17 Sup. Ct. Rep. 618; Springville City v. Thomas, 166 U. S. 707, 17 Sup. Ct. Rep. 717.]

2 A judge who urges his opinion upon the facts to the jury decides the cause, while avoiding the responsibility. How often would a jury be found bold enough to declare their opinion in opposition to that of the judge upon the bench, whose words would fall upon their ears with all the weight which experience, learning, and commanding position must always carry with them? What lawyer would care to sum up his case, if he knew that the judge, whose words would be so much more influential, was to declare in his favor, or would be bold enough to argue the facts to the jury, if he knew the judge was to declare against him? Blackstone has justly remarked that "in settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to range in; either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances,
ness would he be justified in refusing to receive and record the verdict of the jury, because of its being, in his opinion, rendered in favor of the prisoner when it ought not to have been (a).

He discharges his duty of giving instructions to the jury when he informs them what in his view the law is which is applicable to the case before them, and what is essential to constitute the offence charged; and the jury should be left free and unbiased by his opinion to determine for themselves whether the facts in evidence are such as, in the light of the instructions of the judge, make out beyond any reasonable doubt that the accused party is guilty as alleged.1

How far the jury are to judge of the law as well as of the facts, is a question, a discussion of which we do not propose to enter upon. If it be their choice to do so, they may return specially what facts they find established by the evidence, and allow the court to apply the law to those facts, and thereby to determine whether the party is guilty or not. But they are not obliged in any case to find a special verdict; they have a right to apply for themselves the law to the facts, and to express their own opinion, upon the whole evidence, of the defendant’s guilt. Where a

stretching and warping others, and distinguishing away the remainder.” 3 Bl. Com. 380. These are evils which jury trial is designed to prevent; but the effort must be vain if the judge is to control by his opinion, where the law has given him no power to command. In Lord Campbell’s Lives of the Chancellors, c. 181, the author justly condemns the practice with some judges in libel cases, of expressing to the jury their belief in the defendant’s guilt. On the trial of parties charged with a libel on the Empress of Russia, Lord Kenyon, sneering at the late Libel Act, said: “I am bound by my oath to declare my own opinion, and I should forget my duty were I not to say to you that it is a gross libel.” Upon this Lord Campbell remarks: “Mr. Fox’s act only requires the judges to give their opinion on matters of law in libel cases as in other cases. But did any judge ever say, ‘Gentlemen, I am of opinion that this is a wilful, malicious, and atrocious murder?’ For a considerable time after the act passed, against the unanimous opposition of the judges, they almost all pitifully followed this course. I myself heard one judge say: ‘As the legislature requires me to give my own opinion in the present case, I am of opinion that this is a diabolically atrocious libel.’” Upon this subject, see McGuflle v. State, 17 Ga. 497; State v. McGinnis, 5 Nev. 337; Pittock v. O’Neill, 63 Pa. St. 263, 3 Am. Rep. 544; People v. Gastro, 75 Mich. 127, 42 N. W. 937.

1 The independence of the jury, with respect to the matters of fact in issue before them, was settled by Penn’s Case, 6 Howell’s State Trials, 951, and by Bushel’s Case, which grew out of it, and is reported in Vaughan’s Reports, 135. A very full account of these cases is also found in Forsyth on Trial by Jury, 397. See Bushel’s Case also in Brown’s Const. Law, 120, and the valuable note thereto. Bushel was foreman of the jury which refused to find a verdict of guilty at the dictation of the court, and he was punished as for contempt of court for his refusal, but was released on habeas corpus.

(a) [But when verdict is unintelligible or its parts are repugnant the jury may be sent back to correct it. Grant v. State, 33 Fla. 291, 14 So. 757, 23 L. R. A. 733, and note upon correction of verdict.]
general verdict is thus given, the jury necessarily determine in their own mind what the law of the case is; 1 and if their determination is favorable to the prisoner, no mode is known to the law in which it can be reviewed or reversed. A writ of error does not lie on behalf of the Commonwealth to reverse an acquittal, unless expressly given by statute; 2 nor can a new trial be granted in such a case; 3 but neither a writ of error nor a motion for a new trial could remedy an erroneous acquittal by the jury, because, as they do not give reasons for their verdict, the precise grounds for it can never be legally known, and it is always presumable that it was given in favor of the accused because the evidence was not sufficient in degree or satisfactory in character; and no one is at liberty to allege or assume that they have disregarded the law.

Nevertheless, as it is the duty of the court to charge the jury upon the law applicable to the case, it is still an important question whether it is the duty of the jury to receive and act upon the law as given to them by the judge, or whether, on the other hand, his opinion is advisory only, so that they are at liberty either to follow it if it accords with their own convictions, or to disregard it if it does not.

In one class of cases, that is to say, in criminal prosecutions for libels, it is now very generally provided by the State constitutions, or by statute, that the jury shall determine the law and the

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1 "As the main object of the institution of the trial by jury is to guard accused persons against all decisions whatsoever by men invested with any permanent official authority, it is not only a settled principle that the opinion which the judge delivers has no weight but such as the jury choose to give it, but their verdict must besides [unless they see fit to return a special finding] comprehend the whole matter in trial, and decide as well upon the fact as upon the point of law that may arise out of it; in other words, they must pronounce both on the commission of a certain fact, and on the reason which makes such fact to be contrary to law." De L. on the Constitution of England, c. 13. In January, 1735, Zenger, the publisher of Zenger's Journal in New York, was informed against for a libel on the governor and other officers of the king in the province. He was defended by Hamilton, a Quaker lawyer from Philadelphia, who relied upon the truth as a defence. The court excluded evidence of the truth as constituting no defence, but Hamilton appealed to the jury as the judges of the law, and secured an acquittal. Street's Council of Revision, 71.

2 See State v. Reynolds, 4 Hayw. 110; United States v. Moore, 3 Cranch, 174; People v. Dill, 2 Ill. 257; People v. Royal, 2 Ill. 557; Commonwealth v. Cummings, 3 Cush. 212; People v. Corning, 2 N. Y. 9; State v. Kemp, 17 Wis. 609; compare State v. Robinson, 37 La. Ann. 673. A constitutional provision, saving "to the defendant the right of appeal" in criminal cases, does not, by implication, preclude the legislature from giving to the prosecution the same right. State v. Tait, 22 Iowa, 149. Compare People v. Webb, 38 Cal. 467; State v. Lo., 10 R. I. 494.

3 People v. Comstock, 8 Wend. 649; State v. Brown, 16 Conn. 54; State v. Kanouse, 20 N. J. 115; State v. Burns, 3 Tex. 118; State v. Taylor, 1 Hawks, 462.
facts. How great a change is made in the common law by these provisions it is difficult to say, because the rule of the common law was, not very clear upon the authorities; but for that very reason, and because the law of libel was sometimes administered with great harshness, it was certainly proper and highly desirable that a definite and liberal rule should be thus established.

In all other cases the jury have the clear legal right to return a simple verdict of guilty or not guilty, and in so doing they necessarily decide such questions of law as well as of fact as are involved in the general question of guilt. If their view conduce to an acquittal, their verdict to that effect can neither be reviewed

1 See Constitutions of Alabama, Connecticut, California, Delaware, Georgia, Kentucky, Maine, Michigan, Missouri, Nebraska, New York, Pennsylvania, South Carolina, Tennessee, and Texas. See post, p. 590, note. That of Maryland makes the jury judges of the law in all criminal cases; and the same rule is established by constitution or statute in some other States. In Holder v. State, 5 Ga. 444, the following view was taken of such a statute: 'Our penal code declares, 'On every trial of a crime or offence contained in this code, or for any crime or offence, the jury shall be judges of the law and the fact, and shall in every case give a general verdict of guilty or not guilty, and on the acquittal of any defendant or prisoner, no new trial shall on any account be granted by the court.' Juries were, at common law, in some sense judges of the law. Having the right of rendering a general verdict, that right involved a judgment on the law as well as the facts, yet not such a judgment as necessarily to control the court. The early commentators on the common law, notwithstanding they concede this right, yet hold that it is the duty of the jury to receive the law from the court. Thus Blackstone equivocally writes: 'And such public or open verdict may be either general, guilty or not guilty, or special, setting forth all the circumstances of the case, and praying the judgment of the court whether, for instance, on the facts stated, it be murder or manslaughter, or no crime at all. This is where they doubt the matter of the law, and therefore choose to leave it to the determination of the court, though they have an unquestionable right of determining upon all the circumstances, and of finding a general verdict, if they think proper so to hazard a breach of their oaths,' &c. 4 Bl. Com. 361; Co. Lit. 228 a; 2 Hale, P. C. 318. Our legislature have left no doubt about this matter. The juries in Georgia can find no special verdict at law. They are declared to be judges of the law and the facts, and are required in every case to give a general verdict of guilty or not guilty; so jealous, and rightfully jealous, were our ancestors of the influence of the State upon the trial of a citizen charged with crime. We are not called upon in this case to determine the relative strength of the judgment of the court and the jury, upon the law in criminal cases, and shall express no opinion thereon. We only say it is the right and duty of the court to declare the law in criminal cases as well as of civil, and that it is at the same time the right of the jury to judge of the law as well as of the facts in criminal cases. I would not be understood as holding that it is not the province of the court to give the law of the case distinctly in charge to the jury; it is unquestionably its privilege and its duty to instruct them as to what the law is, and officially to direct their finding as to the law, yet at the same time in such way as not to limit the range of their judgment.' See also McGuiire v. State, 17 Ga. 497; Clem v. State, 51 Ind. 480; and post, p. 659, et seq.

2 For a condensed history of the struggle in England on this subject, see May's Constitutional History, c. 9. See also Lord Campbell's Lives of the Chancellors, c. 178; Introduction to Speeches of Lord Erskine, edited by James H. High; Forsyth's Trial by Jury, c. 12.
nor set aside. In such a case, therefore, it appears that they pass upon the law as well as the facts, and that their finding is conclusive. If, on the other hand, their view leads them to a verdict of guilty, and it is the opinion of the court that such verdict is against law, the verdict will be set aside and a new trial granted. In such a case, although they have judged of the law, the court sets aside their conclusion as improper and unwarranted. But it is clear that the jury are no more the judges of the law when they acquit than when they condemn, and the different result in the two cases comes from the merciful maxim of the common law, which will not suffer an accused party to be twice put in jeopardy for the same cause, however erroneous may have been the first acquittal. In theory, therefore, the rule of law would seem to be, that it is the duty of the jury to receive and follow the law as delivered to them by the court; and such is the clear weight of authority.

There are, however, opposing decisions, and it is evident that

1 United States v. Battiste, 2 Sum. 240; Stetinns v. United States, 5 Cranch, C. C. 573; United States v. Morris, 1 Curt. 53; United States v. Riley, 5 Blatch. 204; United States v. Greathouse, 4 Sawyer, 459; Montgomery v. State, 11 Ohio, 427; Robbins v. State, 8 Ohio St. 131; Commonwealth v. Porter, 10 Met. 253; Commonwealth v. Anthes, 5 Gray, 185; Commonwealth v. Rock, 10 Gray, 4; State v. Peace, 1 Jones, 251; Handy v. State, 7 Mo. 607; Nels v. State, 2 Tex. 250; State v. Tully, 23 La. Ann. 677; State v. Tisdale, 41 La. Ann. 336, 6 So. 579; People v. Pine, 2 Barb. 666; Carpenter v. People, 8 Barb. 1003; People v. Finnigan, 1 Park C. R. 147; Safford v. People, 1 Park C. R. 471; McMath v. State, 55 Ga. 303; Hamilton v. People, 29 Mich. 173; McGowan v. State, 9 Yerg. 181; Pleasant v. State, 13 Ark. 360; Monte c v. Commonwealth, 3 J. J. Marsh. 132; Commonwealth v. Van Tyul, 1 Met. (Ky.) 1; Pierce v. State, 13 N. H. 556; People v. Stewart, 7 Cal. 40; Mullinex v. People, 76 Ill. 211; Barte v. State, 18 Ala. 119; reviewing previous cases in the same State. As the jury have the right, and if required by the prisoner are bound to return a general verdict of guilty or not guilty, they must necessarily, in the discharge of this duty, decide such questions of law as well as of fact as are involved in the general question, and there is no mode in which their opinions upon questions of law can be reviewed by this court or by any other tribunal. But this does not diminish the obligation resting upon the court to explain the law. The instructions of the court in matters of law may safely guide the consciences of the jury, unless they know them to be wrong; and when the jury undertake to decide the law (as they undoubtedly have the power to do) in opposition to the advice of the court, they assume a high responsibility, and should be very careful to see clearly that they are right.” Commonwealth v. Knapp, 10 Pick. 406; cited with approval in McGowan v. State, 9 Yerg. 135, and Dale v. State, 10 Yerg. 555. And see Kane v. Commonwealth, 59 Pa. St. 522, 33 Am. Rep. 787; Habershon v. State, 50 Ga. 01, 2 Am. Cr. Rep. 45; Hunt v. State, 51 Ga. 140, 7 S. E. 142. Even where the jury are judges of the law and facts and instructions are only advisory, error in the charge is prejudicial. State v. Rice, 56 Iowa, 531; Hudson v. State, 94 Ind. 426. Even if there is no dispute, a court cannot direct a conviction. United States v. Taylor, 3 McCravy, 500.

2 See especially State v. Croteau, 23 Vt. 14, where will be found a very full and carefully considered opinion, holding that at the common law the jury are the judges of the law in criminal cases. See also State v. Wilkinson, 2 Vt. 280; Doss v. Commonwealth, 1 Grat. 557; State v.
the judicial prerogative to direct conclusively upon the law cannot be carried very far or insisted upon with much pertinacity, when the jury have such complete power to disregard it, without the action degenerating into something like mere scolding. Upon this subject the remarks of Mr. Justice Baldwin, of the Supreme Court of the United States, to a jury assisting him in the trial of a criminal charge, and which are given in the note, seem peculiarly dignified and appropriate, and at the same time to embrace about all that can properly be said to a jury on this subject.  

