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William Blackstone

Thomas M. Cooley

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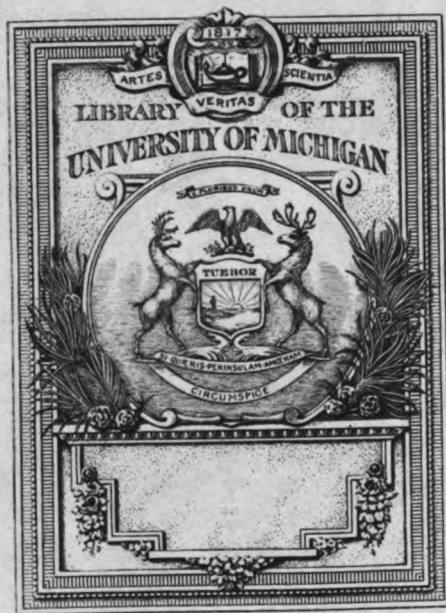
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COMMENTARIES  
ON THE  
LAWS OF ENGLAND;

IN FOUR BOOKS.

By SIR WILLIAM BLACKSTONE, KNIGHT,  
ONE OF THE JUSTICES OF HIS MAJESTY'S COURT OF COMMON PLEAS

TOGETHER WITH

A COPIOUS ANALYSIS OF THE CONTENTS.

And Notes with References to English and American Decisions and Statutes to date,  
which Illustrate or Change the Law of the Text; also, a  
Full Table of Abbreviations, and

SOME CONSIDERATIONS REGARDING THE STUDY OF THE LAW.

By THOMAS M. COOLEY,  
PROFESSOR OF LAW AND POLITICAL SCIENCE IN THE UNIVERSITY OF MICHIGAN, AND  
AUTHOR OF "CONSTITUTIONAL LIMITATIONS," &c.

VOL. 2. INCLUDING BOOKS III & IV.

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BOOK THE THIRD.  
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OF THE REDRESS OF PRIVATE WRONGS BY THE  
MERE ACT OF THE PARTIES.

AT the opening of these Commentaries (a) municipal law was in general defined to be, "a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong." (b) From hence, therefore, it followed, that the primary objects of the law are the establishment of rights, and the prohibition of wrongs. And this occasioned (c) the distribution of these collections into two general heads; under the former of which we have already considered the *rights* that were defined and established, and under the latter are now to consider the *wrongs* that are forbidden, and redressed by the laws of England.

\*In the prosecution of the first of these enquiries, we distinguished rights into two sorts: first, such as concern, or are annexed to, the persons of men, and are then called *jura personarum*, or *the rights of persons*; which, together with the means of acquiring and losing them, composed the first book of these Commentaries: and secondly, such as a man may acquire over external objects, or things unconnected with his person, which are called *jura rerum*, or *the rights of things*: and these, with the means of transferring them from man to man, were the subject of the second book. I am now, therefore, to proceed to the consideration of *wrongs*; which for the most part convey to us an idea merely negative, as being nothing else but a privation of right. For which reason it was necessary, that before we entered at all into the discussion of wrongs, we should entertain a clear and distinct notion of rights: the contemplation of what is *jus* being necessarily prior to what may be termed *injuria*, and the definition of *fas* precedent to that of *nefas*.

Wrongs are divisible into two sorts or species: *private wrongs*, and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries*: the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a com-

(a) Introd. § 2.

(b) *Sanctio justa, jubens honesta, et prohibens contraria.* Cic. 11. *Philipp.* 12. *Bract.* l. 1, a. 2.

(c) Book 1, ch. 1.

munity; and are distinguished by the harsher appellations of *crimes* and *misdeemeanors*. To investigate the first of these species of wrongs, with their legal remedies, will be our employment in the present book; and the other species will be reserved till the next or concluding volume.

The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws by which rights are defined, and wrongs prohibited. This remedy is therefore [ \*3 ] *principally* to be sought by application to these \*courts of justice; that is, by civil suit or action. For which reason, our chief employment in this book will be to consider the redress of private wrongs, by *suit* or *action* in courts. But as there are certain injuries of such a nature, that some of them furnish and others require a more speedy remedy than can be had in the ordinary forms of justice, there is allowed in those cases an extrajudicial, or eccentric kind of remedy; of which I shall first of all treat, before I consider the several remedies by suit; and to that end, shall distribute the redress of private wrongs into three several species: first, that which is obtained by the *mere act* of the *parties* themselves; secondly, that which is effected by the *mere act* and operation of *law*; and, thirdly, that which arises from *suit* or *action* in courts, which consists in a conjunction of the other two, the act of the parties co-operating with the act of law.

And, *first*, of that redress of *private* injuries, which is obtained by the *mere act* of the *parties*. This is of two sorts: first, that which arises from the act of the injured party only; and, secondly, that which arises from the joint act of all the parties together: both which I shall consider in their order.

Of the first sort, or that which arises from the sole act of the injured party, is, I. The *defence* of one's self, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or *any* of these his relations, (1) be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace which happens, is chargeable upon him only who began the affray. (d) For the law, in this case, respects the passions of the human mind; and (when external violence is offered to a man himself, or those to whom he bears a near connexion), makes it lawful in him to do [ \*4 ] himself that immediate justice, to which he \*is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say to what wanton

(d) 2 Roll. Abr. 546. 1 Hawk. P. C. 121.

(1) In the defense of one's self, or any member of his family, a man has a right to employ all necessary violence, even to the taking of life. Shorter v. People, 2 N. Y., 193; Yates v. People, 32 N. Y., 509; Logue v. Commonwealth, 83 Penn. St., 265; Pond v. People, 8 Mich., 150; Maher v. People, 24 Ill., 241. But except where a forcible felony is attempted against person or property, he is always to avoid such lamentable consequences if possible, and he cannot justify standing up and resisting to the death when the assailant might have been avoided by retreat. People v. Sullivan, 7 N. Y., 396. But when a man is assaulted in his dwelling, he 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; whatever at the common law is within the curtilage is entitled to the same protection. Pond v. People, 8 Mich., 150. And in deciding what force it is necessary to employ in resisting the assault, a man 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 was excessive. See the cases cited above; also Hinton v. State, 24 Texas, 454; Schuier v. People, 23 Ill., 17; Patten v. People, 18 Mich., 814. In the last case it was held that where a man's dwelling, in which was his mother in feeble health, was assailed by rioters, and he had reason to believe that the noise and threats of the assailants endangered his mother's life, he had the same right to employ force to quell the riot that he would have had to defend his mother against an actual attack upon her person.



lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. Self-defence, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society. In the English law, particularly, it is held an excuse for breaches of the peace, nay even for homicide itself: but care must be taken, that the resistance does not exceed the bounds of mere defence and prevention; for then the defender would himself become an aggressor.

II. Recaption or *reprisal* is another species of remedy by the mere act of the party injured. This happens, when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant: in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them, wherever he happens to find them; so it be not in a riotous manner, or attended with a breach of the peace. (e) The reason for this is obvious; since it may frequently happen that the owner may have this only opportunity of doing himself justice: his goods may be afterwards conveyed away or destroyed; and his wife, children, or servants, concealed or carried out of his reach; if he had no speedier remedy than the ordinary process of law. If, therefore, he can so contrive it as to gain possession of his property again, without force or terror, the law favours and will justify his proceeding. But, as the public peace is a superior consideration to any one man's private property; and, as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided, that this natural right of recaption \*shall never be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, [\*5] for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen; (f) but must have recourse to an action at law. (2)

III. As recaption is a remedy given to the party himself, for an injury to his *personal* property, so, thirdly, a remedy of the same kind for injuries to *real* property, is by *entry* on lands and tenements, when another person without any right has taken possession thereof. This depends in some measure on like reasons with the former; and like that, too, must be peaceable and without force. There is some nicety required to define and distinguish the cases, in which such entry is lawful or otherwise; it will therefore be more fully considered in a subsequent chapter; being only mentioned in this place for the sake of regularity and order.

IV. A fourth species of remedy by the mere act of the party injured, is the *abatement* or removal of *nuisances*. (3) What nuisances are, and their several

(e) 2 Inst. 134. Hal. Anal. § 46.

(f) 2 Roll. Rep. 55, 56, 303. 2 Roll. Abr. 565, 566.

(2) A man may not lawfully enter upon the lands of a third party who is not a wrongdoer, for the purpose of retaking his own property: *Heermance v. Vernoy*, 6 Johns., 5; *Blake v. Jerome*, 14 Johns., 406; and his attempt to do so may be resisted by force. *Newkirk v. Sabler*, 9 Barb., 652.

(3) Any obstruction to a navigable river is a nuisance, which any citizen having occasion to use the river for the passage of his vessel may lawfully remove. *Inhab. of Arundel v. McCulloch*, 10 Mass., 70. And the permission of the town to create the obstruction will not preclude the abatement. *Id.* But that which the legislature of the state permits cannot be a public nuisance: *Williams v. N. Y. Central R. R. Co.*, 18 Barb., 222; unless the permission is exceeded: *Renwick v. Morris*, 7 Hill, 575; *Hinchman v. Railroad Co.*, 2 Green N. J., 75; it may nevertheless be a private nuisance, as where a dam erected by state permission floods the lands of an individual, in which case he may abate it. *State v. Moffett*, 1 Greene, Iowa, 247. Generally a legislative act permitting the construction of a bridge or dam across a navigable stream is a complete protection to the structure. *Commonwealth v.*

species, we shall find a more proper place to inquire under some of the subsequent divisions. At present I shall only observe, that whatsoever unlawfully annoys or doth damage to another is a nuisance; and such nuisance may be abated, that is, taken away or removed by the party aggrieved thereby, so as he commits no riot in the doing of it. (g) If a house or wall is erected so near to mine that it stops my ancient lights, which is a *private* nuisance, I may enter my neighbor's land, and peaceably pull it down. (h) Or if a new gate be erected across the public highway, which is a *common* nuisance, any of the king's subjects passing that way, may cut it down and destroy it. (i)

[\*6] \*And the reason why the law allows this private and summary method of doing one's self justice, is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice.

V. A fifth case, in which the law allows a man to be his own avenger, or to minister redress to himself, is that of *distraining* cattle or goods for non-payment of rent, or other duties; or, distraining another's cattle, *damage-feasant*, that is, doing damage, or trespassing, upon his land. The former intended for the benefit of landlords, to prevent tenants from secreting or withdrawing their effects to his prejudice; the latter arising from the necessity of the thing itself, as it might otherwise be impossible at a future time to ascertain whose cattle they were that committed the trespass or damage.

As the law of distresses is a point of great use and consequence, I shall consider it with some minuteness: by inquiring, first, for what injuries a distress may be taken; secondly, what things may be distrained; and, thirdly, the manner of taking, disposing of, and avoiding distresses.

1. And, first, it is necessary to premise, that a distress, (j) *districtio*, is the taking a personal chattel out of the possession of the wrongdoer into the custody of the party injured, to procure a satisfaction for the wrong committed. 1. The most usual injury, for which a distress may be taken, is that of non-payment of rent. It was observed in a former book, (k) that distresses were incident by the common law to every *rent-service*, and by particular reservation to *rent-charges* also; but not to *rent-seck*, till the statute 4 Geo. II, c. 28, extended the same remedy to all rents alike, and thereby in effect abolished all material distinction between them. So that now we may lay it down as an [\*7] universal principle, \*that a distress may be taken for any kind of rent in arrear; the detaining whereof beyond the day of payment is an injury to him that is entitled to receive it. 2. For neglecting to do suit to the lord's court, (l) or other certain personal service, (m) the lord may distrain of com-

(g) 5 Rep. 101. 9 Rep. 55. (h) Salk. 459. (i) Cro. Car. 184.

(j) The thing itself taken by this process, as well as the process itself, is in our law-books very frequently called a distress.

(k) Book II. ch. 2.

(l) Bro. Abr. tit. Distress, 15.

(m) Co. Litt. 46.

Breed, 4 Pick. 460; Depew v. Trustees of W. and E. Canal, 5 Ind., 8; Dover v. Portsmouth Bridge, 17 N. H., 200. Except where the river constitutes a highway for foreign or interstate commerce, in which case the regulations which congress might prescribe would be supreme. See Columbus Ins. Co. v. Peoria Bridge Co., 6 McLean, 70; United States v. New Bedford Bridge, 1 Wood. and M., 401; Wheeling Bridge Case, 18 How., 518. A statutory penalty or other remedy for abating a private nuisance does not exclude the private remedy. Wetmore v. Tracy, 14 Wend., 250; State v. Moffett, 1 Greene, Iowa, 247. But in exercising the right to abate, as little injury is to be done as possible. Moffett v. Brewer, *id.*, 348. And if the nuisance consists in occupying a building for an unlawful purpose, it seems that this does not justify tearing down the building: Welch v. Stowell, 2 Doug. Mich., 332; State v. Paul, 5 R. I., 185; Ely v. Supervisors, 36 N. Y., 297; Miller v. Burch, 32 Texas, 208; S. C., 5 Am. Rep., 242; though if the occupation is such as to breed disease, it has been held that it might be destroyed if necessary. Meeker v. Van Rensselaer, 15 Wend., 397.

As to the right to abate private nuisances in general, see, further, Dimes v. Petley, 15 Q. B., 276; Jones v. Williams, 11 M. and W., 176; Davies v. Williams, 10 Q. B., 546; Hyde v. Graham, 1 H. and C., 593; Indianapolis v. Miller, 27 Ind., 394. The abatement must be without doing unnecessary injury. Roberts v. Rose, L. R. 1 Exch., 82; Indianapolis v. Miller, 27 Ind., 394.

mon right. 3. For amercements in a court-leet a distress may be had of common right; but not for amercements in a court-baron, without a special prescription to warrant it. (n) 4. Another injury, for which distresses may be taken, is where a man finds beasts of a stranger wandering in his grounds, *damage-feasant*; that is, doing him hurt or damage, by treading down his grass, or the like; in which case the owner of the soil may distrain them, till satisfaction be made him for the injury he has thereby sustained. 5. Lastly, for several duties and penalties inflicted by special acts of parliament (as for assessments made by commissioners of sewers, (o) or for relief of the poor), (p) remedy by distress and sale is given; for the particulars of which we must have recourse to the statutes themselves: remarking only, that such distresses (q) are partly analogous to the ancient distress at common law, as being replevable and the like; but more resembling the common law process of execution, by seizing and selling the goods of the debtor under a writ of *fiery facias*, of which hereafter.

2. Secondly; as to the things which may be distrained, or taken in distress, we may lay it down as a general rule that all chattels personal are liable to be distrained, unless particularly protected or exempted. Instead, therefore, of mentioning what things are distrainable, it will be easier to recount those which are not so, with the reason of their particular exemptions. (r) And, 1. As every thing which is distrained is presumed to be the property of the wrong-doer, it will follow that such things wherein no man can have an absolute and valuable property (as dogs, cats, rabbits, and \*all animals *feræ naturæ*) cannot be distrained. Yet if deer (which are *feræ naturæ*) are kept in a [\*8] private inclosure for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandise, that they may be distrained for rent. (s) Whatever is in the personal use or occupation of any man, is for the time privileged and protected from distress; as an axe with which a man is cutting wood, or a horse while a man is riding him. But horses drawing a cart, may (cart and all) be distrained for rent-arrere; and also, if a horse, though a man be riding him, be taken *damage-feasant*, or trespassing in another's grounds, the horse (notwithstanding his rider) may be distrained and led away to the pound. (t) (4) Valuable things in the way of trade shall not be liable to distress. As a horse standing in a smith shop to be shoed, or in a common inn; or cloth at a tailor's house; or corn sent to a mill or market. For all these are protected and privileged for the benefit of trade; and are supposed in common presumption not to belong to the owner of the house, but to his customers. (5) But, generally speaking, whatever goods and chattels the landlord finds upon the premises, whether they in fact belong to the tenant or a stranger, are distrainable by him for rent: for otherwise a door would be open to infinite frauds upon the landlord; and the stranger has *his* remedy over by action on the case against the tenant, if by the tenant's default the

(n) Brownl. 36.  
(r) Co. Litt. 47.

(o) Stat. 7 Ann. c. 10.  
(s) Davis v. Powell, C. B. 11 Geo. II.

(p) Stat. 43 Eliz. c. 2.  
11 Geo. II.

(q) 1 Burr. 569.  
(t) 1 Sid. 440.

(4) The court of king's bench, in *Story v. Robinson*, 6 T. R., 138, decided, contrary to this dictum, that such a distress could not be made, as it would lead to a breach of the peace. And see *Field v. Adames*, 13 Ad. and Ell., 649; *Bunch v. Kennington*, 1 Q. B., 679.

As to what may and what may not be taken by distress, see *Simpson v. Hartopp*, Willes, 512, and the notes thereto, 1 Smith Lead. Cas., 187.

(5) Upon the subject of exemptions from distress the following American cases are referred to: *Himely v. Wyatt*, 1 Bay, 102; *Phaelon v. McBride*, 1 Bay, 170; *Youngblood v. Lowrey*, 2 McCord, 39; *Walker v. Johnson*, 4 McCord, 552; *Hoskins v. Paul*, 9 N. J., 110; *Brown v. Sims*, 17 S. and R., 188; *Stone v. Mathews*, 7 Hill, 428; *Connah v. Hale*, 23 Wend., 462. These cases hold, generally, that wherever the tenant, in the regular course of his business, comes into possession of the goods of his customers, they are not subject to distress for his rent. See *Riddle v. Weiden*, 5 Whart., 9.

Many of the United States have, by statute, abolished the landlord's remedy by distress.

chattels are distrained, so that he cannot render them when called upon. With regard to a stranger's beasts which are found upon the tenant's land, the following distinctions are however taken. If they are put in by consent of the owner of the beasts, they are distrainable immediately afterwards for rent-arriere by the landlord. (u) So also if the stranger's cattle break the fences, and commit a trespass by coming on the land, they are distrainable immediately by the lessor for his tenant's rent, as a punishment to the owner of the beasts for the wrong committed through his negligence. (v) But if the lands were not \*sufficiently fenced so as to keep out cattle, the landlord [\*9] cannot distrain them, till they have been *levant* and *couchant* (*levantes et cubantes*) on the land; that is, have been long enough there to have lain down and rose up to feed; which in general is held to be one night at least: and then the law presumes, that the owner may have notice whether his cattle have strayed, and it is his own negligence not to have taken them away. Yet, if the lessor or his tenant were bound to repair the fences and did not, and thereby the cattle escaped into their grounds, without the negligence or default of the owner; in this case, though the cattle may have been *levant* and *couchant*, yet they are not distrainable for rent, till actual notice is given to the owner that they are there, and he neglects to remove them: (w) for the law will not suffer the landlord to take advantage of his own or his tenant's wrong.

4. There are also other things privileged by the ancient common law; as a man's tools and utensils of his trade, the axe of a carpenter, the books of a scholar, and the like: which are said to be privileged for the sake of the public, because the taking them away would disable the owner from serving the commonwealth in his station. So, beasts of the plough *averia carucarum*, and sheep, are privileged from distresses at common law; (x) while dead goods or other sorts of beasts, which Bracton calls *catalla otiosa*, may be distrained. But as beasts of the plough may be taken in execution for debt, so they may be for distresses by statute, which partake of the nature of executions. (y) And perhaps the true reason why these and the tools of a man's trade were privileged at the common law, was because the distress was then merely intended to compel the payment of the rent, and not as a satisfaction for its non-payment: and therefore, to deprive the party of the instruments and means of paying it, would counteract the very end of the distress. (z) 5. Nothing shall be distrained for rent, which may not be rendered again in as good plight as when it was distrained: for which reason milk, fruit and the [\*10] like, cannot be distrained, a distress at \*common law being only in the nature of a pledge or security, to be restored in the same plight when the debt is paid. So, anciently, sheaves or shocks of corn could not be distrained, because some damage must needs accrue in their removal, but a cart loaded with corn might; as that could be safely restored. But now by statute 2. W. and M., c. 5, corn in sheaves or cocks, or loose in the straw, or hay in barns or ricks, or otherwise, may be distrained, as well as other chattels. 6. Lastly, things fixed to the freehold may not be distrained; as caldrons, windows, doors and chimney-pieces: for they savour of the realty. For this reason also corn growing could not be distrained; till the statute 11 Geo. II., c. 19, empowered landlords to distrain corn, grass, or other products of the earth, and to cut and gather them when ripe.

Let us next consider, thirdly, how distresses may be taken, disposed of or avoided. And, first, I must premise, that the law of distresses is greatly altered within a few years last past. Formerly, they were looked upon in no other light than as a mere pledge or security, for payment of rent or other duties, or satisfaction for damage done. And so the law still continues with regard to distresses of beasts taken *damage-feasant*, and for other causes, not altered by act of parliament; over which the distrainer has no other power

(u) Cro. Eliz. 549.

(v) Co. Litt. 47.

(w) Lutw. 1580.

(x) Ibid. 588.

(y) Stat. 51 Hen. III., st. 4, *de districtione scaccarii*.

(z) 1 Burr. 589.

than to retain them till satisfaction is made. But distresses for rent-arrears being found by the legislature to be the shortest and most effectual method of compelling the payment of such rent, many beneficial laws for this purpose have been made in the present century; which have much altered the common law, as laid down in our ancient writers.

In pointing out, therefore, the methods of distraining, I shall in general suppose the distress to be made for rent; and remark, where necessary, the differences between such distress, and one taken for other causes.

\*In the first place then all distresses must be made *by day* unless [\*11] in the case of *damage-feasant*; an exception being there allowed, lest the beasts should escape before they are taken. (a) And, when a person intends to make a distress, he must, by himself or his bailiff, enter on the demised premises; formerly during the continuance of the lease, but now, (b) if the tenant holds over, the landlord may distrain within six months after the determination of the lease; provided his own title or interest, as well as the tenant's possession, continue at the time of the distress. If the lessor does not find sufficient distress on the premises, formerly he could resort nowhere else; and, therefore, tenants who were knavish made a practice to convey away their goods and stock fraudulently from the house or lands demised, in order to cheat their landlords. But now (c) the landlord may distrain any goods of his tenant, carried off the premises clandestinely, wherever he finds them within thirty days after, unless they have been *bona fide* sold for a valuable consideration: and all persons privy to, or assisting in, such fraudulent conveyance, forfeit double the value to the landlord. The landlord may also distrain the beasts of his tenant, feeding upon any commons or wastes, appendant or appurtenant to the demised premises. The landlord might not formerly break open a house, to make a distress, for that is a breach of the peace. But when he was in the house, it was held that he might break open an inner door; (d) and now (e) he may, by the assistance of the peace-officer of the parish, break open in the daytime any place whither the goods have been fraudulently removed and locked up to prevent a distress; oath being first made, in case it be a dwelling-house, of a reasonable ground to suspect that such goods are concealed therein.

Where a man is entitled to distrain for an entire duty, he ought to distrain for the whole at once; and not for part at one time, and part at another. (f) But if he distrains for the whole, and there is not sufficient on the premises, or he happens to mistake in the value of the thing distrained, and so takes an insufficient distress, he may take a second distress to complete [\*12] his remedy. (g)

Distresses must be proportioned to the thing distrained for. By the statute of Marlbridge, 52 Hen. III. c. 4, if any man takes a great or unreasonable distress, for rent-arrears, he shall be heavily amerced for the same. As if (h) the landlord distrains two oxen for twelve-pence rent; the taking of *both* is an unreasonable distress; but if there were no other distress nearer the value to be found, he might reasonably have distrained *one* of them; but for homage, fealty, or suit and service, as also for parliamentary wages it is said that no distress can be excessive. (i) For as these distresses cannot be sold, the owner, upon making satisfaction, may have his chattels again. The remedy for excessive distresses is by a special action on the statute of Marlbridge; for an action of trespass is not maintainable upon this account, it being no injury at the common law. (j)

When the distress is thus taken, the next consideration is the disposal of it. For which purpose the things distrained must in the first place be carried to some pound, and there impounded by the taker. But, in their way thither,

(a) Co. Litt. 142.

(b) Stat. 8 Ann. c. 14.

(c) Stat. 8 Ann. c. 14. 11 Geo. II. c. 19.

(d) Co. Litt. 161. Comberb. 17.

(e) Stat. 11 Geo. II. c. 19.

(f) 2 Lutw. 1532.

(g) Cro. Eliz. 13. Stat. 17 Car. II. c. 7. 1 Burr. 590.

(h) 2 Inst. 107.

(i) Bro. Abr. s. assise, 291, prerogative, 98.

(j) 1 Vent. 104. Fitzgibb. 85. 1 Burr. 590.

they may be *rescued* by the owner, in case the distress was taken without cause, or contrary to law: as if no rent be due; if they were taken upon the highway, or the like; in these cases the tenant may lawfully make rescue. (*k*) But if they be once impounded, even though taken without any cause, the owner may not break the pound and take them out; for they are then in the custody of the law. (*l*)

A pound (*parcus*, which signifies any inclosure) is either pound-overt, that is, open overhead; or pound-covert, that is, close. By the statute 1 and 2 P. and M., c. 12, no distress of cattle can be driven out of the hundred where it [ \*13 ] is taken, \*unless to a pound-overt within the same shire; and within three miles of the place where it was taken. This is for the benefit of the tenants, that they may know where to find and replevy the distress. And by statute 11 Geo. II, c. 19, which was made for the benefit of landlords, any person distraining for rent may turn any part of the premises, upon which a distress is taken, into a pound, *pro hac vice*, for securing of such distress. If a live distress, of animals, be impounded in a common pound-overt, the owner must take notice of it at his peril; but if in any *special* pound-overt, so constituted for this particular purpose, the distrainer must give notice to the owner: and in both these cases, the owner, and not the distrainer, is bound to provide the beasts with food and necessaries. But if they are put in a pound-covert, as in a stable or the like, the landlord or distrainer must feed and sustain them. (*m*) A distress of household goods, or other dead chattels, which are liable to be stolen or damaged by weather, ought to be impounded in a pound-covert, else the distrainer must answer for the consequences.

When impounded, the goods were formerly, as was before observed, only in the nature of a pledge or security to compel the performance of satisfaction; and upon this account it hath been held, (*n*) that the distrainer is not at liberty to work or use a distrained beast. And thus the law still continues with regard to beasts taken damage-feasant, and distresses for suit or services; which must remain impounded, till the owner makes satisfaction; or contests the right of distraining, by replevying the chattels. To *replevy* (*replegiare*, that is to take back the pledge) is, when a person distrained upon applies to the sheriff or his officers, and has the distress returned into his own possession, upon giving good security to try the right of taking it in a suit at law, and, if that be determined against him, to return the cattle or goods once more into the hands of the distrainer. This is called a replevin, of which more will be said hereafter. At present I shall only observe, that, as a distress is at com- [ \*14 ] mon \*law only in nature of a security for the rent or damages done, a replevin answers the same end to the distrainer as the distress itself; since the party replevying gives security to return the distress, if the right be determined against him.

This kind of distress, though it puts the owner to inconvenience, and is therefore a punishment to *him*, yet if he continues obstinate and will make no satisfaction or payment, it is no remedy at all to the distrainer. But for a debt due to the crown, unless paid within forty days, the distress was always salable at the common law. (*o*) And for an amercement imposed at a court-leet, the lord may also sell the distress: (*p*) partly because, being the king's court of record, its process partakes of the royal prerogative; (*q*) but principally because it is in the nature of an execution to levy a legal debt. And, so in the several statute-distresses before mentioned, which are also in the nature of executions, the power of sale is likewise usually given, to effectuate and complete the remedy. And, in like manner, by several acts of parliament, (*r*) in all cases of distress for rent, if the tenant or owner do not, within five days **after the distress is taken**, and notice of the cause thereof given him, replevy the same with sufficient security; the distrainer, with the sheriff or constable,

(*k*) Co. Litt. 160, 161. (*l*) Co. Litt. 47. (*m*) *Ibid.* (*n*) Cro. Jac. 148.  
 (*o*) Bro. Abr. *t. distress*, 71. (*p*) 8 Rep. 41. (*q*) Bro. *Ibid.* 12 Mod. 280.  
 (*r*) 2 W. & M. c. 5. 5 Ann. c. 14. 4 Geo. II, c. 28. 11 Geo. II, c. 19.

shall cause the same to be appraised by two sworn appraisers, and sell the same towards satisfaction of the rent and charges; rendering the overplus, if any, to the owner himself. And, by this means, a full and entire satisfaction may now be had for rent in arriere, by the mere act of the party himself, viz.: by distress, the remedy given at common law; and sale consequent thereon, which is added by act of parliament.

Before I quit this article, I must observe, that the many particulars which attend the taking of a distress, used formerly to make it a hazardous kind of proceeding: for if any \*one irregularity was committed, it vitiated the whole, and made the distrainers trespassers *ab initio*. (s) (6) But now [\*15] by the statute 11 Geo. II, c. 19, it is provided, that, for any unlawful act done, the whole shall not be unlawful, or the parties trespassers *ab initio*: but that the party grieved shall only have an action for the real damage sustained, and not even that, if tender of amends is made before any action is brought.

VL The seizing of heriots, when due on the death of a tenant, is also another species of self-remedy; not much unlike that of taking cattle or goods in distress. As for that division of heriots, which is called heriot-service, and is only a species of rent, the lord may distrain for this, as well as seize, but for heriot-custom (which Sir Edward Coke says (t) lies only in *prender*, and not in *render*) the lord may seize the identical thing itself, but cannot distrain any other chattel for it. (u) The like speedy and effectual remedy, of seizing, is given with regard to many things that are said to lie in franchise; as waifs, wrecks, estrays, deodands, and the like; all which the person entitled thereto may seize, without the formal process of a suit or action. Not that they are debarred of this remedy by action; but have also the other and more speedy one, for the better asserting their property; the thing to be claimed being frequently of such a nature, as might be out of the reach of the law before any action could be brought.

These are the several species of remedies which may be had by the *mere act of the party injured*. I shall next briefly mention such as arise from the *joint act of all the parties* together. And these are only two, *accord* and *arbitration*.

L Accord is a satisfaction agreed upon between the party injuring and the party injured, which, when performed, is a bar of all actions upon this account. As if a man contract \*to build a house or deliver a horse, and fail in it; [\*16] this is an injury for which the sufferer may have his remedy by action, but if the party injured accepts a sum of money, or other thing, as a satisfaction, this is a redress of that injury, and entirely takes away the action. (w) (7) By several late statutes (particularly 11 Geo. II, c. 19, in case of irregu-

(s) 1 Ventr. 37.

(t) Cop. § 25.

(u) Cro. Eliz. 500. Cro. Car. 300.

(w) 9 Rep. 79.

(6) Generally, a party pursuing a remedy *ex parte*, which may result in depriving another of his property, must pursue strictly the authority the law gives him. In *Newsam v. Hart*, 14 Mich., 233, it was held that, under a statute which authorized freeholders to take up estrays, a freeholder could not justify the taking up of an estray for him by a third person without his previous authorization, notwithstanding he had assumed to ratify the act. This was merely the application of a general rule which has been often declared under statutes to prevent the running at large of domestic animals. See *Commonwealth v. Fourteen Hogs*, 10 S. & R., 393; *Hanyman v. Titus*, 3 Mo., 302; *Crook v. Peebly*, 8 Mo., 844; *Morse v. Reed*, 28 Me., 481; *Kinder v. Gillespie*, 63 Ill., 88; *Spect v. Arnold*, 52 Cal., 455; *Hearn v. Ervin*, 3 Cold., 399; *Thompson v. Corpstein*, 52 Cal., 653. A statute authorizing the taking up of bulls will not justify the taking up of cows, heifers or steers. *Oil v. Rowley*, 69 Ill., 469. As to the strictness with which the same principle is applied in tax cases, see *Blackwell on Tax Titles*, 45; *Cooley on Taxation*, 323.

(7) To be good, an accord and satisfaction must be advantageous to the creditor; and it is upon this ground that a receipt by a creditor of a part of his demand then due has been held no answer to an action for the remainder, notwithstanding his agreement to receive it in satisfaction. *Watkinson v. Inglesby*, 5 Johns., 386; *Blanchard v. Noyes*, 3 N. H., 518; *Wheeler v. Wheeler*, 11 Vt., 60; *Hinckley v. Arey*, 27 Me., 362; *Daniels v. Hatch*, 1 N. J., 91; *Eve v. Moseley*, 2 Strobb., 203; *Warren v. Skinner*, 20 Conn., 559. But it is otherwise if the claim is not liquidated, or is in dispute. *Stockton v. Frey*, 4 Gill, 406;

larity in the method of distraining, and 24 Geo. II, c. 24, in case of mistakes committed by justices of the peace), even *tender* of sufficient amends to the party injured is a bar of all actions, whether he thinks proper to accept such amends or no. (8)

II. Arbitration is where the parties, injuring and injured, submit all matters in dispute, concerning any personal chattels or personal wrong, to the judgment of two or more *arbitrators*; who are to decide the controversy: and if they do not agree, it is usual to add, that another person be called in as *umpire*, (*imperator*, or *impar*,) (x) to whose sole judgment it is then referred: or frequently there is only one arbitrator originally appointed. This decision, in any of these cases, is called an *award*. And thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties, or the judgment of a court of justice. (y) But the right of real property cannot thus pass by a mere award: (z) which subtilty in point of form (for it is now reduced to nothing else) had its rise from feudal principles; for, if this had been permitted, the land might have been aliened collusively without the consent of the superior. Yet, doubtless, an arbitrator may now award a conveyance or a release of land; and it will be a breach of the arbitration bond to refuse compliance. For, though originally the submission to arbitration used to be by word, or by deed, yet both of these being revocable in their nature, it is now become the practice to enter into mutual bonds, with condition to stand to the award or arbitration of the arbitrators, [\*17] \*or umpire therein named. (a) And experience having shown the great use of these peaceable and domestic tribunals, especially in settling matters of account, and other mercantile transactions, which are difficult and almost impossible to be adjusted on a trial at law; (9) the legislature has now established the use of them, as well in controversies where causes are depending, as

(x) Whart. *Angl. sacr.* i. 773. Nicola. *Scot. Hist. Libr.* ch. 1, *prope finem*.

(y) Brownl. 55. 1 Freem. 410.

(z) 1 Roll. Abr. 242. 1 Lord Raym. 118.

(a) Append. No. III, § 6.

Tuttle v. Tuttle, 12 Met., 551. Or if the debtor give a negotiable note for part of the debt. Sibree v. Tripp, 15 M. and W., 23. Or any chattel though of much less value than the amount of the debt. Jones v. Bullitt, 2 Lit., 49; Reed v. Bartlett; 19 Pick., 278. Or the note of a third person. Booth v. Smith, 3 Wend., 66. Or pay part before it is due. Brooks v. White, 2 Met., 283. And in any other case it is a good accord and satisfaction if the creditor receive some distinct benefit which he would not otherwise have been entitled to. See Douglass v. White, 3 Barb. Ch., 621. And it has been held that where a vendee who has ordered goods from a manufacturer, consents to receive them and waive strict compliance with the contract, he is bound by this waiver, notwithstanding there was no distinct consideration for it. Moore v. Detroit Locomotive Works, 14 Mich., 266; and see Monroe v. Perkins, 9 Pick., 805; Lattimore v. Harsen, 14 Johns., 330; Conyer v. Lynde, 10 Ind., 282. And of late the courts have inclined towards upholding agreements to accept part of a demand in satisfaction of the whole. See Pepper v. Aikens, 2 Bush, 251.

(8) In some of the United States statutes will be found adding to the number of cases in which tender of amends may be made, and in some a disposition has been manifested to permit the defendant in any suit brought for the recovery of debt or damages, to make an offer of such a sum as he is willing to allow judgment to pass for, and if the plaintiff declines to accept, to give costs against him unless the verdict in his favor is larger than the offer.

(9) It has been very common of late to introduce into certain species of contract a clause requiring the parties to submit to arbitration any disputes that may arise under them; but it has been generally supposed these stipulations could not be enforced, because they ousted the courts of jurisdiction. But recently an agreement not to bring suit until the damages were adjusted by a committee, or by arbitration, has been sustained. Avery v. Scott, 8 Exch., 487; S. C. in House of Lords, 5 H. L. Cas., 811; and see Russell v. Pellegrini, 6 El. and Bl., 1020.

The statement above that the marriage of a feme-sole revokes a submission to arbitration is probably not applicable in those states where the disabilities of coverture are removed and the woman is allowed to act on her own behalf the same after marriage as before.

Although it is perhaps true that the bankruptcy of one of the parties will not revoke a submission, yet the assignee would have the same power to revoke which the bankrupt possessed before the assignment. See Marsh v. Wood, 9 B. and C., 659.



in those where no action is brought: enacting by statute 9 and 10 Wm. III, c. 15, that all merchants and others, who desire to end any controversy, suit, or quarrel, (for which there is no other remedy but by personal action or suit in equity), may agree, that their submission of the suit to arbitration or umpirage shall be made a rule of any of the king's courts of record, and may insert such agreement in their submission, or promise, or condition of the arbitration-bond: which agreement being proved upon oath by one of the witnesses thereto, the court shall make a rule that such submission and award shall be conclusive: and, after such rule made, the parties disobeying the award shall be liable to be punished, as for a contempt of the court; unless such award shall be set aside, for corruption or other misbehaviour in the arbitrators or umpire, proved on oath to the court, within one term after the award is made. And, in consequence of this statute, it is now become a considerable part of the business of the superior courts, to set aside such awards when partially or illegally made; or to enforce their execution, when legal, by the same process of contempt, as is awarded for disobedience to those rules and orders, which are issued by the courts themselves. (10)

## CHAPTER II.

### OF REDRESS BY THE MERE OPERATION OF LAW.

THE remedies for private wrongs, which are effected by the mere operation of law, will fall within a very narrow compass; there being only two instances of this sort that at present occur to my recollection: the one that of *retainer*, where a creditor is made executor or administrator to his debtor; the other in the case of what the law calls a *remitter*.

I. If a person indebted to another makes his creditor or debtee his executor, or if such a creditor obtains letters of administration to his debtor; in these cases the law gives him a remedy for his debt, by allowing him to *retain* so much as will pay himself, before any other creditors whose debts are of equal degree. (a)(1) This is a remedy by the mere act of law, and grounded upon this reason; that the executor cannot, without an apparent absurdity, commence a suit against himself as a representative of the deceased, to recover that which is due to him in his own private capacity: but having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose. Else, by being made executor, \*he would be put in a worse condition than all the rest of the world, [\*19] besides. For, though a ratable payment of all the debts of the deceased,

(a) 1 Roll. Abr. 922. Plowd. 543. See book II, page 511.

(10) The common law procedure act, 1854, contains various provisions designed to give full effect to an agreement to arbitrate, where the parties fail to select a sole arbitrator or umpire, or where two are to be chosen and one party neglects or refuses to make choice. In the first case an arbitrator or umpire may be chosen by a judge of one of the superior courts, and in the other, the arbitrator who has been selected by one party may proceed as sole arbitrator. And if a reference is to two arbitrators, they may without special authority in the submission appoint an umpire, unless the terms of the submission forbid; and if they fail to award, and fail to appoint an umpire, one may be appointed by a judge. The act also contains provisions for expediting the award, and it empowers the court to set it aside in proper cases. It also empowers the court, where the award directs possession of land to be delivered, to enforce the award by summary process, as it might a judgment in ejectment.

(1) This is not the law in the United States. Debts of equal degree are paid ratably, and the executor in his accounting is allowed for no payment to himself beyond his just proportion.

in equal degree, is clearly the most equitable method, yet as every scheme for a proportionable distribution of the assets among all the creditors hath been hitherto found to be impracticable, and productive of more mischiefs than it would remedy; so that the creditor who first commences his suit is entitled to a preference in payment; it follows that as the executor can commence no suit, he must be paid the last of any, and, of course, must lose his debt in case the estate of his testator should prove insolvent, unless he be allowed to retain it. The doctrine of *retainer* is therefore the necessary consequence of that other doctrine of the law, the priority of such creditor who first commences his action. But the executor shall not retain his own debt, in prejudice to those of a higher degree; for the law only puts him in the same situation, as if he had sued himself as executor, and recovered his debt; which he never could be supposed to have done, while debts of a higher nature subsisted. Neither shall one executor be allowed to retain his own debt, in prejudice to that of his co-executor in equal degree; but both shall be discharged in proportion. (b) Nor shall an executor of his own wrong be in any case permitted to retain. (c)

II. Remitter is where he who hath the true property or *jus proprietatis* in lands, but is out of possession thereof, and hath no right to enter without recovering possession in an action, hath afterwards the freehold cast upon him by some subsequent, and of course defective, title; in this case he is remitted, or sent back by operation of law, to his ancient and more certain title. (d) The right of entry, which he hath gained by a bad title, shall be *ipso facto* annexed to his own inherent good one: and his defeasible estate shall be utterly defeated and annulled by the instantaneous act of law, without his participation or consent. (e) As if A disseizes B, that \*is, turns him out of possession, and [\*20] dies, leaving a son C; hereby the estate descends to C the son of A, and B is barred from entering thereon till he proves his right in an action; now if afterwards C, the heir of the disseizor, makes a lease for life to D, with remainder to B, the disseizee, for life, and D dies; hereby the remainder accrues to B, the disseizee: who thus gaining a new freehold by virtue of the remainder, which is a bad title, is by act of law *remitted*, in of his former and surer estate. (f) For he hath hereby gained a new right of possession, to which the law immediately annexes his ancient right of property.

If the subsequent estate, or right of possession, be gained by a man's own act or consent, as by immediate purchase, being of full age, he shall not be remitted. For the taking such subsequent estate was his own folly, and shall be looked upon as a waiver of his prior right. (g) Therefore it is to be observed, that to every remitter there are regularly these incidents; an ancient right, and a new defeasible estate of freehold, uniting in one and the same person; which defeasible estate must be *cast upon* the tenant, not gained by his own act or folly. The reason given by Littleton (h) why this remedy, which operates silently, and by the mere act of law, was allowed, is somewhat similar to that given in the preceding article; because otherwise he who hath right would be deprived of all remedy. For as he himself is the person in possession of the freehold, there is no other person against whom he can bring an action to establish his prior right. And for this cause the law doth adjudge him in by remitter; that is, in such plight as if he had lawfully recovered the same land by suit. For, as Lord Bacon observes, (i) the benignity of the law is such, as when, to preserve the principles and grounds of law, it depriveth a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse. *Nam quod remedio destituitur, ipsa re valet, si culpa absit.* But there shall be no \*remitter to a right, for [\*21] which the party has no remedy by action: (k) as if the issue in tail be

(b) Viner. *Abr. t. executors*, D. 2.

(c) 5 Rep. 30.

(d) Litt. § 659.

(e) Co. Litt., 358. Oro. Jac. 489.

(f) Finch, L. 191. Litt. § 683.

(g) Co. Litt. 348, 350.

(h) § 661.

(i) Elem. c. 2.

(k) Co. Litt. 349.

barred by the fine or warranty (2) of his ancestor, and the freehold is afterwards cast upon him; he shall not be remitted to his estate-tail: (1) for the operation of the remitter is exactly the same, after the union of the two rights, as that of a real action would have been before it. As, therefore, the issue in tail could not by any action have recovered his ancient estate, he shall not recover it by remitter.

And thus much for these extra judicial remedies, as well for real as personal injuries, which are furnished or permitted by the law, where the parties are so peculiarly circumstanced, as not to make it eligible, or in some cases even possible, to apply for redress in the usual and ordinary methods to the courts of public justice.

### CHAPTER III. OF COURTS IN GENERAL.

THE next, and principal, object of our inquiries is the redress of injuries by *suit in courts*: wherein the act of the parties and the act of law co-operate; the act of the parties being necessary to set the law in motion, and the process of the law being in general the only instrument by which the parties are enabled to procure a certain and adequate redress.

And here it will not be improper to observe, that although in the several cases of redress by the act of the parties mentioned in a former chapter, (a) the law allows an extrajudicial remedy, yet that does not exclude the ordinary course of justice; but it is only an additional weapon put into the hands of certain persons in particular instances, where natural equity or the peculiar circumstances of their situation require a more expeditious remedy, than the formal process of any court of judicature can furnish. Therefore, though I may defend myself, or relations, from external violence, I yet am afterwards entitled to an action of assault and battery: though I may retake my goods, if I have a fair and peaceable opportunity, this power of recaption does not debar me from my action of trover or detinue: I may either enter on the lands, on which I have a right of entry, or may demand possession by a real action: I may either abate a nuisance by my own authority, or call upon the law to do it for me: I may distrain for rent, or have an action of debt, at my own option; if I do not distrain my neighbor's cattle *damage-feasant*, I [\*28] may compel him by action of trespass to make me a fair satisfaction: if a heriot, or a deodand, be withheld from me by fraud or force, I may recover it though I never seized it. And with regard to accords and arbitrations, these, in their nature, being merely an agreement or compromise, most indisputably suppose a previous right of obtaining redress some other way: which is given up by such agreement. But as to remedies by the mere operation of law, those are indeed given, because no remedy can be ministered by suit or action, without running into the palpable absurdity of a man's bringing an action against himself: the two cases wherein they happen being such wherein the only possible legal remedy would be directed against the very person himself who seeks relief.

(1) Moor. 115. 1 Andr. 286.

(a) Ch.

(2) Estates tail are no longer barrable by these means. See statute 3 and 4 Wm. IV, c. 74, § 14.

There is no remitter where the right is barred by the statute of limitations. See Daniel v. Woodroffe, 10 M. and W., 608; 15 id., 769; 2 H. L. Ca., 811.

In all other cases it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded. And in treating of these remedies by suit in courts, I shall pursue the following method: *first*, I shall consider the nature and several species of courts of justice; and, *secondly*, I shall point out in which of these courts, and in what manner, the proper remedy may be had for any private injury, or, in other words, what injuries are cognizable, and how redressed, in each respective species of courts.

First, then, of courts of justice. And herein we will consider, *first*, their nature and incidents in general; and then, the several species of them, erected and acknowledged by the laws of England.

A court is defined to be a place wherein justice is judicially administered. (*b*) And, as by our excellent constitution the sole executive power of the laws is vested in the person of the king, it will follow that all courts of justice which [\*24] are \*the medium by which he administers the laws, are derived from the power of the crown. (*c*) For, whether created by act of parliament, or letters patent, or subsisting by prescription (the only methods by which any courts of judicature (*d*) can exist), the king's consent in the two former is expressly, and in the latter impliedly given. In all these courts the king is supposed in contemplation of law to be always present; but as that is in fact impossible, he is there represented by his judges, whose power is only an emanation of the royal prerogative.

For the more speedy, universal, and impartial administration of justice between subject and subject, the law hath appointed a prodigious variety of courts, some with a more limited, others with a more extensive, jurisdiction; some constituted to inquire only, others to hear and determine; some to determine in the first instance, others upon appeal and by way of review. All these in their turns will be taken notice of in their respective places: and I shall therefore here only mention one distinction, that runs throughout them all, viz.: that some of them are courts of record, others not of record. A court of record is that, where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony: which rolls are called the records of the court, and are of such high and supereminent authority, that their truth is not to be called in question. For it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary. (*e*) (1) And if the existence of a record be denied, it shall be tried by nothing but itself: that is, upon bare inspection whether there be any such record or no; else there would be no end of disputes. But, if there appear any mistake of the clerk in making up such record, the court will direct him to amend it. All courts of record are the king's courts, in right of his crown and royal dignity, (*f*) and therefore no other court hath authority to fine or imprison; so that the very erection [\*25] \*of a new jurisdiction with the power of fine or imprisonment makes it instantly a court of record. (*g*) A court not of record is the court of a private man; whom the law will not intrust with any discretionary power over the fortune or liberty of his fellow subjects. Such are the courts-baron

(*b*) Co. Litt. 58.  
(*c*) Co. Litt. 260.

(*e*) See Book I, ch. 27.  
(*f*) Finch, L. 251.

(*d*) Co. Litt. 280.  
(*g*) Salk. 200. 13 Mod. 338.

(1) A judgment is void if the court which assumed to render it had no jurisdiction. But generally it is not competent to show a want of jurisdiction in opposition to the recitals in the record. Whether, where a judgment rendered in one state is brought into controversy in another, it is competent to show a want of jurisdiction in contradiction of the record, is in dispute upon the authorities. See *Starbuck v. Murray*, 5 Wend., 148; *Hall v. Williams*, 6 Pick. 232; *Brudshaw v. Heath*, 13 Wend., 407; *Gleason v. Dodd*, 4 Met., 333; *Norwood v. Cobb*, 24 Texas, 551; which allow such evidence, and *Newcomb v. Peck*, 17 Vt., 302; *Wilcox v. Kassick*, 2 Mich., 165; *Bimelar v. Dawson*, 5 Ill., 536; *Roberts v. Caldwell*, 5 Dana, 512, and *Lincoln v. Tower* 2 McLean, 473, which exclude it. The recent case of *Knowles v. Gas Light Co.*, 19 Wall., 58, admits of such evidence.

incident to every manor, and other inferior jurisdictions: where the proceedings are not enrolled or recorded; but as well their existence as the truth of the matters therein contained shall, if disputed, be tried and determined by a jury. These courts can hold no plea of matters cognizable by the common law, unless under the value of 40s., nor of any forcible injury whatsoever, not having any process to arrest the person of the defendant. (h) (2)

In every court there must be at least three constituent parts, the *actor*, *reus*, and *judez*; the *actor*, or plaintiff, who complains of an injury done; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judez*, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and if any injury appears to have been done, to ascertain and, by its officers, to apply the remedy. It is also usual in the superior courts to have attorneys and advocates, or counsel, as assistants.

An attorney-at-law answers to the *procurator*, or proctor, of the civilians and canonists. (i) And he is one who is put in the place, stead, or *turn* of another, to manage his matters of law. Formerly every suitor was obliged to appear in person to prosecute or defend his suit (according to the old Gothic constitution), (k) unless by special license under the king's letters patent. (l) This is still the law in criminal cases. (3) And an idiot cannot to this day appear by attorney, but in person, (m) for he hath not discretion to enable him to appoint \*a proper substitute: and upon his being [ \*26 ] brought before the court in so defenceless a condition, the judges are bound to take care of his interests, and they shall admit the best plea in his behalf that any one present can suggest. (n) But as in the Roman law, "*cum olim in usu fuisset, alterius nomine agi non posse, sed, quia hoc non minimam incommoditatem habebat, ceperunt homines per procuratores litigare,*" (o) so with us upon the same principle of convenience, it is now permitted in general, by divers ancient statutes, whereof the first is statute Westm. 2, c. 10, that attorneys may be made to prosecute or defend an action in the absence of the parties to the suit. These attorneys are now formed into a regular corps; they are admitted to the execution of their office by the superior courts of Westminster-hall; and are in all points officers of the respective courts in which they are admitted; and, as they have many privileges on account of their attendance there, so they are peculiarly subject to the censure and animadversion of the judges. (4) No man can practice as an attorney in any

(h) 2 Inst. 311.

(i) Pope Boniface VIII, in 6 Decretal, l. 2, t. 16, § 2, speaks of "*procuratoribus, qui in aliquibus partibus attorney nuncupantur.*"

(k) Stiernhook *de jure Goth.* l. 1, c. 6.

(l) F. N. B. 25.

(m) F. N. B. 27.

(n) Bro. Abr. t. *idiot*, l.

(o) Inst. 4 tit. 10.

(2) The courts not of record in the United States, as well as the superior courts, are the creatures of statute, and are held by officers elected or appointed for the purpose. But they are not in any proper sense the courts of private men, and some of them are vested with large powers, and try cases in the common law mode, with jury. Courts of justices of the peace in the several states are generally held not to be courts of record.

(3) Now in England a full defense is allowed to be made by counsel in all cases of felony. See statute 6 and 7 Wm. IV, c. 114. It is allowed also in the United States in all cases, civil and criminal.

(4) Upon the general power of the court to deal summarily with attorneys, see *In re Austin et al.*, 5 Rawle, 202; S. C., 28 Am. Dec., 657; *Matter of Mills*, 1 Mich., 892; *In re Percy*, 36 N. Y., 651; *Matter of Blake*, 3 El. and El., 34; *Walker v. State*, 4 W. Va., 749; *Beene v. State*, 22 Ark., 149; *Dickens' Case*, 67 Penn. St., 169; *Bradley v. Fisher*, 13 Wall., 835. A person appearing as attorney is presumed to have due authority. *Lagow v. Patterson*, 1 Blackf., 327; *Osborne v. Bank of U. S.*, 9 Wheat., 738; *Hamilton v. Wright*, 37 N. Y., 502. Having been connected on one side he will not be permitted to engage on the other. *Cholmondeley v. Clinton*, 19 Vesey, 261; *Wilson v. State*, 16 Ind., 892; *Goulden v. State*, 11 Ga., 47. He will be liable to his client for any damages sustained by the latter in consequence of his negligence, misconduct or disobedience of instructions. *Wilcox v. Plummer*, 4 Pet., 174; *Holmes v. Peck*, 1 R. I., 242; *Reilly v. Cavanaugh*, 29 Ind., 435. A purchase made by him of his client of the subject matter of an existing litigation will not be upheld. *Wood v. Downer*, 18 Vesey, 119; *Jackson v. Ketcham*, 8 Johns., 479; *West v. Raymond*, 21 Ind., 805.

of those courts, but such as is admitted, and sworn an attorney of that particular court: an attorney of the court of king's bench cannot practice in the court of common pleas; nor *vice versa*. To practice in the court of chancery it is also necessary to be admitted a solicitor therein: and by the statute 22 Geo. II, c. 46, no person shall act as an attorney at the court of quarter sessions, but such as has been regularly admitted in some superior court of record. So early as the statute 4 Henry IV, c. 18, it was enacted, that attorneys should be examined by the judges, and none admitted but such as were virtuous, learned, and sworn to do their duty. And many subsequent statutes (p) have laid them under farther regulations.

Of advocates, or (as we generally call them) counsel, there are two species or degrees; barristers, and serjeants. The former are admitted after a considerable period of study, or at least standing, in the inns of court; (q) and are [\*27] in our old books \*styled apprentices, *apprenticii ad legem*, being looked upon as merely learners, and not qualified to execute the full office of an advocate till they were sixteen years standing; at which time, according to Fortescue, (r) they might be called to the state and degree of serjeants, or *servientes ad legem*. How ancient and honorable this state and degree is, with the form, splendour, and profits attending it, hath been so fully displayed by many learned writers, (s) that it need not be here enlarged on. I shall only observe, that serjeants at law are bound by a solemn oath (t) to do their duty to their clients, and that by custom (u) the judges of the courts of Westminster are always admitted into this venerable order, before they are advanced to the bench; the original of which was probably to qualify the *puisse* barons of the exchequer to become justices of assize, according to the exigence of the statute of 14 Edw. III, c. 16. From both these degrees some are usually selected to be his majesty's counsel learned in the law; the two principal of whom are usually called his attorney, and solicitor general. The first king's counsel, under the degree of serjeant, was Sir Francis Bacon, who was made so *honoris causa*, without either patent or fee; (w) so that the first of the modern order (who are now the sworn servants of the crown, with a standing salary) seems to have been Sir Francis North, afterwards lord keeper of the great seal to King Charles II. (x) These king's counsel answer, in some measure, to the advocates of the revenue, *advocati fisci*, among the Romans. For they must not be employed in any cause against the crown without special license; (y) in which restriction they agree with the advocates of the fisc: (z) but in the imperial law the prohibition was carried still further, and perhaps was more for the dignity of the sovereign: for, excepting some peculiar causes, the fiscal [\*28] advocates were not permitted to be at all concerned \*in private suits between subject and subject. (a) A custom has of late years prevailed of granting letters patent of precedence to such barristers as the crown thinks proper to honour with that mark of distinction, whereby they are entitled to such rank and pre-audience (a) as are assigned in their respective patents; some-

(p) 3 Jac. I. c. 7. 12 Geo. I. c. 29. 2 Geo. II. c. 23. 23 Geo. II. c. 46. 23 Geo. II. c. 26.

(q) See Book I, introduc. § 1. (r) *De LL.* c. 50.

(s) Fortesc. *ibid.* 10 Rep. pref. *Dudg. Orig. Jurid.* To which may be added a tract by the late Serjeant Wynne, printed in 1765, entitled "Observations touching the antiquity and dignity of the degree of serjeant at law."

(t) 2 Inst. 214.

(u) Fortesc. c. 50.

(w) See his letters, 256.

(x) See his life by Roger North. 37.

(y) *Cod.* 2, 9, 1.

(z) *Ibid.* 2, 7, 13.

(a) Pre-audience in the courts is reckoned of so much consequence, that it may not be amiss to subjoin a short table of the precedence which usually obtains among the practisers:

1. The king's premier serjeant (so constituted by special patent.) (6)
2. The king's ancient serjeant, or the eldest among the king's serjeants.
3. The king's advocate general.
4. The king's attorney-general. (6)
5. The king's solicitor-general. (6)

(b) The license to defend a prisoner is never refused, but some expense must be incurred in obtaining it.

(6) The king's attorney and solicitor-general now take precedence of the king's premier serjeant.

times next after the king's attorney-general, but usually next after his majesty's counsel then being. These (as well as the queen's attorney and solicitor-general), (*b*) rank promiscuously with the king's counsel, and together with them sit within the bar of the respective courts; but receive no salaries, and are not sworn; and therefore are at liberty to be retained in causes against the crown. And all other serjeants and barristers indiscriminately (except in the court of common pleas, where only serjeants are admitted) (*7*) may take upon them the protection and defence of any suitors, whether plaintiff or defendant; who are therefore called their *clients*, like the dependents upon the ancient Roman orators. Those indeed practiced *gratis*, for honor merely, or at most for the sake of gaining influence: and so likewise it is established with us, (*c*) that a counsel can maintain no action for his fees; which are given, not as *locatio vel conductio*, but as *quiddam honorarium*; not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation: (*d*) (*8*) as is also laid down with regard to advocates in the civil law, (*e*) whose *honorarium* was directed by a decree of the senate not to exceed in any case ten thousand sesterces, \*or about 80*l.* of English money. (*f*) [\*29] And, in order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to the unseemly licentiousness of prostitute and illiberal men (a few of whom may sometimes insinuate themselves even into the most honourable professions), it hath been holden that a counsel is not answerable for any matter by him spoken, relative to the cause in hand, and suggested in his client's instructions; although it should reflect upon the reputation of another, and even prove absolutely groundless; but if he mentions an untruth of his own invention, or even upon instructions if it be impertinent to the cause in hand, he is then liable to an action from the party injured. (*g*) (*9*) And counsel guilty of deceit or collusion are punishable by the statute Westm. 1, 3 Edw. I, c. 28, with imprisonment for a year and a day, and perpetual silence in the courts; a punishment still sometimes inflicted for gross misdemeanors in practice. (*h*)

6. The king's serjeants.

7. The king's counsel, with the queen's attorney and solicitor.

8. Serjeants at law.

9. The recorder of London.

10. Advocates of the civil law.

11. Barristers.

In the courts of exchequer two of the most experienced barristers, called the *post-man* and the *tub-man* (from the places in which they sit) have also a precedence in motions.

(b) Seid. tit. Aon. 1, 6, 7.

(c) Davis pref. 22. 1 Ch. Rep. 28.

(d) Davis 22.

(e) Ff. 11, 6, 1.

(f) Tac. ann. l. 1, 11, 7.

(g) Cro. Jac. 90.

(h) Sir T. Raym. 876.

(7) This is no longer the case.

(8) In the United States a counsellor is not only entitled to stipulate for a reasonable fee, but he may recover upon the client's implied promise to pay a reasonable compensation. In the state of New Jersey, however, the rule appears to be otherwise. Seeley v. Crane, 18 N. J., 85; Van Atta v. McKinney's Ex'rs, 19 N. J., 235.

It has been held that if an attorney renders a bill on the understanding that it is to be immediately paid, and the client disputes it, and compels its collection by legal proceedings, the attorney is not bound by the bill rendered, but may recover what the evidence shows the services to be reasonably worth. Romeyn v. Campau, 17 Mich., 327.

Physicians also in the United States may recover upon an implied promise to pay reasonable fees. See Ordonaux, Juris. of Med., 40.

(9) See McMillan v. Birch, 1 Binn., 178; Hoar v. Wood, 3 Met., 193; Ring v. Wheeler, 7 Cow., 725; Hastings v. Lusk, 22 Wend., 410; Garr v. Selden, 4 N. Y., 91; Jennings v. Paine, 4 Wis., 358; Cooley Const. Lim., 443.

## CHAPTER IV.

## OF THE PUBLIC COURTS OF COMMON LAW AND EQUITY.

WE are next to consider the several species and distinctions of courts of justice, which are acknowledged and used in this kingdom. And these are, either such as are of public and general jurisdiction throughout the whole realm; or such as are only of a private and special jurisdiction in some particular parts of it. Of the former there are four sorts; the universally established courts of common law and equity; the ecclesiastical courts; the courts military; and courts maritime. And, first, of such public courts as are courts of common law and equity.(1)

(1) This seems an appropriate place in which to note the very great changes which have recently been made in the English judicial system, in the creation of the supreme court of judicature, and the merger therein of the several ancient courts.

By the judicature acts of 1873 and 1875, the supreme court of judicature is to consist of two permanent divisions, the high court of justice and the court of appeal. An appeal will lie from the high court of justice to the court of appeal, and from the court of appeal to the house of lords. Two lords of appeal in ordinary are appointed to aid the house of lords in determining appeals. They hold the title of baron for life only, and have a salary of £8,000 per annum. The house of lords may now sit for hearing appeals during the prorogation and dissolution of parliament. The lords of appeal consist of the lord chancellor, the lords of appeal in ordinary, and those peers who have held "high judicial office." Three lords of appeal must be present in hearing every case.

The high court of justice has original jurisdiction, with appellate jurisdiction from the inferior courts. It has the jurisdiction formerly exercised by the court of chancery, the three common law courts, the courts of admiralty, probate and divorce, the courts of pleas at Lancaster and Durham, and the courts created by commissions of assize, oyer and terminer, and gaol delivery. It consists of five divisions: 1. the chancery division; 2. the queen's bench division; 3. the common pleas division; 4. the exchequer division, and 5. the probate, divorce and admiralty division. In 1881 the queen's bench division, the common pleas division and the exchequer division were consolidated into one, called the queen's bench division.

The court of appeal exercises appellate jurisdiction corresponding to that exercised by the court of appeal in chancery, exchequer chamber, the court of the lord warden of the stannaries, and the appellate jurisdiction of the judicial committee in admiralty and herey matters. It consists of the lord chancellor as its president, the lord chief justice of England, the master of the rolls, and six other judges. The court may be divided into divisions by its president, but every appeal must be heard by at least three judges.

By 11 and 12 Vict., c. 78, the court of crown cases reserved was established for hearing such questions of law in criminal trials as should be remitted to them by the trial judge. There was no appeal from its judgment. These cases are now to be heard by at least five of the judges of the high court of justice.

The high court of admiralty has jurisdiction over all maritime causes, that is, injuries occurring on the high seas. It has an instance jurisdiction and in time of war a prize jurisdiction. The independent criminal jurisdiction of this court has been taken away and conferred upon the common law courts, but the judge of the admiralty court may still sit with the commissioners of oyer and terminer. Vice admiralty courts are established in the English colonies and foreign possessions.

A court for divorce and matrimonial causes was created by 20 and 21 Vict., c. 85. The court has jurisdiction over suits for dissolution of marriages, for judicial separation, for nullity of marriage, for restitution of conjugal rights, and for jactitation of marriage. The judge of the court of probate is the judge ordinary of this court. Questions of fact may be tried before the court itself or before a jury. An appeal lies from the judge ordinary to the full court.

The probate court had conferred upon it by statute in 1857 the jurisdiction over testamentary matters formerly exercised by the ecclesiastical courts. The courts of admiralty, probate and divorce now constitute one of the divisions of the high court of justice.

The judicial committee of the privy council is the ultimate court of appeal from the



The policy of our ancient constitution, as regulated and established by the great Alfred, was to bring justice home to every man's door, by constituting as many courts of judicature as there are manors and townships in the kingdom; wherein injuries were redressed in an easy and expeditious manner, by the suffrage of neighbours and friends. These little courts, however, communicated with others of a larger jurisdiction, and those with others of a still greater power; ascending gradually from the lowest to the supreme courts, which were respectively constituted to correct the errors of the inferior ones, and to determine such causes as, by reason of their weight and difficulty, demanded a more solemn discussion. \*The course of justice flowing in [\*31] large streams from the king, as the fountain, to his superior courts of record; and being then subdivided into smaller channels, till the whole and every part of the kingdom were plentifully watered and refreshed. An institution that seems highly agreeable to the dictates of natural reason, as well as of more enlightened policy; being equally similar to that which prevailed in Mexico and Peru before they were discovered by the Spaniards, and to that which was established in the Jewish republic by Moses. In Mexico each town and province had its proper judges, who heard and decided causes, except when the point in litigation was too intricate for their determination; and then it was remitted to the supreme court of the empire, established in the capital, and consisting of *twelve* judges. (a) Peru, according to Gracilasso de Vega (an historian descended from the ancient Incas of that country), was divided into small districts containing *ten* families each, all registered and under one magistrate; who had authority to decide little differences and punish petty crimes. Five of these composed a higher class of *fifty* families; and two of these last composed another, called a *hundred*. Ten hundreds constituted the largest division, consisting of a *thousand* families; and each division had its separate judge or magistrate, with a proper degree of subordination. (b) In like manner we read of Moses, that, finding the sole administration of justice too heavy for him, he "chose able men out of all Israel, such as feared God, men of truth, hating covetousness; and made them heads over the people, rulers of thousands, rulers of hundreds, rulers of fifties, and rulers of tens; and they judged the people at all seasons; the hard causes they brought unto Moses; but every small matter they judged themselves." (c) These inferior courts, at least the name and form of them, still continue in our legal constitution: but as the superior courts of record have in practice obtained a concurrent original jurisdiction with these, and as there is, besides, a power of removing plaints or actions thither from all the inferior jurisdictions; upon these accounts (amongst others) it has happened that \*these petty tribunals have fallen into decay, and almost into oblivion; whether for the better or the worse, may be mat- [\*32]

(a) Mod. Un. Hist. xxxviii, 400.

(b) Mod. Un. Hist. xxxix, 14.

(c) Exod. c. 18.

courts of the various colonies and dependencies of Great Britain and the ecclesiastical courts. The ecclesiastical courts have now virtually lost their jurisdiction in civil cases.

The county courts have jurisdiction in personal actions where the amount involved does not exceed £50, and in ejectment where the annual value of the land does not exceed £30. In 1865 an equitable jurisdiction was conferred upon them. Some of them have also jurisdiction in probate, admiralty and bankruptcy cases. There are fifty-eight county courts in England, and their jurisdiction is concurrent with the superior courts, but if a case which might have been begun in the county court is commenced in the superior court, costs will generally be denied to the plaintiff. The judge of the county court may determine matters of fact as well as of law. An appeal lies to the divisional courts of the high court of justice.

Justices of the peace possess preliminary jurisdiction in criminal cases. They commit prisoners for trial at quarter sessions or assize, and may punish petty offenses summarily. They are required to possess a certain amount of property, and except in the larger cities and towns serve gratuitously.

Criminal cases are heard by either a judge of the high court, the court of quarter sessions in counties, or the recorder in corporate towns and cities. The court of quarter sessions or the recorder cannot impose a greater sentence than seven years penal servitude.

ter of some speculation, when we consider on the one hand the increase of expense and delay, and on the other the more able and impartial decision, that follow from this change of jurisdiction.

The order I shall observe in discoursing on these several courts, constituted for the redress of *civil* injuries (for with those of a jurisdiction merely *criminal* I shall not at present concern myself), will be by beginning with the lowest, and those whose jurisdiction, though public and generally dispersed throughout the kingdom, is yet, (with regard to each particular court) confined to very narrow limits; and so ascending gradually to those of the most extensive and transcendent power.

I. The lowest, and at the same time the most expeditious, court of justice known to the law of England, is the court of *piepoudre*, *curia pedis pulverizati*; so called from the dusty feet of the suitors: or, according to Sir Edward Coke, (*d*) because justice is there done as speedily as dust can fall from the foot;—upon the same principle that justice among the Jews was administered in the gate of the city (*e*) that the proceedings might be the more speedy, as well as public. But the etymology given us by a learned modern writer (*f*) is much more ingenious and satisfactory; it being derived, according to him, from *piéd puldreaux*, (a pedlar, in old French), and therefore signifying the court of such petty chapmen as resort to fairs or markets. It is a court of record, incident to every fair and market; of which the steward of him who owns or has the toll of the market, is the judge; and its jurisdiction extends to administer justice for all commercial injuries done in that very fair or market, and not in any preceding one. So that the injury must be done, complained of, heard, and determined, within the compass of one and the same day, unless [\*33] the fair continues longer. The court hath cognizance of \*all matters of contract that can possibly arise within the precinct of that fair or market; and the plaintiff must make oath that the cause of action arose there. (*g*) From this court a writ of error lies, in the nature of an appeal, to the courts at Westminster; (*h*) which are now also bound by the statute 19 Geo. III., c. 70, to issue writs of execution, in aid of its process, after judgment, where the person or effects of the defendant are not within the limits of this inferior jurisdiction; which may possibly occasion the revival of the practice and proceedings in these courts, which are now in a manner forgotten. The reason of their original institution seems to have been, to do justice expeditiously among the variety of persons that resort from distant places to a fair or market; since it is probable that no other inferior court might be able to serve its process, or execute its judgments, on both or perhaps either of the parties; and therefore unless this court had been erected, the complainant must necessarily have resorted, even in the first instance, to some superior judicature.

II. The *court-baron* is a court incident to every manor in the kingdom, to be holden by the steward within the said manor. This court-baron is of two natures: (*i*) the one is a customary court, of which we formerly spoke, (*k*) appertaining entirely to the copyholders, in which their estates are transferred by surrender and admittance, and other matters transacted relative to their tenures only. The other, of which we now speak, is a court of common law, and it is the court of the barons, by which name the freeholders were sometimes anciently called: for that it is held before the freeholders who owe suit and service to the manor, the steward being rather the register than the judge. These courts, though in their nature distinct, are frequently confounded together. The court we are now considering, viz.: the freeholders' court, was composed of the lord's tenants, who were the  *pares* of each other, and were bound by their feudal tenure to assist their lord in the dispensation of domestic justice. This was formerly held every three weeks; and its most im-

(d) 4 Inst. 272.

(e) Ruth, c. 4.

(f) Barrington's observat. on the stat. 33E.

(g) Stat. 17 Edw. IV. c. 2.

(h) Cro. Eliz. 773.

(i) Co. Litt. 58.

(k) Book 2, ch. 4, ch. 6 and ch. 22.

portant business is to determine, by writ of right, all controversies relating to the right of lands within the manor. It may also hold plea of any personal actions, of debt, trespass on the case, or the like, where the debt or damages do not \*amount to forty shillings: (l) which is the same sum, or three marks, that bounded the jurisdiction of the ancient Gothic courts in [\*34] their lowest instance, or *ferding-courts*, so called, because four were instituted within every superior district or hundred. (m) But the proceedings on a writ of right may be removed into the county court by a precept from the sheriff called a *tolt*, (n) "*quia tollit atque eximit causam e curia baronum.*" (o) (2) And the proceedings in all other actions may be removed into the superior courts by the king's writs of *pone*, (p) or *accedas ad curiam*, according to the nature of the suit. (q) After judgment given, a writ also of *false judgment* (r) lies to the courts at Westminster to rehear and review the cause, and not a writ of *error*; for this is not a court of record: and therefore in some of these writs of removal, the first direction given is to cause the plaint to be recorded, *recordari facias loquelam*.

III. A hundred-court is only a larger court-baron, being held for all the inhabitants of a particular hundred instead of a manor. (3) The free suitors are here also the judges, and the steward the registrar, as in the case of a court-baron. It is likewise no court of record; resembling the former in all points, except that in point of territory it is of a greater jurisdiction. (s) This is said by Sir Edward Coke to have been derived out of the county court for the ease of the people, that they might have justice done to them at their own doors, without any charge or loss of time; (t) but its institution was probably coeval with that of hundreds themselves, which were formerly observed (u) to have been introduced, though not invented, by Alfred, being derived from the polity of the ancient Germans. The *centeni*, we may remember, were the principal inhabitants of a district composed of different villages, originally in number a hundred, but afterwards only \*called by that name; (v) and who probably gave the same denomination to the district out of which they were [\*35] chosen. Cæsar speaks positively of the judicial power exercised in their hundred-courts and courts-baron. "*Principes regionum atque pagorum*" (which we may fairly construe, the lords of hundreds and manors), "*inter suos jus dicunt, controversiasque minuunt.*" (w) And Tacitus, who had examined their constitution still more attentively, informs us not only of the authority of the lords, but that of the *centeni*, the hundredors, or jury; who were taken out of the common freeholders, and had themselves a share in the determination. "*Eliguntur in conciliis et principes, qui jura per pagos vicosque reddunt: centeni singulis, ex plebe comites, consilium simul et auctoritas, adsunt.*" (x) This hundred-court was denominated *hæreda* in the Gothic constitution. (y) But this court, as causes are equally liable to removal from hence as from the common court-baron, and by the same writs, and may also be reviewed by writ of false judgment, is therefore fallen into equal disuse with regard to the trial of actions.

IV. The county court (4) is a court incident to the jurisdiction of the sheriff. It is not a court of record, but may hold pleas of debt or damages under the value of forty shillings. (z) Over some of which causes these inferior courts have, by the express words of the statute of Gloucester, (a) a jurisdiction

(l) Finch, 248. (m) Stiernhook *de jure Goth.* l. 1, c. 2. (n) F. N. B. 3, 4. See Appen. No. I, § 2.  
 (o) 3 Rep. pref. (p) See Appen. No. I, § 3. (q) F. N. B. 4, 70. Finch, l. 444, 445.  
 (r) F. N. B. 18. (s) Finch, l. 248. 4 Inst. 287. (t) 2 Inst. 71. (u) Book I, p. 116.  
 (v) *Centeni ex singulis pagis sunt, idque ipsum inter suos vocantur; et, quod primo numerus fuit, jam nomen et honor est.* Tac. *de mor. Germ.* c. 6.  
 (w) De Bell. Gall. l. 6, c. 22. (x) De Morib. German. c. 18. (y) Stiernhook, l. 1, c. 2.  
 (z) 4 Inst. 286. (a) 6 Edw. I, c. 8.

(2) Writs of right are now abolished.

(3) The courts-baron and hundred-court have long been obsolete as courts of civil jurisdiction.

(4) Very different county courts, created by statute, are now in existence.

totally exclusive of the king's superior courts. For in order to be entitled to sue an action of trespass for goods before the king's justiciars, the plaintiff is directed to make affidavit that the cause of action does really and *bona fide* amount to 40s.; which affidavit is now unaccountably disused, (b) except in the court of exchequer. The statute, also, 43 Eliz. c. 6, which gives the judges in many personal actions, where the jury assess less damages than 40s., [\*36] a power to certify the same and \*abridge the plaintiff of his full costs, was also meant to prevent vexation by litigious plaintiffs; who, for purposes of mere oppression, might be inclinable to institute suits in the superior courts for injuries of a trifling value. The county court may also hold plea of many real actions, and of all personal actions to any amount, by virtue of a special writ called a *justicies*; which is a writ empowering the sheriff for the sake of dispatch to do the same justice in his county court, as might otherwise be had at Westminster. (c) The freeholders of the county are the real judges in this court, and the sheriff is the ministerial officer. The great conflux of freeholders, which are supposed always to attend at the county court (which Spelman calls *forum plebeie justicie et theatrum comitivie potestatis* (d) is the reason why all acts of parliament at the end of every session were wont to be there published by the sheriff; why all outlawries of absconding offenders are there proclaimed; and why all popular elections which the freeholders are to make, as formerly of sheriffs and conservators of the peace, and still of coroners, verderors, and knights of the shire, must ever be made *in pleno comitatu* or in full county court. By the statute 2 Edw. VI, c. 25, no county court shall be adjourned longer than for one month, consisting of twenty-eight days. And this was also the ancient usage, as appears from the laws of King Edward the elder; (e) "*præpositus* (that is, the sheriff) *ad quartam circiter septimanam frequentem populi concionem celebrato: cuique jus dicito; litesque singulas dirimito.*" In those times the county court was a court of great dignity and splendour, the bishop and the ealdorman (or earl), with the principal men of the shire sitting therein to administer justice both in lay and ecclesiastical causes. (f) But its dignity was much impaired, when the bishop was prohibited and the earl neglected to attend it. And, in modern times, as proceedings are removable from hence into the king's superior courts, by writ of *pone* or *recor-* [\*37] *dari*, (g) in the same manner as from \*hundred-courts, and courts-baron; and as the same writ of false judgment may be had, in nature of a writ of error; this has occasioned the same disuse of bringing action therein.

These are the several species of common law courts, which, though dispersed universally throughout the realm, are nevertheless of a partial jurisdiction, and confined to particular districts: yet communicating with, and as it were members of, the superior courts of a more extended and general nature; which are calculated for the administration of redress, not in any one lordship, hundred, or county only, but throughout the whole kingdom at large. Of which sort is,

V. The court of *common pleas*, or, as it is frequently termed in law, the court of *common bench*.

By the ancient Saxon constitution, there was only one superior court of justice in the kingdom; and that court had cognizance both of civil and spiritual causes, viz.: the *wittena-gemote*, or general council, which assembled annually or oftener, wherever the king kept his Christmas, Easter, or Whitsuntide, as well to do private justice as to consult upon public business. At the conquest the ecclesiastical jurisdiction was diverted into another channel; and the conqueror, fearing danger from these annual parliaments, contrived also to separate their ministerial power, as judges, from their deliberative, as counsellors to the crown. He therefore established a constant court in his own hall, thence called by Bracton, (h) and other ancient authors *aula regia*, or *aula regis*. This court was composed of the king's great officers of state resident in his

(b) 3 Inst. 511.

(c) Finch, 318. r. N. B. 152.

(d) Gloss v. comitatus.

(e) C. 11.

(f) LL. Eadgar. c. 5.

(g) F. N. B. 70. Finch, 445.

(h) l. 2, tr. 1, c. 7.

palace, and usually attendant on his person: such as the lord high constable and lord mareschal, who chiefly presided in matters of honour and of arms; determining according to the law military and the law of nations. Besides these there were the lord high steward, and lord great chamberlain; the steward of the household; the lord chancellor, whose peculiar \*business it was to keep the king's seal, and examine all such writs, grants, and [\*38] letters, as were to pass under that authority; and the lord high treasurer, who was the principal adviser in all matters relating to the revenue. These high officers were assisted by certain persons learned in the laws, who were called the king's justiciars or justices; and by the greater barons of parliament, all of whom had a seat in the *aula regia*, and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. All these in their several departments transacted all secular business both criminal and civil, and likewise the matters of the revenue: and over all presided one special magistrate, called the chief justiciar, or *capitalis justiciarius totius Angliæ*; who was also the principal minister of state, the second man in the kingdom, and by virtue of his office guardian of the realm in the king's absence. And this officer it was, who principally determined all the vast variety of causes that arose in this extensive jurisdiction; and from the plenitude of his power grew at length both obnoxious to the people, and dangerous to the government which employed him. (i)

This great universal court being bound to follow the king's household in all his progresses and expeditions, the trial of common causes therein was found very burthensome to the subject. Wherefore King John, who dreaded also the power of the justiciar, very readily consented to that article which now forms the eleventh chapter of *magna carta*, and enacts, "that *communia placita non sequantur curiam regis, sed teneantur in aliquo loco certo*." This certain place was established in Westminster-hall, the place where the *aula regis* originally sat, when the king resided in that city; and there it hath ever since continued. And the court being thus rendered fixed and stationary, the judges became so too, and a chief with other justices of the common pleas was thereupon appointed; with jurisdiction to hear and determine all pleas of land, and injuries merely civil, between subject and subject. Which critical establishment of this principal court of \*common law, at that particular juncture and that particular place, gave rise to the inns of court in its [\*39] neighbourhood; and thereby collecting together the whole body of the common lawyers, enabled the law itself to withstand the attacks of the canonists and civilians, who laboured to extirpate and destroy it. (j) This precedent was soon after copied by King Philip the Fair in France, who about the year 1302 fixed the parliament of Paris to abide constantly in that metropolis; which before used to follow the person of the king wherever he went, and in which he himself used frequently to decide the causes that were there depending; but all were then referred to the sole cognizance of the parliament and its learned judges. (k) And thus, also, in 1495, the Emperor Maximilian I. fixed the imperial chamber (which before always traveled with the court and household) to be constantly held at Worms, from whence it was afterwards translated to Spire. (l)

The *aula regia* being thus stripped of so considerable a branch of its jurisdiction, and the power of the chief justiciar being also considerably curbed by many articles in the great charter, the authority of both began to decline apace under the long and troublesome reign of King Henry III. And, in further pursuance of this example, the other several officers of the chief justiciar were under Edward the First (who new-modeled the whole frame of our judicial polity) subdivided and broken into distinct courts of judicature. A court of chivalry was erected, over which the constable and mareschal presided; as did

(i) Spelm. Gl. 331, 2. 3. Glhb. Hist. O. P. Introduc. 17.  
(k) Mod. Un. Hist. xxiii, 396.

(l) Ibid. xxix, 467.

(j) See Book I, introduc. § 1.

the steward of the household over another, constituted to regulate the king's domestic servants. The high steward, with the barons of parliament, formed an august tribunal for the trial of delinquent peers; and the barons reserved to themselves in parliament the right of reviewing the sentences of other courts in the last resort. The distribution of common justice between man and man was thrown into so provident an order, that the great judicial officers were

[\*40] \*made to form a check upon each other: the court of chancery issuing all original writs under the great seal to the other courts; the common pleas being allowed to determine all causes between private subjects; the exchequer managing the king's revenue; and the court of king's bench retaining all the jurisdiction which was not cantoned out to other courts, and particularly the superintendence of all the rest by way of appeal; and the sole cognizance of pleas of the crown or criminal causes. For pleas or suits are regularly divided into two sorts: *pleas of the crown*, which comprehend all crimes and misdemeanors, wherein the king (on behalf of the public) is the plaintiff; and *common pleas*, which include all civil actions, depending between subject and subject. The former of these were the proper object of the jurisdiction of the court of king's bench; the latter of the court of common pleas: which is a court of record, and is styled by Sir Edward Coke (*m*) the lock and key of the common law; for herein only can real actions, that is, actions which concern the right of freehold or the realty, be originally brought: and all other, or personal pleas between man and man, are likewise here determined; though in most of *them* the king's bench has also a concurrent authority.

The judges of this court are at present (*n*) four in number, one chief and three *puisne* justices, created by the king's letters patent, who sit every day in the four terms to hear and determine all matters of law arising in civil causes, whether real, personal, or mixed and compounded of both. These it takes cognizance of, as well originally, as upon removal from the inferior courts before-mentioned. But a writ of error, in the nature of an appeal, lies from this court into the court of king's bench.

[\*41] \*VI. The court of king's bench (so called because the king used formerly to sit there in person, (*o*) the style of the court still being *coram ipso rege*) is the supreme court of common law in the kingdom; consisting of a chief justice and three *puisne* justices, who are by their office the sovereign conservators of the peace, and supreme coroners of the land. Yet, though the king himself used to sit in this court, and still is supposed so to do; he did not, neither by law is he empowered (*p*) to, determine any cause or motion, but by the mouth of his judges, to whom he hath committed his whole judicial authority. (*q*)

This court, which (as we have said) is the remnant of the *aula regia*, is not, nor can be, from the very nature and constitution of it, fixed to any certain place, but may follow the king's person wherever he goes: for which reason all process issuing out of this court in the king's name is returnable "*ubicunque fuerimus in Anglia*." It hath indeed, for some centuries past, usually sat at Westminster, being an ancient palace of the crown; but might remove with the king to York or Exeter, if he thought proper to command it. And we find that, after Edward I had conquered Scotland, it actually sat at Roxburgh. (*r*) And this movable quality, as well as its dignity and power, are fully

(*m*) 4 Inst. 99.

(*n*) King James I, during the greater part of his reign, appointed five judges in the courts of king's bench and common pleas, for the benefit of a casting voice in case of a difference in opinion, and that the circuits might at all times be fully supplied with judges of the superior courts. And, in subsequent reigns, upon the permanent indisposition of a judge, a fifth hath been sometimes appointed. Sir T. Bayn. 475.

(*o*) 4 Inst. 73.

(*p*) See book 1. ch. 7. The king used to decide causes in person in the *aula regia*. "*In curia domini regis ipse in propria persona jura decernit*." (*Dial. de Scacc.* l. 1. § 4.) After its dissolution King Edward I frequently sat in the court of king's bench. (See the records cited. 4 Burr. 861.) And in later times, James I is said to have sat there in person, but was informed by his judges that he could not deliver an opinion.

(*q*) 4 Inst. 71.

(*r*) M. 20. 21 Edw. I. Hale Hist. C. L. 200.

expressed by Bracton, when he says that the justices of this court are "*capitales, generales, perpetui, et majores; a latere regis residentes, qui omnium aliorum corrigere tenentur injurias et errores.*" (s) And it is moreover especially provided in the *articuli super cartas*, (t) that the king's chancellor, and the justices of his bench, shall follow him, so that he may have at all times near unto him some that be learned in the laws.

\*The jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and [\*42] may either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the liberty of the subject, by speedy and summary interposition. It takes cognizance both of criminal and civil causes; the former in what is called the crown-side or crown-office; the latter in the plea-side of the court. The jurisdiction of the crown-side it is not our present business to consider; that will be more properly discussed in the ensuing book. But on the plea-side, or civil branch, it hath an original jurisdiction and cognizance of all actions of trespass, or other injury alleged to be committed *vi et armis*; or actions of forgery of deeds, maintenance, conspiracy, deceit, and actions on the case which allege any falsity or fraud; all of which savour of a criminal nature, although the action is brought for a civil remedy; and make the defendant liable in strictness to pay a fine to the king, as well as damages to the injured party. (u) The same doctrine is also now extended to all actions on the case whatsoever; (v) but no action of debt or detinue, or other mere civil action, can by the *common law* be prosecuted by any subject in this court, by *original* writ out of chancery; (x) though an action of debt, given by *statute*, may be brought in the king's bench as well as in the common pleas. (y) And yet this court might always have held plea of any civil action (other than actions real) provided the defendant was an officer of the court; or in the custody of the marshal, or prison-keeper, of this court; for a breach of the peace or any other offence. (z) And, in process of time, it began by a fiction to hold plea of all personal actions whatsoever, and has continued to do so for ages: (a) it being surmised that the defendant is arrested for a supposed trespass, which he never has in reality committed; and being thus in the custody of the marshal of this court, the plaintiff is at liberty to proceed against him for any other personal injury: which surmise of being in the marshal's custody, the defendant is not at liberty to dispute. (b) And these fictions of law, though at first they may startle the student, he will find upon further consideration to be highly beneficial and useful; especially as this maxim is ever invariably observed, that no fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law. (c) So true it is, that *in fictions juris semper subsistit æquitas*. (d) In the present case, it gives the suitor his choice of more than one tribunal, before which he may institute his action; and prevents the circuitry and delay of justice, by allowing that suit to be originally, and in the first instance, commenced in this court, which, after a determination in another, might ultimately be brought before it on a writ of error.

For this court is likewise a court of appeal, into which may be removed by a writ of error all determinations of the court of common pleas, and of all inferior courts of record in England; and to which a writ of error lies also from the court of king's bench in Ireland. Yet even this so high and honour-

(s) 1. 3, c. 10. (t) 28 Edw. I. c. 5.  
 (u) Finch L. 198. 1 Inst. 23. *Diversité de courtes c. bank le roy.*  
 (v) F. N. B. 86, 92. 1 Lilly Prac. Reg. 508. (x) 4 Inst. 76. Trye's Jus Filizar. 101.  
 (y) Carth. 234. (z) 4 Inst. 71. (a) *Ibid.* 72.  
 (b) Thus, too, in the civil law: *contra fictionem non admittitur probatio: quid enim efficeret probatio veritatis, ubi fictio adversus veritatem fingit. Nam fictio nihil aliud est, quam legis adversus veritatem in re possibilibus ex justa causa dispositio.* (Gothofred. in Ff. l. 22, t. 3.)  
 (c) 3 Rep. 30. 3 Roll. Rep. 502. (d) 11 Rep. 51. Co. Litt. 150.

able court is not the *dernier resort* of the subject; for, if he be not satisfied with any determination here, he may remove it by writ of error into the house of lords, or the court of exchequer chamber, as the case may happen, according to the nature of the suit, and the manner in which it has been prosecuted.

VII. The court of exchequer is inferior in rank not only to the court of king's bench, but to the common pleas also: but I have chosen to consider it in this order, on account of its double capacity, as a court of law and a court of [\*44] equity \*also. It is a very ancient court of record, set up by William the Conqueror, (e) as a part of the *aula regia*, (f) though regulated and reduced to its present order by King Edward I; (g) and intended principally to order the revenues of the crown, and to recover the king's debts and duties. (h) It is called the exchequer, *scaccharium*, from the checked cloth, resembling a chess-board, which covers the table there: and on which, when certain of the king's accounts are made up, the sums are marked and scored with counters. It consists of two divisions: the receipt of the exchequer, which manages the royal revenue, and with which these Commentaries have no concern: and the court or judicial part of it, which is again subdivided into a court of equity, and a court of common law.

The court of equity is held in the exchequer chamber before the lord treasurer, the chancellor of the exchequer, the chief baron, and three *puisne* ones. These Mr. Selden conjectures (i) to have been anciently made out of such as were barons of the kingdom, or parliamentary barons; and thence to have derived their name; which conjecture receives great strength from Bracton's explanation of *magna carta*, c. 14, which directs that the earls and barons be amerced by their peers; that is, says he, by the barons of the exchequer. (k) The primary and original business of this court is to call the king's debtors to account, by bill filed by the attorney-general; and to recover any lands, tenements, or hereditaments, any goods, chattels, or other profits or benefits, belonging to the crown. So that by their original constitution the jurisdiction of the courts of common pleas, king's bench, and exchequer, was entirely separate and distinct; the common pleas being intended to decide all controversies between subject and subject; the king's bench to correct all crimes and misdemeanors that amount to a breach of the peace, the king being then plaintiff, as such offences are in open derogation of the *jura regalia* of his crown; and [\*45] the exchequer to adjust \*and recover his revenue, wherein the king also is plaintiff, as the withholding and non-payment thereof is an injury to his *jura fiscalia*. But, as by a fiction almost all sorts of civil actions are now allowed to be brought in the king's bench, in like manner by another fiction all kinds of personal suits may be prosecuted in the court of exchequer. For as all the officers and ministers of this court have, like those of other superior courts, the privilege of suing and being sued only in their own court; so also the king's debtors and farmers, and all accomptants of the exchequer, are privileged to sue and implead all manner of persons in the same court of equity that they themselves are called into. They have likewise privilege to sue and implead one another, or any stranger, in the same kind of common law actions (where the personalty only is concerned) as are prosecuted in the court of common pleas.

This gives original to the common law part of their jurisdiction, which was established merely for the benefit of the king's accomptants, and is exercised by the barons only of the exchequer, and not the treasurer or chancellor. The writ upon which all proceedings here are grounded is called a *quo minus*; in which the plaintiff suggests that he is the king's farmer or debtor, and that the defendant hath done him the injury or damage complained of; *quo minus sufficiens existit*, by which he is the less able to pay the king his debt or rent. And these suits are expressly directed, by what is called the statute of Rutland, (l)

(e) Lamb. *Archeion*. 24.

(f) Madox, *hist. exch.* 109.

(g) Tit. hon. 2, 5, 10.

(h) Spelm. *Gloss. I.* in cod. leg. vet. apud Wilkins. (i) 4 Inst. 109-110.

(k) 1 R. 2, tr. 2, c. 1, § 3.

(l) 10 Edw. 1, c. 11.



to be confined to such matters only as specially concern the king or his ministers of the exchequer. And by the *articuli super cartas*, (m) it is enacted, that no common pleas be thenceforth holden in the exchequer contrary to the form of the great charter. But now, by the suggestion of privilege, any person may be admitted to sue in the exchequer as well as the king's accomptant. The surmise of being debtor to the king, is therefore become matter of form and mere words of course, and the court is open to all the nation equally. The same holds with regard to the equity side of the court: for there any person may file \*a bill against another upon a bare suggestion that he is [46] the king's accomptant; but whether he is so or not is never controverted. In this court, on the equity side, the clergy have long used to exhibit their bills for the non-payment of tithes: in which case the surmise of being the king's debtor is no fiction, they being bound to pay him their first fruits, and annual tenths. But the chancery has of late years obtained a large share in this business.

An appeal from the equity side of this court lies immediately to the house of peers; but from the common law side, in pursuance of the statute 31 Edw. III, c. 12, a writ of error must be first brought into the court of exchequer chamber. And from the determination there had, there lies, in the *dernier resort*, a writ of error to the house of lords.

VIII. The high court of chancery is the only remaining, and in matters of civil property by much the most important of any, of the king's superior and original courts of justice. It has its name of chancery, *cancellaria*, from the judge who presides here, the lord chancellor or *cancellarius*; who, Sir Edward Coke tells us, is so termed a *cancellando*, from cancelling the king's letters patent when granted contrary to law, which is the highest point of his jurisdiction. (n) But the office and name of chancellor (however derived) was certainly known to the courts of the Roman emperors: where it originally seems to have signified a chief scribe or secretary, who was afterwards invested with several judicial powers, and a general superintendency over the rest of the officers of the prince. From the Roman empire it passed to the Roman church, ever emulous of imperial state; and hence every bishop has to this day his chancellor, the principal judge of his consistory. And when the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities, according to their different constitutions. But in all of them he seems to have had the supervision of all charters, letters, and such other public instruments of the crown, as were authenticated in the most solemn manner; and, therefore, \*when seals came in use, he had always the custody [47] of the king's great seal. So that the office of chancellor, or lord keeper (whose authority by statute 5 Eliz. c. 18, is declared to be exactly the same), is with us at this day created by the mere delivery of the king's great seal into his custody: (o) whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom; and superior in point of precedency to every temporal lord. (p) He is a privy counsellor by his office, (q) and, according to Lord Chancellor Ellesmere, (r) prolocutor of the house of lords by prescription. To him belongs the appointment of all justices of the peace throughout the kingdom. Being formerly usually an ecclesiastic (for none else were then capable of an office so conversant in writings), and presiding over the royal chapel, (s) he became keeper of the king's conscience; visitor, in right of the king, of all hospitals and colleges of the king's foundation; and patron of all the king's livings under the value of twenty marks (t) *per annum* in the king's books. He is the general

(m) 28 Edw. I. c. 4.

(n) 4 Inst. 88.

(o) Lamb. *Archeion*, 65. 1 Roll. Abr. 885.

(p) Stat. 31 Hen. VIII, c. 10.

(q) Selden, *office of lord chanc.* § 2.(r) Of the office of lord chancellor, *edit.* 1651.(s) Madox. *hist. of exch.* 42.

(t) 38 Edw. III. c. 2. F. N. B. 35, though Hobart (214), extends this value to twenty pounds.

guardian of all infants, idiots, and lunatics; and has the general superintendence of all charitable uses in the kingdom. And all this, over and above the vast and extensive jurisdiction which he exercises in his *judicial* capacity in the court of chancery; wherein, as in the exchequer, there are two distinct tribunals: the one ordinary, being a court of common law; the other extraordinary, being a court of equity.

The ordinary legal court is much more ancient than the court of equity. Its jurisdiction is to hold plea upon a *scire facias* to repeal and cancel the king's letters patent, when made against law, or upon untrue suggestions; and to hold plea of petitions, *monstrans de droit*, traverses of offices, and the like; when the king hath been advised to do any act, or is put in possession of any lands or goods, in prejudice of a subject's right. (u) On proof of which, as the king can never \*be supposed intentionally to do any [48] wrong, the law questions not, but he will immediately redress the injury; and refers that conscientious task to the chancellor, the keeper of his conscience. It also appertains to this court to hold plea of all personal actions, where any officer or minister of the court is a party. (v) It might likewise hold plea (by *scire facias*) of partitions of land in coparcenery, (w) and of dower, (x) where any ward of the crown was concerned in interest, so long as the military tenures subsisted: as it now may also do of the tithes of forest land, where granted by the king, and claimed by a stranger against the grantee of the crown; (y) and of executions on statutes, or recognizances in nature thereof, by the statute 23 Hen. VIII., c. 6. (z) But if any cause comes to issue in this court, that is, if any fact be disputed between the parties, the chancellor cannot try it, having no power to summon a jury; but must deliver the record *propria manu* into the court of king's bench, where it shall be tried by the country, and judgment shall be there given thereon. (a) And when judgment is given in chancery upon demurrer or the like, a writ of error in nature of an appeal lies out of this ordinary court into the court of king's bench: (b) though so little is usually done on the common law side of the court, that I have met with no traces of any writ of error (c) being actually brought, since the fourteenth year of Queen Elizabeth, A. D. 1572.

In this ordinary, or legal, court is also kept the *officina justitiæ*: out of which all original writs that pass under the great seal, all commissions of charitable uses, sewers, bankruptcy, idiotcy, lunacy, and the like, do issue; and for which it is always open to the subject, who may there at any time demand [49] and have, *ex debito justitiæ*, any writ that his occasions \*may call for. These writs (relating to the business of the subject) and the returns to them were, according to the simplicity of ancient times, originally kept in a hamper, in *hanaperio*; and the others (relating to such matters wherein the crown is immediately or mediately concerned) were preserved in a little sack or bag, in *parva бага*; and thence hath arisen the distinction of the *hanaper* office, and *petty bag* office, which both belong to the common law court in chancery.

But the extraordinary court, or court of equity, is now become the court of the greatest judicial consequence. This distinction between law and equity, as administered in different courts, is not at present known, nor seems to have ever been known, in any other country at any time: (d) and yet the difference of one from the other, when administered by the same tribunal, was perfectly

(u) 4 rep. 54.

(v) 4 Inst. 80.

(w) Co. Litt. 171. F. N. B. 62.

(y) Bro. Abr. tit. *diemes*. 10.

(z) 2 Roll. Abr. 409.

(a) Cro. Jac. 12. Latch. 112.

(b) Year book, 18 Edward III., 25. 17 Ass. 21. 20 Ass. 47. Dyer. 315. 1 Roll. Rep. 337. 4 Inst. 80.

(c) The opinion of Lord Keeper North, in 1682 (1 Vern. 131; 1 Equ. Cas. abr. 129), that no such writ of error lay, and that an injunction might issue against it, seems not to have been well considered.

(d) The council of conscience, instituted by John III. King of Portugal, to review the sentence of all inferior courts, and moderate them by equity (Mod. Un. Hist. xxii, 237), seems rather to have been a court of appeal.

familiar to the Romans: (e) the *jus prætorium*, or discretion of the prætor, being distinct from the *leges*, or standing laws, (f) but the power of both centred in one and the same magistrate, who was equally intrusted to pronounce the rule of law, and to apply it to particular cases, by the principles of equity. With us, too, the *aula regia*, which was the supreme court of judicature, undoubtedly administered equal justice, according to the rules of both or either, as the case might chance to require; and, when that was broken to pieces, the idea of a court of equity, as distinguished from a court of law, did not subsist in the original plan of partition. For, though equity is mentioned by Bracton (g) as a thing contrasted to strict law, yet neither in that writer, nor in Glanvil or Fleta, nor yet in Britton (composed under the auspices and in the name of Edward I, and \*treating particularly of courts and their several jurisdictions), is there a syllable to be found relating to the [\*50] equitable jurisdiction of the court of chancery. It seems, therefore, probable that, when the courts of law, proceeding merely upon the ground of the king's original writs, and confining themselves strictly to that bottom, gave a harsh or imperfect judgment, the application for redress used to be to the king in person, assisted by his privy council (from whence, also, arose the jurisdiction of the court of requests, (h) which was virtually abolished by the statute 18 Car. I, c. 10); and they were wont to refer the matter either to the chancellor and a select committee, or by degrees to the chancellor only, who mitigated the severity or supplied the defects of the judgments pronounced in the courts of law, upon weighing the circumstances of the case. This was the custom, not only among our Saxon ancestors, before the institution of the *aula regia*, (i) but also after its dissolution, in the reign of King Edward I; (k) and, perhaps, during its continuance, in that of Henry II. (l)

In these early times, the chief judicial employment of the chancellor must have been in devising new writs, directed to the courts of common law, to give remedy in cases where none was before administered. And to quicken the diligence of the clerks in the chancery, who were too much attached to ancient precedents, it is provided by statute, Westm. 2, 13 Edw. I, c. 24, that, "whosoever from thenceforth in one case a writ shall be found in the chancery, and in a like case, falling under the same right and requiring like remedy, \*no precedent of a writ can be produced, the clerks in chancery shall [\*51] agree in forming a new one; and, if they cannot agree, it shall be adjourned to the next parliament, where a writ shall be framed by consent of the learned in the law, (m) lest it happen for the future that the court of our lord the king be deficient in doing justice to the suitors." And this accounts for the very great variety of writs of trespass on the case to be met with in the register; whereby the suitor had ready relief, according to the exigency of his business, and adapted to the specialty, reason and equity of his very case. (n) Which provision (with a little accuracy in the clerks of the chancery, and a little liberality in the judges, by extending, rather than narrowing, the remedial effects of the writ), might have effectually answered all the purposes.

(e) Thus, too, the parliament of Paris, the court of session in Scotland, and every other jurisdiction in Europe, of which we have any tolerable account, found all their decisions as well upon principles of equity as those of positive law. (Lord Kaimes, *histor. law tracta*, I, 325, 330, princ. of equity, 44.)

(f) Thus Cicero: "*Jam illis promissis, non esse standum, quis non videt, quæ coactus quis metu et deceptus dolo promiserit? quæ quidem plerumque jure prætorio liberantur, nonnulla legibus.*" *Offic. l. i. c. 2, § 7, fol. 28.*

(g) The matters cognizable in this court, immediately before its dissolution, were "almost all suits, that by colour of equity, or supplication made to the prince, might be brought before him; but originally and properly all poor men's suits, which were made to his majesty by supplication; and upon which they were entitled to have right, without payment of any money for the same." (Smith's *Commonwealth*, b. 3, c. 7.)

(h) *Nemo ad regem appellat pro aliqua lite, nisi jus domi consequi non possit. Si jus nimis severum sit, alleviatio deinde queratur apud regem.* *LL. Edg. c. 2.*

(i) Lambard, *Archeion*, 69.

(j) Joannes Bariburionensis (who died A. D. 1182, 26 Hen. II), speaking of the chancellor's office in the verses prefixed to his *polycraticon*, has these lines:

*Hic est, qui leges regni cancellat iniquas  
Et mandata pii principis æqua facit.*

(m) A great variety of new precedents of writs, in cases before unprovided for, are given by this very statute of Westm. 2.

(n) Lamb. *Archeion*, 61.

of a court of equity; (o) except that of obtaining a discovery by the oath of the defendant.

But when, about the end of the reign of King Edward III, uses of lands were introduced, (p) and though totally discountenanced by the courts of common law, were considered as fiduciary deposits and binding in conscience by the clergy, the separate jurisdiction of the chancery as a court of equity began to be established; (q) and John Waltham, who was bishop of Salisbury and chancellor to King Richard II, by a strained interpretation of the above mentioned statute of Westm. 2, devised the writ of *subpoena*, returnable in the court of chancery only, to make the feoffee to uses accountable to his *cestui que use*: which process was afterwards extended to other matters wholly determinable at the common law, upon false and fictitious suggestions; for which, therefore, the chancellor himself is, by statute 17 Ric. II, c. 6, directed [\*52] to give damages to the party unjustly aggrieved. But as the clergy, so early as the reign of King Stephen, had attempted to turn their ecclesiastical courts into courts of equity, by entertaining suits *pro lésione fidei*, as a spiritual offence against conscience, in case of non-payment of debts or any breach of civil contracts: (r) till checked by the constitutions of Clarendon, (s) which declared that, "*placita de debitis, quæ fide interposita debentur, vel absque interpositione fidei, sint in iustitia regis*:" therefore probably the ecclesiastical chancellors, who then held the seal, were remiss in abridging their own new acquired jurisdiction; especially as the spiritual courts continued (t) to grasp at the same authority as before in suits *pro lésione fidei*, so late as the fifteenth century, (u) till finally prohibited by the unanimous concurrence of all the judges. However, it appears from parliament rolls, (w) that, in the reigns of Henry IV and V, the commons were repeatedly urgent to have the writ of *subpoena* entirely suppressed, as being a novelty devised by the subtlety of Chancellor Waltham, against the form of the common law; whereby no plea could be determined, unless by examination and oath of the parties, according to the form of the law civil, and the law of holy church, in subversion of the common law. But though Henry IV, being then hardly warm in his throne, gave a palliating answer to their petitions, and actually passed the statute 4 Henry IV, c. 23, whereby judgments at law are declared irrevocable unless by attainr or writ of error, yet his son put a negative at once upon their whole application: and in Edward IV's time, the process by bill and *subpoena* was become the daily practice of the court. (x)

\*But this did not extend very far: for in the ancient treatise, entitled [\*53] *diversité des courtes*, (y) supposed to be written very early in the sixteenth century, we have a catalogue of the matters of conscience then cognizable by *subpoena* in chancery, which fall within a very narrow compass. No regular judicial system at that time prevailed in the court; but the suitor when he thought himself aggrieved, found a desultory and uncertain remedy, according to the private opinion of the chancellor, who was generally an ecclesiastic, or sometimes (though rarely) a statesman: no lawyer having sat in the court of chancery from the times of the chief justices Thorpe and Knyvet, successively chancellors to King Edward III, in 1372 and 1373, (z) to the promotion

(o) This was the opinion of Fairfax, a very learned judge in the time of Edward the Fourth. "*Le subpoena (says he) ne serroit my cy souventement use come il est ore, si nous attendomus tiels actions sur les cases et mainetnomus le jurisdiction de ceo court, et d'auter courts.*" (Yearbook, 21 Edw. IV. 23.)

(p) See book II. ch. 20.

(q) Spelm. Gloss. 106. 1 Lev. 243.

(r) Lord Lyttel. H. n. II. b. 3. p. 381. note.

(s) 10 Hen. II. c. 15. Speed. 458.

(t) In 4 Hen. III, suits in court christian *pro lésione fidei* upon temporal contracts were adjudged to be contrary to law. (Fitzh. Abr. t. Prohibition. 15.) But in the statute or writ of *circumspecte agatis*, supposed by some to have issued 13 Edw. I, but more probably (3 Pryn. Rec. 336) 9 Edw. II, suits *pro lésione fidei* were all wed to the ecclesiastical courts; according to some ancient copies (Berthelet stat. antiq. London 1531, 90 b; 3 Pryn. Rec. 336), and the common English translation of that statute, though in Lyndewode's copy (Prov. I. 2. t. 2), and in the Cotton MS. (Claud. D. 2), that clause is omitted.

(u) Yearbook, 2 Hen. IV. 10. 11 Hen. IV. 88. 38 Hen. VI. 29. 20 Edw. IV. 10.

(w) Rot. Parl. 4 Hen. IV. Nos. 78 and 110. 3 Hen. V. No. 46, cited in Prynne's abr. of Cotton's records, 410, 422, 424, 548. 4 Inst. 83. 1 Roll. Abr. 370, 371, 372.

(x) Rot. Parl. 14 Edw. IV. No. 33 (not 14 Edw. III, as cited 1 Roll. Abr. 370, &c.).

(y) Tit. Chancery, fol. 295. Rastell's edit. A. D. 1534.

(z) Spelm. Gloss. 111. Dudg. Chron. Ser. 50.

of Sir Thomas Moore by King Henry VIII, in 1530. After which the great seal was indiscriminately committed to the custody of lawyers, or courtiers, (a) or churchmen, (b) according as the convenience of the times and the disposition of the prince required, till Sergeant Puckering was made lord keeper in 1592; from which time to the present the court of chancery has always been filled by a lawyer, excepting the interval from 1621 to 1625, when the seal was intrusted to Dr. Williams, then dean of Westminster, but afterwards bishop of Lincoln; who had been chaplain to Lord Ellesmere, when chancellor. (c)

In the time of Lord Ellesmere (A. D. 1616) arose that notable dispute between the courts of law and equity, set on foot by Sir Edward Coke, then chief justice of the court of king's bench; whether a court of equity could give relief after or against a judgment at the common law? This contest was so warmly carried on, that indictments were preferred against the suitors, the solicitors, the counsel, and even a master in chancery, for having incurred a *præmunire*, by questioning in a court of equity a judgment in the court of king's bench, obtained by gross fraud and imposition. (d) This matter being brought before the king, was by him referred \*to his learned counsel [\*54] for their advice and opinion: who reported so strongly in favour of the courts of equity, (e) that his majesty gave judgment in their behalf; but not contented with the irrefragable reasons and precedents produced by his counsel (for the chief justice was clearly in the wrong), he chose rather to decide the question by referring it to the plenitude of his royal prerogative. (f) Sir Edward Coke submitted to the decision, (g) and thereby made atonement for his error: but this struggle, together with the business of *commendams* (in which he acted a very noble part), (h) and his controlling the commissioners of sewers, (i) were the open and avowed causes, (k) first of his suspension and soon after of his removal, from his office.

Lord Bacon, who succeeded Lord Ellesmere, reduced the practice of the court into a more regular system; but did not sit long enough to effect any considerable revolution in the science itself: and few of his decrees which have reached us are of any great consequence to posterity. His successors, in the reign of Charles I, did little to improve upon his plan; and even after the restoration the seal was committed to the earl of Clarendon, who had withdrawn from practice as a lawyer near twenty years; and afterwards to the earl of Shaftesbury, who (though a lawyer by education) had never practised at all. Sir Heneage Finch, who succeeded in 1673, \*and became afterwards earl of Nottingham, was a person of the greatest abilities and [\*55] most uncorrupted integrity; a thorough master and zealous defender of the laws and constitution of his country; and endued with a pervading genius, that enabled him to discover and to pursue the true spirit of justice, notwithstanding the embarrassments raised by the narrow and technical notions which then prevailed in the courts of law, and the imperfect ideas of redress which had possessed the courts of equity. The reason and necessities of mankind arising from the great change in property by the extension of trade and the

(a) Wriothesley, St. John, and Hatton. (b) Goodrick, Gardiner, and Heath.

(c) *Biog. Brit.* 4978.

(d) Bacon's Works, IV. 611, 612, 632.

(e) Whitelocke of parl. II. 300. 1 Chan. Rep. Append. 11.

(f) "For that it appertaineth to our princely office only to judge over all judges, and to discern and determine such differences as at any time may and shall arise between our several courts, touching their jurisdictions, and the same to settle and determine, as we in our princely wisdom shall find to stand most with our honour," &c. (1 Chan. Rep. append. 26.)

(g) See the entry in the council book, 28 July, 1616. (*Biog. Brit.* 1390.)

(h) In a cause of the bishop of Winchester, touching a *commendam*, King James, conceiving that the matter affected his prerogative, sent letters to the judges not to proceed in it till himself had been first consulted. The twelve judges joined in a memorial to his majesty, declaring that their compliance would be contrary to their oaths and the law; but upon being brought before the king and council, they all retracted and promised obedience in every such case for the future, except Sir Edward Coke, who said, "that when the case happened, he would do his duty." (*Biog. Brit.* 1388.)

(i) See that article in chap. 6.

(k) See Lord Ellesmere's speech to Sir Henry Montague, the new chief justice, 15 Nov. 1616. (Moore's reports, 828.) Though Sir Edward might probably have retained his seat, if, during his suspension, he would have complimented Lord Villiers (the new favorite), with the disposal of the most lucrative office in his court. (*Biog. Brit.* 1391.)

abolition of military tenures, co-operated in establishing his plan, and enabled him in the course of nine years to build a system of jurisprudence and jurisdiction upon wide and rational foundations; which have also been extended and improved by many great men, who have since presided in chancery. And from that time to this the power and business of the court have increased to an amazing degree.

From this court of equity in chancery, as from the other superior courts, an appeal lies to the house of peers. But there are these differences between appeals from a court of equity, and writs of error from a court of law: 1. That the former may be brought upon any interlocutory matter, the latter upon nothing but only a definitive judgment: 2. That on writs of error the house of lords pronounces the judgment, on appeals it gives direction to the court below to rectify its own decree.

IX. The next court that I shall mention is one that hath no original jurisdiction, but is only a court of appeal, to correct the errors of other jurisdictions. This is the court of exchequer chamber; which was first erected by statute 31 Edw. III, c. 12, to determine causes by writs of error from the common law side of the court of exchequer. And to that end it consists of the lord chancellor and lord treasurer, taking unto them the justices of the king's bench and common pleas. In imitation of which a second court of exchequer chamber was erected by statute 27 Eliz., ch. 8, consisting of the justices of the common pleas, and the barons of the exchequer, before whom [\*56] writs of error may be brought to reverse judgments \*in certain suits (l) originally begun in the court of king's bench. Into the court also of exchequer chamber (which then consists of all the judges of the three superior courts, and now and then the lord chancellor also), are sometimes adjourned from the other courts such causes as the judges upon argument find to be of great weight and difficulty, before any judgment is given upon them in the court below. (m)

From all the branches of this court of exchequer chamber, a writ of error lies to

X. The house of peers, which is the supreme court of judicature in the kingdom, having at present no original jurisdiction over causes, but only upon appeals and writs of error, to rectify any injustice or mistake of the law, committed by the courts below. To this authority this august tribunal succeeded of course upon the dissolution of the *aula regia*. For, as the barons of parliament were constituent members of that court; and the rest of its jurisdiction was dealt out to other tribunals, over which the great officers who accompanied those barons were respectively delegated to preside; it followed, that the right of receiving appeals, and superintending all other jurisdictions, still remained in the residue of that noble assembly, from which every other great court was derived. They are therefore in all causes the last resort, from whose judgment no farther appeal is permitted; but every subordinate tribunal must conform to their determinations; the law reposing an entire confidence in the honour and conscience of the noble persons who compose this important assembly, that (if possible) they will make themselves masters of those questions upon which they undertake to decide, and in all dubious cases refer themselves to the opinions of the judges, who are summoned by writ to advise them; since upon their decision all property must finally depend. (5)

(l) See chap. 25, p. 411.

(m) 4 Inst. 119. 2 Bulst. 146.

(5) In practice the house of lords, when sitting to hear appeals, is composed only of the "law lords," as they are called; that is, the peers who at the time hold judicial positions or who have heretofore held such positions. Every peer indeed has the right to be present and participate, but it is a right which is not, and could not often with propriety be, asserted, since few except the law lords have any such training as would fit them for the duties to be performed. A quorum of peers must be present, but *three* is a quorum of the house of peers, and two besides the chancellor would be sufficient to constitute this court.

Hitherto may also be referred the tribunal established by statute 14 Edw. III, c. 5, consisting (though now out of use) of one prelate, two earls, and two barons who are to be chosen at every new parliament, to hear complaints of grievances and delays of justice in the king's courts, and (with the advice of the chancellor, treasurer and justices of both benches) to give directions for remedying these \*inconveniences in the courts below. This committee [\*57] seems to have been established, lest there should be a defect of justice for want of a supreme court of appeal during any long intermission or recess of parliament; for the statute farther directs, that if the difficulty be so great, that it may not well be determined without assent of parliament, it shall be brought by the said prelate, earls and barons, unto the next parliament, who shall finally determine the same.

XI. Before I conclude this chapter, I must also mention an eleventh species of courts, of general jurisdiction and use, which are derived out of, and act as collateral auxiliaries to, the foregoing; I mean the courts of assize and *nisi prius*.

These are composed of two or more commissioners, who are twice in every year sent by the king's special commission all round the kingdom except London and Middlesex, where courts of *nisi prius* are holden in and after every term, before the chief or other judge of the several superior courts; and except the four northern counties, where the assizes are holden only once a year, (6) to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in the courts of Westminster-hall. These judges of assize came into use in the room of the ancient justices in eyre, *justiciarii in itinere*: who were regularly established, if not first appointed, by the parliament of Northampton, A. D. 1176, 22 Hen. II, (n) with a delegated power from the king's great court, or *aula regia*, being looked upon as members thereof; and they afterwards made their circuit round the kingdom once in seven years for the purpose of trying causes. (o) They were afterwards directed by *magna carta*, c. 12, to be sent into every county once a year, to take (or receive the verdict of the jurors or recognitors in certain actions, then called) recognitions or assizes; the most difficult of which they are directed to adjourn into the court of common pleas to be there determined. The itinerant justices were sometimes mere justices of assize or of dower, or of gaol-delivery, and the like; and \*they had sometimes a more general [\*58] commission to determine all manner of causes, being constituted *justiciariis ad omnia placita*: (p) but the present justices of assize and *nisi prius* are more immediately derived from the statute Westm. 2, 13 Edw. I, c. 30, which directs them to be assigned out of the king's sworn justices, associating to themselves one or two discreet knights of each county. By statute 27 Edw. I, c. 4, (explained by 12 Edw. II, c. 3,) assizes and inquests were allowed to be taken before any one justice of the court in which the plea was brought; associating to him one knight or other approved man of the county. And, lastly, by statute 14 Edw. III, c. 16, inquests of *nisi prius* may be taken before any justice of either bench (though the plea be not depending in his own court), or before the chief baron of the exchequer, if he be a man of the law; or otherwise before the justices of assize, so that one of such justices be a judge of the king's bench or common pleas, or the king's serjeant sworn.

(n) Seld. Jan. 1. 2, § 5. Spelm. Cod. 339.

(o) Co. Litt. 298. Anno, 1261, *justiciarii itinerantes venerunt apud Wigorniam in octavis S. Johannis baptiste*;—et totus comitatus eos admittere recusavit, quod septem anni nondum elapsi, postquam *justiciarii ibidem ultimo sederunt*. (Annal. Eccl. Wigorn. in Whart. Angl. sacr. I, 496.)

(p) Bract. 1. 3. tr. 1. c. 11.

Formerly it was not necessary that the three be law lords, and if two chanced to be lay members, and the decree under review was one made by the chancellor himself, his own vote would affirm it, as the lay members would take no part. But now three lords of appeal are required to be present in hearing every case. For the law as to this see note 1, p. 30.

(6) But now the assizes are held here twice a year.

They usually make their circuits in the respective vacations after Hilary and Trinity terms; assizes being allowed to be taken in the holy time of Lent by consent of the bishops at the king's request, as expressed in statute Westm. 1, 8 Edw. 1, c. 51. And it was also usual during the times of popery, for the prelates to grant annual licenses to the justices of assize to administer oaths in holy times: for oaths being of a sacred nature, the logic of those (deluded) ages concluded that they must be of ecclesiastical cognizance. (q) The prudent jealousy of our ancestors ordained (r) that no man of law should be judge of assize in his own county, wherein he was born or doth inhabit; and a similar prohibition is found in the civil law, (s) which has carried this principle so far that it is equivalent to the crime of sacrilege, for a man to be governor of the province in which he was born, or has any civil connexion. (t)

The judges upon their circuits now sit by virtue of five several authorities. 1. The commission of the *peace*. 2. A commission of *oyer and terminer*. 3. A commission of general *gaol-delivery*. The consideration of all which belongs [\*59] properly \*to the subsequent book of these Commentaries. But the fourth commission is, 4. A commission of *assize*, directed to the justices and serjeants therein named, to take (together with their associates) assizes in the several counties; that is to take the verdict of a peculiar species of jury, called an assize, and summoned for the trial of *landed* disputes, of which hereafter. The other authority is, 5. That of *nisi prius*, which is a consequence of the commission of *assize*, (u) being annexed to the office of those justices by the statute of Westm. 2, 13 Edw. 1, c. 30, and it empowers them to try all questions of fact issuing out of the courts at Westminster, that are then ripe for trial by jury. These by the course of the courts (w) are usually appointed to be tried at Westminster in some Easter or Michaelmas term, by a jury returned from the county wherein the cause of action arises; but with this proviso, *nisi prius, unless before* the day prefixed the judges of assize come into the county in question. This they are sure to do in the vacations preceding each Easter and Michaelmas term, which saves much expense and trouble. These commissions are constantly accompanied by writs of *association*, in pursuance of the statutes of Edward I and II, before mentioned; whereby certain persons (usually the clerk of assize and his subordinate officers) are directed to associate themselves with the justices and serjeants, and they are required to admit the said persons into their society, in order to take the assizes, &c.; that a sufficient supply of commissioners may never be wanting. But, to prevent the delay of justice by the absence of any of them, there is also issued of course a writ of *si non omnes*; directing that if all cannot be present, any two of them (a justice or a serjeant being one) may proceed to execute the commission.

These are the several courts of common law and equity, which are of public and general jurisdiction throughout the kingdom. And, upon the whole, we cannot but admire the wise economy and admirable provision of our ancestors, in settling the distribution of justice in a method so well calculated for cheapness, expedition, and ease. By the constitution which they established, all trivial debts, and injuries of small consequence, were to be recovered or redressed in every \*man's own county, hundred, or perhaps parish. Pleas [\*60] of freehold, and more important disputes of property, were adjourned to the king's court of common pleas, which was fixed in one place for the benefit of the whole kingdom. Crimes and misdemeanors were to be examined in a court by themselves; and matters of the revenue in another distinct jurisdiction. Now indeed, for the ease of the subject and greater dispatch of causes, methods have been found to open all the three superior courts for the redress of private wrongs; which have remedied many inconveniences, and

(q) Instances hereof may be met with in the appendix to Spelman's original of the terms, and in Mr. Parker's Antiquities, 209.

(r) Stat. 4 Edw. III, c. 2. 8 Ric. II, c. 2. 23 Hen. VIII, c. 24.

(s) *Ff.* 1, 22, 2. (t) *C.* 9, 22, 4.

(u) *Salk.* 451.

(w) See ch. 23, p. 323.



yet preserved the forms and boundaries handed down to us from high antiquity. If facts are disputed, they are sent down to be tried in the country by the neighbors; but the law, arising upon those facts, is determined by the judges above; and, if they are mistaken in point of law, there remain in both cases two successive courts of appeal, to rectify such their mistakes. If the rigour of general rules does in any case bear hard upon individuals, courts of equity are open to supply the defects, but not sap the fundamentals, of the law. Lastly, there presides over all one great court of appeal, which is the last resort in matters both of law and equity; and which will therefore take care to preserve a uniformity and *equilibrium* among all the inferior jurisdictions: a court composed of prelates selected for their piety, and of nobles advanced to that honour for their personal merit, or deriving both honour and merit from an illustrious train of ancestors; who are formed by their education, interested by their property, and bound upon their conscience and honour, to be skilled in the laws of the country. This is a faithful sketch of the English juridical constitution, as designed by the masterly hands of our forefathers, of which the great original lines are still strong and visible; and if any of its minuter strokes are by the length of time at all obscured or decayed, they may still be with ease restored to their pristine vigour; and that not so much by fanciful alterations and wild experiments (so frequent in this fertile age), as by closely adhering to the wisdom of the ancient plan, concerted by Alfred and perfected by Edward I, and by attending to the spirit, without neglecting the forms, of their excellent and venerable institutions. (7)

(7) The courts of the United States consist of the following:

1. The senate as a court of impeachment.
2. The supreme court.
3. The circuit courts.
4. The district courts.
5. The court of claims.
6. The supreme court of the District of Columbia.
7. The territorial courts.

The court of impeachment derives its authority from article 1, section 3 of the constitution, and is sufficiently spoken of elsewhere. The judicial power generally is conferred by article 3, section 2.

The supreme court has original jurisdiction of all cases affecting ambassadors, other public ministers and consuls, and of those to which a state shall be a party. It also has appellate jurisdiction from the circuit court in civil cases, where the matter in dispute exceeds \$2000, and from the highest state court of each state, in any case where has been drawn in question the validity of a treaty, or of a statute of, or an authority exercised under, the United States, and the decision of the state court has been against its validity; also where has been drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of its being repugnant to the constitution, laws or treaties of the United States, and the decision of the state court has been in favor of such state law or authority; also where the decision of the state court has been against a right claimed under any clause of the constitution of the United States, or under any treaty or statute of or commission held under the United States; it has also appellate jurisdiction from the territorial courts where the amount in dispute exceeds \$1000, except from Washington territory, where it must exceed \$2000; and from the supreme court of the District of Columbia and from the court of claims, where the amount in controversy exceeds \$3000; and in any other case where the judgment or decree may present a constitutional question or furnish a precedent for a class of cases, the United States may appeal without regard to the amount in controversy.

The United States circuit courts have original jurisdiction, concurrently with the state courts, of all civil suits, at common law or in equity, where the matter in dispute exceeds \$500, and the United States is a plaintiff, or an alien is a party, or where the suit is between a citizen of the state in which it is brought and a citizen of another state. They have exclusive jurisdiction of all crimes and offences cognizable under the authority of the United States, except where specially otherwise provided; and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein. Under the patent laws they have jurisdiction in equity to restrain infringements. They have also appellate jurisdiction from the district courts where the matter in dispute exceeds \$50.

The district courts have jurisdiction exclusively of the state courts, and concurrently with the circuit courts, of all crimes and offences cognizable under the authority of the United

## CHAPTER V.

## OF COURTS ECCLESIASTICAL, MILITARY AND MARITIME.

BESIDES the several courts which were treated of in the preceding chapter and in which all injuries are redressed, that fall under the cognizance of the common law of England, or that spirit of equity which ought to be its constant attendant, there still remain some other courts of a jurisdiction equally public and general; which take cognizance of other species of injuries, of an ecclesiastical, military and maritime nature; and therefore are properly distinguished by the title of ecclesiastical courts, courts military, and courts maritime.

I. Before I descend to consider particular ecclesiastical courts, I must first of all in general premise, that, in the time of our Saxon ancestors, there was no sort of distinction between the lay and the ecclesiastical jurisdiction: the county court was as much a spiritual as a temporal tribunal; the rights of the church were ascertained and asserted at the same time, and by the same judges, as the rights of the laity. For this purpose the bishop of the diocese, and the alderman, or, in his absence, the sheriff of the county, used to sit together in the county court, and had there the cognizance of all causes, as well ecclesiastical as civil: a superior deference being paid to the bishop's opinion in spiritual matters, and to that of the lay judges in temporal. (a) This

(a) *Celeberrimo huc conventui episcopus et aldermannus intersunt; quorum alter jura divina, alter humana populum edocet. L. L. Eadgar. c. 5.*

States, committed within their several districts or upon the high seas, where the punishment is not capital. They have also exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, including seizures under the laws of impost, navigation or trade of the United States; and of all seizures on land or water under the laws of the United States, and of all suits for penalties and forfeitures incurred under those laws. They have also jurisdiction concurrently with the state courts and circuit courts, of all cases where an alien sues for a tort, done in violation of the law of nations or of a treaty of the United States; also of all suits at common law where the United States or any officer thereof, under the authority of an act of congress, may sue; also exclusive of the state courts of all suits against consuls or vice-consuls except for capital offences. These courts also have jurisdiction in bankruptcy cases.

The territorial courts possess such powers as are specially conferred upon them by the acts providing for their creation.

The supreme court of the District of Columbia is a court of general jurisdiction in law and equity: any one of its judges may hold a district court with the powers of the other district courts; and may also hold a criminal court for the trial of all crimes and offences arising within the district. From the special terms held by one judge appeals may be taken to the general term held by all or a quorum of all.

The court of claims has authority to hear and determine all claims founded upon any law of congress or regulation of the executive department, or upon any contract, express or implied, with the government of the United States, and all claims which may be referred to it by congress; also all set-offs, counter claims, claims for damages liquidated or unliquidated, or other demands whatsoever on the part of the government, against any person making claim against the government in said court.

The supreme court consists of one chief justice and eight associate justices, appointed by the president, by and with the advice and consent of the senate, during good behavior.

There are nine judicial circuits, for each of which a circuit judge is appointed in like manner and with the like tenure. The circuit courts are held by one justice of the supreme court and the circuit judge, or by the latter and the district judge, or may be held by any one of the three sitting alone. Where two sit together and disagree in opinion, the point of disagreement is certified to the supreme court for its decision.

There is one district court for each state, and in some states, two or more. Each district has a district judge appointed in the same manner and for the same term as the justices of the supreme court. The supreme court of the District of Columbia consists of four justices, and the court of claims of five, with the like tenure. The territorial judges hold their offices only during the pleasure of the president.

union of power was very advantageous to them both; the presence of the \*bishop added weight and reverence to the sheriff's proceedings; and the authority of the sheriff was equally useful to the bishop, by enforcing [\*62] obedience to his decrees in such refractory offenders, as would otherwise have despised the thunder of mere ecclesiastical censures.

But so moderate and rational a plan was wholly inconsistent with those views of ambition that were then forming by the court of Rome. It soon became an established maxim in the papal system of policy, that all ecclesiastical persons, and all ecclesiastical causes, should be solely and entirely subject to ecclesiastical jurisdiction only: which jurisdiction was supposed to be lodged, in the first place and immediately, in the pope, by divine indefeasible right and investiture from Christ himself; and derived from the pope to all inferior tribunals. Hence the canon law lays it down as a rule, that "*sacerdotes a regibus honorandi sunt, non judicandi*;" (b) and places an emphatic reliance on a fabulous tale which it tells of the emperor Constantine; that, when some petitions were brought to him, imploring the aid of his authority against certain of his bishops, accused of oppression and injustice, he caused (says the holy canon) the petitions to be burnt in their presence, dismissing them with this valediction: "*ite et inter vos causas vestras discutite, quia dignum non est ut nos judicemus Deos*." (c)

It was not, however, till after the Norman conquest that this doctrine was received in England; when William I (whose title was warmly espoused by the monasteries, which he liberally endowed, and by the foreign clergy whom he brought over in shoals from France and Italy, and planted in the best preferments of the English church), was at length prevailed upon to establish this fatal encroachment, and separate the ecclesiastical court from the civil: whether actuated by principles of bigotry, or by those of a more refined policy, in order to discountenance the laws of King Edward, abounding with the spirit of Saxon liberty, is not altogether \*certain. But the latter, if [\*63] not the cause, was undoubtedly the consequence, of this separation: for the Saxon laws were soon overborne by the Norman justiciaries, when the county court fell into disregard by the bishop's withdrawing his presence, in obedience to the charter of the conqueror; (d) which prohibited any spiritual cause from being tried in the secular courts, and commanded the suitors to appear before the bishop only, whose decisions were directed to conform to the canon law. (e)

King Henry the First, at his accession, among other restorations of the laws of King Edward the Confessor, revived this of the union of the civil and ecclesiastical courts. (f) Which was, according to Sir Edward Coke, (g) after the great heat of the conquest was past, only a restitution of the ancient law of England. This, however, was ill-relished by the popish clergy, who, under the guidance of that arrogant prelate, Archbishop Anselm, very early disapproved of a measure that put them on a level with the profane laity, and subjected spiritual men and causes to the inspection of the secular magistrates: and, therefore, in their synod at Westminster, 3 Hen. I, they ordained that no bishop should attend the discussion of temporal causes; (h) which soon dissolved this newly affected union. And when, upon the death of King Henry

(b) *Decret. part 2. caus. 11; qu. 1, c. 41.*

(c) *Ibid.*

(d) *Hale Hist. C. L. 102. Selden, in Radm. p. 6. l. 24. 4 Inst. 229. Wilk. LL. Angl. Sax. 222.*

(e) *Nulius episcopus vel archidiaconus de legibus episcopalibus amplius in hundred placita teneant, nec causam, quæ ad regimen animarum pertinet, ad iudicium secularium hominum adducant: sed quicumque secundum episcopales leges, de quacunque causa vel culpa interpellatus fuerit, ad locum, quem ad hoc episcopus elegerit et nominaverit, veniat; ibique de causa vel culpa sua respondeat; et non secundum hundred, sed secundum canones et episcopales leges, rectum Deo et episcopo suo faciat.*

(f) *Volo et præcipio, ut omnes de comitatu eant ad comitatus et hundreda, sicut fecerint tempore regis Edwardi.* (Cart. Hen. I, in *Spelm. cod. vet. legum.* 305.) And what is here obscurely hinted at, is fully explained by his code of laws extant in the red book of the exchequer, though in general but of doubtful authority. (Cap. 8.) *Generalia comitatum placita certis locis et vicibus teneantur. Interviant autem episcopi, comites, &c.; et agantur primo debita veræ christianitatis jura, secundo regis placita, postremo causas singulorum dignis satisfactionibus expleantur.*

(g) 2 Inst. 70. (A) *Ne episcopi secularium placitorum officium suscipiant.* *Spelm. Cod. 301.*

[\*64] the First, \*the usurper Stephen was brought in and supported by the clergy, we find one article of the oath which they imposed upon him was, that ecclesiastical persons and ecclesiastical causes should be subject only to the bishop's jurisdiction. (i) And as it was about that time that the contest and emulation began between the laws of England and those of Rome, (k) the temporal courts adhering to the former, and the spiritual adopting the latter as their rule of proceeding, this widened the breach between them, and made a coalition afterwards impracticable; which probably would else have been effected at the general reformation of the church.

In briefly recounting the various species of ecclesiastical courts, or, as they are often styled, courts christian (*curiæ christianitatis*) I shall begin with the lowest, and so ascend gradually to the supreme court of appeal. (l)

1. The *archdeacon's* court is the most inferior court in the whole ecclesiastical polity. It is held, in the archdeacon's absence, before a judge appointed by himself, and called his official; and its jurisdiction is sometimes in concurrence with, sometimes in exclusion of, the bishop's court of the diocese. From hence, however, by statute 24 Hen. VIII, c. 12, an appeal lies to that of the bishop.

2. The *consistory* court of every diocesan bishop is held in their several cathedrals, for the trial of all ecclesiastical causes arising within their respective dioceses. The bishop's chancellor, or his commissary, is the judge; and from his sentence an appeal lies, by virtue of the same statute, to the archbishop of each province respectively.

3. The court of *arches* is a court of appeal belonging to the archbishop of Canterbury; whereof the judge is called \*the *dean of the arches*, because he anciently held his court in the church of Saint Mary *le bow* (*sancta Maria de arcubus*), though all the principal spiritual courts are now holden at doctors' commons. His proper jurisdiction is only over the thirteen peculiar parishes belonging to the archbishop in London; but the office of dean of the arches having been for a long time united with that of the archbishop's principal official, he now, in right of the last mentioned office (as doth also the official principal of the archbishop of York), receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province. And from him an appeal lies to the king in chancery (that is, to a court of delegates appointed under the king's great seal) by statute 25 Hen. VIII, c. 19, as supreme head of the English church, in the place of the bishop of Rome, who formerly exercised this jurisdiction; which circumstance alone will furnish the reason why the popish clergy were so anxious to separate the spiritual court from the temporal.

4. The court of *peculiars* is a branch of and annexed to the court of arches. It has a jurisdiction over all those parishes dispersed through the province of Canterbury in the midst of other dioceses, which are exempt from the ordinary's jurisdiction, and subject to the metropolitan only. All ecclesiastical causes arising within these peculiar or exempt jurisdictions, are, originally cognizable by this court; from which an appeal lay formerly to the [\*66] pope, but now by the \*statute 25 Hen. VIII, c. 19, to the king in chancery.

5. The *prerogative* court is established for the trial of all testamentary causes, where the deceased hath left *bona notabilia* within two different dioceses. In which case the probate of wills belongs, as we have formerly seen, (m) to the archbishop of the province, by way of special prerogative. And all causes relating to the wills, administrations, or legacies of such persons are, originally, cognizable herein, before a judge appointed by the archbishop, called the judge of the prerogative court; from whom an appeal

(i) Spelm. Cod. 810.

(k) See Book I, introd. § 1.

(l) For further particulars, see Burn's *ecclesiastical law*, Wood's *institute of the common law*, and Oughton's *ordo judiciorum*.

(m) Book II, ch. 32.

lies by statute 25 Hen. VIII, c. 19, to the king in chancery, instead of the pope, as formerly.

I pass by such ecclesiastical courts as have only what is called a *voluntary*, and not a *contentious*, jurisdiction; which are merely concerned in doing or selling what no one opposes, and which keep an open office for that purpose (as granting dispensations, licenses, faculties, and other remnants of the papal extortions), but do not concern themselves with administering redress to any injury; and shall proceed to,

6. The great court of appeal in all ecclesiastical causes, viz.: the court of *delegates*, *judices delegati*, appointed by the king's commission under his great seal, and issuing out of chancery, to represent his royal person, and hear all appeals to him made by virtue of the before-mentioned statute of Henry VIII. This commission is frequently filled with lords, spiritual and temporal, and always with judges of the courts at Westminster, and doctors of the civil law. Appeals to Rome were always looked upon by the English nation, even in the times of popery, with an evil eye; as being contrary to the liberty of the subject, the honour of the crown, and the independence of the whole realm; and were first introduced in very turbulent times, in the sixteenth year of King Stephen (A. D. 1151), at the same period (Sir Henry Spelman observed) that the civil and canon laws were first imported into England. (n) But, in a few years after, to obviate this growing practice, the constitutions made at Clarendon, 11 Hen. II, on account of the disturbances raised by Archbishop Becket, and other zealots of the holy see, expressly declare, (o) that appeals in causes ecclesiastical ought to lie, from the archdeacon to the diocesan; from the diocesan to the archbishop of the province; and from the archbishop to the king; and are not to proceed any farther without special license from the crown. But the unhappy advantage that was given in the reigns of King John, and his son Henry the Third, to the encroaching \*power of the pope, who was ever vigilant to improve all opportunities of extending his jurisdiction hither, at length riveted the custom of appealing to Rome in causes ecclesiastical so strongly that it never could be thoroughly broken off, till the grand rupture happened in the reign of Henry the Eighth; when all the jurisdiction usurped by the pope in matters ecclesiastical was restored to the crown, to which it originally belonged: so that the statute 25 Hen. VIII, was but declaratory of the ancient law of the realm. (p) But in case the king himself be party in any of these suits, the appeal does not then lie to him in chancery, which would be absurd; but, by the statute 24 Henry VIII, c. 12, to all the bishops of the realm, assembled in the upper house of convocation.

7. A commission of *review* is a commission sometimes granted, in extraordinary cases, to revise the sentence of the court of delegates; when it is apprehended they have been led into a material error. This commission the king may grant, although the statutes 24 and 25 Hen. VIII, before cited, declares the sentence of the delegates definitive: because the pope as supreme head by the canon law, used to grant such commission of review; and such authority as the pope heretofore exerted is now annexed to the crown (q) by statutes 28 Hen VIII, c. 1, and 1 Eliz. c. 1. But it is not matter of right, which the subject may demand, *ex debito justitiæ*: but merely a matter of favour, and which, therefore, is often denied.

These are now the principal courts of ecclesiastical jurisdiction: none of which are allowed to be courts of record; no more than was another much more formidable jurisdiction, but now deservedly annihilated, viz.: the court of the king's *high commission* in causes ecclesiastical. This court was erected and united to the regal power (r) by virtue of the statute 1 Eliz. c. 1, instead of a larger jurisdiction which had before been exercised under the pope's

(n) *Cod. vet. leg.* 815.  
(q) *Ibid.*

(o) Chap. 8.  
(r) 4 Inst. 234.

(p) 4 Inst. 341.

[\*68] authority. It was intended \*to vindicate the dignity and peace of the church, by reforming, ordering, and correcting the ecclesiastical state and persons, and all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities. Under the shelter of which very general words, means were found in that and the two succeeding reigns, to vest in the high commissioners extraordinary and almost despotic powers, of fining and imprisoning; which they exerted much beyond the degree of the offence itself, and frequently over offences by no means of spiritual cognizance. For these reasons this court was justly abolished by statute 16 Car. I, c. 11. And the weak and illegal attempt that was made to revive it, during the reign of King James the Second, served only to hasten that infatuated prince's ruin.

II. Next, as to the courts military. The only court of this kind known to, and established by, the permanent laws of the land, is the court of *chivalry*, formerly held before the lord high constable and earl marshal of England jointly, but since the attainder of Stafford, duke of Buckingham, under Hen. VIII, and the consequent extinguishment of the office of lord high constable, it hath usually, with respect to civil matters, been held before the earl marshal only. (s) This court, by statute 13 Ric. II, c. 2, hath cognizance of contracts and other matters touching deeds of arms and war, as well out of the realm as within it. And from its sentences an appeal lies immediately to the king in person. (t) This court was in great reputation in the times of pure chivalry, and afterwards during our connexions with the continent, by the territories which our princes held in France: but is now grown almost entirely out of use, on account of the feebleness of its jurisdiction, and want of power to enforce its judgments; as it can neither fine nor imprison, not being a court of record. (u)

III. The maritime courts, or such as have power and jurisdiction to determine all maritime injuries, arising upon the \*seas, or in parts out of reach of the common law, are only the court of admiralty, and its courts of appeal. The court of admiralty is held before the lord high admiral of England, or his deputy, who is called the judge of the court. According to Sir Henry Spelman, (v) and Lambard (x) it was first of all erected by King Edward the Third. Its proceedings are according to the method of the civil law, like those of the ecclesiastical courts; upon which account it is usually held at the same place with the superior ecclesiastical courts, at doctors' commons in London. It is no court of record, any more than the spiritual courts. From the sentences of the admiralty judge an appeal always lay, in ordinary course, to the king in chancery, as may be collected from the statute 25 Hen. VIII, c. 19, which directs the appeal from the archbishop's courts to be determined by persons named in the king's commission, "like as in case of appeal from the admiral-court." But this is also expressly declared by statute 8 Eliz. c. 5, which enacts, that upon appeal made to the chancery, the sentence definitive of the delegates appointed by commission shall be final.

Appeals from the vice-admiralty courts in America, and our other plantations and settlements, may be brought before the courts of admiralty in England, as being a branch of the admiral's jurisdiction, though they may also be brought before the king in council. But in case of prize vessels, taken in time of war, in any part of the world, and condemned in any courts of admiralty or vice-admiralty as lawful prize, the appeal lies to certain commissioners of appeals consisting chiefly of the privy council, and not to judges delegates. And this by virtue of divers treaties with foreign nations; by which particular courts are established in all the maritime countries of Europe for the decision of this question, whether lawful prize or not: for this being a question between subjects of different states, it belongs entirely to the law of nations, and not to the municipal laws of either country to determine it. The original court to

[\*70] which this question is \*permitted in England is the court of adm ralty; and the court of appeal is in effect the king's privy council, the members

(s) 1 Lev. 330. Show. Parl. Cas. 60.

(t) 4 Inst. 135.

(u) 7 Mod. 127.

(v) Gloe 13.

(x) Archæon. 41.

of which are, in consequence of treaties, commissioned under the great seal for this purpose. In 1748, for the more speedy determination of appeals, the judges of the courts of Westminster-hall, though not privy counsellors, were added to the commission then in being. But doubts being conceived concerning the validity of that commission, on account of such addition, the same was confirmed by statute 22 Geo. II, c. 3, with a proviso, that no sentence given under it should be valid, unless a majority of the commissioners present were actually privy counsellors. But this did not, I apprehend, extend to any future commissions: and such an addition became indeed totally unnecessary in the course of the war which commenced in 1756; since during the whole of that war, the commission of appeals was regularly attended and all its decisions conducted by a judge (1) whose masterly acquaintance with the law of nations was known and revered by every state in Europe. (y)

## CHAPTER VI.

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1. The forest courts, instituted for the government of the king's forests, in different parts of the kingdom, and for the punishment of all injuries done to the king's deer or *venison*, to the *vert* or greensward, and to the *covert* in which such deer are lodged. These are the courts of *attachments*, of *regard*, of *sweinmote* and of *justice-seat*. The court of *attachments*, *wood-mote*, or forty days court, is to be held before the verderors of the forest once in every forty days; (a) and is instituted to inquire into all offenders against vert and venison; (b) who may be attached by their bodies, if taken with the mainour (or *mainoeuvre*, a *manu*), that is, in the very act of killing venison, or stealing wood, or preparing so to do, or by fresh and immediate pursuit after the act is done; (c) else they must be attached by their goods. And in this forty days court the foresters or keepers are to bring in their attachments, \*or presentments *de viridi et venatione*; and the verderors are to receive the same, and to enroll them, and to certify them under their [\*72] seals to the court of justice-seat, or *sweinmote*: (d) for this court can only inquire of, but not convict offenders. 2. The court of *regard* or survey of dogs, is to be holden every third year, for the lawing or expeditation of mastiffs,

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which is done by cutting off the claws and ball (or pelote) of the fore-feet, to prevent them from running after deer. (e) No other dogs but mastiffs are to be thus lawed or expeditated, for none other were permitted to be kept within the precincts of the forest; it being supposed that the keeping of these, and these only, was necessary for the defense of a man's house. (f) 3. The court of *sweinmote* is to be holden before the verderors, as judges, by the steward of the swainmote, thrice in every year, (g) the swains or freeholders within the forest composing the jury. The principal jurisdiction of this court is, first, to inquire into the oppression and grievances committed by the officers of the forest; "*de super-onatione forestariorum, et aliorum ministrorum forestarum; et de eorum oppressionibus populo regis illatis*;" and, secondly, to receive and try presentments certified from the court of attachments against offences in vert and venison. (h) And this court may not only inquire but convict also, which conviction shall be certified to the court of justice-seat under the seals of the jury; for this court cannot proceed to judgment. (i) But the principal court is, 4. The court of *justice-seat*, which is held before the chief justice in eyre, or chief itinerant judge, *capitalis justitiarius in itinere*, or his deputy; to hear and determine all trespasses within the forest, and all claims of franchises, liberties and privileges, and all pleas and causes whatsoever therein arising. (k) It may also proceed to try presentments in the inferior courts of the forest, and to give judgment upon conviction of the swainmote. And the chief justice may therefore, after presentment made, or indictment found, but [\*73] not before, (l) issue his warrant to the officers of the forest to apprehend the offenders. It may be held every third year; and forty days' notice ought to be given of its sitting. This court may fine and imprison for offences within the forest, (m) it being a court of record: and therefore a writ of error lies from hence to the court of king's bench, to rectify and redress any mal-administrations of justice; (n) or the chief justice in eyre may adjourn any matter of law into the court of king's bench. (o) These justices in eyre were instituted by King Henry II, A. D. 1184; (p) and their courts were formerly very regularly held; but the last court of justice-seat of any note was that holden in the reign of Charles I, before the earl of Holland; the rigorous proceedings at which are reported by Sir William Jones. After the restoration another was held, *pro forma* only, before the earl of Oxford; (q) but since the æra of the revolution in 1688, the forest laws have fallen into total disuse, to the great advantage of the subject.

II. A second species of restricted courts is that of commissioners of *sewers*. (1) This is a temporary tribunal, erected by virtue of a commission under the great seal; which formerly used to be granted *pro re nata* at the pleasure of the crown, (r) but now at the discretion and nomination of the lord chancellor, lord treasurer, and chief justices, pursuant to the statute 23 Hen. VIII, c. 5. Their jurisdiction is to overlook the repairs of sea banks and sea walls; and the cleansing of rivers, public streams, ditches, and other conduits, whereby any waters are carried off; and is confined to such county or particular district as the commission shall expressly name. The commissioners are a court of record, and may fine and imprison for contempt; (s) and in the execution of their duty may proceed by jury, or upon their own view, and may take order for the [\*74] removal of any annoyances, or the \*safeguard and conservation of the sewers within their commission, either according to the laws and customs of Romney-marsh, (t) or otherwise at their own discretion. They may also assess

(e) *Cart. de forest.* c. 6. (f) 4 Inst. 308. (g) *Cart. de forest.* c. 8.  
 (h) Stat. 34 Edw. I, c. 1. (i) 4 Inst. 299. (k) 4 Inst. 291.  
 (l) Stat. 1 Edw. III, c. 8. 7 Ric. II, c. 4. (m) 4 Inst. 313. (n) *Ibid.* 297.  
 (o) *Ibid.* 295. (p) Hoveden. (q) F. N. B. 113. (r) *Ibid.* 145.  
 (s) North's Life of Lord Guilford, 45. (t) Romney-marsh, in the county of Kent, a tract containing 24,000 acres, is governed by certain ancient and equitable laws of sewers, composed by Henry de Bathe, a venerable judge in the reign of King Henry the Third; from which laws all commissioners of sewers in England may receive light and direction. (4 Inst. 276.)

(1) The law regarding these commissioners has since been materially altered.

such rates, or scots, upon the owners of lands within their district, as they shall judge necessary; and, if any person refuses to pay them, the commissioners may levy the same by distress of his goods and chattels; or they may, by statute 23 Hen. VIII. c. 5, sell his freehold lands (and by the 7 Ann. c. 10, his copyhold also), in order to pay such scots or assessments. But their conduct is under the control of the court of king's bench, which will prevent or punish any illegal or tyrannical proceedings.<sup>(u)</sup> And yet, in the reign of King James I (8 November, 1616), the privy council took upon them to order, that no action or complaint should be prosecuted against the commissioners, unless before that board; and committed several to prison who had brought such actions at common law, till they should release the same: and one of the reasons for discharging Sir Edward Coke from his office of lord chief justice was for countenancing those legal proceedings.<sup>(v)</sup> The pretence for which arbitrary measures was no other than the tyrant's plea, *(w)* of the necessity of unlimited powers in works of evident utility to the public, "the supreme reason above all reasons, which is the salvation of the king's lands and people." But now it is clearly held, that this (as well as all other inferior jurisdictions) is subject to the discretionary coercion of his majesty's court of king's bench. *(x)*

III. The court of *policies of assurance*, when subsisting, is erected in pursuance of the statute 43 Eliz. c. 12, which recites the immemorial usage of policies of assurance, "by means whereof it cometh to pass, upon the loss or perishing \*of any ship, there followeth not the undoing of any man, but [\*75] the loss lighteth rather easily upon many than heavy upon few, and rather upon them that adventure not, than upon those that do adventure; whereby all merchants, especially those of the younger sort, are allured to venture more willingly and more freely: and that heretofore such assurers had used to stand so justly and precisely upon their credits, as few or no controversies had arisen thereupon; and if any had grown, the same had from time to time been ended and ordered by certain grave and discreet merchants appointed by the lord mayor of the city of London; as men, by reason of their experience, fittest to understand and speedily decide those causes;" but that of late years divers persons had withdrawn themselves from that course of arbitration, and had driven the assured to bring separate actions at law against each assurer: it therefore enables the lord chancellor yearly to grant a standing commission to the judge of the admiralty, the recorder of London, two doctors of the civil law, two common lawyers, and eight merchants; any three of which, one being a civilian or a barrister, are thereby, and by the statute 13 and 14 Car. II, c. 23, empowered to determine in a summary way all causes concerning policies of assurance in London, with an appeal (by way of bill) to the court of chancery. But the jurisdiction being somewhat defective, as extending only to London, and to no other assurances but those on merchandize, *(y)* and to suits brought by the assured only, and not by the insurers, *(z)* no such commission has of late years issued: but insurance causes are now usually determined by the verdict of a jury of merchants, and the opinion of the judges in case of any legal doubts; whereby the decision is more speedy, satisfactory, and final, though it is to be wished that some of the parliamentary powers invested in these commissioners, especially for the examination of witnesses, either beyond the seas or speedily going out of the kingdom, *(a)* could at present be adopted by the courts of Westminster-hall, without requiring the consent of parties. *(2)*

\*IV. The court of *marshalsea*, and the *palace-court* at Westminster, [\*76] though two distinct courts, are frequently confounded together. The former was originally holden before the steward and marshal of the king's

(u) Cro. Jac. 336.

(v) Moor, 835, 836. See page 55.

(w) Milt. parad. lost, iv. 393.

(x) 1 Vent. 60. Salk. 146.

(y) Styl. 166.

(z) Show. 306.

(a) 1 Stat. 13 and 14 Car. II, c. 22, §§ 3 and 4.

(2) The courts at Westminster have now the power of ordering the examination of witnesses who are abroad.

house, and was instituted to administer justice between the king's domestic servants, that they might not be drawn into other courts, and thereby the king lose their service. (b) It was formerly held in, though not a part of, the *aule regie*; (c) and, when that was subdivided, remained a distinct jurisdiction: holding plea of all trespasses committed within the verge of the court, where only one of the parties is in the king's domestic service (in which case the inquest shall be taken by a jury of the country), and of all debts, contracts, and covenants, where both of the contracting parties belong to the royal household; and then the inquest shall be composed of men of the household only. (d) By the statute of 13 Ric. II, st. 1, c. 3, (in affirmance of the common law), (e) the verge of the court in this respect extends for twelve miles round the king's place of residence. (f) And, as this tribunal was never subject to the jurisdiction of the chief justiciary, no writ of error lay from it (though a court of record) to the king's bench, but only to parliament, (g) till the statutes of 5 Edw. III, c. 2, and 18 Edw. III, st. 2, c. 7, which allowed such writ of error before the king in his place. But this court being ambulatory, and obliged to follow the king in all his progresses so that, by the removal of the household, actions were frequently discontinued, (h) and doubts having arisen as to the extent of its jurisdiction, (i) King Charles I, in the sixth year of his reign, by his letters patent, erected a new court of record, called the *curia palatii* or *palace-court*, to be held before the steward of the household and knight-marshal, and the steward of the court, \*or his deputy; with jurisdiction [\*77] to hold plea of all manner of personal actions whatsoever, which shall arise between any parties within twelve miles of his majesty's palace at Whitehall. (k) The court is now held once a week, together with the ancient court of marshalsea, in the borough of Southwark: and a writ of error lies from thence to the court of king's bench. But if the cause is of any considerable consequence, it is usually removed on its first commencement, together with the custody of the defendant, either into the king's bench or common pleas, by a writ of *habeas corpus cum causa*; and the inferior business of the court hath of late years been much reduced, by the new courts of conscience erected in the environs of London; in consideration of which the four counsel belonging to these courts had salaries granted them for their lives by the statute 23 Geo. II, c. 27.

V. A fifth species of private courts of a limited, though extensive jurisdiction are those of the principality of Wales; which, upon its thorough reduction, and the settling of its polity in the reign of Henry the Eighth, (l) were erected all over the country; principally by the statute 34 and 35 Hen. VIII, c. 26, though much had before been done, and the way prepared by the statute of Wales, 12 Edw. I, and other statutes. By the statute of Henry the Eighth before-mentioned, courts-baron, hundred, and county courts are there established as in England. A session is also to be held twice in every year in each county, by judges (m) appointed by the king, to be called the great sessions of the several counties in Wales: in which all pleas of real and personal actions shall be held, with the same form of process and in as ample a manner as in the court of common pleas at Westminster: (n) and writs of error shall lie from judgments therein (it being a court of record) to the court of king's bench at Westminster. But the ordinary original writs of process of the king's courts at Westminster do not run into the principality of Wales: (o) though

(b) 1 Bulstr. 211. (c) Flet. I. 2, c. 2. (d) Artic. sup. cart. 28 Edw. I, c. 3. Stat. 5 Edw. III, c. 2. 10 Edw. III, st. 2, c. 2. (e) 2 Inst. 548.  
(f) By the ancient Saxon constitution, the *pax regia*, or privilege of the king's palace, extended from his palace gate to the distance of three miles, three furlongs, three acres, nine feet, nine palms, and nine barley-corns; as appears from a fragment of the *textus Roffensis*, cited in Dr. Hicke's *dissertat. epistol.* 114.  
(g) 1 Bulstr. 211. 10 Rep. 69. (h) F. N. B. 241. 2 Inst. 548. (i) 1 Bulstr. 208.  
(k) 1 Sid. 180. Salk. 439.  
(l) See Book I, introduc. § 4. (m) Stat. 18 Eliz. c. 2.  
(n) See, for farther regulations of the practice of these courts, stat. 5 Eliz. c. 25. 6 Eliz. c. 20. 6 Geo. I, c. 25, § 6. 6 Geo. II, c. 14. 13 Geo. III, c. 51.  
(o) 2 Roll. Rep. 141.

\*process of execution does: (p) as do also all prerogative writs, as writs of *certiorari*, *quo minus*, *mandamus*, and the like. (q) And even in causes between subject and subject, to prevent injustice through family factions or prejudices, it is held lawful (in causes of freehold at least, and it is usual in all others) to bring an action in the English courts, and try the same in the next English county adjoining to that part of Wales where the cause arises, (r) and wherein the venue is laid. But, on the other hand to prevent trifling and frivolous suits, it is enacted by statute 13 Geo. III, c. 51, that in *personal* actions, *tried* in any English county, where the cause of action arose, and the defendant resides in Wales, if the plaintiff shall not recover a verdict for ten pounds, he shall be nonsuited and pay the defendant's costs, unless it be certified by the judge that the freehold or title came principally in question, or that the cause was proper to be tried in such English county. And if any *transitory* action, the cause whereof arose and the defendant is resident in Wales, shall be *brought* in any English county, and the plaintiff shall not recover a verdict for ten pounds, the plaintiff shall be nonsuited, and shall pay the defendant's costs, deducting thereout the sum recovered by the verdict. (s)

VI. The court of the duchy chamber of Lancaster is another special jurisdiction, held before the chancellor of the duchy or his deputy, concerning all matter of equity relating to lands holden of the king in the right of the duchy of Lancaster; (s) which is a thing very distinct from the county palatine (which hath also its separate chancery, for sealing of writs, and the like), (t) and comprises much territory which lies at a vast distance from it; as particularly a very large district surrounded by the city of Westminster. The proceedings in this court are the same as on the equity side in the courts of exchequer and chancery; (u) so that it seems not to be a court of record; and indeed it has been holden that those courts have a concurrent jurisdiction with the duchy court, and may take cognizance of the same causes. (v)

\*VII. Another species of private courts, which are of a limited local jurisdiction, and have at the same time an exclusive cognizance of pleas, in matters both of law and equity, (w) are those which appertain to the counties palatine of Chester, Lancaster, and Durham, and the royal franchise of Ely. (x) (4) In all these, as in the principality of Wales, the king's ordinary writs, issuing under the great seal out of chancery, do not run; that is they are of no force. For as originally all *jura regalia* were granted to the lords of these counties palatine, they had of course the sole administration of justice, by their own judges, appointed by themselves and not by the crown. It would therefore be incongruous for the king to send his writ to direct the judge of another's court in what manner to administer justice between the suitors. But when the privileges of these counties palatine and franchises were abridged by statute 27 Henry VIII, c. 24, it was also enacted that all writs and process should be made in the king's name, but should be *teste'd* or witnessed in the name of the owner of the franchise. Wherefore all writs, whereon actions are founded, and which have current authority here, must be under the seal of the respective franchises; the two former of which are now united to the crown, and the two latter under the government of their several

(p) 2 Bulstr. 156. 2 Saund. 198. Raym. 206.

(q) Cro. Jac. 484.

(r) Vaugh. 418. Hard. 66.

(s) Hob. 77. 2 Lev. 24.

(t) 1 Vent. 267.

(u) 4 Inst. 206.

(v) 1 Chan. Rep. 55. Toth. 145. Hardr. 171.

(w) 4 Inst. 213, 218. Finch. R. 452.

(x) See Book I, introd. § 4.

(3) These distinctions are now abolished, and by statutes 11 Geo. IV, and 1 Wm. IV, c. 70, § 14, 5 Vic., c. 33, § 2, and 8 Vic., c. 11, the administration of justice in Wales is in every respect rendered uniform with that of England, and the writs of the superior courts of common law run into that principality.

(4) The counties palatine of Lancaster and Durham are now united to the crown (6 and 7 Wm. IV, c. 19); while that of Chester has been by statutes 11 Geo. IV, and 7 Wm. IV, c. 70, abolished, and that of Ely by statutes 6 and 7 Wm. IV, c. 87, and 7 Wm. IV., § 1, 1 Vic., c. 53, also extinguished.

bishops. And the judges of assize, who sit therein, sit by virtue of a special commission from the owners of the several franchises, and under the seal thereof; and not by the usual commission under the great seal of England. Hither also may be referred the courts of the *cinque ports*, or five most important havens, as they formerly were esteemed in the kingdom, viz.: Dover, Sandwich, Romney, Hastings, and Hythe; to which Winchelsea and Rye have been since added; which have also similar franchises in many respects (y) with the counties palatine, and particularly an exclusive jurisdiction (before the mayor and jurats of the ports), in which exclusive jurisdiction the king's ordinary writ does not run. A writ of error lies from the mayor and jurats of each port to the lord warden of the *cinque ports*, in his court of *Shepway*; and [\*80] from the court of *Shepway* to the king's \*bench. (z) So likewise a writ of error lies from all the other jurisdictions to the same supreme court of judicature, (a) as an ensign of superiority reserved to the crown at the original creation of the franchises. And all prerogative writs (as those of *habeas corpus*, prohibition, *certiorari* and *mandamus*) may issue for the same reason to all these exempt jurisdictions; (b) because the privilege, that the king's writ runs not, must be intended between party and party, for there can be no such privilege against the king. (c)

VIII. The stannary courts in Devonshire and Cornwall, for the administration of justice among the tinners therein, are also courts of record, but of the same private and exclusive nature. They are held before the lord warden and his substitutes, in virtue of a privilege granted to the workers in the tin mines there, to sue and be sued only in their own courts, that they may not be drawn from their business, which is highly profitable to the public, by attending their law-suits in other courts. (d) The privileges of the tinners are confirmed by a charter, 33 Edw. I, and fully expounded by a private statute, (e) 50 Edw. III, which has since been explained by a public act, 16 Car. I, c. 15. What relates to our present purpose is only this: that all tinners and labourers in and about the stannaries shall, during the time of their working therein *bona fide*, be privileged from suits in other courts, and be only impleaded in the stannary court in all matters, excepting pleas of land, life, and member. No writ of error lies from hence to any court in Westminster-hall; as was agreed by all the judges (f) in 4. Jac. I. But an appeal lies from the steward of the court to the under-warden; and from him to the lord-warden; and thence to the privy council of the prince of Wales, as duke of Cornwall, (g) when he hath had livery or investiture of the same. (h) And from thence the appeal lies to the king himself, in the last resort. (i)

[\*81] \*IX. The several courts within the city of London, (j) and other cities, boroughs, and corporations throughout the kingdom, held by prescription, charter, or act of parliament, are also of the same private and limited species. It would exceed the design and compass of our present inquiries, if I were to enter into a particular detail of these, and to examine the nature and extent of their several jurisdictions. It may in general be sufficient to say, that they arose originally from the favour of the crown to those particular districts, wherein we find them erected, upon the same principle that hundred-courts, and the like, were established; for the convenience of the inhabitants, that they may prosecute their suits and receive justice at home: that, for the most part, the courts at Westminster-hall have a concurrent jurisdiction with these, or else a superintendency over them, (k) and are bound by the statute 19

(y) 1 Sid. 166. (z) Jenk. 71. *Diversite des courtes, t. bank le roy.* 1 Sid. 356.  
 (a) Bro. Adu. t. error, 74, 101. Davis. 62. 4 Inst. 38, 214, 218. (b) 1 Sid. 92.  
 (c) 4 Inst. 232. (e) See this at length in 4 Inst. 232. (f) 4 Inst. 231.  
 (d) Ibid. 230. (h) 8 Bulstr. 183. (i) Doddridge, Hist. of Cornw. 94.  
 (j) The chief of those in London are the *sheriff's courts*, holden before their steward or judge; from which a writ of error lies to the court of *hustings*, before the mayor, recorder and sheriffs; and from thence to justices appointed by the king's commission, who used to sit in the church of St. Martin le grand. (F. N. B. 32.) And from the judgment of those justices a writ of error lies immediately to the house of lords.  
 (k) Salk. 144, 263.

Geo. III, c. 70, to give assistance to such of them as are courts of record, by issuing writs of execution, where the person or effects of the defendant are not within the inferior jurisdiction: and that the proceedings in these special courts ought to be according to the course of the common law, unless otherwise ordered by parliament; for though the king may erect new courts, yet he cannot alter the established course of law.

But there is one species of courts, constituted by act of parliament, in the city of London, and other trading and populous districts, which in their proceedings so vary from the course of the common law, that they may deserve a more particular consideration. I mean the courts of requests, or courts of conscience, for the recovery of small debts. The first of these was established in London, so early as the reign of Henry the Eighth, by an act of their common council; which however was certainly insufficient for that purpose and illegal, till confirmed by statute 3 Jac. I, c. 15, which has since been explained and amended by statute 14 Geo. II, c. 10. The constitution is this: two aldermen, and four commoners, sit twice a week to hear all causes of debt not exceeding the \*value of forty shillings; which they examine in a summary way, by [\*82] the oath of the parties or other witnesses, and make such order therein as is consonant to equity and good conscience. The time and expense of obtaining this summary redress are very inconsiderable, which make it a great benefit to trade; and thereupon divers trading towns and other districts have obtained acts of parliament, for establishing in them courts of conscience upon nearly the same plan as that in the city of London.

The anxious desire that has been shown to obtain these several acts, proves clearly that the nation in general is truly sensible of the great inconvenience arising from the disuse of the ancient county and hundred courts; wherein causes of this small value were always formerly decided, with very little trouble and expense to the parties. But it is to be feared that the general remedy which of late hath been principally applied to this inconvenience (the erecting these new jurisdictions) may itself be attended in time with very ill consequences: as the method of proceeding therein is entirely in derogation of the common law; as their large discretionary powers create a petty tyranny in a set of standing commissioners; and as the disuse of the trial by jury may tend to estrange the minds of the people from that valuable prerogative of Englishmen, which has already been more than sufficiently excluded in many instances. How much rather is it to be wished that the proceedings in the county and hundred courts could again be revived, without burdening the freeholders with too frequent and tedious attendances; and at the same time removing the delays that have insensibly crept into their proceedings, and the power that either party has of transferring at pleasure their suits to the courts at Westminster! And we may with satisfaction observe, that this experiment has been actually tried, and has succeeded, in the populous county of Middlesex; which might serve as an example for others. For by statute 23 Geo. II, c. 33, it is enacted, 1. That a special county court should be held at least once a month in every hundred of the county of \*Middlesex, by [\*83] the county clerk. 2. That twelve freeholders of that hundred, qualified to serve on juries, and struck by the sheriff, shall be summoned to appear at such court by rotation; so as none shall be summoned oftener than once a year. 3. That in all causes not exceeding the value of forty shillings, the county clerk and twelve suitors shall proceed in a summary way, examining the parties and witnesses on oath, without the formal process anciently used: and shall make such order therein as they shall judge agreeable to conscience. 4. That no complaints shall be removed out of this court, by any process whatsoever; but the determination herein shall be final. 5. That if any action be brought in any of the superior courts against a person resident in Middlesex, for a debt or contract, upon the trial whereof the jury shall find less than 40s. damages, the plaintiff shall recover no costs, but shall pay the defendant double costs; unless

upon some special circumstances, to be certified by the judge who tried it. 6. Lastly, a table of very moderate fees is prescribed and set down in the act; which are not to be exceeded upon any account whatsoever. This is a plan entirely agreeable to the constitution and genius of the nation, and at the same time to give honest creditors an opportunity of recovering small sums; which now they are frequently deterred from by the expense of a suit at law: a plan which, one would think, wants only to be generally known in order to its universal reception.

X. There is yet another species of private courts, which I must not pass over in silence, viz.: the chancellors' courts in the two universities of England. Which two learned bodies enjoy the sole jurisdiction, in exclusion of the king's courts, over all civil actions and suits whatsoever, when a scholar or privileged person is one of the parties; excepting in such cases where the right of freehold is concerned. And these, by the university charter, they are at liberty to try and determine, either according to the common law of the land, or according to their own local customs, at their discretion; which has generally led [\*84] them to carry on their process in a \*course much conformed to the civil law, for reasons sufficiently explained in a former book. (l)

These privileges were granted, that students might not be distracted from their studies by legal process from the distant courts, and other forensic avocations. And privileges of this kind are of a very high antiquity, being generally enjoyed by all foreign universities as well as our own, in consequence (I apprehend) of a constitution of the emperor Frederick, A. D. 1158. (m) But as to England in particular, the oldest charter that I have seen, containing this grant to the university of Oxford, was 28 Hen. III. A. D. 1244. And the same privileges were confirmed and enlarged by almost every succeeding prince, down to King Henry the Eighth; in the fourteenth year of whose reign, the largest and most extensive charter of all was granted. One similar to which was afterwards granted to Cambridge, in the third year of Queen Elizabeth. But yet, notwithstanding these charters, the privileges granted therein, of proceeding in a course different from the law of the land, were of so high a nature that they were held to be invalid; for though the king might erect new courts, yet he could not alter the course of law by his letters patent. Therefore, in the reign of Queen Elizabeth, an act of parliament was obtained, (n) confirming all the charters of the two universities, and those of 14 Hen. VIII and 3 Eliz. by name. Which *blessed act*, as Sir Edward Coke entitles it, (o) established this high privilege without any doubt or opposition: (p) or, as Sir Matthew Hale, (q) very fully expresses the sense of the common law and the operation of the act of parliament, "although King Henry the Eighth, 14 A. R. *sui*, granted to the university a liberal charter, to proceed according to the use of the university, viz.: by a course much conformed to the civil law, yet that charter had not been sufficient to have warranted such proceedings [\*85] without the help of an act of parliament. And, therefore, in 3 Eliz. \*an act passed, whereby that charter was in effect enacted; and it is thereby that at this day they have a kind of civil law procedure, even in matters that are of themselves of common law cognizance, where either of the parties is privileged."

This privilege, so far as it relates to civil causes, is exercised at Oxford in the chancellor's court; the judge of which is the vice-chancellor, his deputy or assessor. From his sentence an appeal lies to delegates appointed by the congregation; from thence to other delegates of the house of convocation; and if they all three concur in the same sentence it is final, at least by the statutes of the university, (r) according to the rule of the civil law. (s) But, if there be any discordance or variation in any of the three sentences, an appeal lies in

(l) Book I. introd. § 1.

(m) Cod. 4 tit. 13.

(n) 13 Eliz. c. 29.

(o) 4 Inst. 227.

(p) Jenk. Cent. 2 pl. 88.

Cent. 3 pl. 33.

Hard. 504.

Godbolt. 201.

(q) Hist. C. L. 33.

(r) Tit. 21, § 19.

(s) Cod. 7, 70, 1.



the last resort to judges delegates appointed by the crown under the great seal in chancery. (5)

I have now gone through the several species of private, or special courts, of the greatest note in the kingdom, instituted for the local redress of private wrongs; and must in the close of all, make one general observation from Sir Edward Coke: (*c*) that these particular jurisdictions, derogating from the general jurisdiction of the courts of common law, are ever strictly restrained, and cannot be extended farther than the express letter of their privileges will most explicitly warrant.

## CHAPTER VII.

### OF THE COGNIZANCE OF PRIVATE WRONGS.

WE are now to proceed to the cognizance of private wrongs; that is, to consider in which of the vast variety of courts, mentioned in the three preceding chapters, every possible injury that can be offered to a man's person or property is certain of meeting with redress.

The authority of the several courts of private and special jurisdiction, or of what wrongs such courts have cognizance, was necessarily remarked as those respective tribunals were enumerated; and therefore need not be here again repeated; which will confine our present inquiry to the cognizance of civil injuries in the several courts of public or general jurisdiction. And the order in which I shall pursue this inquiry, will be by showing: 1. What actions may be brought or what injuries remedied, in the ecclesiastical courts. 2. What in the military. 3. What in the maritime. And, 4. What in the courts of common law.

And, with regard to the three first of these particulars, I must beg leave not so much to consider what hath at any time been *claimed* or pretended to belong to their jurisdiction, by the officers and judges of those respective courts; but what the common law *allows* and permits to be so. For these eccentric tribunals (which are principally guided by the rules of the imperial and canon laws), as they subsist and are admitted in England, not by any right of their own, (*a*) but upon bare sufferance and toleration from the municipal laws, must have recourse to the laws of that country wherein they are thus adopted, to be informed how far their jurisdiction extends, or what causes are permitted, and what forbidden, to be discussed or drawn in question before them. It matters not, therefore, what the pandects of Justinian, or the decretals of Gregory, have ordained. They are here of no more intrinsic authority than the laws of Solon and Lycurgus: curious perhaps for their antiquity, respectable for their equity, and frequently of admirable use in illustrating a point of history. Nor is it at all material in what light other nations may consider this matter of jurisdiction. Every nation must and will abide by its own municipal laws; which various accidents conspire to render different in almost every country in Europe. We permit some kinds of suits to be of ecclesiastical cognizance, which other nations have referred entirely to the temporal courts; as concerning wills and successions to intestate's chattels; and perhaps we may, in our turn, prohibit them from interfering in some controversies, which on the continent may be looked upon as merely spiritual. In short the common law of England is the one uniform rule to determine the

(5) 2 Inst. 548.

(a) See Book I, introd. § 1.

(5) See as to the privilege of the University of Oxford, *Matter of the Chancellor, &c.*, 1 Q. B., 952.

jurisdiction of our courts : and, if any tribunals whatsoever attempt to exceed the limits so prescribed them, the king's courts of common law may and do prohibit them; and in some cases punish their judges. (b)

Having premised this general caution, I proceed now to consider,

I. The wrongs or injuries cognizable by the ecclesiastical courts. I mean such as are offered to private persons or individuals; which are cognizable by the ecclesiastical court, not for reformation of the offender himself or party *injuring* (*pro salute animæ*, as is the case with immoralities in general when unconnected with private injurier), but for the sake of the party *injured*, to [ \*88 ] make him a satisfaction and redress for \*the damage which he has sustained. And these I shall reduce under three general heads; of causes *pecuniary*, causes *matrimonial*, and causes *testamentary*.

1. Pecuniary causes, cognizable in the ecclesiastical courts are such as arise either from the withholding ecclesiastical dues, or the doing or neglecting some act relating to the church, whereby some damage accrues to the plaintiff; towards obtaining a satisfaction for which he is permitted institute a suit in the spiritual court. (1)

The principal of these is the subtraction or withholding of *tithes* from the parson or vicar, whether the former be a clergyman or a lay appropriator. (c) But herein a distinction must be taken : for the ecclesiastical courts have no jurisdiction to try the *right* of tithes unless between spiritual persons ; (d) but in ordinary cases, between spiritual men and lay men, are only to compel the payment of them, when the right is not disputed. (e) By the statute or rather writ (f) of *circumspecte agatis* (g) it is declared that the court christian shall not be prohibited from holding plea, "*si rector petat versus parochianos oblationes et decimas debitas et consuetas*:" so that if any dispute arises whether such tithes be *due* and *accustomed*, this cannot be determined in the ecclesiastical court, but before the king's courts of the common law; as such question affects the temporal inheritance, and the determination must bind the real property. But where the *right* does not come into question, but only the *fact*, whether or no the tithes allowed to be due are really subtracted or withdrawn, this is a transient personal injury, for which the remedy may properly be had in the spiritual court; viz.: the recovery of the tithes, or their equivalent. By statute 2 and 3 Edw. VI, c. 13, it is enacted that if any person shall carry off his predial tithes (viz.: of corn, hay, or the like), before the tenth [ \*89 ] part \*is duly set forth, or agreement is made with the proprietor, or shall willingly withdraw his tithes of the same, or shall stop or hinder the proprietor of the tithes or his deputy from viewing or carrying them away; such offender shall pay *double* the value of the tithes, with costs to be recovered before the ecclesiastical judge, according to the king's ecclesiastical laws. By a former clause of the same statute, the *treble* value of the tithes, so subtracted or withheld, may be sued for in the temporal courts, which is equivalent to the *double* value to be sued for in the ecclesiastical. For one may sue for and recover in the ecclesiastical courts the tithes themselves, or a recompense for them, by the ancient law; to which the suit for the *double* value is superadded by the statute. But as no suit lay in the temporal courts for the subtraction of tithes themselves, therefore the statute gave a *treble* forfeiture, if sued for there; in order to make the course of justice uniform by giving the same reparation in one court as in the other. (h) However it

(c) Hal. Hist. C. L. c. 2.

(e) Stat. 33 Hen. VIII, c. 7.

(d) 2 Roll. Abr. 330, 310.

Bro. Abr. t. jurisdiction, 85.

(f) 2 Inst. 354, 499, 490.

(g) See Barrington, 128. 3 Fryn. Rec. 336.

(h) 13 Edw. I. st. 4, or rather 9 Edw. II.

(A) 2 Inst. 354.

(1) This jurisdiction became unimportant under the operation of statute 6 and 7 Wm. IV, c. 71, and subsequent statutes for the commutation of tithes. And the statute 81 and 82 Vic., c. 109, takes away wholly the jurisdiction of the ecclesiastical courts to compel the payment of church rates.

now seldom happens that tithes are sued for at all in the spiritual court; for if the defendant pleads any custom, *modus*, composition, or other matter whereby the right of tithing is called in question; this takes it out of the jurisdiction of the ecclesiastical judges; for the law will not suffer the existence of such a right to be decided by the sentence of any single, much less an ecclesiastical, judge; without the verdict of a jury. But a more summary method than either of recovering small tithes under the value of 40s., is given by statute 7 and 8 Wm. III, c. 6, by complaint to two justices of the peace; and, by another statute of the same year, c. 34, the same remedy is extended to all tithes withheld by Quakers under the value of ten pounds.

Another pecuniary injury, cognizable in the spiritual courts, is the *non-payment* of other ecclesiastical *dues* to the clergy: as pensions, mortuaries, compositions, offerings and whatsoever falls under the denomination of surplice-fees, for marriages or other ministerial offices of the church: all which injuries are redressed by a decree for their actual \*payment. Besides which, all offerings, oblations and obventions not exceeding the value of 40s. may [\*90] be recovered in a summary way before two justices of the peace. (i) But care must be taken that these are real and not imaginary dues; for if they be contrary to the common law, a prohibition will issue out of the temporal courts to stop all suits concerning them. As where a fee was demanded by the minister of the parish for the baptism of a child, which was administered in another place; (k) this, however, authorized by the canon, is contrary to common right: for of common right, no fee is due to the minister even for performing such branches of his duty, and it can only be supported by a special custom; (l) but no custom can support the demand of a fee without performing them at all.

For *fees* also, settled and acknowledged to be due to the officers of the ecclesiastical courts, a suit will lie therein; but not if the *right* of the fees is at all disputable; for then it must be decided by the common law. (m) It is also said, that if a curate be licensed, and his salary appointed by the bishop, and he be not paid, the curate has a remedy in the ecclesiastical court; (n) but, if he be not licensed, or hath no such salary appointed, or hath made a special agreement with the rector, he must sue for a satisfaction at common law; (o) either by proving such special agreement, or else by leaving it to a jury to give damages upon a *quantum meruit*, that is, in consideration of what he reasonably deserved in proportion to the service performed.

Under this head of pecuniary injuries may also be reduced the several matters of spoliation, dilapidations, and neglect of repairing the church and things thereunto belonging; for which a satisfaction may be sued for in the ecclesiastical court.

Spoliation is an injury done by one clerk or incumbent to another, in taking the fruits of his benefice without any \*right thereunto, but under a pretended title. It is remedied by a decree to account for the profits so [\*91] taken. This injury, when the *jus patronatus* or right of advowson doth not come in debate, is cognizable in the spiritual court: as if a patron first presents A to a benefice, who is instituted and inducted thereto; and then, upon pretence of a vacancy, the same patron presents B to the same living, and he also obtains institution and induction. Now, if the fact of the vacancy be disputed, then that clerk who is kept out of the profits of the living, whichever it be, may sue the other in the spiritual court for spoliation, or taking the profits of his benefice. And it shall there be tried, whether the living were or were not vacant: upon which the validity of the second clerk's pretensions must depend. (p) But if the right of patronage comes at all into dispute, as if one patron presented A, and another patron presented B, there the ecclesiastical

(i) Stat. 7 and 8 W. III c. 6.

(j) *Ibid.*, 334. Lord Raym. 450, 1558. Ffitt. 55.

(k) 1. Freem. 70.

(l) F. N. B. 36.

(m) Salk. 333.

(n) 1 Ventr. 156.

(o) 1 Burn. eccl. law, 438.

court hath no cognizance, provided the tithes sued for amount to a fourth part of the value of the living, but may be prohibited at the instance of the patron by the king's writ of *indicavit*. (g) So also if a clerk, without any colour of title, ejects another from his parsonage, this injury must be redressed in the temporal courts: for it depends upon no question determinable by the spiritual law (as plurality of benefices or no plurality, vacancy or no vacancy), but is merely a civil injury.

For *dilapidations*, which are a kind of ecclesiastical waste, either voluntary, by pulling down; or permissive, by suffering the chancel, parsonage-house and other buildings thereunto belonging to decay; an action also lies, either in the spiritual court by the canon law, or in the courts of common law; (r) (2) and it may be brought by the successor against the predecessor if living, or, if dead, then against his executors. It is also said to be good cause of deprivation, if the bishop, parson, vicar or other ecclesiastical person dilapidates the buildings, or cuts down timber growing on the patrimony of [92] \*the church, unless for necessary repairs: (s) and that a writ of prohibition will also lie against him in the courts of common law. (t) By statute 13 Eliz. c. 10, if any spiritual person makes over or alienates his goods with intent to defeat his successors of their remedy for dilapidations, the successor shall have such remedy against the alienee, in the ecclesiastical court, as if he were the executor of his predecessor. And by statute 14 Eliz. c. 11, all money recovered for dilapidations shall within two years be employed upon the buildings, in respect whereof it was recovered, on penalty of forfeiting double the value to the crown.

As to the neglect of reparations of the church, church-yard and the like, the spiritual court has undoubted cognizance thereof; (u) and a suit may be brought therein for non-payment of a rate made by the church-wardens for that purpose. (3) And these are the principal pecuniary injuries, which are cognizable, or for which suits may be instituted in ecclesiastical courts.

2. Matrimonial causes, or injuries respecting the rights of marriage, are another, and a much more undisturbed, branch of the ecclesiastical jurisdiction. Though, if we consider marriages in the light of mere civil contracts, they do not seem to be properly of spiritual cognizance. (v) But the Romanists having very early converted this contract into a holy sacramental ordinance, the church of course took it under her protection, upon the division, of the two jurisdictions. And, in the hands of such able politicians, it soon became an engine of great importance to the papal scheme of an universal monarchy over Christendom. The numberless canonical impediments that were invented, and occasionally dispensed with, by the holy see, not only enriched the coffers of the church, but gave it a vast ascendant over princes of all denominations; whose marriages were sanctified or reprobated, their issue legitimated or bastardized, and the succession to their thrones established or rendered precarious, [93] according \*to the humor or interest of the reigning pontiff; besides a thousand nice and difficult scruples, with which the clergy of those ages puzzled the understandings and loaded the consciences of the inferior orders of the laity; and which could only be unravelled and removed by these their spiritual guides. Yet, abstracted from this universal influence, which affords so good a reason for their conduct, one might otherwise be led to wonder, that the same authority, which enjoined the strictest celibacy to the priesthood, should think them the proper judges in causes between man and wife. These

(g) *Circumspecte agatis*; 13 Edw. I. st. 4 *Artic. cleri*. 9 Edw. II. c. 2. F. N. B. 45.

(r) *Cart. 224*. 3 Lev. 268. (s) 1 Roll. Rep. 86. 11 Rep. 98. Godb. 259. (t) 3 Bulstr. 158. 1 Roll. Rep. 335.

(u) *Circumspecte agatis*. 5. Rep. 66. (v) Warb. alliance, 178.

(2) The usual and more effectual remedy is, in the courts of common law, by action on the case. See *Radcliffe v. D'Oyly*, 2 T. R. 630.

(3) A summary remedy before two justices of the peace is now given. See *Rex v. Milnrow*, 6. M. and S., 248; *Richards v. Dyke*, 11 Law J. Rep. (N. S.) Q. B., 275.

causes, indeed, partly from the nature of the injuries complained of, and partly from the clerical method of treating them, (w) soon became too gross for the modesty of a lay tribunal. And causes matrimonial are now so peculiarly ecclesiastical, that the temporal courts will never interfere in controversies of this kind, unless in some particular cases. As if the spiritual court do proceed to call a marriage in question after the death of either of the parties; this the courts of common law will prohibit, because it tends to bastardize and disinherit the issue; who cannot so well defend the marriage, as the parties themselves, when both of them living, might have done. (x)

Of matrimonial causes, one of the first and principal is, 1. *Causa jactitationis matrimonii*; when one of the parties boasts or gives out that he or she is married to the other, whereby a common reputation of their matrimony may ensue. On this ground the party injured may libel the other in the spiritual court; and, unless the defendant undertakes and makes out a proof of the actual marriage, he or she is enjoined perpetual silence upon that head; which is the only remedy the ecclesiastical courts can give for this injury. 2. Another species of matrimonial causes was, when a party contracted to another brought a suit in the ecclesiastical court to compel a celebration of the marriage in pursuance of such contract; but this branch of causes is now cut off entirely by the act for preventing clandestine marriages, 28 Geo. II, \*c. 33, which enacts, that [94] for the future no suit shall be had in any ecclesiastical court, to compel a celebration of marriage *in facie ecclesiæ*, for or because of any contract of matrimony whatsoever. 3. The suit for *restitution of conjugal rights* is also another species of matrimonial causes: which is brought whenever either the husband or wife is guilty of the injury of subtraction, or lives separate from the other without any sufficient reason; in which case the ecclesiastical jurisdiction will compel them to come together again, if either party be weak enough to desire it, contrary to the inclination of the other. 4. *Divorces* also, of which, and their several distinctions, we treated at large in a former book, (y) are causes thoroughly matrimonial, and cognizable by the ecclesiastical judge. If it becomes improper, through some supervenient cause arising *ex post facto*, that the parties should live together any longer; as through intolerable cruelty, adultery, a perpetual disease, and the like; this unfitness or inability for the marriage state may be looked upon as an injury to the suffering party: and for this the ecclesiastical law administers the remedy of separation, or a divorce *a mensa et thoro*. But if the cause existed previous to the marriage, and was such a one as rendered the marriage unlawful *ab initio*, as consanguinity, corporal imbecility, or the like; in this case the law looks upon the marriage to have been always null and void, being contracted *in fraudem legis*, and decrees not only a separation from bed and board, but a *vinculo matrimonii* itself. 5. The last species of matrimonial causes is a consequence drawn from one of the species of divorce, that a *mensa et thoro*; which is the suit for *alimony*, a term which signifies maintenance: which suit the wife, in case of separation, may have against her husband, if he neglects or refuses to make her an allowance suitable to their station in life. This is an injury to the wife, and the court christian will redress it by assigning her a competent maintenance, and compelling the husband by ecclesiastical censures to pay it. But no alimony will be assigned in case of a divorce for adultery on her part; for as that amounts to a forfeiture of her \*dower after his death, it is [95] when living.

3. Testamentary causes are the only remaining species belonging to the ecclesiastical jurisdiction; which, as they are certainly of a mere temporal nature (z) may seem at first view a little oddly ranked among matters of a spiritual cognizance. And, indeed, (as was in some degree observed in a for-

(w) Some of the impurest books, that are extant in any language are those written by the popish clergy on the subjects of matrimony and divorce.

(y) Book I, ch. 13.

(z) Inst. 614.

(z) Warburt. alliance. 173.

mer book) (a) they were originally cognizable in the king's courts of common law, viz., the county courts; (b) and afterwards transferred to the jurisdiction of the church, by the favour of the crown, as a natural consequence of granting to the bishops the administration of intestates' effects.

This spiritual jurisdiction of testamentary causes is a peculiar constitution of this island; for in almost all other (even in popish) countries all matters testamentary are under the jurisdiction of the civil magistrate. And that this privilege is enjoyed by the clergy in England, not as a matter of ecclesiastical right, but by the special favour and indulgence of the municipal law, and as it should seem by some public act of the great council, is freely acknowledged by Lindewode, the ablest canonist of the fifteenth century. Testamentary causes, he observes, belong to the ecclesiastical courts "*de consuetudine Angliæ, et super consensu regio et suorum procerum in talibus ab antiquo concessio.*" (c) The same was, about a century before, very openly professed in a canon of Archbishop Stratford, viz.: that the administration of intestates' goods was "*ab olim*" granted to the ordinary, "*consensu regio et magnatum regni Angliæ.*" (d) The constitutions of Cardinal Othobon also testify, that this provision "*olim a prælati cum approbatione regis et baronum dicitur emanasse.*" (e) And Archbishop Parker, (f) in Queen Elizabeth's time, affirms in express words, that originally in matters testamentary, "*non ullam habebant episcopi auctoritatem, præter eam quam a rege acceptam referebant. Jus testamenta probandi non habebant: administrationis potestatem cuique delegare non poterant.*" [\*96]

At what period of time the ecclesiastical jurisdiction of testaments and intestacies began in England, is not ascertained by any ancient writer: and Lindewode (g) very fairly confesses, "*cujus regis temporibus hoc ordinatum sit, non reperio.*" We find it indeed frequently asserted in our common law books, that it is but of *late years* that the church hath had the probate of wills. (h) But this must only be understood to mean that it hath not *always* had this prerogative: for certainly it is of very high antiquity. Lindewode, we have seen, declares that it was "*ab antiquo*;" Stratford, in the reign of King Edward III, mentions it as an "*ab olim ordinatum*;" and Cardinal Othobon, in the 52 Hen. III, speaks of it as an ancient tradition. Bracton holds it for clear law in the same reign of Henry III, that matters testamentary belonged to the spiritual court. (i) And yet earlier, the disposition of intestates' goods "*per visum ecclesiæ*" was one of the articles confirmed to the prelates by King John's *magna carta*. (j) Matthew Paris also informs us that King Richard I ordained in Normandy "*quod distributio rerum quæ in testamento relinquuntur auctoritate ecclesiæ fiet.*" And even this ordinance, of King Richard, was only an introduction of the same law into his ducal dominions, which before prevailed in this kingdom: for in the reign of his father, Henry II, Glanvil is express, that "*si quis aliquid dixerit contra testamentum, placitum illud in curia christianitatis audiri debet et terminari.*" (k) And the Scots book, called *regiam maiestatem*, agrees *verbatim* with Glanvil in this point. (l)

It appears that the foreign clergy were pretty early ambitious of this branch of power; but their attempts to assume \*it on the continent were effectually [\*97] curbed by the edict of the Emperor Justin, (m) which restrained the insinuation or probate of testaments (as formerly) to the office of the *magister census*; for which the emperor subjoins this reason: "*Absurdum etenim clericis est, immo etiam opprobriosum, si peritos se velint ostendere disceptationum esse forensium.*" But afterwards, by the canon law, (n) it was allowed that the bishop might compel, by ecclesiastical censures, the performance of a bequest to *pious uses*. And, therefore, as that was considered as a

(a) Book II. ch. 22.

(b) Hickee's *Dissert. Epistolæ*. p. 8, 58.

(c) Provincial. l. 2, t. 13, fol. 178.

(d) *Ibid.* l. 2, t. 23, fol. 263.

(e) Cap. 13.

(f) See 9 Rep. 86.

(g) Fol. 263.

(h) *Fitz. Abr. tit. testament*, pl. 4.

(i) 2 Roll. Abr. 317.

(j) 9 Rep. 37.

(k) Vaugh. 207.

(l) l. 5, de exceptionibus, c. 10.

(m) Cap. 37, edit. Oxon.

(n) l. 7, c. 3.

(o) l. 2, c. 38.

(p) Decretal. 2, 28, 17.

(q) Gilb. Rep. 204, 205.

cause *quæ secundum canones et episcopales leges ad regimen animarum pertinent*, it fell within the jurisdiction of the spiritual courts by the express words of the charter of King William I, which separated those courts from the temporal. And afterwards, when King Henry I, by his coronation-charter, directed that the goods of an intestate should be divided for the good of his soul, (o) this made all intestacies immediately spiritual causes, as much as a legacy to pious uses had been before. This, therefore, we may probably conjecture, was the *æra* referred to by Stratford and Othobon, when the king, by the advice of the prelates, and with the consent of his barons, invested the church with this privilege. And, accordingly, in King Stephen's charter it is provided that the goods of an intestate ecclesiastic shall be distributed *pro salute animæ ejus, ecclesiæ consilio*; (p) which latter words are equivalent to *per visum ecclesiæ*, in the great charter of King John, before mentioned. And the Danes and Swedes (who received the rudiments of christianity and ecclesiastical discipline from England about the beginning of the twelfth century), have thence also adopted the spiritual cognizance of intestacies, testaments, and legacies. (q)

This jurisdiction, we have seen, is principally exercised with us in the consistory courts of every diocesan \*bishop, and in the prerogative court [ \*98 ] of the metropolitan, originally; and in the arches court and court of delegates, by way of appeal. It is divisible into three branches; the probate of wills, the granting of administrations, and the suing for legacies. The two former of which, when no opposition is made, are granted merely *ex officio et debito justitiæ*, and are then the object of what is called the *voluntary*, and not the *contentious* jurisdiction. But when a *caveat* is entered against proving the will or granting administration, and a suit thereupon follows to determine either the validity of the testament, or who hath a right to administer; this claim and obstruction by the adverse party are an injury to the party entitled, and as such are remedied by the sentence of the spiritual court, either by establishing the will or granting the administration. Subtraction, the withholding or detaining of legacies, is also still more apparently injurious, by depriving the legatees of that right with which the laws of the land and the will of the deceased have invested them; and, therefore, as a consequential part of testamentary jurisdiction, the spiritual court administers redress herein, by compelling the executor to pay them. But in this last case the courts of equity exercise a concurrent jurisdiction with the ecclesiastical courts, as incident to some other species of relief prayed by the complainant; as to compel the executor to account for the testator's effects, or assent to the legacy, or the like. For, as it is beneath the dignity of the king's courts to be merely ancillary to other inferior jurisdictions, the cause, when once brought there, receives there also its full determination.

These are the principal injuries for which the party grieved either must, or may, seek his remedy in the spiritual courts. But before I entirely dismiss this head, it may not be improper to add a short word concerning the *method of proceeding* in these tribunals, with regard to the redress of injuries.

It must (in the first place) be acknowledged, to the honour of the spiritual courts, that though they continue to this \*day to decide many questions [ \*99 ] which are properly of temporal cognizance, yet justice is in general so ably and impartially administered in those tribunals (especially of the superior kind), and the boundaries of their power are now so well known and established, that no material inconvenience at present arises from this jurisdiction still continuing in the ancient channel. And should an alteration be attempted, great confusion would probably arise, in overturning long-established forms,

(o) *Si quis baronum seu hominum meorum—pecuniam suam non dederit vel dare disposuerit, usor sua, sive liberti, aut parentes et legitimi homines ejus, eam pro anima ejus dividant, sicut eis melius viderint fuerit.* (Text. Roffens. c. 34. p. 61.)

(p) Lord Lyttel. Hen. II. vol. i. 586. Hearnæ ad Gul. Neubr. 711.

(q) Stiernhook, de jure Sueon. l. 3, c. 8.

and new-modelling a course of proceedings that has now prevailed for seven centuries.

The establishment of the civil law process in all the ecclesiastical courts was indeed a masterpiece of papal discernment, as it made a coalition impracticable between them and the national tribunals, without manifest inconvenience and hazard. And this consideration had undoubtedly its weight in causing this measure to be adopted, though many other causes concurred. The time when the pandects of Justinian were discovered afresh, and rescued from the dust of antiquity, the eagerness with which they were studied by the popish ecclesiastics, and the consequent dissensions between the clergy and the laity of England, have formerly (r) been spoken to at large. I shall only now remark upon those collections, that their being written in the Latin tongue, and referring so much to the will of the prince and his delegated officers of justice, sufficiently recommended them to the court of Rome, exclusive of their intrinsic merit. To keep the laity in the darkest ignorance, and to monopolize the little science, which then existed, entirely among the monkish clergy, were deep-rooted principles of papal policy. And, as the bishops of Rome affected in all points to mimic the imperial grandeur, as the spiritual prerogatives were moulded on the pattern of the temporal, so the canon law process was formed on the model of the civil law: the prelates embracing with the utmost ardor a method of judicial proceedings which was carried on in a language unknown to the bulk of the people, which banished the intervention of a jury (that bul- [\*100] wark of \*Gothic liberty), and which placed an arbitrary power of decision in the breast of a single man.

The proceedings in the ecclesiastical courts are therefore regulated according to the practice of the civil and canon laws; or rather according to a mixture of both, corrected and new-modelled by their own particular usages, and the interposition of the courts of common law. For, if the proceedings in the spiritual court be ever so regularly consonant to the rules of the Roman law, yet if they be manifestly repugnant to the fundamental maxims of the municipal laws, (to which upon principles of sound policy the ecclesiastical process ought in every state to conform (s) as if they require two witnesses to prove a fact, where one will suffice at common law); in such cases a prohibition will be awarded against them. (t) But under these restrictions, their ordinary course of proceeding is: first by *citation*, to call the party injuring before them. Then, by *libel*, *libellus*, a little book, or by articles drawn out in a formal *allegation*, to set forth the complainant's ground of complaint. To this succeeds the *defendant's answer* upon oath, when if he denies or extenuates the charge, they proceed to *proofs* by witnesses examined, and their depositions taken down in writing, by an officer of the court. If the defendant has any circumstances to offer in his defence, he must also propound them in what is called his *defensive allegation*, to which he is entitled in his turn to the *plaintiff's answer* upon oath, and may from thence proceed to *proofs* as well as his antagonist. The canonical doctrine of *purgation*, whereby the parties were obliged to answer upon oath to any matter, however criminal, that might be objected against them (though long ago overruled in the court of chancery, the genius of the English law having broken through the bondage imposed on it by its clerical chancellors, and asserted the doctrines of judicial as well as civil liberty), continued to the middle of the last century to be upheld by the spiritual courts; when the legislature was obliged to interpose, to teach them [\*101] a lesson of similar moderation. By the \*statute of 13 Car. II, c. 12, it is enacted, that it shall not be lawful for any bishop or ecclesiastical judge, to tender or administer to any person whatsoever, the oath usually called the oath *ex officio*, or any other oath whereby he may be compelled to confess, accuse, or purge himself of any criminal matter or thing, whereby he may be liable to any censure or punishment. When all the pleadings and

(r) Book I, introd. § 1.

(s) Warb. alliance, 179.

(t) 2 Roll. Abr. 300, 302.



proofs are concluded, they are referred to the consideration, not of a jury, but of a single judge; who *takes information* by hearing advocates on both sides, and thereupon forms his *interlocutory decree* or *definitive sentence* at his own discretion: from which there generally lies an *appeal*, in the several stages mentioned in a former chapter; (u) though if the same be not appealed from in fifteen days, it is final, by the statute 25 Hen. VIII, c. 19.

But the point in which these jurisdictions are the most defective, is that of enforcing their sentences when pronounced; for which they have no other process but that of *excommunication*; which is described (v) to be twofold; the less, and the greater excommunication. The less is an ecclesiastical censure, excluding the party from the participation of the sacraments: the greater proceeds farther, and excludes him not only from these, but also from the company of all christians. But, if the judge or any spiritual court excommunicates a man for a cause of which he hath not the legal cognizance, the party may have an action against him at common law, and he is also liable to be indicted at the suit of the king. (w)

Heavy as the penalty of excommunication is, considered in a serious light, there are, notwithstanding, many obstinate or profligate men, who would despise the *brutum fulmen* of mere ecclesiastical censures, especially when pronounced by a petty surrogate in the country, for railing or contumelious words, for non-payment of fees, or costs, or for other trivial causes. The common law therefore compassionately steps in to \*the aid of the ecclesiastical [\*102] jurisdiction, and kindly lends a supporting hand to an otherwise tottering authority. Imitating herein the policy of our British ancestors, among whom, according to Cæsar, (x) whoever were interdicted by the Druids from their sacrifices, "*in numero impiorum ac sceleratorum habentur: ab iis omnes decedunt, aditum eorum sermonemque defugiunt, ne quid ex contagione incommodi accipiant: neque iis petentibus jus redditur, neque honos ullus communicatur.*" And so with us by the common law an excommunicated person is disabled to do any act that is required to be done by one that is *probus et legalis homo*. He cannot serve upon juries, cannot be a witness in any court, and, which is the worst of all, cannot bring an action, either real or personal, to recover lands or money due to him. (y) Nor is this the whole: for if, within forty days after the sentence has been published in the church, the offender does not submit and abide by the sentence of the spiritual court, the bishop may certify such contempt to the king in chancery. Upon which there issues out a writ to the sheriff of the county, called, from the bishop's certificate, a *significavit*; or from its effect a writ *de excommunicato capiendo*; and the sheriff shall thereupon take the offender, and imprison him in the county goal, till he is reconciled to the church, and such reconciliation certified by the bishop; upon which another writ *de excommunicato deliberando*, issues out of chancery to deliver and release him. (z) This process seems founded on the charter of separation (so often referred to) of William the Conqueror. "*Si aliquis per superbiam elatus ad justitiam episcopalem venire noluerit, excommunicetur; et, si opus fuerit, ad hoc vindicandum fortitudo et justitia regis sive vicecomitis adhibeatur.*" And in case of subtraction of tithes, a more summary and expeditious assistance is given by the statutes of 27 Hen. VIII, c. 20, and 32 Hen. VIII, c. 7, which enact, that upon complaint of any contempt or misbehaviour to the ecclesiastical judge by the defendant in any suit for tithes, any privy counsellor, or any \*two justices of the peace (or, in case of disobedience to a definitive sentence, any two justices of the peace), may [\*103] commit the party to prison without bail or mainprize, till he enters into a recognizance with sufficient sureties to give due obedience to the process and sentence of the court. These timely aids, which the common and statute laws have lent to the ecclesiastical jurisdiction, may serve to refute that groundless

(w) Chap. 5.  
(w) 2 Inst. 628.

(v) Co. Litt. 183.  
(x) *De bello Gall.* l. 6, c. 13.

(y) Litt. § 301.

(z) F. N. B. 62.

notion which some are too apt to entertain, that the courts of Westminster-hall are at open variance with those at doctors' commons. It is true that they are sometimes obliged to use a parental authority, in correcting the excesses of these inferior courts, and keeping them within their legal bounds; but, on the other hand, they afford them a parental assistance in repressing the insolence of contumacious delinquents, and rescuing their jurisdiction from that contempt, which for want of sufficient compulsive powers would otherwise be sure to attend it.

II. I am next to consider the injuries cognizable in the *court military*, or court of *chivalry*. The jurisdiction of which is declared by statute 13 Ric. II, c. 2, to be this: "that it hath cognizance of contracts touching deeds of arms or of war, out of the realm, and also of things which touch war within the realm, which cannot be determined or discussed by the common law; together with other usages and customs to the same matters appertaining." So that wherever the common law can give redress, this court hath no jurisdiction, which has thrown it entirely out of use as to the matter of contracts, all such being usually cognizable in the courts of Westminster-hall, if not directly, at least by fiction of law; as if a contract be made at Gibraltar, the plaintiff may suppose it made at Northampton: for the locality, or place of making it, is of no consequence with regard to the validity of the contract.

The words, "other usages and customs," support the claim of this court, 1. To give relief to such of the nobility and gentry as think themselves aggrieved in matters of honour; and 2. To keep up the distinction of degrees [\*104] and \*quality. Whence it follows, that the civil jurisdiction of this court of chivalry is principally in two points; the redressing injuries of honour, and correcting encroachments in matters of coat-armour, precedence, and other distinctions of families.

As a court of honour, it is to give satisfaction to all such as are aggrieved in that point; a point of a nature so nice and delicate, that its wrongs and injuries escape the notice of the common law, and yet are fit to be redressed somewhere. Such, for instance, as calling a man a coward, or giving him the lie; for which, as they are productive of no immediate damage to his person or property, no action will lie in the courts at Westminster: and yet they are such injuries as will prompt every man of spirit to demand some honourable amends, which by the ancient law of the land were appointed to be given in the court of chivalry. (a) But modern resolutions have determined, that how much soever such a jurisdiction may be expedient, yet no action for words will at present lie therein. (b) And it hath always been most clearly holden, (c) that as this court cannot meddle with anything determinable by the common law, it therefore can give no pecuniary satisfaction or damages, inasmuch as the quantity and determination thereof is ever of common law cognizance. And, therefore, this court of chivalry can at most only order reparation in point of honour; as, to compel the defendant *mendacium sibi ipsi imponere*, or to take the lie that he has given upon himself, or to make such other submission as the laws of honour may require. (d) Neither can this court, as to the point of reparation in honour, hold plea of any such word or thing, wherein the party is relievable by the courts of common law. As if a man gives another a blow, or calls him thief or murderer; for in both these cases the common law has pointed out his proper remedy by action.

[\*105] \*As to the other point of its civil jurisdiction, the redressing of encroachments and usurpations in matters of heraldry and coat-armour, it is the business of this court, according to Sir Matthew Hale, to adjust the right of armorial ensigns, bearings, crests, supporters, pennons, &c.; and also rights of place or precedence, where the king's patent or act of par-

(a) Year-book, 37 Hen. VI, 31. Selden of duels, c. 10. Hal. Hist. C. I. 37.

(b) Salk. 533. 7 Mod. 126. 3 Hawk. P. C. c. 4.

(c) Hal. Hist. C. I. 37.

(d) 1 Roll. Abr. 126.

liament (which cannot be overruled by this court) have not already determined it.

The proceedings in this court are by petition, in a summary way; and the trial not by a jury of twelve men, but by witnesses, or by combat. (e) But as it cannot imprison, not being a court of record, and as by the resolutions of the superior courts it is now confined to so narrow and restrained a jurisdiction, it has fallen into contempt and disuse. The marshalling of coat-armour, which was formerly the pride and study of all the best families in the kingdom is now greatly disregarded; and has fallen into the hands of certain officers and attendants upon this court, called heralds, who consider it only as a matter of lucre, and not of justice; whereby such falsity and confusion have crept into their records (which ought to be the standing evidence of families, descents, and coat-armour), that though formerly some credit has been paid to their testimony, now even their common seal will not be received as evidence in any court of justice in the kingdom. (f) But their original visitation books, compiled when progresses were solemnly and regularly made into every part of the kingdom, to inquire into the state of families, and to register such marriages and descents as were verified to them upon oath, are allowed to be good evidence of pedigrees. (g) And it is much to be wished that this practice of visitation at certain periods were revived; for the failure of inquisitions *post mortem*, by the abolition of military tenures, combined with the negligence of the heralds in omitting their usual progresses, has rendered the proof of a modern descent \*for the recovery of an estate, or succession to a title of honour, more difficult than that of an ancient. This will be indeed [\*106] remedied for the future, with respect to claims of peerage, by a late standing order (h) of the house of lords; directing the heralds to take exact accounts, and preserve regular entries of all peers and peeresses of England, and their respective descendants; and that an exact pedigree of each peer and his family shall, on the day of his first admission, be delivered to the house by garter, the principal king-at-arms. But the general inconvenience, affecting more private successions, still continues without a remedy.

III. Injuries cognizable by the courts maritime, or admiralty courts, are the next object of our inquiries. These courts have jurisdiction and power to try and determine all maritime causes; or such injuries, which, though they are in their nature of common law cognizance, yet being committed on the high seas, out of the reach of our ordinary courts of justice, are therefore to be remedied in a peculiar court of their own. All admiralty causes must be therefore causes arising wholly upon the sea, and not within the precincts of any county. (i) For the statute 13 Ric. II, c. 5, directs that the admiral and his deputy shall not meddle with any thing, but only things done upon the sea; and the statute 15 Ric. II, c. 3, declares that the court of the admiral hath no manner of cognizance of any contract, or of any other thing, done within the body of any county, either by land or by water; nor of any wreck of the sea: for that must be cast on land before it becomes a wreck. (j) But it is otherwise of things *flotsam*, *jetsam*, and *ligan*; for over them the admiral hath jurisdiction, as they are in and upon the sea. (k) If part of any contract, or other cause of action, doth arise upon the sea, and part upon the land, the common law excludes the admiralty court from its jurisdiction; for, part belonging properly to one cognizance and part to another, the common or general law takes place of the particular. (l) \*Therefore, though pure maritime acquisitions, [\*107] which are earned and become due on the high seas, as seamen's wages, are one proper object of the admiralty jurisdiction, even though the contract for them be made upon land; (m) yet, in general, if there be a contract made in England, and to be executed upon the seas, as a charter-party or covenant

(e) Co. Litt. 261.

(f) Co. Litt., 260. Hob. 79.

(g) 1 Vent., 146.

(h) 2 Roll. Abr. 686. 2 Jon., 224.

(i) See *boo* kl, ch. 8.

(j) Comb., 68.

(k) 5 Rep., 106.

(l) 11 May, 1707.

(m) Co. Litt., 261.

that a ship shall sail to Jamaica, or shall be in such a latitude by such a day; or a contract made upon the sea to be performed in England, as a bond made on shipboard to pay money in London or the like; these kinds of mixed contracts belong not to the admiralty jurisdiction, but to the courts of common law. (n) And indeed it hath been farther holden, that the admiralty court cannot hold plea of any contract under seal. (o) (4)

And also, as the courts of common law have obtained a concurrent jurisdiction with the court of chivalry with regard to foreign contracts, by supposing them made in England; so it is no uncommon thing for a plaintiff to feign that a contract, really made at sea was made at the royal exchange, or other inland place, in order to draw the cognizance of the suit from the courts of admiralty to those of Westminster-hall. (p) This the civilians exclaim against loudly, as inequitable and absurd; and Sir Thomas Ridley (q) hath very gravely proved it to be impossible for the ship in which such cause of action arises to be really at the royal exchange in Cornhill. But our lawyers justify this fiction, by alleging (as before) that the locality of such contracts is not at all essential to the merits of them; and that learned civilian himself seems to have forgotten how much such fictions are adopted and encouraged in the Roman law; that a son killed in battle is supposed to live forever for the benefit of his parents; (r) and that by the fiction of *postliminium* and the *lex Cornelia*, captives, when freed from bondage, were held to have never been prisoners, (s) and such as died in captivity were supposed to have died in their own country. (t)

[\*108] \*Where the admiral's court hath not original jurisdiction of the cause, though there should arise in it a question that is proper for the cognizance of that court, yet that doth not alter nor take away the exclusive jurisdiction of the common law. (u) And so *vice versa*, if it hath jurisdiction of the original, it hath also jurisdiction of all consequential questions, though properly determinable at common law. (v) Wherefore, among other reasons, a suit for beaconage of a beacon standing on a rock in the sea may be brought in the court of admiralty, the admiral having an original jurisdiction over beacons. (w) In case of prizes also in time of war, between our own nation and another, or between two other nations, (5) which are taken at sea, and brought into our ports, the courts of admiralty have an undisturbed and exclusive jurisdiction to determine the same according to the law of nations. (x) (6)

(n) Hob. 12. Hal. Hist. C. L., 25.

(o) Hob., 212.

(p) 4 Inst., 134.

(q) View of the civil law, b. 3, p. 1, § 3.

(r) Inst. 1, tit. 25.

(s) Ff. 49, 15, 12, § 8.

(t) Ff. 49, 15, 18.

(u) Comb. 462.

(v) 1 Sid., 158.

(w) 2 Show., 232. Comb. 44

(x) 18 Rep., 53. 2 Lev., 25. Hard., 183.

(4) In the United States the admiralty and prize jurisdiction is in the district courts of the United States, and is very full and complete in civil cases. See 1 Kent, 858, *et seq.*; Conklin's Treatise, part 8; Parsons on Maritime Law. Late decisions of the supreme court of the United States seem to give these courts substantially the same jurisdiction in respect to the great interior lakes which they possess in respect to the ocean.

The criminal jurisdiction of these courts is only such as by acts of congress is conferred upon them; U. S. v. McGill, 4 Dall., 426; U. S. v. Bevens, 3 Wheat., 336; U. S. v. Wiltberger, 5 Wheat., 76; Tyler v. People, 8 Mich., 320. These acts, however, are designed to confer jurisdiction of all cases properly cognizable in admiralty.

(5) This remark is not accurate. The validity of maritime captures must be determined in a court of the captor's government, sitting either in his own country or in that of its ally. Wheat. Int. Law, part 4, c. 2, § § 13-16; Halleck Int. Law, 749, and authorities cited; 1 Kent, 103.

(6) Mr. Justice Coleridge calls attention to the fact that the author takes no notice of what is very material, that there are, in fact, two courts: the admiralty court, or, more properly, the instance court, of which he has hitherto been speaking, and the prize court. Both these courts have, indeed, the same judge, but in the former he sits by virtue of a commission under the great seal, which enumerates the objects of his jurisdiction, but specifies nothing relative to prize; while in the latter he sits by virtue of a commission which issues in every war, under the great seal of the lord high admiral, requiring the

The proceedings of the courts of admiralty bear much resemblance to those of the civil law, but are not entirely founded thereon; and they likewise adopt and make use of other laws, as occasion requires; such as the Rhodian laws and the laws of Oleron. (y) For the law of England, as has frequently been observed, doth not acknowledge or pay any deference to the civil law considered as such; but merely permits its use in such cases where it judged its determinations equitable, and therefore blends it, in the present instance, with other marine laws: the whole being corrected, altered and amended by acts of parliament and common usage; so that out of this composition a body of jurisprudence is extracted, which owes its authority only to its reception here by consent of the crown and people. The first process in these courts is frequently by arrest of the defendant's person: (z) and they also take recognizance or stipulations of certain fidejussors in the nature of bail, (a) and in case of default may \*imprison both them and their principal. (b) They may [\*109] also fine and imprison for a contempt in the face of the court. (c) And all this is supported by immemorial usage, grounded on the necessity of supporting a jurisdiction so extensive; (d) though opposite to the usual doctrines of the common law; these being no courts of record, because in general their process is much conformed to that of the civil law. (e)

IV. I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that do not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are for that very reason within the cognizance of the common law courts of justice. For it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress. The definition and explication of these numerous injuries and their respective legal remedies, will employ our attention for many subsequent chapters. But before we conclude the present, I shall just mention two species of injuries, which will properly fall now within our immediate consideration: and which are, either when justice is delayed by an inferior court that has proper cognizance of the cause; or, when such inferior court takes upon itself to examine a cause and decide the merits without a legal authority.

1. The first of these injuries, refusal or neglect of justice, is remedied either by a writ of *procedendo*, or of *mandamus*. A writ of *procedendo ad iudicium* issues out of the court of chancery, where judges of any subordinate court do delay the parties; for that they will not give judgment, either on the one side or on the other, when they ought so to do. In this case a writ of *procedendo* shall be awarded, commanding them in the king's name to proceed to judgment; but without specifying any particular judgment, for that (if erroneous) may \*be set aside in the course of appeal, or by writ of error or false [\*110] judgment: and upon farther neglect or refusal, the judges of the inferior court may be punished for their contempt, by writ of attachment, returnable in the king's bench or common pleas. (f)

A writ of *mandamus* is, in general, a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or

(y) Hale, Hist. C. L. 26. Co. Litt. 11.

(z) *Ibid.* § 11. 1 Roll. Abr. 531. Raym. 78.

(c) 1 Ventr. 1.

(d) 1 Keb. 552.

(e) Clerke *prax. cur. adm.* § 13.

Lord Raym. 1296.

(b) 1 Roll. Abr. 531. Godb. 193, 260.

(a) Bro. Abr. 4. error, 177.

(f) F. N. B. 153, 154, 240.

court of admiralty, and the lieutenant and judge of the same court, "to proceed upon all and all manner of captures, seizures, prizes and reprisals of all ships and goods that are or shall be taken," &c.

Now by statute 8 and 4 Vic., c. 65, the court of admiralty has jurisdiction of questions of booty at war, and by statute 13 and 14 Vic., cc. 26 and 27, jurisdiction of questions relating to the attack and capture of pirates. And by statute 7 and 8 Vic., c. 2, and 12 and 13 Vic., c. 96, offenses committed within the jurisdiction of the admiralty might be tried in the ordinary criminal courts; but the independent criminal jurisdiction of the high court of admiralty is now taken away. See *ante*, note 1, p. 30.

inferior court of judicature within the king's dominions, requiring them to do some *particular* thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice. It is a high prerogative writ, of a most extensively remedial nature; and may be issued in some cases where the injured party has also another more tedious method of redress, as in the case of admission or restitution to an office: (7) but it issues in all cases where the party hath a right to have any thing done, and hath no other specific means of compelling its performance. A *mandamus* therefore lies to compel the admission or restoration of the party applying to any office or franchise of a public nature, whether spiritual or temporal; to academical degrees; to the use of a meeting-house, &c.: it lies for the production, inspection, or delivery of public books and papers; for the surrender of the *regalia* of a corporation; to oblige bodies corporate to affix their common seal; to compel the holding of a court; and for an infinite number of other purposes, which it is impossible to recite minutely. But at present we are more particularly to remark, that it issues to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the court of king's bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers, with which the crown or legislature have invested them: and this not only by restraining their excesses, but also by [\*111] quickening \*their negligence, and obviating their denial of justice. A *mandamus* may therefore be had to the courts of the city of London, to enter up judgment; (g) to the spiritual courts to grant an administration, to swear a church-warden, and the like. This writ is grounded on a suggestion, by the oath of the party injured, of his own right, and the denial of justice below; whereupon, in order more fully to satisfy the court that there is a

(g) Raym. 814.

(7) The writ of *mandamus* is only issued where there is a clear legal right, and the party has no other adequate remedy. Shipley v. The Bank, 10 Johns., 484; People v. Stevens, 5 Hill, 616; People v. Judges of Oneida C. P., 21 Wend., 20; People v. Supervisors, 11 N.Y., 563; People v. Judges of Branch C. C., 1 Doug. Mich., 819; St. Luke's Church v. Slack, 7 Cush., 226; James v. Commissioners, 18 Penn. St., 72. The court will exercise a discretion in awarding or refusing it. Weber v. Zimmerman, 23 Md., 45; *Ex parte* Stickney, 40 Ala., 160.

Its office is to compel the performance of a ministerial act, but not to control the exercise of judicial discretion. Ferris v. Munn, 2 N. J., 161; Lamar v. Marshall, 31 Ala., 773; People v. Auditor General, 8 Mich., 427; *Ex parte* Davenport, 6 Pet., 661.

It cannot command an act to be done which, without the writ, the officer or court would have no power to perform. Johnson v. Lucas, 11 Humph., 806; State v. Judge, &c., 15 Ala., 740.

It may compel an inferior court to take action, but cannot require it to come to any particular conclusion. Chase v. Blackstone Canal Co., 10 Pick., 244; People v. Inspectors, &c., 4 Mich., 187; U. S. v. Lawrence, 8 Dall., 42; Hoyt *ex parte*, 18 Pet., 279; Elkins v. Athearn, 3 Denio, 191; State v. La Fayette County Court, 41 Mo., 223. But where an inferior court takes unauthorized action it may be compelled by this writ to vacate it if the party has no other remedy. *Ex parte* Bradstreet, 7 Pet., 634; People v. Judges, &c., 1 Cow., 576; Ten Eyck v. Farlee, 1 Harr., 269; People v. Judges, &c., 1 Doug. Mich., 434.

Though generally used to enforce the performance of public duties, it may also be resorted to for the enforcement of private rights when withheld by public or corporate officers. People v. Walker, 9 Mich., 328; Case v. Wresler, 4 Ohio St., 561; Nourse v. Merriam, 8 Cush., 11; Helm v. Swiggett, 12 Ind., 194. But in the case of neglected public duties, a private citizen will not generally be permitted to move for this writ; the attorney general is the proper relator. Sanger v. County Om'rs, 25 Me., 291; Heffner v. Commonwealth, 28 Penn. St., 108; Hamilton v. State, 8 Ind., 452; People v. Regents of University, 4 Mich. 98.

The supreme court of the United States issues this writ in cases falling within the federal jurisdiction, and the supreme court of each state also issues it in proper cases. And in some of the states inferior courts are allowed to issue the writ. A peremptory *mandamus* is not often issued in the first instance, but the case is heard on an alternative writ, or on an order to show cause, and the peremptory writ is awarded, if at all, as the final result.

probable ground for such interposition, a rule is made (except in some general cases, where the probable ground is manifest) directing the party complained of to show cause why a writ of *mandamus* should not issue: and, if he shows no sufficient cause, the writ itself is issued, at first in the alternative, either to do thus, or signify some reason to the contrary; to which a return, or answer, must be made at a certain day. And, if the inferior judge, or other person to whom the writ is directed, returns or signifies an insufficient reason, then there issues in the second place a *peremptory mandamus*, to do the thing absolutely; to which no other return will be admitted, but a certificate of perfect obedience and due execution of the writ. If the inferior judge or other person makes no return, or fails in his respect and obedience, he is punishable for his contempt by attachment. But, if he, at the first, returns a sufficient cause, although it should be false in fact, the court of king's bench will not try the truth of the fact upon affidavits; but will for the present believe him, and proceed no farther on the *mandamus*. But then the party injured may have an action against him for his false return, and (if found to be false by the jury) shall recover damages equivalent to the injuries sustained; together with a *peremptory mandamus* to the defendant to do his duty. Thus much for the injury of neglect or refusal of justice.

2. The other injury, which is that of encroachment of jurisdiction, or calling one *coram non judice*, to answer in a court that has no legal cognizance of the cause, is also a grievance, for which the common law has provided a remedy by the writ of *prohibition*.

\*A prohibition is a writ issuing properly only out of the court of king's bench, being the king's prerogative writ; but, for the furtherance of justice, it may now also be had in some cases out of the court of chancery, (A) common pleas, (i) or exchequer, (k) (8) directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion, that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. This writ may issue either to inferior courts of common law; as, to the courts of the counties palatine or principality of Wales, if they hold plea of land or other matters not lying within their respective franchises; (l) to the county-courts or courts-baron, where they attempt to hold plea of any matter of the value of forty shillings: (m) or it may be directed to the courts christian, the university courts, the court of chivalry, or the court of admiralty, where they concern themselves with any matter not within their jurisdiction; as if the first should attempt to try the validity of a custom pleaded, or the latter a contract made or to be executed within this kingdom. Or, if, in handling of matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of England; as where they require two witnesses to prove the payment of a legacy, a release of tithes, (n) or the like; in such cases also a prohibition will be awarded. For, as the fact of signing a release, or of actual payment, is not properly a spiritual question, but only allowed to be decided in those courts, because incident or accessory to some original question clearly within their jurisdiction; it ought, therefore, where the two laws differ, to be decided not according to the spiritual, but the temporal law; else the same question

(A) 1 P. Wms. 476.  
(m) Finch, L. 451.

(i) Hob., 15.  
(n) Cro. Eliz. 666.

(k) Palmer, 528.  
Hob. 188.

(l) Lord Raym., 1408.

(8) In the United States it may be issued by the supreme court to the United States district courts when proceeding as courts of admiralty and maritime jurisdiction. And in the several states, the supreme court of the state may issue the writ in proper cases. See *State v. Commissioners*, 1 Mill, 55; S. C., 12 Am. Dec., 596; *Appo v. People*, 20 N. Y., 531; *Arnold v. Shields*, 5 Dana, 19; S. C., 30 Am. Dec., 669; *People v. Wayne Circuit Court*, 11 Mich., 398; *State v. Nathan*, 4 Rich., 518; *Mayo v. James*, 12 Grat., 17; *State v. Clark County Court*, 41 Mo., 44.

might be determined different ways, according to the court in which the suit is depending: an impropriety, which no wise government can or ought to endure, \*and which is therefore a ground of prohibition. And if either [\*113] the judge or the party shall proceed after such prohibition, an attachment may be had against them, to punish them for the contempt, at the discretion of the court that awarded it; (o) and an action will lie against them, to repair the party injured in damages.

So long as the idea continued among the clergy, that the ecclesiastical state was wholly independent of the civil, great struggles were constantly maintained between the temporal courts and the spiritual, concerning the writ of prohibition and the proper object of it; even from the time of the constitutions of Clarendon, made in opposition to the claims of Archbishop Becket, in 10 Hen. II, to the exhibition of certain articles of complaint to the king by Archbishop Bancroft, in 3 Jac. I, on behalf of the ecclesiastical courts: from which, and from the answers to them signed by all the judges of Westminster-hall, (p) much may be collected concerning the reasons of granting and methods of proceeding upon prohibitions. A short summary of the latter is as follows: The party aggrieved in the court below applies to the superior court, setting forth in a suggestion upon record the nature and cause of his complaint, in being drawn *ad aliud examen*, by a jurisdiction or manner of process disallowed by the laws of the kingdom: upon which, if the matter alleged appears to the court to be sufficient, the writ of prohibition immediately issues; commanding the judge not to hold, and the party not to prosecute the plea. But sometimes the point may be too nice and doubtful to be decided merely upon a motion: and then for the more solemn determination of the question, the party applying for the prohibition is directed by the court to *declare* in prohibition; that is, to prosecute an action, by filing a declaration against the other, upon a supposition or fiction (which is not traversable) (q) that he has proceeded in the suit below, notwithstanding the writ of prohibition. And if, upon demurrer and argument, the court shall finally be of the opinion, that the matter suggested is a good and sufficient ground of [\*114] prohibition in point of law, then judgment with nominal damages shall be given for the party complaining, and the defendant, and also the inferior court, shall be prohibited from proceeding any farther. On the other hand, if the superior court shall think it no competent ground for restraining the inferior jurisdiction, then judgment shall be given against him who applied for the prohibition in the court above, and a writ of *consultation* shall be awarded; so called, because, upon deliberation and consultation had, the judges find the prohibition to be ill-founded, and therefore by this writ they return the cause to its original jurisdiction, to be there determined, in the inferior court. And, even in ordinary cases, the writ of prohibition is not absolutely final and conclusive. For though the ground be a proper one in point of law, for granting the prohibition, yet if the *fact* that gave rise to it be afterwards falsified, the cause shall be remanded to the prior jurisdiction. If, for instance, a custom be pleaded in the spiritual court; a prohibition ought to go, because that court has no authority to try it: but if the fact of such a custom be brought to a competent trial, and be there found false, a writ of consultation will be granted. For this purpose the party prohibited may appear to the prohibition, and take a declaration (which must always pursue the suggestion), and so plead to issue upon it; denying the contempt and traversing the custom upon which the prohibition was grounded; and if that issue be found for the defendant, he shall then have a writ of *consultation*. The writ of *consultation* may also be, and is frequently, granted by the court without any action brought; when, after a prohibition issued, upon more mature consideration the court are of opinion that the matter suggested is not a good and sufficient ground to stop the proceedings below. Thus careful has the law been, in compelling the inferior

(o) F. N. B. 40.

(p) 2 Inst. 601-618.