Jones, 6 Ala. 665; State v. Snow, 18 Me. 340; State v. Allen, 1 McCord, 525, 10 Am. Dec. 687; Armstrong v. State, 4 Blackf. 217; Warren v. State, 4 Blackf. 150; Stocking v. State, 7 Ind. 328; Lynch v. State, 9 Ind. 511; Nelson v. State, 2 Swan, 482; People v. Thayers, 1 Park. C. R. 506; People v. Videto, 1 Park. C. R. 603. The subject was largely discussed in People v. Crosswell, 3 Johns. Cas. 337. In Virginia, it is said that unless instructions are asked, a court should in general not instruct the jury upon the law; Dejeanette v. Com., 75 Va. 697, and in Maryland it seems to be optional with the court to instruct them. Broll v. State, 45 Md. 350.

1 "In repeating to you what was said on a former occasion to another jury, that you have the power to decide on the law as well as the facts of this case, and are not bound to find according to our opinion of the law, we feel ourselves constrained to make some explanations not then deemed necessary, but now called for from the course of the defence. You may find a general verdict of guilty or not guilty, as you think proper, or you may find the facts specially, and leave the guilt or innocence of the prisoner to the judgment of the court. If your verdict acquit the prisoner, we cannot grant a new trial, however much we may differ with you as to the law which governs the case; and in this respect a jury are the judges of the law, if they choose to become so. Their judgment is final, not because they settle the law, but because they think it not applicable, or do not choose to apply it to the case.

But if a jury find a prisoner guilty against the opinion of the court on the law of the case, a new trial will be granted. No court will pronounce a judgment on a prisoner against what they believe to be the law. On an acquittal there is no judgment; and the court do not act, and cannot judge, there remaining nothing to act upon.

"This, then, you will understand to be what is meant by your power to decide on the law; but you will still bear in mind that it is a very old, sound, and valuable maxim in law, that the court answers to questions of law, and the jury to facts. Every day's experience evinces the wisdom of this rule." United States v. Wilson, Baldw. 108. We quote also from an Alabama case: "When the power of juries to find a general verdict, and consequently their right to determine without appeal both law and fact, is admitted, the abstract question whether it is or is not their duty to receive the law from the court becomes rather a question of casuistry or conscience than one of law; nor can we think that anything is gained in the administration of criminal justice by urging the jury to disregard the opinion of the court upon the law of the case. It must, we think, be admitted, that the judge is better qualified to expound the law, from his previous training, than the jury; and in practice, unless he manifests a wanton disregard of the rights of the prisoner,—a circumstance which rarely happens in this age of the world and in this country,—his opinion of the law will be received by the jury as an authoritative exposition, from their conviction of his superior knowledge of the subject. The right of the jury is doubtless one of inestimable value, especially in those cases where it may be supposed that the government has an interest in the conviction of the criminal; but in this country, where the government in all its branches, executive, legislative, and judicial, is created by the people, and is in fact their servant, we
One thing more is essential to a proper protection of accused parties, and that is, that one shall not be subject to be twice put in jeopardy upon the same charge. One trial and verdict must, as a general rule, protect him against any subsequent accusation of the same offence,\(^1\) whether the verdict be for or against him,

are unable to perceive why the jury should be invited or urged to exercise this right contrary to their own convictions of their capacity to do so, without danger of mistake. It appears to us that it is sufficient that it is admitted that it is their peculiar province to determine facts, intents, and purposes; that it is their right to find a general verdict, and consequently that they must determine the law; and whether in the exercise of this right they will distrust the court as expounders of the law, or whether they will receive the law from the court, must be left to their own discretion under the sanction of the oath they have taken."

State v. Jones, 5 Ala. 672. But as to this case, see Batre v. State, 18 Ala. 119.

It cannot be denied that discredit is sometimes brought upon the administration of justice by juries acquitting parties who are sufficiently shown to be guilty, and where, had the trial been by the court, a conviction would have been sure to follow. In such cases it must be supposed that the jury have been controlled by their prejudices or their sympathies. However that may be, it by no means follows that because the machinery of jury trial does not work satisfactorily in every case, we must therefore condemn and abolish the system, or, what is still worse, tolerate it, and yet denounce it as being unworthy of public confidence.

The remarks of Lord Erskine, the most distinguished jury lawyer known to English history, may be quoted as peculiarly appropriate in this connection: "It is of the nature of everything that is great and useful, both in the animate and inanimate world, to be wild and irregular, and we must be content to take them with the alloys which belong to them, or live without them. ... Liberty herself, the last and best gift of God to his creatures, must be taken just as she is. You might pare her down into bushal regularity, shape her into a perfect model of severe, scrupulous law; but she would then be liberty no longer; and you must be content to die under the lash of this inexorable justice which you have exchanged for the banners of freedom."

The province of the jury is sometimes invaded by instructions requiring them to adopt, as absolute conclusions of law, those deductions which they are at liberty to draw from a particular state of facts, if they regard them as reasonable: such as that a homicide must be presumed malicious, unless the defendant proves the contrary; which is a rule contradictory of the results of common observation; or that evidence of a previous good character in the defendant ought to be disregarded, unless the other proof presents a doubtful case; which would deprive an accused party of his chief protection in many cases of false accusations and conspiracies. See People v. Garbutt, 17 Mich. 9; People v. Lamb, 2 Keyes, 360; State v. Henry, 6 Jones (N. C.), 66; Harrison v. State, 19 Ohio St. 269; Silvus v. State, 22 Ohio St. 90; State v. Patterson, 45 Vt. 308; Renssela v. People, 43 N. Y. 6; Kistler v. State, 54 Ind. 400.

Upon the presumption of malice in homicide, the reader is referred to the Review of the Trial of Professor Webster, by Hon. Joel Parker, in the North American Review, No. 72, p. 178. See also, upon the functions of judge and jury respectively, the cases of Commonwealth v. Wool, 11 Gray, 50; Maher v. People, 10 Mich. 212; Commonwealth v. Billings, 37 Mass. 405; State v. Patterson, 63 N. C. 520; State v. Newton, 4 Nev. 410. [See, upon the right of the jury to pass upon the law, note to State v. Whitmore in 42 Am. St. Rep. 290-293; 13 Am. Law Reg. 355, and 7 Crim. Law Mag. 652. No more scholarly contribution to the discussion of this general subject of "Law and Fact in Jury Trials" can be found than in the late Professor Thayer's "Preliminary Evidence at the Common Law," c. 5.]

\(^1\) By the same offence is not signified the same eo nomine, but the same criminal act or omission. Hersheyfield v. State, 11 Tex. App. 297; Wilson v. State, 24 Conn. 57; State v. Thornton, 37 Mo. 390;
and whether the courts are satisfied with the verdict or not. We shall not attempt in this place to collect together the great number of judicial decisions bearing upon the question of legal jeopardy, and the exceptions to the general rule above stated; for these the reader must be referred to the treatises on criminal law, where the subject will be found to be extensively treated. It will be sufficient for our present purpose to indicate very briefly some general principles.

A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance. And a jury is


1 Commonwealth v. Cook, 6 S. & R. 589; State v. Norvell, 2 Yerg. 21; Williams v. Commonwealth, 2 Grat. 508; People v. McGowan, 17 Wend. 380; Mounts v. State, 14 Ohio, 295; Price v. State, 19 Ohio, 423; Wright v. State, 5 Ind. 292; State v. Nelson, 26 Ind. 366; State v. Spier, 1 Dev. 401; State v. Ephraim, 2 Dev. & Bat. 162; Commonwealth v. Tuck, 20 Pick. 366; People v. Webb, 28 Cal. 467; People v. Cook, 10 Mich. 104; State v. Ned, 7 Port. 217; State v. Callendine, 8 Iowa, 288; [State v. Rook, 61 Kan. 382, 50 Pac. 653, 49 L. R. A. 188; State v. Richardson, 47 S. C. 106, 25 S. E. 220, 35 L. R. A. 238.] If a defendant is arraigned before a justice who has jurisdiction, and pleads guilty, and the prosecutor dismisses the case, he has been in jeopardy. Boswell v. State, 111 Ind. 47. It cannot be said, however, that a party is in legal jeopardy in a prosecution brought about by his own procurement; and a former conviction or acquittal is consequently no bar to a second indictment, if the former trial was brought about by the procurement of the defendant, and the conviction or acquittal was the result of fraud or collusion on his part. Commonwealth v. Alderman, 4 Mass. 477; State v. Little, 1 N. H. 257; State v. Lowry, 1 Swan, 35; State v. Green, 16 Iowa, 259. See also State v. Reed, 26 Conn. 292; Bigham v. State, 59 Miss. 520; State v. Simpson, 28 Minn. 66, 9 N. W. 78; McFarland v. State, 63 Wis. 400, 32 N. W. 226. And if a jury is called and sworn, and then discharged for the reason that it is discovered the defendant has not been arraigned, this will not constitute a bar. United States v. Riley, 5 Blatch. 204. In State v. Garvey, 42 Conn. 232, it is held that a prosecution not, proceeded after the jury is sworn is no bar to a new prosecution, "If the prisoner does not claim a verdict, but waives his right to insist upon it." See Hoffman v. State, 29 Md. 425. [See notes to 21 L. ed. U. S. 872, 6 L. ed. U. S.
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said to be thus charged when they have been impannelled and sworn.† The defendant then becomes entitled to a verdict which shall constitute a bar to a new prosecution; and he cannot be deprived of this bar by a *nolle prosequi* entered by the prosecuting officer against his will, or by a discharge of the jury and continuance of the cause.

If, however, the court had no jurisdiction of the cause, or if the indictment was so far defective that no valid judgment could be rendered upon it, or if by any overruling necessity the jury are discharged without a verdict, which might happen from the

165. 4 L. R. A. 513, and 1 L. R. A. 451. Indefinite suspension of sentence and discharge without recognizance after plea of guilty amounts to a complete loss of power over prisoner, and he cannot subsequently be taken and sentenced. People v. Allen, 155 Ill. 61, 39 N. E. 508, 41 L. R. A. 473; but the court may after sentence suspend in whole or in part the execution thereof, and may at any time within the term in which such sentence was rendered revoke the suspension of execution. Weber v. State, 58 Ohio St. 616, 51 N. E. 116, 41 L. R. A. 472. See also People v. Monroe Co. Ct., 141 N. Y. 288, 30 N. E. 386, 23 L. R. A. 856. Statute giving complainant in criminal case for illegal fishing a right of appeal in case of acquittal is void. People v. Miner, 144 Ill. 508, 33 N. E. 40, 19 L. R. A. 342, and note.] 1


5 United States v. Perez, 9 Wheat. 570; State v. Ephraim, 2 Dev. & Bat. 156; Commonwealth v. Fells, 9 Leigh, 629; People v. Goodwin, 18 Johns. 253;
sickness or death of the judge holding the court, or of a juror, or the inability of the jury to agree upon a verdict after reasonable time for deliberation and effort; or if the term of the court as fixed by law comes to an end before the trial is finished; or the jury are discharged with the consent of the defendant expressed or implied; or if, after verdict against the accused, it has been set aside on his motion (a) for a new trial, or on writ of error;  

Commonwealth v. Bowden, 9 Mass. 194; Hoffman v. State, 20 Md. 425; Price v. State, 36 Miss. 533. In State v. Wiseman, 68 N. C. 203, the officer in charge of the jury was found to have been conversing with them in a way calculated to influence them unfavorably towards the evidence of the prosecution, and it was held that this was such a case of necessity as authorized the judge to permit a juror to be withdrawn, and that it did not operate as an acquittal. See also State v. Washington, 89 N. C. 555. If a nulla prosequi to an indictment is entered after the jury is sworn, because it is found that the person alleged to have been murdered is misnamed, this is no bar to a new indictment which shall give the name correctly. Taylor v. State, 53 Tex. 57. 

1 Nugent v. State, 4 Stew. & Port. 72. 

2 Hector v. State, 2 Mo. 103; State v. Curtis, 5 Humph. 601; Mahala v. State, 10 Yerg. 582; Commonwealth v. Fells, 9 Leigh, 618; Dole v. State, 97 Ind. 555; State v. Emery, 53 Vt. 84, 7 Atl. 123. [Or from the fact just then brought to the judge's notice that one of the jurors had sat upon the grand jury that returned the indictment. Thompson v. United States, 156 U. S. 271, 15 Sup. Ct. Rep. 73. Or was otherwise incompetent. Simmons v. United States, 142 U. S. 148, 12 Sup. Ct. Rep. 171.] 


4 State v. Brooks, 3 Humph. 70; State v. Battle, 7 Ala. 250; Mahala v. State, 10 Yerg. 582; State v. Spier, 1 Dev. 491; Wright v. State, 5 Ind. 200. See Whitten v. State, 61 Miss. 717. 

5 State v. Shack, 6 Ala. 676; Elijah v. State, 1 Humph. 103; Commonwealth v. Stowell, 9 Met. 572; People v. Curtis, 76 Cal. 57, 17 Pac. 941; People v. White, 68 Mich. 418, 37 N. W. 34; State v. Parker, 60 Iowa, 588, 24 N. W. 225. As to the effect of jury's separation by defendant's consent, see State v. Ward, 48 Ark. 36, 2 S. W. 191; Hillands v. Com., 111 Pa. St. 1, 2 Atl. 70. 

6 Kendall v. State, 66 Ala. 492; State v. Blaisdell, 59 N. H. 328; Gannon v. People, 127 Ill. 507, 21 N. E. 525; State v. Breast, 41 Minn. 60, 42 N. W. 602; People v. Hardisson, 61 Cal. 378. See Comm. v. Downing, 150 Mass. 197, 22 N. E. 912. And it seems, if the verdict is so defective that no judgment can be rendered upon it, it may be set aside even against the defendant's objection, and a new trial had. State v. Redman, 17 Iowa, 226. 

(a) See Murphy v. Massachusetts, 177 U. S. 155, 20 Sup. Ct. Rep. 639, aff'g 70 id. 393, 51 N. E. 850.
or the judgment thereon been arrested, 1— in any of these cases the accused may again be put upon trial upon the same facts before charged against him, and the proceedings had will constitute no protection. But where the legal bar has once attached, (a) the government cannot avoid it by varying the form of the charge in a new accusation: if the first indictment or information were such that the accused might have been convicted under it on proof of the facts by which the second is sought to be sustained, then the jeopardy which attached on the first must constitute a protection against a trial on the second. 2 And if a prisoner is acquitted on some of the counts in an indictment, and convicted on others, and a new trial is obtained on his motion, he can be put upon trial a second time on those counts only on which he was before convicted, and is forever discharged from the others. 3

1 Cashorus v. People, 13 Johns. 351; State v. Clark, 69 Iowa, 196, 28 N. W. 537. But where the indictment was good, and the judgment was erroneously arrested, the verdict was held to be a bar. State v. Norvell, 2 Yerg. 24. See People v. Webb, 28 Cal. 467. So if the error was in the judgment and not in the prior proceedings, if the judgment is reversed, the prisoner must be discharged. See post, p. 473. But it is competent for the legislature to provide that on reversing the erroneous judgment in such case, the court, if the proper proceedings are regular, shall remand the case for the proper sentence. McKee v. People, 22 N. Y. 229.

[Upon section of sentence and re-sentence, see note to 36 Ill. ed. U. S. 903.]

It is also competent, by statute, in the absence of express constitutional prohibition, to allow an appeal or writ of error to the prosecution, in criminal cases. See cases, p. 462, note 2.

2 State v. Cooper, 13 N. J. 360; Commonwealth v. Rohy, 12 Pick. 504; People v. McGowan, 17 Wend. 389; Price v. State, 19 Ohio, 423; Leslie v. State, 18 Ohio St. 395; State v. Benham, 7 Conn. 314. See Mitchell v. State, 42 Ohio St. 383; Williams v. Com., 78 Ky. 93; Sims v. State, 65 Miss. 53, 5 So. 525. [Where judge is authorized to discharge jury when a juror becomes sick, such discharge must be in open court and in presence of prisoner; else he will be allowed to plead former jeopardy. Uphurch v. State, 36 Tex. Cr. 624, 38 S. W. 203, 44 L. R. A. 934; State v. Nelson, 19 R. I. 407, 34 Atl. 390, 53 L. R. A. 669; and upon former jeopardy by reason of discharge of jury in prisoner's absence, see note to this case in L. R. A. Where injunction may issue to prevent a prohibited act, punishment for contempt in disobeying the injunction will not prevent a prosecution for the crime. State v. Roby, 142 Ind. 108, 41 N. E. 145, 33 L. R. A. 213, 51 Am. St. 174. The fact that acquittal was secured by bribery of prosecuting attorney does not invalidate plea of former jeopardy. Shideler v. State, 129 Ind. 523, 28 N. E. 337, 29 N. E. 36, 16 L. R. A. 225, 28 Am. St. 206.]

3 Campbell v. State, 9 Yerg. 333; State v. Kettle, 2 Tyler, 475; Morris v. State, 8 S. & M. 762; Eason v. State, 1 Swan, 14; Guenther v. People, 24 N. Y. 100; State v. Kattelman, 55 Mo. 105; State v. Ross, 29 Mo. 39; State v. Martin, 50 Wis. 216, 11 Am. Rep. 567; United States v. Davenport, Deady, 264, 1 Green, Cr. R. 429; Stuart v. Commonwealth, 28 Grat. 950; Johnson v. State, 29 Ark. 31; Barnett v. People, 54 Ill. 321; contra, State v. Behimer, 29 Ohio St. 572. A nulla prosequitur on one count of an indictment after a jury is called and sworn, is a bar to a new indictment for the offence charged therein. Baker v. State, 12 Ohio St. 214; Murphy v. State, 25 Neb. 807, 41 N. W.

(a) [As to when jeopardy attaches, see notes to 4 L. R. A. 543, and 1 L. R. A. 451; also to 21 L. ed. U. S. 872, and to 6 L. ed. U. S. 166.]
Excessive Fines and Cruel and Unusual Punishments.

It is also a constitutional requirement that excessive bail shall not be required, nor cruel and unusual punishments inflicted.

Within such bounds as may be prescribed by law, the question what fine shall be imposed is one addressed to the discretion of the court. But it is a discretion to be judicially exercised; and there may be cases in which a punishment, though not beyond any limit fixed by statute, is nevertheless so clearly excessive as to be erroneous in law. A fine should have some reference to the party's ability to pay it. By Magna Charta a freeman was not to be amerced for a small fault, but according to the degree of the fault, and for a great crime in proportion to the heinousness of it, saving to him his contenement; and after the same manner a merchant, saving to him his merchandise. And a villein was to be amerced after the same manner, saving to him his wainage. The merciful spirit of these provisions addresses itself to the criminal courts of the American States through the provisions of their constitutions.

792. See Com. v. Dunster, 145 Mass. 101, 12 N. E. 320. [On the subject of double jeopardy, see 50 Cent. L. Jour. 143.]

The subject of cruel and unusual punishments was somewhat considered in Barker v. People, 3 Cow. 636, where the opinion was expressed by Chancellor Sanford that a forfeiture of fundamental right — e. g. the right to jury trial — could not be imposed as a punishment, but that a forfeiture of the right to hold office might be. But such a forfeiture could not be imposed without giving a right to trial in the usual mode. Commonwealth v. Jones, 10 Bush, 725. In Done v. People, 5 Park. 364, the cruel punishments of colonial times, such as burning alive and breaking on the wheel, were enumerated by W. W. Campbell, J., who was of opinion that they must be regarded as "cruel" if not "unusual," and therefore as being now forbidden. [And where the criminal is convicted of many offences, he cannot complain if the punishments therefor are cumulated, provided the punishment for a single offence is not excessive, although the aggregate punishments may amount to imprisonment for a term much greater than his natural life. O'Neill v. Vermont, 144 U. S. 323, 12 Sup. Ct. Rep. 693; but see the vigorous dissenting opinion of Mr. Justice Field in this case, and also the dissenting opinion of Harlan and Brewer, JJ. And see also State v. Whitaker, 48 La. Ann. 627, 19 So. 457, 35 L. R. A. 561, and note thereeto in L. R. A., in which cases upon "cruel and unusual punishment" are collected. In Whitaker's case it was held, that a total imprisonment for 2160 days or fine of $720 for 72 violations imposed within one hour and forty minutes, though upon separate complaints, was within the prohibition of the constitution. Also Ex parte Keeler, 45 S. C. 537, 23 S. E. 865, 31 L. R. A. 678, 55 Am. St. 785. See also People ex rel. Tweed v. Liscomb, 60 N. Y. 559, 19 Am. Rep. 211, upon cumulative punishment, holding that punishment for several offences charged in separate counts of same indictment is unlawful: that punishment for one offence exhausts the power of the court under that indictment. Life imprisonment for constructive rape is not invalid, even though the legal age of consent is as high as sixteen years, and the female lacked only a few months of that age, and actually consented, and the male was a mere youth. Com. v. Murphy, 165 Mass. 66, 42 N. E. 504, 30 L. R. A. 731, 52 Am. St. 406.]
It has been decided by the Supreme Court of Connecticut that it was not competent in the punishment of a common-law offence to inflict fine and imprisonment without limitation. The precedent, it was said, cited by counsel contending for the opposite doctrine, of the punishment for a libel upon Lord Chancellor Bacon, was deprived of all force of authority by the circumstances attending it; the extravagance of the punishment being clearly referable to the temper of the times. "The common law can never require a fine to the extent of the offender's goods and chattels, or sentence of imprisonment for life. The punishment is both uncertain and unnecessary. It is no more difficult to limit the imprisonment of an atrocious offender to an adequate number of years than to prescribe a limited punishment for minor offences. And when there exists no firmly established practice, and public necessity or convenience does not imperiously demand the principle contended for, it cannot be justified by the common law, as it wants the main ingredients on which that law is founded. Indefinite punishments are fraught with danger, and ought not to be admitted unless the written law should authorize them." ¹

It is certainly difficult to determine precisely what is meant by cruel and unusual punishments. Probably any punishment declared by statute for an offence which was punishable in the same way at the common law could not be regarded as cruel or unusual in the constitutional sense. And probably any new statutory offence may be punished to the extent and in the mode permitted by the common law for offences of similar nature. But those degrading punishments which in any State had become obsolete before its existing constitution was adopted, we think may well be held forbidden by it as cruel and unusual. We may well doubt the right to establish the whipping-post and the pillory in States where they were never recognized as instruments of pun-

¹ Per Hosmer, Ch. J., in State v. Danforth, 3 Conn. 112-116. Peters, J., in the same case, pp. 122-124, collects a number of cases in which perpetual imprisonment was awarded at the common law, but, as his associates believed, unwarrantably. Compare Blydenburg v. Miles, 39 Conn. 481. [Fixing by statute the minimum fine to be collected for a certain offence, but not the maximum, is not the imposition of an excessive fine. Southern Express Co. v. Conn., 92 Va. 50, 22 S. E. 809, 41 L. R. A. 439. Prisoner upon conviction may, where statute authorizes, be sentenced for the maximum period with power to prison managers to release upon parole and good behavior after satisfactory conduct during minimum period. Miller v. State, 149 Ind. 697, 49 N. E. 894, 40 L. R. A. 109; People v. Bd. of Managers, &c., 148 Ill. 413, 36 N. E. 76, 25 L. R. A. 139; contra, People v. Cummings, 88 Mich. 249, 50 N. W. 310, 14 L. R. A. 285, and note. A statute providing for a more severe punishment for a second conviction is not for that reason invalid. Moore v. Missouri, 159 U. S. 673, 10 Sup. Ct. Rep. 173, aff. 121 Mo. 514, 26 S. W. 345.]
ishment, or in States whose constitutions, revised since public opinion had banished them, have forbidden cruel and unusual punishment. In such States the public sentiment must be regarded as having condemned them as "cruel," and any punishment which if ever employed at all, has become altogether obsolete, must certainly be looked upon as "unusual." 1

A defendant, however, in any case is entitled to have the precise punishment meted out to him which the law provides, and no other. A different punishment cannot be substituted on the ground of its being less in severity. Sentence to transportation for a capital offence would be void; and as the error in such a case would be in the judgment itself, the prisoner would be entitled to his discharge, and could not be tried again. 2 If, however, the legal punishment consists of two distinct and severable

1 In New Mexico it has been decided that flogging may be made the punishment for horse-stenting: Garcia v. Territory, 1 New Mex. 415; so for wife-beating. Ponte v. State, 39 Md. 201. For the non-payment of fine for unlicensed liquor selling, street labor may be imposed. Ex parte Bedell, 20 Mo. App. 125. See further as to unusual punishments, Ex parte Swann, 90 Mo. 44, 9 S. W. 10; People v. Haug, 68 Mich. 519, 37 N. W. 21.

The power in prison keepers to inflict corporal punishment for the misconduct of convicts cannot be delegated to contractors for convict labor or their managers. Cornell v. State, 6 Lea. 624. The keeper of a workhouse may not be authorized to inflict such punishment at his discretion. Smith v. State, 5 Lea. 711. A jailer may not chain up a prisoner for several hours by the neck so he cannot lie or sit. In re Hirdsong, 39 Fed. Rep. 569. [Punishment of death may be inflicted by electric shock. Re Kempler, 136 U. S. 436, 10 Sup. Ct. Rep. 930, aff. People v. Durston, 55 Hun, 64, 119 N. Y. 569, 24 N. E. 6, 16 Am. St. 859; McElvaine v. Brush, 142 U. S. 155, 12 Sup. Ct. Rep. 150, aff. 121 N. Y. 250, 24 N. E. 4. 0., 125 N. Y. 569, 26 N. E. 929; Re Storti, 178 Mass. 549, 60 N. E. 210, 52 L. R. A. 520. Permitting the warden to fix the particular day of execution does not render statute void upon the theory that such permission tends to aggravate the punishment. Id. A sentence fixing a maximum and minimum term of imprisonment, the prison board to determine when the prisoner shall be discharged within such limits, is not within the constitutional prohibition. Miller v. State, 140 Ind. 607, 49 N. E. 894, 40 L. R. A. 199. An act of Congress providing for the arrest, trial, and punishment of one as a "suspicious person" is invalid as providing a punishment without an offence, which is cruel and unusual. Stoutenburgh v. Frazier, 10 D. C. App. 220, 48 L. R. A. 220. An act providing the death penalty for assault upon a railway train with intent to commit robbery or other felony, does not prescribe a cruel or unusual punishment. Terr. of New Mexico v. Ketchum, 10 N. M. 718, 65 Pac. 109, 55 L. R. A. 90. A statute providing that any tramp who shall threaten to do injury to the person or property of any person shall be imprisoned in the State penitentiary, is not one providing for cruel or unusual punishments. State v. Hogan, 63 Ohio St. 202, 58 N. E. 572, 81 Am. St. 625.]