(q) Barn. Not. 4to, 148.



courts to do ample and speedy justice; in preventing them from transgressing their due bounds; and in allowing them the undisturbed cognizance of such causes as by right, founded on the usage of the kingdom or act of parliament, do properly belong to their jurisdiction.

## CHAPTER VIII.

### OF WRONGS AND THEIR REMEDIES, RESPECTING THE RIGHTS OF PERSONS.

THE former chapters of this part of our Commentaries having been employed in describing the several methods of redressing private wrongs, either by the mere act of the parties, or the mere operation of law; and in treating of the nature and several species of courts; together with the cognizance of wrongs or injuries by private or special tribunals, and the public ecclesiastical, military, and maritime jurisdictions of this kingdom; I come now to consider at large, and in a more particular manner, the respective remedies in the public and general courts of common law, for injuries or private wrongs of any denomination whatsoever, not exclusively appropriated to any of the former tribunals. And herein I shall, first, define the several injuries cognizable by the courts of common law, with the respective remedies applicable to each particular injury; and shall, secondly, describe the method of pursuing and obtaining these remedies in the several courts.

First, then, as to the several injuries cognizable by the courts of common law, with the respective remedies applicable to each particular injury. And, in treating of these, I shall at present confine myself to such wrongs as may be committed in the mutual intercourse between subject and subject; which the king, as the fountain of justice, is officially bound to redress in the ordinary forms of law: reserving such \*injuries or encroachments as may occur between the crown and the subject, to be distinctly considered here- [\*116] after, as the remedy in such cases is generally of a peculiar and eccentric nature.

Now, since all wrong may be considered as merely a privation of right, the plain, natural remedy for every species of wrong is the being put in possession of that right, whereof the party injured is deprived. This may either be effected by a specific delivery or restoration of the subject-matter in dispute to the legal owner; as when lands or personal chattels are unjustly withheld or invaded: or, where that is not a possible, or at least not an adequate remedy, by making the sufferer a pecuniary satisfaction in damages; as in case of assault, breach of contract, &c.: to which damages the party injured has acquired an incomplete or inchoate right, the instant he receives the injury; (a) though such right be not fully ascertained till they are assessed by the intervention of the law. The instruments whereby this remedy is obtained (which are sometimes considered in the light of the remedy itself) are a diversity of suits and actions, which are defined by the Mirror (b) to be "the lawful demand of one's right: or, as Bracton and Fleta express it, in the words of Justinian, (c) *jus prosequendi in judicio quod alicui debetur*.

The Romans introduced, pretty early, set forms for actions and suits in their law, after the example of the Greeks; and made it a rule that each injury should be redressed by its proper remedy only. "*Actiones*," say the pandects, "*compositas sunt, quibus inter se homines disceptarent: quas actiones ne popu-*

(a) See book II, ch. 20.  
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(b) C. 2, § 1.

(c) Inst. 4, 6, pr.  
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*ius prout vellet institueret, certas solennesque esse voluerunt.*" (d) The forms of these actions were originally preserved in the books of the pontifical college, as choice and inestimable secrets; till one Cneius Flavius, the secretary of Appius Claudius, stole a copy and published them to the people. (e) The [\*117] \*concealment was ridiculous: but the establishment of some standard was undoubtedly necessary to fix the true state of a question of right; lest in a long and arbitrary process it might be shifted continually, and be at length no longer discernible. Or, as Cicero expresses it, (f) "*sunt iura, sunt formulæ de omnibus rebus constitutæ, ne quis aut in genere injuriæ, aut in ratione actionis, errare possit. Expressæ enim sunt ex uniuscujusque damno, dolore, incommodo, calamitate, injuria, publicæ a prætore formulæ, ad quas privata his accommodatur.*" And in the same manner our Bracton, speaking of the original writs upon which all our actions are founded, declares them to be fixed and immutable, unless by authority of parliament. (g) And all the modern legislatures of Europe have found it expedient, from the same reasons, to fall into the same or a similar method. With us in England the several suits, or remedial instruments of justice, are from the subject of them distinguished into three kinds; actions *personal, real and mixed.* (1)

*Personal* actions are such whereby a man claims a debt or personal duty, or damages in lieu thereof: and likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon *torts* or wrongs: and they are the same which the civil law calls "*actiones in personam, quas adversus eum intenduntur, qui ex contractu vel delicto obligatus est aliquid dare vel concedere.*" (h) Of the former nature are all actions upon debt or promises; and of the latter all actions for trespasses, nuisances, assaults, defamatory words, and the like.

*Real* actions (or, as they are called in the Mirror, (i) *feudal* actions), which concern real property only, are such whereby the plaintiff, here called the demandant, claims title to have any lands or tenements, rents, commons, or [\*118] other \*hereditaments, in fee-simple, fee-tail, or for term of life. By these actions formerly all disputes concerning real estates were decided: but they are now pretty generally laid aside in practice, upon account of the great nicety required in their management; and the inconvenient length of their process: a much more expeditious method of trying titles being since introduced by other actions personal and mixed.

*Mixed* actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained. As, for instance, an action of waste, which is brought by him who hath the inheritance, in remainder or reversion, against the tenant for life, who hath committed waste therein, to recover not only the land wasted, which would make it merely a *real* action; but also treble damages, in pursuance of the statute of Gloucester, (k) which is a *personal* recompense; and so both being joined together, denominate it a *mixed* action.

Under these three heads may every species of remedy by suit or action in the courts of common law be comprised. But in order effectually to apply the remedy, it is first necessary to ascertain the complaint. I proceed, therefore, now to enumerate the several kinds, and to inquire into the respective natures of all private wrongs, or civil injuries which may be offered to the rights of

(d) *Ff. 1. 2. 2. § 6.* (e) *Cic. pro Muræna. § 11, de orat. l. 1, c. 41.* (f) *Pro. Qu. Roscio, § 8.*  
 (g) *Sunt quædam brevita formata super certis casibus de curre, et de communi consilio totius regni approbata et concessa, quas quidem nullatenus mutari poterint absque consensu et voluntate eorum. L. 5. de exceptionibus, c. 17. § 2.*  
 (h) *Inst. 4. 6. 15.* (i) *C. 2. § 6.* (k) *6 Edw. I. c. 15.*

(1) All real and mixed actions were abolished by statute 3 and 4 Wm. IV. cc. 37, 36, except actions for dower, *quare impedit* and ejectment, and a new proceeding in ejectment was substituted for that form of action by the common law procedure act of 1852.

either a man's person or his property; recounting at the same time the respective remedies which are furnished by the law for every infraction of right. But I must first beg leave to premise, that all civil injuries are of two kinds, the one *without force* or violence, as slander or breach of contract; the other, coupled *with force* and violence, as batteries or false imprisonment. (*l*) Which latter species savour something of the criminal kind, being always attended with some violation of the peace; for which, in strictness of law, a fine ought to be paid to the king, as *well* as a private satisfaction to the party [\*119] injured. (*m*) And this distinction of private wrongs, into injuries *with* and *without* force, we shall find to run through all the variety of which we are now to treat. In considering of which, I shall follow the same method that was pursued with regard to the distribution of rights: for as these are nothing else but an infringement or breach of those rights, which we have before laid down and explained, it will follow that this negative system of *wrongs* must correspond and tally with the former positive system of *rights*. As, therefore, we divided (*n*) all rights into those of *persons* and those of *things*, so we must make the same general distribution of injuries into such as affect the *rights of persons*, and such as affect the *rights of property*.

The rights of *persons*, we may remember, were distributed into *absolute* and *relative*: *absolute*, which were such as appertained and belonged to private men, considered merely as individuals, or single persons: and *relative*, which were incident to them as members of society, and connected to each other by various ties and relations. And the absolute rights of each individual were defined to be the right of personal security, the right of personal liberty, and the right of private property, so that the wrongs or injuries affecting them must consequently be of a corresponding nature.

I. As to injuries which affect the *personal security* of individuals, they are either injuries against their lives, their limbs, their bodies, their health, or their reputations.

1. With regard to the first subdivision, or injuries affecting the life of man, they do not fall under our present contemplation; being one of the most atrocious species of crimes, the subject of the next book of our Commentaries.

(2)

\*2, 3. The two next species of injuries, affecting the limbs or bodies [\*120] of individuals, I shall consider in one and the same view. And these

(*l*) Finch, L. 184.

(*m*) Finch, L. 192. Jenk. Cent. 185.

(*n*) See book I, ch. 1.

(2) That no civil action will lie at the common law for causing the death of a human being, see *Whitford v. Panama R. R.*, 28 N. Y., 465; *Carey v. Berkshire R. R. Co.*, 1 Cush., 475; *Ohio and M. R. R. Co. v. Tindall*, 18 Ind., 866; *Eden v. L. and F. R. R. Co.*, 14 B. Monr., 204. But where death does not at once ensue, a person entitled to the services of the person injured may recover for the loss accruing between the injury and the death, and this recovery will not be barred by the death. *Long v. Morrison*, 14 Ind., 595; *Hyatt v. Adams*, 16 Mich., 180.

And now, by statute 9 and 10 Vic. c. 93, whenever the death of a person shall be caused by such wrongful act, neglect or default, as would, if death had not ensued, have entitled the party injured to maintain an action for damages, the person who would have been liable to such action may be sued by the executor or administrator, for the benefit of the wife, husband, parent, or child of the person deceased. The damages awarded are apportioned among the persons for whose benefit the action is brought, as the jury may direct. Similar statutes have been passed in the United States. See *Read v. Great Eastern R. R. Co.*, L. R., 3 Q. B., 555; *Carey v. Berkshire R. R. Co.*, 1 Cush., 479; *Soule v. New York, &c., R. R. Co.*, 24 Conn., 575; *Whitford v. Panama R. R. Co.*, 28 N. Y., 465; *Georgia, &c., Co. v. Wynn*, 43 Geo., 881; *Frank v. New Orleans, &c., R. R. Co.*, 20 La. An., 25; *Walters v. Chicago, &c., R. R. Co.*, 36 Iowa, 458; *Steel v. Kurtz*, 28 Ohio St., 191; *Alabama, &c., R. R. Co. v. Waller*, 48 Ala., 459; *Covington St. R. R. Co. v. Packer*, 9 Bush, 455; S. C., 15 Am. Rep., 725; *Mathews v. Warner*, 29 Gratt., 570; S. C., 26 Am. Rep., 896.

The English doctrine that the civil remedy for an injury by a felony is suspended until the criminal remedy has been pursued is generally held inapplicable in the United States, where the duty of prosecuting for public offenses is devolved upon a public officer. See cases collected, 1 Bish. Cr. L., § 829, *et seq.*

may be committed, 1. By *threats* and menaces of bodily hurt, through fear of which a man's business is interrupted. A menace alone, without a consequent inconvenience, makes not the injury: but to complete the wrong, there must be both of them together. (o) The remedy for this is in pecuniary damages to be recovered by action of *trespass vi et armis*; (p) this being an inchoate, though not an absolute violence. 2. By *assault*; which is an attempt or offer to beat another, without touching him: as if one lifts up his cane, or his fist in a threatening manner at another; or strikes at him, but misses him; this is an assault, *insultus*, which Finch (q) describes to be "an unlawful setting upon one's person." This also is an inchoate violence, amounting considerably higher than bare threats; and, therefore, though no actual suffering is proved, yet the party injured may have redress by action of *trespass vi et armis*; wherein he shall recover damages as a compensation for the injury. 3. By *battery*; which is the unlawful beating of another. The least touching of another's person wilfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner. And, therefore, upon a similar principle the Cornelian law *de injuriis* prohibited *pulsation* as well as *verberation*; distinguishing verberation, which was accompanied with pain, from pulsation, which was attended with none. (r) But battery is, in some cases, justifiable or lawful; as where one who hath authority, a parent, or master, gives moderate correction to his child, his scholar, or his apprentice. So also on the principle of self-defence: for if one strikes me first, or even only assaults me, I may strike in my own defense; and, if sued [\*121] for it, may plead *son assault demesne*, or that it was the plaintiff's own original assault that occasioned it. So likewise in defence of my goods or possession, if a man endeavors to deprive me of them, I may justify laying hands upon him to prevent him; and in case he persists with violence, I may proceed to beat him away. (s) Thus, too, in the exercise of an office, as that of churchwarden or beadle, a man may lay hands upon another to turn him out of church, and prevent his disturbing the congregation. (t) And, if sued for this or the like battery, he may set forth the whole case, and plead that he laid hands upon him gently, *molliter manus imposuit*, for this purpose. On account of these causes of justification, battery is defined to be the *unlawful* beating of another; for which the remedy is, as for assault, by action of *trespass vi et armis*: wherein the jury will give adequate damages. 4. By *wounding*; which consists in giving another some dangerous hurt, and is only an aggravated species of battery. 5. By *mayhem*; which is an injury still more atrocious, and consists in violently depriving another of the use of a member proper for his defence in fight. This is a battery, attended with this aggravating circumstance, that thereby the party injured is forever disabled from making so good a defence against future external injuries, as he otherwise might have done. Among these defensive members are reckoned not only arms and legs, but a finger, an eye, and a fore tooth, (u) and also some others. (v) But the loss of one of the jaw teeth, the ear, or the nose, is no mayhem at common law; as they can be of no use in fighting. The same remedial action of *trespass vi et armis* lies also to recover damages for this injury, an injury which (when wilful) no motive can justify, but necessary self-preservation. If the ear be cut off, treble damages are given by statute 37 Hen. VIII, c. 6, though this is not mayhem at common law. And here I must observe, that for these four last injuries, assault, battery, wounding, and mayhem, an indictment may be brought as well as an action; and frequently both are accordingly prosecuted; the one at the suit of the crown for the crime against

(o) Finch, L. 302.

(p) Finch, L. 304.

(q) 1 Finch L. 203.

(r) Regist. 104.

(s) Ff. 47, 10, 5.

(t) 1 Sid. 301.

27 Ass. 11. 7 Ed. IV, 24.

(u) Finch, L. 304.

(v) 1 Hawk. P. C. 111.

the public; the \*other at the suit of the party injured, to make him a [\*122] reparation in damages.

4. Injuries affecting a man's *health* are where, by any unwholesome practices of another, a man sustains any apparent damage in his vigor or constitution. As by selling him bad provisions or wine; (w) by the exercise of a noisome trade, which infects the air in his neighborhood; (x) or by the neglect or unskillful management of his physican, surgeon, or apothecary. (3) For it hath been solemnly resolved, (y) that *mala praxis* is a great misdemeanor and offence at common law, whether it be for curiosity and experiment or by neglect; because it breaks the trust which the party had placed in his physician, and tends to the patient's destruction. Thus, also, in the civil law, (z) neglect or want of skill in physicians or surgeons, "*culpe adnumerantur, veluti si medicus curationem dereliquerit, male quempiam secuerit, aut perperam ei medicamentum dederit.*" These are wrongs or injuries unaccompanied by force, for which there is a remedy in damages by a special action of *trespass upon the case*. This action of *trespass*, or transgression, *on the case*, is an universal remedy, given for all personal wrongs and injuries without force; so called because the plaintiff's whole case or cause of complaint is set forth at length in the original writ. (a) For though in general there are methods prescribed, and forms of actions previously settled, for redressing those wrongs, which most usually occur, and in which the very act itself is immediately prejudicial or injurious to the plaintiff's person or property, as battery, non-payment of debts, detaining one's goods, or the like, yet where \*any special consequential [\*123] damage arises, which could not be foreseen and provided for in the ordinary course of justice, the party injured is allowed, both by common law and the statute of Westm. 2, c. 24, to bring a special action on his own case, by a writ formed according to the peculiar circumstances of his own particular grievance. (b) For wherever the common law gives a right or prohibits an injury, it also gives a remedy by action; (c) and, therefore, wherever a new injury is done, a new method of remedy must be pursued. (d) And it is a settled distinction, (e) that where an act is done which is in itself an *immediate* injury to another's person or property, there the remedy is usually by an action of *trespass vi et armis*; but where there is no act done, but only a culpable omission; or where the act is not immediately injurious, but only by *consequences* and collaterally; there no action of *trespass vi et armis* will lie, but an action on the special case, for the damages consequent on such omission or act. (4)

5. Lastly: injuries affecting a man's *reputation* or good name are, first, by malicious, scandalous and slanderous *words*, tending to his damage and derogation. As if a man maliciously and falsely utter any slander or false tale of another; which may either endanger him in law, by impeaching him of some

(w) 1 Roll. Abr. 80. (x) 9 Rep. 52. Hutt. 185. (y) Lord Raym. 214. (z) Inst. 4, 8, 6, 7.

(a) For example: "*Rez vicecomiti salutem, Si A. fecerit te securem de clamore suo proseguendo, tunc pone per vadum et salvo plegios B. quod sit corem justiciarum nostris apud Westmonasterium in octabis sancti Michaelis, ostensurus quare cum idem B. ad dextrum oculum ipsius A. casualiter lœsum bene et competenter curandum apud S. pro quadam pecunia summa præs manibus soluta assumpsisset, idem B. curam suam circa oculum prædictum tam negligenter et improvide apposuit, quod idem A. defectus ipsius B. visum oculi prædicti totaliter amisit, ad damnum ipsius A. viginti librarum, ut dicit. Et habeas ibi nomina plegiorum et hoc breve. Teste meipso apud Westmonasterium.*" &c. Registr. Brev. 106.

(b) See page 58. (c) 1 Salk. 20. 6 Mod. 54.

(d) Cro. Jac. 478.

(e) 11 Mod. 180. Lord Raym. 1402. Stra. 686.

(3) As to the liability of a physician for the negligent or unskillful treatment of a patient: See *Landon v. Humphrey*, 9 Conn., 209; *Holmes v. Peck*, 1 R. I., 248; *Walker v. Goodman*, 21 Ala., 647; *Hathorn v. Richmond*, 48 Vt., 557; *Craig v. Chambers*, 17 Ohio St., 253; *Patten v. Wiggin*, 51 Me., 594; *Uiley v. Burns*, 70 Ill., 162; *Hichecock v. Burgett*, 38 Mich., 501; *Gambert v. Hart*, 44 Cal., 542; *Heath v. Glison*, 8 Ore., 64; *Bradstreet v. Everson*, 72 Penn. St., 124; *Branner v. Stormont* 9 Kan., 51; *Smothers v. Hanks*, 34 Iowa, 286.

(4) See the celebrated *Squibb case*, *Scott v. Shepherd*, 2 Bl. Rep., 892; also, *Ricker v. Freeman*, 50 N. H., 420; *S. C.*, 9 Am. Rep., 267; *Percival v. Hickey*, 18 Johns., 257; *S. C.*, 9 Am. Dec., 210.

heinous crime, as to say that a man hath poisoned another, or is perjured; (f) or which may exclude him from society, as to charge him with having any infectious disease; or which may impair or hurt his trade or livelihood, as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave. (g) (5) Words spoken in derogation of a peer, a judge, or other great officer of the realm, which are called *scandalum magnatum*, are held to be still more heinous: (h) and though they be such as would not be actionable in the case of a common person, yet, when spoken in disgrace of such high and respectable characters, [124] they amount to an atrocious injury; \*which is redressed by an action on the case, founded on many ancient statutes; (i) as well on behalf of the crown, to inflict the punishment of imprisonment on the slanderer, as on behalf of the party, to recover damages for the injury sustained. (6) Words also tending to scandalize a magistrate, or person in a public trust, are reputed more highly injurious than when spoken of a private man. (k) It is said, that formerly no actions were brought for words, unless the slander was such as (if true) would endanger the life of the object of it. (l) But too great encouragement being given by this lenity to false and malicious slanderers, it is now held that, for scandalous words of the several species before mentioned (that may endanger a man by subjecting him to the penalties of the law, may exclude him from society, may impair his trade, or may affect a peer of the realm, a magistrate, or one in public trust), an action on the case may be had, without proving any particular damage to have happened, but merely upon the probability that it might happen. But with regard to words that do not thus apparently, and upon the face of them, import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened; which is called laying his action with a *per quod*. As if I say that such a clergyman is a bastard, he cannot for this bring an action against me, unless he can show some special loss by it; in which case he may bring his action against me, for saying he was a bastard, *per quod* he lost the presentation to such a living. (m) In like manner, to *slander another man's title*, by spreading such injurious reports as, if true, would deprive him of his estate (as to call the issue in tail, or one who hath land by descent, a bastard), is actionable, provided any special damage accrues to the proprietor thereby; as if he loses an opportunity of selling the land. (n) But mere scurrility, or opprobrious words, which neither in themselves import, nor are in fact attended with, any injurious effects, will not support an action. So [125] scandals, which concern matters merely spiritual, as to call a \*man heretic or adulterer, are cognizable only in the ecclesiastical court; (o) unless any temporal damage ensues, which may be a foundation for a *per quod*. Words of heat and passion, as to call a man a rogue and rascal, if productive of no ill consequence, and not of any of the dangerous species before mentioned, are not actionable: neither are words spoken in a friendly manner, as by way of advice, admonition, or concern, without any tincture or circumstance of ill-will: for, in both these cases, they are not *maliciously* spoken, which is part of the definition of slander. (p) (7) Neither (as was formerly

(f) Finch, L. 185. (g) *Ibid.* 186. (h) 1 Ventr. 60.  
 (i) Westm. L. 3 Edw. I. c. 24. 2 Ric. II. c. 5. 12 Ric. II. c. 11.  
 (k) Lord Raym. 1369. (l) 2 Ventr. 23. (m) 4 Rep. 17. 1 Lev. 243.  
 (n) Cro. Jac. 213. Cro. Eliz. 197. (o) Noy 64. 1 Freem. 277.  
 (p) Finch, L. 186. 1 Lev. 53. Cro. Jac. 91.

(5) See *Brooker v. Coffin*, 5 Johna., 188; S. C., 4 Am. Dec., 337; *Pollard v. Lyon*, 95 U. S., 225.

(6) This action is now obsolete.

(7) The defendant in an action for slander may give in evidence under the general issue, in mitigation of damages, any such facts as, without showing the truth of the charge, tend to show that defendant believed it, and thus to rebut the presumption of malice. *Wagner v. Holbrunner*, 7 Gill, 296; *Scott v. McKinnish*, 15 Ala., 683; *Bisbey v. Shaw*, 13 N. Y., 67; *Hart v. Reed*, 1 B. Monr., 166; *Farr v. Rasco*, 9 Mich., 353; *Chapman v. Calder*, 14 Pann. St., 365; *Kennedy v. Dear*, 6 Port., 90; *Blickenstaff v. Perrin*, 27 Ind., 537.

hinted) (q) are any reflecting words made use of in legal proceedings, and pertinent to the cause in hand, a sufficient cause of action for slander. (r) Also if the defendant be able to justify, and prove the words to be true, no action will lie, (s) even though special damage hath ensued: for then it is no slander or false tale. As if I can prove the tradesman a bankrupt, the physician a quack, the lawyer a knave, and the divine a heretic, this will destroy their respective actions: for though there may be damage sufficient accruing from it, yet, if the fact be true, it is *damnum absque injuria*; and where there is no injury, the law gives no remedy. And this is agreeable to the reasoning of the civil law; (t) "*Eum qui nocentem infamat, non est æquum et bonum ob eam rem condemnari; delicta enim nocentium nota esse oportet et expedit.*"

A second way of affecting a man's reputation is by printed or written libels, pictures, signs, and the like; which set him in an odious or ridiculous (u) light, and thereby diminish his reputation. With regard to libels in general, there are, as in many other cases, two remedies: one by indictment, and another by action. The former for the public offence; for every libel has a tendency to the breach of the peace, by provoking the person libeled to break it, which offence is the same (in point of law) whether \*the matter contained be [126] true or false; and therefore the defendant, on an indictment for publishing a libel, is not allowed to allege the truth of it by way of justification. (w) (8) But in the remedy by action on the case, which is to repair the party in damages for the injury done him, the defendant may, as for words spoken, justify the truth of the facts and show that the plaintiff has received no injury at all. (x) What was said with regard to words spoken, will also hold in every particular with regard to libels by writing or printing, and the civil actions consequent thereupon: but as to signs or pictures, it seems necessary also to show, by proper *innuendos* and averments of the defendant's meaning, the import and application of the scandal, and that some special damage has followed; (9) otherwise it cannot appear, that such libel by picture was understood to be

(q) Page 29.  
(i) 27. 47, 10, 18.

(r) Dyer, 235. Cro. Jac. 90.  
(u) 2 Show. 314. 11 Mod. 99.

(s) 4 Rep. 13.  
(w) 5 Rep. 125.

(x) Hob. 253. 11 Mod. 99.

(8) But now by statute 6 and 7 Vic., c. 96, the defendant in any indictment or information for libel may plead the truth of the matters charged, and also that it was for the public benefit that the same should be published; and this plea, if sustained, constitutes a good defense, but if not sustained, the court may, in pronouncing sentence, consider whether the guilt of the defendant was aggravated or mitigated by the plea.

In the United States, by constitutional or statutory provisions, the truth is made a defense to a criminal prosecution, if published with good motives and for justifiable ends.

(9) In general, to authorize an action of tort for malicious prosecution, there must be a concurrence of the following circumstances: 1. A suit or prosecution must have been instituted without any probable cause therefor; 2. The motive in instituting it must have been malicious; 3. The prosecution must have terminated in the acquittal or discharge of the accused. To probable cause it is necessary "that there be such a state of facts as would lead a man of ordinary caution and prudence to believe and entertain an honest and strong suspicion that the person is guilty." *Bacon v. Towne*, 4 Cush., 217, 238. See *Broad v. Ham*, 5 Bing. (N. C.), 722; *Mowry v. Whipple*, 8 R. I., 360; *Fagnan v. Knox*, 68 N. Y., 525; *Driggs v. Burton*, 44 Vt., 124; *Bank of British N. A. v. Strong*, 1 App. Cas. Priv. Coun., 307; 16 Moak, 24. In suits for malicious prosecution the burden of showing want of probable cause is on the plaintiff and proof of malice will not establish it. *Heyne v. Blair*, 62 N. Y., 19; *Skidmore v. Bricker*, 77 Ill., 164; *Cloon v. Gerry*, 13 Gray, 201. But malice may be inferred from the want of probable cause, though the inference is not a necessary one. *Dietz v. Langfitt*, 63 Penn. St., 234; *Flickinger v. Wagner*, 46 Md., 580.

In a few cases an action for the malicious institution of proceedings not criminal in their nature will lie. One of these is the case of a malicious attempt to procure an adjudication in bankruptcy without cause, or an adjudication of insanity in order to put the party under guardianship. *Lockenour v. Sides*, 57 Ind., 360. The case of a malicious arrest in an unfounded civil suit, or of a malicious attachment of property, in such a suit would seem equally to support this action. *Collins v. Hayte*, 50 Ill., 337; *Preston v. Cooper*, 1 Dill., 559; *Woods v. Finnell*, 13 Bush, 628; *Williams v. Hunter*, 3 Hawks, 545; 8 C., 14 Am. Dec., 597.

levelled at the plaintiff, or that it was attended with any actionable consequences.

A third way of destroying or injuring a man's reputation is by preferring malicious indictments or prosecutions against him; which, under the mask of justice and public spirit, are sometimes made the engines of private spite and enmity. For this, however, the law has given a very adequate remedy in damages, either by an action of *conspiracy*, (y) which cannot be brought but against two at the least; or, which is the more usual way, by a special action on the case for a false and malicious prosecution. (z) In order to carry on the former (which gives a recompense for the danger to which the party has been exposed) it is necessary that the plaintiff should obtain a copy of the record of his indictment and acquittal; but, in prosecutions for felony, it is usual to deny a copy of the indictment, where there is any, the least, probable cause to found such prosecution upon. (a) For it would be a very great discouragement to the public justice of the kingdom, if prosecutors, who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictments [\*127] miscarried. \*But an action on the case for a malicious prosecution may be founded upon an indictment, whereon no acquittal can be had; as if it be rejected by the grand jury, or be *coram non iudice*, or be insufficiently drawn. For it is not the danger of the plaintiff, but the scandal, vexation, and expense, upon which this action is founded. (b) However, any probable cause for preferring it is sufficient to justify the defendant.

II. We are next to consider the violation of the right of personal liberty. This is effected by the injury of false imprisonment, for which the law has not only decreed a punishment, as a heinous public crime, but has also given a private reparation to the party; as well by removing the actual confinement for the present, as, after it is over, by subjecting the wrong-doer to a civil action, on account of the damage sustained by the loss of time and liberty.

To constitute the injury of false imprisonment there are two points requisite: 1. The detention of the person: and 2. The unlawfulness of such detention. Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. (c) Unlawful, or false, imprisonment consists in such confinement or detention without sufficient authority; which authority may arise either from some process from the courts of justice, or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment; (d) or from some other special cause warranted, for the necessity of the thing, either by common law, or act of parliament; such as the arresting of a felon by a private person without warrant, the impressing of mariners for the public service, or the apprehending of waggoners for misbehaviour in the public highways. (e) False imprisonment also may arise by executing a lawful warrant or process at an [\*128] \*unlawful time, as on a Sunday; (f) for the statute hath declared, that such service or process shall be void. (10) This is the injury. Let us next see the remedy: which is of two sorts; the one *removing* the injury, the other *making satisfaction* for it.

The means of *removing* the actual injury of false imprisonment are fourfold. 1. By writ of *mainprize*. 2. By writ of *de odio et atia*. 3. By writ *de homine replegiando*. 4. By writ of *habeas corpus*.

1. The writ of *mainprize*, *manu captio*, is a writ directed to the sheriff (either generally, when any man is imprisoned for a bailable offence, and bail hath

(y) Finch, L. 305.

(z) F. N. B. 116.

(c) 2. Inst. 589.

(f) Stat. 22 Car. II. c. 7. Saik. 78. 5 Mod. 95.

(a) Carth. 421. Lord Raym. 263.

(d) *Ibid.* 52, 591.

(b) 10 Mod. 219, 220. Stra. 691.

(e) Stat. 13 Geo. III. c. 78.

(10) The statute excepts cases of treason, felony and breach of the peace, in which the execution of a lawful warrant or process is allowed upon a Sunday.



been refused; or specially, when the offence or cause of commitment is not properly bailable below), commanding him to take sureties for the prisoner's appearance, usually called *mainpernors*, and to set him at large. (g) Mainpernors differ from bail, in that a man's bail may imprison or surrender him up before the stipulated day of appearance; mainpernors can do neither, but are barely sureties for his appearance at the day: bail are only sureties, that the party be answerable for the special matter for which they stipulate; mainpernors are bound to produce him to answer all charges whatsoever. (h)

2. The writ *de odio et atia* was anciently used to be directed to the sheriff, commanding him to inquire whether a prisoner charged with murder was committed upon just cause of suspicion, or merely *propter odium et atiam*, for hatred and ill-will; and if upon the inquisition due cause of suspicion did not appear, then there issued another writ for the sheriff to admit him to bail. This writ, according to Bracton, (i) ought not to be denied to any man, it being expressly ordered to be made out *gratis*, without any denial, by *magna carta*, c. 26, and statute West. 2, 13 Edw. I, c. 29. But the statute \*of Gloucester, 6 Edw. I, c. 9, restrained it in the case of killing by misadventure or self-defence, and the statute 28 Edw. III, c. 9, abolished it in all cases whatsoever: but as the statute 42 Edw. III, c. 1, repealed all statutes then in being, contrary to the great charter, Sir Edward Coke is of opinion (k) that the writ *de odio et atia* was thereby revived.

3. The writ *de homine replegiando* (l) lies to replevy a man out of prison or out of the custody of any private person (in the same manner that chattels taken in distress may be replevied, of which in the next chapter), upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him. And if the person be conveyed out of the sheriff's jurisdiction, the sheriff may return that he is eloigned, *elongatus*; upon which a process issues (called a *capias in withernam*) to imprison the defendant himself, without bail or mainprize, (m) till he produces the party. But this writ is guarded with so many exceptions, (n), that it is not an effectual remedy in numerous instances, especially where the crown is concerned. The incapacity therefore of these three remedies to give complete relief in every case hath almost entirely antiquated them; and hath caused a general recourse to be had, in behalf of persons aggrieved by illegal imprisonment, to

4. The writ of *habeas corpus*, the most celebrated writ in the English law. Of this there are various kinds made use of by the courts at Westminster, for removing prisoners from one court into another for the more easy administration of justice. Such is the *habeas corpus ad respondendum*, when a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner, and charge him with this new action in the court above. (o) Such is that *ad satisfaciendum*, when a prisoner hath \*had judgment against him in an action, and the plaintiff is desirous [\*130] to bring him up to some superior court to charge him with process of execution. (p) Such also are those *ad prosequendum*, *testificandum*, *deliberandum*, &c., which issue when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed. Such is, lastly, the common writ *ad faciendum et recipiendum* which issues out of any of the courts of Westminster-hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer (whence the writ is frequently denominated an *habeas*

(g) F. N. B. 250. 1 Hal. P. C. 141. Coke on Bail and Mainp. ch. 10.

(h) Coke on Bail and Mainp. ch. 3. 4 Inst. 179.

(i) L. 2, tit. 2, c. 8.

(k) 2 Inst. 42, 55, 815.

(l) F. N. B. 86.

(m) Rayn. 474.

(n) *Nisi captus est per speciale preceptum nostrum, vel capitalis justitiarum nostrorum, vel pro morte hominis, vel pro foresta nostra, vel pro aliquo alio recto, quare secundum consuetudinem Angliæ non sit replegiabilis.* Registr. 77.

(o) 2 Mod. 198.

(p) 2 Lilly Prac. Reg. 4.

*corpus cum causa*) to do and receive whatsoever the king's court shall consider in that behalf. This is a writ grantable of common right, without any motion in court, (q) and it instantly supersedes all proceedings in the court below. But in order to prevent the surreptitious discharge of prisoners, it is ordered by statute 1 and 2 P. and M. c. 13, that no *habeas corpus* shall issue to remove any prisoner out of any gaol, unless signed by some judge of the court out of which it is awarded. And to avoid vexatious delays by removal of frivolous causes, it is enacted by statute 21 Jac. I, c. 23, that, where the judge of an inferior court of record is a barrister of three years' standing, no cause shall be removed from thence by *habeas corpus* or other writ, after issue or demurrer deliberately joined: that no cause, if once remanded to the inferior court by writ of *procedendo* or otherwise, shall ever afterwards be again removed; and that no cause shall be removed at all, if the debt or damages laid in the declaration do not amount to the sum of five pounds. But an *expedient* (r) having been found out to elude the latter branch of the statute, by procuring a nominal plaintiff to bring another action for five pounds or upwards (and then by the course of the court, the *habeas corpus* removed both actions together), [\*131] it is therefore enacted by statute 12 Geo. I, c. 29, that the inferior \*court may proceed in such actions as are under the value of five pounds, notwithstanding other actions may be brought against the same defendant to a greater amount. And by statute 19 Geo. III, c. 70, no cause, under the value of ten pounds, shall be removed by *habeas corpus*, or otherwise, into any superior court, unless the defendant so removing the same, shall give special bail for payment of the debt and costs.

But the great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*; directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf. (s) This is a high prerogative writ, and therefore by the common law issuing out of the court of king's bench not only in term-time, but also during the vacation, (t) (11) by a *fiat* from the chief justice or any other of the judges, and running into all parts of the king's dominions; for the king is at all times entitled to have an account, why the liberty of any of his subjects is restrained, (u) wherever that restraint may be inflicted. If it issues in vacation, it is usually returnable before the judge himself who awarded it, and he proceeds by himself thereon; (v) unless the term should intervene and then it may be returned in court. (w) Indeed, if the party were privileged, in the courts of common pleas and exchequer, as being (or supposed to be) an officer or suitor of the court, an *habeas corpus ad subjiciendum* might also by common law have been awarded from thence; (x) and, if the cause of imprisonment were palpably illegal, they might have discharged him: (y) but, if he were committed for any criminal matter, they could only have remanded him, or taken bail for his appearance in the court of king's bench (z) which occasioned the common pleas for some time to discountenance such applications. [\*132] But since the \*mention of the king's bench and common pleas, as co-ordinate in this jurisdiction, by statute 16 Car. I, c. 10, it hath been holden, that every subject of the kingdom is equally entitled to the benefit of the common law writ, in either of those courts, at his option. (a) It hath

(q) 2 Mod. 306. (r) Bohun, *Instit. Legal.* 85, edit. 1708. (s) St. Trials, viii. 142.  
 (t) The *pluries habeas corpus* directed to Berwick in 43 Eliz. (cited Burr. 856), was *teste die Jovis post quintiden' Sancti Martini*. It appears, by referring to the dominical letter of that year, that this *quindena* (Nov. 36) happened that year on a Saturday. The Thursday after was therefore the 30th of November—two days after the expiration of the term.  
 (u) Cro. Jac. 543. (v) Burr. 606. (w) *Ibid.* 460, 542, 606.  
 (x) 2 Inst. 55. 4 Inst. 290. 2 Hal. P. C. 144. 2 Vent. 24. (y) Vaugh. 155.  
 (z) Carter, 221. 3 Jon. 12. (a) 2 Mod. 198. Wood's Case, C. B. Hill. 11 Geo. III.

(11) Watson's Case, 9 Ad. and E., 781.

also been said, and by very respectable authorities, (b) that the like *habeas corpus* may issue out of the court of chancery in vacation; but upon the famous application to Lord Nottingham by Jenks, notwithstanding the most diligent searches, no precedent could be found where the chancellor had issued such a writ in vacation, (c) and therefore his lordship refused it.

In the king's bench and common pleas it is necessary to apply for it by motion to the court, (d) as in the case of all other prerogative writs (*certiorari*, prohibition, *mandamus*, &c.), which do not issue as of mere course, without showing some probable cause why the extraordinary power of the crown is called in to the party's assistance. For, as was argued by Lord Chief Justice Vaughan, (e) "it is granted on motion, because it cannot be had of course; and there is, therefore, no necessity to grant it; for the court ought to be satisfied that the party hath a probable cause to be delivered." And this seems the more reasonable, because (when once granted) the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner. (f) So that if it issued of mere course, without showing to the court or judge some reasonable ground for awarding it, a traitor or felon under sentence of death, a soldier or mariner in the king's service, a wife, a child, a relation, or a domestic, confined for insanity, or other prudential reasons, might obtain a temporary enlargement by suing out an *habeas corpus*, though sure to be remanded as soon as brought up to the court. And, therefore, Sir Edward Coke, when chief justice, did not scruple, in 13 Jac. I., to deny an *habeas corpus* to one confined by the court of admiralty for piracy; there appearing, upon his own showing, sufficient grounds to \*confine him. (g) On the other hand, if [\*133] a probable ground be shown, that the party is imprisoned without just cause, (h) and therefore hath a right to be delivered, the writ of *habeas corpus* is then a writ of right, which "may not be denied, but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained, though it be by the command of the king, the privy council, or any other." (i)

In a former part of these Commentaries (k) we expatiated at large on the personal liberty of the subject. This was shown to be a natural inherent right, which could not be surrendered or forfeited unless by the commission of some great and atrocious crime, and which ought not to be abridged in any case without the special permission of law. A doctrine coeval with the first rudiments of the English constitution, and handed down to us, from our Saxon ancestors, notwithstanding all their struggles with the Danes, and the violence of the Norman conquest: asserted afterwards and confirmed by the conqueror himself and his descendants; and though sometimes a little impaired by the ferocity of the times, and the occasional despotism of jealous or usurping princes, yet established on the firmest basis by the provisions of *magna carta* and a long succession of statutes enacted under Edward III. To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty, by rendering its protection impossible: but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree the imprisonment of the subject may be lawful. This it is, which induces the absolute necessity of expressing upon every commitment the reason for which it is made: that the court upon an *habeas corpus* may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.

\*And yet early in the reign of Charles I., the court of king's bench, [\*134] relying on some arbitrary precedents (and those perhaps misunderstood), determined (l) that they could not upon an *habeas corpus* either bail or deliver a prisoner, though committed without any cause assigned, in case he

(b) 4 Inst. 183, 2 Hal. P. C. 147.

(c) Lord Nott. MSS. Rep. July, 1676.

(d) 3 Mod. 806. 1 Lev. 1.

(e) Bushel's Case, 2 Jon. 13. (f) Cro. Jac. 548.

(g) 2 Bulstr. 37. See also 2 Roll. Rep. 138.

(h) 2 Inst. 615.

(i) Com. Jour. 1 Apr. 1628.

(k) Book I, ch. 1.

(l) State Tr. vii. 136.

was committed by the special command of the king, or by the lords of the privy council. This drew on a parliamentary inquiry, and produced the *petition of right*, 3 Car. I, which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when in the following year, Mr. Selden and others were committed by the lords of the council, in pursuance of his majesty's special command, under a general charge of "notable contempts and stirring up sedition against the king and government," the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge was bailable. And when at length they agreed that it was, they however annexed a condition of finding sureties for the good behaviour, which still protracted their imprisonment, the chief justice, Sir Nicholas Hyde, at the same time declaring, (m) that "if they were again remanded for that cause, perhaps the court would not afterwards grant an *habeas corpus*, being already made acquainted with the cause of the imprisonment." But this was heard with indignation and astonishment by every lawyer present: according to Mr. Selden's own (n) account of the matter, whose resentment was not cooled at the distance of four-and-twenty years.

These pitiful evasions gave rise to the statute 16 Car. I, c. 10, § 8, whereby it is enacted, that if any person be committed by the king himself in person, [\*135] or by his privy council, or by any of the members thereof, he shall have granted unto him, without any delay upon any pretence whatsoever, a writ of *habeas corpus*, upon demand or motion made to the court of king's bench or common pleas; who shall thereupon, within three court days after the return is made, examine and determine the legality of such commitment, and do what to justice shall appertain, in delivering, bailing, or remanding such prisoner. Yet still in the case of Jenks, before alluded to, (o) who in 1676 was committed by the king in council for a turbulent speech at Guildhall, (p) new shifts and devices were made use of to prevent his enlargement by law, the chief justice (as well as the chancellor) declining to award a writ of *habeas corpus ad subjiciendum*, in vacation, though at last he thought proper to award the usual writs *ad deliberandum*, &c., whereby the prisoner was discharged at the Old Bailey. Other abuses had also crept into daily practice, which had in some measure defeated the benefit of this great constitutional remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and a third, called an *alias* and a *pluries*, were issued, before he produced the party; and many other vexatious shifts were practiced to detain state-prisoners in custody. But whoever will attentively consider the English history, may observe, that the flagrant abuse of any power, by the crown or its ministers, has always been productive of a struggle; which either discovers the exercise of that power to be contrary to law, or (if legal) restrains it for the future. This was the case in the present instance. The oppression of an obscure individual gave birth to the famous *habeas corpus* act, 31 Car. II, c. 2, which is frequently considered as another *magna carta* (q) of the kingdom; and by consequence and analogy has also in subsequent times reduced the general method of proceeding on these writs (though not within the reach of that statute, but issuing merely at the common law) to the true standard of law and liberty. (12)

(m) State Tr. vii. 240.

(n) "Etiam judicum tunc primarius, nisi illud faceremus, rescripti illius forensis, qui libertatis personalis omnimodæ vindicæ legitimus est fere solus, usum omnimodum palam pronuntiavit (sui semper similis) nobis perpetuo in posterum denegandum. Quod ut odiosissimum juris prodigium, solentioribus hæc universis censuit." (Vindic. Mar. claus. edit. A. D. 1853.)

(o) Page 132.

(p) State Tr. vii. 471.

(q) See book 1, ch. 1.

(12) Mr. Hallam (Const. Hist. ch. xiii), gives a different account of the passing of the *habeas corpus* act, and shows that the case of Jenks had very little to do with it. The act conferred no new rights, but only furnished more complete means for enforcing those which existed before. Hallam's Const. Hist. ch. xiii; Beeching's Case, 4 B. and C., 126; Matter of Jackson, 15 Mich., 417.

\*The statute itself enacts, 1. That on complaint and request in writing by or on behalf of any person committed and charged with any *crime*, (unless committed for treason or felony expressed in the warrant; or as accessory, or on suspicion of being accessory, before the fact, to any petit-treason or felony: or any suspicion of such petit-treason or felony, plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process), the lord chancellor or any of the twelve judges, in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a *habeas corpus* for such prisoner, returnable immediately before himself or any other of the judges; and upon the return made shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature. 2. That such writs shall be indorsed, as granted in pursuance of this act, and signed by the person awarding them. 3. That the writ shall be returned and the prisoner brought up, within a limited time according to the distance, not exceeding in any case twenty days. 4. That officers and keepers neglecting to make due returns, or not delivering to the prisoner or his agent within six hours after demand a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another, without sufficient reason or authority (specified in the act), shall for the first offence forfeit 100*l.*, and for the second offence 200*l.*, to the party grieved, and be disabled to hold his office. 5. That no person once delivered by *habeas corpus*, shall be recommitted for the same offence, on penalty of 500*l.* 6. That every person committed for treason or felony shall, if he requires it the first week of the next term, or the first day of the next session of *oyer and terminer*, be indicted in that term or session, or else admitted to bail: unless the king's witnesses cannot be produced at that time: and if acquitted, or if not indicted and tried in the second term, or session, he shall be discharged from his imprisonment for such imputed offence: but that no person, after the assizes shall be \*open for the county in which he is detained, shall be removed by *habeas corpus*, till after the assizes are ended; but [137] shall be left to the justice of the judges of assize. 7. That any such prisoner may move for and obtain his *habeas corpus*, as well out of the chancery or exchequer, as out of the king's bench or common pleas; and the lord chancellor or judges denying the same, on sight of the warrant, or oath that the same is refused, forfeit severally to the party grieved the sum of 500*l.* 8. That this writ of *habeas corpus* shall run into the counties palatine, cinque ports, and other privileged places, and the islands of Jersey and Guernsey. 9. That no inhabitant of England (except persons contracting, or convicts praying to be transported; or, having committed some capital offence in the place to which they are sent), shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the king's dominions; on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party aggrieved a sum not less than 500*l.*, to be recovered with treble costs; shall be disabled to bear any office of trust or profit; shall incur the penalties of *præmunire*; and shall be incapable of the king's pardon.

This is the substance of that great and important statute: which extends (we may observe) only to the case of commitments for such criminal charge, as can produce no inconvenience to public justice by a temporary enlargement of the prisoner: all other cases of unjust imprisonment being left to the *habeas corpus* at common law. But even upon writs at the common law it is now expected by the court, agreeable to ancient precedents (r) and the spirit of the act of parliament, that the writ should be immediately obeyed, without waiting for any *alias* or *pluries*; otherwise an attachment will issue. By which admirable regulations, judicial as well as parliamentary, the remedy is now complete for removing the injury of unjust and illegal confinement. A

(r) Burr. 683.

remedy the more necessary, because the oppression does not always arise from the ill-nature, but sometimes from the mere inattention of \*government. [\*138] For it frequently happens in foreign countries (and has happened in England during temporary suspensions (s) of the statute), that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten. (13)

The *satisfactory* remedy for this injury of false imprisonment is by an action of trespass *vi et armis*, usually called an action of false imprisonment: which is generally, and almost unavoidably, accompanied with a charge of assault and battery also: and therein the party shall recover damages for the injury he has received; and also the defendant is, as for all other injuries committed with force, or *vi et armis*, liable to pay a fine to the king for the violation of the public peace.

III. With regard to the third absolute right of individuals, or that of private property, though the enjoyment of it, when acquired, is strictly a personal right, yet as its nature and original, and the means of its acquisition or loss, fell more directly under our second general division, of the *rights of things*; and as, of course, the wrongs that affect these rights must be referred to the corresponding division in the present book of our commentaries; I conceive it will be more commodious and easy to consider together, rather than in a separate view, the injuries that may be offered to the *enjoyment*, as well as to the *rights* of property. And therefore I shall here conclude the head of injuries affecting the *absolute* rights of individuals.

We are next to contemplate those which affect their *relative* rights or such as are incident to persons considered as members of society, and connected to each other by various ties and relations; and, in particular, such injuries as may be done to persons under the four following relations, husband and wife, parent and child, guardian and ward, master and servant.

\*I. Injuries that may be offered to a person, considered as a *husband*, [\*139] are principally three: *abduction*, or taking away a man's wife; *adultery*, or criminal conversation with her; and *beating* or otherwise abusing her. 1. As to the first sort, *abduction*, or taking her away, this may either be by fraud and persuasion, or open violence: though the law in both cases supposes force and constraint, the wife having no power to consent; and therefore gives a remedy by writ of *ravishment*, or action of *trespass vi et armis, de uxore rapta et abducta*. (t) This action lay at the common law; and thereby the husband shall recover, not the possession (u) of his wife, but damages for taking her away: and by statute Westm. 1, 3 Edw. I, c. 13, the offender shall also be

(s) See book I, page 126.

(t) F. N. B. 88.

(u) 2 Inst. 434.

(13) As a general rule the protection of personal liberty in the United States is left to state jurisdictions, and the highest court in each state, and the judges thereof, and generally some other courts and judicial officers, are empowered to issue the writ of *habeas corpus* for that purpose. But the supreme court of the United States and the circuit and district courts, as well as their respective justices and judges, have also by statute the authority to issue the writ in certain cases. But in no case does the writ extend to a prisoner in jail unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof, or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof, or is in custody in violation of the constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission or order or sanction of any foreign state, or under color thereof, the validity or effect whereof depends upon the law of nations; or unless it is necessary to bring the prisoner into court to testify. As to when the jurisdiction of the federal courts is exclusive, see *Tarble's Case*, 13 Wall., 397. The federal supreme court may also issue the writ in the exercise of its appellate jurisdiction. But the court in reviewing a criminal case on a writ of *habeas corpus* will inquire only into the jurisdiction of the court that sentenced. *Ex parte Rowland*, 104 U. S., 604; *Ex parte Carll*, 106 U. S., 521.

imprisoned two years, and be fined at the pleasure of the king. Both the king and the husband may therefore have this action; (w) and the husband is also entitled to recover damages in an action on the case against such as persuade and entice the wife to live separate from him without a sufficient cause. (x) The old law was so strict in this point, that if one's wife missed her way upon the road, it was not lawful for another man to take her into his house unless she was benighted and in danger of being lost or drowned: (y) but a stranger might carry her behind him on horseback to market to a justice of the peace for a warrant against her husband, or to the spiritual court to sue for a divorce. (z) 2. *Adultery*, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury (and surely there can be no greater), the law gives a satisfaction to the husband for it by action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary. (14) But these are properly increased and diminished by circumstances; (a) as the rank and fortune of the plaintiff and defendant; the relation or \*connexion between them; the seduction or otherwise of [\*140] the wife, founded on her previous behaviour and character, and the husband's obligation by settlement or otherwise to provide for those children, which he cannot but suspect to be spurious. In this case, and upon indictments for polygamy, a marriage *in fact* must be proved; though generally, in other cases, reputation and cohabitation are sufficient evidence of marriage. (b) 3. The third injury is that of *beating* a man's wife, or otherwise ill-using her; for which, if it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages, by action of trespass *vi et armis*, which must be brought in the names of the husband and wife *jointly*: but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a *separate* remedy by an action of trespass in nature of an action upon the case for this ill-usage, *per quod consortium amisit*; in which he shall recover a satisfaction in damages. (c)

II. Injuries that may be offered to a person considered in the relation of a *parent* (15) were likewise of two kinds: 1. *Abduction*, or taking his children

(w) *Ibid.*(x) Law of *nisi prius*, 78.(y) *Bro. Abr. t. trespass*, 313.(z) *Bro. Abr.* 307, 440.(a) Law of *nisi prius*, 25.(b) *Burr.* 3087.(c) *Oro. Jac.* 501, 538.

(14) Trespass on the case may be brought at the election of the husband.

(15) The American authorities follow the English in holding that, in an action for dehaunching the plaintiff's daughter, it is necessary to declare upon an injury to the plaintiff in the relation of master and servant, and to give some evidence from which a loss of service may be implied. *Lee v. Hodges*, 18 Grat., 726; *McDaniel v. Edwards*, 7 Ired., 408. If, therefore, the daughter at the time of the seduction was actually in the service of another as his indentured apprentice or otherwise, the parent cannot maintain this action: *South v. Denniston*, 3 Watts, 474; *Dain v. Wyckoff*, 7 N. Y., 191; *Parker v. Meek*, 8 Sneed, 29; unless the daughter was under age, and was absent from home at the time with the consent of the parent, and with the right on his part to recall her at any time. *Martin v. Payne*, 9 Johns., 887; S. C., 6 Am. Dec., 288; *Clark v. Fitch*, 2 Wend., 459; S. C., 20 Am. Dec., 639; *Mulvehall v. Millward*, 11 N. Y., 343; *Boyd v. Byrd*, 8 Blackf., 113; *Bolton v. Miller*, 6 Ind., 262; *Hornketh v. Barr*, 8 S. and R., 36; S. C., 11 Am. Dec., 583. Or unless she was in the service of the defendant, who had employed her with the fraudulent purpose of seduction. *Dain v. Wyckoff*, 18 N. Y., 45. It is no importance that the daughter is over twenty-one if she actually resides with her father: *Kelley v. Donnelly*, 5 Md., 211; *Vossell v. Cole*, 10 Mo., 634; but if, being over age, she is also not living with her father when the seduction takes place, he cannot bring the suit, notwithstanding she returns to his house before her confinement. *Nickleson v. Stryker*, 10 Johns., 115. The recovery is therefore nominally based upon loss of services; but proof of the slightest loss is sufficient: *Kendrick v. McCrary*, 11 Ga., 603; and a loss of services will be presumed if the plaintiff had a right to require them: *Anderson v. Ryan*, 4 Ill., 533; and the jury may give substantial damages to compensate for the parent's anxiety and sense of disgrace: *Kendrick v. McCrary*, 11 Ga., 603; *Travis v. Barger*, 24 Barb., 614; *Dain v. Wyckoff*, 7 N. Y., 191; though these alone will not support the action. See *Knight v. Wilcox*, 14 N. Y., 418.

away; and, 2. *Marrying* his son and heir without the father's consent, whereby during the continuance of the military tenures he lost the value of his marriage. But this last injury is now ceased, together with the right upon which it was grounded; for, the father being no longer entitled to the value of the marriage, the marrying his heir does him no sort of injury for which a civil action will lie. As to the other, of abduction, or taking away the children from the father, that is also a matter of doubt whether it be a civil injury or no; for, before the abolition of the tenure in chivalry, it was equally a doubt whether an action would lie for taking and carrying away any other child besides the heir; some holding that it would not, upon the supposition that the only ground or cause of action was losing the value of the heir's marriage; and others holding that an action would lie for taking away *any* of the children, for that the parent hath an interest in them all, to provide for their education. (d) If, therefore, before the abolition of these tenures it was an injury to the [\*141] father to take away the rest of his children, as well as his heir (as I am inclined to think it was), it still remains an injury, and is remediable by writ of *ravishment*, or action of *trespass vi et armis, de filio, vel filia, raptio vel abducto*; (e) in the same manner as the husband may have it, on account of the abduction of his wife.

III. Of a similar nature to the last is the relation of *guardian* and *ward*, and the like actions *mutatis mutandis*, as are given to fathers, the guardian also has for recovery of damages, when his ward is stolen or ravished away from him. (f) And though guardianship in chivalry is now totally abolished, which was the only beneficial kind of guardianship to the guardian, yet the guardian in socage was always (g) and is still entitled to an action of *ravishment*, if his ward or pupil be taken from him: but then he must account to his pupil for the damages which he so recovers. (h) And, as guardian in socage was also entitled at common law to a writ of *right of ward, de custodia terræ et hæredis*, in order to recover the possession and custody of the infant, (i) so I apprehend that he is still entitled to sue out this antiquated writ. But a more speedy and summary method of redressing all complaints relative to wards and guardians hath of late obtained by an application to the court of chancery; which is the supreme guardian, and has the superintendent jurisdiction of all the infants in the kingdom. And it is expressly provided by statute 12 Car. II, c. 24, that testamentary guardians may maintain an action of *ravishment* or *trespass*, for recovery of any of their wards, and also for damages to be applied to the use and benefit of the infants. (k)

IV. To the relation between *master* and *servant*, and the rights accruing therefrom, there are two species of injuries incident. The one is, retaining a man's hired servant before his time is expired; the other is beating or confining him in such a manner that he is not able to perform his work. As [\*142] to the first, the retaining another person's servant during the time he has

(d) Cro. Eliz. 770.  
(i) F. N. B. 189.

(e) F. N. B. 90.  
(k) 2 F. Wms. 108.

(f) *Ibid.* 189.

(g) *Ibid.*

(h) Hale on F. N. B. 139.

Thus it will be seen that the action is nominally for one thing, and the recovery *in fact* for another; and the anomaly is so great that it has often been made the subject of comment by courts. The New York cases upon this subject are particularly instructive. Compare especially *Clark v. Fitch*, 2 Wend., 459; S. C., 20 Am. Dec., 639; with *Bartley v. Richtmyer*, 4 N. Y., 38. The legislation of several of the states has relieved the law of some odium by authorizing suit to be brought in these cases by the father, mother, or some other person for the benefit of the woman, and without averment or proof of loss of service.

It follows, from what is above stated, that any one who at the time holds the legal relation of master to the person seduced—whether parent, guardian or employer—or with whom she lives, and for whom she performs services, whether for compensation agreed upon or not, may maintain the action.

Under a somewhat peculiar statute in Michigan it has been held that the woman may institute the suit in her own name. *Watson v. Watson*, 49 Mich., 540.



agreed to serve his present master; this, as it is ungentlemanlike, so it is also an illegal act. For every master has by his contract purchased for a valuable consideration the service of his domestics for a limited time; the inveigling or hiring his servant, which induces a breach of this contract, is therefore an injury to the master; and for that injury the law has given him a remedy by a special action on the case; and he may also have an action against the servant for the non-performance of his agreement. (l) But, if the new master was not apprised of the former contract, no action lies against him, (m) unless he refuses to restore the servant upon demand. The other point of injury, is that of beating, confining, or disabling a man's servant, which depends upon the same principle as the last; viz.: the property which the master has by his contract acquired in the labor of the servant. In this case, besides the remedy of an action of battery or imprisonment, which the servant himself as an individual may have against the aggressor, the master also, as a recompense for his immediate loss, may maintain an action of trespass *vi et armis*; in which he must allege and prove the special damage he has sustained by the beating of his servant, *per quod servitium amisit*; (n) and then the jury will make him a proportionable pecuniary satisfaction. A similar practice to which, we find also to have obtained among the Athenians; where masters were entitled to an action against such as beat or ill-treated their servants. (o)

We may observe that in these relative injuries, notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom: while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this: that the inferior hath no kind of property in the company, care, or assistance of the superior, as the \*superior is held to [\*143] have in those of the inferior; and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband, for she hath no separate interest in anything during her coverture. The child hath no property in his father or guardian; as they have in him, for the sake of giving him education and nurture. Yet the wife or the child, if the husband or parent be slain, have a peculiar species of criminal prosecution allowed them, in the nature of a civil satisfaction; which is called an *appeal*, (16) and which will be considered in the next book. And so the servant, whose master is disabled, does not thereby lose his maintenance or wages. He had no property in his master; and if he receives his part of the stipulated contract, he suffers no injury, and is therefore entitled to no action, for any battery or imprisonment which such master may happen to endure.

## CHAPTER IX.

### OF INJURIES TO PERSONAL PROPERTY.

IN the preceding chapter we considered the wrongs or injuries that affected the rights of persons, either considered as individuals, or as related to each other; and are at present to enter upon the discussion of such injuries as affect the rights of property, together with the remedies which the law has given to repair or redress them.

(l) F. N. B. 167. (m) *Ibid.* 158. Winch. 51. (n) 9 Rep. 113. 10 Rep. 130. (o) Pott. Antiq. b. 1, c. 26.

(16) This proceeding has been abolished by statute.  
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And here again we must follow our former division (*a*) of property into personal and real; *personal*, which consists in goods, money, and all other movable chattels, and things thereunto incident; a property which may attend a man's person wherever he goes, and from thence receives its denomination: and *real* property which consists of such things as are permanent, fixed, and immovable; as lands, tenements, and hereditaments of all kinds, which are not annexed to the person, nor can be moved from the place in which they subsist.

First then we are to consider the injuries that may be offered to the rights of *personal* property; and, of these, first, the rights of personal property in *possession*, and then those that are in *action* only. (*b*)

I. The rights of personal property in *possession*, are liable to two species of injuries: the amotion or deprivation of that possession; and the abuse or damage of the chattels, while the possession continues in the legal owner. The former or deprivation of possession is also divisible into two branches; the unjust and unlawful *taking* them away; and the unjust *detaining* them, though the original taking might be lawful.

\*1. And first of an unlawful *taking*. The right of property in all [\*145] external things being solely acquired by occupancy, as has been formerly stated, and preserved and transferred by grants, deeds, and wills, which are a continuation of that occupancy; it follows, as a necessary consequence, that when I once have gained a rightful possession of any goods or chattels, either by a just occupancy or by a legal transfer, whoever, either by fraud or force, dispossesses me of them, is guilty of a transgression against the law of society, which is a kind of secondary law of nature. For there must be an end of all social commerce between man and man, unless private possession be secured from unjust invasions: and if an acquisition of goods by either force or fraud were allowed to be a sufficient title, all property would soon be confined to the most strong, or the most cunning; and the weak and simple-minded part of mankind (which is by far the most numerous division) could never be secure of their possessions.

The wrongful taking of goods being thus most clearly an injury, the next consideration is, what remedy the law of England has given for it. And this is, in the first place, the restitution of the goods themselves so wrongfully taken, with damages for the loss sustained by such unjust invasion; which is effected by action of *replevin*, (1) an institution which the Mirror (*c*) ascribes to Glanvil, chief justice to King Henry the Second. This obtains only in one instance of an unlawful taking, that of a wrongful distress: and this, and the action of *detinue* (of which I shall presently say more) are almost the only actions in which the actual specific possession of the identical personal chattel is restored to the proper owner. For things personal are looked upon by the law as of a nature so transitory and perishable, that it is for the most part impossible either to ascertain their identity, or to restore them in the same condition as when they came to the hands of the wrongful possessor. And since

(a) See book II, chap. 2.

(b) *Ibid.* 25.

(c) C. 2, § 4.

(1) Replevin is the universal remedy in the United States where chattels have been wrongfully taken or are wrongfully detained from the plaintiff, and he seeks to recover them *in specie* instead of a satisfaction in damages. It is a statutory action, and the statutes are considerably variant. The plaintiff must have either a general or a special property in the chattels. Speaking generally we may say that the plaintiff is required to show his right by affidavit when he sues out the writ; that the officer seizes the property, if to be found, and delivers it to the plaintiff, on receiving bond with sureties for its return in case the action is not sustained; that if the plaintiff recovers in such cases, he takes judgment for any damages he may have proved, while if the plaintiff is defeated, the defendant takes judgment either for a return of the property, or for its value, together with such damages as he may have shown. But if the officer does not find the property, so that it may be delivered to the plaintiff, the case nevertheless proceeds to judgment, and if the plaintiff recovers, he may, at his option, have the proper writ for its delivery in execution.

it is a maxim that "*lex neminem cogit ad vana, seu impossibilia*," it therefore \*contents itself in general with restoring, not the thing itself, but a [\*146] pecuniary equivalent to the party injured; by giving him a satisfaction in damages. But in the case of a *distress*, the goods are from the first taking in the custody of the law, and not merely in that of the distrainor; and therefore they may not only be identified, but also restored to their first possessor, without any material change in their condition. And being thus in the custody of the law, the taking them back by force is looked upon as an atrocious injury, and denominated a *rescous*, for which the distrainor has a remedy in damages, either by writ of *rescous*, (*d*) in case they were going to the pound, or by writ *de parco fracto*, or *pound-breach*, (*e*) in case they were actually impounded. He may also, at his option, bring an action on the case for this injury: and shall therein, if the distress were taken for rent, recover treble damages. (*f*) The term *rescous* is likewise applied to the forcible delivery of a defendant, when arrested, from the officer who is carrying him to prison. In which circumstances the plaintiff has a similar remedy by action on the case, or of *rescous*: (*g*) (2) or, if the sheriff makes a return of such *rescous* to the court out of which the process issued, the rescuer will be punished by attachment. (*h*)

An action of replevin, the regular way of contesting the validity of the transaction, is founded, I said, upon a distress taken wrongfully and without sufficient cause: being a redelivery of the pledge, (*i*) or thing taken in distress, to the owner; upon his giving security to try the right of the distress, and to restore it if the right be adjudged against him, (*j*) after which the distrainor may keep it, till tender made of sufficient amends; but must then redeliver it to the owner. (*k*) And formerly, when the party distrained upon intended to dispute the right of the distress, he had no other process by the old common law than by a writ of replevin, *replegiari facias*; (*l*) which issued out of chancery, commanding the sheriff to deliver the distress to the owner, and \*afterwards to do justice in respect of the matter in dispute in his [\*147] own county court. But this being a tedious method of proceeding, the beasts or other goods were long detained from the owner, to his great loss and damage. (*m*) For which reason the statute of Marlbridge (*n*) directs that (without suing a writ out of the chancery) the sheriff immediately, upon plaint to him made, shall proceed to replevy the goods. And, for the greater ease of the parties, it is farther provided by statute 1 P. and M. c. 12, that the sheriff shall make at least four deputies in each county, for the sole purpose of making replevins. Upon application, therefore, either to the sheriff or one of his said deputies, security is to be given, in pursuance of the statute of Westm. 2, 13 Edw. I, c. 2. 1. That the party replevying will pursue his action against the distrainor, for which purpose he puts in *plegios de proseguendo*, or pledges to prosecute; and, 2. That if the right be determined against him, he will return the distress again; for which purpose he is also bound to find *plegios de retorno habendo*. Besides these pledges, the sufficiency of which is discretionary and at the peril of the sheriff, the statute 11 Geo. II, c. 19, requires that the officer granting a replevin on a distress for rent, shall take a bond with two sureties in a sum of double the value of the goods distrained, conditioned to prosecute the suit with effect and without delay, and for return of the goods; which bond shall be assigned to the avowant or person making cognizance, on request made to the officer; and, if forfeited, may be sued in the name of the assignee. And certainly as the end of all distresses is only to compel the party distrained upon to satisfy the debt or duty owing from him, this end is as well answered

(d) F. N. B. 101.

(e) 6 Mod. 211.

(f) 8 Rep. 147.

(g) *Ibid.* 100.

(h) Cro. Jac. 419. Salk. 588.

(i) F. N. B. 68.

(j) Stat. 2 W. & M. Sess. 1, c. 5.

(k) See page 12.

(l) 2 Inst. 133.

(m) Co. Litt. 145.

(n) 58 Hen. III, c. 21.

(2) The action of *rescous* has fallen into disuse, and it is usual now to bring an action on the case.

by such sufficient sureties as by retaining the very distress, which might frequently occasion great inconvenience to the owner; and that the law never wantonly inflicts. The sheriff, on receiving such security, is immediately, by his officers, to cause the chattels taken in distress to be restored into the possession of the party distrained upon: unless the distrainer claims a property in the goods so taken. For if, by this method of distress, the distrainer [\*148] \*happens to come again into possession of his own property in goods which before he had lost, the law allows him to keep them, without any reference to the manner by which he thus has regained possession; being a kind of personal remitter. (o) If, therefore, the distrainer claims any such property, the party replevying must sue out a writ *de proprietate probanda*, in which the sheriff is to try, by an inquest, in whom the property previous to the distress subsisted. (p) And if it be found to be in the distrainer, the sheriff can proceed no farther; but must return the claim of property to the court of king's bench or common pleas, to be there farther prosecuted, if thought advisable, and there finally determined. (q)

But if no claim of property be put in, or if (upon trial) the sheriff's inquest determines it against the distrainer; then the sheriff is to replevy the goods (making use of even force, if the distrainer makes resistance), (r) in case the goods be found within his county. But if the distress be carried out of the county, or concealed, then the sheriff may return that the goods, or beasts, are *eloigned, elongata*, carried to a distance, to places to him unknown; and thereupon the party replevying shall have a writ of *capias in withernam, in vetito* (or more properly, *repetito*) *namio*; a term which signifies a second or reciprocal distress, (s) in lieu of the first which was eloigned. It is therefore a command to the sheriff to take other goods of the distrainer, in lieu of the distress formerly taken, and eloigned or withheld from the owner. (t) So that there is now distress against distress; one being taken to answer the other, by way of reprisal, (u) and as a punishment for the illegal behaviour of the original distrainer. For which reason goods taken in *withernam* cannot be replevied till the original distress is forthcoming. (v)

\*But in common cases, the goods are delivered back to the party [\*149] replevying, who is then bound to bring his action of replevin; which may be prosecuted in the county court, be the distress of what value it may. (w) But either party may remove it to the superior courts of king's bench or common pleas, by writ of *recordari* or *pone*; (x) the plaintiff at pleasure, the defendant upon reasonable cause; (y) and also if in the course of proceeding any right of freehold comes in question, the sheriff can proceed no farther; (z) so that it is usual to carry it up in the first instance to the courts of Westminster-hall. Upon this action brought, and declaration delivered, the distrainer, who is now the defendant, makes *avowry*; that is, he *avows* taking the distress in his own right, or the right of his wife; (a) and sets forth the reason of it, as for rent arriere, damage done, or other cause: or else, if he justifies in another's right, as his bailiff or servant, he is said to make *cognizance*; that is, he *acknowledges* the taking, but insists that such taking was legal, as he acted by the command of one who had a right to distrain; and on the truth and legal merits of this avowry or cognizance the cause is determined. If it be determined for the plaintiff, viz.: that the distress was wrongfully taken; he has already got his goods back into his own possession, and shall keep them, and moreover recover

(o) See page 19. (p) Finch, L. 816. (q) Co. Litt. 145. Finch, L. 450. (r) 2 Inst. 198.  
 (s) Smith's Commonw. b. 3, c. 10. 2 Inst. 141. Hickee's Thesaur. 164. (t) F. N. B. 69, 73.  
 (u) In the old northern languages the word *withernam* is used as equivalent to *reprisals*. (Stiernhook, *de jure Sueon.* l. 1, c. 10.)  
 (v) Raym. 475. The substance of this rule composed the terms of that famous question, with which Sir Thomas Moore (when a student on his travels) is said to have puzzled a pragmatical professor in the university of Bruges in Flanders; who gave a universal challenge to dispute with any person in science; in *omni scibili, et de quolibet ente*. Upon which Mr. Moore sent him this question, "*utrum averia carucae, capta in vetito namio sint irrepiegibilia*," whether beasts of the plough, taken in *withernam*, are incapable of being replevied. (Hoddesd. c. 5.)  
 (w) 2 Inst. 139. (x) *Ibid.* 23. (y) F. N. B. 69, 70. (z) Finch, L. 317. (a) 2 Saund. 199.

damages. (b) But if the defendant prevails, by the default or nonsuit of the plaintiff, then he shall have a writ *de retorno habendo*, whereby the goods or chattels (which were distrained and then replevied) are returned again into his custody; to be sold, or otherwise disposed of, as if no replevin had been made. And at the common law, the plaintiff might have brought another replevin, and so *in infinitum* to the intolerable vexation of the defendant. Wherefore the statute \*of Westm. 2, c. 2, restrains the plaintiff, when nonsuited, [\*150] from suing out any fresh replevin; but allows him a *judicial writ*, issuing out of the original record, and called a writ of *second deliverance*, in order to have the same distress again delivered to him, on giving the like security as before. And, if the plaintiff be a second time nonsuit, or if the defendant has judgment upon verdict or demurrer in the first replevin, he shall have a writ of *return irreplevisable*; after which no writ of second deliverance shall be allowed. (c) But in case of a distress for rent arriere, the writ of second deliverance is in effect (d) taken away by statute 17 Car. II, c. 7, which directs that, if the plaintiff be nonsuit before issue joined, then upon suggestion made on the record in nature of an avowry or cognizance; or if judgment be given against him on demurrer, then, without any such suggestion, the defendant may have a writ to inquire into the value of the distress by a jury, and shall recover the amount of it in damages, if less than the arrear of rent; or, if more, then so much as shall be equal to such arrear, with costs; or, if the nonsuit be after issue joined, or if a verdict be against the plaintiff, then the jury impanelled to try the cause shall assess such arrears for the defendant: and if (in any of these cases) the distress be insufficient to answer the arrears distrained for, the defendant may take a farther distress or distresses. (e) But otherwise, if, pending a replevin for a former distress, a man distrains again for the same rent or service, then the party is not driven to his action of replevin, but shall have a writ of *recaption* (f) and recover damages for the defendant the redistrainer's contempt of the process of the law.

In like manner, other remedies for other unlawful takings of a man's goods consist only in recovering a satisfaction in damages. As if a man takes the goods of another out of his actual or virtual possession, without having a lawful title so to do, it is an injury; which, though it doth not amount to felony unless it be done *animo furandi*, is nevertheless a transgression, for which an action of *trespass vi et armis* \*will lie; wherein the plaintiff shall not recover the thing itself, but only damages for the loss of it. (3) Or, if [\*151] committed without force, the party may, at his choice, have another remedy in damages by action of *trover* and *conversion*, of which I shall presently say more.

2. Deprivation of possession may also be by an unjust *detainer* of another's goods, though the original *taking* was lawful. As if I distrain another's cattle damage-feasant, and before they are impounded he tenders me sufficient amends; now, though the original taking was lawful, my subsequent detainment of them after tender of amends is wrongful, and he shall have an action of *replevin* against me to recover them: (g) in which he shall recover damages only for the *detention* and not for the *caption*, because the original taking was

(b) F. N. B. 69.

(c) 2 Inst. 340.

(d) 1 Ventr. 64.

(e) Stat. 17 Car. II, c. 7.

(f) F. N. B. 71.

(g) F. N. B. 69. 3 Rep. 147.

(3) To entitle one to maintain trespass *de bonis asportatis* the taking must have been wrongful and against the will of the plaintiff, but need not have been with actual force. *Gibbs v. Chase*, 10 Mass., 125. If the plaintiff delivers the property to defendant under a fraudulent purchase, he cannot, on discovery of the fraud, bring trespass. *McCarty v. Vickery*, 12 Johns., 348. And see *Prince v. Puckett*, 13 Ala., 832. But an officer who has rightfully taken possession of property by virtue of process may sometimes render himself a trespasser *ab initio*, through abuse of his authority by any act of unlawful force. See 2 Greenl. Ev., § 615. And the same is true of any person who abuses an authority the law confers upon him. *Six Carpenters' Case*, 8 Co., 146; S. C., 1 Smith Lead. Cas., 216.

lawful. Or, if I lend a man a horse, and he afterwards refuses to restore it, this injury consists in the detaining, and not in the original taking, and the regular method for me to recover possession is by action of *detinue*. (*h*) In this action of *detinue* it is necessary to ascertain the thing detained, in such manner as that it may be specifically known and recovered. Therefore it cannot be brought for money, corn, or the like; for that cannot be known from other money or corn; unless it be in a bag or sack, for then it may be distinguishably marked. In order, therefore, to ground an action of *detinue*, which is only for the *detaining*, these points are necessary: (*i*) 1. That the defendant came lawfully into possession of the goods, as either by delivery to him, or finding them; 2. That the plaintiff have a property; 3. That the goods themselves be of some value; and, 4. That they be ascertained in point of identity. Upon this the jury, if they find for the plaintiff, assess the respective values of the several parcels detained, and also damages for the detention. And the judgment is conditional; that the plaintiff recover the said goods, or (if they cannot be had) their respective values, and also the damages for detaining them. (*j*) (4) But there is one disadvantage which attends this action; viz.: that the defendant is herein permitted to wage his [\*152] law, that is, to \*exculpate himself by oath, (*k*) and thereby defeat the plaintiff of his remedy: which privilege is grounded on the confidence originally reposed in the bailee by the bailor, in the borrower by the lender, and the like; from whence arose a strong presumptive evidence, that in the plaintiff's own opinion the defendant was worthy of credit. But for this reason the action itself is of late much disused, and has given place to the action of *trover*. (5)

This action of *trover* (6) and *conversion* was in its original an action of trespass upon the case, for recovery of damages against such person as had *found* another's goods, and refused to deliver them on demand, but *converted* them to his own use; from which finding and converting it is called an action of *trover* and *conversion*. The freedom of this action from wager of law, and the less degree of certainty requisite in describing the goods, (*l*) gave it so considerable an advantage over the action of *detinue*, that by a fiction of law actions of *trover* were at length permitted to be brought against any man who had in his possession, by any means whatsoever, the personal goods of another, and sold them or used them without the consent of the owner, or refused to deliver them when demanded. The injury lies in the conversion: for any man may take the goods of another into possession, if he finds them; but no finder is allowed to acquire a property therein, unless the owner be forever unknown: (*m*) and therefore he must not convert them to his own use, which the law presumes him to do, if he refuses to restore them to the owner: for which reason such refusal alone is, *prima facie*, sufficient evidence of a conversion. (*n*) The fact of the finding, or *trover*, is therefore now totally immaterial: for the plaintiff needs only to suggest (as words of form) that he lost such goods, and that the defendant

(*h*) F. N. B. 138.

(*i*) Co. Litt. 286.

(*j*) Co. Entr. 170. Cro. Jac. 682.

(*k*) Co. Litt. 286.

(*l*) Salk. 654.

(*m*) See book I, ch. 8; book II, ch. 1 and 26.

(*n*) 10 Rep. 56.

(4) In an action of *detinue*, if the plaintiff recovered, and the subject of the suit possessed peculiar value so that a recovery of the damages might not be an adequate remedy, the court of equity sometimes interfered to compel specific delivery; but this is now unnecessary, as the courts of common law possess the same power under the common law procedure act of 1854.

(5) Wager of law was abolished by statute 8 and 4 Wm. IV, c. 42, s. 18, and since then the action of *detinue* is said to be brought more frequently than formerly. For curious historical information regarding Wager of Law, see Superstition and Force, by H. C. Lea.

(6) As to the meaning of conversion, see *Burroughes v. Bayne*, 5 H. and N., 296; *Pillott v. Wilkinson*, 3 H. and C., 72; *Thompson v. Currier*, 24 N. H., 237; *Adams v. McGlinchy*, 62 Me., 533; *Ireland v. Horseman*, 65 Mo., 51; *Laverty v. Snethen*, 68 N. Y., 522; *Haas v. Damon*, 9 Iowa, 589; *Dudley v. Abner*, 52 Ala., 572; *Ealow v. Mitchell*, 26 Mich., 500; *Millar v. Allen*, 10 R. I., 49.

found them: and if he proves that the goods are *his* property, and that the defendant had them in his possession, it is sufficient. But a conversion must be fully proved: and then in this action the plaintiff shall recover damages, equal to the value of the thing converted, but not the thing itself: which nothing will recover but an action of *detinue* or *replevin*.

\*As to the damage that may be offered to things personal, while in the possession of the owner, as hunting a man's deer, shooting his dogs, [\*153] poisoning his cattle, or in anywise taking from the value of any of his chattels, or making them in a worse condition than before, these are injuries too obvious to need explication. I have only therefore to mention the remedies given by the law to redress them, which are in two shapes; by action of *trespass vi et armis*, where the act is in itself *immediately* injurious to another's property, and therefore necessarily accompanied with some degree of force; and by special action *on the case*, where the act is in itself indifferent, and the injury only *consequential*, and therefore arising without any breach of the peace. In both of which suits the plaintiff shall recover damages, in proportion to the injury which he proves that his property has sustained. And it is not material whether the damage be done by the defendant himself, or his servants by his direction; for the action will lie against the master as well as the servant. (o) And, if a man keeps a dog or other brute animal, used to do mischief, as by worrying sheep, or the like, the owner must answer for the consequences, if he knows of such evil habit. (p) (7)

II. Hitherto of injuries affecting the right of things personal, in *possession*. We are next to consider those which regard things in *action* only; or such rights as are founded on, and arise from, *contracts*; the nature and several divisions of which were explained in the preceding volume. (q) The violation, or non-performance, of these contracts might be extended into as great a variety of wrongs, as the rights which we then considered; but I shall now consider them in a more comprehensive view, by here making only a twofold division of contracts; viz., contracts *express*, and contracts *implied*; and pointing out the injuries that arise from the violation of each, with their respective remedies.

Express contracts include three distinct species; debts, covenants, and promises.

\*1. The legal acceptance of *debt* is, a sum of money due by certain and express agreement: as, by a bond for a determinate sum; a bill or [\*154] note; a special bargain; or a rent reserved on a lease; where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it. The non-payment of these is an injury, for which the proper remedy is by action of *debt*, (r) to compel the performance of the contract and recover the specific sum due. (s) This is the shortest and surest remedy; particularly where the debt arises upon a specialty, that is, upon a deed or instrument under seal. So also, if I verbally agree to pay a man a certain price for a certain parcel of goods, and fail in the performance, an action of debt lies against me; for this is also a *determinate* contract: but if I agree for no settled price, I am not liable to an action of debt, but a special action on the case, according to the nature of my contract. And indeed actions of debt are now seldom brought but upon special contracts under seal; wherein the sum due is clearly and precisely expressed: for, in case of such an action upon a simple

(o) Noy's Max. c. 44.  
(r) F. N. B. 119.

(p) Cro. Car. 254, 487.  
(s) See Appendix, No. III, § 1.

(q) See book II, ch. 30.

(7) See *Brown v. Giles*, 1 C. & P., 118; *Van Leuven v. Lyke*, 4 Denio, 127; S. C., 1 N. Y., 515; *Hinckley v. Emerson*, 4 Cow., 351; S. C., 15 Am. Dec., 383; *Durden v. Barnett*, 7 Ala., 169; *Keightlinger v. Egan*, 65 Ill., 235; S. C., 75 Ill., 141; *Karr v. Parks*, 44 Cal., 46; *Campbell v. Brown*, 19 Penn. St., 359; *Murray v. Young*, 12 Bush., 337; *Marsh v. Jones*, 21 Vt., 378; *Cockerham v. Nixan*, 11 Ired., 269; *Hewes v. McNamara*, 106 Mass., 261; *Arnold v. Norton*, 25 Conn., 92; *Meredith v. Reed*, 26 Ind., 334.

contract, the plaintiff labours under two difficulties. First, the defendant has here the same advantage as in an action of *detinue*, that of waging his law, or purging himself of the debt by oath, if he thinks proper. (t) Secondly, in an action of debt the plaintiff must prove the whole debt he claims, or recover nothing at all. For the debt is one single cause of action, fixed and determined; and which, therefore, if the proof varies from the claim, cannot be looked upon as the same contract whereof the performance is sued for. If, therefore, I bring an action of debt for 30*l.*, I am not at liberty to prove a debt of 20*l.* and recover a verdict thereon; (u) any more than if I bring an action of *detinue* for a horse, I can thereby recover an ox. For I fail in the proof of that contract, which my action or complaint has alleged to be specific, express, and determinate. But in an action on the case, on what is called an *indebitatus assumpsit*, which is not brought to compel a specific performance [\*155] of the contract, but to recover damages for its \*non-performance, the implied *assumpsit*, and consequently the damages for the breach of it, are in their nature indeterminate; and will therefore adapt and proportion themselves to the truth of the case which shall be proved, without being confined to the precise demand stated in the declaration. For if *any* debt be proved, however less than the sum demanded, the law will raise a promise *pro tanto*, and the damages will of course be proportioned to the actual debt. So that I may declare that the defendant, *being indebted* to me in 30*l.* *undertook* or promised to pay it, but failed; and lay my damages arising from such failure at what sum I please; and the jury will, according to the nature of my proof, allow me either the whole in damages, or any inferior sum. And even in actions of *debt*, where the contract is proved or admitted, if the defendant can show that he has discharged any part of it, the plaintiff shall recover the residue. (v)

The form of the writ of *debt* is sometimes in the *debet* and *detinet*, and sometimes in the *detinet* only: that is, the writ states, either that the defendant *owes* and unjustly *detains* the debt or thing in question, or only that he unjustly *detains* it. It is brought in the *debet* as well as *detinet*, when sued by one of the original contracting parties who personally gave the credit, against the other who personally incurred the debt, or against his heirs, if they are bound to the payment; as by the obligee against the obligor, the landlord against the tenant, &c. But, if it be brought by or against an executor for debt due to or from the testator, this not being his own debt, shall be sued for in the *detinet* only. (w) So also if the action be for goods, for corn, or a horse, the writ shall be in the *detinet* only; for nothing but a sum of money, for which I (or my ancestors in my name) have personally contracted, is properly considered as my *debt*. And indeed a writ of *debt* in the *detinet* only, for goods and chattels, is neither more nor less than a mere writ of *detinue*; and is followed by the very same judgment. (x)

2. A covenant also contained in a deed, to do a direct act or to omit one, is another species of express contracts, the violation or breach of which is a civil injury. As if a man covenants to be at York by such a day, or not to exercise [\*156] a \*trade in a particular place, and is not at York at the time appointed, or carries on his trade in the place forbidden, these are direct breaches of his covenant; and may be perhaps greatly to the disadvantage and loss of the covenantee. The remedy for this is by a writ of *covenant*; (y) which directs the sheriff to command the defendant generally to keep his covenant with the plaintiff (without specifying the nature of the covenant), or show good cause to the contrary; and if he continues refractory, or the covenant is already so broken that it cannot now be specifically performed, then the subsequent proceedings set forth with precision the covenant, the breach and the loss which has happened thereby; whereupon the jury will give damages in pro-

(f) 4 Rep. 84.  
(v) 1 Roll. Rep. 257.

(u) Bro. *Ley pager*, 92. Dyer, 219.  
(w) F. N. B. 119.

2 Roll. Abr. 706. 1 Show. 215.  
(x) Rast. Entr. 174.

(y) F. N. B. 145.



portion to the injury sustained by the plaintiff, and occasioned by such breach of the defendant's contract.

There is one species of covenant of a different nature from the rest; and that is a covenant *real*, to convey or dispose of lands, which seems to be partly of a personal and partly of a real nature. (2) For this the remedy is by a special writ of covenant, for a specific performance of the contract concerning certain lands particularly described in the writ. It therefore directs the sheriff to command the defendant, here called the deforciant, to keep the covenant made between the plaintiff and him concerning the identical lands in question; and upon this process it is that fines of land are usually levied at common law, (a) the plaintiff or person to whom the fine is levied, bringing a writ of covenant, in which he suggests some agreement to have been made between him and the deforciant, touching those particular lands, for the completion of which he brings this action. And for the end of this supposed difference, the fine, or *finalis concordia* is made, whereby the deforciant (now called the cognizor) acknowledges the tenements to be the right of the plaintiff, now called the cognizee. And, moreover, as leases for years were formerly considered only as contracts (b) or covenants for the enjoyment of rents and profits, and not as the conveyance \*of any real interest in the land, the ancient remedy [\*157] for the lessee, if ejected, was by a writ of covenant against the lessor, to recover the term (if in being) and damages in case the ouster was committed by the lessor himself: or if the term was expired, or the ouster was committed by a stranger, claiming by an elder title, then to recover damages only. (c)

No person could at common law take advantage of any covenant or condition, except such as were parties or privies thereto; and, of course, no grantee or assignee of any reversion or rent. To remedy which, and more effectually to secure to the king's grantees the spoils of the monasteries then newly dissolved, the statute 32 Hen. VIII, c. 34, gives the assignee of a reversion (after notice of such assignment) (d) the same remedies against the particular tenant, by entry or action, for waste or other forfeitures, non-payment of rent, and non-performance of conditions, covenants and agreements, as the assignor himself might have had; and makes him equally liable, on the other hand, for acts agreed to be performed by the assignor, except in the case of warranty.

3. A promise is in the nature of a verbal covenant, and wants nothing but the solemnity of writing and sealing to make it absolutely the same. If, therefore, it be to do any explicit act, it is an express contract, as much as any covenant; and the breach of it is an equal injury. The remedy, indeed, is not exactly the same: since, instead of an action of covenant, there only lies an action upon the case, for what is called the *assumpsit* or undertaking of the defendant; the failure of performing which is the wrong or injury done to the plaintiff, the damages whereof a jury are to estimate and settle. As, if a builder promises, undertakes, or assumes to Caius, that he will build and cover his house within a time limited, and fails to do it; Caius has an action on the case against the builder, for this breach of his express promise, undertaking, or *assumpsit*; and shall recover a pecuniary satisfaction for the injury sustained by such delay. So also in the case before-mentioned, of a debt by simple contract if the debtor promises to pay it and does not, this breach of promise entitles the creditor to his action on the case, instead of being driven to an action of debt. (e) Thus likewise a promissory note, or note of hand not under seal, to pay money at a day certain, is an express *assumpsit*; and the payee at common law, or, by custom and act of parliament, the indorsee (f), may recover the value of the note in damages, if it remains unpaid. Some agreements, indeed, though never so expressly made, are deemed of so important a nature, that they ought not to rest in verbal promise only, which cannot be proved but by the memory

(a) Hal. on F. N. B. 146.

(c) Bro. Abr. t. covenant, 22.

(e) 4 Rep. 24.

(a) See book II, ch. 21.

(c) F. N. B. 145.

(f) See book II, ch. 30.

(b) *Ibid.* 2.

(d) Co. Litt. 215. Moor. 878. Cro. Jac. 478.

(which sometimes will induce the perjury) of witnesses. To prevent which the statute of frauds and perjuries, 29 Car. II, c. 3, enacts, that in the five [\*158] following cases no verbal promise shall be sufficient to ground an action upon, but at the least some note or memorandum of it shall be made in writing, and signed by the party to be charged therewith: 1. Where an executor or administrator promises to answer damages out of his own estate. 2. Where a man undertakes to answer for the debt, default or miscarriage of another. 3. Where any agreement is made upon consideration of marriage. 4. Where any contract or sale is made of lands, tenements, or hereditaments, or any interest therein. 5. And lastly, where there is any agreement that is not to be performed within a year from the making thereof. In all these cases a mere verbal *assumpsit* is void. (8)

From these *express* contracts the transition is easy to those that are only *implied* by law. Which are such as reason and justice dictate, and which therefore the law presumes that every man has contracted to perform; and upon this presumption makes him answerable to such persons as suffer by his non-performance.

Of this nature are, first, such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party. And thus it is that every person is bound and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation of the law. For it is a part of the original contract, entered into by all mankind who partake the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that state, of which each individual is a member. Whatever, therefore, the laws order any one to pay, that becomes instantly a debt, which he hath before-hand contracted to discharge. And this implied agreement it is, that gives the plaintiff a right to institute a second action, founded merely on the general contract, in order to recover such damages, or sum of money, as are assessed by the jury and adjudged by the court to be due from the defendant to the plaintiff in any former action. So that if he hath once obtained a judgment against another for a [\*159] certain sum, and neglects to take out execution \*thereupon, he may afterwards bring an action of debt upon this judgment, (g) and shall not be put upon the proof of the original cause of action; but upon showing the judgment once obtained, still in full force, and yet unsatisfied, the law immediately implies, that by the original contract of society the defendant hath contracted a debt, and is bound to pay it. This method seems to have been invented, when *real* actions were more in use than at present, and damages were permitted to be recovered thereon; in order to have the benefit of a writ of *capias* to take the defendant's body in execution for those damages, which process was allowable in an action of debt (in consequence of the statute 25 Edw. III, c. 17), but not in an action real. Wherefore, since the disuse of those real actions, actions of debt upon judgments in personal suits have been pretty much discountenanced by the courts, as being generally vexatious and oppressive by harassing the defendant with the costs of two actions instead of one.

On the same principle it is (of an implied original contract to submit to the rules of the community whereof we are members), that a forfeiture imposed by the by-laws and private ordinances of a corporation upon any that belong to the body, or an amercement set in a court-leet or court-baron upon any of

(g) Rol. Abr. 600, 601.

(8) The substance of the statute of frauds and perjuries has been re-enacted in the several American states, and the decisions under it have been too numerous to admit of their being analyzed or even mentioned by name here. The reader must therefore be referred to the several treatises on contracts for such explanation and application of the statute as have been made by the courts, and to the works on equity jurisprudence for such relief as equity can afford when contracts which should be in writing are allowed to rest in oral agreement.

the suitors to the court (for otherwise it will not be binding), (h) immediately create a debt in the eye of the law: and such forfeiture or amercement, if unpaid, work an injury to the party or parties entitled to receive it, for which the remedy is by action of debt. (i)

\*The same reason may with equal justice be applied to all penal statutes, that is, such acts of parliament whereby a forfeiture is inflicted for transgressing the provisions therein enacted. The party offending is here bound by the fundamental contract of society to obey the directions of the legislature, and pay the forfeiture incurred to such persons as the law requires. The usual application of this forfeiture is either to the party aggrieved, or else to any of the king's subjects in general. Of the same sort is the forfeiture inflicted by the statute of Winchester (k) (explained and enforced by several subsequent statutes) (l) upon the hundred wherein a man is robbed, which is meant to oblige the hundredors to make hue and cry after the felon; for if they take him they stand excused. But otherwise the party robbed is entitled to prosecute them by a special action on the case for damages equivalent to his loss. And of the same nature is the action given by statute 9 Geo. I. c. 22, commonly called the black act, against the inhabitants of any hundred, in order to make satisfaction in damages to all persons who have suffered by the offences enumerated and made felony by that act. But more usually these forfeitures created by statute are given at large to any common informer; or, in other words, to any such person or persons as will sue for the same: and hence such actions are called *popular* actions, because they are given to the people in general. (m) Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor: and then the suit is called a *qui tam* action, because it is brought by a person "*qui tam pro domino rege, &c., quam pro se ipso in hac parte sequitur.*" If the king, therefore, himself commences this suit, he shall have the whole forfeiture. (n) But if any one hath begun a *qui tam*, or *popular* action, no other person can pursue it: and the verdict passed upon the defendant in the first suit is a bar to all others, and conclusive even to the king himself. This has frequently occasioned offenders to procure their own friends to begin a suit, in order to forestal, and prevent other actions: which practice is in some measure prevented by a statute made in the reign of a very sharp-sighted prince in penal laws, 4 Hen. VII. c. 20, which enacts that no recovery, otherwise than by verdict, obtained by collusion in an action popular, shall be a bar to any other action prosecuted *bona fide*. A provision that seems borrowed from \*the rule of the Roman law, that if a person was acquitted of any accusation, merely by the prevarication of the accuser, a new prosecution might be commenced against him. (o)

A second class of implied contracts are such as do not arise from the express determination of any court, or the positive direction of any statute; but from natural reason and the just construction of law. Which class extends to all presumptive undertakings or *assumpsits*; which though never perhaps actually made, yet constantly arise from this general implication and intendment of the courts of judicature that every man hath engaged to perform what his duty or justice requires. Thus,

1. If I employ a person to transact any business for me, or perform any work, the law implies that I undertook or assumed to pay him so much as his labour deserved. And if I neglect to make him amends, he has a remedy for this injury by bringing his action on the case upon this implied *assumpsit*; wherein he is at liberty to suggest that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury; who will assess such a sum

(A) Law of Nisi prius, 167.

(h) 13 Edw. I. c. 1.

(m) See book II, ch. 20.

(i) 5 Rep. 64. Hob. 200.

(k) 27 Edw. I. c. 12. 20 Ch. II. c. 7. 8 Geo. II. c. 10. 22 Geo. II. c. 24.

(l) 3 Hawk. P. C. 268.

(o) 77. 47, 15. 2.

in damages as they think he really merited. This is called an *assumpsit* on a *quantum meruit*.

2. There is also an implied *assumpsit* on a *quantum valebat*, which is very similar to the former, being only where one takes up goods or wares of a tradesman, without expressly agreeing for the price. There the law concludes that both parties did intentionally agree, that the real value of the goods should be paid; and an action on the case may be brought accordingly, if the vendee refuses to pay that value.

\*3. A third species of implied *assumpsits* is when one has had and [\*162] received money belonging to another, without any valuable consideration given on the receiver's part: for the law construes this to be money had and received for the use of the owner only; and implies that the person so receiving promised and undertook to account for it to the true proprietor. And if he unjustly detains it, an action on the case lies against him for the breach of such implied promise and undertaking; and he will be made to repay the owner in damages, equivalent to what he has detained in violation of such his promise. This is a very extensive and beneficial remedy, applicable to almost every case where the defendant has received money which *ex æquo et bono* he ought to refund. It lies for money paid by mistake, or on a consideration which happens to fail, or through imposition, extortion, or oppression, or where any undue advantage is taken of the plaintiff's situation. (p)

4. Where a person has laid out and expended his own money for the use of another, at his request, the law implies a promise of repayment, and an action will lie on this *assumpsit*. (q)

5. Likewise, fifthly, upon a stated account between two merchants, or other persons, the law implies that he against whom the balance appears has engaged to pay it to the other; though there be not any actual promise. And from this implication it is frequent for actions on the case to be brought, declaring that the plaintiff and defendant had settled their accounts together, *insimul computassent* (which gives name to this species of *assumpsit*), and that the defendant engaged to pay the plaintiff the balance, but has since neglected to do it. But if no account has been made up, then the legal remedy is by bringing a writ of account, *de computo*; (r) commanding the defendant to render a just account [\*163] to the plaintiff, \*or show the court good cause to the contrary. In this action if the plaintiff succeeds, there are two judgments: the first is, that the defendant do account (*quod computet*) before auditors appointed by the court; and, when such account is finished, then the second judgment is, that he do pay the plaintiff so much as he is found in arrear. This action by the old common law, (s) lay only against the parties themselves, and not their executors, because matters of account rested solely on their own knowledge. But this defect, after many fruitless attempts in parliament, was at last remedied by statute 4 Ann. c. 16, which gives an action of account against the executors and administrators. (9) But, however, it is found by experience that the most ready and effectual way to settle these matters of account is by bill in a court of equity, where a discovery may be had on the defendant's oath, without relying merely on the evidence which the plaintiff may be able to produce. Wherefore actions of account to compel a man to bring in and settle his accounts, are now very seldom used; though when an account is once stated, nothing is more common than an action upon the implied *assumpsit* to pay the balance.

(p) Burr. 1012.

(q) Carth. 446. 2 Keb. 99.

(r) F. N. B. 116.

(s) Co. Litt. 90.

(9) And by statute 3 and 4 Wm. IV, c. 42, an action may be maintained by or against the personal representatives of any person deceased, for any wrong committed by or against him, in respect of property, real or personal, within six calendar months before such person's death, and any damages recovered against such representatives are made payable in the regular order of administration.

6. The last class of contracts, implied by reason and construction of law, arises upon this supposition, that every one who undertakes any office, employment, trust or duty, contracts with those who employ or entrust him, to perform it with integrity, diligence, and skill. And, if by his want of either of those qualities any injury accrues to individuals, they have therefor their remedy in damages by a special action on the case. A few instances will fully illustrate this matter. If an officer of the public is guilty of neglect of duty, or a palpable breach of it, of non-feasance or of misfeasance; as, if the sheriff does not execute a writ sent to him, or if he wilfully makes a false return thereof; in both these cases the party aggrieved shall have an action *on the case*, for damages to be assessed by a jury. (t) If the sheriff or gaoler suffers a prisoner, who is taken upon mesne process, (that \*is, during the pendency of a suit) to escape, he is liable to an action *on the case*. (u) But [\*164] if, after judgment, a gaoler or a sheriff permits a debtor to escape, who is charged in execution for a certain sum; the debt immediately becomes his own, and he is compellable by action of *debt*, being for a sum liquidated and ascertained, to satisfy the creditor his whole demand: which doctrine is grounded (w) on the equity of the statutes of Westm. 2, 13 Edw. I, c. 11, and 1 Ric. II, c. 12. An advocate or attorney that betray the cause of their client, or being retained, neglect to appear at the trial, by which the cause miscarries, are liable to an action on the case, for a reparation to their injured client. (x) (10) There is also in law always an implied contract with a common inn-keeper, to secure his guest's goods in his inn; with a common carrier, or bargemaster, to be answerable for the goods he carries; with a common farrier, that he shoes a horse well, without laming him; with a common tailor, or other workman, that he performs his business in a workmanlike manner; in which, if they fail, an action on the case lies to recover damages for such breach of their general undertaking. (y) (11) But if I employ a person to transact any of these concerns, whose common profession and business it is not, the law implies no such *general* undertaking, but, in order to charge him with damages, a *special* agreement is required. Also, if an inn-keeper, or other victualler, hangs out a sign and opens his house for travellers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he without good reason refuses to admit a traveller. (z) If any one cheats me with false cards or dice, or by false weights and measures, or by selling me one commodity for another, an action on the case also lies against him for damages, upon the contract which the law always implies, that every transaction is fair and honest. (a)

In contracts likewise for sales, it is constantly understood that the seller undertakes that the \*commodity he sells is his own; and if it proves [\*165] otherwise, an action on the case lies against him, to exact damages for

(t) Moor. 451. 11 Rep. 99.

(u) Cro. Eliz. 625. Comb. 69.

(w) Bro. Abr. t. parliament. 19.

2 Inst. 323.

(x) Finch, L. 188.

(y) 11. Rep. 54. 1 Saund. 314.

(z) 1 Vent. 323.

(a) 10 Rep. 54.

(10) There is no implied undertaking on the part of an attorney, solicitor, or counsellor, that the business he takes charge of shall be successful, or that his advice shall always be sound and reliable. What he is responsible for is ordinary skill, diligence and care in the exercise of his profession, having reference to the nature of the business he undertakes to do: *Holmes v. Peck*, 1 R. I., 242; *Miller v. Wilson*, 24 Penn. St., 114; *Cox v. Sullivan*, 7 Ga., 144; *Clusman v. Merkel*, 3 Bosw., 402; *Walker v. Goodman*, 21 Ala., 641; and for any failure to exercise these, an action on the case may be maintained by his client against him. For the rules of fairness and good faith which the law requires to be observed in this relation, and the skill required, see *Leighton v. Sargent*, 27 N. H., 460; *Howard v. Grover*, 28 Me., 97; *Holmes v. Peck*, 1 R. I., 243; *Hallam v. Means*, 82 Ill., 879; *Long v. Morrison*, 14 Ind., 595; *Craig v. Chambers*, 17 Ohio St., 253; *Heath v. Glisan*, 3 Ore., 64.

(11) Upon these subjects, which are very broad, and embrace cases almost infinite in variety, the reader will of course consult the elementary treatises on bailments, carriers, contracts, &c.

this deceit. In contracts for provisions, it is always implied that they are wholesome; and if they be not, the same remedy may be had. Also if he, that selleth any thing, doth upon the sale warrant it to be good, the law annexes a tacit contract to his warranty, that if it be not so, he shall make compensation to the buyer; else it is an injury to good faith, for which an action on the case will lie to recover damages. (b) The warranty must be *upon the sale*; for if it be made *after*, and not *at* the time of the sale, it is void warranty: (c) for it is then made without any consideration; neither does the buyer then take the goods upon the credit of the vendor. Also the warranty can only reach to things in being at the time of the warranty made, and not to things *in futuro*: as, that a horse is sound at the buying of him, not that he *will be* sound two years hence. But if the vendor knew the goods to be unsound, and hath used any art to disguise them, (d) or if they are in any shape different from what he represents them to be to the buyer, this artifice shall be equivalent to an express warranty, and the vendor is answerable for their goodness. A general warranty will not extend to guard against defects that are plainly and obviously the object of one's senses, as if a horse be warranted perfect, and wants either a tail or an ear, unless the buyer in this case be blind. But if cloth is warranted to be of such a length, when it is not, there an action on the case lies for damages; for that cannot be discerned by sight, but only by a collateral proof, the measuring it. (e) Also if a horse is warranted sound, and he wants the sight of an eye, though this seems to be the object of one's senses, yet as the discernment of such defects is frequently matter of skill, it hath been held that an action on the case lieth to recover damages for this imposition. (f)

Besides the special action on the case, there is also a peculiar remedy, entitled an action of *deceit*, (g) to give damages \*in some particular cases of fraud, (12) and principally where one man does any thing in the name of another, by which he is deceived or injured; (h) as if one brings an action in another's name, and then suffers a nonsuit, whereby the plaintiff becomes liable to costs: or where one obtains or suffers a fraudulent recovery of lands, tenements, or chattels, to the prejudice of him that hath right. As when by collusion the attorney of the tenant makes default in a real action, or where the sheriff returns that the tenant was summoned when he was not so, and in either case he loses the land, the writ of *deceit* lies against the demandant, and also the attorney or the sheriff and his officers; to annul the former proceedings, and recover back the land. (i) It also lies in the cases of warranty before mentioned, and other personal injuries committed contrary to good faith and honesty. (k) But an action *on the case*, for damages, in the nature of a writ of *deceit*, is more usually brought upon these occasions. (l) And indeed it is the only (m) remedy for a lord of a manor, in or out of ancient demesne, to reverse a fine or recovery had in the king's courts of lands lying within his jurisdiction; which would otherwise be thereby turned into frank fee. And this may be brought by the lord against the parties and *cestuy que use* of such fine or recovery; and thereby he shall obtain judgment, not only for damages (which are usually remitted), but also to recover his court, and jurisdiction over the lands, and to annul the former proceedings. (n)

Thus much for the non-performance of contracts express or implied; which includes every possible injury to what is by far the most considerable species of personal property, viz.: that which consists in action merely, and not in possession. Which finishes our inquiries into such wrongs as may be offered to *personal* property, with their several remedies by suit or action.

(b) F. N. B. 94. (c) Finch, L. 189. (f) Salk. 211. (g) F. N. B. 95. (h) Law of *nisai prius*, 22.  
 (d) 3 Roll. Rep. 5. (e) Finch, L. 189. (i) East. Entr. 221, 222. See page 405. (j) F. N. B. 96.  
 (k) Booth, real actions, 251. (l) East. Entr. 221, 222. See page 405. (m) F. N. B. 96.  
 (n) Booth, 253. Co. Entr. 6. (o) 3 Lev. 412. (p) East. Entr. 100, b. 3 Lev. 412. Lutw. 711, 720.

(12) This particular action is abolished; an action on the case being now the substitute.

CHAPTER X.

OF INJURIES TO REAL PROPERTY; AND FIRST OF  
DISPOSSESSION, OR OUSTER OF THE FREEHOLD.

I COME now to consider such *injuries* as affect that species of property which the laws of England have denominated *real*; as being of a more substantial and permanent nature than those transitory rights of which personal chattels are the object.

Real injuries, then, or injuries affecting real rights, are principally six; 1. Ouster; 2. Trespass; 3. Nuisance; 4. Waste; 5. Subtraction; 6. Disturbance.

Ouster, or dispossession, is a wrong or injury that carries with it the amotion of possession: for thereby the wrong-doer gets into the actual occupation of the land or hereditament, and obliges him that hath a right to seek his legal remedy, in order to gain possession, and damages for the injuries sustained. And such ouster, or dispossession, may either be of the *freehold*, or of *chattels real*. Ouster of the *freehold* is effected by one of the following methods: 1. Abatement; 2. Intrusion; 3. Disseisin; 4. Discontinuance; 5. Deformement. All of which in their order, and afterwards their respective remedies, will be considered in the present chapter.

1. And first, an *abatement* is where a person dies seized of an inheritance, and before the heir or devisee enters, a stranger \*who has no right makes entry, and gets possession of the freehold: this entry of him is [\*168] called an abatement, and he himself is denominated an abator. (a) It is to be observed that this expression, of *abating* which is derived from the French, and signifies to quash, beat down, or destroy, is used by our law in three senses. The first, which seems to be the primitive sense, is that of abating or beating down a nuisance, of which we spoke in the beginning of this book; (b) and in a like sense it is used in statute Westm. 1, 3 Edw. I, c. 17; where mention is made of abating a castle or fortress; in which case it clearly signifies to pull it down, and level it with the ground. The second signification of abatement is that of abating a writ or action, of which we shall say more hereafter: here it is taken figuratively, and signifies the overthrow or defeating of such writ, by some fatal exception to it. The last species of abatement is that we have now before us; which is also a figurative expression to denote that the rightful possession or freehold of the heir or devisee is overthrown by the rude intervention of a stranger.

The abatement of a freehold is somewhat similar to an immediate occupancy in a state of nature, which is effected by taking possession of the land the same instant that the prior occupant, by his death, relinquishes it. But this, however agreeable to natural justice, considering man merely as an individual, is diametrically opposite to the law of society, and particularly the law of England; which for the preservation of public peace, hath prohibited, as far as possible, all acquisitions by mere occupancy: and hath directed that lands, on the death of the present possessor, should immediately vest either in some person, expressly named and appointed by the deceased, as his devisee; or, on default of such appointment, in such of his next relations as the law hath selected and pointed out as his natural representative or heir. Every entry, therefore, of a mere stranger by way of intervention between the ancestor and heir, or person next entitled, which keeps the heir or devisee out of possession, is one of the highest injuries to the right of real property.

(a) Finch, L. 125.

(b) Page 8.

\*2. The second species of injury by ouster, or amotion of possession [\*169] from the freehold, is by *intrusion*: which is the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion. And it happens where a tenant for term of life dieth seized of certain lands and tenements, and a stranger entereth thereon, after such death of the tenant, and before any entry of him in remainder or reversion. (c) This entry and interposition of the stranger differ from an abatement in this; that an abatement is always to the prejudice of the heir, or immediate devisee; an intrusion is always to the prejudice of him in remainder or reversion. For example; if A dies seized of lands in fee-simple, and before the entry of B his heir C enters thereon, this is an abatement; but if A be tenant for life, with remainder to B in fee-simple, and after the death of A, C enters, this is an intrusion. Also if A be tenant for life on lease from B, or his ancestors, or be tenant by the curtesy, or in dower, the reversion being vested in B; and after the death of A, C enters and keeps B out of possession, this is likewise an intrusion. So that an intrusion is always immediately consequent upon the determination of a particular estate; an abatement is always consequent upon the descent or devise of an estate in fee-simple. And in either case the injury is equally great to him whose possession is defeated by this unlawful occupancy.

3. The third species of injury by ouster, or privation of the freehold, is by *disseisin*. Disseisin is a wrongful putting out of him that is seized of the freehold. (d) The two former species of injury were by a wrongful entry where the possession was vacant; but this is an attack upon him who is in actual possession, and turning him out of it. Those were an ouster from a freehold in law; this is an ouster from a freehold in deed. Disseisin may be effected either in corporeal inheritances, \*or incorporeal. Disseisin of [\*170] things corporeal, as of houses, lands, &c., must be by entry and actual dispossession of the freehold; (e) as if a man enters either by force or fraud into the house of another, and turns, or at least keeps, him or his servants out of possession. Disseisin of incorporeal hereditaments cannot be an actual dispossession: for the subject itself is neither capable of actual bodily possession or dispossession; but it depends on their respective natures, and various kinds; being in general nothing more than a disturbance of the owner in the means of coming at, or enjoying them. With regard to freehold rent in particular, our ancient law books (f) mentioned five methods of working a disseisin thereof: 1. By *enclosure*; where the tenant so encloseth the house or land, that the lord cannot come to distrain thereon, or demand it: 2. By *forestaller*, or lying in wait; when the tenant besetteth the way with force and arms, or by menaces of bodily hurt affrights the lessor from coming: 3. By *rescous*; that is, either by violently retaking a distress taken, or by preventing the lord with force and arms from taking any at all: 4. By *replevin*; when the tenant replevies the distress at such time when his rent is really due: 5. By *denial*; which is when the rent being lawfully demanded is not paid. All, or any of these circumstances, amount to a disseisin of rent; that is, they wrongfully put the owner out of the only possession, of which the subject-matter is capable, namely, the receipt of it. But all these disseisins of hereditaments incorporeal are only so at the election and choice of the party injured; if, for the sake of more easily trying the right, he is pleased to suppose himself disseised. (g) Otherwise, as there can be no actual dispossession, he cannot be compulsively disseised of any incorporeal hereditament.

And so too, even in corporeal hereditaments, a man may frequently suppose himself to be disseised, when he is not so in fact, for the sake of entitling himself to the more easy and commodious remedy of an assize of *novel disseisin* (which will be explained in the sequel of this chapter), instead of being

(c) Co. Litt. 277. F. N. B. 203, 204.

(f) Finch, L. 105, 106. Litt. § 287, &amp;c.

(d) Co. Litt. 277.

(e) Co. Litt. 182.

(g) Litt. §§ 588, 589.



\*driven to the more tedious process of a writ of entry. (A) The true injury of compulsive disseisin seems to be that of dispossessing the tenant, and substituting oneself to be the tenant of the lord in his stead; in order to which in the times of pure feudal tenure the consent or connivance of the lord, who upon every descent or alienation personally gave, and who therefore alone could change, the seisin or investiture, seems to have been considered as necessary. But when in process of time the feudal form of alienations wore off, and the lord was no longer the instrument of giving actual seisin, it is probable that the lord's acceptance of rent or service, from him who had dispossessed another, might constitute a complete disseisin. Afterwards, no regard was had to the lord's concurrence, but the disposessor himself was considered as the sole disseisor: and this wrong was then allowed to be remedied by entry only, without any form of law, as against the disseisor himself; but required a legal process against his heir or alienee. And when the remedy by assize was introduced under Henry II, to redress such disseisins as had been committed within a few years next preceding, the facility of that remedy induced others, who were wrongfully kept out of the freehold, to feign or allow themselves to be disseised, merely for the sake of the remedy.

These three species of injury, *abatement*, *intrusion* and *disseisin*, are such wherein the entry of the tenant *ab initio*, as well as the continuance of his possession afterwards, is unlawful. But the two remaining species are where the entry of the tenant was at first lawful, but the wrong consists in the detaining of possession afterwards.