2 Bourne v. The King, 7 Ad. & El. 58; Lowenberg v. People, 27 N. Y. 335; Hartung v. People, 20 N. Y. 107; Elliott v. People, 13 Mich. 365; Ex parte Page, 49 Mo. 291; Christian v. Commonwealth, 5 Met. 539; Ex parte Lange, 18 Wall. 163; McDonald v. State, 45 Md. 90. See also Whitebread v. The Queen, 7 Q. B. 682; Rex v. Fletcher, Russ. & Ry. 68. It is competent, however, to provide by statute that on setting aside an erroneous sentence the court shall proceed to impose the sentence which the law required. Wilson v. People, 21 Mich. 410; McDonald v. State, 45 Md. 50.
things, — as fine and imprisonment, — the imposition of either is legal, and the defendant cannot be heard to complain that the other was not imposed also.\footnote{1 See Kane v. People, 8 Wend. 263. When one has been convicted and sentenced to confinement, it is not competent, after the period of his sentence has expired, to detain him longer in punishment for misbehavior in prison; and a statute to that effect is unwarranted. Gross v. Rice, 71 Mo. 211. The whole measure of punishment must be imposed at once. The judgment cannot be split up. People v. Felker, 61 Mich. 110, 114, 27 N. W. 869, 28 N. W. 83. Cumulative punishment may be imposed: Lillard v. State, 17 Tex. App. 114; State v. O'Neal, 53 Vt. 140, 2 Atl. 556, [sustained in 144 U. S. 323, 12 Sup. Ct. Rep. 693, but with very vigorous dissenting opinions from Field, Harlan, and Brewer, J.J. But see State v. Whitaker, 48 La. Ann. 527, 19 So. 457, 35 L. R. A. 561; Ex parte Keeler, 45 S. C. 537, 23 S. E. 865, 31 L. R. A. 678, 55 Am. St. 785, and People ex rel. Tweed v. Liscomb, 69 N. Y. 559, 19 Am. Rep. 211]; so increased punishment for second offence may be imposed. Kelly v. People, 115 III. 655, 4 N. E. 644; Chenowith v. Comm., 11 Ky. L. 561, 12 S. W. 585.}

\footnote{2 In Commonwealth v. Knapp, 9 Pick. 498, the court denied the application of the defendant that Mr. Rantoul should be assigned as his counsel, because, though admitted to the Common Pleas, he was not yet an attorney of the Supreme Court, and that court, consequently, had not the usual control over him; and, besides, counsel was to give aid to the court as well as to the prisoner, and therefore it was proper that a person of more legal experience should be assigned.}

\footnote{3 "Every counter is chargeable by the oath that he shall do no wrong nor falsity, (a) The right to compulsory process by which to secure witnesses in his favor is also an important right of the accused. Where the constitution secures this right, the witnesses thus compelled to appear do not thereby become entitled to claim the fees of the county. Henderson, Petitioner, in State v. Evans, 51 S. C. 331, 29 S. E. 5, 40 L. R. A. 421; Whittle v. Saluda Co., 60 S. C. 504, 38 S. E. 168. Where important witnesses for the accused are absent from the court without his fault, a continuance must be granted until they can be brought in. Ryder v. State, 100 Ga. 523, 28 S. E. 246, 38 L. R. A. 721, 62 Am. St. 331. But after a reasonable time and opportunity have been allowed for this purpose, the prosecution may be allowed to proceed upon the admission of the prosecutor that the witnesses for the accused would, if present, testify as accused alleged they would. It is not necessary to admit that such testimony is true. Atkins v. Commonwealth, 98 Ky. 529, 33 S. W. 948, 32 L. R. A. 108; Hoyt v. People, 140 III. 588, 39 N. E. 315, 16 L. R. A. 236, and note; State v. Gibbs, 10 Mont. 213, 25 Pac. 239, 10 L. R. A. 749, and note.}
it was their special duty to see that no wrong was done their clients by means of false or prejudiced witnesses, or through the perversion or misapplication of the law by the court. Strangely enough, however, the aid of this profession was denied in the very cases in which it was needed most, and it has cost a long struggle, continuing even into the present century, to rid the English law of one of its most horrible features. In civil causes and on the trial of charges of misdemeanor, the parties were entitled to the aid of counsel in eliciting the facts, and in presenting both the facts and the law to the court and jury; but when the government charged a person with treason or felony, he was denied this privilege. 1 Only such legal questions contrary to his knowledge, but shall plead for his client the best he can, according to his understanding.” Mirror of Justice, c. 2, § 5. The oath in Pennsylvania, on the admission of an attorney to the bar, “to behave himself in the office of an attorney, according to the best of his learning and ability, and with all fidelity, as well to the court as to his client; that he will use no falsehood, nor delay any man’s cause, for lucre or malice,” is said, by Mr. Sharswood, to present a comprehensive summary of his duties as a practitioner. Sharswood’s Legal Ethics, p. 3. The advocate’s oath, in Geneva, was as follows: “I solemnly swear, before Almighty God, to be faithful to the Republic, and to the canton of Geneva; never to depart from the respect due to the tribunals and authorities; never to counsel or maintain a cause which does not appear to be just or equitable, unless it be the defence of an accused person; never to employ, knowingly, for the purpose of maintaining the causes confided to me, any means contrary to truth, and never to seek to mislead the judges by any artifice or false statement of facts or law; to abstain from all offensive personality, and to advance no fact contrary to the honor and reputation of the parties, if it be not indispensable to the cause with which I may be charged; not to encourage either the commencement or continuance of a suit from any motives of passion or interest; nor to reject, for any consideration personal to myself, the cause of the weak, the stranger, or the oppressed.” In “The Lawyer’s Oath, its Obligations, and some of the Duties springing out of them,” by D. Bethune Duffield, Esq., a masterly analysis is given of this oath; and he well says of it: “Here you have the creed of an upright and honorable lawyer. The clear, terse, and lofty language in which it is expressed needs no argument to elucidate its principles, no eloquence to enforce its obligations. It has in it the sacred savor of divine inspiration, and sounds almost like a restored reading from Sinai’s original, but broken tablets.” 1 When an ignorant person, unaccustomed to public assemblies, and perhaps feeble in body or in intellect, was put upon trial on a charge which, whether true or false, might speedily consign him to an ignominious death, with able counsel arrayed against him, and all the machinery of the law ready to be employed in bringing forward the evidence of circumstances indicating guilt, it is painful to contemplate the barbarity which could deny him professional aid. Especially when in most cases he would be imprisoned immediately on being apprehended, and would thereby be prevented from making even the feeble preparations which might otherwise have been within his power. A “trial” under such circumstances would be only a judicial murder in very many cases. The spirit in which the old law was administered may be judged of from the case of Sir William Parkins, tried for high treason before Lord Holt and his associates in 1685, after the statute 7 Wm. III. c. 3, allowing counsel to prisoners indicted for treason, had been passed, but one day before it was to take effect. He prayed to be allowed counsel, and quoted the preamble to the statute that such allowance was just and reasonable. His prayer was denied; Lord
as he could suggest was counsel allowed to argue for him; and this was but a poor privilege to one who was himself unlearned in the law, and who, as he could not fail to perceive the monstrous injustice of the whole proceeding, would be quite likely to accept any perversion of the law that might occur in the course of it as regular and proper, because quite in the spirit that denied him a defence. Only after the Revolution of 1688 was a full defence allowed on trials for treason,¹ and not until 1836

¹ Holt declaring that he must administer the law as he found it, and could not anticipate the operation of an act of Parliament, even by a single day. The accused was convicted and executed. See Lieber's Hermeneutics, c. 4, § 15; Sedgwick on Stat. and Const. Law, 31. In proceedings by the Inquisition against suspected heretics the aid of counsel was expressly prohibited. Lea's Superstition and Force, 377.

¹ See an account of the final passage of this bill in Macaulay's “England,” Vol. IV. c. 21. It is surprising that the effort to extend the same right to all persons accused of felony was so strenuously resisted afterwards, and that, too, notwithstanding the best lawyers in the realm admitted its importance and justice. “I have myself,” said Mr. Scarlett, “often seen persons I thought innocent convicted, and the guilty escape, for want of some acute and intelligent counsel to show the bearings of the different circumstances on the conduct and situation of the prisoner.” House of Commons Debates, April 25, 1820. “It has lately been my lot,” said Mr. dennan, on the same occasion, “to try two prisoners who were deaf and dumb, and who could only be made to understand what was passing by the signs of their friends. The cases were clear and simple; but if they had been circumstantial cases, in what a situation would the judge and jury be placed, when the prisoner could have no counsel to plead for him.” The cases looked clear and simple to Mr. Denman; but how could he know they would not have looked otherwise, had the coloring of the prosecution been relieved by a counter-presentation for the defence? See Sydney Smith’s article on Counsel for Prisoners, 45 Edinb. Rev. p. 74; Works, Vol. II. p. 553. The plausible objection to extending the right was, that the judge would be counsel for the prisoner,—a pure fallacy at the best, and, with some judges, a frightful mockery. Baron Garrow, in a charge to a grand jury, said: “It has been truly said that, in criminal cases, judges were counsel for the prisoners. So, undoubtedly, they were, as far as they could be, to prevent undue prejudice, to guard against improper influence being excited against prisoners; but it was impossible for them to go further than this, for they could not suggest the course of defence prisoners ought to pursue; for judges only saw the deposition so short a time before the accused appeared at the bar of their country, that it was quite impossible for them to act fully in that capacity.” If one would see how easily, and yet in what a shocking manner, a judge might pervert the law and the evidence, and act the part of both prosecutor and king’s counsel, while assuming to be counsel for the prisoner, he need not go further back than the early trials in our own country, and he is referred for a specimen to the trials of Robert Tucker and others for piracy, before Chief Justice Trott at Charleston, S. C., in 1718, as reported in 6 State Trials (Evelyn), 156 et seq. Especially may he there see how the statement of prisoners in one case, to which no credit was given for their exculpation, was used as hearsay evidence to condemn a prisoner in another case. All these abuses would have been checked, perhaps altogether prevented, had the prisoners had able and fearless counsel. But without counsel for the defence, and under such a judge, the witnesses were not free to testify, the prisoners could not safely make even the most honest explanation, and the jury, when they retired, could only feel that returning a verdict in accordance with the opinion of the judge was merely matter of form. Sydney Smith’s lecture on “The judge that smites
was the same privilege extended to persons accused of other felonies.\(^1\)

With us it is a universal principle of constitutional law, that the prisoner shall be allowed a defence by counsel. And generally it will be found that the humanity of the law has provided that, if the prisoner is unable to employ counsel, the court may designate some one to defend him who shall be paid by the government; but when no such provision is made, it is a duty which counsel so designated owes to his profession, to the court engaged in the trial, and to the cause of humanity and justice, not to withhold his assistance nor spare his best exertions, in the defence of one who has the double misfortune to be stricken by poverty and accused of crime. No one is at liberty to decline such an appointment,\(^2\) and few, it is to be hoped, would be disposed to do so.

In guaranteeing to parties accused of crime the right to the aid of counsel, the Constitution secures it with all its accustomed incidents. Among these is that shield of protection which is thrown around the confidence the relation of counsel and client requires, and which does not permit the disclosure by the former, even in the courts of justice, of communications which may have contrary to the law" is worthy of being carefully pondered in this connection. "If ever a nation was happy, if ever a nation was visibly blessed by God, if ever a nation was honored abroad, and left at home under a government (which we can now conscientiously call a liberal government) to the full career of talent, industry, and vigor, we are at this moment that people, and this is our happy lot. First, the Gospel has done it, and then justice has done it; and he who thinks it his duty that this happy condition of existence may remain, must guard the pieté of these times, and he must watch over the spirit of justice which exists in these times. First, he must take care that the altars of God are not polluted, that the Christian faith is retained in purity and in perfection; and then, turning to human affairs, let him strive for spotless, incorruptible justice; praising, honouring, and loving the just judge, and abhorring as the worst enemy of mankind him who is placed there to 'judge after the law, and who suits contrary to the law.'"

1 By statute 6 & 7 Wm. IV. c. 114; 4 Couley's Bl. Com. 355; May's Const. Hist. c. 18.

2 Vice v. Hamilton County, 10 Ill. 18; Wayne Co. v. Waller, 90 Pa. St. 99, 35 Am. Rep. 636; House v. White, 5 Bax. 690. It has been held that, in the absence of express statutory provisions, counties are not obliged to compensate counsel assigned by the court to defend poor prisoners. Bacon v. Wayne County, 1 Mich. 401; Wayne Co. v. Waller, 90 Pa. St. 99, 35 Am. Rep. 636. But there are several cases to the contrary. Webb v. Baird, 6 Ind. 13; Hall v. Washington County, 2 Greene (Iowa), 473; Carpenter v. Dane County, 9 Wis. 277. But we think a court has a right to require the service, whether compensation is to be made or not; and that counsel who should decline to perform it, for no other reason than that the law does not provide pecuniary compensation, is unworthy to hold his responsible office in the administration of justice. Said Chief Justice Hale in one case: "Although serjeants have a monopoly of practice in the Common Pleas, they have a right to practice, and do practice, at this bar; and if we were to assign one of them as counsel, and he was to refuse to act, we should make bold to commit him to prison." Life of Chief Justice Hale, in Campbell's Lives of the Chief Justices, Vol. II.
been made to him by the latter, with a view to pending or anticipated litigation. This is the client's privilege; the counsel cannot waive it; and the court would not permit the disclosure even if the client were not present to take the objection. 1

Having once engaged in a cause, the counsel is not afterwards at liberty to withdraw from it without the consent of his client and of the court; and even though he may be impressed with a belief in his client's guilt, it will nevertheless be his duty to see that a conviction is not secured contrary to the law. 2 The worst

1 The history and reason of the rule which exempts counsel from disclosing professional communications are well stated in Whiting v. Barney, 30 N. Y. 330. And see 1 Phil. Ev., by Cowen, Hill, and Edwards, 130 et seq.; Earle v. Grant, 46 Vt. 113; Machette v. Vanless, 2 Col. 169. The privilege would not cover communications made, not with a view to professional assistance, but in order to induce the attorney to aid in a criminal act. People v. Biakely, 1 Park. Cr. R. 176; Bank of Utica v. Mersereau, 3 Barb. Ch. 398. And see the analogous case of Hewitt v. Prince, 21 Wend. 79. Nor communications before a crime with a view to being guided as to it. Orman v. State, 22 Tex. App. 604, 3 S. W. 468; People v. Van Alstine, 57 Mich. 69, 23 N. W. 594. But it is not confined to cases where litigation is begun or contemplated: Root v. Wright, 81 N. Y. 72; or to cases where a fee is received: Andrews v. Simms, 33 Ark. 771; Bacon v. Fisher, 80 N. Y. 391, 26 Am. Rep. 627; [Bruley v. Garvin, 105 Wis. 625, 81 N. W. 1038, 48 L. R. A. 839;] and is not waived by the party becoming a witness for himself. Dettenhofer v. State, 34 Ohio St. 91, 32 Am. Rep. 352; Sutton v. State, 16 Tex. App. 450; but see Jones v. State, 65 Miss. 170, 3 So. 379. Communications to a State's attorney with a view to a prosecution are privileged. Vogel v. Grunz, 110 U. S. 311, 4 Sup. Ct. Rep. 12. Communications extraneous or impertinent to the subject-matter of the professional consultation are not privileged. Dixon v. Parmele, 2 Vt. 155. See Brandon v. Gowing, 7 Rich. 455. Or communications publicly made in the presence of others. Hartford F. Ins. Co. v. Reynolds, 30 Mich. 502. See Perkins v. Grey, 65 Miss. 153; Moffatt v. Hardin, 22 S. C. 9; [Kramer v. Kister, 187 Pa. 227, 40 Atl. 1008, 44 L. R. A. 432.]; Or to the communications made to or by the attorney when acting for both parties. Hanlon v. Doherty, 100 Ind. 37, 9 N. E. 782; Cady v. Walker, 62 Mich. 167, 28 N. W. 805; Goodwin, & Co.'s Appeal, 117 Pa. St. 514, 12 Atl. 738. Or to an attorney if he acts as a mere scrivener. Smith v. Long, 106 Ill. 483; Todd v. Munson, 63 Conn. 679, 4 Atl. 99. Or facts within the personal knowledge of counsel, such as the dating of a bond. Rundall v. Foster, 3 Tenn. Ch. 608. The privilege extends to communications by other means than words: State v. Dawson, 90 Mo. 149, 1 S. W. 827; and to communications to a legal adviser, who is not a licensed attorney. Benedict v. State, 44 Ohio St. 679, 11 N. E. 123; Ladd v. Rice, 57 N. H. 374. [But see 1 Greenleaf on Evidence, ed. 16, § 239, and cases cited. See also People v. Barker, 60 Mich. 277, 27 N. W. 593, 1 Am. St. 501. It is waived by asking the attorney who drew a will to be a witness to it. Matter of Coleman, 111 N. Y. 229, 19 N. E. 71.] It has been intimated in New York that the statute making parties witnesses has done away with the rule which protects professional communications. Mitchell's Case, 12 Abb. Pr. R. 249; note to 1 Phil. Ev., by Cowen, Hill, and Edwards, 150 (marg.). Supposing this to be so in civil cases, the protection would still be the same in the case of persons charged with crime, for such persons cannot be compelled to give evidence against themselves, so that the reason for protecting professional confidence is the same as formerly.

2 If one would consider this duty and the limitations upon it fully, he should read the citations upon the conduct of Mr. Charles Phillips on the trial of Courvoisier for the murder of Lord William
criminal is entitled to be judged by the laws; and if his conviction is secured by means of a perversion of the law, the injury to the cause of public justice will be more serious and lasting in its results than his being allowed to escape altogether.  

But how persistent counsel may be in pressing for the acquittal of his client, and to what extent he may be justified in throwing his own personal character as a weight in the scale of justice, are questions of ethics rather than of law. No counsel is justifiable who defends even a just cause with the weapons of fraud and falsehood, and no man on the other hand can excuse himself for accepting the confidence of the accused, and then betraying it by a feeble and heartless defence. And in criminal cases we think the court may sometimes have a duty to perform in seeing that


1. There may be cases in which it will become the duty of counsel to interpose between the court and the accused, and fearlessly to brave all consequences personal to himself, where it appears to him that in no other mode can the law be vindicated and justice done to his client; but these cases are so rare, that doubtless they will stand out in judicial history as notable exceptions to the ready obedience which the bar should yield to the authority of the court. The famous scene between Mr. Justice Buller and Mr. Erskine, on the trial of the Dean of St. Asaph for libel,—5 Campbell's Lives of the Chancellors, c. 168; Erskine's Speeches, by Jas. L. High, Vol. I. p. 242,—will readily occur to the reader as one of the exceptional cases. Lord Campbell says of Erskine's conduct: "This noble stand for the independence of the bar would alone have entitled Erskine to the statue which the profession affectionately erected to his memory in Lincoln's Inn Hall. We are to admire the decency and propriety of his demeanor during the struggle, no less than its spirit, and the felicitous precision with which he meted out the requisite and justifiable portion of defiance. His example has had a salutary effect in illustrating and establishing the relative duties of judge and advocate in England." And elsewhere, in speaking of Mr. Fox's Libel Act, he makes the following somewhat extravagant remark: "I have said, and I still think, that this great constitutional triumph is mainly to be ascribed to Lord Camden, who had been fighting in the cause for half a century, and uttered his last words in the House of Lords in its support; but had he not received the invaluable assistance of Erskine, as counsel for the Dean of St. Asaph, the Star Chamber might have been re-established in this country." And Lord Brougham says of Erskine: "He was an undaunted man; he was an undaunted advocate. To no court did he ever truckle, neither to the court of the King, neither to the court of the King's Judges. Their smiles and their frowns he disregarded alike in the fearless discharge of his duty. He upheld the liberty of the peers against the one; he defended the rights of the people against both combined to destroy them. If there be yet amongst us the power of freely discussing the acts of our rulers; if there be yet the privilege of meeting for the promotion of needful reforms; if he who desires wholesome changes in our Constitution be still recognized as a patriot, and not doomed to die the death of a traitor, — let us acknowledge with gratitude that to this great man, under Heaven, we owe this felicity of the times." Sketches of Statesmen of the Time of George III. A similar instance of the independence of counsel is narrated of that eminent advocate, Mr. Samuel Dexter, in the reminiscences of his life by "Sigma," published at Boston, 1857, p. 61. See Stor on Const. (4th ed.) § 1064, note.
the prisoner suffers nothing from inattention or haste on the part of his counsel, or impatience on the part of the prosecuting officer or of the court itself. Time may be precious to the court; but it is infinitely more so to him whose life or whose liberty may depend upon the careful and patient consideration of the evidence; when the counsel for the defence is endeavoring to sift the truth from the falsehood, and to subject the whole to logical analysis, so as to show that how suspicious soever the facts may be, they are nevertheless consistent with innocence. Often indeed it must happen that the impression of the prisoner’s guilt, which the judge and the jury unavoidably receive when the case is opened to them by the prosecuting officer, will, insensibly to themselves, color all the evidence in the case, so that only a sense of duty will induce a due attention to the summing up for the prisoner, which after all may prove unexpectedly convincing. Doubtless the privilege of counsel is sometimes abused in these cases; we cannot think an advocate of high standing and character has a right to endeavor to rob the jury of their opinion by asseverating his own belief in the innocence of his client; and cases may arise in which the court will feel compelled to impose some reasonable restraints upon the address to the jury; but it is better in these cases to err on the side of liberality; and restrictions which do not leave to counsel, who are apparently acting in good faith, such reasonable time and opportunity as they may deem necessary for presenting their client’s case fully, may possibly in some cases be so far erroneous in law as to warrant setting aside a verdict of guilty.

Whether counsel are to address the jury on questions of law in criminal cases, generally, is a point which is still in dispute. If the jury in the particular case, by the constitution or statutes of the State, are judges of the law, it would seem that counsel should be allowed to address them fully upon it, though the contrary seems to have been held in Maryland: while in Massachusetts where it is expected that the jury will receive the law from the

1 Thus it has been held, that, even though the jury are the judges of the law in criminal cases, the court may refuse to allow counsel to read law books to the jury. Murphy v. State, 6 Ind. 420; And see Lynch v. State, 9 Ind. 541; Phenix Ins. Co. v. Allen, 11 Mich. 501.

2 In People v. Keenan, 13 Cal. 581, a verdict in a capital case was set aside on this ground.

3 Lynch v. State, 9 Ind. 541; Murphy v. State, 6 Ind. 490.

4 Franklin v. State, 12 Md. 236. What was held there was, that counsel should not argue the constitutionality of a statute to the jury; and that the Constitution, in making the jury judges of the law, did not empower them to decide a statute invalid. This ruling corresponds to that of Judge Chase in United States v. Callendar, Whart. State Trials, 668, 710. But see remarks of Perkins, J., in Lynch v. State, 9 Ind. 542.
court, it is nevertheless held that counsel has a right to address them upon the law. ¹ It is unquestionably more decorous and more respectful to the bench that argument upon the law should always be addressed to the court; and such, we believe, is the general practice. The jury hear the argument, and they have a right to give it such weight as it seems to them properly to be entitled to.

For misconduct in their practice, the members of the legal profession may be summarily dealt with by the courts, who will not fail, in all proper cases, to use their power to protect clients or the public, as well as to preserve the profession from the contamination and disgrace of a vicious associate. ² A man of bad reputation may be expelled for that alone; ³ and counsel who has ¹ Commonwealth v. Porter, 10 Met. 263; Commonwealth v. Austin, 7 Gray, 51.

² As a class, attorneys are supposed to be, and in fact have always been, the vindicators of individual rights, and the fearless assertors of the principles of civil liberty, existing, where alone they can exist, in a government, not of parties nor of men, but of laws. On the other hand, to declare them irresponsible to any power but public opinion and their conscience, would be incompatible with free government. Individuals of the class may, and sometimes do, forfeit their professional franchise by abusing it; and a power to exact the forfeiture must be lodged somewhere. Such a power is indispensable to protect the court, the administration of justice, and themselves. Abuses must necessarily creep in; and, having a deep stake in the character of their profession, they are vitally concerned in preventing it from being sullied by the misconduct of unworthy members of it. No class of the community is more dependent on its reputation for honor and integrity. It is indispensable to the purposes of its creation to assign it a high and honorable standing; but to put it above the judiciary, whose official tenure is good behavior and whose members are removable from office by the legislature, would render it intractable; and it is therefore necessary to assign it but an equal share of independence. In the absence of specific provision to the contrary, the power of removal is, from its nature, commensurate with the power of appointment, and it is consequently the business of the judges to deal with delinquent members of the bar, and withdraw their facilities when they are incorrigible." Gibson, Ch. J., In re Austin et al., 5 Rawle, 191, 293, 28 Am. Dec. 657. See State v. Kirke, 12 Fla. 278; Rice's Case, 18 B. Monr. 472; Walker v. State, 4 W. Va. 749.

An attorney may be disbarred for a personal attack upon the judge for his conduct as much; but the attorney is entitled to notice, and an opportunity to be heard in defense. Beene v. State, 22 Ark. 149. See In re Wallace, L. R. 1 P. C. 283; Ex parte Bradley, 7 Wall. 304; Withers v. State, 35 Ala. 252; Matter of Moore et al., 63 N. C. 387; Ex parte Biggs, 61 N. C. 202; Bradley v. Fisher, 13 Wall. 333; Dickens's Case, 67 Pa. St. 169.

³ For example, one whose reputation for truth and veracity is such that his neighbors would not believe him when under oath. Matter of Mills, 1 Mich. 393. See In re Percy, 36 N. Y. 551; People v. Ford, 64 Ill. 520. An attorney convicted and punished for perjury, and disbarred, was refused restoration, notwithstanding his subsequent behavior had been unexceptionable. Ex parte Garbett, 18 C. B. 493. See Matter of McCarthy, 42 Mich 71, 51 N. W. 963; Ex parte Walls, 64 Ind. 401. An attorney disbarred for collusion to procure false testimony, Matter of Gale, 75 N. Y. 520. See Matter of Eldridge, 82 N. Y. 161. 37 Am. Rep. 598. For inducing a commissioner to admit to bail without right a convicted prisoner. State v. Burr, 19 Neb. 593, 28 N. W. 261. For antedating jurat and acknowledgment. Matter of
once taken part in litigation, and been the adviser or become entrusted with the secrets of one party, will not afterwards be suffered to engage for an opposing party, notwithstanding the original employment has ceased, and there is no imputation upon his motives.¹ And, on the other hand, the court will not allow counsel to be made the instrument of injustice, nor permit the client to exact of him services which are inconsistent with the obligation he owes to the court and to public justice,—a higher and more sacred obligation than any which can rest upon him to gratify a client's whims, or to assist in his revenge.²

Arctander, 26 Minn. 25, 1 N. W. 43. For embezzlement of client's papers, though he has settled with client. In re Davies, 93 Pa. St. 116. For want of fidelity to client. Matter of Wool, 30 Mich. 290; Strout v. Proctor, 71 Me. 268; Slemmer v. Wright, 54 Iowa, 164, 6 N. W. 181; People v. Murphy, 119 Ill. 159, 6 N. E. 488. If he commits a crime in his professional capacity he may be disbarred, though he has not been convicted of the crime. State v. Winton, 11 Oreg. 466, 5 Pac. 337. Even if it is not committed as an attorney. The rule is not inflexible that he must be convicted before disbarment. Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. Rep. 589; Delano's Case, 58 N. H. 5. See Ex parte Steinma., 96 Pa. St. 220. One may be disbarred for publishing a libel on the court unless some constitutional or statutory provision forbids. State v. McLaugherty, 33 W. Va. 250, 10 S. E. 407.

¹ In Gaulden v. State, 11 Ga. 47, the late solicitor-general was not suffered to assist in the defence of a criminal case, because he had, in the course of his official duty, instituted the prosecution, though he was no longer connected with it. And see Wilson v. State, 10 Ind. 392. A late city attorney for accepting a retainer not to appear for the city in certain cases against it, appealed by him while such attorney, was suspended for six months from practice. In re Cowdery, 93 Cal. 52, 10 Pac. 47.

² Upon this subject the remarks of Chief Justice Gibson in Rush v. Cavanaugh, 2 Pa. St. 189, are worthy of being repeated in this connection. The prosecutor in a criminal case had refused to pay the charges of the counsel employed by him to prosecute in the place of the attorney-general, because the counsel, after a part of the evidence had been put in, had consented that the charge might be withdrawn. In considering whether this was sufficient reason for the refusal, the learned judge said: "The material question is, did the plaintiff violate his professional duty to his client in consenting to withdraw his charge, . . . instead of lending himself to the prosecution of one whom he then and has since believed to be an innocent man? "It is a popular but gross mistake to suppose that a lawyer owes no fidelity to any one except his client, and that the latter is the keeper of his professional conscience. He is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as to the client; and he violates it when he consciously presses for an unjust judgment; much more so when he presses for the conviction of an innocent man. But the prosecution was depending before an alderman, to whom, it may be said, the plaintiff was bound to no such fidelity. Still he was bound by those obligations which, without oaths, rest upon all men. The high and honorable office of a counsel would be degraded to that of a mercenary, were he compellable to do the bidding of his client against the dictates of his conscience. The origin of the name proves the client to be subordinate to his counsel as his patron. Besides, had the plaintiff succeeded in having Cream held to answer, it would have been his duty to abandon the prosecution at the return of the recognizance. As the office of attorney-general is a public trust which involves, in the discharge of it, the exercise of an almost boundless discretion by an officer who stands as impartial as a judge, it might be doubted whether counsel retained by a private
The Writ of Habeas Corpus.