4. Such is, fourthly, the injury of *discontinuance*; which happens when he who hath an estate-tail, maketh a larger estate of the land than by law he is entitled to do: (i) in which case the estate is good, so far as his power extends who made it, but no farther. As if tenant in tail makes a feoffment in fee-simple, or for the life of the feoffee, or in tail; all \*which are beyond his power to make, for that by the common law extends no farther than to make a lease for his own life; in such case the entry of the feoffee is lawful during the life of the feoffor; but if he retains the possession after the death of the feoffor, it is an injury, which is termed a discontinuance: the ancient legal estate, which ought to have survived to the heir in tail, being gone; or at least suspended, and for a while discontinued. For, in this case, on the death of the alienors, neither the heir in tail, nor they in remainder or reversion expectant on the determination of the estate-tail, (1) can enter on and possess the lands so alienated. Also, by the common law, the alienation of a husband who was seized in the right of his wife, worked a discontinuance of the wife's estate: till the statute 32 Hen. VIII, c. 28 provided, that no act by the husband alone shall work a discontinuance of, or prejudice, the inheritance or freehold of the wife; but that, after his death, she or her heirs may enter on the lands in question. Formerly, also, if an alienation was made by a sole corporation, as a bishop or dean, without consent of the chapter, this was a discontinuance. (j) But this is now quite antiquated by the disabling statutes of 1 Eliz. c. 19, and 13 Eliz. c. 10, which declare all such alienations absolutely void *ab initio*, and, therefore, at present no discontinuance can be thereby occasioned. (2)

5. The fifth and last species of injuries by ouster or privation of the freehold, where the entry of the present tenant or possessor was originally lawful, but his detainer is now become unlawful, is that by *deforcement*. This, in

(A) *Hengh. parv. c. 7.* 1 Burr. 110.

(i) *Finch, L. 190.*

(j) *F. N. B. 194.*

(1) This is no longer the law. See statute 8 and 4 Wm. IV, c. 27, § 39; also, 8 and 9 Vic., c. 106, § 4.

(2) And a discontinuance in any case would now appear to be impossible, since the statutes mentioned in the last note, the second of which declares that a feoffment made after October 1, 1845, shall not have a tortious operation, so as to create an estate by wrong.

its most extensive sense, is *nomen generalissimum*; a much larger and more comprehensive expression than any of the former: it then signifying the holding of any lands or tenements to which another person hath a right. (k) So that this includes as well an abatement, an intrusion, a disseisin, or a discontinuance, as any other species of wrong whatsoever, whereby he that hath right to the freehold is kept out of possession. But as contradistinguished from the [\*173] former, it is only such a detainer of the \*freehold, from him that hath the right of property, but never had any possession under that right, as falls within none of the injuries which we have before explained. As in case where a lord has a seignior, and lands escheat to him *propter defectum sanguinis*, but the seisin of the lands is withheld from him; here the injury is not *abatement*, for the right vests not in the lord as heir or devisee; nor is it *intrusion*, for it vests not in him who hath the remainder or reversion; nor is it *disseisin*, for the lord was never seised; nor does it at all bear the nature of any species of *discontinuance*; but, being neither of these four, it is therefore a *deforcement*. (l) If a man marries a woman, and during the coverture is seised of lands, and alienes, and dies; is disseised, and dies; or dies in possession; and the alienee, disseisor, or heir, enters on the tenements and doth not assign the widow her dower; this is also a *deforcement* to the widow, by withholding lands to which she hath a right. (m) In like manner, if a man lease lands to another for term of years, or for the life of a third person, and the term expires by surrender, efflux of time, or death of the *cestuy que vie*; and the lessee or any stranger, who was at the expiration of the term in possession, holds over, and refuses to deliver the possession to him in remainder or reversion, this is likewise a *deforcement*. (n) *Deforcements* may also arise upon the breach of a condition in law: as if a woman gives lands to a man by deed, to the intent that he marry her, and he will not when thereunto required, but continues to hold the lands: this is such a fraud on the man's part that the law will not allow it to divest the woman's right of possession; though, his entry being lawful, it does divest the actual possession, and thereby becomes a *deforcement*. (o) *Deforcements* may also be grounded on the disability of the party *deforced*: as if an infant do make an alienation of his lands, and the alienee enters and keeps possession; now, as the alienation is voidable, this possession as against the infant (or, in case of his decease, as against his heir) is after avoidance wrongful, and, therefore, a *deforcement*. (p) The same [\*174] happens, \*when one of non-sane memory alienes his lands or tenements, and the alienee enters and holds possession; this may also be a *deforcement*. (q) Another species of *deforcement* is, where two persons have the same title to land, and one of them enters and keeps possession against the other: as where the ancestor dies seised of an estate in fee-simple, which descends to two sisters as coparceners, and one of them enters before the other, and will not suffer her sister to enter and enjoy her moiety; this is also a *deforcement*. (r) *Deforcement* may also be grounded on the non-performance of a covenant real: as if a man, seised of lands, covenants to convey them to another, and neglects or refuses so to do, but continues possession against him; this possession, being wrongful, is a *deforcement*: (s) whence, in levying a fine of lands, the person against whom the fictitious action is brought upon a supposed breach of covenant, is called the *deforciant*. (3) And, lastly, by way of analogy, keeping a man by any means out of a freehold office is construed to be a *deforcement*; though, being an incorporeal hereditament, the *deforciant* has no corporeal possession. So that whatever injury (withholding the posses-

(k) Co. Litt. 277.

(l) F. N. B. 142.

(m) *Ibid.* 8, 147.

(n) Finch, L. 203. F. N. B. 201, 205, 6, 7. See book II, ch. 9, p. 151.

(o) F. N. B. 202.

(p) Finch, L. 204. F. N. B. 192.

(q) Finch, *ibid.* F. N. B. 202.

(r) Finch, L. 203, 204. F. N. B. 197.

(s) F. N. B. 146.

(3) This proceeding was abolished by statute 8 and 4 Wm. IV, c. 74.

sion of a freehold) is not included under one of the four former heads, is comprised under this of *deforcement*.

The several species and degrees of injury by *ouster* being thus ascertained and defined, the next consideration is the remedy; which is, universally, the *restitution* or *delivery of possession* to the right owner: and, in some cases, *damages* also for the unjust amotion. The methods whereby these remedies, or either of them, may be obtained, are various.

1. The first is that extrajudicial and summary one, which we slightly touched in the first chapter of the present book, (*t*) of *entry* by the legal owner, when another person, who hath no right, hath previously taken possession of lands or tenements. In this case the party entitled may make a formal, but peaceable, entry thereon, declaring that thereby he takes possession; which notorious act of ownership is equivalent to a feudal investiture by the lord: (*u*) or he may enter on any \*part of it in the same county, declaring it to be in the name of the whole: (*v*) but if it lies in different counties [\*175] he must make different entries; for the notoriety of such entry or claim to the  *pares* or freeholders of Westmoreland, is not any notoriety to the  *pares* or freeholders of Sussex. Also if there be *two* disseisors, the party disseised must make his entry on *both*; or if *one* disseisor has conveyed the lands with livery to *two* distinct feoffees, entry must be made on *both*: (*w*) for as their seisin is distinct, so also must be the act which devests that seisin. If the claimant be deterred from entering by menaces or bodily fear, he may make *claim*, as near to the estate as he can, with the like forms and solemnities: which claim is in force for only a year and a day. (*x*) And this claim, if it be repeated once in the space of every year and day (which is called *continual claim*), has the same effect with, and in all respects amounts to, a legal entry. (*y*) Such an entry gives a man seisin, (*z*) or puts into immediate possession him that hath right of entry on the estate, and thereby makes him complete owner, and capable of conveying it from himself by either descent or purchase. (4)

This remedy by entry takes place in three only of the five species of *ouster*, viz: abatement, intrusion, and disseisin; (*a*) for, as in these the original entry of the wrongdoer was unlawful, they may therefore be remedied by the mere entry of him who hath right. But, upon the discontinuance or *deforcement*, the owner of the estate cannot enter, but is driven to his action: for herein the original entry being lawful, and thereby an apparent right of possession being gained, the law will not suffer that right to be overthrown by the mere act or entry of the claimant. Yet a man may enter (*b*) on his tenant by sufferance: for such tenant hath no freehold, but only a bare possession; which may be defeated, like a tenancy at will, by the mere entry of the owner. But if the owner thinks it more expedient to suppose or admit (*c*) such tenant to have \*gained a tortious freehold, he is then remediable by writ of entry, *ad* [\*176] *terminum qui præteriiit*. (5)

On the other hand, in case of abatement, intrusion, or disseisin, where entries are generally lawful, this right of entry may be *toll'd*, that is taken away by descent. Descents, which take away entries, (*d*) (6) are when any one, seized by any means whatsoever of the inheritance of a corporeal hereditament, dies; whereby the same descends to his heir: in this case, however feeble the right of the ancestor might be, the entry of any other person who claims title to the

(5) See page 5.

(6) Litt. § 432.

(b) See book II, p. 180.

(c) See book II, ch. 14, p. 209.

(d) *Ibid.* §§ 419, 420.

(e) Co. Litt. 57.

(v) Litt. § 417.

(w) Co. Litt. 15.

(x) Litt. §§ 295-312.

(y) Co. Litt. 222.

(z) *Ibid.* 227, 228.

(4) Now by statute 8 and 4 Wm. IV, c. 27, s. 10, no person shall be deemed to have been in possession of any land within the meaning of that act, merely by reason of having made an entry thereon; and by section 11 no continual or other claim upon or near any land shall preserve any right of making an entry.

(5) The statute above mentioned abolishes this proceeding.

(6) This and the two following paragraphs are not applicable to the present state of the law.

freehold is taken away; and he cannot recover possession against the heir by this summary method, but is driven to his action to gain a legal seisin of the estate. And this, first, because the heir comes to the estate by act of law, and not by his own act; the law therefore protects his title, and will not suffer his possession to be divested, till the claimant hath proved a better right. Secondly, because the heir may not suddenly know the true state of his title; and therefore the law, which is ever indulgent to heirs, takes away the entry of such claimant as neglected to enter on the ancestor who was well able to defend his title; and leaves the claimant only the remedy of an action against the heir. (e) Thirdly, this was admirably adapted to the military spirit of the feudal tenures, and tended to make the feudatory bold in war; since his children could not, by any mere entry of another, be dispossessed of the lands whereof he died seized. And, lastly, it is agreeable to the dictates of reason and the general principles of law.

For in every complete title (f) to lands, there are two things necessary; the possession or seisin, and the right or property therein: (g) or, as it is expressed in Fleta, *juris et seisinæ conjunctio*. (h) Now if the possession be severed from the property, if A has the *jus proprietatis*, and B by some unlawful means has gained possession of the lands, this is an injury to A; for which the law [\*177] gives a remedy, by putting \*him in possession, but does it by different means, according to the circumstances of the case. Thus, as B, who was himself the wrongdoer, and hath obtained the possession by either fraud or force, hath only a *bare* or *naked possession*, without any shadow of right; A, therefore, who hath both the *right* of property and the *right* of possession, may put an end to his title at once, by the summary method of *entry*. But, if B, the wrongdoer, dies seized of the lands, then B's heir advances one step farther towards a good title: he hath not only a *bare* possession, but also an apparent *jus possessionis*, or *right* of possession. For the law presumes that the possession which is transmitted from the ancestor to the heir, is a rightful possession until the contrary be shewn; and therefore the mere entry of A is not allowed to evict the heir of B; but A is driven to his action at law to remove the possession of the heir, though his entry alone would have dispossessed the ancestor.

So that in general it appears, that no man can recover possession by mere entry on lands, which another hath by descent. Yet this rule hath some exceptions (i) wherein those reasons cease, upon which the general doctrine is grounded; especially if the claimant were under any legal disabilities, during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, or being out of the realm: in all which cases there is no neglect or *laches* in the claimant, and therefore no descent shall bar, or take away his entry. (k) And this title of taking away entries by descent, is still farther narrowed by the statute 32 Hen. VIII. c. 33, which enacts that if any person disseises or turns another out of possession, no descent to the heir of the disseisor shall take away the entry of him that has a right to the land, unless the disseisor had peaceable possession five years next after the disseisin. But the statute extendeth not to any feoffee or donee of the disseisor, mediate or immediate: (l) because such a one by the genuine feudal constitutions always came into the tenure solemnly [\*178] \*and with the lord's concurrence, by actual delivery of seisin, that is, open and public investiture. On the other hand, it is enacted by the statute of limitations, 21 Jac. I. c. 16, that no entry shall be made by any man upon lands, unless within twenty years after his right shall accrue. And by statute 4 and 5 Ann. c. 16, no entry shall be of force to satisfy the said statute of limitations, or to avoid a fine levied of lands, unless an action be thereupon commenced within one year after, and prosecuted with effect.

(e) Co. Litt. 287.

(f) See book II. ch. 12.

(g) Mirror, c. 2 § 27.

(h) L. 2. c. 16. § 5.

(i) See the particular cases mentioned by Littleton, b. 3, ch. 5, the principles of which are well explained in Gilbert's law of tenures.

(k) Co. Litt. 246.

(l) Ibid. 258

Upon an ouster, by the discontinuance of tenant in tail, we have said that no remedy by mere entry is allowed; but that, when tenant in tail aliens the lands entailed, this takes away the entry of the issue in tail, and drives him to his action at law to recover the possession. (m) For, as in the former cases, the law will not suppose, without proof, that the ancestor of him in possession, acquired the estate by wrong; and therefore, after five years peaceable possession, and a descent cast, will not suffer the possession of the heir to be disturbed by mere entry without action; so here the law will not suppose the discontinuor to have aliened the estate without power so to do, and therefore leaves the heir in tail to his action at law, and permits not his entry to be lawful. Besides, the alienee, who came into possession by a lawful conveyance, which was at least good for the life of the alienor, hath not only a *bare* possession, but also an *apparent right* of possession; which is not allowed to be divested by the mere entry of the claimant, but continues in force till a better right be shown, and recognized by a legal determination. And something also, perhaps, in framing this rule of law, may be allowed to the inclination of the courts of justice, to go as far as they could in making estates-tail alienable, by declaring such alienations to be voidable only, and not absolutely void.

In case of forfeiture, also, where the deforciant had originally a lawful possession of the land, but now detains it wrongfully, he still continues to have the presumptive *prima facie* evidence of right; that is, possession [\*179] lawfully gained. Which possession shall not be overturned by the mere entry of another; but only by the demandant's showing a better right in a course of law.

This remedy by entry must be pursued according to statute 5 Ric. II, st. 1, c. 8, in a peaceable and easy manner; and not with force or strong hand. For, if one turns or keeps another out of possession forcibly, this is an injury of both a civil and a criminal nature. The civil is remedied by immediate restitution; which puts the ancient possessor *in statu quo*; the criminal injury, or public wrong, by breach of the king's peace, is punished by fine to the king. For, by the statute 8 Hen. VI, c. 9, upon complaint made to any justice of the peace, of a forcible entry, with strong hand, on lands or tenements; or a forcible detainer after a peaceable entry; he shall try the truth of the complaint by jury, and, upon force found, shall restore the possession to the party so put out; and in such case, or if any alienation be made to defraud the possessor of his right (which is likewise declared to be absolutely void), the offender shall forfeit, for the force found, treble damages to the party grieved, and make fine and ransom to the king. But this does not extend to such as endeavour to keep possession *manu forti*, after three years' peaceable enjoyment of either themselves, their ancestors, or those under whom they claim; by a subsequent clause of the same statute, enforced by statute 31 Eliz. c. 11.

II. Thus far of remedies, where the tenant or occupier of the land hath gained only a *mere* possession, and no apparent shadow of right. Next follow another class, which are in use where the title of the tenant or occupier is advanced one step nearer to perfection; so that he hath in him not only a bare possession, which may be destroyed by a bare entry, but also an *apparent right of possession*, which cannot be removed but by orderly course of law; in the process of which it must be shown, that though he hath at present possession, and, therefore, hath *the presumptive right*, yet there is a right [\*180] of possession, superior to his, residing in him who brings the action.

These remedies are either by a *writ of entry*, or an *assize*; (7) which are actions merely *possessory*; serving only to regain that possession, whereof the demandant (that is, he who sues for the land) or his ancestors have been unjustly deprived by the tenant or possessor of the freehold, or those under whom he

(m) Co. Litt. 325.

(7) These writs were abolished by statute 3 and 4 Wm. IV, c. 27, § 36.

claims. They decide nothing with respect to the *right of property*; only restoring the demandant to that state or situation in which he was (or by law ought to have been) before the dispossession committed. But this without any prejudice to the right of ownership: for, if the dispossessor has any legal claim, he may afterwards exert it, notwithstanding a recovery against him in these possessory actions. Only the law will not suffer him to be his own judge, and either take or maintain possession of the lands, until he hath recovered them by legal means: (n) rather presuming the right to have accompanied the ancient seisin, than to reside in one who has no such evidence in his favour.

1. The first of these possessory remedies is by *writ of entry*; which is that which disproves the title of the tenant or possessor, by showing the unlawful means by which he entered or continues possession. (o) The writ is directed to the sheriff, requiring him to "command the tenant of the land that he render (in Latin, *præcipe quod reddat*) to the demandant the land in question, which he claims to be his right and inheritance; and into which, as he saith, the said tenant had not entry but by (or after) a disseisin, intrusion, or the like, made to the said demandant, within the time limited by law for such actions; or that upon refusal he do appear in court on such a day, to show wherefore he hath not done it." (p) This is the original process, the *præcipe* upon which all the rest of the suit is grounded: wherein it appears that the tenant is required, [\*181] either to deliver \*seisin of the lands, or to show cause why he will not. This cause may be either a denial of the fact of having entered by or under such means as are suggested, or a justification of his entry by reason of title in himself or in those under whom he makes claim: whereupon the possession of the land is awarded to him who produces the clearest right to possess it.

In our ancient books we find frequent mention of the *degrees* within which writs of entry are brought. If they be brought against the party himself that did the wrong, then they only charge the tenant himself with the injury; "*non habuit ingressum nisi per intrusionem quam ipse fecit.*" But if the intruder, disseisor, or the like, has made any alienation of the land to a third person, or it has descended to his heir, that circumstance must be alleged in the writ, for the action must always be brought against the tenant of the land; and the defect of his possessory title, whether arising from his own wrong or that of those under whom he claims, must be set forth. One such alienation or descent makes the first (q) degree, which is called the *per*, because then the form of a writ of entry is this that the tenant had not entry, but by the original wrong-doer, who alienated the land, or from whom it descended to him: "*non habuit ingressum, nisi per Gulielmum, qui se in illud intrusit, et illud tenenti dimisit.*" (r) A second alienation or descent makes another degree, called the *per* and *cui*; because the form of a writ of entry, in that case, is, that the tenant had not entry, but *by* or *under* a prior alienee, to whom the intruder demised it; "*non habuit ingressum nisi per Ricardum, cui Gulielmus illud dimisit qui se in illud intrusit.*" (s) These degrees thus state the original wrong, and the title of the tenant who claims under such wrong. If more than two degrees (that is, two alienations or descents) were past, there lay no writ of entry at the common law.

[\*182] For, as it was provided, for the \*quietness of men's inheritances, that no one, even though he had the true right of possession, should enter upon him who had the apparent right by descent or otherwise, but he was driven to his *writ of entry* to gain possession; so, after more than two descents or two conveyances were passed, the demandant, even though he had the right both of possession and property, was not allowed this *possessory* action; but was driven to his *writ of right*, a long and final remedy, to punish his neglect in

(n) Mir. c. 4 § 24.

(o) Finch, L. 251.

(p) See book II. Append. No. V. § 1.

(q) Finch, L. 302. Booth, indeed (of real actions, 172), makes the first degree to consist in the original wrong done, the second in the *per*, and the third in the *per* and *cui*. But the difference is immaterial.

(r) Booth, 151.

(s) Finch, L. 302. F. N. B., 206, 204.

not sooner putting in his claim, while the degrees subsisted, and for the ending of suits, and quieting all controversies. (t) But by the statute of Marlbridge, 52 Hen. III, c. 30, it was provided, that when the number of alienations or descents exceeded the usual degrees, a new writ should be allowed without any mention of degrees at all. And, accordingly, a new writ has been framed, called a writ of entry in the *post*, which only alleges the injury of the wrongdoer, without deducing all the intermediate title from him to the tenant; stating it in this manner: that the tenant had not entry unless *after*, or subsequent to, the ouster or injury done by the original dispossessor; "*non habuit ingressum nisi post intrusionem quam Gulielmus in illud fecit*;" and rightly concluding, that, if the original title was wrongful, all claims derived from thence must participate of the same wrong. Upon the latter of these writs it is (the writ of entry *sur disseisin* in the *post*) that the form of our common recoveries of landed estates (u) is usually grounded; which, we may remember, were observed in the preceding volume (v) to be fictitious actions brought against the tenant of the freehold (usually called the tenant to the *precipe*, or writ of entry), in which, by collusion, the demandant recovers the land.

This remedial instrument, or writ of entry, is applicable to all the cases of ouster before-mentioned, except that of discontinuance by tenant in tail, and some peculiar species of deforcements. Such is that of deforcement of dower, by not assigning *any* dower to the widow within the time limited by *law*; for which she has her remedy by writ of *dower*, *unde nihil habet*. [\*183] (w) But if she be deforced of part only of her dower, she cannot then say that *nihil habet*; and, therefore, she may have recourse to another action, by writ of *right of dower*; which is a more general remedy, extending either to part or the whole; and is (with regard to her claim) of the same nature as the grand writ of right, whereof we shall presently speak, is with regard to claims in fee-simple. (x) (8) On the other hand, if the heir (being within age), or his guardian, assign her more than she ought to have, they may be remedied by a writ of *admeasurement of dower*. (y) But, in general, the writ of entry is the universal remedy to recover possession, when wrongfully withheld from the owner. It were, therefore, endless to recount all the several divisions of writs of entry, which the different circumstances of the respective demandants may require, and which are furnished by the laws of England: (z) being plainly and clearly chalked out in that most ancient and highly venerable collection of legal forms, the *registorum omnium brevium*, or register of such writs as are suable out of the king's courts, upon which Fitzherbert's *natura brevium* is a comment; and in which every man who \*is injured will be sure to find a method of relief exactly adapted to [\*184] his own case, described in the compass of a few lines, and yet without the omission of any material circumstance. So that the wise and equitable provision of the statute Westm. 2, 13 Edw. I, c. 24, for framing new writs when wanted, is almost rendered useless by the very great perfection of the

(t) 2 Inst. 158.

(u) See book II. Append. No. V.

(v) Book II. ch. 21.

(w) F. N. B. 147.

(x) *Ibid.* 16.

(y) F. N. B. 148. Finch, L. 314. Stat. Westm. 2, 13 Ed. I, c. 7.

(z) See Bracton, l. 4, tr. 7, c. 6, § 4. Britton, c. 114. fol. 264. The most usual were, 1. The writs of entry *sur disseisin*, and of intrusion, (F. N. B. 191, 203) which are brought to remedy either of those species of ouster. 2. The writs of *dum fuit infra aetatem*, and *dum fuit non compos mentis*, (*Ibid.* 192, 203) which lie for a person of full age, or one who hath recovered his understanding, after having (when under age or insane) aliened his lands; or for the heirs of such alienor. 3. The writs of *cui in vita*, and *cui ante divortium*, (*Ibid.* 193, 204) for a woman, when a widow or divorced, whose husband during the coverture (*cui in vita sua*, *vel cui ante divortium*, *ipse contradicere non potuit*) hath aliened her estate. 4. The writ *ad communem legem*, (*Ibid.* 207) for the reversioner after the alienation and death of the particular tenant for life. 5. The writs *in casu proviso* and *in consimili casu*, (*Ibid.* 205, 206) which lay not *ad communem legem*, but are given by stat. Glouc. 6 Edw. I, c. 7, and Westm. 2, 13 Edw. I, c. 24, for the reversioner after the alienation, but during the life, of the tenant in dower or other tenant for life. 6. The writ *ad terminum qui praterit*, (*Ibid.* 201) for the reversioner, when the possession is withheld by the lessee or a stranger after the determination of a lease for years. 7. The writ *contra matrimonii pralocuti* (*Ibid.* 206) for a woman who giveth land to a man in fee or for life, to the intent that he may marry her, and he doth not. And the like in case of other deforcements.

(8) Both these writs were abolished by the common law procedure act, 1860, and a writ of summons from the common pleas substituted.

ancient forms. And, indeed, I know not whether it is a greater credit to our laws to have such a provision contained in them, or not to have occasion, or at least very rarely, to use it.

In the times of our Saxon ancestors, the right of possession seems only to have been recoverable by writ of entry, (a) which was then usually brought in the county court. And it is to be observed, that the proceedings in these actions were not then so tedious when the courts were held, and process issued from and was returnable therein at the end of every three weeks, as they became after the conquest, when all causes were drawn into the king's courts, and process issued only from term to term: which was found exceedingly dilatory, being at least four times as slow as the other. And hence, a new remedy was invented in many cases to do justice to the people, and to determine the possession in the proper counties, and yet by the king's judges. This was the remedy by *assise*, which is called by statute Westm. 2, 13 Edw. I, c. 24, *festinum remedium*, in comparison with that by a writ of entry; it not admitting of many dilatory pleas and proceedings, to which other real actions are subject. (b)

2. The writ of *assise* is said to have been invented by Glanvil, chief justice to Henry the Second; (c) and, if so, it seems to owe its introduction to the parliament held at Northampton, in the twenty-second year of that prince's reign; when justices in eyre were appointed to go round the kingdom in order to take these assizes: and the assizes themselves (particularly those of *mort d'ancestor* and *novel disseisin*) were clearly pointed out and described. (d) [\*185] As a writ of entry \*is a real action (e) which *disproves* the title of the tenant by showing the unlawful commencement of his possession; so an assize is a real action, which *proves* the title of the demandant merely by showing his, or his ancestor's, possession; (f) and these two remedies are in all other respects so totally alike, that a judgment or recovery in one is a bar against the other; so that, when a man's possession is once established by either of these possessory actions, it can never be disturbed by the same antagonist in any other of them. The word *assize* is derived by Sir Edward Coke (g) from the Latin *assideo*, to sit together: and it signifies, originally, the jury who try the cause, and sit together for that purpose. By a figure it is now made to signify the court or jurisdiction, which summons this jury together by a commission of assize, or *ad assisas capiendas*; and hence the judicial assemblies held by the king's commission in every county, as well to take these writs of assize, as to try causes at *nisi prius*, are termed in common speech the *assizes*. By another somewhat similar figure, the name of assize is also applied to this action, for recovering possession of lands; for the reason, saith Littleton, (g) why such writs at the beginning were called assizes, was, for that in these writs the sheriff is ordered to summon a jury, or assize; which is not expressed in any other original writ. (h)

This remedy, by writ of assize, is only applicable to two species of injury by ouster, viz.: *abatement*, and a recent or *novel disseisin*. If the abatement happened upon the death of the demandant's father or mother, brother or sister, uncle or aunt, nephew or niece, the remedy is by an assize of *mort d'ancestor*, or the death of one's ancestor. This writ directs the sheriff to summon a jury or assize, who shall view the land in question, and recognize whether such ancestor was seized thereof on the day of his death, and whether the demandant be the next heir: (i) soon after which the judges came down by the king's

(a) Glfb. Ten. 42. (b) Booth, 262. (c) Mirror, c. 2, § 25.  
(d) § 9. *Si dominus feodi negat hæredibus defuncti saisinam ejusdem feodi, justitiarii domini regis faciant inde fieri, recognitionem per xii legales homines, qualem saisinam defunctus inde habuit, die qua fuit vivus et mortuus; et sicut recognitum fuerit, ita hæredibus ejus restituant.* § 10. *Justitiarii domini regis faciant fieri recognitionem de dissaisinis factis super assisam, a tempore quo dominus res venit in Angliam proxime post pacem factam inter ipsum et regem filium suum.* (Spelm. Cod. 330.)  
(e) Finch, L. 284. (f) 1 Inst. 153. (g) § 234. (h) Co. Litt. 159. (i) F. N. B. 195. Finch, L. 280.

(9) Writs of assize and entry are now abolished.



commission to take the recognition of assize: when, if \*these points are found in the affirmative, the law immediately transfers the possession [\*186] from the tenant to the demandant. If the abatement happened on the death of one's grandfather or grandmother, then an assize of *mort d'ancestor* no longer lies, but a writ of *ayle* or *de avo*: if on the death of the great-grandfather or great-grandmother, then a writ of *besayle*, or *de proavo*: but if it mounts one degree higher, to the *tresayle*, or grandfather's grandfather, or if the abatement happened upon the death of any collateral relation, other than those before-mentioned, the writ is called a writ of *cosinage*, or *de consanguineo*. (k) (10) And the same point shall be inquired of in all these actions *ancestral*, as in an assize of *mort d'ancestor*; they being of the very same nature: (l) though they differ in this point of form, that these *ancestral* writs (like all other writs of *præcipe*) expressly assert a title in the demandant (viz.: the seisin of the ancestor at his death and his own right of inheritance), the assize asserts nothing directly, but only prays an inquiry whether those points be so. (m) There is also another *ancestral* writ, denominated a *nuper obiit*, to establish an equal division of the land in question, where, on the death of an ancestor, who has several heirs, one enters and holds the others out of possession. (n) But a man is not allowed to have any of these actions *ancestral* for an abatement consequent on the death of any collateral relation, beyond the fourth degree; (o) though in the lineal ascent he may proceed *ad infinitum*. (p) For there must be some boundary; else the privilege would be universal, which is absurd; and therefore the law pays no regard to the possession of a collateral ancestor, who was no nearer than the fifth degree.

It was always held to be law, (q) that where lands were divisible in a man's last will by the custom of the place, there an assize of *mort d'ancestor* did not lie. For, where lands were so divisible, the right of possession could never be determined by a process, which inquired only of these two points, the seisin of the ancestor, and the heirship of the demandant. And hence it may be reasonable to conclude, that when the \*statute of wills, 32 Hen. VIII, c. 1, [\*187] made all socage lands divisible, an assize of *mort d'ancestor* no longer could be brought of lands held in socage; (r) and that now, since the statute 12 Car. II, c. 24 (which converts all tenures, a few only excepted, into free and common socage), no assize of *mort d'ancestor* can be brought of any lands in the kingdom, but that, in case of abatements, recourse must be properly had to the writs of entry.

An assize of *novel* (or recent) *disseisin* is an action of the same nature with the assize of *mort d'ancestor* before-mentioned, in that herein the demandant's possession must be shown. But it differs considerably in other points; particularly in that it recites a complaint by the demandant of the disseisin committed in terms of direct averment; whereupon the sheriff is commanded to re seize the land and all the chattels thereon, and keep the same in his custody till the arrival of the justices of assize (which in fact hath been usually omitted); (s) and in the mean time to summon a jury to view the premises, and make recognition of the assize before the justices. (t) At which time the tenant may plead either the general issues *nul tort*, *nul disseisin*, or any special plea. And if, upon the general issue, the recognitors find an actual seisin in the demandant, and his subsequent disseisin by the present tenant; he shall have judgment to recover his seisin, and damages for the injuries sustained: being the only case in which damages were recoverable in any possessory action at the common law; (u) the tenant being in all other cases allowed to retain the intermediate profits of the land, to enable him to perform the feudal services. But

(k) Finch. L. 255, 257.

(l) Stat. Westm. 2. 13 Edw. I, c. 30.

(m) 2 Inst. 399.

(n) F. N. B. 197. Finch. L. 393.

(o) Hale on F. N. B. 251.

(p) Fitz. Abr. tit. *cosinage*, 15.(q) Bracton. l. 4 *de assis. mortis antecessoris*, c. 13, § 8. F. N. B. 195.

(r) See 1 Leon. 267.

(s) Booth, 211. Bract. 4, l. 19, § 7.

(t) F. N. B. 177.

(u) Bract. 157. Stat. Marib. c. 16.

(10) All the writs mentioned were abolished by statute 3 and 4 Wm. IV, c. 27.

costs and damages were annexed to many other possessory actions by the statutes of Marlberge, 52 Hen. III, c. 16, and of Gloucester, 6 Edw. I, c. 1. And [\*188] \*to prevent frequent and vexatious disseisins, it is enacted by the statute of Merton, 20 Hen. III, c. 3, that if a person disseised recover seisin of the land again by assize of *novel disseisin*, and be again disseised of the same tenements by the same disseisor, he shall have a writ of *re-disseisin*; and if he recover therein, the re-disseisor shall be imprisoned; and by the statute of Marlberge, 52 Hen. III, c. 8, shall also pay a fine to the king: to which the statute Westm. 2, 13 Edw. I, c. 26, hath superadded double damages to the party aggrieved. In like manner, by the same statute of Merton, when any lands or tenements are recovered by assize of *mort d'ancestor*, or other jury, or any judgment of the court, if the party be afterwards disseised by the same person against whom judgment was obtained, he shall have a writ of *post-disseisin* against him; which subjects the post-disseisor to the same penalties as a re-disseisor. The reason of all which, as given by Sir Edward Coke, (w) is because such proceeding is a contempt of the king's courts, and in despite of the law; or, as Bracton more fully expresses it, (x) "*talis qui ita convictus fuerit, dupliciter delinquit contra regem: quia facit disseisinam et roberiam contra pacem suam; et etiam ausu temerario irrita facit ea, quæ in curia domini regis rite acta sunt: et propter duplex delictum merito sustinere debet poenam duplicatam.*"

In all these possessory actions there is a time of limitation settled, beyond which no man shall avail himself of the possession of himself or his ancestors, or take advantage of the wrongful possession of his adversary. For, if he be negligent for a long and unreasonable time, the law refuses afterwards to lend him any assistance, to recover the possession merely, both to punish his neglect (*nam leges vigilantibus, non dormientibus, subveniunt*), and also because it is presumed that the supposed wrongdoer has in such a length of time procured a legal title, otherwise he would sooner have been sued. This time of limitation by the statute of Merton, 20 Hen. III, c. 8, and Westm. 1, 3 Edw. I, c. 39, was successively dated from particular æras, viz.: from the return of King John from Ireland, and from the coronation, &c., of King Henry [\*189] Third. But this date of limitation continued so long unaltered, that it became indeed no limitation at all; it being above three hundred years from Henry the Third's coronation to the year 1540, when the present statute of limitations (y) was made. This, instead of limiting actions from the date of a particular event, as before, which in process of years grew absurd, took another and more direct course, which might endure forever: by limiting a certain period, as fifty years for lands, and the like period (z) for customary and prescriptive rents, suits and services (for there is no time of limitation upon rents created by deed, or reserved on a particular estate), (a) and enacting that no person should bring any possessory action, to recover possession thereof merely upon the seisin, or dispossession of his ancestors, beyond such certain period. (11) But this does not extend to services, which by common possibility may not happen to become due more than once in the lord's or tenant's life; as fealty, and the like. (b) And all writs, grounded upon the possession of the demandant himself, are directed to be sued out within thirty years after the disseisin complained of; for if it be of an older date, it can with no propriety be called a fresh, recent, or *novel disseisin*; which name Sir Edward Coke informs

(w) 2 Inst. 83, 84.

(x) L. 4, tr. 1. c. 49.

(y) 39 Hen. VIII, c. 2.

(z) So Berthelet's original edition of the statute, A. D. 1540; and Cay's, Pickering's, and Ruffhead's editions, examined with the record. Rastell's and other intermediate editions, which Sir Edward Coke (2 Inst. 95) and other subsequent writers have followed, make it only forty years for rents, &c.

(a) 8 Rep. 65.

(b) Co. Litt. 115.

(11) This is no longer the law; actions for the recovery of land or rent must now be brought within twenty years after the right accrues. Statute 3 and 4 Wm. IV, c. 27, s. 2

us was originally given to this proceeding, because the disseisin must have been since the last *eyre* or circuit of the justices, which happened once in seven years, otherwise the action was gone. (c) And we may observe, (d) that the limitation prescribed by Henry the Second at the first institution of the assize of *novel disseisin* was from his own return into England, after the peace made between him and the young king, his son; which was but the year before. (12)

What has been here observed may throw some light on the doctrine of *remitter*, which we spoke of in the second \*chapter of this book; and [\*190] which we may remember was where one who hath right to lands, but is out of possession, hath afterwards the freehold cast upon him by some subsequent defective title, and enters by virtue of that title. In this case the law remits him to his ancient and more certain right, and by an equitable fiction supposes him to have gained possession in consequence, and by virtue thereof: and this, because he cannot possibly obtain judgment at law to be restored to his prior right, since he is himself the tenant of the land, and therefore hath nobody against whom to bring his action. This determination of the law might seem superfluous to a hasty observer; who perhaps would imagine, that since the tenant hath now both the right and also the possession, it little signifies by what means such possession shall be said to be gained. But the wisdom of our ancient law determined nothing in vain. As the tenant's possession was gained by a defective title, it was liable to be overturned by showing that defect, in a writ of entry; and then he must have been driven to his writ of right, to recover his just inheritance; which would have been doubly hard, because during the time he was himself tenant, he could not establish his prior title by any possessory action. The law therefore remits him to his prior title, or puts him in the same condition as if he had recovered the land by writ of entry. Without the remitter, he would have had *jus, et seisinam* separate; a good right, but a bad possession; now, by the remitter, he hath the most perfect of all titles, *juris et seisinæ conjunctionem*.

III. By these several possessory remedies the right of possession may be restored to him that is unjustly deprived thereof. But the right of *possession* (though it carries with it a strong presumption) is not always conclusive evidence of the right of *property*, which may still subsist in another man. For, as \*one man may have the *possession*, and another the *right of possession*, which is recovered by these possessory actions; so one man may [\*191] have the *right of possession*, and so not be liable to eviction by any possessory action, and another may have the *right of property*, which cannot be otherwise asserted than by the great and final remedy of a writ of right, or such correspondent writs as are in the nature of a writ of right. (13)

This happens principally in four cases: 1. Upon discontinuance by the alienation of tenant in tail: whereby he who had the right of possession hath transferred it to the alienee; and therefore his issue, or those in remainder or reversion, shall not be allowed to recover by virtue of that possession, which the tenant hath so voluntarily transferred. 2, 3. In case of judgment given against either party, whether by his own default, or upon trial of the merits, in any possessory action; for such judgment, if obtained by him who hath not the true ownership, is held to be a species of *deforcement*; which, however, binds the right of possession, and suffers it not to be ever again disputed, unless the right of property be also proved. In case the demandant, who claims the right is barred from these possessory actions by length of time and the statute of limitations before-mentioned: for an undisturbed possession for fifty years ought not to be devested by any thing, but a very clear proof of the absolute right

(c) 1 Inst. 153. Booth, 210.

(d) See page 184.

(12) For the present limitations to actions, see note 1, book 2, p. 264.

(13) Now that the action of ejectment, which is founded upon a right of possession, is the only mode of recovering land, this distinction is in effect destroyed.

of property. In these four cases the law applies the remedial instrument of either the writ of right itself, or such other writs as are said to be of the same nature.

1. And first, upon an alienation by tenant in tail, whereby the estate-tail is *discontinued*, and the remainder or reversion is by failure of the particular estate displaced, and turned into a mere right, the remedy is by action of *formedon* (*secundum formam doni*), which is in the nature of a writ of right, (e) and is the highest action that tenant in tail can have. (f) For he cannot have an absolute writ of right, which is confined only to such as claim in fee-simple: and for that reason this writ of *formedon* was granted him by the statute *de donis* or \*Westm. 2, 13 Edw. I, c. 1, which is therefore emphatically [\*192] called his writ of right. (g) This writ is distinguished into three species: a *formedon* in the *descender*, in the *remainder*, and in the *reverter*. A writ of *formedon* in the *descender* lieth, where a gift in tail is made, and the tenant in tail alienes the lands entailed, or is disseised of them, and dies; in this case the heir in tail shall have this writ of *formedon* in the *descender*, to recover these lands so given in tail against him who is then the actual tenant of the freehold. (h) In which action the demandant is bound to state the manner and form of the gift in tail, and to prove himself heir *secundum formam doni*.

A *formedon* in the *remainder* lieth, where a man giveth lands to another for life or in tail, with remainder to a third person in tail or in fee, and he who hath the particular estate dieth without issue inheritable, and a stranger intrudes upon him in remainder and keeps him out of possession. (i) In this case the remainder-man shall have his writ of *formedon* in the *remainder*, wherein the whole form of the gift is stated, and the happening of the event upon which the remainder depended. This writ is not given in express words by the statute *de donis*; but is founded upon the equity of the statute, and upon this maxim in law, that, if any one hath a right to the land, he ought also to have an action to recover it. A *formedon* in the *reverter* lieth, where there is a gift in tail, and afterwards by the death of the donee or his heirs without issue of his body the reversion falls in upon the donor, his heirs or assigns: in such case the reversioner shall have this writ to recover the lands, wherein he shall suggest the gift, his own title to the reversion minutely derived from the donor, and the failure of issue upon which his reversion takes place. (k) This lay at common law, before the statute *de donis*, if the donee aliened before he had performed the condition of the gift, by having issue, and afterwards died without any. (l) The time of limitation in a *formedon* by statute [\*193] 21 Jac. I, c. 16, is twenty years; within \*which space of time after his title accrues, the demandant must bring his action, or else he is forever barred.

2. In the second case; if the owners of a particular estate, as for life, in dower, by the curtesy, or in fee-tail, are barred of the right of possession by a recovery had against them through their default or non-appearance in a possessory action, they were absolutely without any remedy at the common law: as a writ of right does not lie for any but such as claim to be tenants of the fee-simple. Therefore the statute Westm. 2, 13 Edw. I, c. 4, gives a new writ for such persons, after their lands have been so recovered against them by default, called a *quod ei deforceat*; which, though not strictly a writ of right, so far partakes of the nature of one, as that it will restore the right to him who has been thus unwarily deforced by his own default. (m) But, in case the recovery were not had by his own default, but upon defence in the inferior possessory action, this still remains final with regard to these particular estates, as at the common law: and hence it is, that a common recovery (on a writ of entry in the *post*) had, not by default of the tenant himself, but (after his defence made and voucher of a third person to warranty) by default of such vouchee, is now the usual bar to cut off an estate-tail. (n)

(e) Finch, L. 367.

(f) Co. Litt. 326.

(g) F. N. B. 355.

(h) *Ibid.* 311, 312.(i) *Ibid.* 322.(k) *Ibid.* 19. 28 Rep. 63.

(l) Finch, L. 353.

(m) F. N. B. 153.

(n) See book II, ch. 21.

3, 4. Thirdly, in case the right of possession be barred by a recovery upon the merits in a possessory action, or lastly by the statute of limitations, a claimant in fee-simple may have a *mere writ of right*; which is in its nature the highest writ in the law, (o) and lieth only of an estate in fee-simple, and not for him who hath a less estate. This writ lies *concurrently* with all other real actions, in which an estate of fee-simple may be recovered: and it also lies *after* them, being as it were an appeal to the mere right, when judgment hath been had as to the possession in an inferior possessory \*action. (p) But though a [\*194] writ of right may be brought, where the demandant is entitled to the possession, yet it rarely is advisable to be brought in such cases; as a more expeditious and easy remedy is had, without meddling with the property, by proving the demandant's own, or his ancestor's, possession, and their illegal ouster, in one of the possessory actions. But, in case the right of possession be lost by length of time, or by judgment against the true owner in one of these inferior suits, there is no other choice: this is then the only remedy that can be had; and it is of so forcible a nature, that it overcomes all obstacles, and clears all objections that may have arisen to cloud and obscure the title. And, after issue once joined in a writ of right, the judgment is absolutely final; so that a recovery had in this action may be pleaded in bar of any other claim or demand. (q)

The pure, proper, or mere writ of right lies only, we have said, to recover lands in fee-simple, unjustly withheld from the true proprietor. But there are also some other writs which are said to be *in the nature of* a writ of right, because their process and proceedings do mostly (though not entirely) agree with the writ of right: but in some of them the fee-simple is not demanded; and in others not land, but some incorporeal hereditament. Some of these have been already mentioned, as the writ of *right of dower*, of *formedon*, &c., and the others will hereafter be taken notice of under their proper divisions. Nor is the mere writ of right alone, or always, applicable to every case of a claim of lands in fee-simple: for if the lord's tenant in fee-simple dies without heir whereby an escheat accrues, the lord shall have a writ of *escheat*, (r) which is in the nature of a writ of right. (s) And if one of two or more coparceners deforces the other, by usurping the sole possession, the party aggrieved shall have a writ of right, *de rationabili parte*, (t) which may be grounded on the \*seisin of the ancestor at any time during his life; whereas, in a *nuper obiit* (which is a possessory remedy) (u) he must be seized at the time [\*195] of his death. But, waiving these and other minute distinctions, let us now return to the general writ of right.

This writ ought to be first brought in the court-baron (v) of the lord, of whom the lands are holden; and then it is open or *patent*: but if he holds no court, or hath waived his right, *remisit curiam suam*, it may be brought in the king's courts by writ of *præcipe* originally; (x) and then it is a writ of right *close*; (y) being directed to the sheriff and not the lord. (z) Also when one of the king's immediate tenants *in capite* is deforced, his writ of right is called a writ of *præcipe in capite* (the improper use of which, as well as of the former *præcipe quia dominus remisit curiam*, so as to oust the lord of his jurisdiction, is restrained by *magna carta*), (a) and being directed to the sheriff, and originally returnable in the king's courts, is also a writ of right *close*. (b) There is likewise a little writ of *right close, secundum consuetudinem manerii*, which lies for the king's tenants in ancient demesne, (c) and others of a similar nature, (d) to try the right of their lands and tenements in the court of the lord exclusively. (e) But the writ of *right patent* itself may also at any time

(o) F. N. B. 1. (p) *Ibid.* 1, 8. (q) *Ibid.* 8. Co. Litt. 158.  
 (r) F. N. B. 143. (s) Booth, 135. (t) F. N. B. 9. (u) See page 186.  
 (v) Append. No. I § 1. (x) F. N. B. 2. Finch, L. 318. (y) Booth, 91.  
 (z) Append. No. I § 4. (a) C. 34. (b) F. N. B. 8. (c) See book II, ch. 8.  
 (d) Kitchen, tit. *copyhold*.  
 (e) Bracton, l. 1. c. 11, l. 4. fr. 1. c. 9 and tr. 2, c. 12, § 2. Old Tenur. t. *tenier en socage*. Old N. B. t. *garde*, and t. *brief de recte clausa*. F. N. B. 11.

be removed into the county court, by writ of *tolt*, (*f*) and from thence into the king's courts by writ of *pone* (*g*) or *recordari facias*, at the suggestion of either party that there is a delay or defect of justice. (*h*)

In the progress of this action, (*i*) the demandant must allege some seisin of the lands and tenements in himself, or else in some person under whom he claims, and then derive the right \*from the person so seised to himself; [\*196] to which the tenant may answer by denying the demandant's right, and averring that he has more right to hold the lands than the demandant has to demand them: and this right of the tenant being shown, it then puts the demandant upon the proof of his title: in which, if he fails, or if the tenant hath shown a better, the demandant and his heirs are perpetually barred of their claim; but if he can make it appear that his right is superior to the tenant's, he shall recover the land against the tenant and his heirs forever. But even this writ of right, however superior to any other, cannot be sued out at any distance of time.

For by the ancient law no seisin could be alleged by the demandant, but from the time of Henry the First; (*k*) by the statute of Merton, 20 Hen. III, c. 8, from the time of Henry the Second; by the statute of Westm. 1, 3 Edward I, c. 39, from the time of Richard the First; and now, by statute 32 Henry VIII, c. 2, seisin in a writ of right shall be within sixty years. So that the possession of lands in fee-simple uninterruptedly, for threescore years, is at present a sufficient title against all the world; and cannot be impeached by any dormant claim whatsoever.

I have now gone through the several species of injury by ouster and dispossession of the freehold, with the remedies applicable to each. In considering which I have been unavoidably led to touch upon much obsolete and abstruse learning, as it lies intermixed with, and alone can explain the reason of, those parts of the law which are now more generally in use. For, without contemplating the whole fabric together, it is impossible to form any clear idea of the meaning and connection of those disjointed parts which still form a considerable branch of the modern law; such as the doctrine of entries and remitter, the levying of fines, and the suffering of common recoveries. Neither indeed is any considerable part of that, which I have selected in this chapter [\*197] from among the venerable monuments of our ancestors, so \*absolutely antiquated as to be out of *force*, though the whole is certainly out of *use*: there being but a very few instances for more than a century past of prosecuting any real action for land by writ of *entry*, *assize*, *formedon*, writ of *right*, or otherwise. The forms are indeed preserved in the practice of common recoveries; but they are forms and nothing else; for which the very clerks that pass them are seldom capable to assign the reason. But the title of lands is now usually tried in actions of *ejectment* or *trespass*; of which in the following chapters. (14)

(*f*) Append. No. I, § 2.  
(*g*) Append. No. I, § 3.

(*g*) *Ibid.* § 3.  
(*h*) Glanv. l. 2. c. 2.    (*i*) F. N. B. 2, 4.  
Co. Litt. 114.

(14) Real and mixed actions, except ejectment, are now almost universally abolished or become obsolete in the United States, and ejectment is the usual remedy to try title to lands. The proceedings in that action have also by statute been divested of all useless forms and made perfectly simple

## CHAPTER XI. OF DISPOSSESSION, OR OUSTER OF CHATTELS REAL.

HAVING in the preceding chapter considered with some attention the several species of injury by dispossession or ouster of the *freehold*, together with the regular and well-connected scheme of remedies by actions real, which are given to the subject by the common law, either to recover the possession only, or else to recover at once the possession, and also to establish the right of property; the method which I there marked out leads me next to consider injuries by ouster of *chattels real*; that is, by amoving the possession of the tenant from an estate by statute-merchant, statute-staple, recognizance in the nature of it, or *elegit*; or from an estate for years.

I. Ouster, or amotion of possession, from estates held by statute, recognizance, or *elegit*, is only liable to happen by a species of disseisin, or turning out of the legal proprietor, before his estate is determined by raising the sum for which it is given him in pledge. And for such ouster, though the estate be merely a chattel interest, the owner shall have the same remedy as for an injury to a freehold; viz., by assize of *novel disseisin*. (a)(1) But this depends upon the several statutes, which \*create these respective interests, (b) and which expressly provide and allow this remedy in case of dispos- [\*199] session. Upon which account it is that Sir Edward Coke observes, (c) that these tenants are said to hold their estates *ut liberum tenementum*, until their debts are paid: because by the statutes they shall have an assize, as tenants of the freehold shall have; and in that respect they have the similitude of a freehold. (d)

II. As for *ouster*, or amotion of possession from an *estate for years*; this happens only by a like kind of disseisin, ejection, or turning out, of the tenant from the occupation of the land during the continuance of his term. For this injury the law has provided him with two remedies, according to the circumstances and situation of the wrongdoer: the writ of *ejectione firmæ*; which lies against any one, the lessor, reversioner, remainder-man, or any stranger who is himself the wrongdoer and has committed the injury complained of: and the writ of *quare ejecit infra terminum*; which lies not against the wrongdoer or ejector himself, but his feoffee or other person claiming under him. These are mixed actions, somewhat between real and personal; for therein are two things recovered, as well restitution of the term of years, as damages for the ouster or wrong.

1. A writ then of *ejectione firmæ*, or action of trespass in *ejectment*, lieth where lands or tenements are let for a term of years; and afterwards the lessor, reversioner, remainder-man, or any stranger, doth eject or oust the lessee of his term. (e) In this case he shall have his writ of *ejection* to call the defendant to answer for entering on the lands so demised to the plaintiff for a term that is not yet expired, and ejecting him. (f) And by this writ the plaintiff shall recover back his term, or the remainder of it, with damages.

\*Since the disuse of real actions, this mixed proceeding is become the common method of trying the title to lands or tenements. It may not [\*200] therefore be improper to delineate, with some degree of minuteness, its history, the manner of its process, and the principles whereon it is grounded.

We have before seen, (g) that the writ of covenant, for breach of the con-

(a) F. N. B. 178.

(b) Stat. Westm. 2. 13 Edw. I. c. 18. Stat. de mercatoribus. 27 Edw. III. c. 2. Stat. 23 Hen. VIII. c. 4, § 9.

(c) 1 Inst. 43.

(d) See book II. ch. 10.

(e) F. N. B. 220.

(f) See Appendix, No. II, § 1.

(g) See page 157.

(1) The assize of *novel disseisin* is now abolished, and ejectment is the present remedy.

tract contained in the lease for years, was anciently the only specific remedy for recovering against the lessor a term from which he had ejected his lessee, together with damages for the ouster. But if the lessee was ejected by a stranger, claiming under a title superior (*h*) to that of the lessor, or by a grantee of the reversion (who might at any time by a common recovery have destroyed the term), (*i*) though the lessee might still maintain an action of covenant against the lessor, for non-performance of his contract or lease, yet he could not by any means recover the term itself. If the ouster was committed by a mere stranger, without any title to the land, the lessor might indeed by a real action recover possession of the freehold, but the lessee had no other remedy against the ejector but in damages, by a writ of *ejectione firmæ*, for the trespass committed in ejecting him from his farm. (*k*) But afterwards, when the courts of equity began to oblige the ejector to make a specific restitution of the land to the party immediately injured, the courts of law also adopted the same method of doing complete justice; and, in the prosecution of a writ of ejectment, introduced a species of remedy not warranted by the original writ nor prayed by the declaration (which are \*calculated for [\*201] damages merely, and are silent as to any restitution, viz.: a judgment to recover the term, and a writ of possession thereupon. (*l*) This method seems to have been settled as early as the reign of Edward IV; (*m*) though it hath been said (*n*) to have first begun under Henry VII, because it probably was then first applied to its present principal use, that of trying the title to the land. (*o*)

The better to apprehend the contrivance, whereby this end is effected, we must recollect that the remedy by ejectment is, in its original, an action brought by one who hath a lease for years, to repair the injury done him by dispossession. In order therefore to convert it into a method of trying titles to the freehold, it is first necessary that the claimant do take possession of the lands, to empower him to constitute a lessee for years, that may be capable of receiving this injury of dispossession. For it would be an offence, called in our law *maintenance* (of which in the next book), to convey a title to another, when the grantor is not in possession of the land; and indeed it was doubted at first, whether this occasional possession, taken merely for the purpose of conveying the title, excused the lessor from the legal guilt of maintenance. (*o*) When, therefore, a person, who hath right of entry into lands, determines to acquire that possession, which is wrongfully withheld by the present tenant, he makes (as by the law he may) a formal entry on the premises; and being so in the possession of the soil, he there, upon the land, seals and delivers a lease for years to some third person or lessee: and, having thus given him entry, leaves him in possession of the premises. This lessee is to stay upon the land, till the prior tenant, or he who had the previous possession, enters thereon afresh and ousts him; or till some other person (either by accident or by [\*202] agreement beforehand) comes upon the land, and turns him \*out or ejects him. For this injury the lessee is entitled to his action of ejectment against the tenant, or his *casual ejector*, whichever it was that ousted him, to recover back his term and damages. But where this action is brought

(A) F. N. B. 145.

(i) See book II, ch. 9.

(k) P. 6. Rto. II. *Ejectione firmæ* n'est que un action de trespass en son nature, et le plaintiff ne recouvrera son terme que est a venir, nient plus que en trespass home recouvrera damages pur trespass nient fait, mes a feuer; mes il convient a suer par action de covenant al comen law a recouvrer son terme: quod tota curia concessit. Et per Belknap, la comen ley est, lou home est ouste de son terme par estranger, il avera *ejectione firmæ* versus cesty que luy ouste; et sil soit ouste par son lessor, brieve de covenant; et si par lessee ou grantee de reversion brieve de covenant versus son lessor, et countera especial count, &c. (Fitz. Abr. t. eject. firm. 3.) See Bract. l. 4, tr. 1, c. 38.

(l) See Append. No. II. § props fin.

(m) 7 Edw. IV, 6. Per Fairfax: si home port *ejectione firmæ*, le plaintiff recouvrera son terme qui est arere, si bien come in quare *ejectit infra terminum*; et, si nul soit arere, donques tout in damages. (Bro. Abr. t. quare *ejectit infra terminum*, 6.)

(n) F. N. B. 220.

(o) 1 Ch. Rep. Append. 29.

(2) See on this subject the note to Doe d. Poole v. Errington, 1 A and E. 750.



against such a casual ejector as is before mentioned, and not against the very tenant in possession, the court will not suffer the tenant to lose his possession without any opportunity to defend it. Wherefore it is a standing rule, that no plaintiff shall proceed in ejectment to recover lands against a casual ejector, without notice given to the tenant in possession (if any there be), and making him a defendant if he pleases. And, in order to maintain the action, the plaintiff must, in case of any defence, make out four points before the court; viz., *title*, *lease*, *entry*, and *ouster*. First, he must show a good *title* in his lessor, which brings the matter of right entirely before the court, then, that the lessor, being seized and possessed by virtue of such title, did make him the *lease* for the present term; thirdly, that he, the lessee or plaintiff, did *enter* or take possession in consequence of such lease; and then, lastly, that the defendant *ousted* or ejected him. Whereupon he shall have judgment to recover his term and damages; and shall, in consequence, have a *writ of possession*, which the sheriff is to execute by delivering him the undisturbed and peaceable possession of his term.

This is the regular method of bringing an action of ejectment, in which the title of the lessor comes collaterally and incidentally before the court, in order to show the injury done to the lessee by this ouster. This method must be still continued in due form and strictness, save only as to the notice to the tenant, whenever the possession is vacant, or there is no actual occupant of the premises; and also in some other cases. But, as much trouble and formality were found to attend the actual making of the *lease*, *entry*, and *ouster*, a new and more easy method of trying titles by writ of ejectment, where there is any actual tenant or occupier of the premises in dispute, was invented somewhat more than a century ago, by the lord chief justice Rolle, (*p*) who then sat in the court of *upper* bench; so called during the exile of King Charles the \*Second. This new method entirely depends upon a string of legal fictions; no actual lease is made, no actual entry by the plaintiff, no [\*203] actual ouster by the defendant; but all are merely ideal, for the sole purpose of trying the title. To this end, in the proceedings (*q*) a lease for a term of years is stated to have been made, by him who claims title, to the plaintiff who brings the action, as by John Rogers to Richard Smith, which plaintiff ought to be some real person, and not merely an ideal fictitious one who hath no existence, as is frequently though unwarrantably practised; (*r*) it is also stated that Smith, the lessee, entered; and that the defendant William Stiles, who is called the *casual ejector*, ousted him; for which ouster he brings this action. As soon as this action is brought, and the complaint fully stated in the declaration, (*s*) Stiles, the casual ejector, or defendant, sends a written notice to the tenant in possession of the lands, as George Saunders, informing him of the action brought by Richard Smith, and transmitting him a copy of the declaration; withal assuring him that he, Stiles the defendant, has no title at all to the premises, and shall make no defence; and therefore advising the tenant to appear in court and defend his own title: otherwise he, the casual ejector, will suffer judgment to be had against him; and thereby the actual tenant, Saunders, will inevitably be turned out of possession. (*t*) On receipt of this friendly caution, if the tenant in possession does not within a limited time apply to the court to be admitted a defendant in the stead of Stiles, he is supposed to have no right at all; and upon judgment being had against Stiles the casual ejector, Saunders the real tenant will be turned out of possession by the sheriff.

But, if the tenant in possession applies to be made a defendant, it is allowed him upon this condition; that he enter into a rule of court (*u*) to confess, at the trial of the cause, three of the four requisites for the maintenance of the plaintiff's action; viz.: the *lease* of Rogers, the lessor, the *entry* of Smith.

(*p*) Styl. Pract. Reg. 106 (edit. 1857.)  
(*q*) Append. No. II, § 2. (*t*) *Ibid.*

(*r*) See Append. No. II, §§ 1, 2.  
(*u*) *Ibid.* § 2.

(*s*) 4 Mod. 302.

[\*204] \*the plaintiff, and his *ouster* by Saunders himself, now made the defendant instead of Stiles: which requisites being wholly fictitious should the defendant put the plaintiff to prove them, he must of course be nonsuited for want of evidence; but by such stipulated confession of *lease, entry, and ouster*, the trial will now stand upon the merits of the *title* only. This done, the declaration is altered by inserting the name of George Saunders instead of William Stiles, and the cause goes down to trial under the name of Smith, (the plaintiff), on the demise of Rogers, (the lessor), against Saunders, the new defendant. And therein the lessor of the plaintiff is bound to make out a clear title, otherwise his fictitious lessee cannot obtain judgment to have possession of the land for the term supposed to be granted. But, if the lessor makes out his title in a satisfactory manner, then judgment and a writ of possession shall go for Richard Smith, the nominal plaintiff, who by this trial has proved the right of John Rogers, his supposed lessor. Yet, to prevent fraudulent recoveries of the possession, by collusion with the tenant of the land, all tenants are obliged by statute 11 Geo. II, c. 19, on pain of forfeiting three years' rent, to give notice to their landlords, when served with any declaration in ejectment: and any landlord may by leave of the court be made a co-defendant to the action, in case the tenant himself appears to it; or, if he makes default, though judgment must be then signed against the casual ejector, yet execution shall be stayed, in case the landlord applies to be made a defendant, and enters into the common rule; a right, which indeed the landlord had long before the provision of this statute; (v) in like manner as (previous to the statute of Westm. 2, c. 3) if in a real action the tenant of the freehold made default, the remainder-man or reversioner had a right to come in and defend the possession; lest, if judgment were had against the tenant, the estate of those behind should be turned to a naked right. (w) But, if the new defendants, whether landlord, or tenant, or both, after entering into the common rule, fail to appear on the trial, and to confess lease, entry, and ouster, the plaintiff, Smith, must indeed be there nonsuited, for want of proving those requisites; but judgment will in the end be entered against the casual ejector Stiles; for the condition on which Saunders, or his landlord, was admitted a [\*205] defendant is broken, and, therefore, the plaintiff is put again in the \*same situation as if he never had appeared at all; the consequence of which (we have seen) would have been, that judgment would have been entered for the plaintiff, and the sheriff, by virtue of a writ for that purpose, would have turned out Saunders, and delivered possession to Smith. The same process, therefore, as would have been had, provided no conditional rule had been ever made, must now be pursued as soon as the condition is broken. (8)

The damages recovered in these actions, though formerly their only intent, are now usually (since the title has been considered as the principal question)

(v) *Styl. Prac. Reg.* 108, 111, 255. 7 *Mod.* 70. *Salk.* 267. *Burr.* 1301. (w) *Bracton*, l. 5, tr. 4, c. 10, § 14.

(8) The proceedings for the recovery of land are now in England as simple as in any other case.

In the United States ejectment is now generally commenced by filing declaration or complaint against the party in possession, setting forth, in general terms, that the plaintiff is entitled to the possession of the premises, describing the same, and that he claims the same in fee-simple (or otherwise, as the case may be), and that the defendant unlawfully withholds the same. A copy of this declaration or complaint is served on the defendant, and unless he pleads or answers to it within the time prescribed by statute or rule of court, judgment may pass against him by default. In some states parties not in possession, but who claim rights in the premises, are allowed to be made co-defendants, and in others, ejectment may be brought to try conflicting rights when the premises are not occupied at all. In general, means are prescribed by which the defeated party in the action can have a second trial as of right. If the plaintiff succeeds, he is allowed to have damages assessed by a proceeding in the same suit.

And in many of the states statutes will be found allowing the defendant, who has been in possession claiming title, to recover of the successful plaintiff the value of his improvements or "betterments" in certain classes of cases.

very small and inadequate; amounting commonly to one shilling, or some other trivial sum. In order, therefore, to complete the remedy, when the possession has been long detained from him that had the right to it, an action of trespass also lies, after a recovery in ejectment, to recover the mesne profits which the tenant in possession has wrongfully received. Which action may be brought in the name of either the nominal plaintiff in the ejectment, or his lessor, against the tenant in possession: whether he be made party to the ejectment, or suffers judgment to go by default. (x) In this case the judgment in ejectment is conclusive evidence against the defendant, for all profits which have accrued since the date of the demise stated in the former declaration of the plaintiff; but if the plaintiff sues for any antecedent profits, the defendant may make a new defense.

Such is the modern way of obliquely bringing in question the title to lands and tenements, in order to try it in this collateral manner; a method which is now universally adopted in almost every case. It is founded on the same principle as the ancient writs of assize, being calculated to try the mere *possessory* title to an estate; and hath succeeded to those real actions, as being infinitely more convenient for attaining the end of justice; because the form of the proceeding being entirely fictitious, it is wholly in the power of the court to direct the application of that fiction, so as to prevent fraud and chicane, and eviscerate the very truth of the title. The writ of ejectment and its nominal parties (as was resolved by all the \*judges) (y) are “judicially to be considered as the fictitious form of an action, really brought [\*206] by the lessor of the plaintiff against the tenant in possession: invented, under the control and power of the court, for the advancement of justice in many respects; and to force the parties to go to trial on the merits, without being entangled in the nicety of pleadings on either side.”

But a writ of ejectment is not an adequate means to try the title of all estates; for on those things whereon an entry cannot in fact be made, no entry shall be supposed by any fiction of the parties. Therefore an ejectment will not lie of an advowson, a rent, a common, or other incorporeal hereditament: (z) except for tithes in the hands of lay appropriators, by the express purview of statute 32 Hen. VIII, c. 7, which doctrine hath since been extended by analogy to tithes in the hands of the clergy: (a) nor will it lie in such cases, where the entry of him that hath right is taken away by descent, discontinuance, twenty years' dispossession, or otherwise.

This action of ejectment is, however, rendered a very easy and expeditious remedy to landlords whose tenants are in arrear, by statute 4 Geo. II, c. 28, which enacts that every landlord, who hath by his lease a right of re-entry in case of non-payment of rent, when half a year's rent is due, and no sufficient distress is to be had, may serve a declaration in ejectment on his tenant, or fix the same upon some notorious part of the premises, which shall be valid, without any formal re-entry or previous demand of rent. And a recovery in such ejectment shall be final and conclusive, both in law and equity, unless the rent and all costs be paid or tendered within six calendar months afterwards.

2. The writ of *quare ejecit infra terminum* lieth, by the ancient law, where the wrongdoer or ejector is not himself in \*possession of the lands, but [\*207] another who claims under him. As where a man leaseth lands to another for years, and, after, the lessor or reversioner entereth, and maketh a feoffment in fee, or for life, of the same lands to a stranger: now the lessee cannot bring a writ of *ejectiones firmæ* or ejectment against the feoffee: because he did not eject him, but the reversioner; neither can he have any such action to recover his term against the reversioner, who did oust him; because he is not now in possession. And upon that account this writ was devised, upon the equity of the statute Westm. 2, c. 24, as in a case where no adequate

(x) Burr. 668.

(y) Mich. 22, Geo. II. Burr. 668.

(z) Brownl. 129. Cro. Car. 498. Stra. 54.

(a) Cro. Car. 301. 2 Lord Raym. 799.

remedy was already provided. (b) And the action is brought against the feoffee for deforcing, or keeping out, the original lessee, during the continuance of his term; and herein, as in the ejectment, the plaintiff shall recover so much of the term as remains; and also shall have actual damages for that portion of it, whereof he has been unjustly deprived. But since the introduction of fictitious ousters, whereby the title may be tried against any tenant in possession (by what means soever he acquired it), and the subsequent recovery of damages by action of trespass for mesne profits, this action is fallen into disuse. (4)

## CHAPTER XII.

### OF TRESPASS.

In the two preceding chapters we have considered such injuries to real property, as consisted in an ouster, or amotion of the possession. Those which remain to be discussed are such as may be offered to a man's real property without any amotion from it.

The second species, therefore, of real injuries, or wrongs that affect a man's lands, tenements, or hereditaments, is that of *trespass*. Trespass in its largest and most extensive sense, signifies any transgression or offence against the law of nature, of society, or of the country in which we live; whether it relates to a man's person, or his property. Therefore beating another is a trespass; for which (as we have formerly seen) an action of trespass *vi et armis* in assault and battery will lie; taking or detaining a man's goods are respectively trespasses; for which an action of trespass *vi et armis*, or on the case in trover and conversion, is given by the law: so also non-performance of promises or undertakings is a trespass, upon which an action of trespass on the case in *assumpsit* is grounded: and in general, any misfeasance, or act of one man whereby another is injuriously treated or damaged, is a transgression or trespass in its largest sense; for which we have already seen (a) that whenever the act itself is directly and immediately injurious to the person or property of another [\*209] \*and therefore necessarily accompanied with some force, an action of trespass *vi et armis* will lie; but, if the injury is only consequential, a special action of trespass on the case may be brought.

But in the limited and confined sense in which we are at present to consider it, it signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property. For the right of *meum* and *tuum*, or property in lands, being once established, it follows as a necessary consequence, that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil; every entry therefore thereon, without the owner's leave, and especially if contrary to his express order, is a trespass or transgression. The Roman laws seem to have made a direct prohibition necessary, in order to constitute this injury; "*qui alienum fundum ingreditur, potest a domino, si is prœviderit, prohiberi ne ingreditur.*" (b) But the law of England, justly considering that much inconvenience may happen to the owner, before he has an opportunity to forbid the entry, has carried the point much farther, and has treated every entry upon another's lands (unless by the owner's leave, or in some very particular

(b) F. N. B. 198.

(a) See page 128.

(b) Inst. 2, 1, 12.

(4) It was abolished by statute 3 and 4 Wm. IV, c. 27, s. 36.

cases), as an injury or wrong, for satisfaction of which an action of trespass will lie; but determines the *quantum* of that satisfaction, by considering how far the offence was wilful or inadvertent, and by estimating the value of the actual damage sustained.

Every unwarrantable entry on another's soil the law entitles a trespasser by *breaking his close*: the words of the writ of trespass commanding the defendant to show cause *quare clausum querentis fregit*. For every man's land is, in the eye of the law, enclosed and set apart from his neighbor's: and that either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal, invisible boundary \*existing only in the contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other; for, if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, viz.: the treading down and bruising his herbage. (c)

One must have a property (either absolute or temporary) in the soil, and actual possession by entry, to be able to maintain an action of trespass; or, at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land. (d) (1) Thus, if a meadow be divided annually among the parishioners by lot, then after each person's several portion is allotted, they may be respectively capable of maintaining an action for the breach of their several closes: (e) for they have an exclusive interest and freehold therein for the time. But before entry and actual possession, one cannot maintain an action of trespass, though he hath the freehold in law. (f) And therefore an heir, before entry, cannot have this action against an abator; though a disseisee might have it against the disseisor, for the injury done by the disseisin itself, at which time the plaintiff was seized of the land: but he cannot have it for any act done after the disseisin, until he hath gained possession by re-entry, and then he may well maintain it for the intermediate damage done; for after his re-entry the law, by a kind of *jus postliminii*, supposes the freehold to have all along continued in him. (g) Neither, by the common law, in case of an intrusion or forcement, could the party kept out of possession sue the wrongdoer by a mode of redress which was calculated merely for injuries committed against the land while in the possession of the owner. But now by the statute 6 Anne, c. 18, if a guardian or trustee for any infant, a husband seized *jure uxoris*, or a person having any estate or interest determinable upon a life or lives, shall, after the \*determination of their respective interests, hold over and continue in the possession of lands or tenements, without the consent of the person entitled thereto, they are adjudged to be trespassers; and any reversioner or remainder-man expectant on any life-estate, may once in every year, by motion to the court of chancery, procure the *cestuy que vie* to be produced by the tenant to the land, or may enter thereon in case of his refusal or wilful neglect. And by the statutes of 4 Geo. II, c. 28, and 11 Geo. II, c. 19, in case, after the determination of any term for life, lives, or years,

(c) F. N. B. 87, 88.  
(f) 2 Roll. Abr. 568.

(d) Dyer, 235. 2 Roll. Abr. 549.  
(g) 11 Rep. 5.

(e) Cro. Eliz. 431.

(1) To entitle one to maintain trespass he must have possession: *Mather v. Ministers, &c.*; 3 S. and R., 509; *Wheeler v. Hotchkiss*, 10 Conn., 225; unless the lands are wild or vacant, in which case the party having title has sufficient constructive possession for the purposes of this suit. *Goodrich v. Hathaway*, 1 Vt., 485; *Van Rensselaer v. Van Rensselaer*, 9 Johns., 377. See *Gardner v. Hart*, 1 N. Y., 528. In other cases it is not necessary for the plaintiff to show title; but every unwarrantable entry upon a peaceable possession is a trespass. *Palmer v. Aldridge*, 16 Barb., 181; *Wells v. Howell*, 19 Johns., 385; *Brown v. McCloud*, 3 Head, 280. And one who uses the highway for purposes other than those for which the public easement exists, is liable in trespass to the owner of the fee. *Avery v. Maxwell*, 4 N. H., 36; *Mayhew v. Norton*, 17 Pick., 357; *Adams v. Rivers*, 11 Barb., 890. If lands are occupied by a tenant, he, and not the lessor, must bring trespass against a stranger for unlawful disturbance of the possession. *Campbell v. Arnold*, 1 Johns., 513.

any person shall wilfully hold over the same, the lessor or reversioner is entitled to recover by action of debt, either at the rate of double the annual value of the premises, in case he himself hath demanded and given notice in writing to the tenant to deliver the possession, or else double the usual rent, in case the notice of quitting proceeds from the tenant himself, having power to determine his lease, and he afterwards neglects to carry that notice into due execution.

A man is answerable for not only his own trespass, but that of his cattle also: for, if by his negligent keeping they stray upon the land of another, (and much more if he permits, or drives them on,) and they there tread down his neighbor's herbage, and spoil his corn or his trees, this is a trespass for which the owner must answer in damages, and the law gives the party injured a double remedy in this case; by permitting him to distrain the cattle thus *damage-feasant*, or doing damage, till the owner shall make him satisfaction: or else by leaving him to the common remedy *in foro contentioso*, by action. And the action that lies in either of these cases of trespass committed upon another's land, either by a man himself or his cattle, is the action of trespass *vi et armis*; whereby a man is called upon to answer, *quare vi et armis clausum ipsius A apud B fregit, et blada ipsius A ad valentiam centum solidorum ibidem nuper crescentia cum quibusdam averiis depastus fuit, conculcavit, et consumpsit, &c.*: (h) for the law always couples the idea of force with that of intrusion upon the property of another. And herein, if any unwarrantable act [\*212] of the \*defendant or his beasts in coming upon the land be proved, it is an act of trespass for which the plaintiff must recover some damages; such, however, as the jury shall think proper to assess.

In trespass of a permanent nature, where the injury is continually renewed, (as by spoiling or consuming the herbage with the defendant's cattle), the declaration may allege the injury to have been committed by *continuation* from one given day to another (which is called laying the action with a *continuando*), and the plaintiff shall not be compelled to bring separate actions for every day's separate offence. (i) But where the trespass is by one or several acts, each of which terminates in itself, and being once done cannot be done again, it cannot be laid with a *continuando*; yet if there be repeated acts of trespass committed, (as cutting down a certain number of trees), they may be laid to be done, not continually, but at divers days and times within a given period. (k) (2)

In some cases trespass is justifiable; or rather entry on another's land or house shall not in those cases be accounted trespass: as if a man comes thither to demand or pay money, there payable; or to execute, in a legal manner, the process of the law. Also a man may justify entering into an inn or public house, without the leave of the owner first specially asked; because when a man professes the keeping such inn or public house, he thereby gives a general license to any person to enter his doors. So a landlord may justify entering to distrain for rent; a commoner to attend his cattle, commoning on another's land; and a reversioner, to see if any waste be committed on the estate; for the apparent necessity of the thing. (l) Also it hath been said, that by the common law and custom of England, the poor are allowed to enter and glean upon [\*213] another's ground after the harvest, without \*being guilty of trespass: (m) which humane provision seems borrowed from the Mosaic law. (n) (8) In like manner the common law warrants the hunting of ravenous

(h) Registr. 94. (i) 2 Roll. Abr. 545. Lord Raym. 940.  
(k) Saik. 638, 639. Lord Raym. 823. 7 Mod. 152. (l) 8 Rep. 146.  
(m) Glub. Ev. 263. Trials per pais, ch. 16, p. 433.  
(n) Levit. c. 19, v. 9, and c. 23, v. 23. Deut. c. 24, v. 19, &c.

(2) The latter mode prevails in modern practice.

(8) It was decided in *Stell v. Houghton*, 1 H. Bl., 51, that a right to glean in the lands of another did not exist at the common law.

beasts of prey, as badgers and foxes, in another man's land; because the destroying such creatures is said to be profitable to the public. (o) (4) But in cases where a man misdemeanors himself, or makes an ill use of the authority with which the law intrusts him, he shall be accounted a trespasser *ab initio*: (p) as if one comes into a tavern and will not go out in a reasonable time, but tarries there all night contrary to the inclinations of the owner; this wrongful act shall affect and have relation back even to his first entry, and make the whole a trespass. (q) But a bare nonfeasance, as not paying for the wine he calls for, will not make him a trespasser: for this is only a breach of contract, for which the taverner shall have an action of debt or *assumpsit* against him. (r) So if a landlord distrained for rent, and wilfully killed the distress, this by the common law made him a trespasser *ab initio*: (s) and so indeed would any other irregularity have done, till the statute 11 Geo. II, c. 19, which enacts, that no subsequent irregularity of the landlord shall make his first entry a trespass; but the party injured shall have a special action of trespass or on the case, for the real specific injury sustained, unless tender of amends hath been made. But, still, if a reversioner, who enters on pretence of seeing waste, breaks the house, or stays there all night; or if the commoner who comes to tend his cattle, cuts down a tree; in these and similar cases, the law judges that he entered for this unlawful purpose, and therefore, as the act which demonstrates such his purpose is a trespass, he shall be esteemed a trespasser *ab initio*. (t) So also in the case of hunting the fox or the badger, a man cannot justify breaking the soil, and digging him out of his earth: for though the law warrants the hunting of such noxious animals for the public good, yet it is held (u) that such things must be done in an ordinary and usual manner; therefore, as there is an ordinary course to kill them, viz., by hunting, the court held that the digging for them was unlawful.

A man may also justify in an action of trespass, on account of the freehold and right of entry being in himself; and this defence brings the title of the estate in question. This is therefore one of the ways devised, since the disuse of real actions, to try the property of estates; though it is not so usual as that by ejectment, because that, being now a mixed action, not only gives damages for the ejection, but also possession of the land; whereas in trespass, which is merely a personal suit, the right can be only ascertained, but no possession delivered; nothing being recovered but damages for the wrong committed.

In order to prevent trifling and vexatious actions of trespass, as well as other personal actions, it is (*inter alia*) enacted by statutes 43 Eliz. c. 6, and 22 and 23 Car. II, c. 9, § 136, that where the jury, who try an action of trespass, give less damages than forty shillings, the plaintiff shall be allowed no more costs than damages, unless the judge shall certify under his hand that the freehold or title of the land came chiefly in question. But this rule now admits of two exceptions more, which have been made by subsequent statutes. One is by statute 8 and 9 Wm. III, c. 11, which enacts, that in all actions of trespass, wherein it shall appear that the trespass was wilful and malicious, and it be so certified by the judge, the plaintiff shall recover full costs. Every trespass is *wilful*, where the defendant has notice, and is especially forewarned not to come on the land; as every trespass is *malicious*, though the damage may not amount to forty shillings, where the intent of the defendant plainly appears to

(o) Cro. Jac. 331.

(p) Finch, L. 47.

(q) Finch, L. 47.

(r) 8 Rep. 146.

(s) Cro. Jac. 143.

(t) Cro. Jac. 331.

(u) 2 Roll. Abr. 561.

(v) 8 Rep. 147.

(4) The law was otherwise declared by Lord Ellenborough in *Earl of Essex v. Capel* (3 Chit. Game Law, 1881), with the qualification, however, that there may be such a public nuisance by a noxious animal as may justify the running him to his earth. In the case of animals chased for sport or game, merely, it is clear that one cannot justify going upon the lands of another in pursuit without his license. *Sutton v. Moody*, 1 L. Raym., 251; *Deane v. Clayton*, 7 Taunt., 534; *Hume v. Oldacre*, 1 Stark., 351.

[\*215] \*be to harass and distress the plaintiff. The other exception is by statute 4 and 5 W. and M. c. 23, which gives full costs against any inferior tradesman, apprentice, or other dissolute person, who is convicted of a trespass in hawking, hunting, fishing, or fowling, upon another's land. Upon this statute it has been adjudged, that if a person be an inferior tradesman, as a clothier for instance, it matters not what qualification he may have in point of estate; but, if he be guilty of such trespass, he shall be liable to pay full costs. (w) (5)

## CHAPTER XIII.

### OF NUISANCE.

A THIRD species of real injuries to a man's lands and tenements, is by *nuisance*. Nuisance, *nocumentum*, or annoyance, signifies any thing that worketh hurt, inconvenience or damage. And nuisances are of two kinds: *public* or *common* nuisances, which affect the public, and are an annoyance to *all* the king's subjects; for which reason we must refer them to the class of public wrongs, or crimes and misdemeanors: and *private* nuisances, which are the objects of our present consideration, and may be defined, anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. (a) We will therefore, first, mark out the several kinds of nuisances, and then their respective remedies.

I. In discussing the several kinds of nuisances, we will consider first, such nuisances as may affect a man's corporeal hereditaments, and then those that may damage such as are incorporeal.

1. First, as to *corporeal* inheritances. If a man builds a house so close to mine that his roof overhangs my roof, and throws the water off his roof upon mine, this is a nuisance for which an action will lie. (b) Likewise to erect a house or other building so near to mine, that it obstructs my ancient [\*217] \*lights and windows, is a nuisance of a similar nature. (c) But in this latter case it is necessary that the windows be *ancient*; that is, have subsisted there a long time without interruption; otherwise there is no injury done. For he hath as much right to build a new edifice upon his ground as I have upon mine; since every man may erect what he pleases upon the upright or perpendicular of his own soil, so as not to prejudice what has long been enjoyed by another; and it was my folly to build so near another's ground. (d) (1) Also if a person keeps his hogs, or other noisome animals, so near the house of another, that the stench of them incommodes him and makes the air unwholesome, (2) this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house. (e) A like injury is, if one's neighbor sets up

(w) Lord Raym. 149.

(d) Cro. Eliz. 118. Salk. 459.

(a) Finch, L. 188.

(c) 9 Rep. 58.

(b) F. N. B. 184.

(e) 9 Rep. 58.

(5) The statute 4 and 5 W. and M. c. 23, is now repealed. The statutes previously mentioned are also now repealed, and new provisions substituted.

(1) The easement of light and air over the land of another is not recognized in the United States as arising by prescriptive enjoyment. See Mahan v. Brown, 18 Wend., 261; S. C., 28 Am. Dec., 461; Parker v. Foote, 19 Wend., 309; Rogers v. Sawin, 10 Gray, 376; Randall v. Sanderson, 111 Mass., 114; Jenks v. Williams, 115 Mass., 217; Ward v. Neal, 87 Ala., 500; Keiper v. Klein, 51 Ind., 316; Cherry v. Stein, 11 Md., 1; Powell v. Sims, 5 W. Va., 1; Guest v. Reynolds, 68 Ill., 478; S. C., 18 Am. Rep., 570. See also the note to Story v. Odin, 7 Am. Dec., 49. Such an easement may of course be created by grant. Keats v. Hugo, 115 Mass., 204.

(2) See Rex v. White, Burr., 833; Howard v. Lee, 8 Sandf., 281; Cropsey v. Murphy, 1 Hilt., 126; Whalen v. Keith, 85 Mo., 87.



and exercises any offensive trade; as a tanner's, a tallow-chandler's, or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule, is "*sic utere tuo ut alienum non lædas*:" this therefore is an actionable nuisance. (*f*) (3) So that the nuisances which affect a man's dwelling may be reduced to these three: 1. Overhanging it; which is also a species of trespass, for *cujus est solum ejus est usque ad cælum*: 2. Stopping ancient lights; and, 3. Corrupting the air with noisome smells: for light and air are two indispensable requisites to every dwelling. (4) But depriving one of a mere matter of pleasure, as of a fine prospect by building a wall, or the like: this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable nuisance. (*g*)

As to nuisance to one's lands: if one erects a smelting-house for lead so near the land of another, that the vapour and smoke kill his corn and grass, and damage his cattle therein, this is held to be a nuisance. (*h*) And by consequence it follows, that if one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance: for it is incumbent on \*him to find some other place [\*218] to do that act, where it will be less offensive. So also, if my neighbour ought to scour a ditch, and does not, whereby my land is overflowed, this is an actionable nuisance. (*i*)

With regard to other corporeal hereditaments; it is a nuisance to stop or divert water that uses to run to another's meadow (*j*) or mill; (*k*) to corrupt or poison a water-course, by erecting a dye-house or a lime-pit for the use of trade, in the upper part of the stream; (*l*) or in short to do any act therein that in its consequences must necessarily tend to the prejudice of one's neighbour. So closely does the law of England enforce that excellent rule of gospel morality, of "doing to others as we would they should do unto ourselves."

2. As to incorporeal hereditaments, the law carries itself with the same equity. If I have a way, annexed to my estate, across another's land, and he obstructs me in the use of it, either by totally stopping it, or putting logs across it, or ploughing over it, it is a nuisance: for in the first case I cannot enjoy my right at all, and in the latter I cannot enjoy it so commodiously as I ought. (*m*) Also, if I am entitled to hold a fair or market, and another person sets up a fair or market so near mine that he does me a prejudice, it is a nuisance to the freehold which I have in my market or fair. (*n*) But in order to make this out to be a nuisance, it is necessary, 1. That my market or fair be the elder, otherwise the nuisance lies at my own door. 2. That the market be erected within the third part of twenty miles from mine. For Sir Matthew Hale (*o*) construes the *dieta*, or reasonable day's journey mentioned by Bracton, (*p*) to be twenty miles; as indeed it is usually understood, not only in our own law, (*q*) but also in the civil (*r*) from which we probably borrowed it. So that if the new market be not within seven miles of the old one, it is no \*nuisance: for it is held reasonable that every man should have a market [\*219] ket within one-third of a day's journey from his own home; that the day being divided into three parts, he may spend one part in going, another

(*f*) Cro. Car. 510. (*g*) 9 Rep. 53. (*h*) 1 Roll. Abr. 59. (*i*) Hale on F. N. B. 427. (*k*) F. N. B. 184.  
(*j*) 9 Rep. 59. 2 Roll. Abr. 141. (*m*) F. N. B. 183. 2 Roll. Abr. 140. (*n*) F. N. B. 184. 2 Roll. Abr. 140.  
(*o*) Hale on F. N. B. 184. (*p*) L. 4, tr. 1, c. 46. (*q*) 2 Inst. 567. (*r*) Ff. 2, 11, 1.

(3) See Catlin v. Valentine, 9 Paige, 575; Dargan v. Waddill, 9 Ired., 244; Peck v. Elder, 3 Sandf., 126; Hackney v. State, 8 Ind., 494; Ashbrook v. Commonwealth, 1 Bush, 189; Ottawa Gas Light Co. v. Thompson, 39 Ill., 598.

(4) See Smith v. McConathy, 11 Mo., 517. Or corrupting the water which is used for ordinary family purposes. Lewis v. Stein, 16 Ala., 314. And noises on adjoining premises may constitute such an impediment to the enjoyment of one's property as to entitle him to treat them as a nuisance. Fish v. Dodge, 4 Denio, 311; Sparhawk v. Union, etc., R. R. Co., 54 Penn. St., 401. Or a dog which comes upon one's premises, and barks or howls about them by day or night. Brill v. Flagler, 28 Wend., 354.

(5) See Wheatley v. Baugh, 25 Penn. St., 528; Earl v. De Hart, 12 N. J. Eq., 280.

in returning, and the third in transacting his necessary business there. If such market or fair be on the same day with mine, it is *prima facie* a nuisance to mine, and there needs no proof of it, but the law will intend it to be so; but if it be on any other day, it *may* be a nuisance; though whether it *is* so or not, cannot be intended or presumed, but I must make proof of it to the jury. If a ferry is erected on a river, so near another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness for the ease of all the king's subjects; otherwise he may be grievously amerced: (s) it would be therefore extremely hard if a new ferry were suffered to share his profits, which does not also share his burthen. But where the reason ceases, the law also ceases with it; therefore it is no nuisance to erect a mill so near mine, as to draw away the custom, unless the miller also intercepts the water. Neither is it a nuisance to set up any trade, or a school, in a neighbourhood or rivalry with another: for by such emulation the public are like to be gainers; and, if the new mill or school occasion a damage to the old one, it is *damnum absque injuria*. (t)

II. Let us next attend to the remedies, which the law has given for this injury of nuisance. And here I must premise that the law gives no *private* remedy for any thing but a *private* wrong. Therefore no *action* lies for a public or common nuisance, but an *indictment* only: because, the damage being common to *all* the king's subjects, no *one* can assign his particular proportion of it; or if he could, it would be extremely hard, if every subject in the kingdom were allowed to harass the offender with separate actions. For this reason, no person natural or corporate, can have an action for a public nuisance, or punish it; but only the king in his public \*capacity of supreme [ \*220] governor, and *pater-familias* of the kingdom. (u) Yet this rule admits of one exception; where a private person suffers some extraordinary damage, beyond the rest of the king's subjects, by a public nuisance; in which case he shall have a private satisfaction by action. As if by means of a ditch dug across the public way, which is a common nuisance, a man or his horse suffer any injury by falling therein; there for this particular damage, which is not common to others, the party shall have his action. (w) (6) Also if a man hath abated, or removed, a nuisance which offended him (as we may remember it was stated in the first chapter of this book, that the party injured hath a right to do), in this case he is entitled to no action. (x) For he had choice of two remedies; either without suit, by abating it himself, by his own mere act and authority; or by suit, in which he may both recover damages, and remove it by the aid of the law; but, having made his election of one remedy, he is totally precluded from the other.

The remedies by suit are, 1. By action *on the case* for damages; in which the party injured shall only recover a satisfaction for the injuries sustained; but cannot thereby remove the nuisance. Indeed every continuance of a nuisance is held to be a fresh one; (y) and therefore a fresh action will lie, and very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardness to continue it. Yet the founders of the law of England did not rely upon probabilities merely, in order to give relief to the injured. They have therefore provided two other actions; the *assize* of

(s) 2 Roll. Abr. 140.

(6) Hale on F. N. B. 184.

(u) Vaugh. 341, 342.

(w) Co. Litt. 56. 5 Rep. 78.

(x) 9 Rep. 55.

(y) 3 Leon. pl. 129. Cro. Eliz. 408.

(6) To entitle one to maintain an action for private damages in a case of public nuisance, it is not sufficient that he be incommoded in the same manner as the rest of the public, but he must sustain some private and peculiar injury and specific damage. *Pierce v. Dart*, 7 Cow., 609; *Lansing v. Smith*, 4 Wend., 9; S. C., 21 Am. Dec., 89; *Brown v. Perkins*, 12 Gray, 89; *Gerish v. Brown*, 51 Me., 256; *Houch v. Wachter*, 34 Md., 265. But several persons may have an action for injuries which each suffers in respect to his own rights, where such injury is additional to the general inconvenience of the public. *Scott v. Bay*, 3 Md., 431.

*nuisance*, and the writ of *quod permittat prosternere*: which not only give the plaintiff satisfaction for his injury past, but also strike at the root and remove the cause itself, the nuisance that occasioned the injury. These two actions, however, can only be brought by the tenant of the freehold; so that a lessee for years is confined to his action upon the case. (z) (7)

\*2. An *assize of nuisance* is a writ: wherein it is stated that the party injured complains of some particular fact done, *ad nocumentum liberi tenementi sui*, and therefore commanding the sheriff to summon an assize, that is, a jury, and view the premises, and have them at the next commission of assizes, that justice may be done therein: (a) and, if the assize is found for the plaintiff, he shall have judgment of two things: 1. To have the nuisance abated; and, 2. To recover damages. (b) Formerly an assize of nuisance only lay against the very wrongdoer himself, who levied or did the nuisance; and did not lie against any person to whom he had alienated the tenements, whereon the nuisance was situated. This was the immediate reason for making that equitable provision in statute West. 2, 13 Edw. I. c. 24, for granting a similar writ, *in casu consimili*, where no former precedent was to be found. The statute enacts that *de cetero non recedant querentes a curia domini regis, pro eo quod tenementum transfertur de uno in alium*; and then gives the form of a new writ in this case: which only differs from the old one in this, that, where the assize is brought against the very person only who levied the nuisance, it is said "*quod A (the wrongdoer) injuste levavit tale nocumentum*;" but, where the lands are aliened to another person, the complaint is against both; "*quod A (the wrongdoer) et B (the alienee) levaverunt*." (c) For every continuation, as was before said, is a fresh nuisance; and therefore the complaint is as well grounded against the alienee who continues it, as against the alienor who first levied it.

3. Before this statute, the party injured, upon any alienation of the land wherein the nuisance was set up, was driven to his *quod permittat prosternere*, which is in the nature of a writ of right, and therefore subject to greater delays. (d) This is a writ commanding the defendant to permit the plaintiff to abate, *quod permittat prosternere*, the nuisance complained of; \*and unless he so permits, to summon him to appear in court, and show cause why he will not. (e) And this writ lies as well for the alienee of the party first injured, as against the alienee of the party first injuring; as hath been determined by all the judges. (f) And the plaintiff shall have judgment herein to abate the nuisance, and to recover damages against the defendant.

Both these actions, of *assize of nuisance*, and of *quod permittat prosternere*, are now out of use, and have given way to the action on the case; in which, as was before observed, no judgment can be had to abate the nuisance, but only to recover damages. (8) Yet, as therein it is not necessary that the freehold should be in the plaintiff and defendant respectively, as it must be in these real actions, but it is maintainable by one that hath possession only, against another that hath like possession, the process is therefore easier: and the effect will be much the same, unless a man has a very obstinate as well as an ill-natured neighbour: who had rather continue to pay damages than remove his

(a) Finch, L. 389.  
(c) *Ibid.*

(d) 2 Inst. 465.

(e) F. N. B. 153.

(f) F. N. B. 194.

(g) 9 Rep. 55.

(h) 5 Rep. 100, 101.

(7) Both are now abolished by statute 8 and 4 Wm. IV. c. 27.

In the United States the remedy to recover damages for a private injury by either public or private nuisance, is by action on the case. The *preventive* remedy, is by writ of injunction from the courts of equity. Webb v. Portland Manuf. Co., 8 Sum., 189; Walker v. Shephardson, 2 Wis., 284. A party does not bar himself of an action for damages by abating the nuisance. Pierce v. Dart, 7 Cow., 609; Gleason v. Gary, 4 Conn., 418.

(8) This action may be brought by a reversioner where the nuisance affects injuriously his reversionary interest. Jackson v. Peaked, 1 M. and S., 284; Alston v. Scales, 9 Bing., 8; Biddlesford v. Onslow, 8 Lev., 209; Tucker v. Newman, 11 Ad. and El., 40.

nuisance. For in such a case, recourse must at last be had to the old and sure remedies, which will effectually conquer the defendant's perverseness, by sending the sheriff with the *posse comitatus*, or power of the county, to level it.

## CHAPTER XIV.

### OF WASTE.

THE fourth species of injury, that may be offered to one's real property is by *waste*, or destruction in lands and tenements. What shall be called waste was considered at large in a former book, (a) as it was a means of forfeiture, and thereby of transferring the property of real estates. I shall therefore here only beg leave to remind the student, that waste is a spoil and destruction of the estate, either in houses, woods, or lands; by demolishing not the temporary profits only, but the very substance of the thing, thereby rendering it wild and desolate; which the common law expresses very significantly by the word *vastum*: and that this *vastum*, or waste, is either voluntary, or permissive; the one by an actual and designed demolition of the lands, woods, and houses; the other arising from mere negligence, and want of sufficient care in reparations, fences, and the like. So, that my only business is at present to show to whom this waste is an injury; and, of course, who is entitled to any, and what, remedy by action.

I. The persons who may be injured by waste, are such as have some *interest* in the estate wasted; for if a man be the absolute tenant in fee-simple, (1) without any incumbrance or charge on the premises, he may commit whatever [\*224] waste his own indiscretion may prompt him to, without being impeachable or accountable for it to any one. And, though his heir is sure to be the sufferer, yet *nemo est hæres viventis*; no man is certain of succeeding him, as well on account of the uncertainty which shall die first, as also because he has it in his power to constitute what heir he pleases, according to the civil law notion of an *hæres natus* and an *hæres factus*: or, in the more accurate phraseology of our English law, he may alien or devise his estate to whomever he thinks proper, and by such alienation or devise may disinherit his heir at law. Into whose hands soever therefore the estate wasted comes, after a tenant in fee-simple, though the waste is undoubtedly *damnum*, it is *damnum absque injuria*.

(a) See book II, ch. 18.

(1) Waste differs from trespass in this, that the wrong-doer is the person actually or constructively in possession, while trespass is an injury to the possession itself. Waste is either voluntary or permissive. Voluntary waste is an injury to the inheritance, resulting from some positive wrongful act of the party in possession; permissive waste is an injury to the inheritance, resulting from the neglect of some duty of the possessor to protect it. See a learned discussion of the general subject in *Duvall v. Waters*, 1 Bland Ch., 569; S. C., 18 Am. Dec., 350. The most common illustration of voluntary waste in England is that of cutting timber for other than the ordinary use and enjoyment of the premises; and in that country, where the policy is to preserve timber as much as possible, a very strict rule is laid down respecting this species of waste. But in the timbered portions of America the old rule is much relaxed. See *Parkins v. Cox*, 2 Hayw., 339; *Ward v. Sheppard*, 2 Hayw., 283; S. C., 2 Am. Dec., 625; *Findlay v. Smith*, 6 Munf., 134; S. C., 8 Am. Dec., 733; *Jackson v. Brownson*, 7 Johns., 227; S. C., 5 Am. Dec., 258; *Hastings v. Crunkleton*, 8 Yeates, 261; *Shine v. Wilcox*, 1 Dev. & Bat. Eq., 631; *Crockett v. Crockett*, 2 Ohio St., 180; *Owen v. Hyde*, 6 Yerg., 334; S. C., 27 Am. Dec., 467. The circumstances of the country will have much to do in determining what is and what is not waste. *Johnson v. Johnson*, 2 Hill Ch. (S. C.), 277; S. C., 29 Am. Dec., 72; *Stout v. Dunning*, 72 Ind., 242. This is especially so as to the method of cultivating land. It was decided in an early case

One species of interest, which is injured by waste, is that of a person who has a right of common in the place wasted; especially if it be common of *estovers*, or a right of cutting and carrying away wood for house-bote, plough-bote, &c. Here, if the owner of the wood demolishes the whole wood, and thereby destroys all possibility of taking estovers, this is an injury to the commoner, amounting to no less than a disseisin of his common of estovers, if he chooses so to consider it; for which he has his remedy to recover possession and damages by assize, if entitled to a freehold in such common; but if he has only a chattel interest, then he can only recover damages by an action on the case for this waste and destruction of the woods, out of which his estovers were to issue. (b)

But the most usual and important interest, that is hurt by this commission of waste, is that of him who hath the remainder or reversion of the *inheritance*, after a particular estate for life or years in being. Here, if the particular tenant (be it the tenant in dower or by curtesy, who was answerable for waste at the common law, (c) or the lessee for life or years, \*who was first made liable by the statutes of Marlbridge, (d) and of Gloucester), [\*225] (e) if the particular tenant, I say, commits or suffers any waste, it is a manifest injury to him that has the inheritance, as it tends to mangle and dismember it of its most desirable incidents and ornaments, among which timber and houses may justly be reckoned the principal. To him therefore in remainder or reversion, to whom the *inheritance* appertains in expectancy, (f) the law hath given an adequate remedy. For he, who hath the remainder for life only, is not entitled to sue for waste; since his interest may never perhaps come into possession, and then he hath suffered no injury. Yet a parson, vicar, arch-deacon, prebendary, and the like, who are seized in right of their churches of any remainder or reversion, may have an action of waste; for they, in many cases, have for the benefit of the church and of the successors a fee-simple qualified; and yet, as they are not seized in their own right, the writ of waste shall not say, *ad exheredationem ipsius*, as for other tenants in fee-simple; but *ad exheredationem ecclesiæ*, in whose right the fee-simple is holden. (g)

II. The redress for this injury of waste is of two kinds; preventive, and corrective: the former of which is by writ of *estrepement*, the latter by that of *waste*. (2)

1. Estrepement is an old French word, signifying the same as waste or extirpation: and the writ of *estrepement* lay at the common law, after judgment obtained in any action real, (h) and before possession was delivered by the sher-

(b) F. N. B. 52. 9 Rep. 112.  
(f) Co. Litt. 53.

(c) 2 Inst. 299.  
(g) *Ibid.* 241.

(d) 52 Hen. III. c. 23.  
(h) 2 Inst. 323.

(e) 6 Edw. I. c. 5.

that it would be waste for a tenant to depart in his cultivation from the established rotation of crops: *Wilds v. Layton*, 1 Del. Ch., 226; S. C., 12 Am. Dec., 91; but this would hardly be followed now as law. See *Richards v. Torbert*, 8 Houst., 172; *Pyncheon v. Stearns*, 11 Met., 304; S. C., 45 Am. Dec., 207. The tenant may work mines as usual, but he must not open new mines. *Gaines v. Mining Co.*, 32 N. J. Eq., 86; *Ward v. Mining Co.*, 47 Mich., 67; *Franklin Coal Co. v. McMillan*, 49 Md., 529. He may make slight changes in buildings and in their use, but not those of a radical character. *Winship v. Pitts*, 3 Paige, 259; *Huntley v. Russell*, 13 Q. B., 572. See *Clemence v. Steere*, 1 R. I., 272.

Permissive waste consists in suffering that to take place to the injury of the inheritance which ordinary care would prevent. For ordinary wear and decay, not hastened by neglect, and for accidental injuries by fire and otherwise, the tenant is not liable; but he should exercise reasonable diligence for the preservation of buildings, not only as against the elements, but as against trespassers. *Attersoll v. Stevens*, 1 Taunt., 183; *Cook v. Champlain, etc., Co.*, 1 Denio, 91; *White v. Wagner*, 4 H. & J., 373; S. C., 7 Am. Dec., 674.

Any one may maintain an action on the case for waste who can show that he has an interest in the inheritance which is injuriously affected. *VanPelt v. McGraw*, 4 N. Y., 110; *Byrom v. Chapin*, 118 Mass., 303; *Waterman v. Matteson*, 4 R. I., 539; *Phoenix v. Clark*, 6 N. J. Eq., 447. But one having only a contingent interest in remainder could not have such an action. *Cannon v. Barry*, 59 Miss., 289.

(2) Both these writs are now abolished. The remedy to recover damages is by action on the case, and to recover possession is by ejectment.

iff; to stop any waste which the vanquished party might be tempted to commit in lands, which were determined to be no longer his. But as in some cases the demandant may be justly apprehensive, that the tenant may make waste or *estrepement* pending the suit, well knowing the weakness of his title, therefore the statute of Gloucester (i) gave another writ of *estrepement pendente placito*, [\*226] commanding the sheriff firmly \*to inhibit the tenant "*ne faciat vastum vel estrepementum pendente placito dicto indiscusso*." (k) And, by virtue of either of these writs the sheriff may resist them that do, or offer to do, waste; and if otherwise he cannot prevent them, he may lawfully imprison the wasters, or make a warrant to others to imprison them; or, if necessity require, he may take the *posse comitatus* to his assistance. So odious in the sight of the law is waste and destruction. (l) In suing out these two writs this difference was formerly observed; that in actions merely possessory, where no damages are recovered, a writ of *estrepement* might be had at any time *pendente lite*, nay even at the time of suing out the original writ, or first process: but in an action where damages were recovered, the demandant could only have a writ of *estrepement*, if he was apprehensive of waste after verdict had; (m) for, with regard to waste done before the verdict was given, it was presumed the jury would consider that in assessing the *quantum* of damages. But now it seems to be held, by an equitable construction of the statute of Gloucester, and in advancement of the remedy, that a writ of *estrepement*, to prevent waste, may be had in every stage, as well of such actions wherein damages are recovered as of those wherein only possession is had of the lands; for peradventure, saith the law, the tenant may not be of ability to satisfy the demandant his full damages. (n) And therefore now, in an action of waste itself, to recover the place wasted and also damages, a writ of *estrepement* will lie, as well before as after judgment. For the plaintiff cannot recover damages for more waste than is contained in his original complaint; neither is he at liberty to assign or give in evidence any waste made after the suing out of the writ; it is therefore reasonable that he should have this writ of *preventive* justice, since he is in his present suit debarred of any farther remedial (o) If a writ of *estrepement*, forbidding waste, be directed and delivered to the tenant himself, as it may be, and he afterwards proceeds to commit waste, an action may be carried on upon the [\*227] \*foundation of this writ; wherein the only plea of the tenant can be, *non fecit vastum contra prohibitionem*; and, if upon verdict it be found that he did, the plaintiff may recover costs and damages, (p) or the party may proceed to punish the defendant for the contempt: for, if after the writ directed and delivered to the tenant or his servants, they proceed to commit waste, the court will imprison them for this contempt of the writ. (q) But not so, if it be directed to the sheriff, for then it is incumbent upon him to prevent the *estrepement* absolutely, even by raising the *posse comitatus*, if it can be done no other way.

Besides this preventive redress at common law, the courts of equity, upon bill exhibited therein, complaining of waste and destruction, will grant an injunction in order to stay waste, until the defendant shall have put in his answer, and the court shall thereupon make further order. Which is now become the most usual way of preventing waste.

2. A writ of *waste* (3) is also an action, partly founded upon the common law, and partly upon the statute of Gloucester; (r) and may be brought by

(i) 6 Edw. I. c. 13.

(n) *Ibid.* 61.

(k) Registr. 77.

(o) 5 Rep. 115.

(l) 2 Inst. 329.

(p) Moor. 100.

(m) F. N. B. 60, 61.

(q) Hob. 83.

(r) 6 Edw. I. c. 5.

(3) This writ, before it was abolished, had almost entirely fallen into disuse, having given way to the more simple proceeding by special action on the case. And this action may be brought not only in those cases in which a writ of waste might formerly have been maintained, but also in any other case where by the wrongful act or default of a party in possession an injury occurs to the rights of one entitled to succeed him in the possession.

him who hath the immediate estate of inheritance in reversion or remainder, against the tenant for life, tenant in dower, tenant by the curtesy, or tenant for years. This action is also maintainable in pursuance of statute (s) Westm. 2, by one tenant in common of the inheritance against another, who makes waste in the estate holden in common. The equity of which statute extends to joint-tenants, but not to coparceners; because by the old law coparceners might make partition, whenever either of them thought proper, and thereby prevent future waste, but tenants in common and joint tenants could not; and therefore the statute gave them this remedy, compelling the defendant either to make partition, and take the place wasted to his own share, or to give security not to commit any farther waste.(t) But these tenants in common and joint-tenants are \*not liable to the penalties of the statute of Gloucester, [\*228] which extends only to such as have life estates, and do waste to the prejudice of the inheritance. The waste however must be something considerable; for if it amount only to twelve pence, or some such petty sum, the plaintiff shall not recover in an action of waste: *nam de minimis non curat lex.*(u)

(4) This action of waste is a mixed action; partly real, so far as it recovers land; and partly personal, so far as it recovers damages. For it is brought for both those purposes; and, if the waste be proved, the plaintiff shall recover the thing or place wasted, and also treble damages by the statute of Gloucester. The writ of waste calls upon the tenant to appear and show cause why he hath committed waste and destruction in the place named, *ad exhæredationem*, to the disinherison of the plaintiff. (v) And if the defendant makes default, or does not appear at the day assigned him, then the sheriff is to take with him a jury of twelve men, and go in person to the place alleged to be wasted, and there inquire of the waste done, and the damages; and make a return or report of the same to the court, upon which report the judgment is founded. (x) For the law will not suffer so heavy a judgment, as the forfeiture and treble damages, to be passed upon a mere default, without full assurance that the fact is according as it is stated in the writ. But if the defendant appears to the writ, and *afterwards* suffers judgment to go against him by default, or upon a *nihil dicit* (when he makes no answer, puts in no plea, in defence), this amounts to a confession of the waste; since having once appeared, he cannot now pretend ignorance of the charge. Now, therefore, the sheriff shall not go to the place to inquire of the fact, whether any waste has, or has not been committed; for this is already ascertained by the silent confession of the defendant: but he shall only, as in defaults upon other actions, make inquiry of the *quantum* of damages. (y) The defendant, on the trial, may give in evidence any thing that proves there was no waste committed, as that the destruction happened by lightning, tempest, the king's enemies, or other inevitable accident. (z) But it is no defence to say, that a stranger did the waste, for against him the plaintiff hath no remedy: though the defendant is entitled to sue such stranger in an action of trespass *vi et armis*, and shall recover the damages he has suffered in consequence of such unlawful act. (a) (5)

(s) 13 Edw. I. c. 22.

(t) 2 Inst. 403, 404.

(u) Finch, L. 29.

(v) F. N. B. 55.

(x) Poph. 24.

(y) Cro. Eliz. 12, 220.

(z) Co. Litt. 53.

(a) Law of *nisi prius*, 130.

A purchaser at a judicial sale, where the defendant had a right of redemption, may maintain this action, after his title becomes absolute, against one who had previously, but after the sale, committed waste on the premises. *Thomas v. Crofut*, 14 N. Y., 474; *Stout v. Keyes*, 2 Doug. Mich., 184.

(4) See this maxim illustrated in Broom's Legal Maxims, 106. Generally the smallness of injury will not preclude the maintenance of an action: *Pindar v. Wadsworth*, 2 East, 154; but the difficulty in drawing a precise line between what is and what is not waste in all cases, is sufficient reason for taking no notice of slight injuries.

(5) But one having a vested interest in reversion, may maintain a special action on the case against a stranger who commits waste to the injury of the inheritance. *Randall v. Cleveland*, 6 Conn., 328; *Elliot v. Smith*, 2 N. H., 430; *Chase v. Hazleton*, 7 N. H., 171;

When the waste and damages are thus ascertained, either by confession, verdict, or inquiry of the sheriff, judgment is given in pursuance of the statute of Gloucester, c. 5, that the plaintiff shall recover the place wasted; for which he has immediately a writ of *seisin*, provided the particular estate be still subsisting (for, if it be expired, \*there can be no forfeiture of the land), [\*229] and also that the plaintiff shall recover treble the damages assessed by the jury, which he must obtain in the same manner as all other damages, in actions personal and mixed, are obtained, whether the particular estate be expired, or still in being.

## CHAPTER XV.

### OF SUBTRACTION.

SUBTRACTION, which is the fifth species of injuries affecting a man's real property, happens when any person who owes any suit, duty, custom, or service to another, withdraws or neglects to perform it. It differs from a disseisin, in that *this* is committed without any denial of the right, consisting merely in non-performance; *that* strikes at the very title of the party injured, and amounts to an ouster or actual dispossession. Subtraction, however, being clearly an injury, is remediable by due course of law; but the remedy differs according to the nature of the services, whether they be due by virtue of any tenure, or by custom only.

1. Fealty, suit of court, and rent, are duties and services usually issuing and arising *ratione tenuræ*, being the conditions upon which the ancient lords granted out their lands to their feudatories; whereby it was stipulated that they and their heirs should take the oath of fealty or fidelity to their lord, which was the feudal bond, or *commune vinculum*, between lord and tenant; that they should do suit, or duly attend and follow the lord's courts, and there from time to time give their assistance, by serving on juries, either to decide the property of their neighbours in the court-baron, or correct their misdemeanors in the court-leet; and, lastly, that they should yield to the lord certain annual stated returns, in military attendance, in provisions, in arms, in matters of ornament [\*231] or pleasure, in rustic employments or \*prædial labours, or (which is *instar omnium*) in money, which will provide all the rest; all which are comprised under the one general name of *reditus*, return, or rent. And the subtraction or non-observance of any of these conditions, by neglecting to swear fealty, to do suit of court, or to render the rent or service reserved, is an injury to the freehold of the lord, by diminishing and depreciating the value of his seigniory.

The general remedy for all these is by *distress*; and it is the only remedy at the common law for the first two of them. The nature of distresses, their incidents and consequences, we have before more than once explained: (a) it may here suffice to remember, that they are a taking of beasts, or other personal property, by way of pledge to enforce the performance of something due from the party distrained upon. And for the most part it is provided that distresses be reasonable and moderate; but in the case of distress for fealty or suit of court, no distress can be unreasonable, immoderate, or too large: (b) for this is the only remedy to which the party aggrieved is entitled,

(a) See pages 6, 143.

(b) Finch, L. 235.

Ripka v. Sergeant, 7 W. and S., 1. The tenant may also sue for the injury to his possession. *Id.* Or the landlord may hold the tenant responsible for the injury by the stranger. Fay v. Brewer, 8 Pick., 203. Threatened waste may be restrained by injunction.



and therefore, it ought to be such as is sufficiently compulsory ; and be it of what value it will, there is no harm done, especially as it cannot be sold or made away with, but must be restored immediately on satisfaction made. A distress of this nature, that has no bounds with regard to its quantity, and may be repeated from time to time, until the stubbornness of the party is conquered, is called a *distress infinite* ; which is also used for some other purposes, as in summoning jurors, and the like.