It still remains to mention one of the principal safeguards to personal liberty, and the means by which illegal restraints upon it are most speedily and effectually remedied. To understand this guaranty, and the instances in which the citizen is entitled to appeal to the law for its enforcement, we must first have a correct idea of what is understood by personal liberty in the law, and inquire what restraints, if any, must exist to its enjoyment.

Sir William Blackstone says, personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. It appears, therefore, that this power of locomotion is not entirely unrestricted, but that by due course of law certain qualifications and limitations may be imposed upon it without infringing upon constitutional liberty. Indeed, in organized society, liberty is the creature of law, and every man will possess it in proportion as the laws, while imposing no unnecessary restraints, surround him and every other citizen with protections against the lawless acts of others.

Prosecutor can be allowed to perform any part of his duty; certainly not unless in subservience to his will and instructions. With that restriction, usage has sanctioned the practice of employing professional assistants, to whom the attorney-general or his regular substitute may, if he please, confide the direction of the particular prosecution; and it has been beneficial to do so where the prosecuting officer has been overmatched or overborne by numbers. In that predicament the ends of justice may require him to accept assistance. But the professional assistant, like the regular deputy, exercises not his own discretion, but that of the attorney-general, whose locum tenens at sufferance he is; and he consequently does so under the obligation of the official oath. And see Meister v. People, 31 Mich. 39. [In furtherance of the full discharge of the duties which an attorney owes to his client and to the court, he is granted certain privileges. One is to be exempt from the service of process while attending upon the court and in going to and returning from the same. Hoffman v. Judge of Circuit Court, 113 Mich. 109, 71 N. W. 480; 38 L. R. A. 663; 67 Am. St. 458. Similar exemption in regard to service of summons and other civil process extends to parties and witnesses. Mulhearn v. Press Publishing Co., 63 N. J. L. 158, 21 Atl. 186, 11 L. R. A. 101.]

1 1 Bl. Com. 134. Montesquieu says: "In governments, that is, in societies directed by laws, liberty can consist only in the power of doing what we ought to will, and in not being constrained to do what we ought not to will. We must have continually present to our minds the difference between independence and liberty. Liberty is a right of doing whatever the laws permit, and if a citizen could do what they forbid, he would no longer be possessed of liberty, because all his fellow-citizens would enjoy the same power." Spirit of the Laws, Book 11, c. 3.

2 "Liberty," says Mr. Webster, "is the creature of law, essentially different from that authorized licentiousness that trespasses on right. It is a legal and a refined idea, the offspring of high civilization, which the savage never understood, and never can understand. Liberty exists in proportion to wholesome restraint; the more restraint on others to keep off from us, the more liberty we have. It is an error to suppose that lib-
In examining the qualifications and restrictions which the law imposes upon personal liberty, we shall find them classed, according to their purpose, as, first, those of a public, and, second, those of a private nature.

The first class are those which spring from the relative duties and obligations of the citizen to society and to his fellow-citizens. These may be arranged into sub-classes as follows: (1) Those imposed to prevent the commission of crime which is threatened; (2) those in punishment of crime committed; (3) those in punishment of contempts of court or legislative bodies, or to render their jurisdiction effectual; (4) those necessary to enforce the duty citizens owe in defence of the State; (5) those which may become important to protect the community against the acts of those who, by reason of mental infirmity, are incapable of self-control. All these limitations are well recognized and generally understood, but a particular discussion of them does not belong to our subject. The second class are those which spring from the helpless or dependent condition of individuals in the various relations of life.

1. The husband, at the common law, is recognized as having legal custody of and power of control over the wife, with the right to direct as to her labor, and to insist upon its performance. The precise nature of the restraints which may be imposed by the husband upon the wife’s actions, it is not easy, from the nature of the case, to point out and define; but at most they can only be such gentle restraints upon her liberty as improper conduct on her part may appear to render necessary; and the general tendency of public sentiment, as well as of the modern decisions, has been in the direction of doing away with the arbitrary power which the husband was formerly supposed to possess, and of placing

1 In Judson v. Keardon, 16 Minn. 431, a statute authorizing the members of a municipal council to arrest and imprison without warrant persons refusing to obey the orders of fire wardens at a fire was held unwarranted and void.

2 Kent, 181. See Cochran’s Case, 3 Dowl. P. C. 630. The husband, however, is under no obligation to support his wife except at his own home; and it is only when he wrongfully sends her away, or so conducts himself as to justify her in leaving him, that he is bound to support her elsewhere. Runney v. Keyes, 7 N. H. 570; Allen v. Aldrich, 29 N. H. 63; Shaw v. Thompson, 16 Pick. 192; Clement v. Mattison, 3 Rich. 93. In such a case his liability to supply her with necessaries cannot be restricted by giving notice to particular persons not to trust her. Bolton v. Prentif, 2 Strange, 1214; Harris v. Morris, 4 Esp. 41; Watkins v. De Armond, 89 Ind. 533.
the two sexes in the marriage relation upon a footing nearer equality. It is believed that the right of the husband to chastise the wife, under any circumstances, would not be recognized in this country; and such right of control as the law gives him would in any case be forfeited by such conduct towards the wife as was not warranted by the relation, and which should render it improper for her to live and cohabit with him, or by such conduct as, under the laws of the State, would entitle her to a divorce. And he surrenders his right of control also, when he consents to her living apart under articles of separation.

2. The father of an infant, being obliged by law to support his child, has a corresponding right to control his actions, and to employ his services during the continuance of legal infancy. The child may be emancipated from this control before coming of age, either by the express assent of the father, or by being turned away from his father’s house, and left to care for himself; though in neither case would the father be released from an obligation which the law imposes upon him to prevent the child becoming a public charge, and which the State may enforce whenever necessary. The mother, during the father’s life, has a power of control subordinate to his; but on his death, or conviction and sentence to imprisonment for felony, she succeeds to the relative rights which the father possessed before. (a)

3. The guardian has a power of control over his ward, corresponding in the main to that which the father has over his child, though in some respects more restricted, while in others it is broader. The appointment of guardian, when made by the courts, (a) [Upon the principle that an ounce of prevention is worth a pound of cure, the State is asserting more and more control over children allowed by their parents to grow up in evil associations, and for the prevention of crime to which such courses so strongly tend recent statutes authorize the summary arrest and detention, in reform schools and like institutions, of youth of incorrigibly vicious habits. Such detention is not looked upon as imprisonment and punishment to the validity of which a jury trial is necessary. State v. Brown, 50 Minn. 353, 52 N..W. 943, 36 Am. St. 631, 10 L. R. A. 691, and note on commitment of minors to reformatories without conviction of crime. To the same effect, see Lee v. McClelland, 157 Ind. 84, 60 N. E. 692.]
is of local force only, being confined to the State in which it is made, and the guardian would have no authority to change the domicile of the ward to another State or country. But the appointment commonly has reference to the possession of property by the ward, and over this property the guardian is given a power of control which is not possessed by the father, as such, over the property owned by his child.¹

4. The relation of master and apprentice is founded on a contract between the two, generally with the consent of the parent or party standing in loco parentis to the latter, by which the master is to teach the apprentice some specified trade or means of living, and the apprentice, either wholly or in part in consideration of the instruction, is to perform services for the master while receiving it. This relation is also statutory and local, and the power to control the apprentice is assimilated to that of the parent by the statute law.²

5. The power of the master to impose restraints upon the action of the servant he employs is of so limited a nature that practically it may be said to rest upon continuous voluntary assent. If the servant misconducts himself, or refuses to submit to proper control, the master may discharge him, but cannot resort to confinement or personal chastisement.

6. The relation of teacher and scholar places the former more nearly in the place of the parent than either of the two preceding relations places the master. While the pupil is under his care, he has a right to enforce obedience to his commands lawfully given in his capacity of teacher, even to the extent of bodily chastisement or confinement. And in deciding questions of discipline he acts judicially, and is not to be made liable, either civilly or criminally, unless he has acted with express malice, or been guilty of such excess in punishment that malice may fairly be implied. All presumptions favor the correctness and justice of his action.³

7. Where parties bail another, in legal proceedings, they are regarded in law as his jailers, selected by himself, and with the

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¹ Cooley's Bl. Com. 462, and cases cited.
² The relation is one founded on personal trust and confidence, and the master cannot assign the articles of apprenticeship except by consent of the apprentice and of his proper guardian. Haley v. Taylor, 3 Dana, 222; Nickerson v. Howard, 19 Johns. 113; Tucker v. Magee, 18 Ala. 93.
right to his legal custody for the purpose of seizing and delivering him up to the officers of the law at any time before the liability of the bail has become fixed by a forfeiture being judicially declared on his failure to comply with the condition of the bond. This is a right which the bail may exercise in person or by agent, and without resort to judicial process.  

8. The control of the creditor over the person of his debtor, through the process which the law gives for the enforcement of his demand, is now very nearly abolished, thanks to the humane provisions which have been made of late by statute or by constitution. In cases of torts and where debts were fraudulently contracted, or where there is an attempt at a fraudulent disposition of property with intent to delay the creditor, or to deprive him of payment, the body of the debtor is allowed to be seized and confined; but the reader must be referred to the constitution and statutes of his State for specific information on this subject. (a)

These, then, are the legal restraints upon personal liberty. For any other restraint, or for any abuse of the legal rights which have been specified, the party restrained is entitled to immediate process from the courts, and to speedy relief.

The right to personal liberty did not depend in England on any statute, but it was the birthright of every freeman. As slavery ceased it became universal, and the judges were bound to protect it by proper writ when infringed. But in those times when the power of Parliament was undefined and in dispute, and the judges held their offices only during the king's pleasure, it was almost a matter of course that rights should be violated, and that legal redress should be impracticable, however clear those rights might be. But in many cases it was not very clear what the legal

1 Harp v. Osgood, 2 Hill, 219; Commonwealth v. Brickett, 8 Pick. 158; Worthen v. Prescott, 60 Vt. 68, 11 Atl. 690. The principal may be followed, if necessary, out of the jurisdiction of the court in which the bail was taken, and arrested wherever found. Parker v. Bidwell, 3 Conn. 84. Even though it be out of the State. Harp v. Osgood, supra. And doors, if necessary, may be broken in order to make the arrest. Read v. Casey, 4 Conn. 104, 10 Am. Dec. 110; Nicolls v. Ingersoll, 7 Johns. 146. After the recognition is defaulted, surrender does not discharge the bail. State v. McGuire, 16 R. I. 519, 17 Atl. 918. Nor will surrender discharge surety on bond for the support of a retarded wife. Miller v. Com., 127 Pa. St. 122, 17 Atl. 964.

2 Parker v. Bidwell, 3 Conn. 81; Nicolls v. Ingersoll, 7 Johns. 145; Worthen v. Prescott, 60 Vt. 68, 11 Atl. 690.

(a) [Obligation arising under order of court to pay money for support of a husband, is not a debt. Livingston v. Los Angeles Sup. Ct., 117 Cal. 633, 49 Pac. 806, 38 L. R. A. 175. And a defendant may be imprisoned for refusing to pay alimony as ordered. Barclay v. Barclay, 184 Ill. 275, 56 N. E. 636, 61 L. R. A. 351; State v. Cook, 66 Ohio, 606, 64 N. E. 597. Person removing baggage from hotel or lodging-house when such baggage is subject to lien for unpaid bills may be punished by imprisonment. State v. Engle, 150 Ind. 339, 58 N. E. 998.]
rights of parties were. The courts which proceeded according to the course of the common law, as well as the courts of chancery, had limits to their authority which could be understood, and a definite course of proceeding was marked out for them by statute or by custom; and if they exceeded their jurisdiction and invaded the just liberty of the subject, the illegality of the process would generally appear in the proceedings. But there were two tribunals unknown to the common law, but exercising a most fearful authority, against whose abuses it was not easy for the most upright and conscientious judge in all cases to afford relief. These were, 1. The Court of Star Chamber, which became fully recognized and established in the time of Henry VII., though originating long before. Its jurisdiction extended to all sorts of offences, contempt of authority and disorders, the punishment of which was not supposed to be adequately provided for by the common law; such as slanders of persons in authority, the propagation of seditious news, refusal to lend money to the king, disregard of executive proclamations, &c. It imposed fines without limit, and inflicted any punishment in the discretion of its judges short of death. Even jurors were punished in this court for verdicts in State trials not satisfactory to the authorities. Although the king's chancellor and judges were entitled to seats in this court, the actual exercise of its powers appears to have fallen into the hands of the king's privy council, which sat as a species of inquiry, and exercised almost any authority it saw fit to assume.¹ The court was abolished by the Long Parliament in 1641. 2. The Court of High Commission, established in the time of Elizabeth, and which exercised a power in ecclesiastical matters corresponding to that which the Star Chamber assumed in other cases, and in an equally absolute and arbitrary manner. This court was also abolished in 1641, but was afterwards revived for a short time in the reign of James II.

It is evident that while these tribunals existed there could be no effectual security to liberty. A brief reference to the remarkable struggle which took place during the reign of Charles I. will perhaps the better enable us to understand the importance of those common-law protections to personal liberty to which we shall have occasion to refer, and also of those statutory securities which have since been added.

¹ See Hallam, Constitutional History, c. 1 and 8; Todd, Parliamentary Government in England, Vol. II. c. 1. The rise and extension of authority of this court, and its arbitrary character, are very fully set forth in Brodie's Constitutional History of the British Empire, to which the reader is referred for more particular information.
When the king attempted to rule without the Parliament, and in 1625 dissolved that body, and resorted to forced loans, the grant of monopolies, and the levy of ship moneys, as the means of replenishing a treasury that could only lawfully be supplied by taxes granted by the commons, the privy council was his convenient means of enforcing compliance with his will. Those who refused to contribute to the loans demanded were committed to prison. When they petitioned the Court of the King’s Bench for their discharge, the warden of the Fleet made return to the writ of habeas corpus that they were detained by warrant of the privy council, informing him of no particular cause of imprisonment, but that they were committed by the special command of his majesty. Such a return presented for the decision of the court the question, “Is such a warrant, which does not specify the cause of detention, valid by the laws of England?” The court held that it was, justifying their decision upon supposed precedents, although, as Mr. Hallam says, “it was evidently the consequence of this decision that every statute from the time of Magna Charta, designed to protect the personal liberties of Englishmen, became a dead letter, since the insertion of four words in a warrant (per speciale mandatum regis), which might become matter of form, would control their remedial efficacy. And this wound was the more deadly in that the notorious cause of these gentlemen’s imprisonment was their withstanding an illegal exaction of money. Everything that distinguished our constitutional laws, all that rendered the name of England valuable, was at stake in this issue.”

This decision, among other violent acts, led to the Petition of Right, one of the principal charters of English liberty, but which was not assented to by the king until the judges had intimated that if he saw fit to violate it by arbitrary commitments, they would take care that it should not be enforced by their aid against his will. And four years later, when the king committed members of Parliament for words spoken in debate offensive to the royal prerogative, the judges evaded the performance of their duty on habeas corpus, and the members were only discharged when the king gave his consent to that course.

The Habeas Corpus Act was passed in 1679, mainly to prevent such abuses and other evasions of duty by judges and ministerial officers, and to compel prompt action in any case in which illegal imprisonment was alleged. That act gave no new right to the

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1 Hallam, Const. Hist. c. 7. See also Brodie, Const. Hist. Vol. II. c. 1.
subject, but it furnished the means of enforcing those which existed before. The preamble recited that "whereas great delays have been used by sheriffs, jailers, and other officers to whose custody any of the king's subjects have been committed for criminal or supposed criminal matters, in making returns of writs of *habeas corpus*, to them directed, by standing out on *alias* or *pluries habeas corpus*, and sometimes more, and by other shifts to avoid their yielding obedience to such writs, contrary to their duty and the known laws of the land, whereby many of the king's subjects have been and hereafter may be long detained in prison in such cases, where by law they are bailable, to their great charge and vexation. For the prevention whereof, and the more speedy relief of all persons imprisoned for any such criminal or supposed criminal matters," the act proceeded to make elaborate and careful provisions for the future. The important provisions of the act may be summed up as follows: That the writ of *habeas corpus* might be issued by any court of record or judge thereof, either in term-time or vacation, on the application of any person confined, or of any person for him; the application to be in writing and on oath, and with a copy of the warrant of commitment attached, if procurable; the writ to be returnable either in court or at chambers; the person detaining the applicant to make return to the writ by bringing up the prisoner with the cause of his detention, and the court or judge to discharge him unless the imprisonment appeared to be legal, and in that case to take bail if the case was bailable; and performance of all these duties was made compulsory, under heavy penalties. Thus the duty which the judge or other officer might evade with impunity before, he must now perform or suffer punishment. The act also provided for punishing severely a second commitment for the same cause, after a party had once been discharged on *habeas corpus*, and also made the sending of inhabitants of England, Wales, and Berwick-upon-Tweed abroad for imprisonment illegal, and subject to penalty. Important as this act was, it was less broad in its scope than the remedy had been before, being confined to cases of imprisonment for criminal or supposed criminal matters; but the attempt in Parliament nearly a century later to extend its provisions to other

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1 Hallam, Const. Hist. c. 18; Beeching's Case, 4 B. & C. 136; Matter of Jackson, 15 Mich. 436. [For a valuable article on the History of the Writ of *Habeas Corpus*, see 18 Law Quar. Rev. 61.]

2 Mr. Hurl, in the appendix to his excellent treatise on the Writ of *Habeas Corpus*, gives a complete copy of the act. See also appendix to Lieber, Civil Liberty and Self-Government; Broom, Const. Law, 218.

3 See Mayor of London's Case, 3 Wils. 198; Wilson's Case, 7 Queen's Bench Rep. 984.
cases was defeated by the opposition of Lord Mansfield, on the express ground that it was unnecessary, inasmuch as the common-law remedy was sufficient; as perhaps it might have been, had officers been always disposed to perform their duty. Another attempt in 1816 was successful.

The Habeas Corpus Act was not made, in express terms, to extend to the American colonies, but it was in some expressly, and in others by silent acquiescence, adopted and acted upon, and all the subsequent legislation in the American States has been based upon it, and has consisted in little more than a re-enactment of its essential provisions.

What Courts issue the Writ.

The protection of personal liberty is for the most part confided to the State authorities, and to the State courts the party must apply for relief on habeas corpus when illegally restrained. There are only a few cases in which the federal courts can interfere; and those are cases in which either the illegal imprisonment is under pretence of national authority, or in which this process becomes important or convenient in order to enforce or vindicate some right, or authority under the Constitution or laws of the United States.

The Judiciary Act of 1789 provided that each of the several federal courts should have power to issue writs of seire facias, habeas corpus, and all other writs not specially provided for by statute, which might be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law; and that either of the justices of the Supreme Court, as well as the district judges, should have power to grant writs of habeas corpus for the purposes of an inquiry into the cause of commitment; provided that in no case should such writs extend to prisoners in jail, unless where they were in custody under or by color of the authority of the United States, or were committed to trial before some court of the same, or were necessary to be brought into court to testify. Under this statute no court of the United States or judge thereof could issue a habeas corpus to bring up a prisoner in custody under a sentence or execution of a State court, for any other purpose than to be used as a witness. And this was so whether the imprisonment was under civil or criminal process.

1 Life of Mansfield by Lord Campbell, 2 Lives of Chief Justices, c. 35; 15 H. of Sard’s Debates, 897 et seq. 2 By Stat. 50 Geo. III. c. 100. See Broom, Const. Law, 224. 3 1 Statutes at Large, 81. 4 Ex parte Dorr, 3 How. 103.
During what were known as the nullification troubles in South Carolina, the defect of federal jurisdiction in respect to this writ became apparent, and another act was passed, having for its object, among other things, the protection of persons who might be prosecuted under assumed State authority for acts done under the laws of the United States. This act provided that either of the justices of the Supreme Court, or a judge of any District Court of the United States, in addition to the authority already conferred by law, should have power to grant writs of habeas corpus in all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined on or by any authority of law, for any act done or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof.\(^1\)

In 1842 further legislation seemed to have become a necessity, in order to give to the federal courts authority upon this writ over cases in which questions of international law were involved, and which, consequently, could properly be disposed of only by the jurisdiction to which international concerns were by the Constitution committed. The immediate occasion for this legislation was the arrest of a subject of Great Britain by the authorities of the State of New York, for an act which his government avowed and took the responsibility of, and which was the subject of diplomatic correspondence between the two nations. An act of Congress was consequently passed, which provides that either of the justices of the Supreme Court, or any judge of any District Court of the United States in which a prisoner is confined, in addition to the authority previously conferred by law, shall have power to grant writs of habeas corpus in all cases of any prisoner or prisoners in jail or confinement, where he, she, or they, being subjects or citizens of a foreign State, and domiciled therein,

\(^1\) 4 Stat. at Large, 634. See *Ex parte* Robinson, 6 McLean, 355, 1 Bond, 39. Robinson was United States marshal, and was imprisoned under a warrant issued by a State court for executing process under the Fugitive Slave Law, and was discharged by a justice of the Supreme Court of the United States under this act. See also United States *v.* Jailer of Fayette Co., 2 Abb. U. S. 265. The relator in that case was in custody of the jailer under a regular commitment charging him under the laws of Kentucky with murder. He averred and offered to show that the act with which he was charged was done by him under the authority of the United States, and in execution of its laws. The federal district judge entered upon an examination of the facts on habeas corpus, and ordered the relator discharged. A similar ruling has been made where a marshal was charged in a State court with murder committed while protecting a Justice of the Supreme Court from an attack. *In re Neagle*, 39 Fed. Rep. 853, aff. 135 U. S. 1, 10 Sup. Ct. Rep. 658. See also *Ex parte* Virginia, 100 U. S. 339; *Ex parte* Siebold, 100 U. S. 371; *Ex parte* Clark, 100 U. S. 399; *Ex parte* Bridges, 2 Woods, 428; *Ex parte* McLean, 3 Hughes, 23; *Ex parte* Jenkins, 2 Wall. Jr. 521.
shall be committed, or confined, or in custody, under, or by any authority, or law, or process founded thereon, of the United States or of any one of them, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, or order, or sanction of any foreign State or sovereignty, the validity or effect whereof depends upon the law of nations, or under color thereof.\(^1\)

In 1867 a further act was passed, which provided that the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States.\(^2\)

These are the cases in which the national courts and judges have jurisdiction of this writ: in other cases the party must seek his remedy in the proper State tribunal.\(^3\) And although the State courts formerly claimed and exercised the right to inquire into the lawfulness of restraint under the national authority,\(^4\) it is now settled by the decision of the Supreme Court of the United States, that the question of the legality of the detention in such cases is one for the determination, exclusively, of the federal judiciary, so that, although a State court or judge may issue this process in any case where illegal restraint upon liberty is alleged, yet when it is served upon any officer or person who detains another in custody under the national authority, it is his duty, by proper return, to make known to the State court or judge the authority by which he holds such person, but not further to obey

\(^{1}\) 5 Stat. at Large, 539. McLeod’s Case, which was the immediate occasion of the passage of this act, will be found reported in 25 Wend. 482, and 1 Hill, 377, 37 Am. Dec. 328. It was reviewed by Judge Talmadge in 25 Wend. 663, and a reply to the review appears in 3 Hill, 635.


\(^{3}\) \textit{Ex parte Dorr}, 3 How. 103; Barry \textit{v.} Marceen, 5 How. 103; De Krafft \textit{v.} Barney, 2 Black, 704. See United States \textit{v.} French, 1 Gail. 1; \textit{Ex parte Barry}, 2 How. 65. [For valuable note upon habeas corpus, collecting many cases, see 43 L. ed. U. S. 92.]

\(^{4}\) See the cases collected in Hurd on Habeas Corpus. B. 2, c. 1, § 5, and in Abb. Nat. Dig. 1090, note.
the process; and that as the State judiciary have no authority within the limits of the sovereignty assigned by the Constitution to the United States, the State court or judge can proceed no further with the case.\(^1\)

The State constitutions recognize the writ of habeas corpus as an existing remedy in the cases to which it is properly applicable, and designate the courts or officers which may issue it; but they do not point out the cases in which it may be employed. Upon this subject the common law and the statutes must be our guide; and although the statutes will be found to make specific provision for particular cases, it is believed that in no instance which has fallen under our observation has there been any intention to restrict the remedy, and make it less broad and effectual than it was at the common law.\(^2\)

\(^1\) Ableman v. Booth, 21 How. 606, See Norris v. Newton, 5 McLean, 92; United States v. Rector, 5 McLean, 174; Spangler's Case, 11 Mich. 258; In re Hopson, 40 Barb. 34; Ex parte Hill, 5 Nev. 154; Ex parte Burr, 49 Cal. 159. Notwithstanding the decision of Ableman v. Booth, the State courts have frequently since assumed to pass definitely upon cases of alleged illegal restraint under federal authority, and this, too, by the acquiescence of the federal officers. As the remedy in the State courts is generally more expeditious and easy than can be afforded in the national tribunals, it is possible that the federal authorities may still continue to acquiesce in such action of the State courts, in cases where there can be no reason to fear that they will take different views of the questions involved from those likely to be held by the federal courts. Nevertheless, while the case of Ableman v. Booth stands un-reversed, the law must be held to be as there declared. It has been approved in Tarble's Case, 13 Wall. 397, Chief Justice Chase dissenting.

An agent of a State to receive from another State a person under extradition proceedings is not an officer of the United States, nor is his detention of the prisoner so far under national authority that a State court may not compel him to bring in the prisoner for an inquiry into the legality of his detention; that is, whether the warrant and the delivery to the agent were in conformity to the federal statutes. In summing up the discussion Harlan, J., says: "Subject, then, to the exclusive and paramount authority of the national government, by its own judicial tribunals, to determine whether persons held in custody by authority of the courts of the United States, or by the commissioners of such courts, or by officers in the general government, acting under its laws, are so held in conformity with law, the States have the right, by their own courts, or by the judges thereof, to inquire into the grounds upon which any person, within their respective territorial limits, is restrained of his liberty, and to discharge him, if it be ascertained that such restraint is illegal; and this, notwithstanding such illegality may arise from a violation of the Constitution or the laws of the United States." Robb v. Connolly, 111 U. S. 624, 4 Sup. Ct. Rep. 641.

\(^2\) See Matter of Jackson, 15 Mich. 417, where this whole subject is fully considered. The application for the writ is not necessarily made by the party in person, but may be made by any other person on his behalf, if a sufficient reason is stated for its not being made by him personally. The Hottentot Venus Case, 13 East, 195; Child's Case, 29 Eng. L. & Eq. 250. A wife may have the writ to release her husband from unlawful imprisonment, and may herself be heard on the application. Cobbett's Case, 15 Q. B. 181, note; Cobbett v. Hudson, 10 Eng. L. & Eq. 318; s. c. 15 Q. B. 988. Lord Campbell in this case cites the case of the wife of John Bunyan, who was heard on his behalf
We have elsewhere referred to certain rules regarding the validity of judicial proceedings. In the great anxiety on the part of our legislatures to make the most ample provision for speedy relief from unlawful confinement, authority to issue the writ of habeas corpus has been conferred upon inferior judicial officers, who make use of it sometimes as if it were a writ of error, under which they might correct the errors and irregularities of other judges and courts, whatever their relative jurisdiction and dignity. Any such employment of the writ is an abuse. Where a party who is in confinement under judicial process is brought up on habeas corpus, the court or judge before whom he is returned will inquire: 1. Whether the court or officer issuing the process under which he is detained had jurisdiction of the case, and has acted within that jurisdiction in issuing such process. If so, mere irregularities or errors of judgment in the when in prison. [See note to 43 L. ed. U. S. 92.]