Other remedies for subtraction of rents or services are, 1. By action of *debt*, for the breach of this express contract, of which enough has been formerly said. This is the most usual remedy, when recourse is had to any action at all for the recovery of pecuniary rents, to which species of render almost all free services are now reduced, since the abolition of the military tenures. But for a freehold rent, reserved on \*a lease for life, &c., no action of *debt* lay by the common law, during the continuance of the freehold out of which it [ \*232] issued; (c) for the law would not suffer a *real* injury to be remedied by an action that was merely *personal*. However, by the statutes 8 Ann. c. 14, and 5 Geo. III. c. 17, actions of debt may now be brought at any time to recover such freehold rents. 2. An assize of *mort d' ancestor* or *novel disseisin* will lie of rents as well as of lands; (d) if the lord, for the sake of trying the possessory right, will make it his election to suppose himself ousted or disseised thereof. This is now seldom heard of; and all other real actions to recover rent, being in the nature of writs of right, and therefore more dilatory in their progress, are entirely disused, though not formally abolished by law. (1) Of this species however is, 3. The writ *de consuetudinibus et servitiis*, which lies for the lord against his tenant, who withholds from him the rents and services due by custom, or tenure, for his land. (e) This compels a specific payment or performance of the rent or service; and there are also others, whereby the lord shall recover the land itself in lieu of the duty withheld. As, 4. The writ of *cessavit*, which lies by the statutes of Gloucester, 6 Edward I. c. 4, and of Westm. 2, 13 Edw. I. cc. 21 and 41, when a man who holds lands of a lord by rent or other services, neglects or *ceases* to perform his services for two years together; or where a religious house hath lands given it, on condition of performing some certain spiritual service, as reading prayers or giving alms, and neglects it; in either of which cases, if the *cesser* or neglect have continued for two years, the lord or donor and his heirs shall have a writ of *cessavit* to recover the land itself, *eo quod tenens in faciendis servitiis per biennium jam cessavit*. (f) In like manner, by the civil law, if a tenant who held lands upon payment of rent or services, or "*jure emphyteutico*," neglected to pay or perform them *per totum triennium*, he might be ejected from such emphyteutic lands. (g) But by the statute of Gloucester, the *cessavit* does not lie for lands let upon fee-farm rents, unless they have lain fresh and uncultivated for two years, and there be \*not sufficient distress upon the premises; or unless [ \*233] the tenant hath so enclosed the land that the lord cannot come upon it to distrain. (h) For the law prefers the simple and ordinary remedies, by distress or by the actions just now mentioned, to this extraordinary one of forfeiture for a *cessavit*: and therefore the same statute of Gloucester has provided farther, that, upon tender of arrears and damages before judgment, and giving security for the future performance of the services, the process shall be at an end, and the tenant shall retain his land; to which the statute of Westm. 2, conforms so far as may stand with convenience and reason of law. (i) It is easy to observe, that the statute (k) 4 Geo. II. c. 28 (which permits landlords, who have a right of re-entry for non-payment for rent, to serve an ejectment on their tenants, when half a year's rent is due, and there is no suffi-

(e) 1 Roll. Abr. 596.  
(g) Cod. 4, 66, 2.

(d) F. N. B. 193.  
(A) F. N. B. 209. 2 Inst. 298.

(e) *Ibid.* 151.  
(f) 2 Inst. 401, 460.

(f) *Ibid.* 208.  
(N) See page 208.

(1) It is since abolished by statute 3 and 4 Wm. IV. c. 27.  
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cient distress on the premises), is in some measure copied from the ancient writ of *cessavit*: especially as it may be satisfied and put an end to in a similar manner, by tender of the rent and costs within six months after. And the same remedy is, in substance, adopted by statute 11 Geo. II, c. 19, § 16, which enacts that, where any tenant at rack-rent shall be one year's rent in arrear, and shall desert the demised premises, leaving the same uncultivated or unoccupied, so that no sufficient distress can be had: two justices of the peace (after notice affixed on the premises for fourteen days without effect) may give the landlord possession thereof, and thenceforth the lease shall be void. 5. There is also another very effectual remedy, which takes place when the tenant, upon a writ of assize for rent, or on a replevin, disowns or disclaims his tenure, whereby the lord loses his verdict: in which case the lord may have a writ of right, *sur disclaimer*, grounded on this denial of tenure; and shall, upon proof of the tenure, recover back the land itself so holden, as a punishment to the tenant for such his false disclaimer. (l) This piece of retaliating justice, whereby the tenant who endeavours to defraud his lord is himself deprived of the estate, as it evidently proceeds upon feudal principles, [\*234] \*so it is expressly to be met with in the feudal constitutions: (m) "*nasallus, qui abnegavit feudum ejusve conditionem, exspoliabitur.*"

And, as on the one hand the ancient law provided these several remedies to obviate the knavery and punish the ingratitude of the tenant, so on the other hand it was equally careful to redress the oppression of the lord; by furnishing 1. The writ of *ne injuste vexes*; (n) which is an ancient writ founded on that chapter (o) of *magna carta* which prohibits distresses for greater services than are really due to the lord; being itself of the prohibitory kind, and yet in the nature of a writ of right. (p) It lies where the tenant in fee-simple and his ancestors have held of the lord by certain services; and the lord hath obtained seisin of more or greater services, by the inadvertent payment or performance of them by the tenant himself. Here the tenant cannot in an avowry avoid the lord's possessory right, because of the seisin given by his own hand; but is driven to this writ, to divest the lord's possession, and establish the mere right of property, by ascertaining the services, and reducing them to their proper standard. But this writ does not lie for tenant in tail; for he may avoid such seisin of the lord, obtained from the payment of his ancestors, by plea to an avowry in replevin. (q) 2. The writ of *mesne, de medio*; which is also in the nature of a writ of right, (r) and lies, when upon a subinfeudation the *mesne*, or middle lord, (s) suffers his under-tenant or tenant *paravail*, to be distrained upon by the lord *paramount*, for the rent due to him from the *mesne* lord. (t) And in such case the tenant shall have judgment to be quitted (or indemnified) by the *mesne* lord: and if he makes default therein, or does not appear originally to the tenant's writ, he shall be forejudged of his *mesnalty*, and the tenant shall hold immediately of the lord *paramount* himself. (u) (2)

(l) Finch, L. 270, 271.

(m) Feud. l. 2, c. 23.

(n) F. N. B. 10.

(o) C. 10.

(p) Booth, 126.

(q) F. N. B. 11. 2 Inst. 21.

(r) Booth, 126.

(s) See book II, ch. 5. pp. 62, 61.

(t) F. N. B. 135.

(u) 2 Inst. 274.

(2) The several writs here mentioned were formally abolished by statute 3 and 4 Wm. IV, c. 27. They were before not the usual remedies for these wrongs. An action on the case might have been maintained by the tenant at the common law against the landlord for distraining for more rent than was due: Taylor Land. and Ten., § 729, *et seq.*; and if the tenant through any error or mistake paid to the landlord more than was due, he might recover it back in an action for money had and received to his use, as paid without consideration. For the general principle in these cases, see Union Bank v. Bank of U. S., 3 Mass., 74; Bank of Commerce v. Union Bank, 3 N. Y., 230; Little v. Derby, 7 Mich., 325. And if an under-tenant is distrained upon, or is compelled in order to protect his own interest to pay rent to the original landlord, he is entitled to treat the payment as one made to the use of the *mesne* tenant, and may deduct it from his own rent, or recover it back from the *mesne* tenant if nothing was owing to him. As to the obligation of the *mesne* tenant to indemnify the under-tenant generally, see Taylor Land. and Ten., § 738.

\*II. Thus far of the remedies for subtraction of rents or other services due by *tenure*. There are also other services due by ancient custom and prescription only. Such is that of doing suit to another's mill: where the persons, resident in a particular place, by usage time out of mind, have been accustomed to grind their corn at a certain mill; and afterwards any of them go to another mill, and withdraw their suit (their *secta a sequendo*) from the ancient mill. This is not only a damage, but an injury to the owner; because this prescription might have a very reasonable foundation; viz.: upon the erection of such mill by the ancestors of the owner for the convenience of the inhabitants, on condition, that when erected, they should all grind their corn there only. And for this injury the owner shall have a writ *de secta ad molendinum*, (*w*) commanding the defendant to do his suit at that mill, *quam ad illud facere debet, et solet*, or show good cause to the contrary: in which action the validity of the prescription may be tried, and if it be found for the owner, he shall recover damages against the defendant. (*x*) In like manner and for like reasons, the register (*y*) will inform us, that a man may have a writ of *secta ad furnum, secta ad torrale, et ad omnia alia hujusmodi*; for suit due to his *furnum*, his public oven or bake-house; or to his *torrale*, his kiln, or malt-house; when a person's ancestors have erected a convenience of that sort for the benefit of the neighborhood, upon an agreement (proved by immemorial custom) that all the inhabitants should use and resort to it when erected. But besides these special remedies for subtractions, to compel the specific performance of the service due by custom; an action *on the case* will also lie for all of them, to repair the party injured in damages. And thus much for the injury of subtraction.

## CHAPTER XVI.

## OF DISTURBANCE.

THE sixth and last species of real injuries is that of *disturbance*; which is usually a wrong done to some incorporeal hereditament, by hindering or disquieting the owners in their regular and lawful enjoyment of it. (*a*) I shall consider five sorts of this injury, viz.: 1. Disturbance of *franchises*. 2. Disturbance of *common*. 3. Disturbance of *ways*. 4. Disturbance of *tenures*. 5. Disturbance of *patronage*.

I. Disturbance of *franchises* happens when a man has the franchise of holding a court-leet, of keeping a fair or market, of free-warren, of taking toll, of seizing waifs or estrays, or, (in short) any other species of franchise whatsoever; and he is disturbed or incommoded in the lawful exercise thereof. As if another by distress, menaces, or persuasions prevails upon the suitors not to appear at my court; or obstructs the passage to my fair or market; or hunts in my free-warren; or refuses to pay me the accustomed toll; or hinders me from seizing the waif or estray, whereby it escapes or is carried out of my liberty; in every case of this kind, all which it is impossible here to recite or suggest, there is an injury done to the legal owner; his property is damnified; and the profits arising from such his franchise are diminished. To remedy which, as the law has given no other writ, he is \*therefore entitled to sue for damages by a special action *on the case*: or, in case of toll may take a [\*237] distress if he pleases. (*b*)

II. The disturbance of *common* comes next to be considered: where any act is done, by which the right of another to his common is incommoded or

(w) F. N. B. 122.  
(a) Finch, L. 187.

(x) Co. Entr. 461.  
(b) Cro. Eliz. 558.

(y) Fol. 153.

diminished. This may happen, in the first place, where one who hath no right of common, puts his cattle into the land; and thereby robs the cattle of the commoners of their respective shares of the pasture. Or if one, who hath a right of common, puts in cattle which are not commonable, as hogs and goats; which amounts to the same inconvenience. But the lord of the soil may (by custom or prescription, but not without) put a stranger's cattle into the common; (c) and also by a like prescription for common appurtenant, cattle that are not commonable may be put into the common. (d) The lord also of the soil may justify making burrows therein, and putting in rabbits, so as they do not increase to so large a number as totally to destroy the common. (e) But in general, in case the beasts of a stranger, or the uncommonable cattle of a commoner, be found upon the land, the lord or any of the commoners may distrain them damage-feasant: (f) or the commoner may bring an action on the case to recover damages, provided the injury done be anything considerable: so that he may lay his action with a *per quod*, or allege that *thereby* he was deprived of his common. But for a trivial trespass the commoner has no action: but the lord of the soil only, for the entry and trespass committed. (g)

Another disturbance of common is by *surcharging* it; or putting more cattle therein than the pasture and herbage will sustain, or the party hath a right to do. In this case he that surcharges does an injury to the rest of the owners, [238] by depriving them of their respective portions, or at least \*contracting them into a smaller compass. This injury by surcharging can, properly speaking, only happen, where the common is *appendant* or *appurtenant*, (h) and of course limitable by law; or where, when *in gross*, it is expressly limited and certain; for where a man hath common *in gross*, *sans nombre*, or *without stint*, he cannot be a surcharger. However, even where a man is said to have common without stint, still there must be left sufficient for the lord's own beasts; (i) for the law will not suppose that, at the original grant of the common, the lord meant to exclude himself.

The usual remedies for surcharging the common, are either by distraining so many of the beasts as are above the number allowed, or else by an action of trespass, both which may be had by the lord: or lastly, by a special action on the case for damages; in which any commoner may be plaintiff. (j) But the ancient and most effectual method of proceeding is by a writ of *admeasurement of pasture*. This lies either where a common appurtenant or in gross is certain as to number, or where a man has common appendant or appurtenant to his land, the quantity of which common has never yet been ascertained. In either of these cases, as well the lord, as any of the commoners, is entitled to this writ of admeasurement; which is one of those writs that are called *vicontiel*, (k) being directed to the sheriff, (*vicecomiti*), and not to be returned to any superior court, till finally executed by him. It recites a complaint that the defendant hath surcharged, *superoneravit*, the common: and therefore commands the sheriff to admeasure and apportion it; that the defendant may not have more than belongs to him, and that the plaintiff may have his rightful share. And upon this suit all the commoners shall be admeasured, as well those who have not, as those who have surcharged the common; as well the plaintiff as the defendant. (l) The execution of this writ must be by a jury [239] of twelve men, who are upon their \*oaths to ascertain, under the superintendence of the sheriff, what and how many cattle each commoner is entitled to feed. And the rule for this admeasurement is generally understood to be, that the commoner shall not turn more cattle upon the common, than are sufficient to manure and stock the land to which his right of common is annexed: or, as our ancient law expressed it, such cattle only as are *levant* and *couchant* upon his tenement; (m) which being a thing uncertain before admea-

(c) 1 Roll. Abr. 396. (d) Co. Litt. 122. (e) Cro. Eliz. 876. Cro. Jac. 195. Lutw. 108. (f) 9 Rep. 112.  
(g) *Ibid.* (h) See book II. ch. 3. (i) 1 Roll. Abr. 399.  
(j) Freeman. 373. (k) 2 Inst. 369. Finch, L. 314. (l) F. N. B. 125. (m) Bro. Abr. tit. *prescription*, 28.

surement, has frequently, though erroneously, occasioned this unmeasured right of common to be called a common *without stint*, or *sans nombre*; (n) a thing which, though possible in law, (o) does in fact very rarely exist.

If, after the admeasurement has thus ascertained the right, the same defendant surcharges the common again, the plaintiff may have a writ of *second surcharge, de secunda superoneratione*, which is given by the statute Westm. 2, 13 Edw. I, c. 8, and thereby the sheriff is directed to inquire by a jury, whether the defendant has in fact again surcharged the common contrary to the tenor of the last admeasurement: and if he has, he shall then forfeit to the king the supernumerary cattle put in, and also shall pay damages to the plaintiff. (p) This process seems highly equitable: for the first offence is held to be committed through mere inadvertence, and therefore there are no damages or forfeiture on the first writ, which was only to ascertain the right which was disputed: but the second offence is a wilful contempt and injustice; and therefore punished very properly with not only damages, but also forfeiture. And herein the right, being once settled, is never again disputed; but only the fact is tried, whether there be any second surcharge or no: which gives this neglected proceeding a great advantage over the modern method, by action on the case, wherein the *quantum* of common belonging to the defendant must be proved upon every fresh trial, for every repeated offence.

\*There is yet another disturbance of common, when the owner of the land, or other person, so encloses or otherwise obstructs it, that the [240] commoner is precluded from enjoying the benefit to which he is by law entitled. This may be done, either by erecting fences, or by driving the cattle off the land, or by ploughing up the soil of the common. (q) Or it may be done by erecting a warren therein, and stocking it with rabbits in such quantities that they devour the whole herbage, and thereby destroy the common. For in such case, though the commoner may not destroy the rabbits, yet the law looks upon this as an injurious disturbance of his right, and has given him his remedy by action against the owner. (r) This kind of disturbance does indeed amount to a disseisin, and if the commoner chooses to consider it in that light, the law has given him an assize of *novel-disseisin*, against the lord, to recover the possession of his common. (s) Or it has given a writ of *quod permittat*, against any stranger, as well as the owner of the land, in case of such a disturbance to the plaintiff as amounts to a total deprivation of his common; whereby the defendant shall be compelled to permit the plaintiff to enjoy his common as he ought. (t) But if the commoner does not choose to bring a *real* action to recover seisin, or to try the right, he may, (which is the easier and more usual way) bring an action on the case for his damages, instead of an assize or a *quod permittat*. (u) (1)

There are cases, indeed, in which the lord may enclose and abridge the common: for which, as they are no injury to any one, so no one is entitled to any remedy. For it is provided by the statute of Merton, 20 Hen. III, c. 4, that the lord may *approve*, that is, enclose and convert to the uses of husbandry (which is a melioration or improvement,) any waste grounds, woods, or pastures, in which his tenants have common *appendant* to their estates; provided he leaves \*sufficient common to his tenants, according to the proportion [241] of their land. And this is extremely reasonable; for it would be very hard if the lord, whose ancestors granted out these estates to which the commons are appendant, should be precluded from making what advantage he can of the rest of his manor; provided such advantage and improvement be no way derogatory from the former grants. The statute Westm. 2, 13 Edw. I, c. 46,

(n) Hard. 117.

(r) Cro. Jac. 195.

(o) Lord. Raym. 407.

(s) F. N. B. 179.

(p) F. N. B. 126. 2 Inst. 370.

(t) Finch, L. 375. F. N. B. 123.

(q) Cro. Eliz. 198.

(u) Cro. Jac. 195.

(1) These real actions having been abolished by statute 8 and 4 Wm. IV, c. 27, the action on the case is now the only remedy.

extends this liberty of approving, in like manner, against *all others* that have common *appurtenant*, or *in gross*, as well as against the tenants of the lord, who have their common *appendant*; and farther enacts, that no assize of *novel-disseisin*, for common, shall lie against a lord for erecting on the common any windmill, sheep-house, or other necessary buildings therein specified: which, Sir Edward Coke says, (w) are only put as examples; and that any other necessary improvements may be made by the lord, though in reality they abridge the common, and make it less sufficient for the commoners. And, lastly, by statutes 29 Geo. II, c. 36, and 31 Geo. II, c. 41, it is particularly enacted, that any lords of wastes and commons, with the consent of the major part, in number and value, of the commoners, may enclose any part thereof, for the growth of timber and underwood. (2)

III. The third species of disturbance, that of *ways*, is very similar in its nature to the last: it principally happening when a person, who hath a right to a way over another's grounds, by grant or prescription, is obstructed by enclosures, or other obstacles, or by ploughing across it; by which means he cannot enjoy his right of way, or, at least, not in so commodious a manner as he might have done. If this be a way annexed to his estate, and the obstruction is made by the tenant of the land, this brings it to another species of injury; for it is then a *nuisance*, for which an assize will lie, as mentioned in a former chapter. (x) But if the right of way, thus obstructed by the tenant, be only *in gross* (that is annexed to a man's person and unconnected with any lands or [ \*242 ] tenements) or if the obstruction of a way belonging to an house or land is made by a stranger, it is then in either case merely a disturbance: for the obstruction of a way in gross is no detriment to any lands or tenements, and therefore does not fall under the legal notion of a nuisance, which must be laid, *ad nocumentum liberi tenementi*; (y) and the obstruction of it by a stranger can never tend to put the *right* of way in dispute: the remedy, therefore, for these disturbances is not by assize or any real action, but by the universal remedy of action on the case to recover damages. (z)

IV. The fourth species of disturbance is that of disturbance of *tenure*, or breaking that connexion which subsists between the lord and his tenant, and to which the law pays so high a regard, that it will not suffer it to be wantonly dissolved by the act of a third person. To have an estate well tenanted is an advantage that every landlord must be very sensible of; and, therefore, the driving away of a tenant from off his estate is an injury of no small consequence. So that if there be a tenant at will of any lands or tenements, and a stranger, either by menaces and threats, or by unlawful distresses, or by fraud and circumvention, or other means, contrives to drive him away, or inveigle him to leave his tenancy, this the law very justly construes to be a wrong and injury to the lord, (a) and gives him a reparation in damages against the offender by a special action on the case.

V. The fifth and last species of disturbance, but by far the most considerable, is that of disturbance of *patronage*; which is an hindrance or obstruction of a patron to present his clerk to a benefice.

This injury was distinguished at common law from another species of injury called *usurpation*; which is an absolute ouster or dispossession of the patron, and happens when a stranger, that hath no right, presenteth a clerk, and he is [ \*243 ] thereupon \*admitted and instituted. (b) In which case of usurpation, the patron lost by the common law not only his turn of presenting *pro hac vice*, but also the absolute and perpetual inheritance of the advowson,

(w) 2 Inst. 478.

(x) C. 12, p. 218.

(y) F. N. B. 182.

(z) Hale on F. N. B. 185.

Lutw. 111, 112.

(a) Hal. Anal. c. 40. 1 Roll. Abr. 108.

(b) Co. Litt. 277.

(2) The statute last mentioned was amended by statutes 1 and 2 Geo. IV, c. 28; 6 and 7 Wm. IV, c. 115; and 3 and 4 Vic., c. 81; under which, lords of wastes and commons, with the consent of two-thirds in number and value of the commoners, may enclose any part thereof for the growth of timber and underwood.

so that he could not present again upon the next avoidance, unless in the meantime he recovered his right by a real action, viz.: a writ of *right of advowson*. (c) The reason given for his losing the present turn, and not ejecting the usurper's clerk, was that the final intent of the law in creating this species of property being to have a fit person to celebrate divine service, it preferred the peace of the church (provided a clerk were once admitted and instituted) to the right of any patron whatever. And the patron also lost the inheritance of his advowson, unless he recovered it in a writ of right, because by such usurpation he was put out of possession of his advowson, as much as when by actual entry and ouster he is disseised of lands or houses; since the only possession, of which an advowson is capable, is by actual presentation and admission of one's clerk. As, therefore, when the clerk was once instituted (except in the case of the king, where he must also be inducted) (d) the church became absolutely full; so the usurper by such plenarty, arising from his own presentation, became in fact seized of the advowson: which seisin it was impossible for the true patron to remove by any possessory action, or other means, during the plenarty or fullness of the church: and when it became void afresh, he could not then present, since another had the right of possession. The only remedy, therefore, which the patron had left, was to try the mere right in a writ of *right of advowson*; which is a peculiar writ of right, framed for this special purpose, but in every other respect corresponding with other writs of right: (e) and if a man recovered therein, he regained the possession of his advowson, and was entitled to present at the next avoidance. (f) But in order to such recovery he must allege a presentation in himself or some of his ancestors, which proves him or them to have been once in possession: for, as a grant of the advowson, during the fullness of the church, conveys \*no manner [ \*244] of possession for the present, therefore a purchaser, until he hath presented, hath no actual seisin whereon to ground a writ of right. (g) Thus stood the common law.

But, bishops in ancient times, either by carelessness or collusion, frequently instituting clerks upon the presentation of usurpers, and thereby defrauding the real patrons of their right of possession, it was in substance enacted by statute Westm. 2, 18 Edw. I. c. 5, § 2, that if a possessory action be brought within six months after the avoidance, the patron shall (notwithstanding such usurpation and institution) recover that very presentation; which gives back to him the seisin of the advowson. Yet still, if the true patron omitted to bring his action within six months, the seisin was gained by the usurper, and the patron, to recover it, was driven to the long and hazardous process of a writ of right. To remedy which it was farther enacted by statute 7 Ann. c. 18, that no usurpation shall displace the estate or interest of the patron, or turn it to a mere right; but that the true patron may present upon the next avoidance, as if no such usurpation had happened. So that the title of usurpation is now much narrowed, and the law stands upon this reasonable foundation: that if a stranger usurps my presentation, and I do not pursue my right within six months, I shall lose that turn without remedy, for the peace of the church, and as a punishment for my own negligence; but that turn is the only one I shall lose thereby. Usurpation now gains no right to the usurper, with regard to any future avoidance, but only to the present vacancy: it cannot indeed be remedied after six months are past; but, during those six months, it is only a species of disturbance.

Disturbers of a right of advowson may, therefore, be these three persons: the pseudo-patron, his clerk, and the ordinary: the pretended patron, by presenting to a church to which he has no right, and thereby making it litigious or disputable; the clerk, by demanding or obtaining institution \*which [ \*245] tends to and promotes the same inconvenience; and the ordinary, by refusing to admit the real patron's clerk, or admitting the clerk of the pre-

(c) 6 Rep. 42.

(d) *Ibid.*

(e) F. N. B. 20.

(f) *Ibid.* 20.

(g) 2 Inst. 357.

tender. These disturbances are vexatious and injurious to him who hath the right: and, therefore, if he be not wanting to himself, the law (besides the writ of *right of advowson*, which is a final and conclusive remedy) hath given him two inferior possessory actions for his relief: an assize of *darrein presentment*, and a writ of *quare impedit*; in which the patron is always the plaintiff, and not the clerk. For the law supposes the injury to be offered to him only, by obstructing or refusing the admission of his nominee; and not to the clerk, who hath no right in him till institution, and of course can suffer no injury.

1. An assize of *darrein presentment*, or last presentation, lies when a man, or his ancestors, under whom he claims, have presented a clerk to a benefice, who is instituted; and afterwards upon the next avoidance a stranger presents a clerk, and thereby disturbs him that is the real patron. In which case the patron shall have this writ (*h*) directed to the sheriff to summon an assize or jury, to inquire who was the last patron that presented to the church now vacant, of which the plaintiff complains that he is deformed by the defendant: and, according as the assize determines that question, a writ shall issue to the bishop; to institute the clerk of that patron, in whose favour the determination is made, and also to give damages, in pursuance of statute Westm. 2, 13 Edw. I, c. 5. This question, it is to be observed, was before the statute 7 Ann. before mentioned, entirely conclusive, as between the patron and his heirs and a stranger: for, till then, the full possession of the advowson was in him who presented last and his heirs: unless, since that presentation, the clerk had been evicted within six months, or the rightful patron had recovered the advowson in a writ of right; which is a title superior to all others. But that statute having given a right to any person to bring a *quare impedit*, and to recover (if his title [\*246] be good) notwithstanding the last presentation, by whomsoever \*made; assizes of *darrein presentment*, now not being in any wise conclusive, have been totally disused, as indeed they began to be before; a *quare impedit* being a more general, and therefore a more usual action. For the assize of *darrein presentment* lies only where a man has an advowson by descent from his ancestors; but the writ of *quare impedit* is equally remedial whether a man claims title by descent or by purchase. (*i*)

2. I proceed therefore, secondly, to inquire into the nature (*k*) of a writ of *quare impedit*, now the only action used in case of the disturbance of patronage: and shall first premise the usual proceedings previous to the bringing of the writ. (*l*)

Upon the vacancy of a living, the patron, we know, is bound to present within six calendar months, (*l*) otherwise it will lapse to the bishop. But if the presentation be made within that time, the bishop is bound to admit and institute the clerk, if found sufficient; (*m*) unless the church be full, or there be notice of any litigation. For if any opposition be intended, it is usual for each party to enter a *caveat* with the bishop, to prevent his institution of his antagonist's clerk. An institution after a *caveat* entered is void by the ecclesiastical law; (*n*) but this the temporal courts pay no regard to, and look upon a *caveat* as a mere nullity. (*o*) But if two presentations be offered to the bishop upon the same avoidance, the church is then said to become *litigious*; and, if nothing farther be done, the bishop may suspend the admission of either, and suffer a lapse to incur. Yet if the patron or clerk on either side request him to award a *jus patronatus*, he is bound to do it. A *jus patronatus* is a commission from the bishop, directed usually to his chancellor and others of competent learning: who are to summon a jury of six clergymen and six laymen, to inquire into and examine who is the \*rightful patron; (*p*) and if, upon [\*247] such inquiry made and certificate thereof returned by the commission-

(h) F. N. B. 31.

(m) See book I, ch. 11.

(i) 2 Inst. 355.

(n) 1 Burn, 207.

(k) See Boswell's Case, 6 Rep. 43.

(o) 1 Roll. Rep. 191.

(l) See book II, c. 12.

(p) 1 Burn, 16, 17.

(3) This writ is now abolished.



ers, he admits and institutes the clerk of that patron whom they return as the true one, the bishop secures himself at all events from being a disturber, whatever proceedings may be had afterwards in the temporal courts.

The clerk refused by the bishop may also have a remedy against him in the spiritual court, denominated a *duplex querela*: (g) which is a complaint in the nature of an appeal from the ordinary to his next immediate superior; as from a bishop to the archbishop, or from an archbishop to the delegates; and if the superior court adjudges the cause of refusal to be insufficient, it will grant institution to the appellants.

Thus far matters may go on in the mere ecclesiastical course; but in contested presentations they seldom go so far; for, upon the first delay or refusal of the bishop to admit his clerk, the patron usually brings his writ of *quare impedit* against the bishop, for the temporal injury done to his property, in disturbing him in the presentation. And, if the delay arises from the bishop alone, as upon pretence of incapacity, or the like, then he only is named in the writ; but if there be another presentation set up, then the pretended patron and his clerk are also joined in the action; or it may be brought against the patron and clerk, leaving out the bishop; or against the patron only. But it is most advisable to bring it against all three: for if the bishop be left out, and the suit be not determined till the six months are past, the bishop is entitled to present by lapse; for he is not party to the suit; (r) but, if he be named, no lapse can possibly accrue till the right is determined. If the patron be left out, and the writ be brought only against the bishop and the clerk, the suit is of no effect, and the writ shall abate: (s) for the right of the patron is the principal question in the cause. (t) If the \*clerk be left out, and has [\*248] received institution before action brought (as is sometimes the case), the patron by this suit may recover his right of patronage, but not the present turn; for he cannot have judgment to remove the clerk, unless he be made a defendant, and party to the suit, to hear what he can allege against it. For which reason, it is the safer way to insert all three in the writ.

The writ of *quare impedit* (u) commands the disturbers, the bishop, the pseudo-patron and his clerk, to permit the plaintiff to present a proper person (without specifying the particular clerk), to such a vacant church, which pertains to his patronage; and which the defendants, as he alleges, do obstruct; and unless they so do, then that they appear in court to show the reason why they hinder him.

Immediately on the suing out of the *quare impedit*, if the plaintiff suspects that the bishop will admit the defendant's or any other clerk, pending the suit, he may have a prohibitory writ, called a *ne admittas*; (w) which recites the contention begun in the king's courts, and forbids the bishop to admit any clerk whatsoever till such contention be determined. And if the bishop doth, after the receipt of this writ, admit any person, even though the patron's right may have been found in a *jure patronatus*, then the plaintiff, after he has obtained judgment in the *quare impedit*, may remove the incumbent, if the clerk of a stranger, by writ of *scire facias*: (x) and shall have a special action against the bishop, called a *quare incumbavit*; (4) to recover the presentation, and also satisfaction in damages for the injury done him by incumbering the church with a clerk, pending the suit, and after the *ne admittas* received. (y) But if the bishop has incumbered the church by instituting the clerk, before the *ne admittas* issued, no *quare incumbavit* lies: for the bishop hath no legal notice, till the writ of *ne admittas* is served upon \*him. The patron [\*249] is therefore left to his *quare impedit* merely; which, as was before observed, now lies (since the statute of Westm. 2) as well upon a recent usurpa-

(g) *Ibid.* 112.  
(w) *Ibid.* 27.

(r) *Oro. Jac.* 98.  
(z) 2 *Ibid.* 98.

(s) *Hob.* 316.  
(y) *F. N. B.* 48.

(t) 7 *Rep.* 23.

(u) *F. N. B.* 22.

(4) Abolished by statute 3 and 4 Wm. IV, c. 27.  
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tion within six months past, as upon a disturbance without any usurpation had.

In the proceedings upon a *quare impedit*, the plaintiff must set out his title at length, and prove at least one presentation in himself, his ancestors, or those under whom he claims; for he must recover by the strength of his own right, and not by the weakness of the defendant's: (2) and he must also show a disturbance before the action brought. (a) Upon this the bishop and the clerk usually disclaim all title: save only, the one as ordinary, to admit and institute; and the other as presentee of the patron, who is left to defend his own right. And upon failure of the plaintiff in making out his own title, the defendant is put upon the proof of his, in order to obtain judgment for himself, if needful. But if the right be found for the plaintiff, on the trial, three farther points are also to be inquired: 1. If the church be full, and, if full, then of whose presentation: for if it be of the defendant's presentation, then the clerk is removable by writ brought in due time. 2. Of what value the living is: and this in order to assess the damages which are directed to be given by the statute of Westm. 2. 3. In case of plenarty upon an usurpation, whether six calendar (b) months have passed between the avoidance and the time of bringing the action: for then it would not be within the statute, which permits an usurpation to be devested by a *quare impedit*, brought *infra tempus semestris*. So that plenarty is still a sufficient bar in an action of *quare impedit*, brought above six months after the vacancy happens; as it was universally by the common law, however early the action was commenced.

If it be found that the plaintiff hath the right, and hath commenced his [\*250] action in due time, then he shall have judgment to recover the presentation; and, if the church be full by institution of any clerk, to remove him: unless it were filled *pendente lite* by lapse to the ordinary, he not being party to the suit: in which case the plaintiff loses his presentation *pro hac vice*, but shall recover two years' full value of the church from the defendant, the pretended patron, as a satisfaction for the turn lost by his disturbance; or in case of insolvency, the defendant shall be imprisoned for two years. (c) But if the church remains still void at the end of the suit, then whichever party the presentation is found to belong to, whether plaintiff or defendant, shall have a writ directed to the bishop *ad admittendum clericum*, (d) reciting the judgment of the court, and ordering him to admit and institute the clerk of the prevailing party; and, if upon this order he does not admit him, the patron may sue the bishop in a writ of *quare non admisit*, (e) and recover ample satisfaction in damages.

Besides these possessory actions there may be also had (as hath before been inoidentially mentioned) a writ of *right of advowson*, (5) which resembles other writs of right: the only distinguishing advantage now attending it being, that it is more conclusive than a *quare impedit*; since to an action of *quare impedit* a recovery had in a writ of right may be pleaded in bar.

There is no limitation with regard to the time within which any actions touching advowsons are to be brought; at least none later than the times of Richard I, and Henry III: for by statute 1 Mar. st. 2, c. 5, the statute of limitations, 32 Hen. VIII, c. 2, is declared not to extend to any writ of right of advowson, *quare impedit*, or assize of *darrein presentment* or *jus patronatus*. And this upon very good reason: because it may very easily happen that the title to an advowson may not come in question, nor the right have opportunity to be tried, within sixty years; which is the longest period of limitation assigned by the statute of Henry VIII. For Sir Edward Coke (f) tells us, that [\*251] there was a parson of one of his churches, that had been incumbent there above fifty years; nor are instances wanting wherein two succes-

(a) Vaugh. 7, 8.  
(d) F. N. B. 88.

(c) Hob. 199.  
(e) *Ibid.* 47.

(b) 2 Inst. 361.  
(f) 1 Inst. 115.

(c) Stat. Westm. 2, 13 Edw. I, c. 5, § 2.

(5) Abolished by statute 3 and 4 Wm. IV, c. 27.

sive incumbents have continued for upwards of a hundred years. (g) Had, therefore, the last of these incumbents been the clerk of a usurper, or had he been presented by lapse, it would have been necessary and unavoidable for the patron, in case of a dispute, to have recurred back above a century; in order to have shown a clear title and seisin by presentation and admission of the prior incumbent. But though, for these reasons, a limitation is highly improper with respect only to the length of time; yet, as the title of advowson is, for want of some limitation, rendered more precarious than that of any other hereditament (especially since the statute of Queen Anne hath allowed possessory actions to be brought upon any prior presentation, however distant), it might not perhaps be amiss if a limitation were established with respect to the number of avoidances; or, rather, if a limitation were compounded of the length of time and the number of avoidances together; for instance, if no seisin were admitted to be alleged in any of these writs of patronage, after sixty years and three avoidances were past. (h)

In a writ of *quare impedit*, which is almost the only real action that remains in common use, and also in the assize of *darrein presentment*, and writ of right, the patron only, and not the clerk, is allowed to sue the disturber. But, by virtue of several acts of parliament, (h) there is one species of presentations, in which a remedy, to be sued in the temporal courts, is put into the hands of the clerks presented, as well as of the owners of the advowson. I mean the presentation to such benefices as belong to Roman Catholic patrons; which, according to their several counties, are vested in and secured to the two universities of this kingdom. And particularly by the statute of 12 Ann. st. 2, c. 14, s. 4, a new method of proceeding is provided, viz.: that, besides the writs of *quare impedit*, which the universities, as patrons, are entitled to bring, they, or their clerks, may be at liberty to file a bill \*in equity [\*252] against any person presenting to such livings, and disturbing their right of patronage, or his *cestuy que trust*, or any other person whom they have cause to suspect; in order to compel a discovery of any secret trusts for the benefit of papists, in evasion of those laws whereby this right of advowson is vested in those learned bodies; and also (by the statute 11 Geo. II, c. 17) to compel a discovery whether any grant or conveyance, said to be made of such advowson, were made *bona fide* to a Protestant purchaser, for the benefit of Protestants, and for a full consideration; without which requisites, every such grant and conveyance of any advowson or avoidance is absolutely null and void. This is a particular law, and calculated for a particular purpose: but in no instance but this does the common law permit the clerk himself to interfere in recovering a presentation of which he is afterwards to have the advantage. For, besides that he has (as was before observed) no temporal right in him till after institution and induction; and, as he therefore can suffer no wrong, is consequently entitled to no remedy; this exclusion of the clerk from being plaintiff seems also to arise from the very great honour and regard which the law pays to his sacred function. For it looks upon the cure of souls as too arduous and important a task to be eagerly sought for by any serious clergyman; and, therefore, will not permit him to contend openly at law for a charge and trust which it presumes he undertakes with diffidence.

But when the clerk is in full possession of the benefice, the law gives him the same possessory remedies to recover his glebe, his rents, his tithes, and other ecclesiastical dues, by writ of entry, assize, ejectment, debt, or trespass (as the case may happen), which it furnishes to the owners of lay property.

(g) Two successive incumbents of the rectory of Chelsfield-cum-Farnborough, in Kent, continued one hundred and one years, of whom the former was admitted in 1650, the latter in 1700, and died in 1751.

(h) Stat. 3 Jac. I, c. 5. 1 W. and M. c. 26. 12 Anne, st. 2, c. 14. 11 Geo. II, c. 17.

(i) The statute 6 and 7 Vic., c. 54, applies the same period of limitations to a *quare impedit* or any other action or suit to enforce a right in a bishop as patron to collate to or bestow any ecclesiastical benefice.

Yet he shall not have a writ of right, nor such other similar writs as are grounded upon the mere right; because he hath not in him the entire fee and right; (i) but he is entitled to a special remedy called a writ of *juris utrum*, [\*253] which is sometimes styled the parson's writ of right, (k) \*being the highest writ which he can have. (l) (7) This lies for a parson or a prebendary at common law, and for a vicar by statute 14 Edw. III, c. 17, and is in the nature of an assize, to inquire whether the tenements in question are frankalmoign belonging to the church of the demandant, or else the lay fee of the tenant. (m) And thereby the demandant may recover lands and tenements belonging to the church, which were alienated by the predecessor; or of which he was disseised; or which were recovered against him by verdict, confession, or default, without praying in aid of the patron and ordinary; or on which any person has intruded since the predecessor's death. (n) But since the restraining statute of 13 Eliz. c. 10, whereby the alienation of the predecessor, or a recovery suffered by him of the lands of the church, is declared to be absolutely void, this remedy is of very little use, unless where the parson himself has been deforced for more than twenty years; (o) for the successor, at any competent time after his accession to the benefice, may enter, or bring an ejectment.

## CHAPTER XVII.

### OF INJURIES PROCEEDING FROM, OR AFFECTING, THE CROWN.

HAVING in the nine preceding chapters considered the injuries, or private wrongs, that may be offered by one subject to another, all of which are redressed by the command and authority of the king, signified by his original writs returnable in the several courts of justice, which thence derive a jurisdiction of examining and determining the complaint; I proceed now to inquire into the mode of redressing those injuries to which the crown itself is a party: which injuries are either where the crown is the aggressor, and which, therefore, cannot, without a solecism, admit of the same kind of remedy; (a) or else is the sufferer, and which then are usually remedied by peculiar forms of process appropriated to the royal prerogative. In treating, therefore, of these, we will consider, first, the manner of redressing those wrongs or injuries which a subject may suffer from the crown, and then of redressing those which the crown may receive from a subject.

I. That the king can do no wrong, is a necessary and fundamental principle of the English constitution: meaning only, as has formerly been observed, (b) that in the first place, whatever may be amiss in the conduct of public affairs [\*255] is not \*chargeable personally on the king; nor is he, but his ministers, accountable for it to the people: and, secondly, that the prerogative of the crown extends not to do any injury: for being created for the benefit of the people, it cannot be exerted to their prejudice. (c) Whenever therefore it happens, that, by misinformation, or inadvertence, the crown hath been induced to invade the private rights of any of its subjects, though no action will lie against the sovereign, (d) (for who shall command the king?) (e) yet the law hath furnished the subject with a decent and respectful mode of removing that

(i) F. N. B. 49.

(k) Booth, 221.

(l) F. N. B. 48.

(m) Registrar. 32.

(n) F. N. B. 48, 49.

(o) Booth, 221.

(a) Bro. Abr. tit. *petition*, 12; tit. *prerogative*, 2.

(b) Book I. ch. 7, pp. 242-246.

(c) Plowd. 487.

(d) Jenkins, 78.

(e) Finch, L. 83.

(7) Abolished by statute 3 and 4 Wm. IV, c. 27.

invasion, by informing the king of the true state of the matter in dispute: and, as it presumes that to *know of* any injury and to *redress* it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved. (1)

The distance between the sovereign and his subjects is such, that it rarely can happen that any *personal* injury can immediately and directly proceed from the prince to any private man; and, as it can so seldom happen, the law in decency supposes that it never will or can happen at all; because it feels itself incapable of furnishing any adequate remedy, without infringing the dignity and destroying the sovereignty of the royal person, by setting up some superior power with authority to call him to account. The inconveniency therefore of a mischief that is barely possible, is (as Mr. Locke has observed) (f) well recompensed by the peace of the public and security of the government, in the person of the chief magistrate being set out of the reach of coercion. But injuries to the rights of *property* can scarcely be committed by the crown without the intervention of its officers; for whom the law in matters of right entertains no respect or delicacy, but furnishes various methods of detecting the errors or misconduct of those agents, by whom the king has been deceived, and induced to do a temporary injustice. (2)

\*The common law methods of obtaining possession or restitution from the crown, of either real or personal property, are, 1. By *petition de droit*, or petition of right: which is said to owe its original to King Edward the First. (g) 2. By *monstrans de droit*, manifestation or plea of right: both of which may be preferred or prosecuted either in the chancery or exchequer. (h) The former is of use, where the king is in full possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the crown, grounded on facts disclosed in the petition itself; in which case he must be careful to state truly the whole title of the crown, otherwise the petition shall abate (i) and then, upon this answer being endorsed or underwritten by the king, *soit droit fait al partie* (let right be done to the party), (j) a commission shall issue to inquire of the truth of this suggestion: (k) after

(f) On Govt. p. 2, § 205.

(g) Bro. Abr. tit. *prerogatives*, 2. Fitz. Abr. tit. *error*, 8.

(h) Skin. 609.

(i) Finch, L. 266.

(j) Stat. Tr. vii, 134.

(k) Skin. 608. Rast. Entr. 461.

(1) The maxim that the king can do no wrong, has no place in American constitutional law. No officer or dignitary is so high as to be above the law, and no individual is so low as not to be entitled to its protection. If a citizen is injured in his rights by the act of an officer of the government, he has his remedy, as he would have had if the injury had proceeded from any other person. If the act which constitutes the injury would be a crime in a private citizen, it would be a crime in the officer also. If however the wrong-doer is the chief executive officer of the nation or state, and constitutes as such a department of the government, he is to be tried for criminal conduct not in the ordinary courts, but upon impeachment before the high court created by the constitution for the purpose. The punishment, if he is found guilty, may extend in some cases to removal from office.

The state itself, which is the sovereign power in corporate organization, can no more wrong an individual with impunity than can any private person. Indeed as the state must act by agents, if its acts are wrongful, every one engaged in them is a wrong-doer, and the state may be ignored and its agents held to accountability. The state itself, however, is not suable except with its own consent; *ante*, Book 1, p. 243, n.; it being inconsistent with its sovereignty that it should be brought against its will into courts which are created and exist only at its pleasure. The state may also, when providing for its own needs under the right of eminent domain, and taking for the purpose the property of individuals, give all necessary protection to its agents, and turn the owner over to such remedy—provided it be adequate—as its laws shall provide. Compare *Hooker v. New Haven, &c., Co.*, 14 Conn., 146; *S. C.*, 38 Am. Dec., 477, with *People v. Green*, 3 Mich., 496. If in any case the remedy which the state gives against itself is inadequate, it is presumed an appeal to the legislature will result in a suitable redress of the grievance. See *United States v. McLemore*, 4 How., 286; *Hill v. United States*, 9 How., 386.

The proceedings on behalf of a subject to obtain redress from the crown are simplified and made more effective by statute 23 and 24 Vic., c. 84, which gives the party a trial in the proper court of law or equity, upon an issue made up substantially as in a suit between individuals.

(2) See the *Bankers' Case*, and notes thereto, *Broom. Const. Law*, 285.

the return of which the king's attorney is at liberty to plead in bar; and the merits shall be determined upon issue or demurrer, as in suits between subject and subject. Thus, if a disseisor of lands, which are holden of the crown, dies seized without an heir, whereby the king is *prima facie* entitled to the lands, and the possession is cast on him either by inquest of office, or by act of law without any office found; now the disseissee shall have remedy by petition of right, suggesting the title of the crown, and his own superior right before the disseisin made. (*l*) But where the right of the party, as well as the right of the crown, appears upon record, there the party shall have *monstrans de droit* which is putting in a claim of right grounded on facts already acknowledged and established, and praying the judgment of the court, whether upon those facts the king or the subject hath the right. As if, in the case before supposed, the whole special matter is found by an inquest of office (as well the disseisin, as the dying without an heir), the party grieved shall have *monstrans de droit* [\*257] at the common law. (*m*) But as this seldom happens, and the \*remedy by petition was extremely tedious and expensive, that by *monstrans* was much enlarged and rendered almost universal by several statutes, particularly 36 Edw. III, c. 13, and 2 and 3 Edw. VI, c. 8, which also allow inquisitions of office to be traversed or denied, wherever the right of a subject is concerned, except in a very few cases. (*n*) These proceedings are had in the petty-bag office in the court of chancery: and, if upon either of them the right be determined against the crown, the judgment is, *quod manus domini regis amoveantur et possessio restituitur petenti, salvo jure domini regis*; (*o*) which last clause is always added to judgments against the king, (*p*) to whom no laches is ever imputed, and whose right (till some late statutes) (*q*) was never defeated by any limitation or length of time. And by such judgment the crown is instantly out of possession; (*r*) so that there needs not the indecent interposition of his own officers to transfer the seisin from the king to the party aggrieved.

II. The methods of redressing such injuries as the crown may receive from the subject are,

1. By such usual common law actions, as are consistent with the royal prerogative and dignity. As therefore the king, by reason of his legal ubiquity cannot be disseised or dispossessed of any real property which is once vested in him, he can maintain no action which supposes a dispossession of the plaintiff; such as an assize or an ejectment: (*s*) but he may bring a *quare impedit*, (*t*) which always supposes the complainant to be seized or possessed of the advowson: and he may prosecute this writ, like every other by him brought, as well in the king's bench (*u*) as the common pleas, or in whatever court he pleases. So, too, he may bring an action of trespass for taking away his goods; but such actions are not usual (though in strictness maintainable) for breaking his close, or other injury done upon his soil or possession. (*w*) It [\*258] would be equally tedious \*and difficult to run through every minute distinction that might be gleaned from our ancient books with regard to this matter; nor is it in any degree necessary, as much easier and more effectual remedies are usually obtained by such prerogative modes of process, as are peculiarly confined to the crown.

2. Such is that of *inquisition* or *inquest of office*: which is an inquiry made by the king's officer, his sheriff, coroner, or escheator, *virtute officii*, or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels. (*x*) This is done by a jury of no determinate number; being either twelve, or less, or more. As, to inquire, whether the king's tenant for life died seized, whereby the reversion accrues to the king; whether A, who

(*l*) Bro. Abr. tit. *petition*. 30. 4 Rep. 55. (*m*) 4 Rep. 55. (*n*) Skin. 608. (*o*) 2 Inst. 605. Rest. Entr. 463.  
 (*p*) Finch, L. 460. (*q*) 21 Jac. I. c. 2. 9 Geo. III, c. 18. (*r*) Finch, L. 459.  
 (*s*) Bro. Abr. tit. *prerogative*, 89. (*t*) F. N. B. 32. (*u*) *Diversité des courtes, c. bank le roy*.  
 (*w*) Bro. Abr. tit. *prerog.* 130. F. N. B. 90. Year-book, 4 Hen. IV, 4. (*x*) Finch, L. 222, 224, 225.

held immediately of the crown, died without heirs; in which case the lands belong to the king by escheat: whether B be attainted of treason; whereby his estate is forfeited to the crown: whether C, who has purchased lands, be an alien; which is another cause of forfeiture: whether D be an idiot *a natiuitate*; and therefore, together with his lands, appertains to the custody of the king; and other questions of like import, concerning both the circumstances of the tenant, and the value or identity of the lands. These inquests of office were more frequently in practice than at present, during the continuance of the military tenures amongst us: when, upon the death of every one of the king's tenants, an inquest of office was held, called an *inquisitio post mortem*, to inquire of what lands he died seized, who was his heir, and of what age, in order to entitle the king to his marriage, wardship, relief, *primer-seisin*, or other advantages, as the circumstances of the case might turn out. To superintend and regulate these inquiries, the court of wards and liveries were instituted, by statute 32 Hen. VIII, c. 46, which was abolished at the restoration of King Charles the Second, together with the oppressive tenures upon which it was founded.

\*With regard to other matters, the inquests of office still remain in force, and are taken upon proper occasions; being extended not only to lands, but also to goods and chattels personal, as in the case of wreck, treasure-trove, and the like; and especially as to forfeitures for offences. For every jury which tries a man for treason or felony, every coroner's inquest that sits upon a *felo de se*, or one killed by chance-medley, is not only with regard to chattels, but also as to real interests, in all respects an inquest of office: and if they find the treason or felony, or even the flight of the party accused (though innocent), the king is thereupon, by virtue of this *office found*, entitled to have his forfeitures; and also, in the case of chance-medley, he or his grantees are entitled to such things by way of deodand, as have moved to the death of the party. [\*259]

These inquests of office were devised by law, as an authentic means to give the king his right by solemn matter of record; without which he in general can neither take nor part from any thing. (y) For it is a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon or seize any man's possessions upon bare surmises without the intervention of a jury. (z) It is however particularly enacted by the statute 33 Hen. VIII, c. 20, that, in case of attainder for high treason, the king shall have the forfeiture instantly, without any inquisition of office. And, as the king hath (in general) no title at all to any property of this sort before office found, therefore by the statute 18 Hen. VI, c. 6, it was enacted, that all letters patent or grants of lands and tenements before office found, or returned into the exchequer, shall be void. And by the bill of rights at the revolution, 1 W. and M. st. 2, c. 2, it is declared, that all grants and promises of fines and forfeitures of particular persons before conviction (which is here the inquest of office) are illegal and void; which indeed was the law of the land in the reign of Edward the Third. (a)

\*With regard to real property, if an office be found for the king, it puts him in immediate possession, without the trouble of a formal entry, provided a subject in the like case would have had a right to enter; and the king shall receive all the mesne or intermediate profits from the time that his title accrued. (b) As, on the other hand, by the *articuli super cartas*, (c) if the king's escheator or sheriff seize lands into the king's hand without cause, upon taking them out of the king's hand again, the party shall have the mesne profits restored to him. [\*260]

In order to avoid the possession of the crown, acquired by the finding of such office, the subject may not only have his *petition of right*, which discloses

(y) *Ibid.* 82.

(b) Finch, L. 285, 286.

(z) Glib. Hist. Exch. 132. Hop. 247.

(c) 28 Edw. I, st. 3, c. 19.

(a) 2 Inst. 48.

new facts not found by the office, and his *monstrans de droit*, which relies on the facts as found: but also he may (for the most part) *traverse* or deny the matter of fact itself, and put it in a course of trial by the common law process of the court of chancery: yet still, in some special cases, he hath no remedy left but a mere petition of right. (*d*) These *traverses*, as well as the *monstrans de droit*, were greatly enlarged and regulated for the benefit of the subject, by the statutes before mentioned, and others. (*e*) And in the traverses thus given by statute, which came in the place of the old petition of right, the party traversing is considered as the plaintiff; (*f*) and must therefore make out his own title, as well as impeach that of the crown, and then shall have judgment *quod manus domini regis amoveantur, &c.*

3. Where the crown hath unadvisedly granted any thing by letters patent, which ought not to be granted, (*g*) or where the patentee hath done an act [\*261] that amounts to a forfeiture of the grant, (*h*) the remedy to repeal the patent is by writ of *scire facias* in chancery. (*i*) This may be brought either on the part of the king in order to resume the thing granted; or, if the grant be injurious to a subject, the king is bound of right to permit him (upon his petition) to use his royal name for repealing the patent in a *scire facias*. (*k*) And so also, if upon office untruly found for the king, he grants the land over to another, he who is grieved thereby, and traverses the office itself, is entitled before issue joined to a *scire facias* against the patentee, in order to avoid the grant. (*l*) (3)

4. An *information* on behalf of the crown, filed in the exchequer by the king's attorney-general, is a method of suit for recovering money or other chattels, or for obtaining satisfaction in damages for any personal wrong (*m*) committed in the lands or other possessions of the crown. It differs from an information filed in the court of king's bench, of which we shall treat in the next book; in that *this* is instituted to redress a private wrong, by which the property of the crown is affected; *that* is calculated to punish some public wrong or heinous misdemeanor in the defendant. It is grounded on no writ under seal, but merely on the intimation of the king's officer, the attorney-general, who "gives the court to understand and be informed of" the matter in question: upon which the party is put to answer, and trial is had, as in suits between subject and subject. The most usual informations are those of *intrusion* and *debt: intrusion*, for any trespass committed on the lands of the crown, (*n*) as by entering thereon without title, holding over after a lease is determined, taking the profits, cutting down timber, or the like; and *debt*, upon any contract for moneys due to the king, or for any forfeiture due to the crown upon the breach of a penal statute. This is most commonly used to recover forfeitures occasioned by transgressing those laws which are enacted [\*262] for the establishment of the revenue; others, which regard mere matters of police and public convenience, being usually left to be enforced by common informers, in the *qui tam* informations or actions, of which we have formerly spoken. (*o*) But after the attorney-general has informed upon the breach of a penal law, no other information can be received. (*p*) There is also an information *in rem*, when any goods are supposed to become the property of the crown, and no man appears to claim them, or to dispute the title of the king. As anciently in the case of treasure-trove, wrecks, waifs, and estrays, seized by the king's officer for his use. Upon such

(*d*) Finch, L. 334.

(*e*) Stat. 34 Edw. III. c. 13. 36 Edw. III. c. 13. 2 and 3 Edw. VI. c. 8. (*f*) Law of Nisi Prius, 214, 215.

(*g*) See book II. c. 21.

(*h*) Dyer, 198.

(*i*) 8 Lev. 230.

4 Inst. 88.

(*k*) 2 Vent. 344.

(*l*) Bro. Abr. tit. *scire facias*, 69, 135.

(*m*) Moor. 375.

(*n*) Cro. Jac. 312.

1 Leon. 48. Savil. 49.

(*o*) See page 162.

(*p*) Hardr. 201.

(3) This remedy is still retained, and is resorted to in the United States; the writ generally issuing from the highest court of law in the state. See in general Tidd. Pr., 1090, *et seq.*



seizure, an information was usually filed in the king's exchequer, and thereupon a proclamation was made for the owner (if any) to come in and claim the effects; and at the same time there issued a commission of *appraisement* to value the goods in the officer's hands; after the return of which, and a second proclamation had, if no claimant appeared, the goods were supposed derelict, and condemned to the use of the crown. (g) And, when, in later times, forfeitures of the goods themselves, as well as personal penalties on the parties, were inflicted by act of parliament for transgressions against the laws of the customs and excise, the same process was adopted in order to secure such forfeited goods for the public use, though the offender himself had escaped the reach of justice.

5. A writ of *quo warranto* is in the nature of a writ of right for the king, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right. (r) It lies also in case of non-user or long neglect of a franchise, or misuser or abuse of it; being a writ commanding the defendant to show by what warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. This was originally returnable before the king's justices at Westminster; (s) but afterwards only \*before the justices in eyre, by virtue of the statutes of *quo warranto*, 6 Edw. I. [\*263] c. 1, and 18 Edw. I. st. 2; (t) but since those justices have given place to the king's temporary commissioners of assize, the judges on the several circuits, this branch of the statutes hath lost its effect; (u) and writs of *quo warranto* (if brought at all) must now be prosecuted and determined before the king's justices at Westminster. And in case of judgment for the defendant, he shall have an allowance of his franchise; but in case of judgment for the king, for that the party is entitled to no such franchise, or hath disused or abused it, the franchise is either seized into the king's hands, to be granted out again to whomever he shall please; or, if it be not such a franchise as may subsist in the hands of the crown, there is merely judgment of *ouster*, to turn out the party who usurped it. (w)

The judgment on a writ of *quo warranto* (being in the nature of a writ of right) is final and conclusive, even against the crown. (x) Which, together with the length of its process, probably occasioned that disuse into which it is now fallen, and introduced a more modern method of prosecution, by *information* filed in the court of king's bench by the attorney-general, in the nature of a writ of *quo warranto*; wherein the process is speedier, and the judgment not quite so decisive. This is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, or seize it for the crown; but hath long been applied to the mere purposes of trying the civil right, seizing the franchise or ousting the wrongful possessor; the fine being nominal only.

During the violent proceedings that took place in the latter end of the reign of King Charles the Second, it was, among other things, thought expedient to new-model most of the corporation-towns in the kingdom; for which purpose many of those \*bodies were persuaded to surrender their charters, and [\*264] informations in the nature of *quo warranto* were brought against others, upon a supposed, or frequently a real, forfeiture of their franchises by neglect or abuse of them. And the consequence was, that the liberties of most of them were seized into the hands of the king, who granted them fresh charters with such alterations as were thought expedient; and, during their state of anarchy, the crown named all their magistrates. This exertion of power, though perhaps *in summo jure* it was for the most part strictly legal, gave a great and just alarm; the new-modelling of all corporations being a very large

(g) Gilb. Hist. of Exch. c. 13.  
(s) Old Nat. Brev. fol. 107, edit. 1534.  
(w) Cro. Jac. 259. 1 Show. 280.

(r) Finch, L. 233. 2 Inst. 233.  
(t) 2 Inst. 493. Rast. Entr. 540.  
(u) 1 Sid. 86. 2 Show. 47. 13 Mod. 235. (w) 2 Inst. 493.

stride towards establishing arbitrary power; and, therefore, it was thought necessary, at the revolution, to bridle this branch of the prerogative, at least so far as regarded the metropolis, by statute 2 W. and M. c. 8, which enacts that the franchises of the city of London shall never hereafter be seized or forejudged for any forfeiture or misdemeanor whatsoever.

This proceeding is, however, now applied to the decision of corporation disputes between party and party, without any intervention of the prerogative, by virtue of the statute 9 Ann. c. 20, which permits an information, in nature of *quo warranto*, to be brought with leave of the court, at the relation of any person desiring to prosecute the same (who is then styled the *relator*), against any person usurping, intruding into, or unlawfully holding any franchise or office in any city, borough, or town corporate; provides for its speedy determination; and directs that, if the defendant be convicted, judgment of ouster (as well as a fine) may be given against him, and that the relator shall pay or receive costs according to the event of the suit. (4)

6. The writ of *mandamus* (y) is also made by the same statute, 9 Ann. c. 20, a most full and effectual remedy, in the first place, for refusal of admission where a person is entitled to an office or place in any such corporation; and, [265] secondly, for wrongful removal, when a person is legally possessed. \*These are injuries, for which, though redress for the party interested may be had by assize, or other means, yet as the franchises concern the public, and may affect the administration of justice, this prerogative writ also issues from the court of king's bench; commanding, upon good cause shown to the court, the party complaining to be admitted or restored to his office. And the statute requires, that a return be immediately made to the first writ of *mandamus*; which return may be pleaded to or traversed by the prosecutor, and his antagonist may reply, take issue, or demur, and the same proceedings may be had, as if an action on the case had been brought, for making a false return; and, after judgment obtained for the prosecutor, he shall have a peremptory writ of *mandamus* to compel his admission or restitution; which latter (in case of an action) is effected by a writ of restitution. (z) So that now the writ of *mandamus*, in cases within this statute, is in the nature of an action; whereupon the party applying and succeeding may be entitled to costs, in case it be the franchise of a citizen, burgess, or freeman; (a) and also, in general, a writ of error may be had thereupon. (b)

This writ of *mandamus* may also be issued, in pursuance of the statute 11 Geo. I. c. 4, in case within the regular time no election shall be made of the mayor or other chief officer of any city, borough, or town corporate, or (being made) it shall afterwards become void; requiring the electors to proceed to election, and proper courts to be held for admitting and swearing in the magistrates so respectively chosen. (5)

We have now gone through the whole circle of civil injuries and the redress which the laws of England have anxiously provided for each. In which the student cannot but observe that the main difficulty which attends their discussion arises from their great variety, which is apt at our first acquaintance to

(y) See page 110.

(z) 11 Rep. 79.

(a) Stat. 12 Geo. III. c. 21.

(b) 1 P. Wms. 351.

(4) In the United States the proceeding to try an alleged usurpation of an office or franchise is by an information in the nature of a *quo warranto*, or some statutory substitute to which the same principles are applicable. The books of practice in the several states will give the proceedings. See also High on Extraordinary Remedies. In Howell's State Trials, vol. 8, p. 1039, *et seq.*, will be found the proceedings in the *quo warranto* cases against the city of London and other corporations in the time of Charles II, which are referred to in the text.

(5) In the United States the writ of *mandamus* is a common remedy where a party is entitled to some specific right which is withheld from him, and for the deprivation of which no other appropriate and adequate remedy exists. Mr. High in his treatise on Extraordinary Remedies deals with this subject, and collects the authorities.

breed a confusion of ideas, and a kind of distraction in the memory: a difficulty not a little increased \*by the very immethodical arrangement in which [\*266] they are delivered to us by our ancient writers, and the numerous terms of art in which the language of our ancestors has obscured them. Terms of art there will unavoidably be in all sciences; the easy conception and thorough comprehension of which must depend upon the frequent and familiar use; and the more subdivided any branch of the science is, the more terms must be used to express the nature of these subdivisions, and mark out with sufficient precision the ideas they are meant to convey. But I trust that this difficulty, however great it may appear at first view, will shrink to nothing upon a nearer and more frequent approach; and, indeed, be rather advantageous than of any disservice, by imprinting on the student's mind a clear and distinct notion of the nature of these several remedies. And, such as it is, it arises principally from the excellence of our English laws; which adapt their redress exactly to the circumstances of the injury, and do not furnish one and the same action for different wrongs, which are impossible to be brought within one and the same description; whereby every man knows what satisfaction he is entitled to expect from the courts of justice, and as little as possible is left in the breast of the judges, whom the law appoints to administer, and not to prescribe, the remedy. And I may venture to affirm that there is hardly a possible injury, that can be offered either to the person or property of another, for which the party injured may not find a remedial writ, conceived in such terms as are properly and singularly adapted to his own particular grievance.

In the several personal actions which we have cursorily explained, as debt, trespass, detinue, action on the case, and the like, it is easy to observe how plain, perspicuous and simple the remedy is, as chalked out by the ancient common law. In the methods prescribed for the recovery of landed and other permanent property, as the right is more intricate, the feudal, or rather Norman remedy, by real actions, is somewhat more complex and difficult, and attended with some delays. And since, in order to obviate those difficulties, and retrench those \*delays, we have permitted the rights of real prop- [\*267] erty to be drawn into question in mixed or personal suits, we are (it must be owned) obliged to have recourse to such arbitrary fictions and expedients, that, unless we had developed their principles, and traced out their progress and history, our present system of remedial jurisprudence (in respect of landed property) would appear the most intricate and unnatural that ever was adopted by a free and enlightened people.

But this intricacy of our legal process will be found, when attentively considered, to be one of those troublesome, but not dangerous evils, which have their root in the frame of our constitution, and which, therefore, can never be cured, without hazarding every thing that is dear to us. In absolute governments, when new arrangements of property and a gradual change of manners have destroyed the original ideas on which the laws were devised and established, the prince by his edict may promulge a new code, more suited to the present emergencies. But when laws are to be framed by popular assemblies, even of the representative kind, it is too herculean a task to begin the work of legislation afresh, and extract a new system from the discordant opinions of more than five hundred counsellors. A single legislator, or an enterprising sovereign, a Solon or Lycurgus, a Justinian or a Frederick, may at any time form a concise, and perhaps an uniform, plan of justice: and evil betide that presumptuous subject who questions its wisdom or utility. But who, that is acquainted with the difficulty of new-modelling any branch of our statute laws (though relating but to roads or to parish settlements), will conceive it ever feasible to alter any fundamental point of the common law, with all its appendages and consequents, and set up another rule in its stead? When, therefore, by the gradual influence of foreign trade and domestic tranquility, the spirit of our military tenures began to decay, and at length the whole structure

was removed, the judges quickly perceived that the forms and delays of the old feudal actions (guarded with their several outworks of essoins, vouchers, aid-prayers, and a hundred other formidable intrenchments) were ill-suited to [\*268] that \*more simple and commercial mode of property which succeeded the former, and required a more speedy decision of right, to facilitate exchange and alienation. Yet they wisely avoided soliciting any great legislative revolution in the old established forms, which might have been productive of consequences more numerous and extensive than the most penetrating genius could foresee; but left them as they were to languish in obscurity and oblivion, and endeavoured, by a series of minute contrivances, to accommodate such personal actions as were then in use to all the most useful purposes of remedial justice: and where, through the dread of innovation, they hesitated at going so far as perhaps their good sense would have prompted them, they left an opening for the more liberal and enterprising judges, who have sat in our courts of equity, to show them their error by supplying the omissions of the courts of law. And, since the new expedients have been refined by the practice of more than a century, and are sufficiently known and understood, they in general answer the purpose of doing speedy and substantial justice, much better than could now be effected by any great fundamental alterations. The only difficulty that attends them arises from their fictions and circuities; but, when once we have discovered the proper clue, that labyrinth is easily pervaded. Our system of remedial law resembles an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless, and therefore neglected. The inferior apartments, now accommodated to daily use, are cheerful and commodious, though their approaches may be winding and difficult.

In this part of our disquisitions, I however thought it my duty to unfold, as far as intelligibly I could, the nature of these real actions, as well as of personal remedies. And this not only because they are still in force, still the law of the land, though obsolete and disused; and may, perhaps, in their turn, be hereafter, with some necessary corrections, called out again into common use; [\*269] but also because, as a sensible \*writer has well observed, (c) "whoever considers how great a coherence there is between the several parts of the law, and how much the reason of one case opens and depends upon that of another, will, I presume, be far from thinking any of the old learning useless, which will so much conduce to the perfect understanding of the modern." And, besides, I should have done great injustice to the founders of our legal constitution, had I led the student to imagine that the remedial instruments of our law were originally contrived in so complicated a form as we now present them to his view: had I, for instance, entirely passed over the direct and obvious remedies by assizes and writs of entry, and only laid before him the modern method of prosecuting a writ of ejectment.

(c) Hawk. Abr. Co. Litt. pref.

## CHAPTER XVIII.

OF THE PURSUIT OF REMEDIES BY ACTION; AND  
FIRST, OF THE ORIGINAL WRIT.

HAVING, under the head of *redress by suit in courts*, pointed out in the preceding pages, in the first place, the *nature* and several *species* of courts of justice, wherein remedies are administered for all sorts of private wrongs; and, in the second place, shown to which of these courts in particular application must be made for redress, according to the distinction of injuries, or, in other words, what wrongs are *cognizable* by one court, and what by another; I proceeded, under the title of *injuries cognizable by the courts of common law*, to define and explain the specific remedies by action, provided for every possible degree of wrong or injury; as well such remedies as are dormant and out of use, as those which are in every day's practice, apprehending that the reason of the one could never be clearly comprehended without some acquaintance with the other: and I am now, in the last place, to examine the *manner* in which these several remedies are *pursued* and applied, by action in the courts of common law; to which I shall afterwards subjoin a brief account of the proceedings in the courts of equity.

\*In treating of remedies by action at common law I shall confine myself to the *modern* method of practice in our courts of judicature. [\*271] For, though I thought it necessary to throw out a few observations on the nature of real actions, however at present disused, in order to demonstrate the coherence and uniformity of our legal constitution, and that there was no injury so obstinate and inveterate, but which might in the end be eradicated by some or other of those remedial writs; yet it would be too irksome a task to perplex both my readers and myself with explaining all the rules of proceeding in those obsolete actions, which are frequently mere positive establishments, the *forma et figura judicii*, and conduce very little to illustrate the reason and fundamental grounds of the law. Wherever I apprehend they may at all conduce to this end, I shall endeavour to hint at them incidentally.

What, therefore, the student may expect in this and the succeeding chapters, is an account of the method of proceeding in and prosecuting a suit upon any of the personal writs we have before spoken of, in the court of *common pleas* at Westminster, that being the court originally constituted for the prosecution of all civil actions. It is true that the court of king's bench and exchequer, in order, without intrenching upon ancient forms, to extend their remedial influence to the necessities of modern times, have now obtained a concurrent jurisdiction and cognizance of very many civil suits: but, as causes are therein conducted by much the same advocates and attorneys, and the several courts and their judges have an entire communication with each other, the methods and forms of proceeding are in all material respects the same in all of them. So that, in giving an abstract or history (a) of the progress of a suit through the court of common pleas, we \*shall at the same time [\*272] give a general account of the proceedings of the other two courts;

(a) In deducing this history the student must not expect authorities to be constantly cited, as practical knowledge is not so much to be learned from any books of law as from experience and attendance on the courts. The compiler must therefore be frequently obliged to rely upon his own observations,—which in general he hath been studious to avoid where those of any other might be had. To accompany and illustrate these remarks, such gentlemen as are designed for the profession will find it necessary to peruse the books of *entries*, ancient and modern, which are transcripts of proceedings that have been had in some particular actions. A book or two of technical learning will also be found very convenient, from which a man of liberal education and tolerable understanding may glean *pro re nata* as much as is sufficient for his purpose. These books of *practice*, as they are called, are all pretty much on a level in point of composition and solid instruction, so that that which bears the latest edition is usually the best. But Gilbert's *History and Practice of the Court of Common Pleas* is a book of a very different stamp; and though (like the rest of his posthumous works) it has suffered most grossly by ignorant or careless transcribers, yet it has traced out the reason of many parts of our modern practice, from the feudal institutions and the primitive construction of our courts, in a most clear and ingenious manner.

taking notice, however, of any considerable difference in the local practice of each. And the same abstract will, moreover, afford us some general idea of the conduct of a cause in the inferior courts of common law, those in cities and boroughs, or in the court-baron, or hundred, or county court; all which conform (as near as may be) to the example of the superior tribunals to which their causes may probably be, in some stage or other, removed.

The most natural and perspicuous way of considering the subject before us will be (I apprehend) to pursue it in the order and method wherein the proceedings themselves follow each other: rather than to distract and subdivide it by any more logical analysis. The general, therefore, and orderly parts of a suit are these: 1. The original writ: 2. The process: 3. The pleadings: 4. The issue or demurrer: 5. The trial: 6. The judgment and its incidents: 7. The proceedings in nature of appeals: 8. The execution.

First, then, of the *original*, or original writ; (1) which is the beginning or foundation of the suit. When a person hath received an injury, and thinks it worth his while to demand a satisfaction for it, he is to consider with himself, [\*273] or take advice, what redress the law has given for that injury; \*and thereupon, is to make application or suit to the crown, the fountain of all justice, for that particular specific remedy which he is determined or advised to pursue. As, for money due on bond, an action of *debt*; for goods detained without force, an action of *detinue* or *trover*; or, if taken with force, an action of *trespass vi et armis*; or to try the title of lands, a *writ of entry* or action of trespass in *ejectment*; or for any consequential injury received, a special action *on the case*. To this end he is to sue out, or purchase by paying the stated fees, an *original*, or original writ, from the court of chancery, which is the *officina justitiæ*, the shop or mint of justice, wherein all the king's writs are framed. It is a mandatory letter from the king in parchment, sealed with his great seal, (b) and directed to the sheriff of the county wherein the injury is committed or supposed so to be, requiring him to command the wrongdoer, or party accused, either to do justice to the complainant, or else to appear in court, and answer the accusation against him. Whatever the sheriff does in pursuance of this writ, he must *return* or certify to the court of common pleas, together with the writ itself: which is the foundation of the jurisdiction of that court, being the king's warrant for the judges to proceed to the determination of the cause. For it was a maxim introduced by the Normans, that there should be no proceeding in common pleas before the king's justices without his original writ; because they held it unfit that those justices, being only the substitutes of the crown, should take cognizance of any thing but what was thus expressly referred to their judgment. (c) However, in small actions below the value of forty shillings, which are brought in the court-baron or county court, no royal writ is necessary; but the foundation of such suits continues to be (as in the times of the Saxons) not by original *writ*, but by *plaint*; (d) that is, by a private memorial tendered in open court to the judge, wherein the party injured sets forth his cause of action; and the judge is bound of [\*274] common right to administer justice therein, without any special \* mandate from the king. Now, indeed, even the royal writs are held to be demandable of common right, on paying the usual fees; for any delay in the granting them, or setting an unusual or exorbitant price upon them, would be a breach of *magna carta*, c. 29, "*nulli vendemus, nulli negabimus, aut differemus, justitiam vel rectum*."

Original writs are either *optional* or *peremptory*; or, in the language of our lawyers, they are either a *præcipe*, or a *si te fecerit securum*. (e) The *præcipe* is in the alternative, commanding the defendant to do the thing required, or show the reason wherefore he hath not done it. (f) The use of this writ is

(b) Finch L. 237. (c) Flet. l. 2, c. 34. (d) Mirr. c. 2, § 3. (e) Finch, L. 237. (f) Append. No. III, § 1.

(1) This writ is no longer in use; a simpler proceeding by summons from the court in which the suit is to be brought having been substituted.

where something certain is demanded by the plaintiff, which it is incumbent on the defendant himself to perform; as, to restore the possession of land, to pay a certain liquidated debt, to perform a specific covenant, to render an account, and the like: in all which cases the writ is drawn up in the form of *præcipe* or command, to do thus, or show cause to the contrary; giving the defendant his choice, to redress the injury, or stand the suit. The other species of original writs is called a *si te fecerit securum*, from the words of the writ; which directs the sheriff to cause the defendant to appear in court, without any option given him, provided the plaintiff gives the sheriff security effectually to prosecute his claim. (g) This writ is in use, where nothing is specifically demanded, but only a satisfaction in general: to obtain which and minister complete redress, the intervention of some judicature is necessary. Such are writs of trespass, or on the case, wherein no debt or other specific thing issued for in certain, but only damages to be assessed by a jury. For this end the defendant is immediately called upon to appear in court, provided the plaintiff gives good security of prosecuting his claim. Both species of writs are *tested*, or witnessed in the king's own name; "witness ourself at Westminster," or wherever the chancery may be held.

\*The security here spoken of, to be given by the plaintiff for prosecuting his claim, is common to both writs, though it gives denomination only to the latter. The whole of it is at present become a mere matter of form; and John Doe and Richard Roe are always returned as the standing pledges for this purpose. The ancient use of them was to answer for the plaintiff, who in case he brought an action without cause, or failed in the prosecution of it when brought, was liable to an amercement from the crown for raising a false accusation; and so the form of the judgment still is. (h) In like manner, as by the Gothic constitutions no person was permitted to lay a complaint against another, "*nisi sub scriptura aut specificatione trium testium, quod actionem vellet persequi*;" (i) and as by the laws of Sancho I, king of Portugal, damages were given against a plaintiff who prosecuted a groundless action. (k)

The day on which the defendant is ordered to appear in court, and on which the sheriff is to bring in the writ and report how far he has obeyed it, is called the *return* of the writ: it being then returned by him to the king's justices at Westminster. And it is always made returnable at the distance of at least fifteen days from the date or *teste*, that the defendant may have time to come up to Westminster, even from the most remote parts of the kingdom; and upon some day in one of the four *terms* in which the court sits for the dispatch of business.

These terms are supposed by Mr. Selden (l) to have been instituted by William the Conqueror: but Sir Henry Spelman hath clearly and learnedly shown, that they were gradually formed from the canonical constitutions of the church; being indeed no other than those leisure seasons of the year, which were not occupied by the great festivals or fasts, or which were not liable to the general avocations of rural business.

\*Throughout all Christendom, in very early times, the whole year [276] was one continual term for hearing and deciding causes. For the Christian magistrates, to distinguish themselves from the heathens, who were extremely superstitious in the observation of their *dies fasti et nefasti*, went into a contrary extreme, and administered justice upon all days alike. Till at length the church interposed and exempted certain holy seasons from being profaned by the tumult of forensic litigations. As, particularly, the time of Advent and Christmas, which gave rise to the winter vacation; the time of Lent and Easter, which created that in the spring; the time of Pentecost, which produced the third; and the long vacation, between midsummer and

(g) Append. No. II, § 1.  
(h) Mod. Un. Hist. xxii, 48.

(i) Finch. L. 189, 262.

(j) Jan. Angl. l. 2, § 2.

(k) Stermhook, *de jure Gotth.* l. 2, § 7.

Michaelmas, which was allowed for the hay-time and harvest. All Sundays also, and some particular festivals, as the days of the Purification, Ascension, and some others, were included in the same prohibition: which was established by a canon of the church, A. D. 517, and was fortified by an imperial constitution of the younger Theodosius, comprised in the Theodosian code. (m)

Afterwards, when our own legal constitution came to be settled, the commencement and duration of our law terms were appointed with an eye to those canonical prohibitions; and it was ordered by the laws of King Edward the Confessor, (n) that from Advent to the octave of the Epiphany, from *septuagesima* to the octave of Easter, from the Ascension to the octave of Pentecost, and from three in the afternoon of all Saturdays till Monday morning, the peace of God and the holy church be kept throughout all the kingdom. And so extravagant was afterwards the regard that was paid to these holy times, that though the author of the Mirror (o) mentions only one vacation of any considerable length, containing the months of August and September, yet Britton is express, (p) that in the reign of King Edward the First no secular [\*277] plea could be held, nor any man sworn on the \*evangelists, (q) in the times of Advent, Lent, Pentecost, harvest, and vintage, the days of the great litanies, and all solemn festivals. But he adds, that the bishops did nevertheless grant dispensations (of which many are preserved in Rymer's *feodera*), (r) that assizes and juries might be taken in some of these holy seasons. And soon afterwards a general dispensation was established by statute Westm. 1, 3 Edw. I, c. 51, which declares, that "by the assent of all the prelates, assizes of *novel disseisin*, *mort d'ancestor*, and *darrein presentment*, shall be taken in Advent, septuagesima, and Lent; and that at the special request of the king to the bishops." The portions of time, that were not included within these prohibited seasons, fell naturally into a fourfold division, and, from some festival day that immediately preceded their commencement, were denominated the terms of St. Hilary, of Easter, of the Holy Trinity, and of St. Michael: which terms have been since regulated and abbreviated by several acts of parliament; particularly Trinity term by statute 32 Hen. VIII, c. 21, and Michaelmas term by statute 16 Car. I, c. 6, and again by statute 24 Geo. II, c. 48.

There are in each of these terms stated days called *days in bank*, *dies in banco*: that is, days of appearance in the court of common bench. They are generally at the distance of about a week from each other, and have reference to some festival of the church. On some one of these days in bank all original writs must be made returnable; and therefore they are generally called the *returns* of that term: whereof every term has more or less, said by the Mirror (s) to have been originally fixed by King Alfred, but certainly settled as early as the statute of 51 Hen. III, st. 2. But though many of the return days are fixed upon Sundays, yet the court never sits to receive these returns till the Monday after: (t) and therefore no proceedings can be held, or judgment can be given, or supposed to be given, on the Sunday. (u)

\*The first return in every term is, properly speaking, the first day in [\*278] that term: as, for instance, the octave of St. Hilary, or the eighth day inclusive after the feast of that saint: which falling on the thirteenth of January, the octave therefore or first day of Hilary term is the twentieth of January. And thereon the court sits to take *essoigns*, or excuses, for such as do not appear according to the summons of the writ: wherefore this is usually called the *essoign day* of the term. But on every return-day in the term, the person summoned has three days of grace, beyond the day named in the writ, in which to make his appearance; and if he appears on the fourth day inclusive, *quarto die post*, it is sufficient. For our sturdy ancestors held it beneath the condition of a freeman to appear, or to do any other act, at the precise time

(m) Spelm. of the Terms.

(n) C. 8. *de temporibus et diebus pacis*.

(r) Temp. Hen. III, *passim*.

(u) 1 Jon. 156. Swann & Broome, B. R. Mich. 5 Geo. III, *et in Dom. Proc.* 1766.

(o) C. 2, § 2.

(p) C. 53.

(q) See page 50.

(s) C. 5, § 1.

(t) Registr. 19. Salk. 637. 6 Mod. 260.



appointed. The feudal law therefore always allowed three distinct days of citation, before the defendant was adjudged contumacious for not appearing; (v) preserving in this respect the German custom, of which Tacitus thus speaks: (w) "*illud ex libertate vitium, quod non simul nec jussi conveniunt; sed et alter et tertius dies cunctatione co-euntium absumitur.*" And a similar indulgence prevailed in the Gothic constitution: "*illud enim nimis libertatis indicium, concessa toties impunitas non parendi; nec enim trinis judicii concessibus poenam perditæ causæ contumax meruit.*" (x) Therefore, at the beginning of each term, the court does not usually (y) sit for dispatch of business till the *fourth* or *appearance* day, as in Hilary term on the twenty-third of January; and in Trinity term, by statute 32 Hen. VIII, c. 21, not till the *fifth* day, the *fourth* happening on the great popish festival of *Corpus Christi*; (z) which days are therefore called and set down in the almanacks as the first days of the term, and the court also sits till the *quarto die post* or appearance day of the last return, which is therefore the end of each term. (2)

## CHAPTER XIX.

## OF PROCESS.

THE next step for carrying on the suit, after suing out the original, is called the *process*; being the means of compelling the defendant to appear in court. This is sometimes called *original* process, being founded upon the original writ; and also to distinguish it from *mesne* or intermediate process, which issues, pending the suit, upon some collateral interlocutory matter; as to summon juries, witnesses, and the like. (a) *Mesne* process is also sometimes put in contradistinction to *final* process, or process of *execution*; and then it signifies all such process as intervenes between the beginning and end of a suit.

But process, as we are now to consider it, is the method taken by the law to compel a compliance with the original writ, of which the primary step is by giving the party notice to obey it. This notice is given upon all real *præcipes*, and also upon all personal writs for injuries not against the peace, by *summons*; which is a warning to appear in court at the return of the original writ, given to the defendant by two of the sheriff's messengers called *summoners*, either in person or left at his house or land: (b) in like manner as in the civil law the first process is by personal citation, *in jus vocando*. (c) This warning on the land is given, in real actions, by erecting a white stick or wand on the defendant's grounds, (d) (which stick or wand among the northern nations is called the *baculus nunciatorius*); (e) and by statute 31 Eliz. c. 3, the notice must also be proclaimed on some Sunday before [\*280] the door of the parish church.

If the defendant disobeys this verbal monition, the next process is by writ of *attachment* or *pone*, so called from the words of the writ, (f) "*pone per*

(v) Feud. l. 2, §. 22.

(w) De Mor. Germ. c. 11.

(x) Stiernhook *de jure Goth.* l. 1, c. 6.

(y) See 1 Bulstr. 35.

(z) See Speelman, on the Terms, ch. 17. Note, that if the feast of St. John the Baptist, or midsummer-day, falls on the morrow of *Corpus Christi* day, (as it did A. D. 1614, 1698, and 1709, and will again A. D. 1791,) Trinity full term then commences, and the courts sit on that day, though in other years it is no juridical day. Yet, in 1702, 1713 and 1724, when midsummer-day fell upon what was regularly the last day of the term, the courts did not then sit, but it was regarded like a Sunday, and the term was prolonged to the twenty-fifth of June. Rot. C. B. Bumb. 178.

(a) Finch. L. 436.

(b) Ibid. 344, 352.

(c) Fy. 2, 4, 1.

(d) Dalt. of Sher. c. 31.

(e) Stiernh. *de jure Sueon.* l. 1, c. 6.

(f) Appendix, No. III, § 2.

(2) The whole practice of the courts is now changed and is much simplified.

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*vadium et salvos plegios*, put by gage and safe pledges A B the defendant," &c. This is a writ not issuing out of chancery, but out of the court of common pleas, being grounded on the non-appearance of the defendant at the return of the original writ; and thereby the sheriff is commanded to attach him, by taking *gage*, that is, certain of his goods, which he shall forfeit if he doth not appear; (g) or by making him find *safe pledges* or sureties who shall be amerced in case of his non-appearance. (h) This is also the first and immediate process, without any previous summons, upon actions of trespass *vi et armis*, or for other injuries, which though not forcible are yet trespasses against the peace, as *deceit* and *conspiracy*; (i) where the violence of the wrong requires a more speedy remedy, and therefore the original writ commands the defendant to be at once attached, without any precedent warning. (j) (1)

If after *attachment*, the defendant neglects to appear, he not only forfeits this security, but is moreover to be farther compelled by writ of *distringas*, (k) or *distress infinite*; which is a subsequent process issuing from the court of common pleas, commanding the sheriff to distrain the defendant from time to time, and continually afterwards, by taking his goods and the profits of his lands, which are called *issues*, and which by the common law he forfeits to the king if he doth not appear. (l) But now the issues may be sold, if the court shall so direct, in order to defray the reasonable costs of the plaintiff. (m) (2)

[\*281] In like \*manner by the civil law, if the defendant absconds, so that the citation is of no effect, "*mittitur adversarius in possessionem bonorum ejus*. (n)

And here by the common, as well as the civil law, the process ended in case of injuries without force: the defendant, if he had any substance, being gradually stripped of it all by repeated distresses, till he rendered obedience to the king's writ; and, if he had no substance, the law held him incapable of making satisfaction, and therefore looked upon all farther process as nugatory. And, besides, upon feudal principles, the person of a feudatory was not liable to be attached for injuries merely civil, lest thereby his lord should be deprived of his personal services. But, in cases of injury accompanied with force, the law, to punish the breach of the peace, and prevent its disturbance for the future, provided also a process against the defendant's *person* in case he neglected to appear upon the former process of attachment, or had no substance whereby to be attached; subjecting his body to imprisonment by the writ of *capias ad respondendum*. (o) But this immunity of the defendant's person, in case of peaceable though fraudulent injuries, producing great contempt of the law in indigent wrongdoers, a *capias* was also allowed to arrest the person, in actions of *account*, though no breach of the peace be suggested, by the statutes of Marlbridge, 52 Hen. III, c. 23, and Westm. 2, 13 Edw. I, c. 11, in actions of *debt* and *detinue*, by statute 25 Edw. III, c. 17, and in all actions *on the case*, by statute 19 Hen. VII, c. 9. Before which last statute a practice had been introduced of commencing the suit by bringing an original writ of trespass *quare clausum fregit*, for breaking the plaintiff's close *vi et armis*: which by the old common law subjected the defendant's person to be arrested by writ of *capias*: and then afterwards, by connivance of the court, the plaintiff might proceed to prosecute for any other less forcible injury. This practice (through custom rather than necessity, and for saving some trouble and expense, in [\*282] suing out a special original \*adapted to the particular injury) still continues in almost all cases, except in actions of debt; though now, by

(g) Finch. L. 345. Lord Raym. 278.

(h) Dalt. of Sher. c. 32.

(i) Finch. L. 305, 302.

(j) Appendix, No. II, § 1.

(k) Appendix, No. III, § 2.

(l) Finch. L. 352.

(m) Stat. 10 Geo. III, c. 50.

(n) Ff. 2, 4, 6.

(o) 3 Rep. 12.

(1) The original writ is now abolished, and the proceedings simplified.

(2) Distringas and outlawry proceedings were abolished by the common law Procedure Act of 1852. If, after due effort, the defendant cannot be found, the court may order his appearance to be entered, and the case will proceed against him.

virtue of the statutes above cited and others, a *capias* might be had upon almost every species of complaint.

If therefore the defendant being summoned or attached makes default, and neglects to appear; or if the sheriff returns a *nihil*, or that the defendant hath nothing whereby he may be summoned, attached, or distrained; the *capias* now usually issues: (*p*) being a writ commanding the sheriff to *take* the body of the defendant if he may be found in his bailiwick or county, and him safely to keep, so that he may have him in court on the day of the return, to answer to the plaintiff of a plea of debt or trespass, &c., as the case may be. This writ, and all other subsequent to the original writ, not issuing out of chancery, but from the court into which the original was returnable, and being grounded on what has passed in that court in consequence of the sheriff's return, are called *judicial*, not *original* writs; they issue under the private seal of that court, and not under the great seal of England; and are *tested*, not in the king's name, but in that of the chief (or, if there be no chief, of the senior) justice only. And these several writs, being grounded on the sheriff's return, must respectively bear date the same day on which the writ immediately preceding was returned.

This is the regular and ordinary method of process. But it is now usual in practice to sue out the *capias* in the first instance, upon a supposed return of the sheriff; especially if it be suspected that the defendant, upon notice to the action, will abscond; and afterwards a fictitious original is drawn up, if the party is called upon so to do, with a proper return thereupon, in order to give the proceedings a colour of regularity. When this *capias* is delivered to the sheriff, he by his under-sheriff grants a warrant to his inferior officers or bailiffs, to execute it on the defendant. And, if the sheriff of Oxfordshire (in which county the injury is supposed to be committed and the action is laid) cannot find the defendant in his jurisdiction, \*he returns that he is not found, *non est inventus*, in his bailiwick: whereupon another writ issues, [\*283] called a *testatum capias*, (*q*) directed to the sheriff of the county where the defendant is supposed to reside, as of Berkshire, reciting the former writ, and that it is *testified*, *testatum est*, that the defendant lurks or wanders in *his* bailiwick, wherefore he is commanded to take him, as in the former *capias*. But here, also, when the action is brought in one county, and the defendant lives in another, it is usual, for saving trouble, time and expense, to make out a *testatum capias* at the first; supposing not only an original, but also a former *capias*, to have been granted which in fact never was. And this fiction being beneficial to all parties, is readily acquiesced in and is now becoming the settled practice; being one among many instances to illustrate that maxim of law, that *in fictione juris consistit æquitas*. (3)

But where a defendant absconds, and the plaintiff would proceed to an outlawry against him, an original writ must then be sued out regularly, and after that a *capias*. And if the sheriff cannot find the defendant upon the first writ of *capias*, and returns a *non est inventus*, there issues out an *alias* writ, and after that a *pluries*, to the same effect as the former: (*r*) only after these words "we command you," this clause is inserted, "as we have *formerly*," or, "as we have *often* commanded you:"—"sicut alias," or "sicut pluries *præcipimus*." And, if a *non est inventus* is returned upon all of them, then a writ of *exigent* or *exigi facias* may be sued out, (*s*) which requires the sheriff to cause the defendant to be proclaimed, required, or exacted, in five county courts successively, to render himself; and if he does, then to take him as in a *capias*: but if he does not appear, and is returned *quinto exactus*, he shall then be outlawed by the coroners of the county. Also by statutes 6 Hen. VIII, c. 4, and 31 Eliz.

(p) Appendix, No. III, § 2.

(q) *Ibid*.

(r) *Ibid*.

(s) *Ibid*.

(3) Arrest upon *meane* process has been almost entirely abolished by statute 1 and 2 Vic., c. 110, and later statutes.

c. 3, whether the defendant dwells within the same or another county than that [284] wherein the *exigent* is sued out, \*a writ of proclamation(t) shall issue out at the same time with the *exigent*, commanding the sheriff of the county, wherein the defendant dwells, to make three proclamations thereof in places the most notorious, and most likely to come to his knowledge, a month before the outlawry shall take place. Such *outlawry* is putting a man out of protection of the law so that he is incapable to bring an action for redress of injuries; and it is also attended with a forfeiture of all one's goods and chattels to the king. And therefore, till sometime after the conquest, no man could be outlawed but for felony; but in Bracton's time, and somewhat earlier, process of outlawry was ordained to lie in all actions for trespasses *vi et armis*.(u) And since his days, by a variety of statutes (the same which allow the writ of *capias* before mentioned), process of outlawry doth lie in divers actions that are merely civil, provided they be commenced by original and not by bill. (v) If after outlawry the defendant appears publicly, he may be arrested by a writ of *capias ulagatum*,(w) and committed till the outlawry be reversed. Which reversal may be had by the defendant's appearing personally in court or by attorney, (x) (though in the king's bench he could not appear by attorney, (y) till permitted by statute 4 and 5 W. and M., c. 18); and any plausible cause, however slight, will in general be sufficient to reverse it, it being considered only as a process to compel an appearance. But then the defendant must pay full costs, and put the plaintiff in the same condition, as if he had appeared before the writ of *exigi facias* was awarded.

Such is the first process in the court of *common pleas*. In the *king's bench* they may also (and frequently do) proceed in certain causes, particularly in actions of ejectment and trespass, by *original writ*, with *attachment* and *capias* thereon; (z) returnable, not at Westminster, where the common pleas are now fixed, in consequence of *magna carta*, but "*ubicunque fuerimus in Anglia*," [285] wheresoever the king shall then be in \*England; the king's bench being removable into any part of England at the pleasure and discretion of the crown. But the more usual method of proceeding therein is without any original, but by a peculiar species of process entitled a *bill of Middlesex*: and therefore so entitled, because the court now sits in that county; for if it sate in *Kent*, it would then be a *bill of Kent*. (a) For though, as the justices of this court have, by its fundamental constitution, power to determine all offences and trespasses, by the common law and custom of the realm,(b) it needed no original writ from the crown to give it cognizance of any misdemeanor in the county wherein it resides; yet, as by this court's coming into any county, it immediately superseded the ordinary administration of justice by the general commissions of *eyre* and of *oyer and terminer*, (c) a process of its own became necessary within the county where it sate, to bring in such persons as were accused of committing any *forcible injury*. The bill of Middlesex (d) (which was formerly always founded on a *plaint* of trespass *quare clausum fregit*, entered on the records of the court) (e) is a kind of *capias*, directed to the sheriff of that county, and commanding him to take the defendant, and have him before our lord the king at Westminster on a day prefixed, to answer to the plaintiff of a plea of trespass. For this accusation of trespass it is, that gives the court of king's bench jurisdiction in other civil causes, as was formerly observed; since when once the defendant is taken into custody of the marshal, or prison-keeper of this court, for the supposed trespass, he being then a prisoner of this court, may here be prosecuted for any other species of injury. Yet, in order to found this jurisdiction, it is not necessary that the defendant be actually the

(t) Appendix No. III. § 2.

(u) Co. Litt. 128.

(v) 1 Sid. 159.

(w) Appendix. No. III. § 2.

(x) 2 Roll. Rep. 490. Regul. C. B., A. D. 1654, c. 12.

(y) Cro. Jac. 616. Salk. 496.

(z) Appendix, No. II, § 1.

(a) Thus, when the court sate at Oxford by reason of the plague, Mich. 1665, the process was by *bill of Oxfordshire*. Trye's *Jus Filicar.* 101.(b) Bro. Abr. tit. *Oyer and Terminer*, 8.(c) Bro. Abr. tit. *Jurisdiction*, 66. 3 Inst. 27.

(d) Appendix, No. III, § 3.

(e) Trye's *Jus Filicar.*

marshal's prisoner; for, as soon as he appears, or puts in bail, to the \*process, he is deemed by so doing to be in such custody of the marshal, as [\*286] will give the court a jurisdiction to proceed. (f) And, upon these accounts, in the bill or process a complaint of trespass is always suggested, whatever else may be the real cause of action. This bill of Middlesex must be served on the defendant by the sheriff, if he finds him in that county; but, if he returns "*non est inventus*," then there issues out a writ of *latitat*, (g) to the sheriff of another county, as Berks; which is similar to the *testatum capias* in the common pleas, and recites the bill of Middlesex and the proceedings thereon, and that it is testified that the defendant "*latitat et discurrit*," lurks and wanders about in Berks; and therefore commands the sheriff to take him, and have his body in court on the day of the return. But, as in the common pleas, the *testatum capias* may be sued out upon only a supposed, and not an actual, preceding *capias*; so in the king's bench a *latitat* is usually sued out upon only a supposed, and not an actual, *bill of Middlesex*. So that, in fact, a *latitat* may be called the first process in the court of king's bench, as the *testatum capias* is in the common pleas. Yet, as in the common pleas, if the defendant lives in the county wherein the action is laid, a common *capias* suffices; so in the king's bench, likewise, if he lives in Middlesex, the process must still be by *bill of Middlesex* only.

In the exchequer the first process is by writ of *quo minus*, in order to give the court a jurisdiction over pleas between party and party. In which writ (h) the plaintiff is alleged to be the king's farmer or debtor, and that the defendant hath done him the injury complained of; *quo minus sufficiens existit*, by which he is the less able to pay the king his rent, or debt. And upon this the defendant may be arrested as upon a *capias* from the common pleas.

Thus differently do the three courts set out at first, in the commencement of a suit, in order to entitle the two courts of king's bench and exchequer to hold plea in causes between subject and subject, which by the original constitution of Westminster-hall they were not empowered to do. Afterwards, when the cause is once drawn into the respective courts, the method of pursuing it is pretty much the same in all of them. \*If the sheriff has found the [\*287] defendant upon any of the former writs, the *capias*, *latitat*, &c., he was [\*287] anciently obliged to take him into custody, in order to produce him in court upon the return, however small and minute the cause of action might be. For, not having obeyed the original summons, he had shown a contempt of the court, and was no longer to be trusted at large. But when the summons fell into disuse, and the *capias* became in fact the first process, it was thought hard to imprison a man for a contempt which was only supposed: and therefore in common cases by the gradual indulgence of the courts (at length authorized by statute 12 Geo. I, c. 29, which was amended by 5 Geo. II, c. 27, made perpetual by 21 Geo. II, c. 3, and extended to all inferior courts by 19 Geo. III, c. 70), the sheriff or proper officer can now only personally serve the defendant with the copy of the writ or process, and with notice in writing to appear by his attorney in court to defend this action; which in effect reduces it to a mere summons. And if the defendant thinks proper to appear upon this notice, his appearance is recorded, and he puts in sureties for his future attendance and obedience; which sureties are called *common bail*, being the same two imaginary persons that were pledges for the plaintiff's prosecution, John Doe and Richard Roe. Or, if the defendant does not appear upon the return of the writ, or within four (or, in some cases, eight) days after, the plaintiff may enter an appearance for him, as if he had really appeared; and may file common bail in the defendant's name, and proceed thereupon as if the defendant had done it himself.

But if the plaintiff will make *affidavit*, or assert upon oath, that the cause of action amounts to ten pounds or upwards, then he may arrest the defendant

(f) 4 Inst. 72.

(g) Appendix, No. III, § 2.

(h) *Ibid.* § 4.

and make him put in substantial sureties for his appearance, called *special bail*. In order to which, it is required by statute 13 Car. II, st. 2, c. 2, that the true cause of action should be expressed in the body of the writ or process: else no security can be taken in a greater sum than 40*l*. This statute (without any such intention in the makers) had like to have ousted the king's bench of [\*288] Middlesex was framed only for actions of trespass, a defendant could not be arrested and held to bail thereupon for breaches of civil contracts. But to remedy this inconvenience, the officers of the king's bench devised a method of adding what is called a clause of *ac etiam* to the usual complaint of trespass: the bill of Middlesex commanding the defendant to be brought in to answer the plaintiff of a plea of trespass, and also to a bill of debt: (i) the complaint of trespass giving cognizance to the court, and that of debt authorizing the arrest. In imitation of which, Lord Chief Justice North a few years afterwards, in order to save the suitors of his court the trouble and expense of suing out special originals, directed that in the common pleas, besides the usual complaint of breaking the plaintiff's close, a clause of *ac etiam* might be also added to the writ of *capias*, containing the true cause of action; as, "that the said Charles the defendant may answer to the plaintiff of a plea of trespass in breaking his close: and also, *ac etiam*, may answer him, according to the custom of the court, in a certain plea of trespass upon the case, upon promises, to the value of twenty pounds," &c. (j) The sum sworn to by the plaintiff is marked upon the back of the writ; and the sheriff, or his officer the bailiff, then obliged actually to arrest or take into custody the body of the defendant, and, having so done, to return the writ with a *cepi corpus* endorsed thereon.

An *arrest* must be by corporal seizing or touching the defendant's body; after which the bailiff may justify breaking open the house in which he is (4) to take him; otherwise he has no such power; but must watch his opportunity to arrest him. For every man's house is looked upon by the law to be his castle of defence and asylum, wherein he should suffer no violence. (5) Which

(4) Trye's *Jus Fidisar*, 103. Appendix, No. III, § 3.

(j) Lilly's *Pract. Reg. tit. ac etiam*. North's *Life of Lord Guilford*, 99. This work is strongly recommended to the student's perusal.

(4) An arrest may be made without touching the person, as if a bailiff comes into a room and tells a person he arrests him, and locks the door; this is a sufficient arrest. Per *Hardwicke*, C. J., in *Williams v. Jones*, Cas. Temp. Hardw., 298. To constitute an arrest it is enough if the person is within the power of the officer and submits to the officer. *Mowry v. Chase*, 100 Mass., 79; *Emery v. Chesley*, 18 N. H., 198. If one on horseback or in a coach follows a bailiff who has process for him, and who merely tells the person so without touching him, it is an arrest; otherwise, if the person rides away. *Harmer v. Battyn*, Bull., N.P., 62. Mere words do not make an arrest, unless the person submits himself, or there is power in the officer to take immediate possession of the person. *Emery v. Chesley*, 18 N. H., 198; *Jenner v. Sparks*, 6 Mod., 173. See *Grainger v. Hill*, 4 Bing, N. C., 212. An officer effects the arrest of a person whom he has authority to arrest, by laying his hand upon him for the purpose of arresting him, though he may not succeed in stopping or holding him. *Whithead v. Keyes*, 3 Allen, 495.

(5) A man's house is a sanctuary for himself, not for a stranger who may fly to it. A sheriff may break it open to arrest such stranger after requesting admittance and being refused. *Semayne's Case*, 5 Coke, 91. But he does so at his peril, if the person he seeks is not in the house. Note to *Semayne's Case* in *Smith Lea Cas.*, vol. I, p. 228. A permanent boarder is so far a member of the household that the officer cannot force an entrance into the house to arrest him. *Oystead v. Shed*, 13 Mass., 520. If a man is once arrested and escapes, the officer may break into his house to retake him. *Jenner v. Sparks*, 6 Mod., 173; *Allen v. Martin*, 10 Wend., 300; S. C., 25 Am. Dec., 564. If the outer door is open an officer may enter and force an inner door. Where the ordinary entrance was by a back passage, and the officer came in through the open back door and burst open inner doors which were neither fastened nor locked, he was held justified. *Hubbard v. Mack*, 17 Johns., 127. See *Ratcliffe v. Burton*, 3 B. and P., 223. So, where one let his house to lodgers, but kept one room for himself, an officer, finding the outer door open, broke open an inner door leading to the room of a lodger, to arrest the latter, it was held no trespass.

principle is carried so far in the civil law that for the most part not so much as a common citation or summons, much less an arrest, can be executed upon a man within his own walls. (k) Peers of the realm, members \*of par- [289] liament, and corporations are privileged from arrests; and of course from outlawries. (l) And against them the process to enforce an appearance must be by summons and distress infinite, (m) instead of a *capias*. Also clerks, attorneys, and all other persons attending the courts of justice (for attorneys, being officers of the court, are always supposed to be there attending), are not liable to be arrested by the ordinary process of the court, but must be sued by *bill* (called usually a *bill of privilege*) as being personally present in court. (n) Clergymen performing divine service, and not merely staying in the church with a fraudulent design, are for the time privileged from arrests, by statutes 50 Edw. III, c. 5, and 1 Ric. II, c. 16, as likewise members of convocation actually attending thereon, by statute 8 Hen. VI, c. 1. Suitors, witnesses, and other persons, necessarily attending any courts of record upon business, are not to be arrested during their actual attendance, which includes their necessary coming and returning. (o) And no arrest can be made in the king's presence, nor within the verge of his royal palace, (p) nor in any place where the king's justices are actually sitting. The king hath moreover a special prerogative (which indeed is very seldom exerted,) (p) that he may

(k) *Fy. 2, 4, 18-21.*(l) *Whitelock of Parl. 206, 207.*

(m) See page 280.

(n) *Bro. Abr. tit. bills, 39. 13 Mod. 162.*

(o) See book IV, 276. The verge of the palace of Westminster extends, by stat. 23 Hen. VIII, c. 12, from Charing Cross to Westminster hall.

(p) Sir Edward Coke informs us (1 Inst. 131) that herein "he could say nothing of his own experience: for albeit Queen Elizabeth maintained many wars, yet she granted few or no protections; and her reason was that he was no fit subject to be employed in her service, that was subject to other men's actions, lest she might be thought to delay justice." But King William, in 1692, granted one to Lord Cutta, to protect him from being outlawed by his tailor (3 Lev. 332): which is the last that appears upon our books.

*Williams v. Spencer*, 5 Johns., 852; *Lee v. Gansel*, 1 Cowp., 1, on the ground that the door was not an outer door as to the lodger.

(b) The law of arrest has been greatly modified in England by the statutes abolishing arrest and imprisonment for debt except in a few specified cases, and also in the United States by constitutional and statutory provisions for the same purpose. But as arrests in civil suits are still allowed in some cases, we refer here to a few of the cases in which an exemption from arrest, on general principles, can still be claimed. Thus, *ambassadors* accredited to a foreign country, and their servants, while passing through the country to enter upon their duties, are privileged: *Novello v. Toogood*, 1 B. and C., 554; *Holbrook v. Henderson*, 4 Sandf., 619; *members of congress and of state legislatures*, while in attendance upon the body to which they belong, or upon any of its committees, and for a reasonable time before and after to go and return: *Cush. Leg. Assem.*, part 8, ch. 2; *members of state conventions*: *Bolton v. Martin*, 1 Dall., 296; *electors*, attending an election, or awaiting the counting of the votes: *Swift v. Chamberlain*, 8 Conn., 537; *parties and attorneys*, while attending court during the trial or hearing of the causes in which they are interested or employed, and while waiting for the same to be reached on the docket: *Clark v. Grant*, 2 Wend., 257; *McNiell's Case*, 6 Mass., 245; *Vincent v. Watson*, 1 Rich., 194; *Wilson v. Nettleton*, 12 Ill., 61; *witnesses*, in attendance on court or other judicial or legislative tribunal: *Bours v. Tuckerman*, 7 Johns., 538; *Ex parte Edme*, 9 S. and R., 147; *Sanford v. Chase*, 3 Cow., 881; *In re Dickenson*, 3 Harr., 517; *Norris v. Beach*, 2 Johns., 294; *Cush. Leg. Assem.* § 907; *jurors*, attending court in the performance of their duties: *Brooks v. Chesley*, 4 H. and McH., 295; *bail*, attending to justify: *Rimmer v. Green*, 1 M. and S., 638; *bankrupts and insolvents* duly discharged, as to all the demands covered by the discharge: *Wilson v. Kemp*, 8 M. and S., 595; *Chaffee v. Jones*, 19 Pick., 260. And in all these cases where the privilege is given by the law for the purpose of attendance at some particular place in a special character, it covers the stay and a reasonable time for going and returning: *Randall v. Gurney*, 3 B. and A., 252; *Childerston v. Barrett*, 11 East, 489; *Clark v. Grant*, 2 Wend., 257; but if the party goes out of his way on other business he loses his privilege. *Chaffee v. Jones*, 19 Pick., 260.

The privilege will not prevent the service of process which only requires common bail: *Hunter v. Cleveland*, 1 Brev., 167; *Hopkins v. Coburn*, 1 Wend., 292; *Catlett v. Morton*, 4 Litt., 123; *Le Grand v. Bedinger*, 4 T. B., Monr., 540; nor the service of a common summons or declaration, on which no bail is taken. *Case v. Rorabacker*, 15 Mich., 537. The courts do not *ex officio* take notice of a privilege, but the party entitled must bring it to the attention of the court by plea or proper motion, or it will be waived. *Prentiss v. Commonwealth*, 5 Rand., 697; S. C., 16 Am. Dec., 782.

by his *writ of protection* privilege a defendant from all personal, and many real, suits for one year at a time, and no longer; in respect of his being engaged in his service out of the realm. (q) And the king also by the common law might take his debtor into his protection, so that no one might sue or arrest him till the king's debts were paid: (r) but by the statute 25 Edw. III, st. 5, c. 19, notwithstanding such protection, another creditor may proceed to judgment against \*him, with a stay of execution, till the king's debt [\*290] be paid; unless such creditor will undertake for the king's debt, and then he shall have execution for both. And lastly, by statute 29 Car. II, c. 7, no arrest can be made, nor process served, upon a Sunday, except for treason, felony, or breach of the peace.

When the defendant is regularly arrested, he must either go to prison, for safe custody: or put in *special bail* to the sheriff. (7) For the intent of the arrest being only to compel an appearance in court at the return of the writ, that purpose is equally answered, whether the sheriff detains his person, or takes sufficient security for his appearance, called *bail* (from the French word *bailler*, to deliver), because the defendant is bailed, or delivered to his sureties, upon their giving security for his appearance: and is supposed to continue in their friendly custody instead of going to gaol. The method of putting in bail to the sheriff is by entering into a bond or obligation, with one or more sureties, (not fictitious persons, as in the former case of common bail, but real, substantial, responsible bondsmen), to insure the defendant's appearance at the return of the writ; which obligation is called the *bail bond*. (s) (8) The sheriff, if he pleases, *may* let the defendant go without any sureties; but that is at his own peril: for, after once taking him, the sheriff is bound to keep him safely, so as to be forthcoming in court; otherwise an action lies against him for an escape. But on the other hand, he is obliged, by statute 23 Hen. VI, c. 10, to take (if it be tendered) a sufficient bail-bond: and by statute 12 Geo. I, c. 29, the sheriff shall take bail for no other sum than such as is sworn to by the plaintiff, and endorsed on the back of the writ.

Upon the return of the writ, or within four days after, the defendant must appear according to the exigency of the writ. This appearance is effected by putting in and justifying bail *to the action*; which is commonly called putting in bail *above*. If this be not done, and the bail that were taken by \*the [\*291] sheriff *below* are responsible persons, the plaintiff may take an assignment from the sheriff of the bail-bond (under the statute 4 and 5 Ann. c. 16), and bring an action thereupon against the sheriff's bail. But if the bail, so accepted by the sheriff, be insolvent persons, the plaintiff may proceed against the sheriff himself, by calling upon him, first, to return the writ (if not already done), and afterwards to bring in the body of the defendant. And if the sheriff does not then cause sufficient bail to be put in and perfected *above*, he will himself be responsible to the plaintiff.

The bail *above*, or bail *to the action*, must be put in either in open court, or before one of the judges thereof; or else, in the country, before a commissioner appointed for that purpose by virtue of the statute 4 W. and M. c. 4, which must be transmitted to the court. These bail, who must at least be two in number, must enter into a recognizance (t) in court or before the judge or commissioner, in a sum equal (or in some cases double) to that which the plaintiff hath sworn to; whereby they do jointly and severally undertake, that if the

(q) Finch, L. 454. s Lev. 332. (r) F. N. B. 28. Co. Litt. 181. (s) Appendix, No. III, § 5. (t) *Ibid*.

(7) The statute 43 Geo. III, c. 46, allowed a deposit of money instead of bail. See Tidd Prac. 8th ed., 226.