1 See post, p. 575 et seq.
2 Ex parte Clay, 98 Mo. 678, 11 S. W. 908; State v. Hayden, 35 Minn. 293, 28 N. W. 559; Willis v. Bayles, 105 Ind. 393, 5 N. E. 8; State v. Orton, 67 Iowa, 554, 25 N. W. 775; People v. Liscumb, 69 N. Y. 559, 574; Petition of Crandall, 31 Wis. 177; Ex parte Van Hagan, 25 Ohio St. 420; Ex parte Shaw, 7 Ohio St. 81; Ex parte Parks, 93 U. S. 18, 23; Perry v. State, 41 Tex. 483; Matter of Underwood, 30 Mich. 502; Matter of Eaton, 27 Mich. 1; In re Burger, 39 Mich. 203; Ex parte Simmons, 62 Ala. 416; Re Stupp, 12 Blatch. 501; Ex parte Winslow, 9 Nev. 71; Ex parte Hartman, 41 Cal. 32; In re Falvey, 7 Wis. 930; Petition of Semler, 41 Wis. 617; In re Stokes, 5 Sup. Ct. (N. Y.) 71; Prohibitory Amendment Cases, 24 Kan. 709; Ex parte Thompson, 93 Ill. 89; Ex parte Fernandez, 10 C. B. n. s. 2, 37. This is so, even though there be no appellate tribunal in which the judgment may be reviewed in the ordinary way. Ex parte Plante, 9 Lower Can. Rep. 106. The writ cannot be used to prevent the commission upon a trial of anticipated errors. Ex parte Crouch, 112 U. S. 178, 5 Sup. Ct. Rep. 90. It is worthy of serious consideration whether, in those States where the whole judicial power is by the constitution vested in certain specified courts, it is competent by law to give to judicial officers not holding such courts authority to review, even indirectly, the decisions of the courts, and to discharge persons committed under their judgments. Such officers could exercise only a special statutory authority. Yet its exercise in such cases is not only judicial, but it is in the nature of appellate judicial power. The jurisdiction of the Supreme Court of the United States to issue the writ in cases of confinement under the order of the District Courts, was sustained in Ex parte Bollman & Swartwout, 4 Cranch, 75, and Matter of Netzger, 6 How. 176, on the ground that it was appellate. It is original only where a State is a party, or an ambassador, minister, or consul. Ex parte Hung Hang, 108 U. S. 592, 2 Sup. Ct. Rep. 803. See also Ex parte Kearney, 7 Wheat. 38; Ex parte Watkins, 7 Pet. 598; Ex parte Millburn, 9 Pet. 704; Matter of Kaine, 14 How. 103; Matter of Eaton, 27 Mich. 1; Matter of Buxton, 29 Mich. 472.

3 The validity of the appointment or election of an officer de facto cannot be inquired into on habeas corpus. Ex parte Strahl, 16 Iowa, 369; Russell v. Whiting, 1 Wms. (N. C.) 463. Otherwise if a mere usurper issues process for the imprisonment of a citizen. Ex parte Strahl, supra.

If the record shows that relator stands convicted of that which is no crime, he is of course entitled to his discharge. Ex parte Kearney, 55 Cal. 212. So if punished for contempt in disobeying a void order of court. In re Ayers, 123 U. S. 413, 8 Sup. Ct. Rep. 104; Ex parte
exercise of that jurisdiction must be disregarded on this writ, and must be corrected either by the court issuing the process, or on regular appellate proceedings. 1 2. If the process is not void for want of jurisdiction, the further inquiry will be made, whether, by law, the case is bailable, and if so, bail will be taken if the party offers it; otherwise he will be remanded to the proper custody. 2

This writ is also sometimes employed to enable a party to enforce a right of control which by law he may have, springing from some one of the domestic relations; especially to enable a parent to obtain the custody and control of his child, where it is detained from him by some other person. The courts, however, do not generally go farther in these cases than to determine what is for the best interest of the child; and they do not feel com-


1 People v. Cassels, 5 Hill, 164; Bushnell's Case, 9 Ohio St. 183; Ex parte Watkins, 7 Pet. 668; Matter of Metzger, 5 How. 170; Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. Rep. 152; Ex parte Harding, 120 U. S. 782, 7 Sup. Ct. Rep. 789; Petition of Smith, 2 Nev. 338; Ex parte Gibson, 31 Cal. 619; Hammond v. People, 32 Ill. 472, per Breeze, J. In State v. Shattuck, 46 N. H. 211, Bellovs, J., states the rule very correctly as follows: "If the court had jurisdiction of the matter embraced in these causes, this court will not, on habeas corpus, revise the judgment. State v. Towle, 42 N. H. 611; Ross's Case, 2 Pick. 160; and Riley's Case, 2 Pick. 171; Adams v. Vose, 1 Gray, 51. If in such case the proceedings are irregular or erroneous, the judgment is voidable and not void, and stands good until revised or annulled in a proper proceeding instituted for that purpose; but when it appears that the magistrate had no jurisdiction, the proceedings are void, and the respondent may be discharged on habeas corpus. State v. Towle, before cited; Ex parte Kellogg, 6 Ct. 599. See also State v. Richmond, 6 N. H. 232; Burnham v. Stevens, 33 N. H. 247; Hurst v. Smith, 1 Gray, 49." If the court has jurisdiction of an offence, its judgment as to what acts are necessary to constitute it cannot be reviewed. In re Coy, 127 U. S. 731, 8 Sup. Ct. Rep. 1203.

2 It is not a matter of course that the party is to be discharged even where the authority under which he is held is adjudged illegal. For it may appear that he should be lawfully confined in different custody; in which case the proper order may be made for the transfer. Matter of Mason, 8 Mich. 70; Matter of Ring, 28 Cal. 247; Ex parte Gibson, 31 Cal. 619. See People v. Kelly, 67 N. Y. 212. And where he is detained for trial on an imperfect charge of crime, the court, if possessing power to commit de novo, instead of discharging him, should proceed to inquire whether there is probable cause for holding him for trial, and if so, should order accordingly. Hard on Habeas Corpus, 416. A discharge on habeas corpus is, apart from statute, conclusive upon the State. People v. Fairman, 59 Mich. 563; 26 N. W. 569; State v. Miller, 97 N. C. 451; Gagnon v. Reese, 20 Fla. 438. A refusal to discharge is not conclusive. Application may be made to another judge. In re Snell, 31 Minn. 110, 16 N. W. 692. But a statute making such refusal conclusive, unless reversed on appeal, is valid. Ex parte Hamilton, 65 Miss. 68, 3 So. 68. See Ex parte Cuddy, 40 Fed. Rep. 62.
pelled to remand him to any custody where it appears not to be for the child's interest. The theory of the writ is, that it relieves from improper restraint; and if the child is of an age to render it proper to consult his feelings and wishes, this may be done in any case; 1 and it is especially proper in many cases where the parents are living in separation and both desire his custody. The right of the father, in these cases, is generally recognized as best; but this must depend very much upon circumstances, and the tender age of the child may often be a controlling consideration against his claim. The courts have large discretionary power in these cases, and the tendency of modern decisions has been to extend, rather than restrict it. 2

There is no common-law right to a trial by jury of the questions of fact arising on habeas corpus; but the issues both of fact and of law are tried by the court or judge before whom the proceeding is had; 3 though without doubt a jury trial might be provided for by statute, and perhaps even ordered by the court in some cases. 4

Right of Discussion and Petition.

The right of the people peaceably to assemble, and to petition the government for a redress of grievances is one which "would seem unnecessary to be expressly provided for in a republican government, since it results from the very nature and structure of its institutions. It is impossible that it could be practically denied until the spirit of liberty had wholly disappeared, and the people had become so servile and debased as to be unfit to exercise any of the privileges of freemen." 5 But it has not been

1 Commonwealth v. Aves, 18 Pick. 103; Shaw v. Nachwes, 43 Iowa, 653; Garner v. Gordon, 41 Ind. 92; People v. Weissenbach, 60 N. Y. 385.
2 Barry's Case may almost be said to exhaust all the law on this subject. We refer to the various judicial decisions made in it, so far as they are reported in the regular reports. 8 Paige, 47; 25 Wend. 61; People v. Mercein, 3 Hill, 599; 2 How. 65; Barry v. Mercein, 5 How. 105. See also the recent case of Adams v. Adams, 1 Duv. 167. For the former rule, see The King v. De Manneville, 5 East, 221; Ex parte Skinner, 9 J. B. Moore, 278. The rules of equity prevail at present in England on the question of custody. In re Brown, L. R. 13 Q. B. D. 614. Cases illustrating the doctrine that the good of the child will control:
3 See Hurd on Habeas Corpus, 297-302, and cases cited; Baker v. Gordon, 23 Ind. 209.
5 Story on the Constitution, § 1894.
thought unimportant to protect this right by statutory enactments in England; and indeed it will be remembered that one of the most notable attempts to crush the liberties of the kingdom made the right of petition the point of attack, and selected for its contemplated victims the chief officers in the Episcopal hierarchy. The trial and acquittal of the seven bishops in the reign of James II. constituted one of the decisive battles in English constitutional history; and the right which was then vindicated is "a sacred right which in difficult times shows itself in its full magnitude, frequently serves as a safety-valve if judiciously treated by the recipients, and may give to the representatives or other bodies the most valuable information. It may right many a wrong, and the deprivation of it would at once be felt by every freeman as a degradation. The right of petitioning is indeed a necessary consequence of the right of free speech and deliberation,—a simple, primitive, and natural right. As a privilege it is not even denied the creature in addressing the Deity." Happily the occasions for discussing and defending it have not been numerous in this country, and have been confined to an exciting subject now disposed of.

Right to bear Arms.

Among the other safeguards to liberty should be mentioned the right of the people to keep and bear arms. A standing army is peculiarly obnoxious in any free government, and the jealousy of such an army has at times been so strongly manifested in England as to lead to the belief that even though recruited from among themselves, it was more dreaded by the people as an instrument of oppression than a tyrannical monarch or any foreign power. So impatient did the English people become of the very

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1 See this case in 12 Howell's State Trials, 183: 3 Mod. 212. Also in Broom, Const. Law, 408. See also the valuable note appended by Mr. Broom, p. 498, in which the historical events bearing on the right of petition are noted. Also, Max, Const. Hist. c. 7; 1 Bl. Com. 143.
2 Lieber, Civil Liberty and Self-Government, c. 12.
3 For the discussions on the right of petition in Congress, particularly with reference to slavery, see 1 Benton's Abridgement of Debates, 397; 2 Benton's Abridgement of Debates, 57-60, 182-188, 209, 436-444; 12 Benton's Abridgement of Debates, 609-673, 705-743; 19 Benton's Abridgement of Debates, 5-28, 206-209, 557-562. Also Benton's Thirty Years' View, Vol. I. c. 135, Vol. II. c. 32, 33, 36, 37. Also the current political histories and biographies. The right to petition Congress is one of the attributes of national citizenship, and as such is under the protection of the national authority. United States v. Cruikshank, 92 U. S. 512, 552, per Waite, Ch. J. No such proceeding as a petition of right to a court to determine the constitutionality of a statute is now recognized. In re Miller, 6 Mackey, 607.
4 1 Bl. Com. 143.
army that liberated them from the tyranny of James II. that they demanded its reduction even before the liberation became complete; and to this day the British Parliament render a standing army practically impossible by only passing a mutiny act from session to session. The alternative to a standing army is "a well-regulated militia;" but this cannot exist unless the people are trained to bearing arms. The federal and State constitutions therefore provide that the right of the people to bear arms shall not be infringed; but how far it may be in the power of the legislature to regulate the right we shall not undertake to say. Happily there neither has been, nor, we may hope, is likely to be, much occasion for an examination of that question by the courts.\footnote{1 See Wilson v. State, 33 Ark. 557.} \footnote{2 In Bliss v. Commonwealth, 2 Lit. 90, the statute to "prevent persons wearing concealed arms" was held unconstitutional, as infringing on the right of the people to bear arms in defence of themselves and of the State. But see Nunn v. State, 1 Kelly, 243; State v. Mitchell, 3 Blackf. 229; Aynette v. State, 2 Humph. 154; State v. Buzzard, 4 Ark. 18; Carroll v. State, 29 Ark. 99, 18 Am. Rep. 538; State v. Jumel, 13 La. Ann. 399; 1 Green, Cr. Rep. 481; Owen v. State, 31 Ala. 387; Cockrum v. State, 24 Tex. 394; Andrews v. State, 3 Heisk. 165; 8 Am. Rep. 8; State v. Wilburn, 7 Bax. 51; State v. Reid, 1 Ala. 612; State v. Shelby, 90 Mo. 302, 2 S. W. 468. A statute prohibiting the open wearing of arms upon the person was held unconstitutional in Stockdale v. State, 32 Ga. 225, and one forbidding carrying, either publicly or privately, a dirk, sword-cane, Spanish stiletto, belt or pocket pistol or revolver, was sustained, except as to the last-mentioned weapon; and as to that it was held that, if the weapon was suitable for the equipment of a soldier the right of carrying it could not be taken away. As bearing also upon the right of self-defence, see Ely v. Thompson, 3 A. K. Marsh. 73, where it was held that the statute subjecting free persons of color to corporal punishment for "lifting their hands in opposition" to a white person was unconstitutional. And see, in general, Bishop on Stat. Crimes, c. 38, and cases cited. [Unauthorized bodies of men may be prohibited the right to drill or parade with arms, and to associate as a military organization. Com. v. Murphy, 106 Mass. 171, 44 N. E. 138, 52 L. R. A. 606. A regulation forbidding the carrying of weapons generally is invalid, though such regulation as to concealed weapons is valid. Re Brickey,—Idaho,—70 Pac. 609.]