(8) The bond must be made to the sheriff by his official title, by the person arrested with proper sureties. Dalton Sheriffs, p. 359. If a statute prescribes the requisites of the bond it must be strictly followed by the sheriff, but the plaintiff may take such security from the defendant as he sees fit. Decker v. Judson, 16 N. Y., 439.



defendant be condemned in the action he shall pay the costs and condemnation, or render himself a prisoner, or that they will pay it for him: which recognizance is transmitted to the court in a slip of parchment entitled a *bail piece*. (u) And, if excepted to, the bail must be *perfected*, that is, they must *justify* themselves in court, or before the commissioner in the country, by swearing themselves housekeepers, and each of them to be worth the full sum for which they are bail, after payment of all their debts. This answers in some measure to the *stipulatio* or *satisfactio* of the Roman laws (v) which is mutually given by each litigant party to the other: by the plaintiff, that he will prosecute his suit, and pay the costs if he loses his cause; in like manner as our law still requires nominal pledges of prosecution from the plaintiff; by the defendant, that he shall continue in court, and abide the sentence of the judge, much like our special bail: but with this difference, that the *fide-jussores* were there absolutely bound *judicatum solvere*, to see the costs and condemnation \*paid at all events: whereas our special bail may be discharged, [\*292] by surrendering the defendant into custody, within the time allowed by law; for which purpose they are at all times entitled to a warrant to apprehend him. (w) (9)

Special bail is required (as of course) only upon actions of debt, or actions on the case in trover or for money due, where the plaintiff can swear that the cause of action amounts to ten pounds: but in actions where the damages are precarious, being to be assessed *ad libitum* by a jury, as in actions for words, ejectment, or trespass, it is very seldom possible for a plaintiff to swear to the amount of his cause of action; and therefore no special bail is taken thereon, unless by a judge's order or the particular directions of the court, in some peculiar species of injuries, as in cases of mayhem or atrocious battery; or upon such special circumstances as make it absolutely necessary that the defendant should be kept within the reach of justice. Also in actions against heirs, executors, and administrators, for debts of the deceased, special bail is not demandable; for the action is not so properly against them in person, as against the effects of the deceased in their possession. But special bail is required even of them, in actions for a *devastavit*, or wasting the goods of the deceased; that wrong being of their own committing.

Thus much for *process*; which is only meant to bring the defendant into court, in order to contest the suit, and abide the determination of the law. When he appears either in person as a prisoner, or out upon bail, then follow the *pleadings* between the parties, which we shall consider at large in the next chapter.

(u) Appendix, No. III, § 5.

(v) Inst. l. 4, t. 11. ff. l. 2, t. 2.

(w) Show. 202. 6 Mod. 221.

(9) The bail are the keepers of their principal, and they may arrest him on the bail piece wherever they can find him, even though not within the jurisdiction of the court in which bail was taken. Anon. Show., 214; Parker v. Bidwell, 8 Conn., 84; Harp v. Osgood, 2 Hill, 216. And this right they may exercise by agent as well as in person: Nicolls v. Ingersoll, 7 Johns., 145; Parker v. Bidwell, 8 Conn., 84; and they may break doors, if necessary, to make the arrest. Read v. Case, 4 Conn., 166; Nicolls v. Ingersoll, 7 Johns., 145. But before breaking doors, admittance should in general be demanded.

## CHAPTER XX. OF PLEADING.

**PLEADINGS** are the mutual altercations between the plaintiff and defendant; which at present are set down and delivered into the proper office in writing, though formerly they were usually put in by their counsel *ore tenus*, or *viva voce*, in court, and then minuted down by the chief clerks, or prothonotaries; whence in our old law French the pleadings are frequently denominated the *parol*. (1)

The first of these is the *declaration, narratio, or count*, anciently called the *tale*; (a) in which the plaintiff sets forth his cause of complaint at length, being indeed only an amplification or exposition of the original writ upon which his action is founded, with the additional circumstances of time and place, when and where the injury was committed. But we may remember, (b) that in the king's bench, when the defendant is brought into court by bill of Middlesex, upon a supposed trespass, in order to give the court a jurisdiction, the plaintiff may declare in whatever action, or charge him with whatever injury, he thinks proper; unless he has held him to bail by a special *ac etiam*, which the plaintiff is then bound to pursue. And so also, in order to have the benefit of a *capias* to secure the defendant's person, it was the ancient practice, [\*294] and is therefore still warrantable in the common \*pleas, to sue out a writ of trespass *quare clausum fregit*, for breaking the plaintiff's close: and when the defendant is once brought in upon this writ, the plaintiff declares in whatever action the nature of his true injury may require; as in an action

(a) Appendix, No. II, § 2; No. III, § 6.

(b) See pages 285, 286.

(1) "Pleading is practically nothing more than affirming or denying, in a formal and orderly manner, those facts which constitute the ground of the plaintiff's demand and of the defendant's defence. Pleading, therefore, consists merely in alleging matter of fact, or in denying what is alleged as such by the adverse party." Gould Pl., Chap. I, § 8. "It is one of the first principles of pleading, that there is only occasion to state facts, which must be done for the purpose of informing the court, whose duty it is to declare the law arising upon those facts, and of apprising the opposite party of what is meant to be proved in order to give him an opportunity to answer or traverse it." Buller J., Dougl., 159. But it is not necessary in pleading to state what is merely matter of evidence, nor what the court takes notice of *ex officio*, nor what would come more properly from the other side; nor is it necessary to allege circumstances necessarily implied, nor to allege what the law will presume. Stephen Pl., 842-855. Only facts which are necessary and relevant should be stated. While irrelevant matter is simply rejected as superfluous, the pleader, by too minute detail in stating necessary matter will increase the difficulty of proving his case, and the danger of failing in it. Steph. Pl., 424.

The requisite facts must be stated intelligibly and consistently. The pleading must not be ambiguous in meaning, and the position taken must be stated in absolute form and not left to be collected from inference or argument. The pleading must not be in the alternative, and must be positive, not by way of recital, must set forth matters according to their legal effect, must be framed agreeably to approved precedents. If facts stated in pleadings admit of two meanings, that is taken which is unfavorable to the pleader. Stephen Pl., 377-393. But the last statement must be received with the qualification that the language of the pleading is to have a reasonable intendment and construction, and where an expression is capable of different meanings, that is to be taken which will support the pleading. I Chitty Pl., p. 238. In general whatever is alleged in pleading must be alleged with certainty, that is, with clearness, distinctness and particularity; but a general mode of pleading is often allowed, to avoid great prolixity, or where the allegation on the other side must reduce the matter to certainty. Less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading; so in the statement of matters merely of inducement or aggravation. Stephen Pl., 335-374. For a discussion of the different degrees of certainty required in different kinds of pleading, see Gould's Pleadings, § 51, *et seq.*

of covenant, or on the case for breach of contract, or other less forcible transgression: (c) unless, by holding the defendant to bail on a special *ac etiam*, he has bound himself to declare accordingly. (2)

In *local* actions, where possession of land is to be recovered, or damages for an actual trespass, or for waste, &c., affecting land, the plaintiff must lay his declaration or declare his injury to have happened in the very county and place that it really did happen; (3) but in *transitory* actions, for injuries that might have happened anywhere, as debt, detinue, slander, and the like, the plaintiff may declare in what county he pleases, and then the trial must be had in that county in which the declaration is laid. Though, if the defendant will make affidavit that the cause of action, if any, arose not in that but in another county, the court will direct a change of the *venue*, or *visme* (that is, the *vicinia*, or neighbourhood, in which the injury is declared to be done), and will oblige the plaintiff to declare in the other county; unless he will undertake to give material evidence in the first. For the statutes 6 Ric. II, c. 2, and 4 Hen. IV, c. 18, having ordered *all* writs to be laid in their proper counties, this, as the judges conceived, empowered them to change the *venue*, if required, and not to insist rigidly on abating the writ: which practice began in the reign of James the First. (4) And this power is discretionally exercised, so as to prevent,

(c) 2 Ventr. 259.

(d) Rastall, tit. *Dette*, 184, b. Fitz. Abr. tit. *Briefs*, 18. Salk. 670. Trye's *Jus. Fidis*, 221. Styl. Pract. Reg. (edit. 1657) 331.

(3) It is an ancient, reasonable and sound principle of the common law that the declaration should be conformable to the writ, and in the language of Lord Coke must not be either "narrower or broader." Co. Lit. 303a. At the earliest period of written pleadings of which we have clear and distinct traces, either in the books of precedents or reports, the declaration, when the action was commenced by original writ, contained a recital of it at large. If, therefore, an objectionable variance existed between the writ and the declaration, it appeared in the face of the latter, and the defendant availed himself of it by demurrer, plea in abatement, motion in arrest of judgment or upon writ of error. Com. Dig., tit. *Pleader*, c. 13; 2 Wils., 293. Such continued the form of pleading until, in the year 1654, a rule was made in the court of common pleas, in order to dispense in most cases with the useless repetition of the writ, that the nature only of the action should be stated. After the adoption of this rule it was held that the only mode whereby the defendant could avail himself of a variance between the writ and the count was by prayingoyer of the writ, whereby the writ as well as the declaration would be placed on the record. Salk., 658, 701; 2 Wils., 85, 293. Oyer of the writ continued to be granted in the court of king's bench until the case of *Boats v. Edwards*, in the year 1779, Doug., 227, when Lord Mansfield, delivering the opinion of that court, said the practice was used for delay, and *from thenceforth* plaintiffs might proceed as though demand of oyer had not been made. Since that time oyer of the writ for the purpose of setting aside the proceedings has been uniformly refused in both courts, and in those cases where a defendant may avail himself of a variance between the writ and the declaration, he is permitted to do so by motion to set aside the proceedings for irregularity. *Bank v. Arrowsmith*, 9 N. J., 284. If, however, the defect in the writ appears on the face of the declaration, the objection may be taken by plea in abatement. *Murray v. Hubbard*, 1 B. and P., 645.

As no demand of oyer is allowed, it is held that no objection can be raised to a variance between the writ and declaration: *Cronly v. Brown*, 19 Wend., 271; except where the defendant has been arrested and held to bail. *McFarlan v. Townsend*, 17 Wend., 440. After demand of oyer the objection was raised either by plea in abatement or special demurrer. *Newlin v. Palmer*, 11 S. and R., 88; though it has been held that the variance was only pleadable in abatement. *Duval v. Craig*, 2 Wheat., 45; *Chirac v. Reinicker*, 11 Wheat., 280. It has been suggested that under the practice in most of our states of issuing the original, not out of chancery, but from the court in which the pleadings are filed, there is no need of craving oyer, but that the variance may be reached by special demurrer. See *Young v. Grey*, 1 McCord, 138.

As to the general requisites of the declaration in regard to the names, number and character of the parties, see 1 Chitty Pleading, 244 *et seq.*

(3) Trespass for injury to real estate, and perhaps actions on covenants which run with the land, are local. *Sumner v. Finegan*, 15 Mass., 280. Where the action of covenant is founded on privity of contract between the parties, their executors or administrators, it is transitory and may be sued as a transitory action; but when it is founded on the privity of estate, the action is then local and must be sued in the county where the land lies. *Lienow v. Ellis*, 6 Mass., 331; *White v. Sanborn*, 6 N. H., 220.

and not to cause, a defect of justice. Therefore, the court will not change the *venue* to any of the four northern counties, previous to the spring circuit; because there the assizes are holden only once a year, at the time of the summer circuit. And it will sometimes remove the *venue* from the proper jurisdiction (especially of a narrow and limited kind), upon a suggestion, duly supported, that a fair and impartial trial cannot be had therein. (e)

\*It is generally usual, in actions upon the case, to set forth several [\*295] cases by different *counts* in the same declaration; so that, if the plaintiff fails in the proof of one, he may succeed in another. (4) As, in an action on the case upon an *assumpsit* for goods sold and delivered, the plaintiff usually counts or declares, first, upon a settled and agreed price between him and the defendant; as that they bargained for twenty pounds: and lest he should fail in the proof of this, he counts likewise upon a *quantum valebant*; that the defendant bought other goods, and agreed to pay him so much as they were reasonably worth; and then avers that they were worth other twenty pounds; and so on in three or four different shapes; (5) and at last concludes with declaring, that the defendant had refused to fulfil any of these agreements, whereby he is endangered to such a value. And if he proves the case laid in any one of his counts, though he fails in the rest, he shall recover proportionable damages. This declaration always concludes with these words: "And thereupon he brings *suit*," &c., *inde producit sectam*," &c. (6) By which words, *suit* or *secta* (*a sequendo*), were anciently understood the witnesses or followers of the plaintiff. (f) For in former times, the law would not put the defendant to the trouble of answering the charge, till the plaintiff had made out at least a probable case. (g) But the actual production of the *suit*, the *secta*, or *followers*, is now antiquated, and hath been totally disused, at least ever since the reign of Edward the Third, though the form of it still continues.

At the end of the declaration are added also the plaintiff's common pledges of prosecution, John Doe and Richard Roe, (7) which as we before observed, (h) are now mere names of form; though formerly they were of use to answer to the king for the amercement of the plaintiff, in case he were nonsuited, barred of his action, or had a verdict or judgment against him. (i) For, if the plaintiff neglects to deliver a declaration for two terms after the defendant appears, or is guilty of other delays or defaults against the rules of law in any subsequent \*stage of the action, he is adjudged *not to follow* or pursue [\*296] his remedy as he ought to do, and thereupon a *nonsuit* or *non prose-*

(e) *Stra.* 374. *Mylock v. Saladina.* Trin. 4 Geo. III. B. R.

(f) *Seld.* on *Fortesc.* c. 21.

(h) See page 274.

(g) *Bract.* 400. *Flet.* l. 2, c. 62.

(i) 3 *Bulstr.* 275. 4 *Inst.* 180.

(4) But several counts for the same cause of action are not now allowed, as a general rule, and the court, on motion, may order them stricken out. *Reg. Gen.*, Trin. T., 1853.

(5) The difference must be more than merely formal, for if the same evidence would support each count, the court may expunge all but one as superfluous. 1 *Tidd Pract.*, c. 16. It is a rule that several counts may be joined in the same declaration for different causes of action, provided they are of the same nature. Thus, in actions upon contract the plaintiff may join as many different counts as he has causes of action in account; so likewise in *assumpsit*, or in covenant, debt, annuity, or *scire facias*. In like manner in actions for wrongs independently of contract, the plaintiff may join as many different counts as he has causes of action in case, or in detinue, replevin, trespass or trover, and he may join trespass and battery of a servant *per quod servitium amisit*, or trespass and rescue. In general, counts in actions upon contract cannot be joined with counts for wrongs independently of contract, nor can counts in any one species of these actions be joined with counts in another. But debt and detinue can be joined if both are founded on contract. 1 *Tidd Pr.*, 12, 13, and case and trover may be joined. 1 *Chitty Pl.*, p. 201 and notes.

(6) When the action is against an officer of the court or attorney it is said that the conclusion should be "and therefore he prays relief, &c., *unde petit remedium*." *Chitty Pl.* 1, p. 437.

(7) This form was not essential, and is now obsolete.

*quitter*, is entered; and he is said to be *nonpros'd.* (8) And for thus deserting his complaint, after making a false claim or complaint (*pro falso clamore suo*), he shall not only pay costs to the defendant, but is liable to be amerced to the king. A *retraxit* differs from a nonsuit, in that the one is negative, and the other positive: the nonsuit is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again, upon payment of costs; but a *retraxit* is an open and voluntary renunciation of his suit in court, and by this he forever loses his action. A *discontinuance* is somewhat similar to a nonsuit; for when a plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day, and time to time, as he ought to do, the suit is discontinued, and the defendant is no longer bound to attend: but the plaintiff must begin again, by suing out a new original, usually paying costs to his antagonist. Anciently, by the demise of the king, all suits depending in his courts were at once discontinued, and the plaintiff was obliged to renew the process by suing out a fresh writ from the successor; the virtue of the former writ being totally gone, and the defendant no longer bound to attend in consequence thereof: but, to prevent the expense as well as delay attending this rule of law, the statute 1 Edw. VI. c. 7, enacts, that by the death of the king no action shall be discontinued; but all proceedings shall stand good as if the same king had been living.

When the plaintiff hath stated his case in the declaration, it is incumbent on the defendant within a reasonable time to make his *defence*, and to put in a *plea*; else the plaintiff will at once recover judgment by *default*, or *nihil dicit* of the defendant.

Defence, in its true legal sense, signifies not a justification, protection, or guard, which is now its popular signification; but merely an *opposing* or *denial* (from the French verb *defendre*) of the truth or validity of the complaint. It is the *contestatio litis* of the civilians: a general assertion that the plaintiff hath no ground of action, which assertion is afterwards extended \*and [\*297] maintained in his plea. For it would be ridiculous to suppose that the defendant comes and *defends* (or, in the vulgar acceptance, justifies) the force and injury, in one line, and pleads that he is *not guilty* of the trespass complained of, in the next. And therefore, in actions of dower, where the demandant doth not count of any injury done, but merely demands her endowment, (*k*) and in assizes of land, where also there is no injury alleged, but merely a question of right stated for the determination of the recognitors or jury, the tenant makes no defence. (*l*) In writs of entry, (*m*) where no injury is stated in the count, but merely the right of the demandant and the defective title of the tenant, the tenant comes and defends or denies *his* right, *jus suum*; that is, (as I understand it, though with a small grammatical inaccuracy), the right of the demandant, the only one expressly mentioned in the pleadings, or else denies his own right to be such, as is suggested by the count of the demandant. And in writs of right, (*n*) the tenant always comes and defends the right of the demandant and his seisin, *jus prædicti S. et seisinam ipsius* (*o*) (or else the seisin of his ancestor, upon which he counts, as the case may be), and the demandant may reply, that the tenant unjustly defends his, the demandant's, right, and the seisin on which he counts. (*p*) All which is extremely clear, if we understand by *defence* an *opposition* or *denial*, but it is otherwise inexplicably difficult. (*q*)

(k) Bastal, Ent. 324. (l) Booth of Real Actions, 118.

(m) Book II. Appendix, No. V. § 2.

(n) Appendix, No. I. § 6.

(o) Co. Entr. 182.

(p) Nov. Nar. 230, edit. 1534.

(q) The true reason of this, says Booth (on Real Actions, 64, 113), I could never yet find; so little did he understand of principles!

(8) Unless this judgment is entered up, the plaintiff is not regarded as out of court till a year from the return day of the writ, and may deliver a declaration within that time. *Cooper v. Nias*, 8 B. and Ald., 271. As to other practice in entering judgment of *non pros*, see 1 Tidd Pr., 458-9.

The courts were formerly very nice and curious with respect to the nature of the defence, so that if no defence was made, though a sufficient plea was pleaded, the plaintiff should recover judgment: (r) and therefore the book entitled *novæ narrationes* or the *new talys*, (s) at the end of almost every count, *narratio*, or tale, subjoins such defence as is proper for the defendant to make. For a general defence or denial was not prudent in every situation, since thereby the propriety of the writ, the competency of the plaintiff, and the cognizance [\*298] of the court were allowed. By defending the force and injury, \*the defendant waived all pleas of misnomer; (t) by defending the damages, all exceptions to the person of the plaintiff; and by defending either the one or the other *when* and *where* it should behove him, he acknowledged the jurisdiction of court. (u) But of late years these niceties have been very deservedly discountenanced: (w) though they still seem to be law, if insisted on. (x)

Before defence made, if at all, *cognizance* of the suit must be *claimed* or demanded; when any person or body corporate hath the franchise, not only of *holding pleas* within a particular limited jurisdiction, but also of the *cognizance of pleas*: and that, either *without* any words exclusive of other courts, which entitles the lord of the franchise, whenever any suit that belongs to his jurisdiction is commenced in the courts at Westminster, to demand the cognizance thereof: or *with* such exclusive words, which also entitles the defendant to plead to the jurisdiction of the court. (y) Upon this claim of cognizance, if allowed, all proceedings shall cease in the superior court, and the plaintiff is left at liberty to pursue his remedy in the special jurisdiction. As, when a scholar, or other privileged person, of the universities of Oxford or Cambridge, is impleaded in the courts at Westminster, for any cause of action whatsoever, unless upon a question of freehold. (z) In these cases, by the charters of those learned bodies, confirmed by act of parliament, the chancellor or vice-chancellor may put in a claim of cognizance; which, if made in due time and form, and with due proof of the facts alleged, is regularly allowed by the courts. (a) It must be demanded before full defence is made (b) or imparlance prayed; for these are a submission to the jurisdiction of the superior court, and the delay is a *laches* in the lord of the franchise: and it will not be allowed, if it occasions a failure of justice, (c) or if an action be brought against the person himself, who claims the franchise, unless he hath also a power in such case of making another judge. (d) (9)

\*After defence made, the defendant must put in his *plea*. But, before [\*299] he defends, if the suit is commenced by *capias* or *latitat*, without any special *original*, he is entitled to demand one *imparlance*, (e) or *licentia loquendi*; and may, before he pleads, have more time granted by consent of the court; to see if he can end the matter amicably without farther suit, by talking with the plaintiff: a practice which is (f) supposed to have arisen from a principle of

(r) Co. Litt. 127. (s) Edit. 1534. (t) Theloa. dig. l. 14, c. 1, p. 357.  
 (u) *En la defence sont ij choses entendants; per tant quil defende tort et force, home doyt entendre quil se excuse de tort a luy surmys per compte, et fait se partie al ple; et per tant quil defende les damages, il affirm le partie able destre respondu; et per tant quil defende ou et quant il devera, il accepte la poiar de court de conuistre ou trier leur ple. Mod. tenend. cur. 406, edit. 1534. See also Co. Litt. 127.*  
 (w) Salk. 217. Lord Raym. 282. (x) Carth. 230. Lord Raym. 217.  
 (y) 2 Lord Raym. 836. 10 Mod. 126. (z) See page 83.  
 (a) Hardr. 505.  
 (b) Rast. Entr. 128, &c. (c) 2 Vent. 383.  
 (d) Hob. 87. Year-book, M. 8 Hen. VI. 20. In this latter case the chancellor of Oxford claimed cognizance of an action of trespass brought against himself, which was disallowed, because he should not be judge in his own cause:—The argument used by Serjeant Rolfe on behalf of the cognizance is curious and worth transcribing:—*Jeo bous dirai un fable. En aucun temps fuit un pape, et avoit fait un grand offence, et le cardinals vindrent a luy et disoyent a luy, "peccasti;" et il dit, "judica me;" et ils disoyent, "non possumus, quia caput es ecclesie: judica teipsum;" et l' apostol dit, "judico me cremari;" et fuit combustus; et apres fuit un saint. Et in oeo cas il fuit son juge demene, et isint n' est pas inconvenient que un home soit juge demene.*  
 (e) Appendix, No. III, § 6. (f) Gilb. Hist. Com. Pl. 35.

(9) While the rule generally is that no one be judge of his own cause, yet if a party agree to refer a controversy to the decision of an interested party, he is bound by such decision. *Ranger v. Railway Co.*, 5 H. L. Cas., 72; *Monongahela, etc., Co. v. Fenton*, 4 Watts and S., 205.

religion, in obedience to that precept of the gospel, "agree with thine adversary quickly, whilst thou art *in the way* with him." (g) And it may be observed that this gospel precept has a plain reference to the Roman law of the twelve tables, which expressly directed the plaintiff and defendant to make up the matter, while they were *in the way*, or going to the prætor,—*in via, rem uti pacunt orato*. There are also many other previous steps which may be taken by a defendant before he puts in his plea. He may, in real actions, demand a *view* of the thing in question, in order to ascertain its identity and other circumstances. He may crave *oyer* (h) of the writ, or of the bond, or other specialty upon which the action is brought: that is, to *hear* it read to him; the generality of defendants in the times of ancient simplicity being supposed incapable to read it themselves, whereupon the whole is entered *verbatim* upon the record, and the defendant may take advantage of any condition or other part of it, not stated in the plaintiff's declaration. (10) \*In real actions also the tenant may pray in *aid*, or call for assistance of another, to help him to plead, because of the feebleness or imbecility of his own estate. Thus a tenant for life may pray in aid of him that hath the inheritance in remainder or reversion; and an incumbent may pray in aid of the patron and ordinary: that is, that they shall be joined in the action, and help to defend the title. *Voucher* also is the calling in of some person to answer the action, that hath warranted the title to the tenant or defendant. This we still make use of in the form of common recoveries (i) which are grounded on a writ of entry; a species of action that we may remember relies chiefly on the weakness of the tenant's title, who therefore vouches another person to warrant it. If the vouchee appears, he is made defendant instead of the voucher: but, if he afterward makes default, recovery shall be had against the original defendant; and he shall recover over an equivalent in value against the deficient vouchee. In assizes, indeed, where the principal question is, whether the demandant or his ancestors were or were not in possession till the ouster happened, and the title of the tenant is little (if at all) discussed, there no voucher is allowed; but the tenant may bring a writ of *warrantia chartæ* against the warrantor, to compel him to assist him with a good plea or defence, or else to render damages and the value of the land, if recovered against the tenant. (j) In many real actions also, (k) brought by or against an infant under the age of twenty-one years, and also in actions of debt brought against him, as heir to any deceased ancestor, either party may suggest the nonage of the infant, and pray that the proceedings may be deferred till his full age; or (in our legal phrase) that the infant may have his age, and that the *parol may demur*, (11) that is, that the pleadings may be stayed: and then they shall not proceed till his full age, unless it be apparent that he cannot be prejudiced thereby. (l) But, by the statutes of Westm. 1, 3 Edw. I, c. 46, and of Gloucester, 6 Edw. I, c. 2, in writs of entry *sur disseisin* in some particular cases, and in actions ancestral brought by \*an infant, the parol shall not demur: otherwise he might be deforced of his whole property, and even want of main- tenance till he came of age. So likewise in a writ of dower the heir shall not have his age; for it is necessary that the widow's claim be immediately determined, else she may want a present subsistence. (m) Nor shall an infant patron have it in a *quare impedit*, (n) since the law holds it necessary and expedient that the church be immediately filled.

When these proceedings are over, the defendant must then put in his excuse or plea. Pleas are of two sorts; *dilatory* pleas, and pleas *to the action*. Dilatory

(g) *Matt. v. 25.*  
(h) *Dyer, 127.*

(i) Appendix, No. III, § 6.  
(j) *Finch, L. 360.*

(k) Book II, Appendix, No. V, § 2.  
(l) 1 Roll. Abr. 137.

(m) *Ibid.* 128.  
(n) *F. N. B. 128.*

(10) Oyer of the original writ cannot now be had. See note 2 *supra*. As to the practice on demand of oyer where allowed, see 1 Tidd Pr., 586; 1 Chitty Pl., 429, and notes.

(11) But now the parol may not demur in actions, suits or other proceedings against infants.

pleas are such as tend merely to delay or put off the suit, by questioning the propriety of the remedy, rather than by denying the injury; pleas to the action are such as dispute the very cause of suit. The former cannot be pleaded after a general imparlance, which is an acknowledgment of the propriety of the action. For imparlances are either *general*, of which we have before spoken, and which are granted of course; or *special*, with a saving of all exceptions to the writ or count, which may be granted by the prothonotary; or they may be still *more special*, with a saving of all exceptions whatsoever which are granted at the discretion of the court. (o)

1. Dilatory pleas are, 1. To the *jurisdiction* of the court: alleging, that it ought not to hold plea of this injury, it arising in Wales or beyond sea; or because the land in question is of ancient demesne, and ought only to be demanded in the lord's court, &c. 2. The *disability* of the plaintiff, by reason whereof he is incapable to commence or continue the suit; as, that he is an alien enemy, outlawed, excommunicated, attainted of treason or felony, under a *præmunire*, not in *rerum natura* (being only a fictitious person), an infant, a feme-covert, or a monk professed. (12) 3. In *abatement*, which abatement is [\*302] either of the writ or the count, for some defect in one of them; as by misnaming the defendant, which is called a *misnomer*; giving him a wrong addition, as *esquire* instead of *knight*; or other want of form in any material respect. (13) Or, it may be, that the plaintiff is dead; for the death of either party is at once an abatement of the suit. (14) And in actions merely personal, arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is that *actio personalis moritur cum persona*; (p) and it never shall be revived either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury. (15) But in actions arising *ex*

(o), 12 Mod. 589.

(p) 4 Inst. 315.

(12) In dilatory pleas the greatest precision and certainty are required. They are not favored, and the least defect is fatal. Gould. Pleading, ch. V, sec. 66. Abatement of a writ or plaint is when for any default the defendant prays that the writ or plaint do abate, that is, cease against him for that time. Com. Dig., Abatement B. The plea in abatement should tend to show not that the plaintiff can never maintain any action, but that he can not maintain that particular action; it should give the plaintiff a better writ. *Elam v. Stevens*, 4 T. R., 224; *Steel v. Farrel*, 14 S. and R., 379; *Steph. Pl.*, 49. As to what matters may be pleaded either in bar or abatement, see Bac. Abr. Abatement, N.

Beside the pleas to inability mentioned in the text, the defendant, if a married woman may plead her coverture in abatement if sued alone when the husband should be joined; namely, for a liability on contract accruing before coverture, or for a tort committed before or after marriage. 1 Chit. Pl., 449. If the liability on contract accrued after marriage, the coverture must be pleaded in bar. *Steel v. Farrel*, 14 S. and R., 379. But the marriage of a feme sole pending suit against her cannot be pleaded. *Crockett v. Ross*, 5 Me., 443.

(13) Pleas in abatement of the writ are now obsolete in the English practice.

(14) By the procedure act of 1852 the legal representative of the deceased party may continue the suit after suggesting the death of record; so may a surviving plaintiff in a proper case.

The pendency of another action may be cause for the abatement of a suit. The action must have been previously commenced and be still pending between the same parties for the same cause of action. *Buffum v. Tilton*, 17 Pick., 510; *Humphries v. Dawson*, 38 Ala., 199; *Prosser v. Chapman*, 29 Conn., 515; *Adams v. Gardiner*, 13 B. Monr., 197. The proceedings must be substantially identical. A suit in *personam* at common law will not be abated by the pendency of a prior suit *in rem* in admiralty. *Granger v. Circuit Judge*, 27 Mich., 406. The first action must be in a court of competent jurisdiction: *Rood v. Eslava*, 17 Ala., 430; and must be capable of an effectual result. *Quinebaug Bank v. Tarbox*, 20 Conn., 510. If the cause is pending in a foreign country or another state, the second suit will not be abated. *Humphries v. Dawson*, 38 Ala., 199; *Long v. Marsh*, 2 Cliff., 311. See *Earl v. Raymond*, 4 McLean, 233.

(15) By statute 3 and 4 Wm. IV, this has been changed, so that under certain circumstances the executor or administrator of a deceased person may, within a given time after the death, bring an action for trespass to the real property of the deceased, and a like action may be maintained against such representative for trespass committed by the deceased within a limited time before his death.



*contractu*, by breach of promise and the like, where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived against or by the executors: (g) being indeed rather actions against the property than the person, in which the executors have now the same interest that their testator had before.

These pleas to the jurisdiction, to the disability, or in abatement, were formerly very often used as mere dilatory pleas, without any foundation of truth, and calculated only for delay; but now by statute 4 and 5 Ann. c. 16, no dilatory plea is to be admitted, without affidavit made of the truth thereof, or some probable matter shown to the court to induce them to believe it true. And with respect to the pleas themselves, it is a rule, that no exception shall be admitted against a declaration or writ, unless the defendant will in the same plea give the plaintiff a better; (r) that is, show him how it might be amended, that there may not be two objections upon the same account. Neither, by statute 8 and 9 Wm. III, c. 31, shall any plea in abatement be admitted in any suit for partition of lands; nor shall the same be abated by reason of the death of any tenant.

\*All pleas to the jurisdiction conclude to the cognizance of the court: praying "judgment, whether the court will have further cognizance of [\*303] the suit;" pleas to the disability conclude to the person; by praying "judgment, if the said A, the plaintiff, ought to be answered;" and pleas in abatement (when the suit is by original) conclude to the writ or declaration; by praying "judgment of the writ, or declaration, and that the same may be quashed," *cassetur*, made void or abated; but, if the action be by bill, the plea must pray "judgment of the bill," and not of the declaration; the bill being here the original, and the declaration only a copy of the bill.

When these dilatory pleas are allowed, the cause is either dismissed from that jurisdiction; or the plaintiff is stayed till his disability be removed; or he is obliged to sue out a new writ, by leave obtained from the court: (s) or to amend and new frame his declaration. But when on the other hand they are overruled as frivolous, the defendant has judgment of *respondeat ouster*, or to answer over in some better manner. It is then incumbent on him to plead.

2. A plea to the action; that is, to answer to the merits of the complaint. This is done by confessing or denying it.

A confession of the whole complaint is not very usual, for then the defendant would probably end the matter sooner; or not plead at all, but suffer judgment to go by default. Yet sometimes, after tender and refusal of a debt, if the creditor harasses his debtor with an action, it then becomes necessary for the defendant to acknowledge the debt, and plead the tender; adding, that he has always been ready, *tout temps prist*, and is still ready, *uncore prist*, to discharge it: for a tender by the debtor and refusal by the creditor, will in all cases discharge the costs (t) but not the debt itself; though in some particular cases the creditor will totally lose his money. (u) (16) \*But frequently the defendant confesses one *part* of the complaint (by a *cognovit actio*—[\*304]

(g) March. 14.  
(u) Litt. § 838.

(r) Brownl. 139.  
Co. Litt. 309.

(s) Co. Entr. 371.

(t) 1 Vent. 31.

(16) A tender may be made in all cases where the demand is in the nature of a debt, where the sum due is either certain or is capable of being made certain by mere computation; but is not allowed where the action is for unliquidated damages, the amount of which is to be determined by the discretion of a jury: *Green v. Shurtliff*, 19 Vt., 592; *Dearle v. Barrett*, 2 A. and E., 82; though it seems by the latter case that a tender is allowed to be pleaded to a count on a *quantum meruit*.

"In actions of debt or assumpsit, the principle of the plea of tender \* \* \* is that the defendant has been always ready (*toujours prist*) to perform entirely the contract on which the action is founded, and that he did perform it as far as he was able by tendering the requisite money, and the plaintiff himself precluded a complete performance by refusing to receive it." \* \* \* "As in ordinary cases the debt is not discharged by tender and refusal,

*nem* in respect thereof), and traverses or denies the rest: in order to avoid the expense of carrying that part to a formal trial, which he has no ground to litigate. A species of this sort of confession is the *payment of money into court*: (v) which is for the most part necessary upon pleading a tender, and is itself a kind of tender to the plaintiff; by paying into the hands of the proper officer of the court as much as the defendant acknowledges to be due, together with the costs hitherto incurred, in order to prevent the expense of any farther

(v) Styl. Pract. Reg. (edit. 1657) 501. 2 Keb. 555. Salk. 564.

the plea must not only go on to allege that the defendant is still ready (*uncore prius*), but must be accompanied by a *proferit in curia* of the money tendered. If the defendant can maintain this plea, although he will not thereby bar the debt, for that would be inconsistent with the *uncore prius* and *proferit in curia*, yet he will answer the action in the sense that he will recover judgment for his costs of defense against the plaintiff." Dixon v. Clark, 5 C. B., 363. The plea of tender admits the cause of action: Bennett v. Francis, 2 B. and P., 550; Cox v. Brain, 3 Taunt., 95; but if the tender is proved, and the money is brought into court, it stops interest on the amount due, and plaintiff loses costs. Cornell v. Green, 10 S. and R., 14; Hunter v. Le Conte, 6 Cow., 728; Raymond v. Bearnard, 12 Johns., 274. A tender does not extinguish the debt, but bars the claim to damages, interest and costs. Curtiss v. Greenbanks, 24 Vt., 536; which see for the rule as to the effect of a tender of chattels. An absolute tender and refusal will operate to discharge a mortgage lien, though not to cancel the debt; and this, too, though the tender be not kept good: Potts v. Plaisted, 30 Mich., 149; Kortright v. Cady, 21 N. Y., 843; Sager v. Tupper, 35 Mich., 184; but if the refusal be not absolute nor unreasonable under the circumstances, the lien will not be discharged. Waldron v. Murphy, 40 Mich., 668.

But, besides, the averment of readiness to perform, the plea should aver an actual performance of the entire contract on the part of the defendant as far as the plaintiff would allow. If the money is to be paid on a future day certain, the plea must allege a tender on the very day. A plea defective in this respect cannot be remedied by resorting to the previous averment of *toujours prius*, and a plea by the maker of a note of a tender after the day the note falls due is bad, though it be made before action and includes interest up to the date of the tender. Dixon v. Clark, 5 C. B., 363. That the tender must be made on the exact day when the debt falls due, and that, at common law, tender after that day and before action is bad, see also Hume v. Peploe, 8 East, 168; Poole v. Turnbridge, 2 M. and W., 223; Dewey v. Humphrey, 5 Pick., 187; City Bank v. Cutter, 3 Pick., 414. The tender may be made up to the uttermost convenient time of the proper day. As to what is a reasonable time of the day for this purpose, see Startup v. McDonald, 6 M. and G., 593. Unless some place is fixed by the contract for the payment of the debt, the debtor must seek his creditor wherever he may be within the state, in order to make a tender. King v. Finch, 60 Ind., 420; Luttell v. Nichols, Hardin, 66.

A tender may be made by an agent: Read v. Goldring, 2 M. and S., 86; not by a stranger—one who has no authority or interest in the matter. Mahler v. Newbaur, 32 Cal., 168. Tender may be made to an authorized agent of the creditor, as well as to the creditor in person, not to a mere servant. Kirton v. Braithwaite, 1 M. and W., 310; King v. Finch, 60 Ind., 420; Thurber v. Jewett, 3 Mich., 295. Where several persons have a joint demand against a debtor, he may, by offering the money to one of them, make a good tender to all. Douglas v. Patrick, 3 T. R., 688; Beebe v. Knapp, 28 Mich., 53.

The whole amount due must be tendered: Read v. Goldring, 2 M. and S., 86; at the peril of the person tendering. Boyden v. Moore, 5 Mass., 365. Tender of less than the amount due, though made in good faith and under misapprehension of the amount due, is not sufficient. Helphrey v. Railroad Co., 29 Iowa, 480. The plea of tender must allege the tender of the whole sum due on the contract, for a tender of a part of it only is no averment that the defendant performed the whole contract as far as the plaintiff would allow. Dixon v. Clark, 5 C. B., 363. A man may tender too much, though a tender of too little is bad. Astley v. Reynolds, 2 Stra., 916. If one tenders more than the amount he admits to be due, and the creditor does not object on the ground that he has no change, but because the amount is too small, or some other collateral reason, it is a good tender. Cadman v. Lubbock, 5 D. and R., 289; Patterson v. Cox, 25 Ind., 261. But if a larger sum than is admitted to be due is tendered and change demanded, it is not a good tender if objected to, because of the need of making change. Robinson v. Cooke, 6 Taunt., 336.

There must be an actual offer of the money or a dispensation of the offer by the creditor. If the debtor has it ready and offers to pay it, and the creditor dispense with the production of it or do anything which is equivalent to it, it is a good tender. Thomas v. Evans, 10 East, 101; Brown v. Gilmore, 8 Me., 107. It ought to appear that the money is at hand and is capable of immediate delivery. Glasscott v. Day, 5 Esp., 46; Breed v. Hurd, 6 Pick., 356. The production of the money and actual offer of it to the creditor is dispensed with, if the party is ready and willing to pay it and is about to produce it, but is prevented

proceedings. This may be done upon what is called a *motion*; which is an occasional application to the court by the parties or their counsel, in order to obtain some rule or order of court, which becomes necessary in the progress of a cause; and it is usually grounded upon an *affidavit* (the perfect tense of the verb *affido*), being a voluntary oath before some judge or officer of the court, to evince the truth of certain facts, upon which the motion is grounded: though no such *affidavit* is necessary for payment of money into court. (17) If after the money paid in the plaintiff proceeds in his suit, it is at his own peril: for, if he does not prove more due than is so paid into court, he shall be nonsuited and pay the defendant costs; but he shall still have the money so paid in, for that the defendant has acknowledged to be his due. (18) In the French law the rule of practice is grounded upon principles somewhat similar to this; for there, if a person be sued for more than he owes, yet he loses his cause if he

from so doing by a declaration on the part of the creditor that he will not or cannot receive it. *Hazard v. Loring*, 10 Cush., 267. Tender is a production and manual offer of the money, and requires that it should be counted down. Held, that it was no tender when a person had money in his pocket and said it was ready, unless the creditor dispensed with its production. *Bakeman v. Pooler*, 15 Wend., 637.

The money must be lawful money of the place where it is tendered. *Wade's Case*, 5 Rep., 114; *Bank v. Howard*, 18 Mass., 335; *Waldron v. Murphy*, 40 Mich., 668. But a tender in money which is not a legal tender is good if the creditor places his refusal to receive the money on other grounds, or makes no objection on that express ground. *Curtiss v. Greenbanks*, 24 Vt., 536. And see *Beebe v. Knapp*, 28 Mich., 53.

A tender must in general be unconditional. *Cothran v. Scanlon*, 84 Ga., 555. At any rate the condition must not be one on which the debtor has no right to insist. *Bevans v. Rees*, 5 M. and W., 306; *Brink v. Freoff*, 40 Mich., 610. It is not in the nature of a tender to make conditions, terms or qualifications, but simply to pay the sum tendered as an admitted debt. Hence a demand of a receipt in full on a tender vitiates the tender. *Wood v. Hitchcock*, 20 Wend., 47; *Glasscott v. Day*, 5 Esp., 48; *Thayer v. Brackett*, 12 Mass., 450. So an offer to pay by a mortgagor conditioned upon the execution of a release, which the creditor was under no legal obligation to execute, is not a good tender. *Loring v. Cooke*, 3 Pick., 48. But if the condition be one on which, by the terms of the contract, the debtor has a right to insist, and to which the creditor has no right to object, insisting upon the performance of such a condition does not vitiate the tender. *Wheelock v. Tanner*, 39 N. Y., 481. A tender upon condition that negotiable commercial paper shall be given up is good, "because such paper might be put in circulation after payment and innocent parties become liable; not so, however, with non-commercial paper; after payment by the maker it becomes harmless as against him wherever it may go." *Story v. Krewson*, 55 Ind., 397. One may make a tender and add that it is done under protest. This creates no condition and avoids admitting the justice of the claim. *Scott v. Ry. Co.*, L. R., 1 O. P., 596.

A tender must be kept good, that is, the person tendering must be ready at all times to pay the debt in current money when requested. *Curtiss v. Greenbanks*, 24 Vt., 536. The tender should be followed by bringing the money into court. *Clark v. Mullenix*, 11 Ind., 532; *Webster v. Pierce*, 35 Ill., 158. "With respect to the averment of *toujours prêt*, if the plaintiff can falsify it, he avoids the plea altogether. Therefore, if he can show that an entire performance of the contract was demanded and refused at any time when by the terms of it he had a right to make such a demand, he will avoid the plea." *Dixon v. Clark*, 5 C. B., 865.

(17) By the common law procedure act of 1852, the defendant in any action, except for assault, battery, false imprisonment, libel, slander, malicious arrest, malicious prosecution, or debauching the plaintiff's daughter or servant, may pay into court, by leave of the court or a judge, a sum of money by way of compensation. The statutes 9 and 10 Vic., c. 93, and 27 and 28 Vic., c. 95, extend the right to actions for compensation to the family of a person killed by accident, and under statute 6 and 7 Vic., c. 96, a plea of apology and payment into court is allowed in certain actions for libel.

(18) Money may be paid into court in cases where a tender might have been effectually made, and thereupon the defendant may have so much of the plaintiff's demand struck out of the declaration; and if the plaintiff does not accept the money, he proceeds at his peril. *Hallet v. East India Co.*, 2 Burr., 1120. The plaintiff may in any event have the amount which is paid in, as the defendant acknowledges that so much is due. *Elliot v. Callon*, 2 Salk., 597. The defendant is bound by the payment, and though demanded wrongfully, he cannot recover it back. *Vaughan v. Barnes*, 2 B. and P., 392; *Malcolm v. Fullarton*, 2 T. R., 645.

doth not tender so much as he really does owe. (w) To this head may also be referred the practice of what is called a *set-off*: whereby the defendant acknowledges the justice of the plaintiff's demand on the one hand; but on the other sets up a demand of his own, to counterbalance that of the plaintiff, either in the whole or in part: as if the plaintiff sues for ten pounds due on a note of hand, the defendant may set off nine pounds due to himself for merchandise sold to the plaintiff, and in case he *pleads* such set-off, must pay the remaining [\*305] balance into court. This answers *very* nearly to the *compensatio* or *stoppage*, of the civil law, (x) and depends on the statutes 2 Geo. II, c. 22, and 8 Geo. II, c. 24, which enact, that where there are mutual debts between the plaintiff and defendant, one debt may be set against the other, and either pleaded in bar or given in evidence upon the general issue at the trial; which shall operate as payment and extinguish so much of the plaintiff's demand. (19)

(w) Sp. L. b. 6, c. 4.

(x) Ry. 16, 2, 1.

(19) To be the subject of set-off, the claims must be mutual debts for the recovery of which indebitatus assumpsit or debt would lie. Howlet v. Strickland, Cowp. 56; Austin v. Feland, 8 Mo., 309; Jones v. Blair, 57 Ala., 457. A set-off is allowed only when the suit is based on a demand which could itself be used as a set-off. Downer v. Eggleston, 15 Wend., 51. If the claim is one arising from a tort there can be no set-off. Sapsford v. Fletcher, 4 T. R., 511; Canal Co. v. Buckley, 7 T. R., 36; Hall's Appeal, 40 Pa. St., 409; Pulliam v. Owen, 25 Ala., 492; Schweizer v. Weiker, 6 Rich., 159; Mitchell v. Gibbs, 3 Bay, 351. One tort cannot be set off against another at common law. Hart v. Davis, 21 Tex., 411. Even if a statute allows such set-off, a claim arising from tort cannot be set off against one arising *ex contractu*. Smith v. Printup, 59 Ga., 610; Zeigelmüller v. Seamer, 63 Ind., 488; Indianapolis, etc., R. R. Co. v. Ballard, 22 Ind., 448; Dean v. Allen, 8 Johns., 391. Judgments may be the subject of set-off. Thus a judgment for costs may set off against a subsequent judgment for damages. Dennie v. Elliott, 2 H. Bl., 587. Where the demands have passed into judgments and each party has an execution in his own right against another, the judgments are mutual debts. It is not necessary to notice the grounds of action on which the judgment is founded. Shapley v. Bellows, 4 N. H., 347. See Hutchins v. Riddle, 12 N. H., 464.

Set-off is wholly inapplicable in actions for unliquidated damages. Unless the claim declared on is capable of being ascertained by calculation and is thus the subject of set-off itself, no set-off can be pleaded. Osborn v. Etheridge, 13 Wend., 839; Hutchinson v. Reid, 8 Camp., 319; State v. Welsted, 6 Halst., 397; Smith v. Warner, 16 Mich., 390; Hardcastle v. Netherwood, 5 B. and Ald., 93. A claim arising simply from tort, or one for unliquidated damages cannot be used as a set-off. Hopkins v. Maguire, 35 Me., 78; Thomas v. McConnell, 3 McLean, 381; Grimes v. Reese, 30 Ga., 330. To be effectual as a set-off the demand must be a valid subsisting claim not barred by the statute of limitations when the suit is begun. Lee v. Lee, 81 Ga., 28; Williams v. Gilchrist, 3 Bibb., 49; Taylor v. Gould, 57 Pa. St., 157; Mandigo v. Mandigo, 26 Mich., 349; Chapple v. Durston, 1 Cr. and J., 1.

There must be mutuality and reciprocity in the rights set off, and the demands on the one side and on the other must be in the same right. Gibbs v. Cunningham, 4 Md., ch. 322; Kinne v. New Haven, 32 Conn., 210. No other demands can be set off than such as are mutual, that is, between the same parties in the same right. In the application of this rule in some cases the real and not the merely nominal parties plaintiff and defendant are regarded. Goodwin v. Richardson, 44 N. H., 125. The debtor on one side must be the same as the creditor on the other, either as the nominal or real party in interest. Hendricks v. Toole, 29 Mich., 340. If executors sue for a debt arising after the death of their testator, the defendant cannot set off a debt due from the testator. Shipman v. Thompson, Willes, 103; Shaw v. Gookin, 7 N. H., 16; Dale v. Cooke, 4 Johns. Ch. 11, Fry v. Evans, 8 Wend., 590. If executors sue on a claim due their testator in his lifetime, the defendant cannot set off claims against the plaintiffs accruing since the death. Houston v. Robertson, 4 Camp., 342. Where an administrator as such sued for a debt due after the death of the intestate, it was held that the defendant could not set-off a debt due him from the intestate while alive, as it was necessary that the debts should have originally existed between the two living parties. Watts v. Rees, 9 Exch., 696; 11 Exch., 410. But to an action by an administrator on a claim arising during the intestate's life, the defendant was allowed to plead as set-off a payment by himself of a bond on which he was surety for the intestate. Bucher v. Dorsheimer, 7 S. and R., 9. In general it is not allowed to set off against an individual debt a demand arising to a person in a representative capacity, or vice versa. Snow v. Conant, 8 Vt., 801; Stickney v. Clement, 7 Gray, 170; Thomas v. Hopper, 5 Ala., 442; Crabtree v. Cleatt, 22 Ala., 181. So where an administrator sues in his own right, the

Pleas that totally deny the cause of complaint, are either the *general* issue, or a *special* plea, in bar.

1. The *general* issue, or general plea, is what traverses, thwarts, and denies at once the whole declaration; without offering any special matter whereby to evade it. As in trespass, either in *vi et armis* or on the case, *non culpabilis*, not guilty; (*y*) in debt upon contract, *nihil debet*, he owes nothing; in debt on

(y) Appendix, No. II, § 4.

defendant cannot set off a debt due him from the intestate in his life-time. *Grew v. Burditt*, 9 Pick., 265; *Wolfsberger v. Bucher*, 10 S. and R., 10.

In an action against two jointly, the individual claim of one defendant against the plaintiff cannot be set off unless the other defendant is a mere surety. *Woods v. Carlisle*, 6 N. H., 27; *Ross v. Knight*, 4 N. H., 236; *Banks v. Pike*, 15 Me., 268. In general joint demands cannot be set off against several demands, nor separate debts against joint debts. *Howe v. Sheppard*, 2 Sumn., 409; *Jackson v. Robinson*, 3 Mason, 138; *Bebb v. Saunders*, 3 Bibb, 86; *Millburn v. Guyther*, 8 Gill, 93; *Heckenkemper v. Dingwehrs*, 32 Ill., 538; *Sager v. Tupper*, 38 Mich., 258. So in a suit for an individual debt, the defendant cannot set off a claim against a firm of which the plaintiff was formerly a member. *McDowell v. Tyson*, 14 S. and R., 800; *Wilson v. Keedy*, 8 Gill, 195; *Warren v. Wells*, 1 Met., 80. Against a claim by partners jointly the defendant cannot set off a debt due him from one of the firm individually, nor in a suit against one partner individually, can a claim against the plaintiff owned by the firm be set off. *Ross v. Pearson*, 21 Ala., 478; *Jones v. Blair*, 57 Ala., 457.

A surviving partner to whom all right of action survives can set off a debt to him individually in an action brought against him as such surviving partner for the recovery of a debt due from the partnership. *Johnson v. Kaiser*, 40 N. J., 286. A debt due from the plaintiff as surviving partner to the defendant can be set off by the latter against a demand which the plaintiff has as an individual. *French v. Andrade*, 6 T. R., 582. So a debt due the defendant as surviving partner may be set off against a demand upon him in his own right. *Stipper v. Stidstone*, 5 T. R., 493.

If goods are bought from an agent known to be such, in an action by the principal for the price a debt due defendant from the agent cannot be set off. *Browne v. Robinson*, 2 Caines Cas., 341. So if an agent be appointed to collect a debt, the debtor cannot set off against the debt due the principal a debt due him from the agent. *Wilson v. Codman*, 3 Cranch, 193. Where a principal permits an agent to sell as apparent principal, and afterwards intervenes, the buyer is entitled to be placed in the same position at the time of the disclosure of the real principal as if the agent had been the real contracting party, and is entitled to the same defense. In such case the defendant may set off a claim against the agent. *Isberg v. Bowden*, 8 Exch., 852; *George v. Claggett*, 7 T. R., 359; *Carr v. Hinchliff*, 4 B. and C., 547.

That in an action by a trustee a debt due the defendant from the *cestui que trust* may be set off, see *Sheldon v. Kendall*, 7 Cush., 217; *Campbell v. Hamilton*, 4 Wash. C. C., 92; *Goodwin v. Richardson*, 44 N. H., 125; *contra* *Wheeler v. Raymond*, 5 Cow., 281.

The claim to be set off must have been a subsisting right of action in the defendant, a debt due and demandable, when the suit was brought. The debt must have arisen before the action: it is not enough if before plea pleaded merely. *Evans v. Prosser*, 3 T. R., 186; *Richards v. James*, 2 Exch., 471; *Morrison v. Moreland*, 15 S. and R., 61; *Carpenter v. Butterfield*, 3 Johns. Cas., 145; *Bank v. Chapman*, 19 Johns., 323; *Hardy v. Coons*, 21 N. H., 356; *Martin v. Kunzmueller*, 37 N. Y., 396; *Houghton v. Houghton*, 87 Me., 72; *Henry v. Butler*, 33 Conn., 140.

By many of the state statutes if the set-off prove greater than the plaintiff's claim, the defendant may have judgment for the balance. *Good v. Good*, 9 Watts, 567. Under the English statutes this could not be done. *Hennell v. Fairlamb*, 8 Esp., 104. These state statutes, though based on the English enactments vary from one another, and should be referred to to determine the right to set off in any particular state, and the proper method of pleading it.

*Recoupment*.—Wherever by a contract mutual duties and obligations are laid upon two parties, and one sues for a breach by the other, the defendant may meet the demand by a counter-claim for a breach of duty by the plaintiff. This is called *recoupment*. 2 Pars. on Con. 247. It differs from set-off, in that the damages recouped must grow out of a breach of the same contract on which suit is brought: *Batterman v. Pierce*, 3 Hill, 171; *Stow v. Yarwood*, 14 Ill., 424; also in that the damages may be unliquidated, and the defense may be made in cases of tort, provided the tort springs from the violation of contract. *Stow v. Yarwood*, *supra*.

If the defendant's damages exceed the claim established by the plaintiff, the action will thereby be defeated, but the defendant cannot have judgment for the excess. *Britton v. Turner*, 6 N. H., 481; *Ward v. Fellers*, 3 Mich., 281.

bond, *non est factum*, it is not his deed; on an *assumpsit, non assumpsit*, he made no such promise. Or in real actions, *nul tort*, no wrong done; *nul disseisin*, no disseisin; and in a writ of right, the mise or issue is, that the tenant has more right to hold than the demandant has to demand. These pleas are called the general issue, because by importing an absolute and general denial of what is alleged in the declaration, they amount at once to an issue: by which we mean a fact affirmed on one side and denied on the other.

Formerly the general issue was seldom pleaded, except when the party meant wholly to deny the charge alleged against him. But when he meant to distinguish away or palliate the charge, it was always usual to set forth the particular facts in what is called a *special* plea; which was originally intended to apprise the court and the adverse party of the nature and circumstances of the defence, and to keep the law and the fact distinct. And it is an invariable rule, that every defence which cannot be thus specially pleaded, may be given [ \*306 ] in evidence upon the general issue at the trial. But the science \*of special pleading having been frequently perverted to the purposes of chicane and delay, the courts have of late in some instances, and the legislature in many more, permitted the general issue to be pleaded, which leaves every thing open, the fact, the law, and the equity of the case; and have allowed special matter to be given in evidence at the trial. And though it should seem as if much confusion and uncertainty would follow from so great a relaxation of the strictness anciently observed, yet experience has shown it to be otherwise; especially with the aid of a new trial, in case either party be unfairly surprised by the other.

2. Special pleas, *in bar* of the plaintiff's demand, are very various, according to the circumstances of the defendant's case. As, in real actions, a general release or a fine, both of which may destroy and bar the plaintiff's title. Or, in personal actions, an accord, arbitration, conditions performed, nonage of the defendant, or some other fact which precludes the plaintiff from his action. (2) A *justification* is likewise a special plea in bar; as in actions of assault and battery, *son assault demesne*, that it was the plaintiff's own original assault; in trespass, that the defendant did the thing complained of in right of some office which warranted him so to do; or, in an action of slander, that the plaintiff is really as bad a man as the defendant said he was.

Also, a man may plead the statutes of limitation (a) in bar; (20) or the time

(s) Appendix No. III, § 6.

(a) See pages 188, 196.

(20) It has generally been held that the statute of limitations bars the remedy only, not the right. *Higgins v. Scott*, 2 B. and Ad., 418; *Eastman v. Foster*, 8 Met., 19; *Elkins v. Edwards*, 8 Ga., 325; *Wood v. Augustine*, 61 Mo., 46; *Kellar v. Sinton*, 14 B. Mon., 307; *Birnie v. Main*, 29 Ark., 591; *Richmond v. Aiken*, 25 Vt., 324; *Hough v. Bailey*, 33 Conn., 288; *Knox v. Galligan*, 21 Wis., 470; *Ohio, &c., Co. v. Winn*, 4 Md. Ch., 253; *Boist v. Corey*, 15 N. Y., 505; *Crooker v. Holmes*, 65 Me., 195; *Fisher v. Mossman*, 11 Ohio St., 42. But in some states the opposite doctrine prevails. *Ross v. Mitchell*, 28 Tex., 150; *Peters v. Dunnells*, 5 Neb., 460; *Newman v. De Lorimer*, 19 Iowa, 243; *Hagan v. Parsons*, 67 Ill., 170; *Chick v. Willetts*, 2 Kan., 884. So under the later English statutes it has been held that the right was barred. *Society v. Richards*, 1 Dru. and W., 289; *De Beauvoir v. Owen*, 5 Exch., 166.

The statute begins to run when the party has a complete present right of action on which he may sue at once. *Little v. Blunt*, 9 Pick., 488; *Railroad Co. v. Parks*, 33 Ark., 131; *Wittersheim v. Countess, &c.*, H. Bl. 631; *Hemp v. Garland* 4 Q. B., 519. In contract the time runs from the time when the contract was broken, though no special damage immediately results; not from the time when the damage is first felt. *Battley v. Faulkner*, 3 B. and Ald., 288; *Bonesteel v. Van Etten*, 20 Hun, 468. So in tort for incompetency or carelessness in professional employments, the time runs from the time when the service was performed. *Troup v. Smith*, 20 Johns., 83. In equity, however, in the case of fraud, the statute is held to run only from the discovery of the fraud. *Hovenden v. Lord Annesley*, 2 Sch. and Lef., 634; *Todd v. Rafferty*, 30 N. J. Eq., 254. Where one collects money for another which he is bound to pay over at once, the statute runs from the time he collects it. *Cagwin v. Ball*, 2 Ill. App., 70. So where surety claims contribution from a co-surety for payment on behalf of the principal, the statute

limited by certain acts of parliament, beyond which no plaintiff can lay his cause of action. This, by the statute of 32 Hen. VIII, c. 2, in a writ of right, is *sixty years*: in assizes, writs of entry, or other possessory actions real, of the seisin of one's ancestors, in lands; and either of their seisin, or one's own, in rents, suits and services, *fifty years*: and in actions real for lands grounded

begins to run against his claim from the time of payment, as he then acquired a right of action. *Singleton v. Townsend*, 45 Mo., 379. The statute runs in the case of a voidable contract from the time when one party terminates it: *Collins v. Thayer*, 74 Ill., 188; against a claim for money paid as usurious interest from the time when paid: *Stephens v. Monongahela Bank*, 88 Penn. St., 157; against a claim where a demand is necessary, immediately after such demand: *Topham v. Braddock*, 1 Taunt., 571; *Stafford v. Richardson*, 15 Wend., 302; *Little v. Blunt*, 9 Pick., 488; against a claim payable so many days after sight or demand, not till the expiration of the given days. *Wolfe v. Whiteman*, 4 Harr., 246; *McDonnell v. Bank*, 20 Ala., 818. But against a promissory note payable on demand, the statute runs from the delivery of the note. *Norton v. Ellam*, 2 M. and W., 461; *Presbrey v. Williams*, 15 Mass., 193; *Little v. Blunt*, 9 Pick., 488. Where one agrees to pay whenever his circumstances would enable him to do so, and he might be called upon for that purpose, held that the creditor had a complete right of action when the debtor became able to pay, not merely when he discovered the fact, and that the fact of bringing an action would be a sufficient demand. *Waters v. Earl of Thanet*, 2 Q. B., 757. So in case of conversion the statute runs from the time of the converting, not from the time when the injured party learned of it. *Granger v. George*, 5 B. and C., 149. If goods delivered to a carrier are destroyed, the statute runs from date of destruction, not from date of delivery. *Merchants, etc., Co. v. Topping*, 89 Ill., 65. In computing the time, the day on which the cause of action accrued is excluded, according to the weight of authority. See cases collected and discussed in *Warren v. Slade*, 23 Mich., 1.

To put the statute in motion there must be some one in being capable of being sued: *Davis v. Garr*, 6 N. Y., 124; *Wenman v. Mohawk Ins. Co.*, 13 Wend., 267; and some one capable of suing, so that the statute does not run against the estate of a deceased person for a debt coming due after death till an administrator is appointed. *Murray v. East India Co.*, 5 B. and Ald., 204; *Bucklin v. Ford*, 5 Barb., 393. If, when the right of action accrues, one is disabled from suing, as from infancy or coverture, the statute does not run till the disability is removed. *Demarest v. Wynkoop*, 3 Johns. Ch., 129. Cumulative disabilities are not regarded. If a female is an infant when a right of action accrues, and marries before her majority, she must bring her action within the time limited after the removal of this disability of infancy. This begins to run as soon she attains her majority without regard to the subsequent disability of coverture. *Demarest v. Wynkoop*, 3 Johns. Ch., 129; *Fritz v. Joiner*, 54 Ill., 101; *Keil v. Healey*, 84 Ill., 104; *Mercer v. Selden*, 1 How., 37; *Cozzens v. Farnam*, 30 Ohio St., 491. So where a married woman, to whom a right of action has accrued, dies leaving a surviving husband, her heirs have the same time in which to sue after the termination of the husband's tenancy by the curtesy as the wife would have had after the husband's death if she had survived him, and this, though the heirs may be under a disability when tenancy by the curtesy ceases. *Henry v. Carson*, 59 Pa. St., 297. A wife who joins her husband in a mortgage is not protected by her coverture from the ordinary effect of the adverse possession of the mortgagee. *Hanford v. Fitch*, 41 Conn., 487. If in a joint action some plaintiffs can avoid the plea of the statute by showing a disability, but all can not, the action is barred, since if the statute once runs against one of two joint parties it operates as a bar to a joint action. *Marsteller v. McClean*, 7 Cranch, 156. By the old English statutes repealed by 19 and 20 Vict., c. 97, s. 10, and by most of the American statutes, if either party is absent from the country or state when the right of action accrues, the statute does not begin to run till he returns. This applies to foreigners or persons permanently residing beyond the jurisdiction, as well as to residents temporarily absent. Such persons, if creditors, have the statutory time after coming to the country or state, in which to begin an action, and if they are debtors, their debt is not barred till six years after such arrival. *Strithorst v. Graeme*, 2 W. Bl., 723; *Williams v. Jones*, 3 Wils., 145; *Lafond v. Ruddock*, 13 C. B., 813; *Fowler v. Hunt*, 10 Johns., 464; *Dwight v. Clark*, 7 Mass., 615; *Goetz v. Voelinger*, 99 Mass., 504. Where a New York citizen sued in Vermont another New York citizen temporarily in Vermont, for a debt barred by the New York statute, held the case was within the foregoing principle, and that the plaintiff might recover. *Graves v. Weeks*, 19 Vt., 178. Where a person did business in New York, but lived in New Jersey, going back and forth every day, so that the time actually spent by him in New York was less than six years, held that the New York statute of limitation did not run in his favor so far as to bar a debt contracted more than seven years before action. *Bennett v. Cook*, 43 N. Y., 537. There has been much discussion as to what return is sufficient to set the statute in motion. It is now settled by the weight of authority that "a return in order to cause the time limited for bringing suit, to commence and keep running during his stay, must be shown by the debtor either to have been actually known to

upon one's own seisin or possession, such possession must have been within *thirty* years. By statute 1 Mar. st. 2, c. 5, this limitation does not extend to any suit for advowsons, upon reasons given in a \*former chapter. (b) [307] But by the statute 21 Jac. I, c. 2, a time of limitation was extended to

(b) See page 250.

the creditor, and to have been so long continued and under such circumstances after such knowledge, as to have enabled the creditor by reasonable diligence to have subjected him to the jurisdiction of the proper state court; or else to have been so notorious and protracted, and so identified with some locality, as to show that the creditor might with reasonable diligence have learned of the debtor's return or non-absence; and by the like diligence after such fact could have been learned, might have subjected him to the jurisdiction as before stated." *Campbell v. White*, 22 Mich., 178; *Hacker v. Everett*, 57 Me., 548; *Milton v. Babson*, 6 Allen, 322; *Hill v. Bellows*, 15 Vt., 727; *Whitton v. Wass*, 109 Mass., 40; *Fowler v. Hunt*, 10 Johns., 464; *White v. Bailey*, 3 Mass., 271. Successive absences may be deducted from the time limited for bringing suit, and successive visits to the state may be reckoned as time when the statute is running. *Campbell v. White*, 22 Mich., 178; *Cole v. Jessup*, 10 N. Y., 96; *Rogers v. Hatch*, 44 Cal., 280. In such case after deducting the aggregate of all absences the time spent in the state must be that prescribed by the statute to bar an action. *Conrad v. Nall*, 24 Mich., 275. If the statute once begins to run there is no deduction for absence which does not amount to a change of domicile. *Whitton v. Wass*, 109 Mass., 40. In cases other than those of absence, if the statute once begins to run, nothing stops it. *Hogan v. Kurtz*, 94 U. S., 778; *Young v. Mackall*, 4 Md., 362; *Peck v. Randall*, 1 Johns., 165; *Pendergrast v. Foley*, 8 Ga., 1. If the statute begins to run in the lifetime of an intestate, in the absence of statutory provision it does not cease to run after the death and before an administrator is appointed. *Sanford v. Sanford* 62 N. Y., 553; and see *Ruff v. Bull*, 7 Harr. and J., 14.

By statute 21 Jac. I, c. 16, "all actions of account or upon the case other than account as concerning the trade of merchandise between merchant and merchant, their factors or servants," were to be brought within six years from the time the cause of action accrued. In England this exception in favor of merchants is held to extend only to actions of account or on the case for not accounting. *Inglis v. Haigh*, 8 M. & W., 769; but the American authorities allow the privilege as well in actions of assumpsit as of account or case. *Mandeville v. Wilson*, 5 Cranch, 15; *Dyott v. Letcher* 6 J. J. Marsh., 541; *McLellan v. Croften*, 6 Me., 307. The account must be current and mutual, must concern the trade of merchandise between merchant and merchant, not between merchant and customer. *Spring v. Gray*, 6 Pet. 151; *Coster v. Murray*, 5 Johns. Ch., 522; *Blair v. Drew*, 6 N. H., 235. But the action of account may be between partners. *Todd v. Rafferty* 30 N. J. Eq., 254. To constitute a mutual account there must have been a "mutual or alternate course of deal." Credit must have been given by each party to the other, founded on some indebtedness, or there must have been an agreement for a set-off of mutual debts. It is not enough if all the credit items are on one side. *Kimball v. Kimball*, 16 Mich., 211.

By statute 19 and 20 Vict., c. 97, s. 9, this privilege in relation to merchants' accounts is abolished, and actions on them must be brought as in other cases.

If a right of action is barred, there must be one of three things to take the case out of the statute. Either there must be an acknowledgment of the debt from which a promise to pay is to be implied; or, second, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt and evidence that the condition has been performed. *In re River Steamer Co.*, L. R., 6 Ch. App., 822; *Skeet v. Lindsay*, L. R., 2 Exch. Div., 814. "If the bar is sought to be removed by proof of a new promise, the promise as a new cause of action ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate, and if any conditions are annexed, they ought to be shown to be performed." "If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, the acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay." If accompanying circumstances repel the presumption of a promise, or the expressions are vague, the acknowledgment will not suffice to remove the bar. *Bell v. Morrison*, 1 Pet., 351. If the acknowledgment does not specify the amount admitted to be due, it must refer to something by which that amount can be definitely ascertained. *Miller v. Baschore*, 83 Pa. St., 356. In the same line are, *Hart v. Prendergast* 14 M. & W., 741; *Chambers v. Rubey*, 47 Mo., 99; *Simonton v. Clark*, 65 N. C., 525; *McClelland v. West*, 59 Pa. St., 487; *Carroll v. Forsyth*, 69 Ill., 127; *Wetzell v. Bussard*, 11 Wheat., 309; *Carruth v. Paige*, 23 Vt., 179; *Stafford v. Richardson*, 15 Wend., 302; *Barnard v. Bartholomew*, 23 Pick., 291; *Bangs v. Hall*, 2 Pick., 368, where many old English cases *contra* are cited and disapproved. But see *Hall v. Bryan*, 50 Md., 194. "I cannot pay the debt at present, but I will pay it as soon as I can," is not such a promise as to raise the bar without proof of ability. *Tanner v. Smart*, 6 B. & C., 603. Where one says in effect "make out an account fully and I will pay if correct," this would raise the bar, as acknowledging that some debt



the case of the king, viz., *sixty years* precedent to 19 Feb. 1623; (c) but, this becoming ineffectual by efflux of time, the same date of limitation was fixed by statute 9 Geo. III, c. 16, to commence and be reckoned backwards, from the time of bringing any suit or other process, to recover the thing in ques-

(c) 3 Inst. 139.

is due. *Sidwell v. Mason*, 2 H. & N., 306. "I know I owe the money, but I will not pay it," does not raise the bar, as the acknowledgment is coupled with a refusal inconsistent with the inference of a promise. *A'Court v. Cross*, 8 Bing., 339. Where an account forms one continuous demand running through many years without rests, a new promise may be applied to the whole account including items barred by the statute. *Leckmere v. Fletcher*, 1 Cr. & M., 623.

In the case of mutual current accounts "every new item and credit given by one party to the other is an admission that there is some unsettled account between them, the amount of which is to be ascertained," and such admission is equivalent to a new promise to pay the balance due, and is enough to remove the bar of the statute. *Catling v. Skoulding*, 6 T. R., 189; *Kimball v. Brown*, 7 Wend., 325; *Hodge v. Manley*, 25 Vt., 210; *Todd v. Rafferty*, 30 N. J. Eq., 254. The weight of American authority supports this position. But in New Hampshire the contrary has been held, and it is said that one item in an account has no power thus to draw after it others which are barred. *Blair v. Drew*, 6 N. H., 235. Since the passage of Lord Tenterden's act, 9 Geo. IV, c. 14, s. 1, the acknowledgment or promise must be in writing, signed by the party to be charged, and under that it is now held in England, that the doctrine laid down in *Catling v. Skoulding*, *supra*, is obsolete. *Williams v. Griffiths*, 2 C. M. & R., 45. Similar provisions are in some of the American statutes. The promise or acknowledgment should be to the creditor or some one authorized to act for him, to some one with a legal or equitable right to the claim, not to a third party. *Parker v. Shuford*, 76 N. C., 219; *Ringo v. Brooks*, 26 Ark. 540; *Keener v. Crull*, 19 Ill., 189; *McGrew v. Forsyth*, 80 Ill., 596; *McKinney v. Snyder* 78 Pa. St., 497; *Niblock v. Goodman*, 67 Ind., 174; *contra*, *Whitney v. Bigelow*, 4 Pick., 110; *Soulden v. VanRensselaer*, 9 Wend., 293; *Palmer v. Butler*, 36 Iowa, 576. Payment by an assignee in insolvency on his assignor's debt cannot be evidence of a new promise by the assignor. *Roscoe v. Hale*, 7 Gray, 274. So a promise by an administrator to pay a debt of his intestate, whether barred in the lifetime of his intestate or not, will not remove the bar. *Seig v. Accord*, 21 Grat., 365; *Thompson v. Peter*, 12 Wheat., 565; *Huntington v. Bobbitt*, 46 Miss., 528, and cases cited. But if such promise be express, it has been held sufficient. *Tullock v. Dunn*, Ry. and Moo., 416; *Johnson v. Beardsley*, 15 Johns., 8; *Shreeve v. Joyce*, 86 N. J., 44.

A part payment of a debt, that is, the payment on account of a larger sum, amounts to a new promise to pay what remains due if there be no act or declaration accompanying the payment inconsistent with such promise. *Whipple v. Stevens*, 22 N. H., 219; *Sigourney v. Downey*, 14 Pick., 387; *Waters v. Tompkins*, 2 Cr., M. & R., 723. The mere fact of a payment is not enough. The surrounding circumstances must fairly warrant the inference of a promise. *Wainman v. Kynman*, 1 Exch., 118; *Locke v. Wilson*, 10 Heisk., 441. There must be something to raise a presumption that the payment was on account of the very claim in question. The principle of taking the debt out of the statute is that by part payment the party paying intended to acknowledge and admit the greater debt to be due. *U. S. v. Wilder*, 13 Wall., 254; *Arnold v. Downing*, 11 Barb., 554; *Butler v. Price*, 110 Mass., 97. Payment of certain specified items in an account is not enough; "it must be on general account and with a view to affect the general balance." *Hodge v. Manley*, 25 Vt., 210. The payment may be by note as well as in cash. *Turney v. Dodwell*, 8 Ellis & B., 136; *Block v. Dorman*, 51 Mo., 81; *Ilsley v. Jewett*, 2 Met., 168. When a third person's note was given as collateral security for a mutual account, any sum collected on the note to apply on account, or a part payment on the note turned over by the debtor to the creditor, acts as payment on account. *Whipple v. Blackington*, 97 Mass., 476. While the delivery of such a note by the debtor to a creditor operates to suspend the running of the statute, whether the note is eventually paid or not, still the payment of such note at maturity by the maker to the creditor will not operate as a payment by the debtor. The statute begins to run from the time the note is transferred. *Smith v. Ryan*, 66 N. Y., 333. Lord Tenterden's act does not change the effect of part payment, since such payment is not a mere acknowledgment in words, but is coupled with a fact. *Waters v. Tompkins*, 2 Cr., M. & R., 723; but the fact of payment must be proved otherwise than by mere oral admission. *Bagley v. Ashton*, 12 A. & E., 493. Payment by an assignee does not imply any promise or raise the bar of the statute. *Davies v. Edwards*, 7 Exch., 22; *Reed v. Johnson*, 1 R. I., 81. Nor does payment by a married woman on her husband's note without his authority remove the bar as to him. *Butler v. Price*, 110 Mass. 97.

The law is not settled as to the effect of payment by one of several joint debtors. In England it was decided that such a payment would take the claim out of the statute as to his co-debtors. The same doctrine prevails in some of the United States, but in others it is strenuously denied, unless the person paying has full power to bind the other parties.

tion; so that possession for *sixty* years is now a bar even against the prerogative, in derogation of the ancient maxim "*nullum tempus occurrit regi.*" By another statute, 21 Jac. I, c. 16, *twenty* years is the time of limitation in any writ of formedon; and by a consequence, *twenty* years is also the limitation in every action of ejectment, for no ejectment can be brought unless where the lessor of the plaintiff is entitled to enter on the lands, (d) and by statute 21 Jac. I, c. 16, no entry can be made by any man, unless within twenty years after his right shall accrue. (21) Also, all actions of trespass (*quare clausum fregit*, or otherwise), detinue, trover, replevin, account, and case (except upon accounts between merchants), debt on simple contract, or for arrears of rent, are limited by the statute last mentioned to *six* years after the cause of action commenced: and actions of assault, menace, battery, mayhem, and imprisonment, must be brought within *four* years, and actions for words within *two* years after the injury committed. (22) And by statute 31 Eliz. c. 5, all suits, indictments, and informations upon any penal statutes, where any forfeiture is to the crown alone, shall be sued within *two* years; and where the forfeiture is to a subject, or to the crown and a subject, within *one* year after the offence committed, (23) unless where any other time is specially limited by the statute. Lastly, by statute 10 & 11 Wm. III, c. 14, no writ of error, *scire facias*, or other suit, shall be brought to reverse any judgment, fine, or recovery, for error, unless it be prosecuted within *twenty* years. (24) The use of these statutes of limitation is to preserve the peace of the kingdom, and to prevent those innumerable perjuries which might ensue if a man were allowed to bring an action for any injury committed at any distance of time. Upon both these accounts the law [ \*308 ] \*therefore holds, that "*interest reipublice ut sit finis litium.*" and upon the same principle the Athenian laws in general prohibited all

(d) See page 206.

See the various authorities collected in Parsons on Contracts, vol. III, p. 80, note, 5th ed., and Stowers v. Blackburn, 21 La. Ann., 127; Hance v. Hair, 25 Ohio St., 349; Clark v. Burn, 86 Penn. St., 502; Lazarus v. Fuller, 89 Penn. St., 331; Smith v. Ryan, 66 N. Y., 352; Mainzinger v. Mohn, 41 Mich., 685, which deny the English doctrine. By statute 19 and 20 Vict., c. 97, s. 14, no such payment now avails to take the case out of the statute as against the other debtors. So by Lord Tenterden's act, and by many similar American statutes, it is provided that a new promise by one of several joint debtors shall not affect the rights of the others.

For a full discussion of the defense of the statute of limitations, see Angell on Limitations; Parsons on Contracts, 5th ed., vol. III, p. 61, *et seq.*

Although the general rule is that statutes of limitation do not run against the state (see Book I, p. 247, note), yet when the state resorts to equity for relief, it must come on the same conditions with other suitors, and a stale claim by the state may be rejected for that reason as it might be when presented by an individual. United States v. Beebee, 17 Cent. L. Jour., 77; McCrary, circuit judge.

(31) Some important modifications of the statutes limiting the time for the commencement of suit, were made by statutes 3 and 4 Wm. IV, cc. 27, 42. Actions for the recovery of lands or rents are required by these statutes to be brought within twenty years, with a saving of cases of persons under disability, who are allowed ten years after the disability ceases, but not to exceed forty years in all. Personal actions generally are required to be brought within six years after the right accrues, but suits in trespass, for assault and battery, must be brought within four years, and suits for verbal slander within two years. Actions upon specialty may be brought at any time within twenty years. Actions against justices, constables, etc., for anything done in the execution of their office, must be brought within six calendar months.

The statute 9 Geo. IV, c. 14, above referred to, commonly called Lord Tenterden's act, has been re-enacted in its main features in many of the American states. As to the defense of the statute generally, and what is sufficient to take a case out of it, see 2 Pars. on Cont. 341, *et seq.*, and Angell on Limitations.

(22) In this, as well as in the subsequent statutes, there was a saving in the case of persons under disability.

(23) Penal actions at the suit of the party aggrieved must now be brought within two years after the wrong done. Statute 3 and 4 Wm. IV, c. 42.

(24) The time for bringing error is now limited to six years, by the Common Law Procedure Act, 1852.

actions where the injury was committed *five* years before the complaint was made. (e) If, therefore, in any suit, the injury or cause of action happened earlier than the period expressly limited by law, the defendant may plead the statutes of limitations in bar; as upon an *assumpsit*, or promise to pay money to the plaintiff, the defendant may plead *non assumpsit infra sex annos*; he made no such promise within six years; which is an effectual bar to the complaint. (25)

An *estoppel* is likewise a special plea in bar; which happens where a man hath done some act, or executed some deed, which estops or precludes him from averring any thing to the contrary. As if tenant for years (who hath no freehold) levies a fine to another person. Though this is void as to strangers, yet it shall work as an estoppel to the cognizor; for if he afterwards brings an action to recover these lands, and his fine is pleaded against him, he shall thereby be estopped from saying that he had no freehold at the time, and therefore was incapable of levying it.

The conditions and qualities of a plea (which, as well as the doctrine of estoppels, will also hold equally, *mutatis mutandis*, with regard to other parts of pleading), are, 1. That it be single and containing only one matter; for duplicity begets confusion. But by statute 4 and 5 Ann. c. 16, a man, with leave of the court, may plead two or more distinct matters or single pleas; as, in an action of assault and battery, these three, not guilty, *son assault demesne*, and the statute of limitations. 2. That it be direct and positive, and not argumentative. 3. That it have convenient certainty of time, place, and persons. 4. That it answer the plaintiff's allegations in every material point. 5. That it be so pleaded as to be capable of trial. (26)

\*Special pleas are usually in the affirmative, sometimes in the negative; but they always advance some new fact not mentioned in the declaration; and then they must be averred to be true in the common form—"and this he is ready to verify." This is not necessary in pleas of the general issue; those always containing a total denial of the facts before advanced by the other party, and therefore putting him upon the proof of them.

It is a rule in pleading, that no man be allowed to plead specially such a plea as amounts only to the general issue, or a total denial of the charge; but in such case he shall be driven to plead the general issue in terms, whereby the whole question is referred to a jury. But if the defendant, in an assize or action of trespass, be desirous to refer the validity of his title to the court rather than the jury, he may state his title specially, and at the same time *give colour* to the plaintiff, or suppose him to have an appearance or colour of title, bad indeed in point of law, but of which the jury are not competent judges. As if his own true title be, that he claims by feoffment, with livery from A, by force of which he entered on the lands in question, he cannot plead this by itself, as it amounts to no more than the general issue, *nul tort, nul disseisin*, in assize, or *not guilty* in an action of trespass. But he may allege this specially, provided he goes farther and says, that the plaintiff claiming by *colour* of a prior deed of feoffment without livery, entered; upon whom he entered; and may then refer himself to the judgment of the court which of these two titles is the best in point of law. (f) (27)

When the plea of the defendant is thus put in, if it does not amount to an issue or total contradiction of the declaration, but only evades it, the plaintiff may plead again, and *reply* to the defendant's plea; either traversing it; that

(e) *Pott. Ant. b. 1, c. 21.*

(f) *Dr. & Stud. 2, c. 53.*

(25) That a new promise or unqualified acknowledgment of liability will keep alive a demand from the date of such promise or acknowledgment for the full period allowed by the statute in which to bring suit on a claim, see note 20, *supra*.

(26) For a full discussion of the requisites of a plea in bar in the various forms of action, see Chitty on Pleading, vol. 1, p. 470.

(27) This method of pleading has been rendered unnecessary by statute.

is, totally denying it; as, if in an action of debt upon bond the defendant [310] pleads *solvit ad diem*, that he paid the money when \*due; here the plaintiff in his *replication* may totally traverse this plea, by denying that the defendant paid it; or, he may allege new matter in contradiction to the defendant's plea; as when the defendant pleads *no award made*, the plaintiff may reply and set forth an actual award, and assign a breach; (g) or the replication may *confess and avoid* the plea, by some new matter or distinction consistent with the plaintiff's former declaration; as, in an action for trespassing upon land whereof the plaintiff is seised, if the defendant shows a title to the land by descent, and that therefore he had a right to enter, and gives colour to the plaintiff, the plaintiff may either traverse and totally deny the fact of the descent; or he may confess and avoid it, by replying, that true it is that such descent happened, but that since the descent the defendant himself demised the lands to the plaintiff for term of life. (28) To the replication the defendant may *rejoin*, or put in an answer called a *rejoinder*. The plaintiff may answer the rejoinder by a *sur-rejoinder*; upon which the defendant may *rebut*; and the plaintiff answer him by a *sur-rebutter*. Which pleas, replications, rejoinders, sur-rejoinders, rebutters, and sur-rebutters, answer to the *exceptio, replicatio, duplicatio, triplicatio, and quadruplicatio* of the Roman laws. (h)

The whole of this process is denominated the *pleading*; in the several stages of which it must be carefully observed, not to depart or vary from the title or defence, which the party has once insisted on. For this (which is called a *departure* in pleading) might occasion endless altercation. Therefore the replication must support the declaration, and the rejoinder must support the plea, without departing out of it. As in the case of pleading no award made, in consequence of a bond of arbitration, to which the plaintiff replies, setting forth an actual award; now the defendant cannot rejoin that he hath performed this award, for such rejoinder would be an entire departure from his original plea, which alleged that no such award was made; therefore he has now no [311] other \*choice, but to traverse the fact of the replication, or else to demur upon the law of it.

Yet in many actions the plaintiff, who has alleged in his declaration a general wrong, may in his replication, after an evasive plea by the defendant, reduce that general wrong to a more particular certainty, by assigning the injury afresh with all its specific circumstances in such manner as clearly to ascertain and identify it, consistently with his general complaint; which is called a *new or novel assignment*. As if the plaintiff in trespass declares on a breach of his close in D; and the defendant pleads that the place where the injury is said to have happened, is a certain close of pasture in D, which descended to him from B his father, and so is his own freehold; the plaintiff may reply and assign another close in D, specifying the abbuttals and boundaries, as the real place of the injury. (i)

It hath previously been observed (k) that *duplicity* in pleading must be avoided. Every plea must be simple, entire, connected, and confined to one single point: it must never be entangled with a variety of distinct, independent answers to the same matter; which must require as many different replies and introduce a multitude of issues upon one and the same dispute. For this would often embarrass the jury, and sometimes the court itself, and at all events would greatly enhance the expense of the parties. Yet it frequently is expedient to plead in such a manner as to avoid any implied admission of a fact, which cannot with propriety or safety be positively affirmed or denied.

(g) Appendix, No. III, § 6.

(h) Bro. Abr. tit. *trespass*, 205, 284.

(A) Inst. 4, 14. Bract. l. 5, §. 5, c. 1.

(k) Page 305.

(28) The replication should answer the plea, should follow and be consistent with the declaration, should be certain, not double nor argumentative. Like a plea, a replication bad in part is wholly bad. Com. Dig. Pleader (E).

And this may be done by what is called a *protestation*; whereby the party interposes an oblique allegation or denial of some fact, protesting (by the gerund *protestando*) that such a matter does or does not exist: and at the same time avoiding a direct affirmation or denial. Sir Edward Coke hath defined (l) a protestation (in the pithy dialect of that age) to be "an exclusion of a conclusion." \*For the use of it is, to save the party from being concluded with respect to some fact or circumstance, which cannot be [\*312] directly affirmed or denied without falling into duplicity of pleading; and which yet, if he did not thus enter his protest, he might be deemed to have tacitly waived or admitted. Thus, while tenure in villenage subsisted, if a villein had brought an action against his lord, and the lord was inclined to try the merits of the demand, and at the same time to prevent any conclusion against himself that he had waived his seignior; he could not in this case both plead affirmatively that the plaintiff was his villein, and also take issue upon the demand; for then his plea would have been *double*, as the former alone would have been a good bar to the action: but he might have alleged the villenage of the plaintiff, by way of protestation, and then have denied the demand. By this means the future vassalage of the plaintiff was saved to the defendant, in case the issue was found in his (the defendant's) favor: (m) for the protestation prevented that conclusion, which would otherwise have resulted from the rest of his defence, that he had enfranchised the plaintiff; (n) since no villein could maintain a civil action against his lord. So also if a defendant, by way of inducement to the point of his defence, alleges (among other matters) a particular mode of seisin or tenure, which the plaintiff, is unwilling to admit, and yet desires to take issue on the principal point of the defence, he must deny the seisin or tenure by way of protestation, and then traverse the defensive matter. So, lastly, if an award be set forth by the plaintiff, and he can assign a breach in one part of it (viz., the non-payment of a sum of money), and yet is afraid to admit the performance of the rest of the award, or to aver in general a non-performance of any part of it, lest something should appear to have been performed: he may save to himself any advantage he might hereafter make of the general non-performance, by alleging *that* by protestation; and plead only the non-payment of the money. (o) (29)

\*In any stage of the pleadings, when either side advances or affirms any new matter, he usually (as was said) avers it to be true; "and this [\*313] he is ready to verify." On the other hand, when either side traverses or denies the facts pleaded by his antagonist, he usually tenders an issue, as it is called; the language of which is different according to the party by whom the issue is tendered; for if the traverse or denial comes from the defendant, the issue is tendered in this manner, "and of this he puts himself upon the country," thereby submitting himself to the judgment of his peers: (p) but if the traverse lies upon the plaintiff, he tenders the issue, or prays the judgment of the peers against the defendant in another form; thus: "and this he prays may be inquired of by the country."

But if either side (as, for instance, the defendant) pleads a special negative plea; not traversing or denying anything that was before alleged, but disclosing some new negative matter; as, where the suit is on a bond, conditioned to perform an award, and the defendant pleads, negatively, that no award was made, he tenders no issue upon this plea; because it does not yet appear whether the fact will be disputed, the plaintiff not having yet asserted the existence of any award; but when the plaintiff replies, and sets forth an actual

(l) 1 Inst. 124.

(m) Co. Litt. 126.

(n) See book II, ch. 6, p. 94.

(o) Appendix, No. III, § 4.

(p) *Ibid.* No. II, § 4.

(29) By the Common Law Procedure Act, 1852, and the Supreme Court of Judicature Act, 1873, and the rules of practice adopted under them, the English practice is now very greatly changed and simplified.

specific award, if then the defendant traverses the replication, and denies the making of any such award, he then, and not before, tenders an issue to the plaintiff. For when in the course of pleading they come to a point which is affirmed on one side, and denied on the other, they are then said to be at issue; all their debates being at last contracted into a single point, which must now be determined either in favor of the plaintiff or of the defendant.

## CHAPTER XXI.

### OF ISSUE AND DEMURRER.

**Issue**, *exiitue*, being the end of all the pleadings, is the fourth part or stage of an action, and is either upon matter of *law*, or matter of *fact*.

An issue upon matter of law is called a *demurrer*; and it confesses the facts to be true, as stated by the opposite party; but denies that, by the law arising upon those facts, any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse; according to the party which first demurs, *demoratur*, rests or abides upon the point in question. As, if the matter of the plaintiff's complaint or declaration be insufficient in law, as by not assigning any sufficient trespass, then the defendant demurs to the declaration; if, on the other hand, the defendant's excuse or plea be invalid, as if he pleads that he committed the trespass by authority from a stranger, without making out the stranger's right; here the plaintiff may demur in law to the plea; and so on in every other part of the proceedings, where either side perceives any material objection in point of law, upon which he may rest his case.

The form of such demurrer is by averring the declaration or plea, the replication or rejoinder, to be insufficient \*in law to maintain the action or [§315] the defence; and therefore praying judgment for want of sufficient matter alleged. (a) Sometimes demurrers are merely for want of sufficient form in the writ or declaration. But in case of exceptions to the form or manner of pleading, the party demurring must, by statutes 27 Eliz. c. 5, and 4 and 5 Ann. c. 16, set forth the causes of his demurrer, or wherein he apprehends the deficiency to consist. (1) And upon either a *general*, or such a *special* demurrer, the opposite party must aver it to be sufficient, which is called a joinder in demurrer, (b) and then the parties are at issue in point of law. Which issue in law, or demurrer, the judges of the court before which the action is brought must determine.

An issue of fact is where the fact only, and not the law, is disputed. And when he that denies or traverses the fact pleaded by his antagonist has tendered the issue, thus: "and this he prays may be inquired of by the country;" or, "and of this he puts himself upon the country;" it may immediately be subjoined by the other party, "and the said A B doth the like." Which done, the issue is said to be joined, both parties having agreed to rest the fate of the cause upon the truth of the fact in question. (c) And this issue of fact

(a) Appendix, No. III. § 4.

(b) *Ibid.*

(c) *Ibid.* No. II. § 4.

(1) A general demurrer is used where the objection is to the substance of the adversary's pleading; a special demurrer where it is to the form merely. The former is couched in general terms; the latter points out the special points of objection. Stephen Pl., 140.

The Common Law Procedure Act, 1852, put an end to special demurrers in England, substituting for them a controlling power, vested in the court or a judge, to amend or strike out pleadings on the application of the opposite party, if they were so framed as to prejudice, embarrass, or delay the fair trial of the action; and as to needless and fictitious averments, the act swept them away altogether.

must, generally speaking, be determined, not by the judges of the court, but by some other method; the principal of which methods is that by the country, *per pais*, (in Latin *per patriam*), that is, by jury. Which establishment of different tribunals for determining these different issues is in some measure agreeable to the course of justice in the Roman republic, where the *judices ordinarii* determined only questions of fact, but questions of law were referred to the decisions of the *centumviri*. (d)

But here it will be proper to observe, that during the whole of these proceedings, from the time of the defendant's appearance in obedience to the king's writ, it is necessary \*that both the parties be kept or *continued* [\*316] in court from day to day, till the final determination of the suit. For the court can determine nothing, unless in the presence of both the parties, in person or by their attorneys, or upon default of one of them, after his original appearance and a time prefixed for his appearance in court again. Therefore, in the course of pleading, if either party neglects to put in his declaration, plea, replication, rejoinder, and the like, within the times allotted by the standing rules of the court, the plaintiff, if the omission be his, is said to be *non suit*, or not to follow and pursue his complaint, and shall lose the benefit of his writ: or, if the negligence be on the side of the defendant, judgment may be had against him, for such his default. And, after issue or demurrer joined, as well as in some of the previous stages of proceeding, a day is continually given, and entered upon the record, for the parties to appear on from time to time, as the exigence of the case may require. The giving of this day is called the *continuance*, because thereby the proceedings are continued without interruption from one adjournment to another. If these continuances are omitted, the cause is thereby discontinued, and the defendant is discharged *sine die*, without a day, for this turn: for by his appearance in court he has obeyed the command of the king's writ: and, unless he be adjourned over to a day certain, he is no longer bound to attend upon that summons; but he must be warned afresh and the whole must begin *de novo*. (2)

Now it may sometimes happen, that after the defendant has pleaded, nay even after issue or demurrer joined, there may have arisen some new matter, which it is proper for the defendant to plead; as that the plaintiff, being a feme sole, is since married, or that she has given the defendant a release, and the like: here, if the defendant takes advantage of this new matter, as early as he possibly can, viz.: at the day given for his next appearance, he is permitted to plead it in what is called a plea of *puis darrein continuance*, or since the last adjournment. (3) For it would be unjust to exclude him \*from the benefit of this new defense, which it was not in his power to [\*317] make when he pleaded the former. But it is dangerous to rely on such a plea, without due consideration; for it confesses the matter which was before in dispute between the parties. (e) And it is not allowed to be put in, if any continuance has intervened between the arising of this fresh matter and the pleading of it: for then the defendant is guilty of neglect, or *laches*, and is supposed to rely on the merits of his former plea. Also it is not allowed after a demurrer is determined, or verdict given; because then relief may be had in another way, namely, by writ of *audita querela*, of which hereafter.

(d) *Cla. de Orator.* l. 1, c. 33.

(e) *Cro. Elis.* 49.

(2) This is otherwise now.

(3) Such a plea must be verified by affidavit: *Prince v. Nicholson*, 5 Taunt., 333; *Bartlett v. Leighton*, 8 C. & P., 408. By 15 and 16 Vict., c. 76, s. 69, the plea must be accompanied by an affidavit that the matter arose within eight days before plea, unless the court shall otherwise direct. Such pleas may be in abatement or in bar, and, after a plea in bar, a plea *puis darrein continuance* in abatement may be pleaded; but if judgment is against the defendant, on such plea, it is final. Such a plea in bar waives all former pleas. *Chitty Pl.*, I, 659; and see *Stephen Pl.*, 63-66; *Gould Pl.*, ch. vi.

And these pleas *puis darrein continuance*, when brought to a demurrer in law or issue of fact, shall be determined in like manner as other pleas.

We have said, that demurrers, or questions concerning the *sufficiency* of the matters alleged in the pleadings, are to be determined by the judges of the court, upon solemn argument by counsel on both sides, and to that end a demurrer-book is made up, containing all the proceedings at length, which are afterwards entered on *record*; and copies thereof, called *paper-books*, are delivered to the judges to peruse. The *record* (*f*) is a history of the most material proceedings in the cause entered on a parchment roll, and continued down to the present time; in which must be stated the original writ and summons, all the pleadings, the declaration, view or *oyer* prayed, the imparlances, plea, replication, rejoinder, continuances, and whatever farther proceedings have been had; all entered *verbatim* on the roll, and also the issue or demurrer, and joinder therein.

These were formerly all written, as indeed all public proceedings were, in Norman or law-French, (4) and even the arguments of the counsel and decisions of the court were in the same barbarous dialect. An evident and shameful [\*318] badge, it must be owned, of tyranny and foreign servitude; being introduced under the auspices of William the Norman, and his sons: whereby the ironical observation of the Roman satirist came to be literally verified, that "*Gallia caustidicos docuit facunda Britannos*." (g) This continued till the reign of Edward III; who, having employed his arms successfully in subduing the *crown* of France, thought it unbeseeming the dignity of the victors to use any longer the *language* of a vanquished country. By a statute, therefore, passed in the thirty-sixth year of his reign, (h) it was enacted, that for the future all pleas should be pleaded, shown, defended, answered, debated, and judged in the English tongue; but be entered and enrolled in Latin. In like manner as Don Alonso X, King of Castile (the great-grandfather of our Edward III), obliged his subjects to use the Castilian tongue in all legal proceedings; (i) and as, in 1286, the German language was established in the courts of the empire. (k) And perhaps if our legislature had then directed that the writs themselves, which are mandates from the king to his subjects to perform certain acts, or to appear at certain places, should have been framed in the English language, according to the rule of our ancient law, (l) it had not been very improper. But the record or enrollment of those writs and the proceedings thereon, which was calculated for the benefit of posterity, was more serviceable (because more durable) in a dead and immutable language than in any flux or living one. The practisers, however, being used to the Norman language, and therefore imagining they could express their thoughts more aptly and more concisely in that than in any other, still continued to take their notes in law-French; and, of course, when those notes came to be published, under the denomination of reports, they were printed in that barbarous dialect; which, joined to the additional terrors of a Gothic black letter, has occasioned many a student to throw away his Plowden and Littleton, without venturing to attack a page of them. And yet in reality, upon a nearer acquaintance, they would have found nothing very formidable in the language; which differs [\*319] in its grammar and orthography as much from the modern French, as the diction of Chaucer and Gower does from that of Addison and Pope. Besides, as the English and Norman languages were concurrently used by our ancestors for several centuries together, the two idioms have naturally assimilated, and mutually borrowed from each other: for which reason the grammatical construction of each is so very much the same, that I apprehend an Englishman (with a week's preparation) would understand the laws of

(f) Appendix, No. II, § 4; No. III, § 2.

(g) *Juv.* xv, 111.

(h) C. 15.

(i) *Mod. Un. Hist.* xx, § 11.

(k) *Ibid.* xxxix, 235.

(l) *Mirr.* c. 4, § 2.

(4) Mr. Stephen contends that the record was from the earliest times in Latin. *Stephen Pl.*, Appendix, xxii.



Normandy, collected in their *grand coutumier*, as well, if not better, than a Frenchman bred within the walls of Paris.

The Latin, which succeeded the French for the entry and enrollment of pleas, and which continued in use for four centuries, answers so nearly to the English (oftentimes word for word) that it is not at all surprising it should generally be imagined to be totally fabricated at home, with little more art or trouble, than by adding Roman terminations to English words. Whereas in reality it is a very universal dialect, spread throughout all Europe at the irruption of the northern nations, and particularly accommodated and moulded to answer all the purposes of the lawyers with a peculiar exactness and precision. This is principally owing to the simplicity, or (if the reader pleases) the poverty and baldness of its texture, calculated to express the ideas of mankind just as they arise in the human mind, without any rhetorical flourishes, or perplexed ornaments of style; for it may be observed that those laws and ordinances, of public as well as private communities, are generally the most easily understood, where strength and perspicuity, not harmony or elegance of expression, have been principally consulted in compiling them. These northern nations, or rather their legislators, though they resolved to make use of the Latin tongue in promulging their laws, as being more durable and more generally known to their conquered subjects than their own Teutonic dialects, yet (either through choice or necessity) have frequently intermixed therein some words of a Gothic original, which is, more or less, the case in every country \*of Europe, and, therefore, not to be imputed as any peculiar blemish [320] in our English legal Latinity. (m) The truth is, what is generally denominated law-Latin is in reality a mere technical language, calculated for eternal duration, and easy to be apprehended both in present and future times; and on those accounts best suited to preserve those memorials which are intended for perpetual rules of action. The rude pyramids of Egypt have endured from the earliest ages, while the more modern and more elegant structures of Attica, Rome, and Palmyra, have sunk beneath the stroke of time.

As to the objection of locking up the law in a strange and unknown tongue, this is of little weight with regard to records which few have occasion to read but such as do, or ought to, understand the rudiments of Latin. And, besides, it may be observed of the law-Latin, as the very ingenious Sir John Davies (n) observes of the law-French, "that it is so very easy to be learned, that the meanest wit that ever came to the study of the law doth come to understand it almost perfectly in ten days without a reader."

It is true, indeed, that the many terms of art, with which the law abounds, are sufficiently harsh when latinized (yet not more so than those of other sciences), and may, as Mr. Selden observes, (o) give offence "to some grammarians of squeamish stomachs, who would rather choose to live in ignorance of things the most useful and important, than to have their delicate ears wounded by the use of a word unknown to Cicero, Sallust, or the other writers of the Augustan age." Yet this is no more than must unavoidably happen when things of modern use, of which the Romans had no idea, and consequently no phrases to express \*them, come to be delivered in the Latin [321] tongue. It would puzzle the most classical scholar to find an appellation, in his pure latinity, for a constable, a record, or a deed of feoffment; it is therefore to be imputed as much to necessity, as ignorance, that they were styled in our forensic dialect *constabularius, recordum, and feoffamentum*. Thus, again, another uncouth word of our *ancient* laws, (for I defend not the ridiculous barbarisms sometimes introduced by the ignorance of *modern* practisers),

(m) The following sentence, "*Si quis ad battalia curte sua exierit*, if any one goes out of his own court to fight," &c., may raise a smile in the student as a flaming modern Anglicism; but he may meet with it, among others of the same stamp, in the laws of the Burgundians on the continent, before the end of the fifth century. Add. 1, c. 5, § 2.

(n) Pref. Rep. (o) Pref. ad Eadmer.

the substantive *murdrum*, or the verb *murdrare*, however harsh and unclassical it may seem, was necessarily framed to express a particular offence; since no other word in being, *occidere*, *interficere*, *necare*, or the like, was sufficient to express the *intention* of the criminal, or *quo animo* the act was perpetrated; and therefore by no means came up to the notion of murder at present entertained by our law, viz.: a killing *with malice aforethought*.

A similar necessity to this produced a similar effect at Byzantium, when the Roman laws were turned into Greek for the use of the oriental empire: for, without any regard to Attic elegance, the lawyers of the imperial courts made no scruple to translate *fidei commissarios*, *φιδειχομισσαριους*; (p) *cubiculum*, *χουβουχλειον*; (q) *filium-familias*, *παιδα-φαμιλιας*; (r) *repudium*, *ρεπουδιον*; (s) *compromissum*, *χομπρομισσον* (t) *reverentia et obsequium*, *ρευερεντια και οβσεχουιον*; (u) and the like. They studied more the exact and precise import of the words than the neatness and delicacy of their cadence. And my academical readers will excuse me for suggesting, that the terms of the law are not more numerous, more uncouth, or more difficult to be explained by a teacher, than those of logic, physics, and the whole circle of Aristotle's philosophy, nay even of the politer arts of architecture and its kindred studies, or the science of rhetoric itself. Sir Thomas Moore's famous legal question [\*322] (w) contains in it nothing more difficult than the \*definition which in his time the philosophers currently gave of their *materia prima*, the groundwork of all natural knowledge; that it is "*neque quid, neque quantum, neque quale, neque aliquid eorum quibus ens determinatur*;" or its subsequent explanation by Adrian Heereboord, who assures us (x) that "*materia prima non est corpus, neque per formam corporeitatis, neque per simplicem essentiam: est tamen ens, et quidem substantia, licet incompleta, habetque actum ex se entitativum, et simul est potentia subjectiva*." The law, therefore, with regard to its technical phrases, stands upon the same footing with other studies, and requests only the same indulgence.

This technical Latin continued in use from the time of its first introduction till the subversion of our ancient constitution under Cromwell; when among many other innovations in the law, some for the better and some for the worse, the language of our records was altered and turned into English. But at the restoration of King Charles, this novelty was no longer countenanced; the practisers finding it very difficult to express themselves so concisely or significantly in any other language but the Latin. And thus it continued without any sensible inconvenience till about the year 1730, when it was again thought proper that the proceedings at law should be done into English, and it was accordingly so ordered by statute 4 Geo. II, c. 26. This provision was made, according to the preamble of the statute, that the common people might have knowledge and understanding of what was alleged or done for and against them in the process and pleadings, the judgment and entries in a cause. Which purpose has, I fear, not been answered; being apt to suspect that the people are now, after many years' experience, altogether as ignorant in matters of law as before. On the other hand, these inconveniences have already arisen from the alteration; that now many clerks and attorneys are hardly able to read, much less to understand, a record even of so modern a date as the reign of George the First. And it has much enhanced the expense of [\*323] \*all legal proceedings; for since the practisers are confined (for the sake of the stamp duties, which are thereby considerably increased) to write only a stated number of words in a sheet; (5) and as the English language, through the multitude of its particles, is much more verbose than the Latin;

(p) Nov. 1, c. 1.  
(r) Nov. 117, c. 1.  
(w) See page 149.

(s) *Ibid.* c. 8.

(q) Nov. 8, *edict. Constantinop.*

(5) *Ibid.* 82, c. 11.

(u) *Ibid.* 78, c. 2.  
(s) *Philosoph. Natural.* c. 1, § 28, &c.

(5) This provision is now obsolete. The stamp duties are now regulated by 33 and 34 Vict., c. 97 and 99.

it follows that the number of sheets must be very much augmented by the change. (y) The translation also of technical phrases, and the names of writs and other process, were found to be so very ridiculous (a writ of *nisi prius, quare impedit, fieri facias, habeas corpus*, and the rest, not being capable of an English dress with any degree of seriousness) that in two years' time it was found necessary to make a new act, 6 Geo. II, c. 14; which allows all technical words to continue in the usual language, and has thereby almost defeated every beneficial purpose of the former statute.

What is said of the alteration of language by the statute 4 Geo. II, c. 26, will hold equally strong with respect to the prohibition of using the ancient immutable *court hand* in writing the records or other legal proceedings; whereby the reading of any record that is fifty years old is now become the object of science, and calls for the help of an antiquarian. But that branch of it, which forbids the use of abbreviations, seems to be of more solid advantage, in delivering such proceedings from obscurity: according to the precept of Justinian; (z) "*ne per scripturam aliqua fiat in posterum dubitatio, jubemus non per siglorum captiones et compendiosa enigmata ejusdem codicis textum conscribi, sed per literarum consequentiam explanari concedimus.*" But to return to our demurrer.

When the substance of the record is completed, and copies are delivered to the judges, the matter of law upon which the demurrer is grounded is upon solemn argument determined by the court, and not by any trial by jury; and judgment is thereupon accordingly given. As in an action of trespass, [\*324] if the defendant in his plea confesses the fact, but justifies it *causa venationis*, for that he was hunting; and to this the plaintiff demurs, that is, he admits the truth of the plea, but denies the justification to be legal: now, on arguing this demurrer, if the court be of opinion, that a man may not justify trespass in hunting, they will give judgment for the plaintiff; if they think that he may, then judgment is given for the defendant. Thus is an issue in law, or demurrer, disposed of.

An issue of fact takes up more form and preparation to settle it; for here the truth of the matters alleged must be solemnly examined and established by proper evidence in the channel prescribed by law. To which examination of facts, the name of trial is usually confined, which will be treated of at large in the two succeeding chapters.

## CHAPTER XXII.

### OF THE SEVERAL SPECIES OF TRIAL

THE uncertainty of legal proceedings is a notion so generally adopted, and has so long been the standing theme of wit and good humour, that he who should attempt to refute it would be looked upon as a man who was either incapable of discernment himself, or else meant to impose upon others. Yet it may not be amiss, before we enter upon the several modes whereby certainty is meant to be obtained in our courts of justice, to inquire a little wherein this uncertainty, so frequently complained of, consists; and to what causes it owes its original.

It hath sometimes been said to owe its original to the number of our municipal constitutions, and the multitude of our judicial decisions; (a) which

(y) For instance, these three words, "*secundum formam statuti*," are now converted into seven, "according to the form of the statute."

(z) *De concep. digest.* § 18.

(a) See the preface to Sir John Davies's Reports, wherein many of the following topics are discussed more at large.

occasion, it is alleged, abundance of rules that militate and thwart with each other, as the sentiments or caprice of successive legislatures and judges have happened to vary. The fact of multiplicity is allowed; and that thereby the researches of the student are rendered more difficult and laborious; but that, with proper industry, the result of those inquiries will be doubt and indecision, is a consequence that cannot be admitted. People are apt to be angry at the want of simplicity in our laws: they mistake variety for confusion, and complicated cases for contradictory. \*They bring us the examples of arbitrary governments, of Denmark, Muscovy, and Prussia; of wild and uncultivated nations, the savages of Africa and America; or of narrow domestic republics, in ancient Greece and modern Switzerland; and unreasonably require the same paucity of laws, the same conciseness of practice, in a nation of freemen, a polite and commercial people, and a populous extent of territory.

In an arbitrary despotic government, where the lands are at the disposal of the prince, the rules of succession, or the mode of enjoyment, must depend upon his will and pleasure. Hence there can be but few legal determinations relating to the property, the descent, or the conveyance of real estates; and the same holds in a stronger degree with regard to goods and chattels, and the contracts relating thereto. Under a tyrannical sway trade must be continually in jeopardy, and of consequence can never be extensive: this therefore puts an end to the necessity of an infinite number of rules, which the English merchant daily recurs to for adjusting commercial differences. Marriages are there usually contracted with slaves; or at least women are treated as such: no laws can be therefore expected to regulate the rights of dower, jointures, and marriage settlements. Few also are the persons who can claim the privileges of any laws; the bulk of those nations, viz., the commonalty, boors, or peasants, being merely villeins and bondmen. Those are therefore left to the private coercion of their lords, are esteemed (in the contemplation of these boasted legislators) incapable of either right or injury, and of consequence are entitled to no redress. We may see, in these arbitrary states, how large a field of legal contests is already rooted up and destroyed.

Again; were we a poor and naked people, as the savages of America are, strangers to science, to commerce, and the arts as well of convenience as of luxury, we might perhaps be content, as some of them are said to be, to refer all disputes to the next man we met upon the road, and so put a short end [\*327] to every controversy. For in a state of nature there is no room for municipal laws; and the nearer any nation approaches to that state the fewer they will have occasion for. When the people of Rome were little better than sturdy shepherds or herdsmen, all their laws were contained in ten or twelve tables; but as luxury, politeness, and dominion increased, the civil law increased in the same proportion; and swelled to that amazing bulk which it now occupies, though successively pruned and retrenched by the emperors Theodosius and Justinian.

In like manner we may lastly observe, that, in petty states and narrow territories, much fewer laws will suffice than in large ones, because there are fewer objects upon which the laws can operate. The regulations of a private family are short and well known; those of a prince's household are necessarily more various and diffuse.

The causes therefore of the multiplicity of the English laws are, the extent of the country which they govern; the commerce and refinement of its inhabitants; but, above all, the liberty and property of the subject. These will naturally produce an infinite fund of disputes, which must be terminated in a judicial way; and it is essential to a free people, that these determinations be published and adhered to; that their property may be as certain and fixed as the very constitution of their state. For though in many other countries every thing is left in the breast of the judge to determine, yet with us he is

only to *declare* and *pronounce*, not to *make* or *new-model*, the law. Hence a multitude of decisions, or cases adjudged, will arise; for seldom will it happen that any one rule will exactly suit with many cases. And in proportion as the decisions of courts of judicature are multiplied, the law will be loaded with decrees, that may sometimes (though rarely) interfere with each other: either because succeeding judges may not be apprized of the prior adjudication; or because they may think differently from their predecessors; or because the same arguments did not occur formerly as at \*present; or, in fine, because of the natural imbecility and imperfection that attends all human [\*328] proceedings. But wherever this happens to be the case in any material point, the legislature is ready, and from time to time, both may, and frequently does, intervene to remove the doubt; and, upon due deliberation had, determines by a declaratory statute how the law shall be held for the future.

Whatever instances, therefore, of contradiction or uncertainty may have been gleaned from our records, or reports, must be imputed to the defects of human laws in general, and are not owing to any particular ill construction of the English system. Indeed, the reverse is most strictly true. The English law is less embarrassed with inconsistent resolutions and doubtful questions, than any other known system of the same extent and the same duration. I may instance in the civil law; the text whereof, as collected by Justinian and his agents, is extremely voluminous and diffuse; but the idle comments, obscure glosses, and jarring interpretations grafted thereupon, by the learned jurists, are literally without number. And these glosses, which are mere private opinions of scholastic doctors (and not like our books of reports, judicial determinations of the court), are all of authority sufficient to be vouched and relied on: which must needs breed great distraction and confusion in their tribunals. The same may be said of the canon law; though the text thereof is not of half the antiquity with the common laws of England; and though the more ancient any system of laws is, the more it is liable to be perplexed with the multitude of judicial decrees. When, therefore, a body of laws, of so high antiquity as the English, is in general so clear and perspicuous, it argues deep wisdom and foresight in such as laid the foundations, and great care and circumspection in such as have built the superstructure.

But is not (it will be asked) the multitude of law-suits, which we daily see and experience, an argument against the clearness and certainty of the law itself? By no means: for \*among the various disputes and controver- [\*329] sies which are daily to be met with in the course of legal proceedings, it is obvious to observe how very few arise from obscurity in the rules or maxims of law. An action shall seldom be heard of, to determine a question of inheritance, unless the fact of the descent be controverted. But the dubious points which are usually agitated in our courts, arise chiefly from the difficulty there is of ascertaining the intentions of individuals, in their solemn dispositions of property; in their contracts, conveyances, and testaments. It is an object, indeed, of the utmost importance in this free and commercial country, to lay as few restraints as possible upon the transfer of possessions from hand to hand, or their various designations marked out by the prudence, convenience, necessities, or even by the caprice, of their owners: yet to investigate the *intention* of the owner is frequently matter of difficulty, among heaps of entangled conveyances or wills of a various obscurity. The law rarely hesitates in declaring its own meaning; but the judges are frequently puzzled to find out the meaning of others. Thus the powers, the interest, the privileges, and the properties of a tenant for life, and a tenant in tail, are clearly distinguished and precisely settled by law: but what words in a will shall constitute this or that estate, has occasionally been disputed for more than two centuries past, and will continue to be disputed as long as the carelessness, the ignorance, or singularity of testators shall continue to clothe their intentions in dark or new-fangled expressions.

But, notwithstanding so vast an accession of legal controversies, arising from so fertile a fund as the ignorance and wilfulness of individuals, these will bear no comparison in point of number to those which are founded upon the dishonesty, and disingenuity of the parties: by either their suggesting complaints that are false in fact, and thereupon bringing groundless actions; or by their denying such facts as are true, in setting up unwarrantable defences. *Ex facto oritur jus*: if therefore the fact be perverted or misrepresented, the law which arises from thence will unavoidably be unjust or partial. \*And, [ \*330] in order to prevent this, it is necessary to set right the fact, and establish the truth contended for, by appealing to some mode of *probation* or *trial*, which the law of the country has ordained for a criterion of truth and falsehood.

These modes of probation or trial form in every civilized country the great object of judicial decisions. And experience will abundantly show, that above a hundred of our law-suits arise from disputed facts, for one where the law is doubted of. About twenty days in the year are sufficient in Westminster-hall to settle (upon solemn argument) every demurrer, or other special point of law that arises throughout the nation: but two months are annually spent in deciding the truth of facts, before six distinct tribunals, in the several circuits of England: exclusive of Middlesex and London, which afford a supply of causes much more than equivalent to any two of the largest circuits.

Trial, then, is the examination of the matter of fact in issue: of which there are many different species, according to the difference of the subject, or thing to be tried: of all which we will take a cursory view in this and the subsequent chapter. For the law of England so industriously endeavours to investigate truth at any rate, that it will not confine itself to one, or to a few, manners of trial; but varies its examination of facts according to the nature of the facts themselves: this being the one invariable principle pursued, that as well the best method of trial, as the best evidence upon that trial which the nature of the case affords, and no other, shall be admitted in the English courts of justice.

The species of trials in civil cases are seven. By *record*; by *inspection*, or *examination*; by *certificate*; by *witnesses*; by *wager of battel*; by *wager of law*; and by *jury*.

I. First then of the trial by *record*. This is only used in one particular instance: and that is where a matter of record \*is pleaded in any action, [ \*331] as a fine, a judgment or the like; and the opposite party pleads, "*nul tiel record*," that there is no such matter of record existing: upon this, issue is tendered and joined in the following form, "and this he prays may be inquired of by *the record*, and the other doth the like;" and hereupon the party pleading the record has a day given him to bring it in, and proclamation is made in court for him to "bring forth the record by him in pleading alleged, or else he shall be condemned;" and, on his failure, his antagonist shall have judgment to recover. The trial, therefore, of this issue is merely by the record; for, as Sir Edward Coke (*b*) observes, a record or enrolment is a monument of so high a nature, and importeth in itself such absolute verity, that if it be pleaded that there is no such record, it shall not receive any trial by witness, jury, or otherwise, but only by itself. Thus, titles of nobility, as whether earl or no earl, baron or no baron, shall be tried by the king's writ or patent only, which is matter of record. (*c*) Also in case of an alien, whether alien friend or enemy, shall be tried by the league or treaty between his sovereign and ours; for every league or treaty is of record. (*d*) And also, whether a manor be to be held in ancient demesne or not, shall be tried by the record of *domesday* in the king's exchequer.

II. Trial by *inspection*, or *examination*, is when, for the greater expedition of a cause, in some point or issue, being either the principal question or arising

(b) 1 Inst. 117, 260.

(c) 6 Rep. 53.

(d) 2 Rep. 31.

collaterally out of it, but being evidently the object of sense, the judges of the court, upon the testimony of their own senses, shall decide the point in dispute. For where the affirmative or negative of a question is matter of such obvious determination, it is not thought necessary to summon a jury to decide it; who are properly called in to inform the conscience of the court in respect of *dubious* facts: and therefore when the fact, from its nature, must be evident to the court either from ocular demonstration or other irrefragable proof, there the law departs \*from its usual resort, the verdict of twelve men, and relies [\*332] on the judgment of the court alone. As in case of a suit to reverse a fine for non-age of the cognizor, or to set aside a statute or recognizance entered into by an infant; here, and in other cases of the like sort, a writ shall issue to the sheriff; (e) commanding him that he constrain the said party to appear, that it may be ascertained by the view of his body by the king's justices, whether he be of full age or not; "*ut per aspectum corporis sui constare poterit justiciariis nostris, si prædictus A sit plenæ ætatis necne.*" (f) If, however, the court has, upon inspection, any doubt of the age of the party (as may frequently be the case), it may proceed to take proofs of the fact; and, particularly, may examine the infant himself upon an oath of *voir dire, veritatem dicere*, that is, to make true answer to such questions as the court shall demand of him; or the court may examine his mother, his godfather, or the like. (g)

In like manner if a defendant pleads in abatement of the suit that the plaintiff is *dead*, and one appears and calls himself the plaintiff, which the defendant denies: in this case the judges shall determine by inspection and examination, whether he be the plaintiff or not. (h) Also if a man be found by a jury an idiot *a nativitate*, he may come in person into the chancery before the chancellor, or be brought there by his friends, to be inspected and examined, whether idiot or not: and if, upon such view and inquiry, it appears he is not so, the verdict of the jury, and all the proceedings thereon, are utterly void and instantly of no effect. (i)

Another instance in which the trial by inspection may be used, is when upon an appeal of mayhem, the issue joined is whether it be mayhem or no mayhem, this shall be decided by the court upon inspection; for which purpose they may \*call in the assistance of surgeons. (j) (1) And, by analogy to [\*333] this, in an action of trespass for mayhem, the court (upon view of such mayhem as the plaintiff has laid in his declaration, or which is certified by the judges who tried the cause to be the same as was given in evidence to the jury) may increase the damages at their own discretion; (k) as may also be the case upon view of an atrocious battery. (l) But then the battery must likewise be alleged so certainly in the declaration, that it may appear to be the same with the battery inspected.

Also to ascertain any circumstances relative to a particular day past, it hath been tried by an inspection of the almanac by the court. Thus upon a writ of error from an inferior court, that of Lynn, the error assigned was that the judgment was given on a Sunday, it appearing to be on 26 of February, 26 Eliz., and upon inspection of the almanacs of that year, it was found that the 26th of February in that year actually fell upon a Sunday: this was held to be a sufficient trial, and that a trial by a jury was not necessary, although it was an error in fact; and so the judgment was reversed. (m) But in all these cases, the judges, if they conceive a doubt, may order it to be tried by jury.

III. The trial by *certificate* is allowed in such cases, where the evidence of

(e) 9 Rep. 31.

(f) This question of non-age was formerly, according to Glanvil (l. 12, c. 15), tried by a jury of eight men, though now it is tried by inspection.

(g) 2 Roll. Abr. 573.

(h) 9 Rep. 30.

(i) *Ibid.* 31.

(j) 2 Roll. Abr. 573.

(k) 1 *Ibid.* 103.

(l) Hardr. 408.

(m) Cro. Eliz. 237.

(1) All appeals of mayhem are now abolished.

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the person certifying is the only proper criterion of the point in dispute. For, when the fact in question lies out of the cognizance of the court, the judges must rely on the solemn averment or information of persons in such a station, as affords them the most clear and competent knowledge of the truth. As therefore such evidence (if given to a jury) must have been conclusive, the law, to save trouble and circuitry, permits the fact to be determined upon such certificate merely. Thus, 1. If the issue be whether A was absent with the king in his army out of the realm in time of war, this shall be tried (*n*) by the certificate of the mareschal of the king's host in writing under his seal, [\*334] which shall be sent to the justices. 2. If, in order to avoid an outlawry, or the like, it was alleged that the defendant was in prison, *ultra mare*, at Bourdeaux, or in the service of the mayor of Bourdeaux, this should have been tried by the certificate of the mayor; and the like of the captain of Calais. (*o*) But when this was law, (*p*) those towns were under the dominion of the crown of England. And therefore, by a parity of reason, it should now hold that in similar cases, arising at Jamaica, or Minorca, the trial should be by certificate from the governor of those islands. We also find (*q*) that the certificate of the queen's messenger, sent to summon home a peeress of the realm, was formerly held a sufficient trial of the contempt in refusing to obey such summons. 3. For matters within the realm, the customs of the city of London shall be tried by the certificate of the mayor and aldermen, certified by the mouth of their recorder; (*r*) upon a surmise from the party alleging it, that the custom ought to be thus tried: else it must be tried by the country. (*s*) As, the custom of distributing the effects of freemen deceased; of enrolling apprentices; or that he who is free of one trade may use another; if any of these or other similar points come in issue. But this rule admits of an exception, where the corporation of London is party, or interested, in the suit; as in an action brought for a penalty inflicted by the custom; for there the reason of the law will not endure so partial a trial; but this custom shall be determined by a jury, and not by the mayor and aldermen, certifying by the mouth of their recorder. (*t*) 4. In some cases the sheriff of London's certificate shall be the final trial: as if the issue be, whether the defendant be a citizen of London or a foreigner, (*u*) in case of privilege pleaded to be sued only in the city courts. Of a nature somewhat similar to which is the trial of the privilege of the university, when the chancellor claims cognizance of the cause, because one of the parties is a [\*335] privileged person. In this case, the charters confirmed by act of parliament direct the trial of the question, whether a privileged person or no, to be determined by the certificate and notification of the chancellor under seal; to which it hath also been usual to add an *affidavit* of the fact: but if the parties be at issue between themselves, whether A is a member of the university or no, on a plea of privilege, the trial shall be then by jury, and not by the chancellor's certificate: (*v*) because the charters direct only that the privilege be allowed on the chancellor's certificate, when the claim of cognizance is made by him, and not where the defendant himself pleads his privilege: so that this must be left to the ordinary course of determination. 5. In matters of ecclesiastical jurisdiction, as *marriage*, and, of course, *general bastardy*; and also *excommunication* and *orders*, these, and other like matters, shall be tried by the bishop's certificate. (*w*) As if it be pleaded in abatement, that the plaintiff is excommunicated, and issue is joined thereon; or if a man claims an estate by descent, and the tenant alleges the demandant to be a bastard; or if on a writ of dower, the heir pleads no marriage; or if the issue in a *quare impedit* be, whether or no the church be full by institution; all these being matters of mere ecclesiastical cognizance, shall be tried by certificate from the ordinary. But in an action on the case for calling a man bastard, the defend-

(*n*) Litt. § 102.

(*r*) Co. Litt. 74.

(*u*) Co. Litt. 74.

(*o*) 9 Rep. 81.

4 Burr. 248.

(*v*) 2 Roll. Abr. 583.

(*p*) 2 Roll. Abr. 588.

(*s*) Bro. Abr. tit. trial, pl. 96.

(*w*) Co. Litt. 74. 2 Lev. 250.

(*q*) Dyer, 176, 177.

(*t*) Hob. 85.



ant having pleaded in justification that the plaintiff was really so, this was directed to be tried by a jury: (x) because, whether the plaintiff be found either a general or special bastard, the justification will be good; and no question of special bastardy shall be tried by the bishop's certificate, but by a jury. (y) For a special bastard is one born before marriage, of parents who afterwards intermarry: which is bastardy by our law, though not by the ecclesiastical. It would therefore be improper to refer the trial of that question to the bishop; who, whether the child be born before or after marriage, will be \*sure [\*336] to return or certify him legitimate. (z) *Ability* of a clerk presented, (a) *admission, institution and deprivation* of a clerk, shall also be tried by certificate from the ordinary or metropolitan, because of these he is the most competent judge: (b) but *induction* shall be tried by a jury, because it is a matter of public notoriety, (c) and is likewise the corporal investiture of the temporal profits. *Resignation* of a benefice may be tried in either way; (d) but it seems most properly to fall within the bishop's cognizance. 6. The trial of all customs and practice of the courts shall be by certificate from the proper officers of those courts respectively; and, what return was made on a writ by the sheriff or under-sheriff, shall be only tried by his own certificate. (e) And thus much for those several issues, or matters of fact, which are proper to be tried by certificate.

IV. A fourth species of trial is that by *witnesses, per testes*, without the intervention of a jury. (2) This is the only method of trial known to the civil law; in which the judge is left to form in his own breast his sentence upon the credit of the witnesses examined: but it is very rarely used in our law, which prefers the trial by jury before it in almost every instance. Save only that when a widow brings a writ of dower, and the tenant pleads that the husband is not dead; this, being looked upon as a dilatory plea, is, in favour of the widow, and for greater expedition, allowed to be tried by witnesses examined before the judges: and so, saith Finch, (f) shall no other case in our law. But Sir Edward Coke (g) mentions some others: as to try whether the tenant in a real action was duly summoned, or the validity of a challenge to a juror: so that Finch's observation must be confined to the trial of direct and not collateral issues. And in every case Sir Edward Coke lays it down, that the affirmative must be proved by two witnesses at the least. (3)

\*V. The next species of trial is of great antiquity, but much disused; though still in force, if the parties choose to abide by it; (4) I [\*337] mean the trial by *wager of battel*. This seems to have owed its original to the military spirit of our ancestors, joined to a superstitious frame of mind; it being in the nature of an appeal to Providence, under an apprehension and hope (however presumptuous and unwarrantable) that heaven would give the victory to him who had the right. The decision of suits by this appeal to the God of battles is by some said to have been invented by the Burgundi, one of the northern or German clans that planted themselves in Gaul. And it is true, that the first written injunction of judiciary combats that we meet with is in the laws of Gundebald, A. D. 501, which are preserved in the Burgundian

(x) Hob. 179.

(a) See book I, ch. 11.

(c) Dyer, 228.

(y) Dyer, 79.

(b) 2 Inst. 682.

(d) 2 Roll. Abr. 588.

(s) See Introd. to the Great Charter, edit. Oxon. sub anno 1225.

(h) 2 Inst. 682. Show. Parl. c. 88. 2 Roll. Abr. 583, &amp;c.

(e) 9 Rep. 81.

(f) L. 423.

(g) 1 Inst. 4.

(2) By the rules adopted since the Judicature Act of 1873, it is optional with the parties in civil cases to proceed without a jury, but either party still has a right to demand a jury. See *Sugg v. Silber*, 1 L. R., Q. B. D., 362. One of several defendants cannot have a jury without the consent of the rest. *Back v. Hay*, L. R., 5 Ch. Div., 235.

(3) In general, except in treason and perjury, it suffices to prove a fact by the evidence of a single credible witness.

(4) Appeals of murder, treason, felony, &c., as well as wager of battle, were abolished by statute 59 Geo. III, c. 46. See, as to wager of battle, book IV, p. 846, n. Also, "Superstition and Force," by H. C. Lea.

code. Yet it does not seem to have been merely a local custom of this or that particular tribe, but to have been the common usage of all those warlike people from the earliest times. (*h*) And it may also seem from a passage in Velleius Paterculus, (*i*) that the Germans, when first they became known to the Romans, were wont to decide all combats of right by the sword; for when Quintilius Varus endeavoured to introduce among them the Roman laws and method of trial, it was looked upon (says the historian) as a "*novitas incognitas disciplinæ, ut solita armis decerni jure terminarentur.*" And among the ancient Goths in Sweden we find the practice of judiciary duels established upon much the same footing as they formerly were in our own country. (*j*)

This trial was introduced into England among other Norman customs by William the Conqueror; but was only used in three cases, one military, one criminal, and the third civil. The first in the court-martial, or court of chivalry and honour; (*k*) the second in appeals of felony, (*l*) of which we shall [\*338] speak in the next book; and the third upon issue joined in a \*writ of right, the last and most solemn decision of real property. For in writs of right the *jus proprietatis*, which is frequently a matter of difficulty, is in question; but other real actions being merely questions of the *jus possessionis*, which are usually more plain and obvious, our ancestors did not in them appeal to the decision of Providence. Another pretext for allowing it, upon these final writs of right, was also for the sake of such claimants as might have the true right, but yet, by the death of witnesses, or other defect of evidence, be unable to prove it to a jury. But the most curious reason of all is given in the Mirror, (*m*) that it is allowable upon warrant of the combat between David for the people of Israel of the one party, and Goliath for the Philistines of the other party: a reason which Pope Nicholas I very seriously decides to be inconclusive. (*n*) Of battle therefore on a writ of right, (*o*) we are now to speak; and although the writ of right itself, and of course this trial thereof, be at present much disused; yet, as it is law at this day, it may be matter of curiosity at least, to enquire into the forms of this proceeding, as we may gather them from ancient authors. (*p*)

The last trial by battle that was waged in the court of common pleas at Westminster (though there was afterwards (*q*) one in the court of chivalry in 1631; and another in the county palatine of *Durham* (*r*) in 1638) was in the thirteenth year of Queen Elizabeth, A. D. 1571, as reported by Sir James Dyer: (*s*) and was held in Tothill-fields, Westminster, "*non sine magna juris consultorum perturbatione,*" saith Sir Henry Spelman, (*t*) who was himself a witness of the ceremony. The form, as appears from the authors before cited, is as follows:

When the tenant in a writ of right pleads the general issue, viz.: that he [\*339] hath more right to hold, than the \*demandant hath to recover; and offers to prove it by the body of his champion, which tender is accepted by the demandant; the tenant in the first place must produce his champion, who, by throwing down his glove as a gage or pledge, thus *wages* or stipulates battel with the champion of the demandant; who, by taking up the gage or glove stipulates on his part to accept the challenge. The reason why it is waged by champions, and not by the parties themselves, in civil actions, is because, if any party to the suit dies, the suit must abate and be at an end for the present; and therefore no judgment could be given for the lands in question, if either of the parties were slain in battle; (*u*) and also that no person might claim an exemption from this trial, as was allowed in criminal cases, where the battle was waged in person.

(A) Seld. of Duels, c. 5. (f) L. 2, c. 118. (g) 2 Hawk. P. C. c. 45. (m) C. 2, § 22.  
 (j) Stiernh. de jure Sueon. l. 1, c. 7. (k) Co Litt. 261. (n) Decret. par. 2, caus. 2, q. 5, c. 22. (o) Appendix, No. 1, § 5.  
 (p) Glanvil. l. 2, c. 3. Vet. Nat. Brev. fol. 2. Nov. Nar. tit. Droit, patent, fol. 221 (edit. 1534), Year-book 29 Edw. III, c. 12. Finch, L. 421. Dyer, 301. 2 Inst. 247.  
 (q) Rushw. Coll. vol. 2, part 2, fol. 112. 19 Rym. 822. (r) Cro. Car. 512. (s) Dyer, 301.  
 (t) Gloss. 108. (u) Co. Litt. 294. Dyversyte des courtes, 304.

A piece of ground is then in due time set out, of sixty feet square, enclosed with lists, and on one side a court erected for the judges of the court of common pleas, who attend there in their scarlet robes; and also a bar is prepared for the learned serjeants at law. When the court sits, which ought to be by sunrising, proclamation is made for the parties, and their champions; who are introduced by two knights, and are dressed in a coat of armour, with red sandals, bare-legged from the knee downwards, bareheaded, and with bare arms to the elbows. The weapons allowed them are only batons, or staves of an ell long, and a four-cornered leather-target; so that death very seldom ensued this civil combat. In the court military indeed they fought with sword and lance, according to Spelman and Rushworth; as likewise in France only villeins fought with the buckler and baton, gentlemen armed at all points. And upon this and other circumstances the president Montesquieu (v) hath with great ingenuity not only deduced the impious custom of private duels upon imaginary points of honour, but hath also traced the heroic madness of knight-errantry, from the same original of judicial combats. But to proceed.

\*When the champions, thus armed with batons, arrive within the lists or place of combat, the champion of the tenant takes his adversary by the hand, and makes oath that the tenements in dispute are not the right of the demandant; and the champion of the demandant, then taking the other by the hand, swears in the same manner that they are: so that each champion is, or ought to be, thoroughly persuaded of the truth of the cause he fights for. Next an oath against sorcery and enchantment is to be taken by both the champions, in this or a similar form; "hear this, ye justices, that I have this day neither eat, drank, nor have upon me, neither bone, stone, nor grass; nor any enchantment, sorcery, or witchcraft, whereby the law of God may be abased, or the law of the devil exalted. So help me God and his saints."

The battle is thus begun, and the combatants are bound to fight till the stars appear in the evening: and, if the champion of the tenant can defend himself till the stars appear, the tenant shall prevail in his cause; for it is sufficient for him to maintain his ground, and make it a drawn battle, he being already in possession; but, if victory declares itself for either party, for him is judgment finally given. This victory may arise, from the death of either of the champions: which indeed hath rarely happened; the whole ceremony, to say the truth, bearing a near resemblance to certain rural athletic diversions, which are probably derived from this original. Or victory is obtained, if either champion proves *recreant*, that is, yields, and pronounces the horrible word of *craven*; a word of disgrace and obloquy, rather than of any determinate meaning. But a horrible word it indeed is to the vanquished champion: since as a punishment to him for forfeiting the land of his principal by pronouncing that shameful word, he is condemned, as a recreant, *amittere liberam legem*, that is, to become infamous, and not to be accounted *liber et legalis homo*; being supposed by the event to be proved forsworn, and therefore never to be put upon a jury or admitted as a witness in any cause.

\*This is the form of a trial by battle; a trial which the tenant, or defendant in a writ of right, has it in his election at this day to demand; and which was the only decision of such writ of right after the conquest, till Henry the Second, by consent of parliament, introduced the *grand assize*, (w) (5) a peculiar species of trial by jury, in concurrence therewith; giving the tenant his choice of either the one or the other. Which example, of discountenancing these judicial combats, was imitated about a century afterwards in France, by an edict of Louis the Pious, A. D. 1260, and soon after by the rest of Europe. The establishment of this alternative, Glanvil, chief justice

(v) Sp. L. b. 28, c. 20, 22.

(w) Appendix, No. I, § 6.

(5) Abolished by statute 3 and 4 Wm. IV. c. 42.

to Henry the Second, and probably his adviser herein, considers as a most noble improvement, as in fact it was, of the law. (x)

VI. A sixth species of trial is by *wager of law*, (6) *vadiatio legis*, as the foregoing is called *wager of battle*, *vadiatio duelli*: because, as in the former case, the defendant gave a pledge, gage, or *vadium*, to try the cause by battle; so here he was to put in sureties or *vadios*, that at such a day he will make his law, that is, take the benefit which the law has allowed him. (y) For our ancestors considered, that there were many cases where an innocent man, of good credit, might be overborne by a multitude of false witnesses; and therefore established this species of trial, by the oath of the defendant himself, for if he will absolutely swear himself not chargeable, and appears to be a person of reputation, he shall go free and forever acquitted of the debt, or other cause of action.

[\*342] \*This method of trial is not only to be found in the codes of almost all the northern nations, that broke in upon the Roman empire, and established petty kingdoms upon its ruins; (z) but its original may also be traced as far back as the Mosaical law. "If a man deliver unto his neighbour an ass, or an ox, or a sheep, or any beast to keep; and it die, or be hurt, or driven away, no man seeing it; then shall an oath of the Lord be between them both, that he hath not put his hands unto his neighbour's goods; and the owner of it shall accept thereof, and he shall not make it good." (a) We shall likewise be able to discern a manifest resemblance, between this species of trial, and the canonical purgation of the popish clergy, when accused of any capital crime. The defendant or person accused was in both cases to make oath of his own innocence, and to produce a certain number of compurgators, who swore they believed his oath. Somewhat similar also to this is the *sacramentum decisionis*, or the voluntary and decisive oath of the civil law; (b) where one of the parties to the suit, not being able to prove his charge, offers to refer the decision of the cause to the oath of his adversary; which the adversary was bound to accept, or tender the same personal back again; otherwise the whole was taken as confessed by him. But though a custom somewhat similar to this prevailed formerly in the city of London, (c) yet in general the English law does not thus, like the civil, reduce the defendant, in case he is in the wrong, to the dilemma of either confession or perjury: but is indeed so tender of permitting the oath to be taken, even upon the defendant's own request, that it allows it only in a very few cases, and in those it has also devised other collateral remedies for the party injured, in which the defendant is excluded from his wager of law.

[\*343] \*The manner of waging and making law is this. He that has waged, or given security, to make his law, brings with him into court eleven of his neighbours: a custom, which we find particularly described so early as in the league between Alfred and Guthrun the Dane; (d) for by the old Saxon constitution every man's credit in courts of law depended upon the opinion which his neighbours had of his veracity. The defendant, then standing at the end of the bar, is admonished by the judges of the nature and danger of a false oath. (e) And if he still persists, he is to repeat this or the like oath: "hear this, ye justices, that I do not owe unto Richard Jones the sum of ten pounds; nor any penny thereof, in manner and form as the said Richard hath declared against me. So help me God." And thereupon his eleven neighbours,

(a) Est autem magnâ assisæ regale quoddam beneficium, clementia principis, de concilio procerum, populis indultum; quo vitæ hominum, et status integritati tam salubriter consulitur, ut, retinendo quod quis possidet in libero tenemento soli, duelli casum declinare possint homines ambiguum. Ac per hoc contingit, inperata et præmatura mortis ultimum evadere supplicium, vel saltem perennis infamia opprobrium illius infestis et inverecundi verbi, quod in ore victi turpiter sonat, consecutum. Ex aquitate autem maxima prodita est legalis ista institutio. Jus enim, quod post multas et longas dilationes, via evincitur per duellum, per beneficium istius constitutionis commodius et acceleratius expeditur. L. 2. c. 7.

(y) Co. Litt. 295.

(z) Sp. L. b. 26, c. 13.

Stiernh., de jure Sueon. l. 1. c. 9. Feud. l. 1. §. 4, 10, 22.

(b) Exod. xxii. 10.

(c) Cod. 4, l. 12.

(d) Bro. Abr. tit. lcy gager, 77.

(e) Cap. 3. Wlk. LL., Angl. Sax.

(e) Salk. 682.

(6) Wager of law was abolished by statute 8 and 4 Wm. IV, c. 42. See an account of it in "Superstition and Force," by H. C. Lea, p. 13.

or compurgators, shall avow upon their oaths, that they believe in their consciences that he saith the truth; so that himself must be sworn *de fidelitate*, and the eleven *de credulitate*. (f) It is held indeed by later authorities, (g) that fewer than eleven compurgators will do: but Sir Edward Coke is positive that there must be this number; and his opinion not only seems founded upon better authority, but also upon better reason: for, as wager of law is equivalent to a verdict in the defendant's favour, it ought to be established by the same or equal testimony, namely, by the oath of *twelve* men. And so indeed Glanvil expresses it, (h) "*jurabit duodecima manu.*" and in 9 Henry III, when a defendant in an action of debt waged his law, it was adjudged by the court "*quod defendat se duodecima manu.*" (i) Thus, too, in an author of the age of Edward the First, (k) we read, "*adjudicabitur reus ad legem suam duodecima manu.*" And the ancient treatise, entitled, *Diversite des courts*, expressly confirms Sir Edward Coke's opinion. (l)

\*It must be however observed, that so long as the custom continued of producing the *secta*, the *suit*, or witnesses to give probability to the plaintiff's demand (of which we spoke in a former chapter), the defendant was not put to wage his law unless the *secta* was first produced, and their testimony was found consistent. To this purpose speaks *magna carta*, c. 28. "*Nullus ballivus de castro ponat aliquem ad legem manifestam,*" (that is, wager of battel), "*nec ad juramentum,*" (that is, wager of law), "*simplici loquela sua,*" (that is, merely by his count or declaration), "*sine testibus fidelibus ad hoc inductis.*" Which Fleta thus explains: (m) "*si petens sectam produxerit, et concordas inveniantur, tunc reus poterit vadiare legem suam contra petentem et contra sectam suam prolatam; sed si secta variabilis inveniatur, extrunc non tenebitur legem vadiare contra sectam illam.*" It is true, indeed, that Fleta expressly limits the number of compurgators to be only double to that of the *secta* produced; "*ut si duos vel tres testes produxerit ad probandum, oportet quod defensio fiat per quatuor vel per sex; ita quod pro quolibet teste duos producat juratores, usque ad duodecim;*" so that, according to this doctrine, the eleven compurgators were only to be *produced*, but not all of them *sworn*, unless the *secta* consisted of *six*. But though this might possibly be the rule till the production of the *secta* was generally disused, since that time the *duodecima manus* seems to have been generally required. (n)

In the old Swedish or Gothic constitution, wager of law was not only permitted, as it still is in *criminal* cases, unless the fact be extremely clear against the prisoner; (o) but was also absolutely required, in many *civil* cases; which an author of their own (p) very justly charges as being the source of frequent perjury. This, he tells us, was owing to the popish ecclesiastics, who introduced this method of purgation from their canon law; and, having sown a plentiful crop of oaths \*in all judicial proceedings, reaped afterwards [ \*345 ] an ample harvest of perjuries: for perjuries were punished in part by pecuniary fines, payable to the coffers of the church. But with us in England wager of law is never *required*; and is then only *admitted*, where an action is brought upon such matters as may be supposed to be privately transacted between the parties, and wherein the defendant may be presumed to have made satisfaction without being able to prove it. Therefore it is only in actions of debt upon simple contract, or for amercement, in actions of detinue, and of account, where the debt may have been paid, the goods restored, or the account balanced, without any evidence of either; it is only in these actions, I say, that the defendant is admitted to wage his law: (q) so that wager of law lieth not, when there is any specialty, (as a bond or deed), to charge the defendant, for that would be cancelled, if satisfied; but when the debt groweth by word

(f) Co. Litt. 295.

(g) 2 Ventr. 171.

(h) Hengham magna, c. 5.

(i) L. 1. c. 9.

(j) Fleta. Abr. tit. ley, 78.

(k) Il convint aver' oue luy at mayns de furer oue luy, so. que lis entendre en leur consciens que il disoyt voler. Fol. 306, edit. 1534.

(m) L. 2. c. 63.

(n) Bro. Abr. tit. ley gager, 9.

(o) Mod. Un. Hist. xxxiii, 22.

(p) Stiernhook, de jure Sueon, l. 1. c. 9.

(q) Co. Litt. 295.

only; nor doth it lie in an action of debt, for arrears of an account, settled by auditors in a former action. (r) And by such wager of law (when admitted) the plaintiff is perpetually barred; for the law, in the simplicity of the ancient times, presumed that no one would forswear himself for any worldly thing. (s) Wager of law, however, lieth in a real action, where the tenant alleges he was not legally summoned to appear, as well as in mere personal contracts. (t)

A man outlawed, attainted for false verdict, or for conspiracy or perjury, or otherwise become infamous, as by pronouncing the horrible word in a trial by battle, shall not be permitted to wage his law. Neither shall an infant under the age of twenty-one, for he cannot be admitted to his oath; and, therefore, on the other hand, the course of justice shall flow equally, and the defendant, where an infant is plaintiff, shall not wage his law. But a feme-covert, when joined with her husband, may be admitted to wage her law, and an alien shall do it in his own language. (u)

[\*346] \*It is moreover a rule, that where a man is compellable by law to do any thing, whereby he becomes creditor to another, the defendant in that case shall not be permitted to wage his law: for then it would be in the power of any bad man to run in debt first, against the inclinations of his creditor, and afterwards to swear it away. But where the plaintiff hath given voluntary credit to the defendant, there he may wage his law; for, by giving him such credit, the plaintiff has himself borne testimony that he is one whose character may be trusted. Upon this principle it is, that in an action of debt against a prisoner by a gaoler for his victuals, the defendant shall not wage his law: for the gaoler cannot refuse the prisoner, and ought not to suffer him to perish for want of sustenance. But otherwise it is for the board or diet of a man at liberty. In an action of debt brought by an attorney for his fees, the defendant cannot wage his law, because the plaintiff is compellable to be his attorney. And so, if a servant be retained according to the statute of laborers, 5 Eliz. c. 4, which obliges all single persons of a certain age, and not having other visible means of livelihood, to go out to service; in an action of debt for the wages of such a servant, the master shall not wage his law, because the plaintiff was compellable to serve. But it had been otherwise, had the hiring been by special contract, and not according to the statute. (v)

In no case where a contempt, trespass, deceit, or any injury, *with force* is alleged against the defendant, is he permitted to wage his law: (w) for it is impossible to presume he has satisfied the plaintiff his demand in such cases, where damages are uncertain and left to be assessed by a jury. Nor will the law trust the defendant with an oath to discharge himself, where the private injury is coupled as it were with a public crime, that of force and violence; which would be equivalent to the purgation oath of the civil law, which ours has so justly rejected.

[\*347] \*Executors and administrators, when charged for the debt of the deceased, shall not be admitted to wage their law: (x) for no man can with a safe conscience wage law of another man's contract; that is, swear that he never entered into it, or, at least, that he privately discharged it. The king also has his prerogative; for, as all wager of law imports a reflection on the plaintiff for dishonesty, therefore there shall be no such wager on actions brought by him. (y) And this prerogative extends and is communicated to his debtor and accomptant; for, on a writ of *quo minus* in the exchequer for a debt on simple contract, the defendant is not allowed to wage his law. (z)

Thus the wager of law was never permitted, but where the defendant bore a fair and unrepachable character; and it also was confined to such cases where a debt might be supposed to be discharged or satisfaction made in private without any witnesses to attest it: and many other prudential restrictions

(r) 10 Rep. 108.  
(u) Co. Litt. 295.  
(x) Finch L. 494.

(s) Co. Litt. 295.  
(v) Ibid.  
(y) Ibid. 523.

(t) Finch, L. 423.  
(w) Ibid. Raym. 298.  
(z) Co. Litt. 295.

accompanied this indulgence. But at length it was considered, that (even under all its restrictions) it threw too great a temptation in the way of indigent or profligate men; and therefore by degrees new remedies were devised, and new forms of action were introduced, wherein no defendant is at liberty to wage his law. So that now no plaintiff need at all apprehend any danger from the hardness of his debtor's conscience, unless he voluntarily chooses to rely on his adversary's veracity, by bringing an obsolete, instead of a modern action. Therefore one shall hardly hear at present of an action of *debt* brought upon a simple contract; that being supplied by an action of *trespass on the case* for the breach of a promise or *assumpsit*; wherein, though the specific debt cannot be recovered, yet the damages may, equivalent to the specific debt. And this being an action of trespass, no law can be waged therein. So instead of an action of *detinue* to recover the very thing detained, an action of trespass on the case in *trover and conversion* \*is usually brought; [\*348] wherein though the horse or other specific chattel cannot be had, yet the defendant shall pay damages for the conversion equal to the value of the chattel; and for this trespass also no wager of law is allowed. In the room of actions of *account*, a bill in equity is usually filed; wherein, though the defendant answers upon his oath, yet such oath is not conclusive to the plaintiff: but he may prove every article by other evidence, in contradiction to what the defendant has sworn. So that wager of law is quite out of use, being avoided by the mode of bringing the action; but still it is not out of force. And therefore, when a new statute inflicts a penalty, and gives an action of debt for recovering it, it is usual to add, in which no wager of law shall be allowed: otherwise an hardy delinquent might escape any penalty of the law, by swearing he had never incurred, or else had discharged it.

These six species of trials, that we have considered in the present chapter, are only had in certain special and eccentric cases; where the trial by the country, *per pais*, or by jury, would not be so proper or effectual. In the next chapter we shall consider at large the nature of that principal criterion of truth in the law of England.

## CHAPTER XXIII.

### OF THE TRIAL BY JURY.

THE subject of our next inquiries will be the nature and method of the trial *by jury*; called also the trial *per pais*, or *by the country*: a trial that hath been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof. Some authors have endeavoured to trace the original of juries up as high as the Britons themselves, the first inhabitants of our island; but certain it is that they were in use among the earliest Saxon colonies, their institution being ascribed by Bishop Nicholson (a) to Woden himself, their great legislator and captain. Hence it is, that we may find traces of juries in the laws of all those nations which adopted the feudal system, as in Germany, France and Italy; who had all of them a tribunal composed of twelve good men and true, "*boni homines*," usually the vassals or tenants of the lord, being the equals or peers of the parties litigant; and, as the lord's vassals judged each other in the lord's courts, so the king's vassals, or the lords themselves, judged each other in the king's court. (b) In England we find actual mention of them so early as the laws of King Ethelred, and that

(a) *De jure Saxonum*, p. 12.

(b) Sp. L. b. 30. c. 18. *Capitul. Ludd. pñt. A. D. 819, c. 2.*

not as a new invention. (c) Stiernhook (*d*) ascribes the invention of the jury, which in the Teutonic language is denominated *nembda*, to Regner, king of Sweden and Denmark, who was cotemporary with our King Egbert. Just as [\*350] we are apt to impute the invention of this, and some other pieces of juridical polity, to the superior genius of Alfred the Great; to whom, on account of his having done much, it is usual to attribute every thing; and as the tradition of ancient Greece placed to the account of their own Hercules whatever achievement was performed superior to the ordinary prowess of mankind. Whereas the truth seems to be, that this tribunal was universally established among all the northern nations, and so interwoven in their very constitution; that the earliest accounts of the one give us also some traces of the other. (1) Its establishment however and use, in this island, of what date soever it be, though for a time greatly impaired and shaken by the introduction of the Norman trial by battle, was always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it. In *magna carta* it is more than once insisted on as the principal bulwark of our liberties; but especially by chapter 29, that no freeman shall be hurt in either his person or property; "*nisi per legale iudicium parium suorum vel per legem terræ.*" A privilege which is couched in almost the same words with that of the emperor Conrad, two hundred years before: (e) "*nemo beneficium suum perdat, nisi secundum consuetudinem antecessorum nostrorum et per iudicium parium suorum.*" And it was ever esteemed, in all countries, a privilege of the highest and most beneficial nature.

But I will not mispend the reader's time in fruitless encomiums on this method of trial; but shall proceed to the dissection and examination of it in all its parts, from whence indeed its highest encomium will arise; since, the more it is searched into and understood, the more it is sure to be valued. And this is a species of knowledge most absolutely necessary for every gentleman in the kingdom: as well because he may be frequently called upon to determine in this capacity the rights of others, his fellow-subjects; as because his own property, his liberty, and his life, depend upon maintaining, in its legal force, the constitutional trial by jury.

\*Trials by jury in civil causes are of two kinds; *extraordinary* and [\*351] *ordinary*. The extraordinary I shall only briefly hint at, and confine the main of my observations to that which is more usual and ordinary.

The first species of extraordinary trial by jury is that of the *grand assize*, which was instituted by King Henry the Second in parliament, as was mentioned in the preceding chapter, by way of alternative offered to the choice of the tenant or defendant in a writ of right, instead of the barbarous and unchristian custom of duelling. For this purpose a writ *de magna assiza eligenda* is directed to the sheriff, (*f*) to return four knights, who are to elect and choose twelve others to be joined with them, in the manner mentioned by Glanvil; (*g*) who, having probably advised the measure itself, is more than usually copious in describing it; and these, all together, form the grand assize, or great jury, which is to try the matter of right, and must now consist of sixteen jurors. (*h*) (2)

Another species of extraordinary juries, is the jury to try an *attaint*; which is a process commenced against a former jury, for bringing in a false verdict: (3) of which we shall speak more largely in a subsequent chapter. At present I shall only observe, that this jury is to consist of twenty-four of the best men

(c) Wilk. LL. Angl. Sax. 117.

(d) De jure Sueonum, l. 1, c. 4.

(e) LL. Longob. l. 2, c. 8, l. 4.

(f) F. N. B. 4.

(g) L. 2, c. 11, 21.

(h) Finch, L. 412. 1 Leon. 202.

(1) For an account of trial by jury among the northern nations, see History of Trial by Jury, by William Forsyth. As to the method of trial at Athens by dicasteries faintly resembling our juries, see Grote, Hist. Greece, vol. v, ch. 46.

(2) This mode of trial is abolished.

(3) Abolished by 6 Geo. IV, c. 50, s. 60.



in the county, who are called the *grand jury* in the attain, to distinguish them from the first or *petit jury*; and these are to hear and try the goodness of the former verdict.

With regard to the *ordinary* trial by jury in civil cases, I shall pursue the same method in considering it, that I set out with in explaining the nature of prosecuting actions in general, viz.: by following the order and course of the proceedings themselves, as the most clear and perspicuous way of treating it.

\*When, therefore, an issue is joined, by these words, "and this the said A prays may be inquired of by the country," or, "and of this he [\*352] puts himself upon the country,—and the said B does the like," the court awards a writ of *venire facias* upon the roll or record, commanding the sheriff "that he cause to come *here* on such a day, twelve free and lawful men, *liberos et legales homines*, of the body of his county, by whom the truth of the matter may be better known, and who are neither of kin to the aforesaid A, nor the aforesaid B, to recognize the truth of the issue between the said parties." (i) And such writ was accordingly issued to the sheriff.

Thus the cause stands ready for a trial *at the bar* of the court itself; for all trials were there anciently had, in actions which were there first commenced; which then never happened but in matters of weight and consequence, all trifling suits being ended in the court-baron, hundred, or county courts: and indeed all causes of great importance or difficulty are still usually retained upon motion, to be tried at the bar in the superior courts. But when the usage began to bring actions of any trifling value in the courts of Westminster-hall, it was found to be an intolerable burthen to compel the parties, witnesses, and jurors, to come from Westmoreland, perhaps, or Cornwall, to try an action of assault at Westminster. A practice therefore, very early obtained, of *continuing* the cause from term to term, in the court above, provided the justices in eyre did not previously come into the county where the cause of action arose; (j) and if it happened that they arrived there within that interval, then the cause was removed from the jurisdiction of the justices at Westminster to that of the justices in eyre. Afterwards, when the justices in eyre were superseded by the modern justices of assize (who came twice or thrice in the year into the several counties, *ad capiendas assisas*, to take or try writs of assize, of *mort d'ancestor*, *novel disseisin*, *nuisance*, \*and the like), a power was superadded by statute Westm. 2, 13 Edw. 1, c. 30, [\*353] to these justices of assize to try common issues in trespass, and other less important suits, with direction to return them (when tried) into the court above, where alone the judgment should be given. And as only the trial, and not the determination of the cause, was now intended to be had in the court below, therefore the clause of *nisi prius* was left out of the conditional *continuances* before mentioned, and was directed by the statute to be inserted in the writs of *venire facias*; that is, "that the sheriff should cause the jurors to come to Westminster (or wherever the king's court should be held) on such a day in Easter and Michaelmas terms; *nisi prius*, unless before that day the justices assigned to take assize shall come into his said county." By virtue of which the sheriff returned his jurors to the court of the justices of assize, which was sure to be held in the vacations before Easter and Michaelmas terms; and there the trial was had.

An inconvenience attended this provision: principally because, as the sheriff made no return of the jury to the court at Westminster, the parties were ignorant who they were till they came upon the trial, and therefore were not ready with their challenges or exceptions. For this reason, by the statute 42 Edw. III, c. 11, the method of trials by *nisi prius* was altered; and it was enacted that no inquests (except of assize and gaol delivery) should be taken by writ of *nisi prius*, till after the sheriff had returned the names of the jurors to the

(i) Appendix, No. II. § 4.

(j) *Semper dabitur dies partibus a justiciariis de banco, sub tali conditione, "nisi justiciarii itinerantes prius venerint ad partes illas."* Bract. l. 3, tr. 1, c. 11, § 8.

court above. So that now in almost every civil cause the clause of *nisi prius* is left out of the writ of *venire facias*, which is the sheriff's warrant to warn the jury: and is inserted in another part of the proceedings, as we shall see presently.

For now the course is to make the sheriff's *venire* returnable on the last return of the same term wherein issue is joined, viz.: Hilary or Trinity terms; which, from the making up of the issues therein, are usually called *issuable* terms. And he returns the names of the jurors in a *panel* (a little pane, [ \*354 ] or oblong piece of parchment) annexed to the writ. This jury \*is not summoned, and therefore, not appearing at the day, must unavoidably make default. For which reason a compulsive process is now awarded against the jurors, called in the common pleas a writ of *habeas corpora juratorum*, and in the king's bench a *distringas*, commanding the sheriff to have their bodies or to distrain them by their lands and goods, that they may appear upon the day appointed. The entry therefore, on the roll or record is, (k) "that the jury is respited, through defect of the jurors, till the first day of the next term, then to appear at Westminster; unless before that time, viz.: on Wednesday the 4th of March, the justices of our lord the king, appointed to take assizes in that county, shall have come to Oxford, that is, to the place assigned for holding the assizes." And thereupon the writ commands the sheriff to have their bodies at Westminster on the said first day of next term, or before the said justices of assize, if before that time they come to Oxford, viz.: on the 4th of March aforesaid. And, as the judges are sure to come and open the circuit commissions on the day mentioned in the writ, the sheriff returns and summons this jury to appear at the assizes, and there the trial is had before the justices of *assize* and *nisi prius*: among whom (as hath been said) (l) are usually two of the judges of the courts of Westminster, the whole kingdom being divided into six circuits, (4) for this purpose. And thus we may observe that the trial of common issues, at *nisi prius*, which was in its original only a collateral incident to the original business of the justices of assize, is now, by the various revolutions of practice, become their principal civil employment: hardly anything remaining in use of the real *assizes* but the name.

If the sheriff be not an indifferent person; as if he be a party in the suit, or be related either by blood or affinity to either of the parties, he is not then trusted to return the jury, but the *venire* shall be directed to the coroners, who in this, as in many other instances, are the substitutes of the sheriff, to execute process when he is deemed an improper person. If any exception lies to the coroners, the *venire* shall be directed to two clerks of the court, or two persons [ \*355 ] of the county \*named by the court, and sworn. (m) And these two, who are called *elisors*, or electors, shall indifferently name the jury, and their return is final; no challenge being allowed to their array.

Let us now pause awhile, and observe (with Sir Matthew Hale) (n) in these first preparatory stages of the trial, how admirably this constitution is adapted and framed for the investigation of truth, beyond any other method of trial in the world. For, first, the *person returning* the jurors is a man of some fortune and consequence; that so he may be not only the less tempted to commit wilful errors, but likewise be responsible for the faults of either himself or his officers; and he is also bound by the obligation of an oath faithfully to execute his duty. Next, as to the *time of their return*: the panel is returned to the court upon the original *venire*, and the jurors are to be summoned and brought in many weeks afterwards to the trial, whereby the parties may have notice of the jurors, and of their sufficiency or insufficiency, characters, connections and

(k) Append. No. II, § 4.  
(n) Hist. C. L. c. 12.

(l) See page 59.

(m) Fortesc. de Laud. LL. c. 25. Co. Litt. 128.

(4) Now seven.

relations, that so they may be challenged upon just cause; while at the same time by means of the compulsory process (of *distringas*, or *habeas corpora*) the cause is not like to be retarded through defect of jurors. Thirdly, as to the *place* of their appearance; which in causes of weight and consequence is at the bar of the court; but in ordinary cases at the assizes, held in the county where the cause of action arises, and the witnesses and jurors live: a provision most excellently calculated for the saving of expense to the parties. For though the preparation of the causes in point of pleading is transacted at Westminster, whereby the order and uniformity of proceedings is preserved throughout the kingdom, and multiplicity of forms is prevented; yet this is no great charge or trouble, one attorney being able to transact the business of forty clients. But the troublesome and most expensive attendance is that of jurors and witnesses at the trial; which, therefore, is brought home to them in the country where most of them inhabit. Fourthly, the *persons before whom* they are to appear, and before whom the trial is to be held, are [\*356] the judges of the superior court, if it be a trial at bar; or the judges of assize, delegated from the courts at Westminster by the king, if the trial be held in the country: persons, whose learning and dignity secure their jurisdiction from contempt, and the novelty and very parade of whose appearance have no small influence upon the multitude. The very point of their being strangers in the county is of infinite service, in preventing those factions and parties which would intrude in every cause of moment, were it tried only before persons resident on the spot, as justices of the peace, and the like. And the better to remove all suspicion of partiality, it was wisely provided by the statutes 4 Edw. III, c. 2, 8 Ric. II, c. 2, and 33 Hen. VIII, c. 24, that no judge of assize should hold pleas in any county wherein he was born or inhabits. (5) And as this constitution prevents party and faction from intermingling in the trial of right, so it keeps both the rule and the administration of the laws uniform. These justices, though thus varied and shifted at every assizes, are all sworn to the same laws, have had the same education, have pursued the same studies, converse and consult together, communicate their decisions and resolutions, and preside in those courts which are mutually connected and their judgments blended together, as they are interchangeably courts of appeal or advice to each other. And hence, their administration of justice and conduct of trials are consonant and uniform; whereby that confusion and contrariety are avoided, which would naturally arise from a variety of uncommunicating judges, or from any provincial establishment. But let us now return to the assizes.

When the general day of trials is fixed, the plaintiff or his attorney must bring down the record to the assizes, and enter it with the proper officer, in order to its being called on in course. If it be not so entered, it cannot be tried; therefore it is in the plaintiff's breast to delay any trial by not carrying down the record: unless the defendant, being fearful of such neglect in the plaintiff, and willing to discharge himself from the action, will himself undertake to bring on \*the trial, giving proper notice to the plaintiff. Which [\*357] proceeding is called the trial by *proviso*; by reason of the clause then inserted in the sheriff's *venire*, viz., "*proviso*, provided that if two writs come to your hands (that is, one from the plaintiff and another from the defendant), you shall execute only one of them." But this practice hath begun to be disused, since the statute 14 Geo. II, c. 17, which enacts, that if, after issue joined, the cause is not carried down to be tried according to the course of the court, the plaintiff shall be esteemed to be nonsuited, and judgment shall be given for the defendant as in case of a nonsuit. In case the plaintiff intends to try the cause, he is bound to give the defendant (if he lives within forty miles of London) eight days' notice of trial; and, if he lives at a greater distance, then

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(5) This is no longer the law.

fourteen days' notice, in order to prevent surprise: and if the plaintiff then changes his mind, and does not countermand the notice six days before the trial, he shall be liable to pay costs to the defendant for not proceeding to trial, by the same last-mentioned statute. The defendant, however, or plaintiff, may, upon good cause shown to the court above, as upon absence or sickness of a material witness, obtain leave upon motion to defer the trial of the cause till the next assizes. (6)

But we will now suppose all previous steps to the regularly settled, and the cause to be called on in court. The record is then handed to the judge, to peruse and observe the pleadings, and what issues the parties are to maintain and prove, while the jury is called and sworn. To this end the sheriff returns his compulsive process, the writ of *habeas corpora*, or *distringas*, with the panel of jurors annexed, to the judge's officer in court. The jurors contained in the panel are either *special* or *common* jurors. *Special* juries were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders; or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him. He is in such cases, upon motion in court and a rule granted thereupon, to attend the prothonotary or other proper officer with his freeholder's book; and the officer is to take \*indifferently forty-eight of the principal free-  
[\*358] holders in the presence of the attorneys on both sides; who are each of them to strike off twelve, and the remaining twenty-four are returned upon the panel. By the statute 3 Geo. II, c. 25, either party is entitled upon motion to have a special jury struck upon the trial of any issue, as well at the assizes as at bar; he paying the extraordinary expense, unless the judge will certify (in pursuance of the statute 24 Geo. II, c. 18) that the cause required such special jury.

A common jury is one returned by the sheriff according to the directions of the statute 3 Geo. II, c. 25, which appoints that the sheriff or officer shall not return a separate panel for every separate cause, as formerly; but one and the same panel for every cause to be tried at the same assizes, containing not less than forty-eight, nor more than seventy-two jurors: and that their names, being written on tickets, shall be put into a box or glass; and when each cause is called, twelve of these persons, whose names shall be first drawn out of the box, shall be sworn upon the jury, unless absent, challenged, or excused; or unless a previous view of the messuages, lands, or place in question, shall have been thought necessary by the court (o) in which case six or more of the jurors returned, to be agreed on by the parties, or named by the judge or other proper officer of the court, shall be appointed by special writ of *habeas corpora* or *distringas* to have the matters in question shown to them by two persons named in the writ; and then such of the jury as have had the view, or so many of them as appear, shall be sworn on the inquest previous to any other jurors. These acts are well calculated to restrain any suspicion of partiality in the sheriff, or any tampering with the jurors when returned.

As the jurors appear, when called, they shall be sworn, unless *challenged* by either party. Challenges are of two sorts; challenges to the *array*, and challenges to the *polls*.

\*Challenges to the array are at once an exception to the whole panel,  
[\*359] in which the jury are arrayed or set in order by the sheriff in his return; and they may be made upon account of partiality or some default in the sheriff,

(o) Stat. 4 Anne. c. 16.

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(6) This statute, so far as relates to judgment as in case of a nonsuit, is repealed by the Common Law Procedure Act, 1853, which however provides a mode in which a plaintiff, who unreasonably delays his suit, may be forced to proceed to trial, or have judgment for costs against him.

or his under-officer who arrayed the panel. (7) And generally speaking, the same reasons that, before the awarding the *venire*, were sufficient to have directed it to the coroners or elisors, will be also sufficient to quash the array, when made by a person or officer of whose partiality there is any tolerable ground of suspicion. Also, though there be no personal objection against the sheriff, yet if he arrays the panel at the nomination, or under the direction of either party, this is good cause of challenge to the array. Formerly, if a lord of parliament had a cause to be tried, and no knight was returned upon the jury, it was a cause of challenge to the array: (p) but an unexpected use having been made of this dormant privilege by a spiritual lord, (q) it was abolished by statute 24 Geo. II, c. 18. But still, in an attain, a knight must be returned on the jury. (r) Also, by the policy of the ancient law, the jury was to come *de vicineto*, from the neighbourhood of the vill or place where the cause of action was laid in the declaration: and therefore some of the jury were obliged to be returned from the hundred in which such vill lay; and if none were returned, the array might be challenged for defect of hundredors. Thus the Gothic jury, or *nembda*, was also collected out of every quarter of the country: "*binos, trinos, vel etiam senos ex singulis territorii quadrantibus.*" (s). For living in the neighborhood, they were properly the very country, or *pais*, to which both parties had appealed; and were supposed to know beforehand the characters of the parties and witnesses, and therefore they better knew what credit to give to the facts alleged in evidence. But this convenience was overbalanced by another very natural and almost unavoidable inconvenience; that jurors, coming out of the immediate neighbourhood, would be apt \*to intermix their prejudices and partialities in the trial of right. And [\*360] this our law was so sensible of, that it for a long time has been gradually relinquishing this practice; the number of necessary hundredors in the whole panel, which, in the reign of Edward III, were constantly *six*, (t) being in the time of Fortescue (u) reduced to *four*. Afterwards, indeed, the statute 35 Hen. VIII, c. 6, restored the ancient number of *six*, but that clause was soon virtually repealed by statute 27 Eliz. c. 6, which required only *two*. And Sir Edward Coke (v) also gives us such a variety of circumstances, whereby the courts permitted this necessary number to be evaded, that it appears they were heartily tired of it. At length, by statute 4 and 5 Ann. c. 6, it was entirely abolished upon all civil actions, except upon penal statutes; and upon those, also, by the 24 Geo. II, c. 18, the jury being now only to come *de corpore comitatus*, from the body of the county at large, and not *de vicineto*, or from the particular neighbourhood. The array by the ancient law may also be challenged, if an alien be party to the suit, and, upon a rule obtained by his motion to the court for a jury *de medietate linguæ*, such a one be not returned by the sheriff, pursuant to the statute 28 Edw. III, c. 13, enforced by 8 Hen. VI, c. 29, which enact, that where either party is an alien born, the jury shall be one-half denizens, and the other aliens (if so many be forthcoming in the place), for the more impartial trial; a privilege indulged to strangers in no other country in the world; but which is as ancient with us as the time of King Ethelred, in whose statute *de monticulis Walliæ* (then aliens to the crown of England) cap. 3, it is ordained, that "*duodeni legales homines, quorum sex Walli et sex Angli erunt, Anglis et Wallis jus dicunt.*" But where both par-

(p) Co. Litt. 156. Seld. on Baronage, ii. 11.

(q) K. vs. Bishop of Worcester, M. 23 Geo. II, B. R.

(r) Co. Litt. 156.

(s) Stiernhook, *de jure Goth.* l. 1, c. 4.

(t) Gilb. Hist. C. P. c. 8.

(u) De Laud. LL. c. 26.

(v) 1 Inst. 157.

(7) Upon a challenge to the array, if the facts are denied the court appoints triers, and if they pronounce the cause of challenge unfounded, it is overruled. If the facts are admitted, the court passes upon their sufficiency, and either quashes the panel or overrules the challenge. *Gardner v. Turner*, 9 Johns., 280. In the United States it is believed that an objection which would be good as a challenge to the array, is generally raised by motion to quash or set aside the panel.

ties are aliens, no partiality is to be presumed to one more than another; and therefore it was resolved soon after the statute 8 Hen. VI, (w) that where the issue is joined between two aliens (unless the plea be had before the mayor of the staple, and thereby subject to the restrictions of statute 27 Edw. III, st. 2, c. 8), the jury shall all be denizens. And it now might be a question, how [\*361] far the \*statute 3 Geo. II, c. 25 (before referred to), hath in civil causes undesignedly abridged this privilege of foreigners, by the positive directions therein given concerning the manner of impanelling jurors, and the persons to be returned in such panel. So that (unless this statute is to be construed by the same equity which the statute 8 Hen. VI c. 29, declared to be the rule of interpreting the statute 2 Hen. V, st. 2, c. 3, concerning the landed qualifications of jurors in suits to which aliens were parties) a court might perhaps hesitate whether it has now a power to direct a panel to be returned *de medietate linguæ*, and thereby alter the method prescribed for striking a special jury, or balloting for common jurors. (8)

Challenges to the polls, *in capita*, are exceptions to particular jurors; and seem to answer to the *recusatio judicis* in the civil and canon laws; by the constitutions of which a judge might be refused upon any suspicion of partiality. (x) By the laws of England, also, in the times of Bracton (y) and Fleta, (z) a judge might be refused for good cause; but now the law is otherwise, and it is held that judges and justices cannot be challenged. (a) For the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea. And should the fact at any time prove flagrantly such, as the delicacy of the law will not presume beforehand, there is no doubt but that such misbehaviour would draw down a heavy censure from those to whom the judge is accountable for his conduct.

But challenges to the polls of the jury (who are judges of fact) are reduced to four heads by Sir Edward Coke; (b) *propter honoris respectum*; *propter defectum*; *propter affectum*; and *propter delictum*.

1. *Propter honoris respectum*; as if a lord of parliament be impanelled on a jury, he may be challenged by either party, or he may challenge himself.

\*2. *Propter defectum*; as if a jurymen be an alien born, this is defect of birth; if he be a slave or bondman, this is defect of liberty, and he cannot be *liber et legalis homo*. Under the word *homo*, also, though a name common to both sexes, the female is however excluded, *propter defectum sexus*: except when a widow feigns herself with child, in order to exclude the next heir, and a suppositious birth is suspected to be intended; then upon the writ *de ventre inspiciendo*, a jury of women is to be impanelled to try the question, whether with child or not. (c) But the principal deficiency is defect of estate sufficient to qualify him to be a juror. This depends upon a variety of statutes. And, first, by the statute of West. 2, 13 Edw. I, c. 38, none shall pass on juries in assizes within the county, but such as may dispend 20s. by the year at the least; which is increased to 40s. by the statutes 21 Edw. I, st. 1, and 2 Hen. V, st. 2, c. 3. This was doubled by the statute 27 Eliz. c. 6, which requires in every such case the jurors to have estate of freehold to the yearly value of 4l. at the least. But, the value of money at that time decreasing very considerably, this qualification was raised by the statute 16 and 17 Car. II, c. 3, to 20l. per annum, which being only a temporary act, for three years, was suffered to expire without renewal, to the great debasement of juries. However, by the statute 4 and 5 W. and M. c. 24, it was again raised

(w) Year-book, 21 Hen. VI. 4.

(x) Cod. 3, l. 16. *Decretal*, l. 2, t. 23, c. 36.

(y) 1 Inst. 156.

(z) Cro. Eliz. 566.

(g) L. 5, t. 5, c. 15.

(x) L. 6, c. 37.

(a) Co. Litt. 394.

(8) By 6 Geo. IV, c. 50, provision is made for a jury *de medietate linguæ*. In the United States, generally, alienage is a ground for excluding a juror whatever the citizenship of the parties to the suit. Proffatt on Jury Trial, § 116.

to 10*l.* per annum in England, and 6*l.* in Wales, of freehold lands or copyhold; which is the first time that copyholders (as such) were admitted to serve upon juries in any of the king's courts, though they had before been admitted to serve in some of the sheriff's courts, by statutes 1 Ric. III, c. 4, and 9 Hen. VII, c. 13. And, lastly, by statute 3 Geo. II, c. 25, any leaseholder for the term of five hundred years absolute, or for any term determinable upon life or lives, of the clear yearly value of 20*l.* per annum over and above the rent reserved, is qualified to serve upon juries. (9) When the jury is *de medietate lingue*, that is, one moiety of the English tongue or nation, and the other of any foreign one, no want of lands shall be \*cause of challenge to the [363] alien; for, as he is incapable to hold any, this would totally defeat the privilege. (d)

3. Jurors may be challenged *propter affectum*, for suspicion of bias or partiality. This may be either a *principal* challenge, or *to the favour*. A *principal* challenge is such, where the cause assigned carries with it *prima facie* evident marks of suspicion, either of malice or favour: as, that a juror is of kin to either party within the ninth degree; (e) that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him: all these are principal causes of challenge; which, if true, cannot be overruled, for jurors must be *omni exceptione majores*. Challenges *to the favour*, are where the party hath no principal challenge: but objects only some probable circumstances of suspicion, as acquaintance and the like; (f) the validity of which must be left to the determination of *triors*, whose office is to decide whether the juror be favourable or unfavourable. The *triors*, in case the first man called be challenged, are two indifferent persons named by the court; and if they try one man and find him indifferent, he shall be sworn; and then he and the two *triors* shall try the next; and when another is found indifferent and sworn, the two *triors* shall be superseded, and the two first sworn on the jury shall try the rest. (g) (10)

4. Challenges *propter delictum*, are for some crime or misdemeanor, that affects the juror's credit and renders him infamous. As for a conviction of treason, felony, perjury, or conspiracy; or if for some infamous offence he hath received judgment of the pillory, tumbrel, or the like; or to be branded, \*whipt, or stigmatized; or if he be outlawed or excommunicated, or [364] hath been attainted of false verdict, *præmunire*, or forgery; or, lastly, if he hath proved recreant when champion in the trial by battle, and thereby hath lost his *liberam legem*. A juror may himself be examined on oath of

(d) See stat. 2 Hen. V, st. 2, c. 3. 8 Hen. VI, c. 29.

(e) Finch, L. 401.

(f) In the *nembo*, or jury of the ancient Goths, three challenges only were allowed to the favour, but the principal challenges were indefinite. "*Licebat palam excipere, et semper ex probabilis causa tres repudiare etiam plures ex causa prægnanti et manifesta.*" Stiernhook, l. 1, c. 4.

(g) Co. Litt. 158.

(9) In England one must be between 21 and 60 years of age, and must be the owner of some interest in real estate in the county, or be a householder taxed on at least £30 for the poor rate, or must occupy a house with at least fifteen windows. See 6 Geo. 4, c. 50, and 33 and 34 Vict. c. 77. In the United States a juror must usually have the qualifications of an elector of the state. Proffatt, Jury Trial, § 116.

(10) The whole subject of challenges was very fully considered in the case of *Freeman v. People*, 4 Denio, 9, to which the reader is referred. As to what opinion formed or expressed by a juror will be sufficient ground for challenge to the favor, see 1 Burr's Trial, 416; *Oslander's Case*, 3 Leigh, 785; *People v. Bodine*, 1 Denio, 307; *Commonwealth v. Knapp*, 9 Pick., 496; *Smith v. Eames*, 4 Ill., 76; *Bradford v. State*, 15 Ind., 347; *Holt v. People*, 18 Mich., 224; *Maddox v. State*, 32 Ga., 581.

The practice upon challenges varies so much in different states, that the American reader will expect to consult and be guided by the book of practice in use in his own state.

As to disqualification from relationship, see *Den v. Clark*, Cox, 444; *Paddock v. Wells*, 2 Barb. Ch., 331; *Hascelg v. Tripp*, 20 Mich., 316.

*voir dire, veritatem dicere*, with regard to such causes of challenge as are not to his dishonor or discredit; but not with regard to any crime, or any thing which tends to his disgrace or disadvantage. (A)

Besides these challenges, which are exceptions against the fitness of jurors, and whereby they may be *excluded* from serving, there are also other causes, to be made use of by the jurors themselves, which are matter of exemption; whereby their service is *excused*, and not *excluded*. As, by statute West. 2, 13 Edw. I, c. 38, sick and decrepit persons, persons not commorant in the county, and men above seventy years old; and by the statute of 7 and 8 Wm. III, c. 32, infants under twenty-one. This exemption is also extended by divers statutes, customs, and charters, to physicians and other medical persons, counsel, attorneys, officers of the courts, and the like; all of whom, if impanelled, must show their special exemption. Clergymen are also usually excused, out of favour and respect to their function: but, if they are seized of lands and tenements, they are, in strictness, liable to be impanelled in respect of their lay-fees, unless they be in the service of the king or some bishop: "*in obsequio domini regis, vel alicujus episcopi.*" (i) (11)

If, by means of challenges, or other cause, a sufficient number of unexceptionable jurors doth not appear at the trial, either party may pray a *tales*. A *tales* is a supply of *such* men as are summoned upon the first panel, in order to make up the deficiency. For this purpose, a writ of *decem tales, octo tales*, and the like, was used to be issued to the sheriff at common law, and must be still so done at a trial at bar, if the jurors make default. But at the assizes, or *nisi prius*, by virtue of the statute 35 Hen. VIII, c. 6, and other subsequent [\*365] statutes, the judge is empowered, at the prayer of either party, to award a *tales de circumstantibus* (j) (12) of persons present in court, to be joined to the other jurors, to try the cause; who are liable, however, to the same challenges as the principal jurors. This is usually done, till the legal number of twelve be completed; in which patriarchal and apostolical number Sir Edward Coke (k) hath discovered abundance of mystery. (l)

When a sufficient number of persons impanelled, or *tales-men*, appear, they are then separately sworn, well and truly to try the issue between the parties, and a true verdict to give according to the evidence; and hence they are denominated the jury, *jurata*, and jurors, *sc. juratores*.

We may here again observe, and, observing, we cannot but admire, how scrupulously delicate, and how impartially just, the law of England approves itself, in the constitution and frame of a tribunal thus excellently contrived for the test and investigation of truth; which appears, most remarkably. 1. In the avoiding of frauds and secret management, by electing the twelve jurors out of the whole panel by lot. 2. In its caution against all partiality and bias, by quashing the whole panel or array, if the officer returning is suspected to be other than indifferent; and repelling particular jurors, if probable cause be shown of malice or favour to either party. The prodigious multitude of exceptions or challenges allowed to jurors, who are the judges of fact, amounts nearly to the same thing as was practised in the Roman republic, before she lost her liberty: that the select judges should be appointed by the prætor, with

(A) Co. Litt., 158, b.

(i) F. N. B. 166. Reg. Brev. 179.

(j) Appendix, No. II, § 4.

(k) 1 Inst. 153.

(l) Pausanias relates that at the trial of Mæra, for murder, in the court denominated *Areopagus* from that incident, he was acquitted by a jury composed of twelve pagan deities. And Dr. Hickes, who attributes the introduction of this number to the Normans, tells us that among the inhabitants of Norway, from whom the Normans, as well as the Danes, were descended, a great veneration was paid to the number twelve: "*nihil sanctius, nihil antiquius fuit; perinde ac si in ipso hoc numero secreta quædam esset religio.*" Dissert. Epistolæ, 49. Spelm. Gloss. 329.

(11) Clergymen, Roman Catholic priests, and dissenting ministers, are now excused.

(12) In general, no writ is issued for this purpose in the United States, but the court, by order, directs the sheriff to summon from the bystanders the necessary number of *talesmen* to fill the panel.



the mutual consent of the parties. \*Or, as Tully (m) expresses it: [\*366] "*neminem voluerunt majores nostri, non modo de existimatione cujusquam, sed ne pecuniaria quidem de re minima, esse judicem; nisi qui inter adversarios convenissent.*"

Indeed, these *selecti judices* bore, in many respects, a remarkable resemblance to our juries: for they were first returned by the prætor: *de decuria senatoria conscribuntur*; then their names were drawn by lot, till a certain number was completed: *in urnam sortito mittuntur, ut de pluribus necessarius numerus confici posset*: then the parties were allowed their challenges: *post urnam permittitur accusatori, ac reo, ut ex illo numero rejiciant quos putaverint sibi, aut inimicos, aut ex aliqua re incommodos fore*: next they struck what we call a *tales*; *rejectione celebrata, in eorum locum qui rejecti fuerunt subsortiebatur prætor alios, quibus ille judicium legitimus numerus compleretur*; lastly, the judges, like our jury, were sworn; *his perfectis, jurabant in leges judices, ut obstricti religione judicarent.* (n)

The jury are now ready to hear the merits; and, to fix their attention the closer to the facts which they are impanelled and sworn to try, the pleadings are opened to them by counsel on that side which holds the affirmative of the question in issue. For the issue is said to lie, and proof is always first required, upon that side which affirms the matter in question: in which our law agrees with the civil; (o) "*ei incumbit probatio, qui dicit, non qui negat; cum per rerum naturam factum-negantis probatio nulla sit.*" The opening counsel briefly informs them what has been transacted in the court above; the parties, the nature of the action, the declaration, the plea, replication, and other proceedings, and, lastly, upon what point the issue is joined, which is there set down to be determined. Instead of which, (p) formerly the whole record and process of the pleadings was read to \*them in English by the court, [\*367] and the matter in issue clearly explained to their capacities. The nature of the case, and the evidence intended to be produced, are next laid before them by counsel also on the same side: and when their evidence is gone through, the advocate on the other side opens the adverse case, and supports it by evidence; and then the party which began is heard by way of reply.

The nature of my present design will not permit me to enter into the numberless niceties and distinctions of what is, or is not, legal evidence to a jury. (q) I shall only, therefore, select a few of the general heads and leading maxims, relative to this point, together with some observations on the manner of giving evidence.

And, first, evidence signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other; and no evidence ought to be admitted to any other point. Therefore upon an action of debt, when the defendant denies his bond by the plea of *non est factum*, and the issue is, whether it be the defendant's deed or no; he cannot give a release of this bond in evidence: for that does not destroy the bond, and therefore does not prove the issue which he has chosen to rely upon, viz., that the bond has no existence.

Again; evidence in the trial by jury is of two kinds, either that which is given in proof, or that which the jury may receive by their own private knowledge. The former, or *proofs* (to which in common speech the name of evidence is usually confined), are either written, or *parol*, that is, by word of mouth. Written proofs, or evidence, are, 1. Records; and 2. Ancient deeds of thirty

(m) *Pro Cluentio*, 43.

(n) *Ascon. in Clæ. Ver.* 1, 6. A learned writer of our own, Dr. Pettingal, hath shown in an elaborate work (published A. D. 1769) so many resemblances between the *δικασται* of the Greeks, the *judices selecti* of the Romans, and the juries of the English, that he is tempted to conclude that the latter are derived from the former.

(o) *Ff.* 22, 3, 2. *Ord.* 4, 19, 23.

(p) *Fortesc.* c. 26.

(q) This is admirably well performed in Lord Chief-baron Gilbert's excellent treatise of evidence,—a work which it is impossible to abstract or abridge, without losing some beauty and destroying the chain of the whole, and which hath lately been engrafted into a very useful work, *The Introduction to the Law of Nisi Prius*, &c. 1787.

years standing, which prove themselves; (13) but 3. Modern deeds; and 4. [\*368] Other writings, must be attested and verified by *parol* evidence of witnesses. And the one general rule that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but if not possible, then the best evidence that can be had shall be allowed. (14) For if it be found that there is any better evidence existing than is produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed. Thus, in order to prove a lease for years, nothing else shall be admitted but the very deed of lease itself, if in being; but if that be positively proved to be burnt or destroyed (not relying on any loose negative, as that it cannot be found, or the like), then an attested copy may be produced; or *parol* evidence be given of its contents. So, no evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases, (as in proof of any general customs, or matters of common tradition or repute), the courts admit of *hearsay* evidence, or an account of what persons deceased have declared in their lifetime: but such evidence will not be received of any particular facts. (15) So, too, books of account, or shop-books, are not allowed of themselves to be given in evidence for the owner; but a servant who made the entry may have recourse to them to refresh his memory; and, if such servant (who was accustomed to make those entries) be dead, and his hand be proved, the book may be read in evidence: (r) for as tradesmen are often under a necessity of giving credit without any note or writing, this is therefore, when accompanied with such other collateral proofs of fairness and regularity, (s) the best evidence that can then be produced. However, this dangerous species of evidence is not carried so far in England as abroad; (t)

(r) Law of Nisi Prius, 262.

(s) Salk. 265.

(t) Gall, observat. 2, 20, 22.

(13) Wills in this respect are like deeds. Both must be free from just grounds of suspicion, and come from the proper custody.

It is much safer to say in these cases, and is much nearer strict accuracy, not that the deed *proves itself*, but that its authenticity may be presumed from the circumstances: such as the long acquiescence of parties interested to dispute it, and who must be supposed to have satisfied themselves originally that the conveyance was effectual. But these circumstances are to be proved like other facts. See 1 Greenl. Ev., §§ 21, 142, 145, 570; 1 Stark. Ev., 93, 523, and especially Phil. Ev. by Cowen, Hill and Edwards, vol. 2, 475-490.

(14) Primary evidence, the best evidence, is that kind of proof which, under any possible circumstances, affords the greatest certainty of the fact in question; it is illustrated by the case of written documents, the instrument itself being always regarded as the primary or best possible evidence of its existence and contents. If the execution of an instrument is to be proved, the primary evidence is the testimony of the subscribing witness, if there be one. Until it is shown that the production of the primary evidence is out of the party's power, no other proof of the fact is in general admitted. All evidence falling short of this degree is termed "*secondary*." The distinction refers to the "quality and not to the strength of the proof." 1 Greenl. Ev., § 84, and see 1 Stark. Ev., 641-649; Reynolds's Steph. Ev., ch. 9.

As to whether there are degrees in secondary evidence, see note to 1 Greenl. Ev., § 84.

(15) The term *hearsay* applies as well to written as to oral evidence. As defined by Prof. Greenleaf *hearsay* "denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part, on the veracity and competency of some other person." 1 Greenl. Ev., § 99. In general such evidence is inadmissible, but there are exceptions to the rule excluding it; thus if the fact that the declaration was made and not its truth or falsity is the question; expressions of feeling, if the existence of such feeling is the question; in cases of pedigree, the declarations of relatives; declarations as to public and general rights by parties who had means of knowledge; declarations against the interest of the party making them; in cases of murder or manslaughter, dying declarations as to the cause of death, or circumstances surrounding it, made by the injured party when he has given up all hope of recovery; admissions and confessions. See 1 Greenleaf Ev., § 156, *et seq.*; Reynolds's Steph. Ev., ch. IV.

Testimony of a witness given on a former trial, where the parties had an opportunity to examine him, may be received if the witness is dead, or is out of the jurisdiction, or insane and unable to testify, or if he has been summoned and is kept away by the adverse party. 1 Greenl. Ev., § 163, and cases cited.

where a man's own books of accounts, by a distortion of the civil law (which seems to have meant the same thing as is practised with us), (u) with the suppletory oath of \*the merchant, amount at all times to full proof. (16) But as this kind of evidence, even thus regulated, would be much too [\*369] hard upon the buyer at any long distance of time, the statute 7 Jac. I. c. 12 (the penners of which seem to have imagined that the books of themselves were evidence at common law), confines this species of proof to such transactions as have happened within one year before the action brought; unless between merchant and merchant in the usual intercourse of trade. For accounts of so recent a date, if erroneous, may more easily be unravelled and adjusted.

With regard to *parol* evidence, or *witnesses*; it must be first remembered that there is a process to bring them in by writ of *subpoena ad testificandum*: which commands them, laying aside all pretences and excuses, to appear at the trial on pain of 100*l.* to be forfeited to the king; to which the statute 5 Eliz. c. 9, has added a penalty of 10*l.* to the party aggrieved, and damages equivalent to the loss sustained by want of his evidence. But no witness, unless his reasonable expenses be tendered him, is bound to appear at all; nor, if he appears, is he bound to give evidence till such charges are actually paid him; except he resides within the bills of mortality, and is summoned to give evidence within the same. This compulsory process, to bring in unwilling witnesses, and the additional terrors of an attachment in case of disobedience, are of excellent use in the thorough investigation of truth: and, upon the same principle, in the Athenian courts, the witnesses who were summoned to attend the trial had the choice of three things; either to swear to the truth of the fact in question, to deny or abjure it, or else pay a fine of a thousand drachmas. (v)

All witnesses, of whatever religion or country, that have the use of their reason, (17) are to be received and examined, except such as are *infamous*, or such as are *interested* in the event of the cause. All others are *competent* witnesses; though the jury from other circumstances will judge of their *credibili-*

(u) *Instrumenta domestica, seu privata testatio, seu adnotatio, si non aliis quoque administris adjuventur ad probationem sola non sufficiunt.* Cod. 4, 19, 5. *Nam exemplo perniciosum est, ut et scripturas credatur, quia unusquisque sibi adnotatione propria debitorem constituit.* *Ibid.* c. 7.  
(v) Pott. *Antiq.* b. 1, c. 31.

(16) A party's own books of account may be given in evidence in his own favor to prove the accounts upon them, after preliminary proof that they were regularly kept as such, and are books of original entries; that the party kept no clerk, or, if he kept any, giving sufficient reason for not producing him; that some of the articles charged were actually delivered; and by proving also, from other persons who have dealt with him, that he keeps fair and honest accounts. But they are not very satisfactory evidence, and wherever from the nature of the case there must be witnesses who can give direct testimony concerning the account, the party will be required to produce them before giving his books in evidence. See *Vosburgh v. Thayer*, 12 Johns., 461; *Cogswell v. Dolliver*, 3 Mass., 217; *Thomas v. Dyott*, 1 Nott and McC., 186; *Sickles v. Mather*, 20 Wend., 72; *Burnham v. Adams*, 5 Vt., 313; *Jackson v. Evans*, 8 Mich., 476; 1 Greenl. Ev., § 118, and notes. If anything suspicious appears in the books when presented to the court, they will be excluded. *Churchman v. Smith*, 6 Whart., 146. There are statutes on this subject in many of the states. The party's own oath is usually required to substantiate the charges. The books can only be made evidence of those things which are properly the subject of book account; not of charges for money loaned, &c. See *Bradley v. Goodyear*, 1 Day, 106. And upon the whole subject see 1 Phil. Ev. by Cowen, Hill and Edwards, 370-386.

If a party, whose book entries would be admissible when alive and sane, dies or becomes insane, the books may be admitted in a suit in his behalf by his personal representative or guardian, if the latter substantiates them by his oath. Reynolds' Steph. Ev. p. 62, and cases.

(17) All persons may give evidence who believe in a supreme superintending Providence who rewards and punishes, and who declare that they consider an oath binding on their conscience. See the leading cases of *Ormichund v. Barker*, Willes, 588; and 1 Smith Lead. Cas., 585. See also *Cubbison v. McCreary*, 7 W. and S., 262; *Jones v. Harris*, 1 Strob., 160; *Brock v. Milligan*, 10 Ohio, 121; *Bennett v. State*, 1 Swan, 411; *Central R. R. Co. v. Rockafellow*, 17 Ill., 541. Some of the United States forbid witnesses being questioned concerning their religious belief. See *Cooley Const. Lim.*, 478, note.

[\*870] *ity.* (18) \*Infamous persons are such as may be challenged as jurors, *propter delictum*; and therefore never shall be admitted to give evidence to inform that jury, with whom they were too scandalous to associate. Interested witnesses may be examined upon a *voir dire*, if suspected of being secretly concerned in the event; or their interest may be proved in court. Which last is the only method of supporting an objection to the former class: for no man is to be examined to prove his own infamy. (19) And no counsel, attorney, or other person entrusted with the secrets of the cause by the party himself shall be compelled, or perhaps allowed, to give evidence of such conversation or matters of privacy, as came to his knowledge by virtue of such trust and confidence: (*w*) (20) but he may be examined as to mere matters of fact, as the execution of a deed or the like, which might have come to his knowledge without being intrusted in the cause.

One witness (if credible) is *sufficient* evidence to a jury of any single fact, though undoubtedly the concurrence of two or more corroborates the proof. Yet our law considers that there are many transactions to which only one person is privy; and therefore does not *always* demand the testimony of two which the civil law universally requires. "*Unius responsio testis omnino non audiatur.*" (*x*) To extricate itself out of which absurdity, the modern practice of the civil law courts has plunged itself into another. For, as they do not allow a less number than two witnesses to be *plena probatio*, they call the testimony of one, though never so clear and positive, *semi-plena probatio* only on which no sentence can be founded. To make up, therefore, the necessary complement of witnesses, when they have one only to a single fact, they admit the party himself (plaintiff or defendant) to be examined in his own behalf; and administer to him what is called the *suppletory* oath; and if his evidence happens to be in his own favour, this immediately converts the half proof into a whole one. By this ingenious device, satisfying at once the

(*w*) Law of Nisi Prius, 284.

(*x*) Cod. 4, 20, 9.

Persons who cannot conscientiously take an oath are allowed to make affirmation, and are under the like penalties with witnesses sworn, in case of false testimony.

The oath is to be administered in such way as the witness deems binding. "If the witness is not of the Christian religion, the court will inquire as to the form in which it is administered in his own country, or among those of his own faith, and will impose it in that form." 1 Greenl. Ev., § 871.

(18) The interest should be such that the witness "will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action." 1 Greenl. Ev., § 890. In almost all the states and territories of the United States, statutes now allow parties and interested witnesses to be sworn, and to testify generally to the merits. Similar statutory provisions also exist in England. The relation of husband and wife gives rise to certain exceptions, generally found in these statutes. In many of the United States accused parties are made competent but not compellable to testify in prosecutions against them.

(19) "Witnesses convicted of crimes rendering them infamous (which comprehend treason, felony, and the *crimen falsi*) are excluded from giving testimony in the courts of the state or country in which they were convicted, unless the disability is removed by a reversal of the judgment or a pardon. In most of the states, the disqualification of infamy has been removed by constitutional provisions or by statute, but a conviction may be proved, to affect the credibility of a witness." Reynolds, Steph. Ev. p. 152. By 6 and 7 Vict., c. 85, the English law is substantially the same as in the United States.

Though a witness may in general decline to answer to avoid criminating himself, he may not do so simply because his answer may render him liable to a civil suit, or show that he owes a debt. Reyn. Steph. Ev., p. 164 and cases.

(20) This rule is adopted less from regard for the legal profession than for the real interests of justice which are fostered thereby. See 1 Greenl. Ev., § 236, *et seq.*

For an excellent case on this subject, see *Whiting v. Barney*, 30 N. Y., 330. See, also, *People v. Blakely*, 4 Park Cr. R., 176; 1 Greenl. Ev., § 237 to 246; 1 Stark. Ev., 40; 1 Phil. Ev. by Cowen, Hill and Edwards, 130, *et seq.* In several of the United States statutes have been passed extending similar protection to the communications made to physicians and clergymen, with a view to obtaining their professional advice or assistance.

forms of the Roman law, and acknowledging the superior \*reasonable-ness of the law of England: which permits one witness to be sufficient [\*371] where no more are to be had: and, to avoid all temptations of perjury, lays it down as an invariable rule, that *nemo testis esse debet in propria causa*. (21)

Positive proof is always required, where from the nature of the case it appears it might possibly have been had. But next to *positive* proof, *circumstantial* evidence, or the doctrine of *presumptions*, must take place; for when the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact is the proof of such circumstances as either *necessarily*, or *usually* attend such facts; and these are called presumptions, which are only to be relied upon till the contrary be actually proved. *Stabitur presumptioni donec probetur in contrarium*. (y) Violent presumption is many times equal to full proof; (z) for there those circumstances appear which *necessarily* attend the fact. As if a landlord sues for rent due at Michaelmas, 1754, and the tenant cannot prove the payment, but produces an acquittance for rent due at a subsequent time, in full of all demands, this is a violent presumption of his having paid the former rent, and is equivalent to full proof; for though the actual payment is not proved, yet the acquittance in full of all demands is proved, which could not be without such payment; and it therefore induces so forcible a presumption, that no proof shall be admitted to the contrary. (a) (22) Probable presumption, arising from such circumstances as *usually* attend the fact, hath also its due weight: as if, in a suit for rent due in 1754, the tenant proves the payment of the rent due in 1755; this will prevail to exonerate the tenant, (b) unless it be clearly shown that the rent of 1754 was retained for some special reason, or that there was some fraud or mistake; for otherwise it will be presumed to have been paid before that in 1755, as it is most usual

(y) Co. Litt. 373.

(z) *Ibid.* 6.

(a) Gilb. Evid. 161.

(b) Co. Litt. 373.

(21) In equity a rule apparently somewhat different prevails in a certain class of cases. If the complainant calls for an answer from the defendant on oath, he thereby makes the answer evidence in the cause; and as it is evidence called for by himself, it is allowed to have the same weight in the case as the testimony of any other witness, and therefore the complainant, who is bound to make out his case, cannot have a decree against an answer denying the equity of the bill, unless he overcomes the answer with the testimony of two witnesses, or at least of one witness and strong supporting circumstances. 1 Greenl. Ev., § 260. Where, however, by statute, the parties in chancery are made competent witnesses generally, and may be orally examined, it would seem that this rule is substantially done away with. *Roberts v Miles*, 12 Mich., 297. See however *Vandegrift v. Herbert*, 3 Green, N. J., 466. In high treason two witnesses are essential in England, and in the United States by the constitution, art. 3, § 3. Two are also necessary in cases where perjury is charged. But in other cases, if the evidence is competent, the jury must be the judges how much weight it is entitled to. 1 Phil. Ev., 1, 2; 1 Stark Ev., 583.

(22) Presumptions may be presumptions of law or of fact. The former are either conclusive or rebuttable. Conclusive presumptions of law are such as the law requires to be made whenever "the facts appear which it assumes as the basis of the inference." These cannot be overthrown by any contrary proof. The tendency of modern courts is to restrict the number of these presumptions. Such a presumption arises when a cause has been regularly adjudicated by a competent court, if in another action between the same parties it is proposed to show the first decision erroneous. So there was a conclusive presumption at common law that there was a good consideration for a bond or receipt under seal. *Best on Ev.*, Morgan's ed., § 304-306. A receipt so far as it is a mere acknowledgment of payment and delivery is always open to explanation or contradiction by parol evidence. 1 Greenl. Ev., § 305. And now by statute in some of the United States, a seal to a bond or other obligation is only *prima facie* evidence of consideration, which may be rebutted.

Rebuttable presumptions of law are such as may be overcome by evidence, but without such evidence prevail; as the innocence or sanity of a person, or the legitimacy of a child born in wedlock. *Best Ev.*, § 314.

Presumptions of fact are those drawn from the circumstances of a case by means of common human experience. They are mere arguments from facts in the case, and should have weight as such. 1 Greenl. Ev., § 44. For a full discussion of presumptive evidence see *Best Ev.*, Morgan's ed., pt. II, Ch. II, and 1 Greenl. Ev., pt. I, Ch. IV.

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to receive first the rents of longest standing. *Light*, or rash, presumptions have no weight or validity at all. (23)

[\*372] \*The oath administered to the witness is not only that what he deposes shall be true, but that he shall also depose the *whole* truth: so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not. And all this evidence is to be given in open court, in the presence of the parties, their attorneys, the counsel, and all bystanders, and before the judge and jury; each party having liberty to except to its competency, which exceptions are publicly stated and by the judge are openly and publicly allowed or disallowed, in the face of the country: which must curb any secret bias or partiality that might arise in his own breast. And if, either in his directions or decisions, he misstates the law by ignorance, inadvertence or design, the counsel on either side may require him publicly to seal a *bill of exceptions*; stating the point wherein he is supposed to err: and this he is obliged to seal by statute Westm. 2, 13 Edw. I, c. 31, or, if he refuses so to do, the party may have a compulsory writ against him, (c) commanding him to seal it, if the fact alleged be truly stated: and if he returns, that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return. This bill of exceptions is in the nature of an appeal; examinable, not in the court out of which the record issues for the trial at *nisi prius*, but in the next immediate superior court, upon a writ of error, after judgment given in the court below. But a *demurrer* to evidence shall be determined by the court out of which the record is sent. This happens, where a record or other matter is produced in evidence, concerning the legal consequences of which there arises a doubt in law: in which case the adverse party may if he please demur to the whole evidence; which admits the truth of every fact that has been alleged, but denies the sufficiency of them all in point of law to maintain or overthrow the issue; (d) which draws the question of law from the cognizance of the jury, to be decided (as it ought) by the court. But neither these demurrers to evidence, nor the bill of exceptions, are at present [\*373] so much \*in use as formerly; since the more frequent extension of the discretionary powers of the court in granting a new trial, which is now very commonly had for the misdirection of the judge at *nisi prius* (24).

This open examination of witnesses, *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth (e) than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law; where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken. Besides, the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses

(c) Reg. Br. 122. 2 Inst. 427.

(d) Co. Litt. 72. 5 Rep. 104.

(e) Hale's Hist. C. L. 254, 255, 256.

(23) But presumptions in themselves so slight as to have no weight, may be of importance in connection with other links in a chain of evidence. Best, Ev., Morgan's ed., § 320.

(24) To obviate the hardships which frequently occurred where parties were defeated on trials at the circuit on account of defects in pleadings not material to the merits of the case, enlarged powers to permit amendments at the trial have been granted by several recent English statutes, and especially by the Common Law Procedure act, 1853, and almost any defect may be amended by leave of the court, where the nature of the action or ground of defense is not changed, and the opposite party not likely to be misled. Amendments are permitted on such terms as the court thinks proper to impose. In the United States the statutes of amendments are generally very broad and liberal, and permit amendments for the furtherance of justice, in any stage of the proceedings, and after judgment.

(25) Writs of attain and assize are both abolished.

on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled; and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. Nor is the presence of the judge, during the examination, a matter of small importance: for, besides the respect and awe with which his presence will naturally inspire the witness, he is able, by use and experience, to keep the evidence from wandering from the point in issue. In short, by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge, in the absence of those who made them; and yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of \*it. These are [\*374] a few of the advantages attending this, the English, way of giving testimony, *ore tenus*. Which was also indeed familiar among the ancient Romans, as may be collected from Quintilian; (*f*) who lays down very good instructions for examining and cross-examining witnesses *viva voce*. And this, or somewhat like it, was continued as low as the time of Hadrian: (*g*) but the civil law, as it is now modelled, rejects all public examination of witnesses.

As to such evidence as the jury may have in their own consciences, by their private knowledge of facts, it was an ancient doctrine, that this had as much right to sway their judgment as the written or parol evidence which is delivered in court. And therefore it hath been often held, (*h*) that though no proofs be produced on either side, yet the jury might bring in a verdict. For the oath of the jurors, to find according to their evidence, was construed (*i*) to be, to do it according to the best of their own knowledge. This seems to have arisen from the ancient practice in taking recognitions of assize, at the first introduction of that remedy; the sheriff being bound to return such recognitors as knew the truth of the fact, and the recognitors, when sworn, being to retire immediately from the bar, and bring in their verdict according to their own personal knowledge, without hearing extrinsic evidence or receiving any direction from the judge. (*j*) And the same doctrine (when attainments came to be extended to trials by jury, (25) as well as to recognitions of assize) was also applied to the case of common jurors; that they might escape the heavy penalties of the *attaint*, in case they could show, by any additional proof, that their verdict was agreeable to the truth, though not according to the evidence produced; with which additional proof the law presumed they were privately acquainted, though it did not appear in \*court. But this doctrine was again gradually exploded, when *attaints* began to be disused, [\*375] and *new trials* introduced in their stead. For it is quite incompatible with the grounds upon which such new trials are every day awarded, viz., that the verdict was given *without*, or *contrary to*, evidence. And, therefore, together with new trials, the practice seems to have been first introduced (*k*) which now universally obtains, that if a juror knows any thing of the matter in issue, he may be sworn as a witness, and give his evidence publicly in court.

When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence.

(*f*) *Institut. Orat.* l. 5, c. 7.

(*g*) See his epistle to Varus, the legate or judge of Cilicia: "*Tu magis scire potes, quanta fides sit habenda testibus; qui, et cujus dignitatis, et cujus castimationis sint; et qui simpliciter visi sint, dicere; utrum unum eundemque meditatum sermonem attulerint, an ad ea quæ interrogaveras extempore verisimilia responderint.*" *Pl.* 25, 5, 8.

(*h*) Year-book, 14 Hen. VII. 20. Plowd. 12. Hob. 227. 1 Lev. 57.

(*j*) Bract. l. 4, tr. 1, c. 19, § 2. Flet. l. 4, c. 9, § 2.

(*i*) Vaugh. 148. 149.

(*k*) Styl. 233. 1 Sid. 133.

The jury, after the proofs are summed up, unless the case be very clear, withdraw from the bar to consider of their verdict: and in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed. A method of accelerating unanimity not wholly unknown in other constitutions of Europe, and in matters of greater concern. For, by the golden bull of the empire, (2) if, after the congress is opened, the electors delay the election of a king of the Romans for thirty days, they shall be fed only with bread and water till the same is accomplished. But if our juries eat or drink at all, or have any eatables about them, without consent of the court, and before verdict, it is finable; and if they do so at his charge for whom they afterwards find, it will set aside the verdict. Also, if they speak with either of the parties or their agents, [\*376] after they are gone \*from the bar; or if they receive any fresh evidence in private; or if to prevent disputes they cast lots for whom they shall find; any of these circumstances will entirely vitiate the verdict. (26) And it has been held, that if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned, (m) the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart. (n) This necessity of a total unanimity seems to be peculiar to our own constitution; (o) or, at least in the *nembda* or jury of the ancient Goths, there was required (even in criminal cases) only the consent of the major part; and in case of an equality, the defendant was held to be acquitted. (p) (27)

When they are all unanimously agreed, the jury return back to the bar; and, before they deliver their verdict, the plaintiff is bound to appear in court, by himself, attorney, or counsel, in order to answer the amercement to which, by the old law, he is liable, as has been formerly mentioned, (q) in case he fails in his suit, as a punishment for his false claim. To be *amerced*, or a *mercie*, is to be at the king's mercy with regard to the fine to be imposed; *in misericordia domini regis pro falso clamore suo*. The amercement is disused, but the form still continues; and if the plaintiff does not appear, no verdict can be given, but the plaintiff is said to be *nonsuit*, *non sequitur clamorem suum*. Therefore it is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or withdraw himself: whereupon the crier is ordered to *call the plaintiff*: and if neither he, nor any body for him, appears, he is nonsuited, the jurors are discharged, the action is at an end, and the defendant shall recover his costs. The reason of this practice is, that a nonsuit is more eligible for the plaintiff than a verdict against him: for, after a nonsuit, which is only a [\*377] default, he may commence the same suit \*again for the same cause of action; but after a verdict had, and judgment consequent thereupon, he is forever barred from attacking the defendant upon the same ground of

(2) C. 2. (m) *Mirr. c. 4. § 24.*

(o) See *Barrington on the Statutes*, 19, 20, 21.

(q) Page 273. See also book IV. 373.

(u) *Lib. Ass.* fol. 40, pl. 1.

(p) *Stiern. l. 1., c. 4.*

(26) That is, the court will set aside the verdict, on misconduct of this character being proven. But the misconduct must be made out by other evidence than that of the jurors themselves; for they will not be allowed to testify to it. *Dana v. Tucker*, 4 Johns., 487; *Clum v. Smith*, 5 Hill, 560. The general rule is that the evidence of jurors will not be received to impeach their verdict. *Bridgewater v. Plymouth*, 97 Mass., 382; *Hann v. Wilson*, 28 Ind., 296; *Rutland v. Hathorn*, 36 Ga., 380. See this principle limited in *Wright v. Telegraph Co.*, 20 Iowa, 195.

(27) As to the origin and history of jury trial, see Forsyth's *History of Trial by Jury: Proffatt on Jury Trial*.

It has been conjectured by Mr. Christian, in a note on the origin of the requirement of unanimity in the jury, that as in grand juries and grand assizes and in the high court of parliament, "less than twelve, if twelve or more were present, could pronounce no effective verdict, when twelve only were sworn, they must have been unanimous."



complaint. But, in case the plaintiff appears, the jury by their foreman deliver in their verdict. (28)

A verdict *vere dictum*, is either *privy* or *public*. A *privy* verdict is when the judge hath left or adjourned the court: and the jury, being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court: (*r*) which *privy* verdict is of no force, unless afterwards affirmed by a public verdict given openly in court; wherein the jury may, if they please, vary from the *privy* verdict. So that the *privy* verdict is indeed a mere nullity; and yet it is a dangerous practice, allowing time for the parties to tamper with the jury, and therefore very seldom indulged. (29) But the only effectual and legal verdict is the *public* verdict: in which they openly declare to have found the issue for the plaintiff, or for the defendant; and if for the plaintiff, they assess the damages also sustained by the plaintiff, in consequence of the injury upon which the action is brought.

Sometimes, if there arises in the case any difficult matter of law, the jury, for the sake of better information, and to avoid the danger of having their verdict attainted, will find a *special* verdict; which is grounded on the statute of Westm. 2, 13 Edw. I, c. 30, § 2. And herein they state the naked facts, as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that if upon the whole matter the court should be of opinion that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant. This is entered at length on the record, and afterwards argued and determined in the court at Westminster, from whence the issue came to be tried.

\*Another method of finding a species of special verdict, is when the jury find a verdict generally for the plaintiff, but subject nevertheless [\*378] to the opinion of the judge of the court above, on a *special case* (30) stated by the counsel on both sides with regard to a matter of law: which has this advantage over a special verdict, that it is attended with much less expense, and obtains a much speedier decision: the *postea* (of which in the next chapter) being stayed in the hands of the officer of *nisi prius*, till the question is determined, and the verdict is then entered for the plaintiff or defendant, as the case may happen. But, as nothing appears upon the record but the general verdict, the parties are precluded hereby from the benefit of a writ of error, if dissatisfied with the judgment of the court or judge upon the point of law. Which makes it a thing to be wished, that a method could be devised of either lessening the expense of special verdicts, or else of entering the cause at length upon the *postea*. But in both these instances the jury may, if they think proper, take upon themselves to determine, at their own hazard, the complicated question of fact and law; and, without either special verdict or special case, may find a verdict absolutely either for the plaintiff or defendant. (*s*)

When the jury have delivered in their verdict, and it is recorded in court, they are then discharged. And so ends the trial by jury; a trial which, besides the other vast advantages which we have occasionally observed in its progress, is also as expeditious and cheap, as it is convenient, equitable, and

(*r*) If the judge hath adjourned the court to his own lodgings, and there receives the verdict, it is a *public* and not a *privy* verdict.

(*s*) Litt. § 368.

(28) Under the English practice a judge frequently recommended the parties to withdraw a juror when it was doubtful if an action would lie. This was done without costs, and the plaintiff had the right to begin his suit again. Tidd. Pr., p. 861. In the several states the practice differs somewhat in regard to this proceeding, and the books of practice of the states must be consulted.

(29) In criminal cases lower than capital felonies, the defendant may consent to have a sealed verdict brought in. But when such verdict is afterwards actually rendered in court, it is his right to have the jury polled. Whart. Cr., L., § 8193; Reins v. People, 30 Ill., 256; Stewart v. People, 23 Mich., 68; Wright v. State, 11 Ind. 569.

(30) Now in England a case may be submitted to the court on an agreed statement of facts, and with or without formal pleadings.

certain; for a commission out of chancery, or the civil law courts, for examining witnesses in one cause will frequently last as long, and of course be full as expensive, as the trial of a hundred issues at *nisi prius*: and yet the fact cannot be determined by such commissioners at all; no, not till the depositions are published, and read at the hearing of the cause in court.

[\*379] \*Upon these accounts the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened, when it is applied to criminal cases! But this we must refer to the ensuing book of these Commentaries: only observing for the present, that it is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals. A constitution, that I may venture to affirm has, under Providence, secured the just liberties of this nation for a long succession of ages. And therefore a celebrated French writer, (d) who concludes, that because Rome, Sparta, and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected that Rome, Sparta, and Carthage, at the time when their liberties were lost, were strangers to the trial by jury.

Great as this eulogium may seem, it is no more than this admirable constitution, when traced to its principles, will be found in sober reason to deserve. The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely intrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity: it is not to be expected from human nature, that *the few* should be always attentive to the interests and good of *the many*. On the other hand, if the power of judicature were placed at random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts. It is wisely therefore ordered, that the principles and axioms of law, which

[\*380] are general propositions, flowing from abstracted reason, and not \*accommodated to times or to men, should be deposited in the breasts of the judges, to be occasionally applied to such facts as come properly ascertained before them. For here partiality can have little scope: the law is well known, and is the same for all ranks and degrees; it follows as a regular conclusion from the premises of fact pre-established. But 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, stretching and warping others, and distinguishing away the remainder. Here, therefore, a competent number of sensible and upright jurymen; chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice. For the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once the fact is ascertained, the law must of course redress it. This, therefore, preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens. Every new tribunal, erected for the decision of facts, without the intervention of a jury (whether composed of justices of the peace, commissioners of the revenue, judges of a court of conscience, or any other standing magistrates), is a step

(d) Montesqu Sp. L. xi, §.

towards establishing aristocracy, the most oppressive of absolute governments. The feudal system, which, for the sake of military subordination, pursued an aristocratical plan in all its arrangements of property, had been intolerable in times of peace, had it not been wisely counterpoised by that privilege so universally diffused through every part of it, the trial by the feudal peers. And in every country on the continent, as the trial by the peers has been gradually disused, so the nobles have increased in power, till the state has been torn to pieces by rival factions, and oligarchy in effect has been established, though under the shadow of regal government; \*unless where the miserable [ \*381] commons have taken shelter under absolute monarchy, as the lighter evil of the two. And, particularly, it is a circumstance well worthy an Englishman's observation, that in Sweden the trial by jury, that bulwark of northern liberty, which continued in its full vigour so lately as the middle of the last century, (u) is now fallen into disuse: (w) and that there, though the regal power is in no country so closely limited, yet the liberties of the commons are extinguished, and the government is degenerated into a mere aristocracy. (x) It is, therefore, upon the whole, a duty which every man owes to his country, his friends, his posterity and himself, to maintain to the utmost of his power, this valuable constitution in all its rights; to restore it to its ancient dignity, if at all impaired by the different value of property, or otherwise deviated from its first institution; to amend it, wherever it is defective; and, above all, to guard with the most jealous circumspection against the introduction of new and arbitrary methods of trial, which, under a variety of plausible pretences, may in time imperceptibly undermine this best preservative of English liberty.

Yet, after all, it must be owned, that the best and most effectual method to preserve and extend the trial by jury in practice, would be by endeavouring to remove all the defects, as well as to improve the advantages, incident to this mode of inquiry. If justice is not done to the entire satisfaction of the people, in this method of deciding facts, in spite of all encomiums and panegyrics on trials at the common law, they will resort in search of that justice to another tribunal; though more dilatory, though more expensive, though more arbitrary in its frame and constitution. If justice is not done to the crown by the verdict of a jury, the necessities of the public revenue will call for the erection of summary tribunals. The principal defects seem to be,

1. The want of a complete discovery by the oath of the parties. This each of them is now entitled to have, by \*going through the expense and [ \*382] circuity of a court of equity, and therefore it is sometimes had by consent, even in the courts of law. How far such a mode of compulsive examination is agreeable to the rights of mankind, and ought to be introduced in any country, may be matter of curious discussion, but is foreign to our present inquiries. It has long been introduced and established in our courts of equity, not to mention the civil law courts; and it seems the height of judicial absurdity, that in the same cause between the same parties, in the examination of the same facts, a discovery by the oath of the parties should be permitted on one side of Westminster-hall, and denied on the other: or that the judges of one and the same court should be bound by law to reject such a species of evidence, if attempted on a trial at bar, but, when sitting the next day as a court of equity, should be obliged to hear such examination read, and to found their decrees upon it. In short, within the same country, governed by the same laws, such a mode of inquiry should be universally admitted, or else universally rejected. (31)

2. A second defect is of a nature somewhat similar to the first: the want of a compulsive power for the production of books and papers belonging to the par-

(u) 2 Whitelock of Parl. 497.

(w) Mod. Un. Hist. xxxiii, 22.

(x) *Ibid.* 17.

(31) It is stated in a previous note that parties are now competent and compellable to testify to the merits.

ties. In the hands of third persons they can generally be obtained by rule of court, or by adding a clause of requisition to the writ of *subpoena*, which is then called a *subpoena duces tecum*. But, in mercantile transactions especially, the sight of the party's own books is frequently decisive; as the day-book of a trader, where the transaction was recently entered, as really understood at the time; though subsequent events may tempt him to give it a different colour. And, as this evidence may be finally obtained, and produced on a trial at law, by the circuitous course of filing a bill in equity, the want of an original power for the same purposes in the courts of law is liable to the same observations as were made on the preceding article. (32)

[\*383] \*3. Another want is that of power to examine witnesses abroad, and to receive their depositions in writing, where the witnesses reside, and especially when the cause of action arises in a foreign country. To which may be added the power of examining witnesses that are aged, or going abroad, upon interrogatories *de bene esse*; to be read in evidence if the trial should be deferred till after their death or departure, but otherwise to be totally suppressed. Both these are now very frequently effected by mutual consent, if the parties are open and candid; and they may also be done indirectly at any time, through the channel of a court of equity; but such a practice has never yet been directly adopted (y) as the rule of a court of law. (33) Yet where the cause of action arises in India, and a suit is brought thereupon in any of the king's courts at Westminster, the court may issue a commission to examine witnesses upon the spot, and transmit the depositions to England. (z)

4. The administration of justice should not only be chaste, but should not even be suspected. A jury coming from the neighbourhood has in some respects a great advantage; but is often liable to strong objections; especially in small jurisdictions, as in cities which are counties of themselves, and such where assizes are but seldom holden; or where the question in dispute has an extensive local tendency; where a cry has been raised, and the passions of the multitude been inflamed; or where one of the parties is popular, and the other a stranger or obnoxious. It is true that, if a whole county is interested in the question to be tried, the trial by the rule of law (a) must be in some adjoining county; but, as there may be a strict interest so minute as not to occasion any bias, so there may be the strongest bias without any pecuniary interest. In all these cases, to summon a jury, laboring under local prejudices, is laying a [\*384] snare for their consciences: and, though they should have virtue and vigour of mind sufficient to keep them upright, the parties will grow suspicious, and resort under various pretences to another mode of trial. The courts of law will therefore in *transitory* actions very often change the *venue*, or county wherein the cause is to be tried: (b) but in *local* actions, though they sometimes do it indirectly and by mutual consent, yet, to effect it directly and absolutely, the parties are driven to a court of equity; where, upon mak-

(y) See page 75.

(z) Stat. 18 Geo. III, c. 63.

(a) Stra. 177.

(b) See page 294.

(32) By the present English rules the judge may order produced under oath any documents deemed necessary in the case. In the United States, usually, such documents, not in the hands of a party, may be had by a *subpoena duces tecum*. When they are under the control of a party, notice to produce them at the trial may be given, and if they are not then so produced, the party demanding them may on proof of notice, give parol evidence of the contents of the original documents. See 1 Greenl. Ev., § 559, *et seq.*

(33) But now by statute 1 Wm. IV, c. 22, the superior courts of law are empowered, upon the application of any party to an action therein, to order the examination of any witnesses upon interrogatories, and, if the witnesses are out of the jurisdiction of the court, a commission may be issued for the purpose. But the examination is not to be read at the trial, without the consent of the opposite party, unless it shall appear that the witness is then beyond the jurisdiction of the court, or dead, or unable from permanent sickness to attend the trial.

ing out a proper case, it is done upon the ground of being necessary to a fair, impartial, and satisfactory trial. (c) (34)

The locality of trial required by the common law seems a consequence of the ancient locality of jurisdiction. All over the world, actions transitory follow the person of the defendant, territorial suits must be discussed in the territorial tribunal. I may sue a Frenchman here for a debt contracted abroad; but lands lying in France must be sued for there, and English lands must be sued for in the kingdom of England. Formerly they were usually demanded only in the court-baron of the manor, where the steward could summon no jurors but such as were the tenants of the lord. When the cause was removed to the hundred-court (as seems to have been the course in the Saxon times), (d) the lord of the hundred had a farther power, to convoke the inhabitants of different villis to form a jury: observing probably always to intermix among them a stated number of tenants of that manor wherein the dispute arose. When afterwards it came to the county court, the great tribunal of Saxon justice, the sheriff had wider authority, and could impanel a jury from the men of his county at large: but was obliged (as a mark of the original locality of the cause) to return a competent number of hundredors; omitting the inferior distinction, if indeed it ever existed. And when at length, after the conquest, the king's justiciars drew the cognizance of the cause from the \*county [\*385] court, though they could have summoned a jury from any part of the kingdom, yet they chose to take the cause as they found it, with all its local appendages; triable by a stated number of hundredors, mixed with other freeholders of the county. The restriction as to hundredors hath gradually worn away, and at length entirely vanished; (e) that of counties still remains, for many beneficial purposes: but, as the king's courts have a jurisdiction co-extensive with the kingdom, there surely can be no impropriety in sometimes departing from the general rule, when the great ends of justice warrant and require an exception.

I have ventured to mark these defects, that the just panegyric, which I have given on the trial by jury, might appear to be the result of sober reflection, and not of enthusiasm or prejudice. But should they, after all, continue unremedied and unsupplied, still (with all its imperfections) I trust that this mode of decision will be found the best criterion, for investigating the truth of facts, that was ever established in any country. (35)

(c) This, among a number of other instances, was the case of the issues directed by the house of lords in the cause between the duke of Devonshire and the miners of the county of Derby, A. D. 1733.

(d) *L.L. Edw. Conf.* c. 32. *Wilk.* 203.

(e) See page 380.

(34) The courts of law now have authority to order a change of venue.

(35) So important has the right of trial by jury been regarded in the United States, that not only the national constitution, but the constitution of each of the states, contains limitations, more or less broad, upon the power of the legislature to deprive parties of it. The national constitution provides "that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed," and that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." Const. U. S. 6th and 7th amendments. The restrictions in the state constitutions vary greatly, and they generally permit parties to waive the right in civil cases. Some of them also allow a jury of less number than twelve. It is well settled, however, that where the constitution preserves the right of trial by jury in general terms, it preserves it for all those cases in which it was demandable of right at the common law. *Grandall v. James*, 6 R. I., 144; *Dane Co. v. Dunning*, 20 Wis., 210; *Tabor v. Cook*, 15 Mich., 323; *In re Kemp*, 16 Wis., 359; *Byers v. Commonwealth*, 42 Penn. St., 89; *Haines v. Levin*, 51 Penn. St. 412. And the right cannot be made to depend upon any condition. *Green v. Briggs*, 1 Curt. C. C., 311. And the number of the jury must be twelve, and in criminal cases, at least, the party cannot waive the right, or bind himself by consent to be tried by a less number. *Work v. State*, 2 Ohio St., 296; *Cancemi v. People*, 18 N. Y., 128; *Brown v. State*, 8 Blackf., 561; *Hill v. People*, 16 Mich., 351. Some cases hold to the contrary of this. See *Tyra v. Commonwealth*, 2 Met. (Ky.), 1; *State v. Kaufman*, 51 Iowa, 578; *Commonwealth v. Daily*, 12 Cush., 80.

## CHAPTER XXIV.

## OF JUDGMENT AND ITS INCIDENTS.

In the present chapter we are to consider the transactions in the cause next immediately subsequent to arguing the demurrer, or trial of the issue.

If the issue be an issue of fact; and, upon trial by any of the methods mentioned in the two preceding chapters, it be found for either the plaintiff or defendant, or specially; or if the plaintiff makes default, or is nonsuit; or whatever, in short, is done subsequent to the joining of issue and awarding the trial, it is entered on record and is called a *postea*. (a) The substance of which is, that *postea*, afterwards, the said plaintiff and defendant appeared by their attorneys at the place of trial; and a jury, being sworn, found such a verdict; or, that the plaintiff, after the jury sworn, made default, and did not prosecute his suit; or as the case may happen. This is added to the roll, which is now returned to the court from which it was sent; and the history of the cause, from the time it was carried out, is thus continued by the *postea*.

Next follows, *sixthly*, the judgment of the court upon what has previously passed; both the matter of law and matter of fact being now fully weighed and adjusted. Judgment \*may however for certain causes be *suspended*, or finally *arrested*: for it cannot be entered till the next term after trial had, and that upon notice to the other party. So that if any defect of justice happened at the trial, by surprise, inadvertence, or misconduct, the party may have relief in the court above, by obtaining a new trial; or if, notwithstanding the issue of fact be regularly decided, it appears that the complaint was either not actionable in itself, or not made with sufficient precision and accuracy, the party may supersede it by arresting or staying the judgment.

1. Causes of *suspending* the judgment, by granting a *new trial* (1) are at present wholly *extrinsic*, arising from matter foreign to, or *dehors* the record. Of this sort are want of notice of trial; or any flagrant misbehaviour of the party prevailing towards the jury, which may have influenced their verdict; or any gross misbehaviour of the jury among themselves: also if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith; (b) or if they have given exorbitant damages; (c) or if the judge himself has misdirected the jury, so that they found an unjustifiable verdict: for these, and other reasons of the like kind, it is the practice of the court to award a *new*, or second *trial*. But if two juries agree in the same or a similar verdict, a third trial is seldom awarded: (d) for the law will not readily suppose, that the verdict of any one subsequent jury can countervail the oaths of the two preceding ones.

The exertion of these superintendent powers of the king's courts, in setting aside the verdict of a jury and granting a new trial, on account of misbehaviour in the jurors, is of a date extremely ancient. There are instances in the year-

(a) Appendix No. II, § 4.

(b) Law of Nisi Prius, 303, 304.

(c) Comb. 357.

(d) 6 Mod. 23.

Salk. 649.

(1) In addition to the grounds for a new trial stated in the text, the following may be mentioned: The want of a proper jury; unavoidable absence of witnesses or attorneys; conviction of perjury of a material witness subsequent to the trial; discovery of new and material evidence, and erroneous rulings of the judge in the course of the trial. The motion for a new trial is, at common law, made to the trial court, and its granting is discretionary, and not ground of error. *McLanahan v. Insurance Co.*, 1 Pet., 170; *Chase v. Davis*, 7 Vt., 476; *Brooklyn v. Patchen*, 8 Wend., 47. In criminal cases the general rule is that when the defendant has been acquitted, no new trial can be granted on the application of the state; but this is changed by statute in some of the United States.

books of the reigns of Edward III, (e) Henry IV, (f) and Henry VII, (g) of judgments being stayed (even after a trial at bar) and \*new *venires* [\*388] awarded, because the jury had eat and drank without consent of the judge, and because the plaintiff had privately given a paper to a juryman before he was sworn. And upon these the chief justice Glynn in 1655, grounded the first precedent that is reported in our books (h) for granting a new trial upon account of *excessive damages* given by the jury: apprehending, with reason, that notorious partiality in the jurors was a principal species of misbehaviour. A few years before, a practice took rise in the common pleas, (i) of granting new trials upon the mere certificate of the judge (unfortified by any report of the evidence), that the verdict had passed against his opinion; though Chief-justice Rolle (who allowed of new trials in case of misbehaviour, surprise, or fraud, or if the verdict was notoriously contrary to evidence) (k) refused to adopt that practice in the court of king's bench. And at that time it was clearly held for law, (l) that whatever matter was of force to avoid a verdict, ought to be returned upon the *postea*, and not merely surmised by the court; lest posterity should wonder why a new *venire* was awarded, without any sufficient reason appearing upon the record. But very early in the reign of Charles the Second new trials were granted upon *affidavits*; (m) and the former strictness of the courts of law, in respect of new trials, having driven many parties into courts of equity to be relieved from oppressive verdicts, they are now more liberal in granting them: the maxim at present adopted being this, that (in all cases of moment) where justice is not done upon one trial, the injured party is entitled to another. (n)

Formerly the principal remedy, for reversal of a verdict unduly given, was by writ of *attaint*; of which we shall speak in the next chapter, and which is at least as old as the institution of the grand assize by Henry II, (o) in lieu of the Norman trial by *battel*. Such a sanction was probably thought \*necessary, when, instead of appealing to Providence for the decision [\*389] of a dubious right, it was referred to the oath of fallible or perhaps corrupted men. Our ancestors saw that a jury might give an erroneous verdict; and if they did, that it ought not finally to conclude the question in the first instance: but the remedy, which they provided, shows the ignorance and ferocity of the times, and the simplicity of the points then usually litigated in the courts of justice. They supposed that the law being told to the jury by the judge, the proof of fact must be always so clear, that, if they found a wrong verdict, they must be willfully and corruptly perjured. Whereas a juror may find a just verdict from unrighteous motives, which can only be known to the great Searcher of hearts: and he may, on the contrary, find a verdict very manifestly wrong, without any bad motive at all; from inexperience in business, incapacity, misapprehension, inattention to circumstances, and a thousand other innocent causes. But such a remedy as this laid the injured party under an insuperable hardship, by making a conviction of the jurors for perjury the condition of his redress.

The judges saw this; and therefore very early, even upon writs of assize, they devised a great variety of distinctions; by which an *attaint* might be avoided, and the verdict set to rights in a more temperate and dispassionate method. (p) Thus, if excessive damages were given, they were moderated by the discretion of the justices. (q) And if, either in that, or in any other instance, justice was not completely done, through the error of either the judge or the recognitors, it was remedied by *certificate of assize*, which was neither more nor less than a second trial of the same cause by the same jury. (r) And, in mixed or personal actions, as trespass and the like (wherein no *attaint* origin-

(e) 24 Edw. III. 94. Bro. Abr. tit. *verdict*, 17.

(f) 11 Hen. IV. 18. Bro. Abr. tit. *enquest*, 75.

(g) 14 Hen. VII. 1. Bro. Abr. tit. *verdict*, 18.

(h) Styl. 466.

(i) *Ibid.* 238.

(k) 1 Sid. 235. Styl. Pract. Reg. 310, 311. edit. 1657.

(l) Cro. Eliz. 616. Palm. 325. 1 Brownl. 807.

(m) 1 Sid. 235. 2 Lev. 140.

(n) 1 Burr. 305.

(o) *Ipsi regali institutione eleganter inserta.* Glan. l. 2. c. 19.

(p) Bract. l. 4. tr. 5. c. 4.

(q) *Ibid.* tr. 1. c. 19. § 8.

(r) *Ibid.* l. 4. tr. 5. c. 6. § 2. F. N. B. 181. 2 Inst. 415.

ally lay), if the jury gave a wrong verdict, the judges did not think themselves warranted thereby to pronounce an iniquitous judgment; but amended it, if possible, by subsequent inquiries of their own; and, if that \*could not [\*390] be they referred it to another examination. (s) When afterwards attaints, by several statutes were more universally extended, the judges frequently, even for the misbehaviour of jurymen, instead of prosecuting the writ of attaint, awarded a second trial: and subsequent resolutions, for more than a century past, have so amplified the benefit of this remedy, that the attaint is now as obsolete as the trial by battel which it succeeded; and we shall probably see the revival of the one as soon as the revival of the other. And here I cannot but again admire (t) the wisdom of suffering time to bring to perfection new remedies, more easy and beneficial to the subject; which, by degrees, from the experience and approbation of the people, supersede the necessity or desire of using or continuing the old.

If every verdict was final in the first instance, it would tend to destroy this valuable method of trial, and would drive away all causes of consequence to be decided according to the forms of the imperial law, upon depositions in writing; which might be reviewed in a course of appeal. Causes of great importance, titles to land, and large questions of commercial property, come often to be tried by a jury, merely upon the general issue: where the facts are complicated and intricate, the evidence of great length and variety, and sometimes contradicting each other; and where the nature of the dispute very frequently introduces nice questions and subtilties of law. Either party may be surprised by a piece of evidence which (had he known of its production) he could have explained or answered: or may be puzzled by a legal doubt, which a little recollection would have solved. In the hurry of a trial the ablest judge may mistake the law, and misdirect the jury: he may not be able so to state and range the evidence as to lay it clearly before them, nor to take off the artful impressions which have been made on their minds by learned and experienced advocates. The jury are to give their \*opinion *instanter*; that [\*391] is, before they separate, eat, or drink. And under these circumstances the most intelligent and best intentioned men may bring in a verdict, which they themselves upon cool deliberation would wish to reverse.

Next to doing right, the great object in the administration of public justice should be to give public satisfaction. If the verdict be liable to many objections and doubts in the opinion of his counsel, or even in the opinion of bystanders, no party would go away satisfied unless he had a prospect of reviewing it. Such doubts would with him be decisive: he would arraign the determination as manifestly unjust; and abhor a tribunal which he imagined had done him an injury without a possibility of redress.

Granting a new trial, under proper regulations, cures all these inconveniences, and at the same time preserves entire and renders perfect that most excellent method of decision, which is the glory of the English law. A new trial is a rehearing of the cause before another jury; but with as little prejudice to either party, as if it had never been heard before. No advantage is taken of the former verdict on the one side, or the rule of court for awarding such second trial on the other: and the subsequent verdict, though contrary to the first, imports no tittle of blame upon the former jury; who, had they possessed the same lights and advantages, would probably have altered their own opinion. The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject; and nothing is now tried but the real merits of the case.

A sufficient ground must however be laid before the court, to satisfy them that

(s) *Si juratores erraverint, et iudiciali secundum eorum dictum iudicium pronuntiaverint, falsam faciunt pronuntiationem; et ideo sequi non debent eorum dictum, sed illud emendare tenentur per diligentem examinationem. Si autem diiudicare nesciant, recurrendum erit ad majus iudicium.* Bract 1.  
tr. 5, c. 4, § 2.

(t) See page 368.



it is necessary to justice that the cause should be farther considered. If the matter be such, as did not or could not appear to the judge who presided at *nisi prius*, it is disclosed to the court by *affidavit*: if it arises from what passed at the trial, it is taken from the judge's information; who usually makes a special and minute report of the evidence. Counsel are heard on both sides to impeach \*or establish the verdict, and the court give their reasons at [\*392] large why a new examination ought or ought not to be allowed. The true import of the evidence is duly weighed, false colours are taken off, and all points of law which arose at the trial are upon full deliberation clearly explained and settled.

Nor do the courts lend too easy an ear to every application for a review of the former verdict. They must be satisfied that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case. A new trial is not granted, where the value is too inconsiderable to merit a second examination. It is not granted upon nice and formal objections, which do not go to the real merits. It is not granted in cases of strict right, or *summum jus*, where the rigorous exaction of extreme legal justice is hardly reconcilable to conscience. Nor is it granted where the scales of evidence hang nearly equal: that which leans against the former verdict ought always very strongly to preponderate.

In granting such farther trial (which is matter of sound discretion) the court has also an opportunity, which it seldom fails to improve, of supplying those defects in this mode of trial which are stated in the preceding chapter; by laying the party applying under all such equitable terms as his antagonist shall desire and mutually offer to comply with: such as the discovery of some facts upon oath; the admission of others not intended to be litigated; the production of deeds, books and papers; the examination of witnesses, infirm, or going beyond sea; and the like. And the delay and expense of this proceeding are so small and trifling, that it seldom can be moved for to gain time or to gratify humour. The motion must be made within the first four days of the next succeeding term, within which term it is usually heard and decided. And it is worthy observation how infinitely superior to all others the trial by jury approves itself, even in the very mode of its revision. In every other country of Europe, and in those of our own tribunals which conform themselves to the \*process of the civil law, the parties are at liberty, whenever they [\*393] please, to appeal from day to day and from court to court upon questions merely of fact; which is a perpetual source of obstinate chicanery, delay, and expensive litigation. (u) With us no new trial is allowed, unless there be a manifest mistake, and the subject-matter be worthy of interposition. The party who thinks himself aggrieved, may still, if he pleases, have recourse to his writ of attaint (2) after judgment: in the course of the trial he may demur to the evidence, or tender a bill of exceptions. And, if the first is totally laid aside, and the other two very seldom put in practice, it is because long experience has shown that a motion for a second trial is the shortest, cheapest, and most effectual cure for all imperfections in the verdict; whether they arise from the mistakes of the parties themselves, of their counsel or attorneys, or even of the judge or jury.

2. Arrests of judgment (3) arise from *intrinsic* causes, appearing upon the

(u) Not many years ago an appeal was brought to the house of lords from the court of session in Scotland, in a cause between Napier and Macfarlane. It was instituted in March, 1746, and (after many interlocutory orders and sentences below, appealed from and reheard as far as the course of proceeding would admit), was finally determined in April, 1749—the question being only on the property in an ox, adjudged to be of the value of three guineas. No pique or spirit could have made such a cause in the court of king's bench or common pleas have lasted a tenth of that time, or have cost a twentieth part of the expense.

(3) Since abolished.

(3) The defects upon record must be such as are not cured by verdict or by any statute of *jeoffaila*. The rule as to the defects that shall be cured by verdict is thus stated in 2 Saund.

face of the record. Of this kind are, first, where the declaration varies totally from the original writ; as where the writ is in debt or detainue, and the plaintiff declares in an action on the case for an *assumpsit*: for the original writ out of chancery being the foundation and warrant of the whole proceedings in the common pleas, if the declaration does not pursue the nature of the writ, the court's authority totally fails. (4) Also, secondly, where the verdict materially differs from the pleadings and issue thereon; as if, in an action for words, it is laid in the declaration that the defendant said, "the plaintiff is a bankrupt;" and the verdict find specially that he said, "the plaintiff *will be* a bankrupt." Or, thirdly, if the case laid in the declaration is not sufficient in [\*394] point of law to found an action upon. And this is an invariable \*rule with regard to arrests of judgment upon matters of law, "that whatever is alleged in arrest of judgment must be such matter as would upon demurrer have been sufficient to overturn the action or plea." As if, on an action for slander in calling the plaintiff a Jew, the defendant denies the words, and issue is joined thereon; now if a verdict be found for the plaintiff, that the words were actually spoken, whereby the fact is established, still the defendant may move in arrest of judgment, that to call a man a Jew is not actionable: and, if the court be of that opinion, the judgment shall be arrested, and never entered for the plaintiff. But the rule will not hold *e converso*, "that every thing that may be alleged as cause of demurrer will be good in arrest of judgment;" for if a declaration or plea omits to state some particular circumstance, without proving of which, at the trial, it is impossible to support the action or defence, this omission shall be aided by a verdict. As if, in an action of trespass, the declaration doth not allege that the trespass was committed on any certain day; (w) or if the defendant justifies, by prescribing for a right of common for his cattle, and does not plead that his cattle were *levant* and *couchant* on the land; (x) though either of these defects might be good cause to demur to the declaration or plea, yet if the adverse party omits to take advantage of such omission in due time, but takes issue, and has a verdict against him, these exceptions cannot, after verdict, be moved in arrest of judgment. For the verdict ascertains those facts, which before from the inaccuracy of the pleadings might be dubious; since the law will not suppose that a jury, under the inspection of a judge, would find a verdict for the plaintiff or defendant, unless he had proved those circumstances, without which his general allegation is defective. (y) Exceptions, therefore, that are moved in arrest of judgment, must be much more material and glaring than such as will maintain a demurrer: or, in other words, many inaccuracies and omissions, which would be fatal, if early observed, are cured by a subsequent verdict; and not suffered, in the last stage of a cause, to unravel the whole proceedings. \*But if the thing omitted be essential to the action or defence, as if the plaintiff does not merely state his title in a defective manner, but sets forth a title that is totally defective in itself, (z) or if to an action of debt the defendant pleads *not guilty* instead of *nil debet*, (a) these cannot be cured by a verdict for the plaintiff in the first case, or for the defendant in the second.

(w) Carth. 330.

(x) Cro. Jac. 44.

(y) 1 Mod. 292.

(z) Salk. 365.

(a) Cro. Eliz. 778.

Rep., 228, n. (1) "When there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission, is cured by the verdict at the common law." See, also, Gould Pl., ch. 10, § 18; 1 Chit. Pl., 673. By 15 and 16 Vict., c. 76, it is provided that when issue has been joined on a demurrer the judgment shall not be arrested for any defect of form merely, but shall be given, "according to the very right of the cause and matter in law."

(4) It is no longer necessary in England to mention in the writ any form of action.

If, by the misconduct or inadvertence of the pleaders, the issue be joined on a fact totally immaterial, or insufficient to determine the right, so that the court upon the finding cannot know for whom judgment ought to be given; as if, in an action on the case in *assumpsit* against an executor, he pleads that he himself (instead of the testator) made no such promise: (b) or if, in an action of debt on bond conditioned to pay money *on or before* a certain day, the defendant pleads payment *on the day*: (c) (which issue, if found for the plaintiff, would be inconclusive, as the money might have been paid *before*;) in these cases the court will after verdict award a *repleader quod parties replacent*; unless it appears from the whole record that nothing material can possibly be pleaded in any shape whatsoever, and then a repleader would be fruitless. (d) And, whenever a repleader is granted, the pleadings must begin *de novo* at that stage of them, whether it be the plea, replication, or rejoinder, &c., wherein there appears to have been the first defect, or deviation from the regular course. (e)

If judgment is not by some of these means arrested within the first four days of the next term after the trial, it is then to be entered on the roll or record. Judgments are the sentence of the law, pronounced by the court upon the matter contained in the record; and are of four sorts. First, where the facts are confessed by the parties, and the law determined by the court; as in case of judgment upon *demurrer*: secondly, where the law is admitted by the parties, and the facts disputed; as in case of judgment on a *verdict*: thirdly, where \*both the fact and the law arising thereon are admitted by the defendant; which is the case of judgments by *confession* or *default*: [\*396] or, lastly, where the plaintiff is convinced that either fact, or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution: which is the case in judgments upon a *nonsuit* or *retraxit*.

The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of *the law*. It is the conclusion that naturally and regularly follows from the premises of law and fact, which stand thus: against him who hath rode over my corn, I may recover damages by law: but A hath rode over my corn; therefore I shall recover damages against A. If the major proposition be denied, this is a demurrer in law: if the minor, it is then an issue of fact; but if both be confessed (or determined) to be right, the conclusion or judgment of the court cannot but follow. Which judgment or conclusion depends not, therefore, on the arbitrary caprice of the judge, but on the settled and invariable principles of justice. The judgment, in short, is the remedy prescribed by law for the redress of injuries; and the suit or action is the vehicle or means of administering it. What that remedy may be, is, indeed, the result of deliberation and study to point out, and therefore the style of the judgment is, not that it is decreed or resolved by the court, for then the judgment might appear to be their own; but "it is considered," *consideratum est per curiam*, that the plaintiff do recover his damages, his debt, his possession, and the like: which implies that the judgment is none of their own; but the act of law, pronounced and declared by the court, after due deliberation and inquiry.

All these species of judgments are either *interlocutory* or *final*. *Interlocutory* judgments are such as are given in the middle of a cause, upon some plea, proceeding, or default, which is only intermediate, and does not finally determine or complete the suit. Of this nature are all judgments for the plaintiff upon pleas in abatement of the suit or action: in \*which it is [\*397] considered by the court that the defendant do answer over, *respondeat* *ouster*; that is, put in a more substantial plea. (f) It is easy to observe, that the judgment here given is not final, but merely interlocutory; for there are

(b) 2 Ventr. 190.

(e) Raym. 458. Salk. 578.

(c) Stra. 904.

(f) 2 Saund. 30.

(d) 1 Burr. 301, 302.

afterwards farther proceedings to be had, when the defendant hath put in a better answer.

But the interlocutory judgments most usually spoken of are those incomplete judgments, whereby the *right* of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained: which is a matter that cannot be done without the intervention of a jury. As by the old Gothic constitution the cause was not completely finished till the *nembda* or jurors were called in "*ad executionem decretorum judicii, ad estimationem, pretii, damni, lucri,*" &c. (g) This can only happen where the plaintiff recovers; for, when judgment is given for the defendant, it is always complete as well as final. And this happens, in the first place, where the defendant suffers judgment to go against him by default, or *nihil dicit*; as if he puts in no plea at all to the plaintiff's declaration: by confession or *cognovit actionem*, where he acknowledges the plaintiff's demand to be just: or by *non sum informatus*, when the defendant's attorney declares he has no instructions to say any thing in answer to the plaintiff, or in defence of his client; which is a species of judgment by default. If these, or any of them, happen in actions where the specific thing sued for is recovered, as in actions of debt for a sum certain, the judgment is absolutely complete. And therefore it is very usual, in order to strengthen a creditor's security, for the debtor to execute a warrant of attorney to some attorney named by the creditor, empowering him to confess a judgment by either of the ways just now mentioned (by *nihil dicit, cognovit actionem, or non sum informatus*) in an action of debt to be brought by the creditor against the debtor for the specific sum due: which judgment, when confessed, is absolutely complete and binding; provided the same (as is also required in all other judgments) be regularly *doctquetted*, that is, abstracted and entered in a book, [\*398] \*according to the directions of statute 4 and 5 W. and M. c. 20. But where damages are to be recovered, a jury must be called in to assess them, unless the defendant, to save charges, will confess the whole damages laid in the declaration: otherwise the entry of the judgment is, "that the plaintiff ought to recover his damages (indefinitely), but because the court know not what damages the said plaintiff hath sustained, therefore the sheriff is commanded, that by the oaths of twelve honest and lawful men he inquire into the said damages, and return such inquisition into court." This process is called a *writ of inquiry*; in the execution of which the sheriff sits as judge, and tries by a jury, subject to nearly the same law and conditions as the trial by jury at *nisi prius*, what damages the plaintiff hath really sustained; and when their verdict is given, which must assess *some* damages, the sheriff returns the inquisition, which is entered upon the roll in manner of a *postea*; and thereupon it is considered that the plaintiff do recover the exact sum of the damages so assessed. In like manner, when a demurrer is determined for the plaintiff upon an action wherein damages are recovered, the judgment is also incomplete, without the aid of a writ of inquiry. (5)

Final judgments are such as at once put an end to the action, by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for. In which case, if judgment be for the plaintiff, it is also considered that the defendant be either amerced, for his wilful delay of justice in not immediately obeying the king's writ by rendering the plaintiff his due; (h) or be taken up, *capitur*, till he pays a fine to the king for the public misdemeanor which is coupled with the private injury, in all cases of force, (i) of

(g) Stiernhook, *de jure Goth.* l. 1. c. 4. (h) 8 Rep. 40, 61.  
(i) 8 Rep. 59. 11 Rep. 43. 5 Mod. 265. See Append. No. II. § 4.

(5) The common American practice is to grant the defendant permission to plead on terms, when his demurrer is overruled.

When damages are to be awarded, and the case is one for mere computation on a basis which is determined by the pleadings, this computation is now commonly made by an officer of the court, and the writ of inquiry is dispensed with.

falsehood in denying his own deed, (k) or unjustly claiming property in replevin, or of contempt by disobeying the command of the king's writ or the express prohibition of any statute. (l) But now in case of trespass, ejectment, assault, and false imprisonment, it is provided by the statute 5 and 6 W. and M., c. 12, that no writ of *capias* shall issue for this fine, nor any fine be paid; but the plaintiff shall pay 6s. 8d. to the proper officer, and be allowed it against the defendant among his other costs. And, therefore, upon such judgments in the common pleas, they used to enter that the fine was remitted, and now in both courts they take no notice of any fine or *capias* at all. (m) \*But if judgment be for the defendant, then, in case of fraud and deceit to the court, or malicious or vexatious suits, the plaintiff may also be fined; (n) but in most cases it is only considered that he and his pledges of prosecuting be (nominally) amerced for his false claim, *pro falso clamore suo*, and that the defendant may go thereof without a day, *eat inde sine die*, that is, without any farther continuance or adjournment; the king's writ commanding his attendance, being now fully satisfied, and his innocence publicly cleared. (o)

Thus much for judgments; to which costs are a necessary appendage; it being now as well the maxim of ours as of the civil law, that "*victus victori in expensis condemnandus est*:" (p) though the common law did not professedly allow any, the amercement of the vanquished party being his only punishment. The first statute which gave costs *eo nomine*, to the defendant in a real action was the statute of Gloucester, 6 Edw. I, c. 1, as did the statute of Marlbridge, 52 Hen. III, c. 6, to the defendant in one particular case, relative to wardship in chivalry: though in reality costs were considered and included in the *quantum* of damages, in such actions where damages are given; and, even now, costs for the plaintiff are always entered on the roll as increase of damages by the court. (q) But, because those damages were frequently inadequate to the plaintiff's expenses, the statute of Gloucester orders costs to be also added; and farther directs, that the same rule shall hold place in all cases where the party is to recover damages. And, therefore, in such actions where no damages were then recoverable (as in *quare impedit*, in which damages were not given till the statute of Westm. 2, 13 Edw. I), no costs are now allowed; (r) unless they have been expressly given by some subsequent statute. The statute 3 Hen. VII, c. 10, was the first which allowed any costs on a writ of error. But no costs were allowed the *defendant* in any shape, till the statutes 23 Hen. VIII, c. 15, 4 Jac. I, c. 3, 8 and 9 Wm. III, c. 11, 4 and 5 Ann. c. 16, which very equitably gave the defendant, if he prevailed, the same costs as the plaintiff would have had, in case he had recovered. These costs on both sides are taxed and moderated by the prothonotary, or other proper officer of the court.

\*The king (and any person suing to his use) (s) shall neither pay nor receive costs; for besides that he is not included under the general words of these statutes, as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them. (t) And it seems reasonable to suppose, that the queen-consort participates of the same privilege; for in actions brought by her, she was not at the common law obliged to find pledges of prosecution, nor could be amerced in case there was judgment against her. (u) In two other cases an exemption also lies from paying costs. Executors and administrators, when suing in the right of the deceased, shall pay none; (v) for the statute 23 Hen. VIII, c. 15, doth not give costs to defendants, unless where the action supposeth the contract to be made with, or the wrong

F (k) F. N. B. 121. Co. Litt. 131. 8 Rep. 60. 1 Roll. Abr. 210. Lill. Entr. 379. C. B. Hill. 4 Ann. ref. 430.  
 (l) 8 Rep. 60. (m) Salk. 54. Carth. 390. (n) 8 Rep. 59, 60. (o) Appendix, No. III, § 6.  
 (p) Cod. 3, 1, 12. (q) Appendix, No. II, § 4. (r) 10 Rep. 116. (s) Stat. 24 Hen. VIII, c. 8.  
 (t) F. N. B. 101. Co. Litt. 125. (u) Cro. Jac. 220. 1 Ventr. 92.

(6) In civil cases the rule is now otherwise.

to be done to, the plaintiff himself. (7) And paupers, that is, such as will swear themselves not worth five pounds, are, by statute 11 Hen. VII, c. 12, to have original writs and *subpoenas gratis*, and counsel and attorney assigned them without fee; and are excused from paying costs, when plaintiffs, by the statute 23 Hen. VIII, c. 15, but shall suffer other punishment at the discretion of the judges. And it was formerly usual to give such paupers, if nonsuited, their election either to be whipped or pay the costs: (*w*) though that practice is now disused. (*x*) It seems, however, agreed that a pauper may recover costs, though he pays none; (8) for the counsel and clerks are bound to give the labour to *him*, but not to his antagonist. (*y*) To prevent also trifling and malicious actions, for words, for assault and battery, and for trespass, it is enacted by statutes 43 Eliz. c. 6, 21 Jac. I, c. 16, and 22 and 23 Car. II, c. 9, § 136, that, where the jury who try any of these actions shall give less damages than 40s., the plaintiff shall be allowed no more costs than damages, unless the judge before whom the cause is tried shall certify under his hand, on the back of the record, that an actual battery (and not an assault only) was proved, or that in trespass the freehold or title of the land came chiefly in question. Also, by statutes 4 and [\*401] 5 W. and M. \*c. 23, and 8 and 9 Wm. III, c. 11, if the trespass were committed in hunting or sporting by an inferior tradesman, or if it appear to be wilfully and maliciously committed, the plaintiff shall have full costs, (*z*) though his damages, as assessed by the jury, amount to less than 40s.

After judgment is entered, *execution* will immediately follow, unless the party condemned thinks himself unjustly aggrieved by any of these proceedings, and then he has his remedy to reverse them by several writs in the nature of appeals, which we shall consider in the succeeding chapter.

## CHAPTER XXV.

### OF PROCEEDINGS IN THE NATURE OF APPEALS.

PROCEEDINGS in the nature of *appeals* from the proceedings of the king's courts of law, are of various kinds: according to the subject-matter in which they are concerned. They are principally four.

1. A writ of *attaint*: (1) which lieth to inquire whether a jury of *twelve* men gave a false verdict; (*a*) that so the judgment following thereupon may be reversed: and this must be brought in the lifetime of him for whom the verdict was given; and of two at least of the jurors who gave it. This lay, at the common law, only upon writs of *assize*; and seems to have been coeval with that institution by King Henry II, at the instance of his chief-justice, Glanvil: being probably meant as a check upon the vast power then reposed in the recognitors of assize, of finding a verdict according to their own personal knowledge, without the examination of witnesses. And even here it extended no farther than to such instances, where the issue was joined upon the very point of assize (the heirship, disseisin, &c.), and not on any collateral matter; as villenage, bastardy, or any other disputed fact. In these cases the

(w) 1 Sid. 361. 7 Mod. 114.

(x) See pages 214, 215.

(y) Salk. 506.

(a) Finch, L. 484.

(z) 1 Eq. Ca. Abr. 135.

(7) The statute 8 and 4 Wm. IV, c. 43, gives costs against executors suing in the right of their testator, in all cases in which they would be liable to costs if suing in their own right, unless the court or judge otherwise orders. As to the law in America, see 8 Redf. on Wills, 295; Bostwick v. Brown, 15 Hun, 808.

(8) Costs in such cases are given only when ordered by the court.

(1) Now abolished.

*assize* was said to be turned into an *inquest* or *jury* (*assisa vertitur in inquestum*), or that the assize should be taken *in modum juratis et non in modum assise*; that is, that the issue should be tried by a common jury or inquest, and not by recognitors of assize: (b) and then I apprehend that no attaint lay against the inquest or jury that determined such collateral issue. (c) Neither do I find any mention made by our ancient writers, of such a process obtaining after the trial by inquest or jury, in the old Norman or feudal actions \*prosecuted by writ of *entry*. Nor did any attaint lie in *trespass*, [403] *debt*, or other action personal, by the old common law: because those were always determined by common inquests or juries. (d) At length the statute of Westm. 1, 3 Edw. I, c. 38, allowed an attaint to be sued upon *inquests*, as well as *assizes*, which were taken upon any plea of *land* or of *freehold*. But this was at the king's discretion, and is so understood by the author of *Fleta*, (e) a writer contemporary with the statute; though Sir Edward Coke (f) seems to hold a different opinion. Other subsequent statutes (g) introduced the same remedy in all pleas of *trespass*, and the statute 34 Edw. III, c. 7, extended it to *all* pleas whatsoever, personal as well as real; except only the writ of *right* in such cases where the mise or issue is joined on the *mere right*, and not on any *collateral* question. For though the attaint seems to have been generally allowed in the reign of Henry the Second (h), at the first introduction of the grand assize (which at that time might consist of only *twelve* recognitors, in case they were all unanimous), yet subsequent authorities have holden, that no attaint lies on a false verdict given upon the mere right, either at common law or by statute; because that is determined by the grand assize, appealed to by the party himself, and now consisting of *sixteen* jurors. (i)

The jury who are to try this false verdict must be twenty-four, and are called the grand jury; for the law wills not that the oath of one jury of twelve should be attained or set aside by an equal number, nor by less indeed than double the former. (k) If the matter in dispute be of forty pounds value in personals, or of forty shillings a year in lands and tenements, then, by statute 15 Hen. VI, c. 5, each grand juror must have freehold to the annual value of twenty pounds. And he that brings the attaint can give no other evidence to the grand jury than what was originally given to the petit. For, as their verdict is now trying, and the question is, whether or no they did right upon the evidence that appeared to them, the law adjudged it the highest absurdity to produce any subsequent proof upon such trial, and to \*condemn the [404] prior jurisdiction for not believing evidence which they never knew. But those against whom it is brought are allowed, in affirmance of the first verdict, to produce new matter: (l) because the petit jury may have formed their verdict upon evidence of their own knowledge, which never appeared in court. If the grand jury found the verdict a false one, the judgment by the common law was, that the jurors should lose their *liberam legem* and become forever infamous; should forfeit their goods and the profits of their lands; should themselves be imprisoned, and their wives and children thrown out of doors; should have their houses razed, their trees extirpated, and their meadows ploughed; and that the plaintiff should be restored to all that he lost by reason of the unjust verdict. But as the severity of this punishment had its usual effect, in preventing the law from being executed, therefore by the statute 11 Hen. VII, c. 24, revived by 23 Hen. VIII, c. 3, and made perpetual by 13 Eliz. c. 25, an attaint is allowed to be brought after the death of the party, and a more moderate punishment was inflicted upon attainted jurors; viz., perpetual infamy, and, if the cause of action were above 40l.

(b) Bract. l. 4, tr. 1, c. 24, §§ 2, 3, 4; tr. 2, c. 17; tr. 5, c. 4, §§ 1, 2. Flet. l. 5, c. 22, § 8. Co. Entr. 61, b. Booth 213.

(c) Bract. c. 4, tr. 1, c. 24, § 2. Flet. *ibid*.  
(d) Year-book, 28 Edw. III, 15, 17. Ass. pl. 15. Flet. 5, 22, 16. (e) L. 5, c. 22, §§ 2, 16. (f) 2 Inst. 180, 237.

(g) Stat. 1 Edw. III, st. 1, c. 6. 5 Edw. III, c. 7. 28 Edw. III, c. 8. (h) See page 389.

(i) Bract. l. 4, tr. 5, c. 4, § 2. Flet. 5, 22, 7. Britt. 249 b. Year-book, 12 Hen. VI, 6 Bro. Abr. tit. *attaint*, 42. 1 Roll. Abr. 239.

(k) Bract. l. 4, tr. 5, c. 4, § 2. Flet. l. 5, c. 22, § 7.

(l) Finch, l. 493.

value, a forfeiture of 20*l.* apiece by the jurors, or, if under 40*l.*, then 5*l.* apiece: to be divided between the king and the party injured. So that a man may now bring an attaint either upon the statute or at common law, at his election; (*m*) and in both of them may reverse the former judgment. But the practice of setting aside verdicts upon motion, and granting *new trials*, has so superseded the use of both sorts of attaints, that I have observed very few instances of an attaint in our books, later than the sixteenth century. (*n*) By the old Gothic constitution, indeed, no certificate of a judge was allowed, in matters of evidence, to countervail the oath of the jury; but their verdict, however erroneous, was absolutely final and conclusive. Yet there was a proceeding from whence our attaint may be derived. If, upon a lawful trial before a superior \*tribunal, the jury were found to have given a false verdict, they

[\*405] were fined, and rendered infamous for the future. (*o*)

II. The writ of *deceit*, or action on the case in nature of it, may be brought in the court of common pleas, to reverse a judgment there had by fraud or collusion in a real action, whereby lands and tenements have been recovered to the prejudice of him that hath right. (2) But of this enough hath been observed in a former chapter. (*p*)

III. An *audita querela* is where a defendant against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, may be relieved upon good matter of discharge, which has happened since the judgment; as if the plaintiff hath given him a general release; or if the defendant hath paid the debt to the plaintiff, without procuring satisfaction to be entered on the record. In these and the like cases, wherein the defendant hath good matter to plead, but hath had no opportunity of pleading it (either at the beginning of the suit, or *puis darrein continuance*, which, as was shown in a former chapter, (*q*) must always be before judgment), and *audita querela* lies, in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. It is a writ directed to the court, stating that the complaint of the defendant hath been heard, *audita querela defendantis*, and then, setting out the matter of the complaint, it at length enjoins the court to call the parties before them, and having heard their allegations and proofs, to cause justice to be done between them. (*r*) It also lies for bail, when judgment is obtained against them by *scire facias* to answer the debt of their principal, and if it happens afterwards that the original judgment against their principal is reversed: for here the bail, after judgment had against them, have no opportunity to plead this special matter, and therefore they shall have redress by *audita querela*; (*s*) which is a writ of a most remedial nature, and

[\*406] seems to have been invented, lest in any case there should \*be an oppressive defect of justice, where a party who hath a good defence is too late to make it in the ordinary forms of law. But the indulgence now shown by the courts in granting a summary relief upon motion, in cases of such evident oppression, (*t*) has almost rendered useless the writ of *audita querela*, and driven it quite out of practice. (3)

IV. But, fourthly, the principal method of redress for erroneous judgments in the king's courts of record, is by *writ of error* to some superior court of appeal.

A writ of error (*u*) lies for some supposed mistake in the proceedings of a

(*m*) 3 Inst. 164.

(*n*) Cro. Eliz. 309. Cro. Jac. 90.

(*o*) "Si tamen evidenti argumento falsum jurasse convinsantur (id quod superius iudicium cognoscere debet) mulctantur in bonis, de cetero perjuri et intestabiles." Stiernh. de jure Goth. l. 1, c. 4.

(*p*) See, page 185.

(*q*) See page 316.

(*r*) Finch, L. 488. F. N. B. 102.

(*s*) 1 Roll. Abr. 308.

(*t*) Lord Raym. 439.

(*u*) Appendix, No. III, § 6.

(3) Now abolished.

(3) If the defendant is clearly entitled to relief the court will grant it on new trial, without forcing him to an *audita querela*: *Lister v. Mundell*, 1 B. & P., 427; but if the case is doubtful, the defendant will be left to his writ, that the plaintiff may demur or bring error. *Symonds v. Blake*, 3 Cr. M. & R., 416.



court of record; for to amend errors in a base court, not of record, a writ of *false judgment* lies. (v) The writ of error only lies upon matter of *law* arising upon the face of the proceedings; so that no evidence is required to substantiate or support it: there being no method of reversing an error in the determination of *facts*, but by an attain, or a new trial, to correct the mistakes of the former verdict. (4)

Formerly, the suitors were much perplexed by writs of error brought upon very slight and trivial grounds, as mis-spellings and other mistakes of the clerks, all which might be amended at the common law, while all the proceedings were in *paper*; (w) for they were then considered as only in *fieri*, and therefore subject to the control of the courts. But, when once the record was made up, it was formerly held, that by the common law no amendment could be permitted, unless within the very term in which the judicial act so recorded was done: for during the term the record is in the breast of the court; but afterwards it admitted of no alteration. (x) But now the courts are become more liberal; and, where justice requires it, will allow of amendments at any time while the suit is depending, notwithstanding the record be made up, and the term be past. For they at present consider the proceedings as in *fieri*, till judgment is given; and therefore that, till then, they have power to permit amendments\* by the common law: but when judgment is once given [\*407] and enrolled, no amendment is permitted in any subsequent term. (y) Mistakes are also effectually helped by the statutes of amendment and *jeofails*: so called, because when a pleader perceives any slip in the form of his proceedings, and acknowledges such error (*jeo faile*), he is at liberty by those statutes to amend it; which amendment is seldom actually made, but the benefit of the acts is attained by the court's overlooking the exception. (z) These statutes are many in number, and the provisions in them too minute to be here taken notice of otherwise than by referring to the statutes themselves; (a) by which all trifling exceptions are so thoroughly guarded against, that writs of error cannot now be maintained, but for some material mistake assigned. (5)

This is at present the general doctrine of amendments; and its rise and history are somewhat curious. In the early ages of our jurisprudence, when all pleadings were *ore tenus*, if a slip was perceived and objected to by the opposite party, or the court, the pleader instantly acknowledged his error and rectified his plea; which gave occasion to that length of dialogue reported in the ancient year-books. So liberal were then the sentiments of the crown as well as the judges, that in the statute of Wales, made at Rothelan, 12 Edw. I, the pleadings are directed to be carried on in that principality, "*sine calumpnia verborum, non observata illa dura consuetudine, qui cadit a syllaba cadit a tota causa.*" The judgments were entered up immediately by the clerks and offi-

(v) Finch, L. 484.

(w) Burr. 1099.

(x) Co. Litt. 260.

(y) Stat. 11 Hen. IV, c. 2.

(z) Stra. 1011.

(a) Stat. 14 Edw. III, c. 6. 9 Hen. V, c. 4. 4 Hen. VI, c. 2. 8 Hen. VI, c. 13 and 15. 22 Hen. VIII, c. 30. 18 Eliz. c. 14. 21 Jac. I, c. 12. 16 and 17 Car. II, c. 8 (styled in 1 Ventr. 100, an omnipotent act). 4 and 5 Anna, c. 16. 9 Anna, c. 20. 5 Geo. I, c. 12.

(4) If, however, there was error in fact in the proceedings, not error in law, a writ of error *coram nobis* or *coram vobis* might issue to the trial court to enable it to correct the error. Thus, if the defendant is a minor and appears by attorney instead of by guardian, if one of the parties is under coverture and the husband is improperly omitted from the proceedings, if one of the parties dies before judgment, if there is some error in the record caused by a ministerial officer of the court; in any such case the judgment would be erroneous in fact, though perhaps good in law. If the cause were in the K. B., the writ would be *coram nobis*, before us, as the record remaining in the court where the king is constructively; if it were in the common pleas, the writ would be *coram vobis*, before you, since the record remains then before the justices of that court. Tidd. Pr., 1186-7. See Kemp v. Crook, 18 Md., 180; Lane v. Williams, 12 Sm. & M., 362; Boughton v. Brown, 8 Jones (N. C.), 393; Teller v. Wetherell, 6 Mich., 46.

(5) In addition to the statutes referred to by the author in the note, see 9 Geo. IV, c. 15; 3 and 4 Wm. IV, c. 42, and the Common Law Procedure Act, 1852.

cers of the court; and if any misentry was made, it was rectified by the minutes, or by the remembrance of the court itself.

When the treatise by Britton was published, in the name and by authority of the king (probably about the 13 Edw. I, because the last statutes therein referred to are those of Winchester and Westminster the second), a check [\*408] seems intended \*to be given to the unwarrantable practices of some judges, who had made false entries on the rolls to cover their own misbehaviour, and had taken upon them by amendments and rasures to falsify their own records. The king therefore declares, (b) that "although we have granted to our justices to make record of pleas pleaded before them, yet we will not that their own record shall be a warranty for their own wrong, nor that they may rase their rolls, nor amend them, nor record them contrary to their original enrolment." The whole of which, taken together, amounts to this, that a record surreptitiously or erroneously made up, to stifle or pervert the truth, should not be a sanction for error; and that a record, originally made up according to the truth of the case, should not afterwards by any private rasure or amendment be altered to any sinister purpose.

But when afterwards King Edward, on his return from his French dominions in the seventeenth year of his reign, after upwards of three years' absence, found it necessary (or convenient, in order to replenish his exchequer) to prosecute his judges for their corruption and other malpractices, the perversion of judgments and other manifold errors, (c) occasioned by their erasing and altering records, were among the causes assigned for the heavy punishments inflicted upon almost all the king's justices, even the most able and upright. (d) [\*409] The severity of which proceedings \*seems so to have alarmed the succeeding judges, that through a fear of being said to do wrong, they hesitated at doing what was right. As it was so hazardous to alter a record duly made up, even from compassionate motives (as happened in Hengham's case, which in strictness was certainly indefensible), they resolved not to touch a record any more; but held that even palpable errors, when enrolled and the term at an end, were too sacred to be rectified or called in question; and, because Britton had forbidden all criminal and clandestine alterations, to make a record speak a falsity, they conceived that they might not judicially and publicly amend it, to make it agreeable to truth. In Edward the Third's time indeed, they once ventured (upon the certificate of the justice in eyre) to estreat a larger fine than had been recorded by the clerk of the court below; (e) but instead of amending the clerk's erroneous record, they made a second enrolment of what the justice had declared *ore tenus*; and left it to be settled by posterity in which of the two rolls that absolute verity resides, which every

(b) Brit. *proem.* 2, 3.

(c) *Judicia perverterunt, et in aliis erraverunt.* Math. West. A. A. 1330.

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If a writ of error be brought to reverse any judgment of an inferior court of record, where the damages are less than ten pounds; or if it is brought to reverse the judgment of any superior court after verdict, he that brings the writ, or that is plaintiff in error, must (except in some peculiar cases) find substantial pledges of prosecution or bail: (*m*) to prevent \*delays by frivolous pretences to appeal; and for securing payment of costs and dam- [\*411] ages, which are now payable by the vanquished party in all, except a few particular instances, by virtue of the several statutes cited in the margin. (*n*)

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commence therein by bill, but by original writ sued out of chancery, (*r*) this takes the case out of the general rule laid down by the statute; (*s*) so that the writ of error then lies, without any intermediate stage of appeal, directly to the house of lords, the dernier resort for the ultimate decision of every civil action. (8) Each court of appeal, in their respective stages, may, upon hearing the matter of law in which the error is assigned, reverse or affirm the judgment of the inferior courts, but none of them are final, save only the house of peers, to whose judicial decisions all other tribunals must therefore submit and conform their own. And thus much for the reversal or affirmance of judgments at law, by writs in the nature of appeals.

## CHAPTER XXVI. OF EXECUTION.

IF the regular judgment of the court, after the decision of the suit, be not suspended, superseded, or reversed, by one or other of the methods mentioned in the two preceding chapters, the next and last step is the *execution* of that judgment; or putting the sentence of the law in force. This is performed in different manners, according to the nature of the action upon which it is founded, and of the judgment which is had or recovered.

If the plaintiff recovers in an action real or mixed, whereby the seisin or possession of land is awarded to him, the writ of execution shall be an *habere facias seisinam*, or writ of seisin, of a freehold; or an *habere facias possessionem*, or writ of possession, (*a*) of a chattel interest. (*b*) These are writs directed to the sheriff of the county, commanding him to give actual possession to the plaintiff of the land so recovered: in the execution of which the sheriff may take with him the *posse comitatus*, or power of the county; and may justify breaking open doors, if the possession be not quietly delivered. But, if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of the door, in the name of seisin, is sufficient execution of the writ. Upon a presentation to a benefice recovered in a *quare impedit*, or assize of *darrein presentment*, \*the execution is by a writ *de clerico admittendo*; directed [\*413] not to the sheriff, but to the bishop or archbishop, and requiring him to admit and institute the clerk of the plaintiff.

(*r*) See page 42.

(*a*) Appendix. No. II, § 4.

(*b*) 1 Roll. Rep. 264. 1 Sid. 494. 1 Saund. 346. Carth. 180. Comb. 295.

(*b*) Finch, L. 470.

(6) By statute 1 Wm. IV, c. 70, and the Common Law Procedure Act, 1852, error upon any judgment of the queen's bench, common pleas or exchequer, must be brought in the exchequer chamber before the judges, or judges and barons as the case may be, of the other two courts, whence it again lies to the house of lords. But by the Judicature Acts of 1873 and 1875, the court of chancery, the queen's bench, the common pleas, the exchequer, the court of admiralty, the court of probate, and the court for divorce and matrimonial causes, were united to form one supreme court of judicature in England. The court was to consist of two parts, one of which, designated her majesty's high court of justice, was to exercise original jurisdiction, and the other to be known as her majesty's court of appeal, to have jurisdiction of appeals, superseding for this purpose the court of exchequer chamber, and also taking to itself a large share of the former appellate jurisdiction of the house of lords.

By the Appellate Jurisdiction Act of 1876, § 59, an appeal is given with certain limitations as to amount recovered, etc., to the house of lords from the court of appeal in England, and from any Scotch or Irish courts from which an appeal lay to the house of lords before this act. The privy council has appellate jurisdiction in ecclesiastical causes and in colonial appeals, whether civil or criminal. *Ex parte The Bishop of Exeter*, 10 C. B., 109; *Reg. v. Bertrand*, 1 L. R. P. C., 520.

In other actions, where the judgment is that something in special be done or rendered by the defendant, then, in order to compel him so to do, and to see the judgment executed, a special writ of execution issues to the sheriff, according to the nature of the case. As, upon an assize of nuisance, or *quod permittat prosternere*, where one part of the judgment is *quod nocumentum amoveatur*, a writ goes to the sheriff to abate it at the charge of the party, which likewise issues even in case of an indictment. (c) Upon a replevin, the writ of execution is the writ *de retorno habendo*: (d) and, if the distress be eloiigned, the defendant shall have a *capias in withernam*; (e) but on the plaintiff's tendering the damages and submitting to a fine, the process in *withernam* shall be stayed. (f) In detinue, after judgment, the plaintiff shall have a *distringas*, to compel the defendant to deliver the goods, by repeated distresses of his chattels: (g) or else a *scire facias* against any third person in whose hands they may happen to be, to show cause why they should not be delivered: and if the defendant still continues obstinate, then (if the judgment hath been by default or on demurrer) the sheriff shall summon an inquest to ascertain the value of the goods, and the plaintiff's damages: which (being either so assessed, or by the verdict in case of an issue), (h) shall be levied on the person or goods of the defendant. So that, after all, in replevin and detinue (the only actions for recovering the specific possession of personal chattels), if the wrongdoer be very perverse, he cannot be compelled to a restitution of the identical thing taken or detained; but he still has his election to deliver the goods or their value: (i) an imperfection in the law, that results from the nature of personal property, which is easily concealed or conveyed out of the reach of justice, and not always amenable to the magistrate.

\*Executions in actions where money only is recovered, as a debt or damages (and not any specific chattel), are of five sorts: either against [414] the body of the defendant; or against his goods and chattels; or against his goods and the *profits* of his lands; or against his goods and the *possession* of his lands; or against all three, his body, lands, and goods.

1. The first of these species of execution is by writ of *capias ad satisfaciendum*; (j) which addition distinguishes it from the former *capias ad respondendum*, which lies to compel an appearance at the beginning of the suit. And properly speaking, this cannot be sued out against any but such as were liable to be taken upon the former *capias*. (k) (1) The intent of it is, to imprison the body of the debtor till satisfaction be made for the debt, costs and damages: it therefore doth not lie against any privileged persons, peers, or members of parliament, nor against executors or administrators, nor against such other persons as could not be originally held to bail. And Sir Edward Coke also gives us a singular instance, (l) where a defendant in 14 Edw. III was discharged from a *capias*, because he was of so advanced an age, *quod pœnam imprisonamenti subire non potest*. If an action be brought against an husband and wife for the debt of the wife when sole, and the plaintiff recovers judgment, the *capias* shall issue to take both husband and wife in execution: (m) but if the action was originally brought against herself when sole, and pending the suit she marries, the *capias* shall be awarded against her only, and not against her husband. (n) Yet, if judgment be recovered against an husband and wife for the contract, nay, even for the personal misbehavior (o) of the

(c) Comb. 10.

(d) See page 150.

(e) See page 149.

(f) 2 Leon. 174.

(g) 1 Roll Abr. 787.

(h) East. Entr. 215.

(i) Bro. Abr. tit. *damages*, 39.

(j) Kellw. 64.

(k) Appendix, No. III, § 7.

(l) 3 Rep. 12.

(m) Moor. 767.

(n) 1 Inst. 289.

(o) Moor. 704.

(p) Cro. Jac. 523.

(q) Cro. Car. 512.

(1) Fuller v. Bowker, 11 Mich., 204. If the suit might have been begun by *capias* but was not, the fact that some other process was used does not preclude taking the body on a *capias ad satisfaciendum*. Hunt v. Burdick, 42 Vt., 610; Eames v. Stevens, 25 N. H., 117; Wesson v. Chamberlain, 8 N. Y., 331.

wife during her coverture, the *capias* shall issue against the husband only: which is one of the many great privileges of English wives. (2)

[\*415] \*The writ of *capias ad satisfaciendum* is an execution of the highest nature, inasmuch as it deprives a man of his liberty, till he makes the satisfaction awarded; and therefore, when a man is once taken in execution upon this writ, no other process can be sued out against his lands or goods. Only by statute 21 Jac. I, c. 24, if the defendant dies, while charged in execution upon this writ, the plaintiff may, after his death, sue out a new execution against his lands, goods, or chattels. The writ is directed to the sheriff, commanding him to take the body of the defendant and have him at Westminster on a day therein named, to make the plaintiff satisfaction for his demand. And, if he does not then make satisfaction, he must remain in custody till he does. This writ may be sued out, as may all other executory process, for costs, against a plaintiff as well as a defendant, when judgment is had against him. (3)

When a defendant is once in custody upon this process, he is to be kept in *arcta et salva custodia*: and if he be afterwards seen at large, it is an *escape*, and the plaintiff may have an action thereupon against the sheriff for his whole debt. For though, upon arrests, and what is called *mesne* process, being such as intervenes between the commencement and end of a suit, (p) the sheriff, till the statute 8 and 9 Wm. III, c. 27, might have indulged the defendant as he pleased, so as he produced him in court to answer the plaintiff at the return of the writ: yet, upon a taking in execution, he could never give any indulgence; for, in that case, confinement is the whole of the debtor's punishment, and of the satisfaction made to the creditor. Escapes are either voluntary, or negligent. Voluntary are such as are by the express consent of the keeper; after which he never can retake his prisoner again (q) (though the plaintiff may retake him at any time), (r) but the sheriff must answer for the debt. Negligent escapes are where the prisoner escapes without his keeper's knowledge or [\*416] consent; and then upon fresh pursuit the defendant may \*be retaken, and the sheriff shall be excused, if he has him again before any action brought against himself for the escape. (s) A rescue of a prisoner *in execution*, either going to gaol or in gaol, or a breach of prison, will not excuse the sheriff from being guilty of and answering for the escape; for he ought to have sufficient force to keep him, since he may command the power of the county. (t) But by statute 32 Geo. II, c. 28, if a defendant, charged in execution for any debt not exceeding 100*l*, will surrender all his effects to his creditors (except his apparel, bedding, and tools of his trade, not amounting in the whole to the value of 10*l*), and will make oath of his punctual compliance with the statute, the prisoner may be discharged, unless the creditor insists on detaining him; in which case he shall allow him 2*s*. 4*d*. per week, to be paid on the first day of every week, and on failure of regular payment the prisoner shall be discharged. Yet the creditor may at any future time have execution against the lands and goods of such defendant, though never more against his person. And, on the other hand, the creditors may, as in the case of bankruptcy, com-

(p) See page 379.

(q) 3 Rep. 52. 1 Sid. 330.

(r) Stat. 8 and 9 Wm. III, c. 27.

(s) F. N. B. 130.

(t) Cro. Jac. 419.

(2) A great change has been effected in the law of England regarding imprisonment for debt since these commentaries were written, and now it is not allowed in actions on contracts, except in cases of fraud. See statutes 1 and 2 Vic. c. 110; 5 and 6 Vic., c. 116; 7 and 8 Vic., c. 96; and 32 and 33 Vic., c. 62.

(3) Taking the body of the defendant in execution suspends the lien of the judgment. *Jackson v. Benedict*, 13 Johns., 533. If the plaintiff gives the defendant, when in execution, permission to go at large, the judgment is discharged, and he will have no remedy either against the defendant or the sheriff. *Blackburn v. Stupart*, 2 East, 243; *Yates v. Van Rensselaer*, 5 Johns., 364; *Poucher v. Holley*, 8 Wend., 184. And this irrespective of the intention of the plaintiff, or of any violation by the defendant of any understanding on which he was discharged. *Id.* The same principle is applicable if one of several defendants is discharged by the plaintiff. *Ransom v. Keyes*, 9 Cow., 128.



pel (under pain of transportation for seven years) such debtor charged in execution for any debt under 100*l.* to make a discovery and surrender of all his effects for their benefit, whereupon he is also entitled to the like discharge of his person.

If a *capias ad satisfaciendum* is sued out, and a *non est inventus* is returned thereon, the plaintiff may sue out a process against the bail, if any were given: who, we may remember, stipulated in this triple alternative, that the defendant should, if condemned in the suit, satisfy the plaintiff his debt and costs; or that he should surrender himself a prisoner; or, that they would pay it for him: as therefore the two former branches of the alternative are neither of them complied with, the latter must immediately take place. (u) In order to which a writ of *scire facias* may be sued out against the bail, commanding them to show cause why the plaintiff should not have execution against them for his \*debt and damages; and on such writ if they show no sufficient cause, or the defendant does not surrender himself on the day of the [\*417] return, or of showing cause (for afterwards is not sufficient), the plaintiff may have judgment against the bail, and take out a writ of *capias ad satisfaciendum*, or other process of execution against them.

2. The next species of execution is against the goods and chattels of the defendant; and is called a writ of *feri facias*, (v) from the words in it where the sheriff is commanded, *quod fieri faciat de bonis*, that he cause to be made of the goods and chattels of the defendant the sum or debt recovered. (4) This lies as well against privileged persons, peers, &c., as other common persons; and against executors or administrators, with regard to the goods of the deceased. The sheriff may not break open any outer door, (x) to execute either this, or the former writ: but must enter peaceably; and may then break open any inner door, belonging to the defendant, in order to take the goods. (y) And he may sell the goods and chattels (even an estate for years, which is a chattel real) (z) of the defendant, till he has raised enough to satisfy the judgment and costs; first paying the landlord of the premises, upon which the goods are found, the arrears of rent then due, not exceeding one year's rent in the whole. (a) If part only of the debt be levied, on a *feri facias*, the plaintiff may have a *capias ad satisfaciendum* for the residue. (b) (5)

3. A third species of execution is by writ of *levari facias*; which affects a man's goods and the *profits* of his lands, by commanding the sheriff to levy the plaintiff's debt on the lands and goods of the defendant: whereby the sheriff may seize all his goods, and receive the rents and profits of his lands, till satisfaction be made to the plaintiff. (c) Little use \*is now made [\*418] of this writ; the remedy by *elegit*, which takes possession of the lands themselves, being much more effectual. But of this species is a writ of execu-

(u) Lutw. 1369-1373.

(a) Stat. 8 Anne, c. 14.

(w) Appendix, No. III. § 7.

(b) 1 Roll. Abr. 904. Cro. Elix. 344.

(x) 5 Rep. 92.

(y) Palm. 54.

(z) 8 Rep. 171.

(c) Finch, L. 471.

(4) If a judgment in tort is rendered against two and the execution is levied wholly on the goods of one, he cannot compel contribution from his co-defendant; otherwise if the judgment is in contract. *Merryweather v. Nixan*, 8 T. R., 186; *Colburn v. Patmore*, 1 Cr. M. and R., 73; *Armstrong Co. v. Clarion Co.*, 66 Pa. St., 218; *Spalding v. Oaks*, 42 Vt., 343. It has been held that "the rule that wrongdoers cannot have redress or contribution as against each other is confined to cases where the person seeking redress must have known that he was doing an unlawful act." *Adamson v. Jarvis*, 4 Bing., 66, 73; *Betts v. Gibbins*, 2 A. and E., 74; *Jacobs v. Pollard*, 10 Cush., 287, and see *Acheson v. Miller*, 2 Ohio St., 203.

(5) A levy upon sufficient personal property to satisfy the judgment is a temporary bar to further execution or suit, and will amount to satisfaction unless it fail, in whole or in part, without the fault of the plaintiff. *Green v. Burke*, 23 Wend., 490. See *Ladd v. Blunt*, 4 Mass., 402; *Webb v. Bumpass*, 9 Port., 201; *F. and M. Bank v. Kingsley*, 2 Doug. Mich., 379. If the defendant is allowed to retain the property, it is no satisfaction. *Peck v. Tiffany*, 2 N. Y., 451. Or if it is taken from the sheriff by due course of law. *Alexander v. Polk*, 39 Miss., 737. A levy upon real property is not a satisfaction. *Ladd v. Blunt*, *supra*; *Shepard v. Rowe*, 14 Wend., 260; *White v. Graves*, 15 Texas, 183.

tion proper only to ecclesiastics; which is given when the sheriff, upon a common writ of execution sued, returns that the defendant is a beneficed clerk, not having any lay fee. In this case a writ goes to the bishop of the diocese, in the nature of a *levari* or *feri facias*, (d) to levy the debt and damages *de bonis ecclesiasticis*, which are not to be touched by lay hands, and thereupon the bishop sends out a *sequestration* of the profits of the clerk's benefice, directed to the churchwardens, to collect the same and pay them to the plaintiff, till the full sum be raised. (e)

4. The fourth species of execution is by the writ of *elegit*; which is a judicial writ given by the statute Westm. 2, 13 Edw. I, c. 18, either upon a judgment for a debt, or damages; or upon the forfeiture of a recognizance taken in the king's court. By the common law a man could only have satisfaction of goods, chattels, and the present profits of lands, by the two last-mentioned writs of *feri facias*, or *levari facias*; but not the possession of the lands themselves; which was a natural consequence of the feudal principles, which prohibited the alienation, and of course the incumbering of the fief with the debts of the owner. And, when the restriction of alienation began to wear away, the consequence still continued; and no creditor could take the possession of lands, but only levy the growing profits: so that, if the defendant aliened his lands, the plaintiff was ousted of his remedy. The statute therefore granted this writ (called an *elegit*, because it is in the choice or election of the plaintiff whether he will sue out this writ or one of the former), by which the defendant's goods and chattels are not sold, but only appraised; and all of them (except oxen and beasts of the plough) are delivered to the plaintiff, at such reasonable appraisement and price, in part of satisfaction of his debt. If the goods are not sufficient, then the moiety or \*one-half of [\*419] his freehold lands, which he had at the time of the judgment given, (f) whether held in his own name, or by any other in trust for him, (g) are also to be delivered to the plaintiff; to hold, till out of the rents and profits thereof the debt be levied, or till the defendant's interest be expired; as till the death of the defendant, if he be tenant for life or in tail. During this period the plaintiff is called tenant by *elegit*, of whom we spoke in a former part of these Commentaries. (h) We there observed that till this statute, by the ancient common law, lands were not liable to be charged with, or seized for, debts; because by these means the connexion between lord and tenant might be destroyed, fraudulent alienations might be made, and the services be transferred to be performed by a stranger; provided the tenant incurred a large debt, sufficient to cover the land. And therefore, even by this statute, only one-half was, and now is, subject to execution; that out of the remainder sufficient might be left for the lord to distrain upon for his services. And upon the same feudal principle, copyhold lands are at this day not liable to be taken in execution upon a judgment. (i) (6) But, in case of a debt to the king, it appears by *magna carta*, c. 8, that it was allowed by the common law for him to take possession of the lands till the debt was paid. For he, being the grand superior and ultimate proprietor of all landed estates, might seize the lands into his own hands, if any thing was owing from the vassal; and could not be said to be defrauded of his services when the ouster of the vassal proceeded from his own command. This execution, or seizing of lands by *elegit*, is of so high a nature, that after it the body of the defendant cannot be taken: but if execution can only be had of the goods, because there are no lands, and such goods are not sufficient to pay the debt, a *capias ad satisfaciendum* may then be had after the *elegit*; for such *elegit* is in this case no more

(d) *Registr. Orig.* 800, *judic.* 22. 2 Inst. 4

(e) 2 Burn. *Ecol. Law*, 339.

(f) 2 Inst. 305.

(g) Stat. 20 Car. II, c. 5.

(h) Book II, ch. 10.

(i) 1 Roll. Abr. 695.

(6) Lands may now be taken on execution in England.

in effect than a *feri facias*.(j) So that body and goods may be taken in execution, or land and goods; but not body \*and land too, upon any judgment between subject and subject in the course of the common law. [\*420] But,

5. Upon some prosecutions given by statute; as in the case of recognizances for debts acknowledged on statutes merchant, or statutes staple (pursuant to the statutes 13 Edw. I, *de mercatoribus*, and 27 Edw. III, c. 9); upon forfeiture of these, the body, land and goods may all be taken at once in execution, to compel the payment of the debt. The process thereon is usually called an *extent*, or *extendi facias*, because the sheriff is to cause the lands, &c., to be appraised to their full extended value, before he delivers them to the plaintiff, that it may be certainly known how soon the debt will be satisfied.(k) And by statute 33 Hen. VIII, c. 39, all obligations made to the king shall have the same force, and of consequence the same remedy to recover them, as a statute staple; though indeed, before this statute, the king was entitled to sue out execution against the body, lands and goods of his accountant or debtor.(l) And his debt shall, in suing out execution, be preferred to that of every other creditor, who hath not obtained judgment before the king commenced his suit.(m) The king's judgment also affects all lands which the king's debtor hath at or after the time of contracting his debt, or which any of his officers mentioned in the statute 13 Eliz. c. 4, hath at or after the time of his entering on the office: so that if such officer of the crown aliens for a valuable consideration, the land shall be liable to the king's debt even in the hands of a *bona fide* purchaser; though the debt due to the king was contracted by the vendor many years after the alienation.(n) Whereas judgments between subject and subject related, even at common law, no farther back than the first day of the term in which they were recovered, in respect of the lands of the debtor; and did not bind his goods and chattels, but from the date of the writ of execution: and now, by the statute of frauds, 29 Car. II, c. 3, the judgment shall not bind the land in the hands of a *bona fide* purchaser, but only from the day [\*421] of actually signing the same: which is directed by the statute to be punctually entered on the record; nor shall the writ of execution bind the goods in the hands of a stranger, or the purchaser,(o) but only from the actual delivery of the writ to the sheriff or other officer, who is therefore ordered to endorse on the back of it the day of his receiving the same.

These are the methods which the law of England has pointed out for the execution of judgments: and when the plaintiff's demand is satisfied, either by the voluntary payment of the defendant, or by this compulsory process, or otherwise, satisfaction ought to be entered on the record, that the defendant may not be liable to be thereafter harassed a second time on the same account. But all these writs of execution must be sued out within a year and a day after the judgment is entered; otherwise the court concludes *prima facie* that the judgment is satisfied and extinct: yet, however, it will grant a writ of *scire facias* in pursuance of statute Westm. 2, 13 Edw. I, c. 45, for the defendant to show cause why the judgment should not be revived, and execution had against him; to which the defendant may plead such matter as he has to allege, in order to show why process of execution should not be issued: or the plaintiff may still bring an action of debt, founded on this dormant judgment, which was the only method of revival allowed by the common law.(p)(7)

(j) Hob. 58.

(n) 10 Rep. 55, 56.

(k) F. N. B. 151.

(o) Skin. 287.

(l) 3 Rep. 12.

(p) Co. Litt. 290.

(m) Stat. 33 Hen. VIII. c. 39, § 74.

(7) By 15 and 16 Vict., c. 76, § 128, during the lives of the parties to a judgment and within six years of the judgment, execution may issue without *scire facias*. By the same statute, § 134, a writ of revivor to revive judgments less than ten years old shall be allowed without rule or order; otherwise if more than ten years old. The common law rule as to the time within which execution shall issue has been changed by statute in many American states.

In this manner are the several remedies given by the English law for all sorts of injuries, either real or personal, administered by the several courts of justice, and their respective officers. In the course, therefore, of the present book, we have, first, seen and considered the nature of remedies, by the mere act of the parties, or mere operation of law, without any suit in courts. We have next taken a review of remedies, by suit or action in courts: and therein have contemplated, first, the nature and species of courts, instituted for the redress of injuries in general; and then have shown in what particular court application must be made for the redress of particular injuries, or the doctrine of jurisdictions and \*cognizance. We afterwards proceed to consider the nature [ \*422 ] and distribution of wrongs and injuries affecting every species of personal and real rights, with the respective remedies by suit, which the law of the land has afforded for every possible injury. And, lastly, we have deduced and pointed out the method and progress of obtaining such remedies in the courts of justice: proceeding from the first general complaint or *original writ*, through all the stages of *process*, to compel the defendant's appearance; and of *pleading*, or formal allegation on the one side, and excuse or denial on the other; with the examination of the validity of such complaint or excuse, upon *demurrer*; or the truth of the facts alleged and denied, upon *issue* joined, and its several *trials*; to the *judgment* or sentence of the law, with respect to the nature and amount of the redress to be specifically given: till after considering the suspension of that judgment by writs in the nature of *appeals*, we have arrived at its final *execution*; which puts the party in specific possession of his right by the intervention of ministerial officers, or else gives him an ample satisfaction, either by equivalent damages, or by the confinement of his body who is guilty of the injury complained of.

This care and circumspection in the law—in providing that no man's right shall be affected by any legal proceeding without giving him previous notice, and yet that the debtor shall not by receiving such notice take occasion to escape from justice; in requiring that every complaint be accurately and precisely ascertained in writing, and be as pointedly and exactly answered; in clearly stating the question either of law or of fact; in deliberately resolving the former after full argumentative discussion, and indisputably fixing the latter by a diligent and impartial trial; in correcting such errors as may have arisen in either of those modes of decision, from accident, mistake, or surprise; and in finally enforcing the judgment, when nothing can be alleged to impeach it;—this anxiety to maintain and restore to every individual the enjoyment of his civil rights, without intrrenching upon those of any other individual in the [ \*423 ] nation, this parental solicitude \*which pervades our whole legal constitution, is the genuine offspring of that spirit of equal liberty which is the singular felicity of Englishmen. At the same time it must be owned to have given a handle, in some degree, to those complaints of delay in the practice of the law, which are not wholly without foundation, but are greatly exaggerated beyond the truth. There may be, it is true, in this, as in all other departments of knowledge, a few unworthy professors: who study the science of chicane and sophistry rather than of truth and justice; and who to gratify the spleen, the dishonesty, and wilfulness of their clients, may endeavor to screen the guilty, by an unwarrantable use of those means which were intended to protect the innocent. But the frequent disappointments and the constant discountenance that they meet with in the courts of justice, have confined these men (to the honor of this age be it spoken) both in number and reputation to indeed a very despicable compass.

Yet some delays there certainly are, and must unavoidably be, in the conduct of a suit, however desirous the parties and their agents may be to come to a speedy determination. These arise from the same original causes as were mentioned in examining a former complaint: (q) from liberty, property, civility,

(q) See page 337.

commerce, and an extent of populous territory: which, whenever we are willing to exchange for tyranny, poverty, barbarism, idleness and a barren desert, we may then enjoy the same dispatch of causes that is so highly extolled in some foreign countries. But common sense and a little experience will convince us that more time and circumspection are requisite in causes, where the suitors have valuable and permanent rights to lose, than where their property is trivial and precarious, and what the law gives them to-day, may be seized by their prince to-morrow. In Turkey, says Montesquieu (r) where little regard is shown to the lives or fortunes of the subject, all causes are quickly decided: the basha, on a summary hearing, orders which party he pleases to be *bastinadoed*, and then sends them about their business. But in \*free states, [\*424] the trouble, expense, and delays of judicial proceedings are the price that every subject pays for his liberty: and in all governments, he adds, the formalities of law increase in proportion to the value which is set on the honour, the fortune, the liberty, and life of the subject.

From these principles it might reasonably follow, that the English courts should be more subject to delays than those of other nations; as they set a greater value on life, on liberty and on property. But it is our peculiar felicity to enjoy the advantage, and yet be exempted from a proportionable share of the burthen. For the course of the civil law, to which most other nations conform their practice, is much more tedious than ours; for proof of which I need only appeal to the suitors of those courts in England where the practice of the Roman law is allowed in its full extent. And particularly in France, not only our Fortescue (s) accuses (on his own knowledge) their courts of most unexampled delays in administering justice; but even a writer of their own (t) has not scrupled to testify that there were in his time more causes there depending than in all Europe besides, and some of them a hundred years old. But (not to enlarge on the prodigious improvements which have been made in the celerity of justice by the disuse of real actions, by the statutes of amendment and jeofails, (u) and by other more modern regulations, which it now might be indelicate to remember, but which posterity will never forget) the time and attendance afforded by the judges in our English courts are also greater than those of many other countries. In the Roman calendar there were in the whole year but twenty eight-judicial or trivernal (v) days allowed to the prætor for deciding causes: (x) whereas, with us one-fourth of the year is term time in which three courts constantly sit for the dispatch of matters of law; besides the very close attendance of the court of chancery for determining \*suits in equity, and the numerous courts of assize and *nisi prius* [\*425] that sit in vacation for the trial of matters of fact. Indeed, there is no other country in the known world, that hath an institution so commodious and so adapted to the dispatch of causes, as our trial by jury in those courts for the decision of facts; in no other nation under heaven does justice make her progress twice in each year into almost every part of the kingdom, to decide upon the spot, by the voice of the people themselves, the disputes of the remotest provinces.

And here this part of our Commentaries, which regularly treats only of redress at the common law, would naturally draw to a conclusion. But, as the proceedings in the courts of equity are very different from those at common law, and as those courts are of a very general and extensive jurisdiction, it is in some measure a branch of the task I have undertaken, to give the student some general idea of the forms of practice adopted by these courts. These will, therefore, be the subject of the ensuing chapter.

(r) Sp. L. b. 6, c. 2.

(s) *De Laud. LL.* c. 53.

(t) *Bodin. de republ.* l. 6, c. 6.

(u) See page 407.

(v) Otherwise called *dies fasti* in quibus licebat prætori fari tria verba, *do, dico, addico*. *Calv. Lex.*

(x) *Spelman of the Terms*, § 4, c. 2.

## CHAPTER XXVII.

### OF PROCEEDINGS IN THE COURTS OF EQUITY.

BEFORE we enter on the proposed subject of the ensuing chapter, viz., the nature and method of proceedings in the courts of equity, (1) it will be proper to recollect the observations which were made in the beginning of this book (a) on the principal tribunals of that kind, acknowledged by the constitution of England; and to premise a few remarks upon those particular causes, wherein any of them claims and exercises a sole jurisdiction, distinct from and exclusive of the other.

(a) Pages 45, 50, 78.

(1) It is not to be assumed, because the system of equity has grown up as an independent and distinct system from that of the common law, that therefore the two are opposed and hostile to each other, and may be expected to operate at cross purposes. On the contrary, they are to be regarded as the two parts of a complete and symmetrical structure, the purpose of which is to accomplish justice in all the varying circumstances of human transactions. On the other hand, we are not to suppose, because equity is said to supply the defects of the common law, that it may do this at the discretion of the chancellor, and regardless of other rules than his own sense of what is right and just. It needs but the most cursory examination to show that the jurisdiction of equity is very clearly defined and limited, and that the discretion of the chancellor in administering this discretion is closely restrained within the lines of precedents which have evolved general rules for his guidance.

The general heads of equity jurisdiction may be stated as follows:

**FRAUD.**—Equity is said to abhor fraud; and therefore it will lend its aid to set aside contracts which are tainted by it, and even to vacate judgments and decrees where they have been obtained by means of it. The law has a concurrent jurisdiction in a great many cases, and will refuse to enforce contracts tainted with fraud; but this negative relief is not always sufficient for the purposes of complete justice, and therefore equity lends its aid to compel the surrender of contracts, the restoration of property dishonestly obtained, and the cancelment on public and corporate records of entries which have been made or shaped by means of fraudulent documents, representations or devices. Equity lends its aid also in the case of constructive frauds as where executors, administrators, guardians, or other trustees take advantage of the confidence belonging to their fiduciary relation to advance their own interests at the expense of those whose interests they were selected to protect; or where attorneys and other professional men betray the confidence of their employers. Unconscionable bargains obtained by the influence properly belonging to the several family relations may also demand the aid of equity for their abrogation.

**ACCIDENT.**—Equity may relieve against the consequences of accident in some cases. A familiar illustration is where, by reason of accidental circumstances and without his fault, a party has incurred a penalty or forfeiture. Here equity may give relief on such terms of compensation as may be found just. This, however, is not universally true; for if the parties themselves have stipulated what the damages shall be when a forfeiture is incurred, equity will not interfere. It is also a general rule that equity cannot relieve against a forfeiture imposed by statute.

**MISTAKE.**—If by mistake the contracts of parties are not made to express the actual intent, equity may give relief, provided they are founded upon a valuable, or even upon a good consideration; but purely voluntary transactions will not be aided. A common illustration of this head of equity is the correction of a deed or mortgage in which the description is imperfect or erroneous. In such a case the grantor or mortgagor will be compelled to correct it if the mistake is clearly established.

**ACCOUNT.**—Mutual dealings between partners can only be examined and the accounts adjusted in equity, and the court may decree the final dissolution of a partnership and the appointment of a receiver to wind up its concerns when the case seems to demand it. Accounts and demands between other parties which are too complicated or numerous to be properly tried at law, may also be adjusted in equity.

**INFANTS.**—Equity has general jurisdiction to protect infants and their estates, and may appoint guardians and displace the custody of parents where the interest of infants appears to require it. The infant on whose behalf a bill is filed becomes a ward of court, and it is a contempt of court to interfere with his custody, or to control or influence his action in such a manner as to defeat or embarrass the jurisdiction of the court which has been invoked in the case.

I have already (b) attempted to trace (though very concisely) the history, rise, and progress, of the extraordinary court, or court of equity, in chancery. The same jurisdiction is exercised, and the same system of redress pursued, in the equity court of the exchequer; with a distinction, however, as to some few matters, peculiar to each tribunal, and in which the other cannot interfere. And, first, of those peculiar to the chancery.

1. Upon the abolition of the court of wards, the care, which the crown was bound to take as guardian of its infant tenants, was totally extinguished in every feudal view; but \*resulted to the king in his court of chancery [ \*427] together with the general protection (c) of all other *infants* in the kingdom. When, therefore, a fatherless child has no other guardian, the court of chancery has a right to appoint one; and from all proceedings relative thereto, an appeal lies to the house of lords. The court of exchequer can only appoint a guardian *ad litem*, to manage the defence of the infant if a suit be com-

(b) Page 50, &amp;c.

(c) F. N. B. 27.

**LUNATICS, IMBECILES, ETC.**—Equity in these cases exercises a jurisdiction analogous to that in the case of infants, and appoints guardians or committees to take charge of person or estate. A statutory jurisdiction is sometimes conferred in the case of those who by vicious habits have been rendered incompetent to manage their estates.

**MARRIED WOMEN.**—The protection of married women in the proper control of their separate estates belongs to equity, as does also the enforcement of their undertakings with creditors and others in respect to such estates. Equity will also, in respect to other property which married women have brought to their husbands or have acquired during coverture, extend to them any needful protection, and make provision for an independent support for themselves or their children out of it when it seems equitable to do so.

**SPECIFIC PERFORMANCE.**—Equity has a discretionary power to decree the specific performance of contracts respecting lands, where damages for a breach would seem inadequate redress, and also in cases where the plaintiff might be without remedy at law by reason of failure in strict performance on his own part. In a few cases specific performance will be decreed in contracts respecting personalty, and it may also be had in some cases of provisions in marriage articles.

**FORECLOSURE OF MORTGAGES.**—Mortgage and other liens may be foreclosed in equity, not only in cases of real estate, but also when personalty has been conveyed or pledged by way of security.

**DOWER.**—A widow's dower may be recovered either at law or in equity, but in some cases only the equitable jurisdiction will be found fully adequate.

**PARTITION.**—The partition of joint estates between the several owners of interests is made on bill in equity filed by any party concerned.

**INTERPLEADER.**—Where two persons claim the same fund, which is in the custody of a third, the custodian for his own protection may file a bill in equity to compel the claimants to litigate as between themselves.

**TRUSTS.**—Equity has general jurisdiction in cases of trust and charity, and this is exclusive of the courts of law. It also has jurisdiction in all matters of the administration of estates of deceased persons, which however, in the United States, has generally been conferred upon special statutory courts.

**BILLS OF PEACE.**—These are calculated to restrain unnecessary and vexatious litigation, and to enjoin the bringing of numerous suits when one is adequate to all the purposes of justice.

**BILLS QUIA TIMET.**—The purpose of these bills is to prevent a threatened or possible future injury, and to quiet titles and estates in respect thereto.

**INJUNCTIONS.**—The court of chancery will issue the writ of injunction, not only as a temporary remedy pending litigation, but also as a permanent mandate against some threatened or contemplated injury. A common case is where a nuisance is being created to the injury of the plaintiff, or where patents are being infringed or trade marks pirated.

These sufficiently indicate the general heads of equity jurisdiction, and illustrate its great extent and value. It should be added that chancery formerly exercised important jurisdiction in compelling discovery where the common law courts were inadequate to reach the facts; but this has been rendered unimportant by the statutes which make parties to suits and other interested persons competent witnesses.

In many states of the American Union chancery as a distinct system has been abolished. Equitable principles nevertheless remain and are to be administered by the courts of law, and those courts issue injunctions and employ other equitable remedies when justice is found to require it. The valuable treatises of Story, Spence, Adams, Willard and Pomeroy on equity jurisdiction are therefore as important as ever, even in the states which no longer have chancery courts.

menced against him; a power which is incident to the jurisdiction of every court of justice: (d) but when the interest of a minor comes before the court judicially, in the progress of a cause, or upon a bill for that purpose filed, either tribunal indiscriminately will take care of the property of the infant.

2. As to *idiots* and *lunatics*: the king himself used formerly to commit the custody of them to proper committees, in every particular case; but now, to avoid solicitations and the very shadow of undue partiality, a warrant is issued by the king, (e) under his royal sign manual, to the chancellor or keeper of his seal to perform this office for him: and, if he acts improperly in granting such custodies, the complaint must be made to the king himself in council. (f) But the previous proceedings on the commission, to inquire whether or no the party be an idiot or a lunatic, are on the law side of the court of chancery, and can only be redressed (if erroneous) by writ of error in the regular course of law.

3. The king, as *parens patriæ*, has the general superintendence of all *charities*; which he exercises by the keeper of his conscience, the chancellor. And, therefore, whenever it is necessary, the attorney-general, at the relation of some informant (who is usually called the *relator*), files *ex officio* an information in the court of chancery to have the charity properly established. By statute, also, 43 Eliz. c. 4, authority is given to the lord chancellor, or lord keeper, and to the [\*428] chancellor of the duchy of Lancaster, respectively, to grant \*commissions under their several seals, to inquire into any abuses of charitable donations, and rectify the same by decree; which may be reviewed in the respective courts of the several chancellors, upon exceptions taken thereto. But, though this is done in the petty bag office in the court of chancery, because the commission is there returned, it is not a proceeding at common law, but treated as an original cause in the court of equity. The evidence below is not taken down in writing, and the respondent, in his answer to the exceptions, may allege what new matter he pleases; upon which they go to proof, and examine witnesses in writing upon all the matters in issue: and the court may decree the respondent to pay all the costs, though no such authority is given by the statute. And as it is thus considered as an original cause throughout, an appeal lies of course from the chancellor's decree to the house of peers, (g) notwithstanding any loose opinions to the contrary. (h)

4. By the several statutes relating to *bankrupts*, a summary jurisdiction is given to the chancellor, in many matters consequential or previous to the commissions thereby directed to be issued; from which the statutes give no appeal. (2)

On the other hand, the jurisdiction of the court of chancery doth not extend to some causes, wherein relief may be had in the exchequer. No information can be brought in chancery for such mistaken charities as are given to the king by the statutes for suppressing superstitious uses. Nor can chancery give any relief against the king, or direct any act to be done by him, or make any decree disposing of or affecting his property; not even in cases where he is a royal trustee. (i) (3) Such causes must be determined in the court of exchequer, as [\*429] a court of revenue: which alone has power \*over the king's treasury, and the officers employed in its management: unless where it properly belongs to the duchy court of Lancaster, which hath also a similar jurisdiction

(d) Cro. Jac. 641. 2 Lev. 163. T. Jones, 90. (e) See book I, ch. 8. (f) 3 P. Wms. 108. See Reg. Br. 267.

(g) Duke's Char. Uses, 62, 123. Corporation of Burford v. Lenthal, Cane. 9 May, 1742.

(h) 2 Vern. 118.

(i) Huggins v. York Buildings' Company, Cane. 24 Oct. 1740. Reeve v. Attorney-General, Cane. 27 Nov. 1741. Lightbourn v. Attorney-General, Cane. 2 May, 1742.

(2) This jurisdiction is now in the bankruptcy courts.

(3) It has already been stated that a sovereignty is not suable in its own courts, except with its own consent, and this consent is given either by general law, or specially for the particular case. See note p. 257, *supra*.



as a court of revenue, and, like the other, consists of both a court of law and a court of equity.

In all other matters, what is said of the court of equity in chancery will be equally applicable to the other courts of equity. Whatever difference there may be in the forms of practice, it arises from the different constitution of their officers: or, if they differ in any thing more essential, one of them must certainly be wrong; for truth and justice are always uniform, and ought equally to be adopted by them all.

. Let us next take a brief, but comprehensive view of the general nature of *equity*, as now understood and practiced in our several courts of judicature. I have formerly touched upon it, (k) but imperfectly: it deserves a more complete explication. Yet as nothing is hitherto extant that can give a stranger a tolerable idea of the courts of equity subsisting in England, as distinguished from the courts of law, the compiler of these observations cannot but attempt it with diffidence: those who know them best are too much employed to find time to write; and those who have attempted but little in those courts must be often at a loss for materials.

Equity, then, in its true and genuine meaning, is the soul and spirit of all law: *positive* law is construed, and *rational* law is made by it. In this, equity is synonymous to justice; in that, to the true sense and sound interpretation of the rule. But the very terms of a court of *equity*, and a court of *law*, as contrasted to each other, are apt to confound and mislead us: as if the one judged without equity, and the other was not bound by any law. Whereas every definition or illustration to be met with, which now draws a line between the two jurisdictions, by setting law and equity \*in opposition to each other, will be found either totally erroneous, or erroneous to a certain [\*430] degree.

1. Thus in the first place it is said, (l) that it is the business of a court of equity in England to abate the rigour of the common law. But no such power is contended for. Hard was the case of bond-creditors whose debtor devised away his real estate; rigorous and unjust the rule, which put the devisee in a better condition than the heir; (m) yet a court of equity had no power to interpose. Hard is the common law still subsisting, that land devised, or descending to the heir, shall not be liable to simple contract debts of the ancestor or deviser, (n) although the money was laid out in purchasing the very land, (4) and that the father shall never immediately succeed as heir to the real estate of the son: (o) but a court of equity can give no relief; though in both these instances the artificial reason of the law, arising from feudal principles, has long ago entirely ceased. The like may be observed of the descent of lands to a remote relation of the whole blood, or even their escheat to the lord, in preference to the owner's half brother; (p) and of the total stop to all justice, by causing the *parol* to *demur*, (q) whenever an infant is sued as heir, or is party to a real action. (5) In all such cases of positive law, the courts of equity, as well as the courts of law, must say with Ulpian, (r) "*hoc quidem perquam durum est, sed ita lex scripta est.*"

2. It is said, (s) that a court of equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a court of law. Both, for instance, are equally bound, and equally profess, to interpret statutes according to the true intent of the legislature. In general law all cases cannot be foreseen; or, if foreseen, cannot be expressed: some will arise that will fall within the \*meaning, though not within the words, [\*431] of the legislator; and others which may fall within the letter, may be

(k) Book I, introd. §§ 2, 3, *ad calc.*

(l) Lord Kaimes, Princ. of Equity, 44.

(m) *Ibid.*, ch. 15, pp. 243, 244; ch. 23, p. 377.

(n) See page 300.

(r) *Et.* 40, 9, 12.

(m) See book II, ch. 23, p. 378.

(o) *Ibid.*, ch. 14, p. 208.

(p) *Ibid.*, p. 227.

(s) Lord Kaimes, Princ. of Equity, 177.

(4) Th's rule is since abrogated by statute.

(5) Demurrer of the parol was abolished by 1 Wm. IV., c. 47.

contrary to his meaning, though not expressly excepted. These cases, thus out of the letter, are often said to be within the equity of an act of parliament; and so cases within the letter are frequently out of the equity. Here by *equity* we mean nothing but the sound interpretation of the law; though the words of the law itself may be too general, too special, or otherwise inaccurate or defective. These, then, are the cases which, as Grotius (*t*) says, "*lex non exacte definit, sed arbitrio boni viri permittit*," in order to find out the true sense and meaning of the lawgiver, from every other topic of construction. But there is not a single rule of interpreting laws, whether equitably or strictly, that is not equally used by the judges in the courts both of law and equity: the construction must in both be the same: or, if they differ, it is only as one court of law may also happen to differ from another. Each endeavors to fix and adopt the true sense of the law in question; neither can enlarge, diminish, or alter that sense in a single tittle.

3. Again, it hath been said, (*u*) that *fraud, accident and trust*, are the proper and peculiar objects of a court of equity. But every kind of *fraud* is equally cognizable, and equally adverted to, in a court of law: and some frauds are cognizable only there: as fraud in obtaining a devise of lands, which is always sent out of the equity courts, to be there determined. Many *accidents* are also supplied in a court of law; as loss of deeds, mistakes in receipts or accounts, wrong payments, deaths which make it impossible to perform a condition literally, and a multitude of other contingencies: and many cannot be relieved even in a court of equity: as, if by accident a recovery is ill suffered, a devise ill executed, a contingent remainder destroyed, or a power of leasing omitted, in a family settlement. A technical *trust*, indeed, created by the limitation of [*\*432*] a second use, was forced into \*the courts of equity in the manner formerly mentioned; (*w*) and this species of trusts, extended by inference and construction, have ever since remained as a kind of *peculium* in those courts. But there are other trusts, which are cognizable in a court of law: as deposits, and all manner of bailments; and especially that implied contract, so highly beneficial and useful, of having undertaken to account for money received to another's use, (*x*) which is the ground of an action on the case almost as universally remedial as a bill in equity.

4. Once more; it has been said that a court of equity is not bound by rules or precedents, but acts from the opinion of the judge, (*y*) founded on the circumstances of every particular case. Whereas the system of our courts of equity is a laboured, connected system, governed by established rules, and bound down by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection. Thus the refusing of a wife her dower in a trust-estate, (*z*) (*6*) yet allowing the husband his curtesy: the holding the penalty of a bond to be merely a security for the debt and interest, yet considering it sometimes as the debt itself, so that the interest shall not exceed that penalty, (*a*) the distinguishing between a mortgage at *five per cent.* with a clause of a reduction to *four*, if the interest be regularly paid, and a mortgage at *four per cent.* with a clause of enlargement to *five*, if the payment of the interest be deferred; so that the former shall be deemed a conscientious, the latter an unrighteous bargain: (*b*) all these, and other cases that might be instanced, are plainly rules of positive law; supported only by

(*t*) *De acquitate*, § 3.

(*u*) 1 Roll. Abr. 374. 4 Inst. 84. 10 Mod. 1.

(*w*) Book II, ch. 30.

(*x*) See page 163.

(*y*) This is stated by Mr. Selden (Table-Talk, tit. Equity) with more pleasantry than truth. "For how we have a measure, and know what to trust to: equity is according to the conscience of him that is chancellor; and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. It is the same thing with the chancellor's conscience."

(*z*) 3 P. Wms. 640. See book II, p. 337.

(*a*) Salk. 154.

(*b*) 3 Vern. 299, 316. 3 Atk. 690.

(6) Now otherwise, by the dower act, 3 and 4 Wm. IV, c. 105.

\*the reverence that is shown, and generally very properly shown, to a series of former determinations; that the rule of property may be uniform and steady. Nay, sometimes a precedent is so strictly followed, that a particular judgment, founded upon special circumstances, (c) gives rise to a general rule. [\*433]

In short, if a court of equity in England did really act as many ingenious writers have supposed it (from theory) to do, it would rise above all law, either common or statute, and be a most arbitrary legislator in every particular case. No wonder they are so often mistaken. Grotius, or Puffendorf, or any other of the great masters of jurisprudence, would have been as little able to discover, by their own light, the system of a court of equity in England, as the system of a court of law: especially, as the notions before mentioned of the character, power, and practice of a court of equity were formerly adopted and propagated (though [not with approbation of the thing] by our principal antiquaries and lawyers; Spelman, (d) Coke, (e) Lambard, (f) and Selden, (g) and even the great Bacon (h) himself. But this was in the infancy of our courts of equity, before their jurisdiction was settled, and when the chancellors themselves, partly from their ignorance of law (being frequently bishops or statesmen), partly from ambition or lust of power (encouraged by the arbitrary principles of the age they lived in), but principally from the narrow and unjust decisions of the courts of law, had arrogated to themselves such unlimited authority, as hath totally been disclaimed by their successors for now about a century past. The decrees of a court of equity were then rather in the nature of awards, formed on the sudden *pro re nata*, with more probity of intention than knowledge of the subject; \*founded on no settled principles, as [\*434] being never designed, and therefore never used for precedents. But the systems of jurisprudence, in our courts both of law and equity, are now equally artificial systems, founded on the same principles of justice and positive law: but varied by different usages in the forms and mode of their proceedings: the one being originally derived (though much reformed and improved) from the feudal customs, as they prevailed in different ages in the Saxon and Norman judicatures; the other (but with equal improvements) from the imperial and pontifical formularies, introduced by their clerical chancellors.

The suggestion indeed of every bill, to give jurisdiction to the courts of equity (copied from those early times), is that the complainant hath no remedy at the common law. But he who should from thence conclude, that no case is judged of in equity where there might have been relief at law, and at the same time casts his eye on the extent and variety of the cases in our equity reports, must think the law a dead letter indeed. The rules of property, rules of evidence, and rules of interpretation in both courts are, or should be, exactly the same: both ought to adopt the best, or must cease to be courts of justice. Formerly some causes, which now no longer exist, might occasion a different rule to be followed in one court, from what was afterwards adopted in the other, as founded in the nature and reason of the thing: but, the instant those causes ceased, the measure of substantial justice ought to have been the same in both. Thus the penalty of a bond, originally contrived to evade the absurdity of those monkish constitutions which prohibited taking interest for money, was therefore very pardonably considered as the real debt in the courts of law, when the debtor neglected to perform his agreement for the return of the loan with interest: for the judges could not, as the law then stood, give judgment that the interest should be specifically paid. But when afterwards the taking of interest became legal, as the necessary companion of commerce, (i) nay after

(c) See the case of Foster and Munt (1 Vern. 478) with regard to the undisposed residuum of personal estates.

(d) Quas in summis itaque tribunalibus multi e legum canone decernunt iudices, solus (si res exigerit) cohibeat cancellarius ex arbitrio; nec aliter decretis tenetur suis curia vel sui ipsius, quin, elucens nova ratione recognoscat quas voluerit, mutet et deleat prout suis videbitur prudentia. Gloss. 108.

(e) See pages 54, 55. (f) Archæon. 71, 72, 73.

(g) Ubi supra.

(h) De Augm. Scient. l. 8, c. 8.

(i) See book II, p. 456.

[\*435] the statute of 37 Hen. VIII, c. 9, had declared the \*debt or loan itself to be "the just and true intent" for which the obligation was given, their narrow-minded successors still adhered wilfully and technically to the letter of the ancient precedents, and refused to consider the payment of principal, interest, and costs, as a full satisfaction of the bond. At the same time more liberal men, who sate in the courts of equity, construed the instrument according to its "just and true intent," as merely a security for the loan: in which light it was certainly understood by the parties, at least after these determinations; and therefore this construction should have been universally received. So in mortgages, being only a landed as the other is a personal security for the money lent, the payment of principal, interest, and costs, ought at any time, before judgment executed, to have saved the forfeiture in a court of law, as well as in a court of equity. And the inconvenience, as well as injustice, of putting different constructions in different courts upon one and the same transaction, obliged the parliament at length to interfere, and to direct, by the statutes 4 and 5 Ann. c. 16, and 7 Geo. II. c. 20, that, in the cases of bonds and mortgages, what had long been the practice of the courts of equity should also for the future be universally followed in the courts of law; wherein it had before these statutes in some degree obtained a footing.(j)

Again; neither a court of equity nor of law can vary men's wills or agreements, or (in other words) make wills or agreements for them. Both are to understand them truly, and therefore uniformly. One court ought not to extend, nor the other abridge, a lawful provision deliberately settled by the parties, contrary to its just intent. A court of equity, no more than a court of law, can relieve against a penalty in the nature of stated damages; as a rent of 5*l.* an acre for ploughing up ancient meadow: (k) nor against a lapse of time, where the time is material to the contract; as in covenants for the renewal of leases. Both courts will equitably construe, but neither pretends to control or change, a lawful stipulation or engagement.

[\*436] \*The rules of decision are in both courts equally apposite to the subjects of which they take cognizance. Where the subject-matter is such as requires to be determined *secundum æquum et bonum*, as generally upon actions on the case, the judgments of the courts of law are guided by the most liberal equity. In matters of positive right, both courts must submit to and follow those ancient and invariable maxims "*quæ relictæ sunt et tradita*." (l) Both follow the law of nations, and collect it from history and the most approved authors of all countries, where the question is the object of that law: as in the case of the privileges of ambassadors, (m) hostages, or ransom-bills. (n) In mercantile transactions they follow the marine law, (o) and argue from the usages and authorities received in all maritime countries. Where they exercise a concurrent jurisdiction, they both follow the law of the proper *forum*: (p) in matters originally of ecclesiastical cognizance, they both equally adopt the canon or imperial law, according to the nature of the subject; (q) and if a question came before either, which was properly the object of a foreign municipal law, they would both receive information what is the rule of the country, (r) and would both decide accordingly.

Such then being the parity of law and reason which governs both species of courts, wherein (it may be asked) does their essential difference consist? It principally consists in the different modes of administering justice in each; in the mode of proof, the mode of trial, and the mode of relief. Upon these, and upon two other accidental grounds of jurisdiction, which were formerly driven into those courts by narrow decisions of the courts of law, viz.: the true construction of securities for money lent, and the form and effect \*of a trust or second use; upon these main pillars hath been gradually erected

(j) 2 Keb. 533, 535. Salk. 597. 6 Mod. 11, 60, 101.

(k) 2 Atk. 280.

(l) *De jure naturæ cogitare per nos aliquis dicere debemus; de jure populi Romani, quæ relictæ sunt et tradita.* Cic. de Leg. l. 3, ad calc.

(m) See book I, p. 253.

(n) *Ricord v. Bettenham*, Tr. 5 Geo. III. B. R.

(o) See book I, p. 75. Book II, pp. 459, 461, 467.

(p) See book II, p. 513.

(q) *Ibid.* 504.

(r) *Ibid.* 463.

that structure of jurisprudence, which prevails in our courts of equity, and is inwardly bottomed upon the same substantial foundations as the legal system which hath hitherto been delineated in these Commentaries; however different they may appear in their outward form, from the different taste of their architects.

1. And first, as to the mode of *proof*. When facts, or their leading circumstances, rest only in the knowledge of the party, a court of equity applies itself to his conscience, and purges him upon oath with regard to the truth of the transaction; and, that being once discovered, the judgment is the same in equity as it would have been at law. But for want of this discovery at law, the courts of equity have acquired a concurrent jurisdiction with every other court in all matters of account. (s) As incident to accounts, they take a concurrent cognizance of the administration of personal assets, (t) consequently of debts, legacies, the distribution of the residue, and the conduct of executors and administrators. (u) As incident to accounts, they also take the concurrent jurisdiction of tithes, and all questions relating thereto; (w) of all dealings in partnership, (x) and many other mercantile transactions; and so of bailiffs, receivers, factors, and agents. (y) It would be endless to point out all the several avenues in human affairs, and in this commercial age, which lead to or end in accounts.

From the same fruitful source, the compulsive discovery upon oath, the courts of equity have acquired a jurisdiction over almost all matters of fraud: (z) all matters in the private knowledge of the party, which, though concealed, are binding in conscience; and all judgments at law, obtained through such fraud or concealment. And this, not by \*impeaching or reversing the judgment itself, but by prohibiting the plaintiff from taking any advantage of a judgment, obtained by suppressing the truth; (a) and which, had the same facts appeared on the trial as now are discovered, he would never have attained at all. [\*438]

2. As to the mode of *trial*. This is by interrogatories administered to the witnesses, upon which their depositions are taken in writing, wherever they happen to reside. If therefore the cause arises in a foreign country, and the witnesses reside upon the spot; if, in causes arising in England, the witnesses are abroad, or shortly to leave the kingdom; or if witnesses residing at home are aged or infirm; any of these cases lays a ground for a court of equity to grant a commission to examine them, and (in consequence) (7) to exercise the same jurisdiction, which might have been exercised at law, if the witnesses could probably attend.

3. With respect to the mode of *relief*. The want of a more specific remedy than can be obtained in the courts of law gives a concurrent jurisdiction to a court of equity in a great variety of cases. To instance in executory agreements. A court of equity will compel them to be carried into strict execution, (b) unless where it is improper or impossible: instead of giving damages for their non-performance. (8) And hence a fiction is established, that what ought to be done shall be considered as being actually done, (c) and shall relate back to the time when it ought to have been done originally: and this

(s) 1 Cha. Ca. 57.

(t) 2 P. Wms. 145.

(u) 2 Cha. Ca. 152.

(w) 1 Eq. Ca. Abr. 367.

(x) 3 Vern. 377.

(y) *Ibid.* 638.

(z) 2 Cha. Ca. 46.

(a) 3 P. Wms. 148. Year-book, 22 Edw. IV, 87, pl. 21.

(b) 1 Eq. Ca. Abr. 16.

(c) 3 P. Wms. 215.

(7) The courts of law now have this jurisdiction, under statutes heretofore referred to.

(8) Specific performance, however, is not a matter of right, but always rests in the discretion of the court, and will not be decreed unless the contract was reasonable and fair. *Seymour v. Delancy*, 6 Johns. Ch., 222, and 3 Cow., 445; *Auter v. Miller*, 18 Iowa, 405; *Chambers v. Livermore*, 15 Mich., 381; *Hawralty v. Warren*, 18 N. J. Eq., 124; *McCarty v. Kyle*, 4 Cold., 348; *Pendleton v. Dalton*, Phill. (N. C.) Eq., 119. A contract which is illegal, immoral, or against public policy, will not be enforced. *Dumont v. Dufore*, 27 Ind., 263; *Platt v. Maples*, 19 La. An., 459.

fiction is so closely pursued through all its consequences, that it necessarily branches out into many rules of jurisprudence, which form a certain regular system. So of waste, and other similar injuries, a court of equity takes a concurrent cognizance, in order to prevent them by injunction. (*d*) Over questions that may be tried at law, in a great multiplicity of actions, a court of [\*439] equity assumes a \*jurisdiction, to prevent the expense and vexation of endless litigations and suits. (*e*) In various kinds of frauds it assumes a concurrent (*f*) jurisdiction, not only for the sake of a discovery, but of a more extensive and specific relief: as by setting aside fraudulent deeds, (*g*) decreeing re-conveyances, (*h*) or directing an absolute conveyance merely to stand as a security. (*i*) And thus, lastly, for the sake of a more beneficial and complete relief by decreeing a sale of lands, (*j*) a court of equity holds plea of all debts, incumbrances, and charges, that may affect it or issue there-out.

4. The true construction of *securities* for money lent is another fountain of jurisdiction in courts of equity. When they held the penalty of a bond to be the form, and that in substance it was only as a pledge to secure the repayment of the sum *bona fide* advanced, with a proper compensation for the use, they laid the foundation of a regular series of determinations, which have settled the doctrine of personal pledges or securities, and are equally applicable to mortgages of real property. The mortgagor continues owner of the land, the mortgagee of the money lent upon it; but this ownership is mutually transferred, and the mortgagor is barred from redemption, if, when called upon by the mortgagee, he does not redeem within a time limited by the court; or he may when out of possession be barred by length of time, by analogy to the statute of limitations. (*9*)

5. The form of a *trust*, or second use, gives the courts of equity an exclusive jurisdiction as to the subject-matter of all settlements and devises in that form, and of all the long terms created in the present complicated mode of conveying. This is a very ample source of jurisdiction: but the trust is governed by very nearly the same rules, as would govern the estate in a court of law, (*k*) [\*440] if no trustee was interposed: and \*by a regular positive system established in the courts of equity, the doctrine of trusts is now reduced to as great a certainty as that of legal estates in the courts of the common law.

These are the principal (for I omit the minuter) grounds of the jurisdiction at present exercised in our courts of equity: which differ, we see, very considerably from the notions entertained by strangers, and even by those courts themselves before they arrived to maturity; as appears from the principles laid down, and the jealousies entertained of their abuse, by our early juridical writers cited in a former page; (*l*) and which have been implicitly received and handed down by subsequent compilers, without attending to those gradual accessions and derelictions, by which in the course of a century this mighty river hath imperceptibly shifted its channel. Lambard, in particular, in the reign of Queen Elizabeth, lays it down, (*m*) that "equity should not be appealed unto, but only in rare and extraordinary matters: and that a good chancellor will not arrogate authority in every complaint that shall be brought before him upon whatsoever suggestion: and thereby both overthrow the authority of the courts of common law, and also bring upon men such a confusion and uncertainty, as hardly any man should know how or how long to hold his own assured to him." And certainly, if a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to preside might entertain of conscience in every particular case the incon-

(*d*) 1 Cha. Rep. 14. 2 Cha. Ca. 82.

(*e*) 1 Vern. 308. Prec. Cha. 261. 1 P. Wms. 672. Stra. 404.

(*f*) 1 Vern. 82. 1 P. Wms. 289.

(*g*) 2 P. Wms. 645, 668, 669.

(*h*) 1 Vern. 337.

(*i*) See page 433.

(*j*) 2 P. Wms. 156.

(*k*) 2 Vern. 84.

(*l*) 1 Eq. Ca. Abr. 337.

(*m*) *Archeion*, 71, 78.

(*9*) Now the bar is by express statute. 3 and 4 Wm. IV., c. 27, § 28.

venience that would arise from this uncertainty would be a worse evil than any hardship that could follow from rules too strict and inflexible. Its powers would have become too arbitrary to have been endured in a country like this, (n) which boasts of being governed in all respects by law and not by will. But since the time when Lambard wrote, a set of great and eminent lawyers, (o) who have successively held the great seal, have by degrees erected the system of relief administered by a court of equity into a regular \*science, [\*441] which cannot be attained without study and experience, any more than the science of law: but from which, when understood, it may be known what remedy a suitor is entitled to expect, and by what mode of suit, as readily and with as much precision in a court of equity as in a court of law.

It were much to be wished, for the sake of certainty, peace, and justice, that each court would as far as possible follow the other, in the best and most effectual rules for attaining those desirable ends. It is a maxim that equity follows the law; and in former days the law has not scrupled to follow even that equity which was laid down by the clerical chancellors. Every one who is conversant in our ancient books, knows that many valuable improvements in the state of our tenures (especially in leaseholds (p) and copyholds (q) and the forms of administering justice, (r) have arisen from this single reason, that the same thing was constantly effected by means of a *subpoena* in the chancery. And sure there cannot be a greater solecism, than that in two sovereign independent courts established in the same country, exercising concurrent jurisdiction, and over the same subject-matter, there should exist in a single instance two different rules of property, clashing with or contradicting each other.

It would carry me beyond the bounds of my present purpose to go farther into this matter. I have been tempted to go so far, because strangers are apt to be confounded by nominal distinctions, and the loose unguarded expressions to be met with in the best of our writers; and thence to form erroneous ideas of the separate jurisdictions now existing in England, but which never were separated in any other country in the universe. It hath also afforded me an opportunity to vindicate, on the one hand, the justice of our \*courts of [\*442] law from being that harsh and illiberal rule, which many are too ready to suppose it; and on the other, the justice of our courts of equity from being the result of mere arbitrary opinion, or an exercise of dictatorial power, which rides over the law of the land, and corrects, amends and controls it by the loose and fluctuating dictates of the conscience of a single judge. It is now high time to proceed to the practice of our courts of equity, thus explained, and thus understood.

The first commencement of a suit in chancery is by preferring a bill to the lord chancellor, in the style of a petition; "humbly complaining, sheweth to your lordship your orator A B that," &c. This is in the nature of a declaration at common law, or a libel and allegation in the spiritual courts: setting forth the circumstances of the case at length, as, some fraud, trust or hardship; "in tender consideration whereof" (which is the usual language of the bill), "and for that your orator is wholly without remedy at the common law," relief is therefore prayed at the chancellor's hands, and also process of *subpoena* against the defendant, to compel him to answer upon oath to all the matter charged in the bill. And, if it be to quiet the possession of lands, to stay waste, or to stop proceedings at law, an injunction is also prayed, in the nature of an *interdictum* by the civil law, commanding the defendant to cease.

This bill must call all necessary parties, however remotely concerned in interest, before the court, otherwise no decree can be made to bind them; and must be signed by counsel, as a certificate of its decency and propriety. For it must not contain matter either scandalous or impertinent: if it does, the

(n) 2 P. Wms. 685, 686.

(o) See pages 54, 55, 56.

(q) Bro. Abr. tit. *tenant per copie*, pl. 10. Litt. § 77.

(p) Gilb. of Ejectment, 2. 3 Bac. Abr. 100. 1

(r) See page 300.

defendant may refuse to answer it, till such scandal or impertinence is expunged, which is done upon an order to refer it to one of the officers of the court, called a master in chancery; of whom there are in number twelve, including the master of the rolls, all of whom, so late as the reign of Queen Elizabeth, were commonly doctors of the civil law. (s) The master is [\*443] to examine the propriety of the bill: and if he reports it scandalous or impertinent, such matter must be struck out, and the defendant shall have his costs; which ought of right to be paid by the counsel who signed the bill.

When the bill is filed in the office of the six clerks (who originally were all in orders; and therefore, when the constitution of the court began to alter, a law (t) was made to permit them to marry), when, I say, the bill is thus filed, if an injunction be prayed therein, it may be had at various stages of the cause, according to the circumstances of the case. If the bill be to stay execution upon an oppressive judgment, and the defendant does not put in his answer within the stated time allowed by the rules of the court, an injunction will issue of course: and, when the answer comes in the injunction can only be continued upon a sufficient ground appearing from the answer itself. But if an injunction be wanted to stay waste, or other injuries of an equally urgent nature, then upon the filing of the bill, and a proper case supported by *affidavits*, the court will grant an injunction immediately to continue till the defendant has put in his answer, and till the court shall make some farther order concerning it: and when the answer comes in, whether it shall then be dissolved or continued till the hearing of the cause, is determined by the court upon argument, drawn from considering the answer and affidavit together.

But, upon common bills, as soon as they are filed, process of *subpoena* is taken out: which is a writ commanding the defendant to appear and answer to the bill, on pain of 100*l*. But this is not all; for if the defendant, on service of the *subpoena*, does not appear within the time limited by the rules of the court, and plead, demur or answer to the bill, he is then said to be in *contempt*; and the respective processes of contempt are in successive order awarded against him. The first of which is an *attachment*, which is a writ [\*444] in the nature of a *capias*, directed to the sheriff, and commanding him to attach, or take up the defendant, and bring him into court. If the sheriff returns that the defendant is *non est inventus*, then an *attachment with proclamations* issues; which, besides the ordinary form of attachment, directs the sheriff that he cause public proclamations to be made throughout the county, to summon the defendant, upon his allegiance, personally to appear and answer. If this be also returned with a *non est inventus*, and he still stands out in contempt, a *commission of rebellion* is awarded against him, for not obeying the king's proclamations according to his allegiance; and four commissioners therein named, or any of them, are ordered to attach him where-soever he may be found in Great Britain, as a rebel and contemner of the king's laws and government, by refusing to attend his sovereign when thereunto required: since as was before observed, (u) matters of equity were originally determined by the king in person, assisted by his council; though that business is now devolved upon his chancellor. If upon this commission of rebellion a *non est inventus* is returned, the court then sends a *sergeant-at-arms* in quest of him; and if he eludes the search of the sergeant also, then a *sequestration* issues to seize all his personal estate, and the profits of his real, and to detain them, subject to the order of the court. Sequestrations were first introduced by Sir Nicholas Bacon, lord keeper in the reign of Queen Elizabeth, before which the court found some difficulty in enforcing its process and decrees. (v) After an order for a sequestration issued, the plaintiff's bill is to be taken *pro confesso*, and a decree to be made accordingly. So that the sequestration does not seem to be in the nature of a process to bring in the

(s) Smith's Commonw. b. ii, c. 12.

(u) Page 50.

(t) Stat. 14 and 15 Hen. VIII, c. 8.

(v) 1 Vern. 421.



defendant, but only intended to enforce the performance of the decree. Thus much if the defendant absconds.

If the defendant is taken upon any of this process, he is to be committed to the Fleet, or other prison, till he puts in his appearance, or answer, or performs whatever else this \*process is issued to enforce, and also clears his contempts by paying the costs which the plaintiff has incurred thereby. [\*445] For the same kind of process (which was also the process of the court of star-chamber till its dissolution) (*w*) is issued out in all sorts of contempts during the progress of the cause, if the parties in any point refuse or neglect to obey the order of the court.

The process against a body corporate is by *distringas*, to distrain them by their goods and chattels, rents and profits, till they shall obey the summons or directions of the court. And, if a peer is a defendant, the lord chancellor sends a *letter missive* to him to request his appearance, together with a copy of the bill; and, if he neglects to appear, then he may be served with a *subpœna*; and, if he continues still in contempt, a sequestration issues out immediately against his lands and goods, without any of the mesne process of attachments, &c., which are directed only against the person, and therefore cannot affect a lord of parliament. The same process issues against a member of the house of commons, except only that the lord chancellor sends him no letter missive.

The ordinary process before mentioned cannot be sued out till after service of the *subpœna*, for then the contempt begins; otherwise he is not presumed to have notice of the bill: and, therefore, by absconding to avoid the *subpœna* a defendant might have eluded justice, till the statute 5 Geo. II, c. 25, which enacts that, where the defendant cannot be found to be served with process of *subpœna*, and absconds (as is believed) to avoid being served therewith, a day shall be appointed him to appear to the bill of the plaintiff; which is to be inserted in the London gazette, read in the parish church where the defendant last lived, and fixed up at the royal exchange; and, if the defendant doth not appear upon that day, the bill shall be taken *pro confesso*.

But if the defendant appears regularly, and takes a copy of the bill, he is next to *demur*, *plead*, or *answer*.

\*A demurrer in equity is nearly of the same nature as a demurrer in [446] law; being an appeal to the judgment of the court, whether the defendant shall be bound to answer the plaintiff's bill; as, for want of sufficient matter of equity therein contained; or where the plaintiff, upon his own showing, appears to have no right; or where the bill seeks a discovery of a thing which may cause a forfeiture of any kind, or may convict a man of any criminal misbehaviour. For any of these causes a defendant may demur to the bill. And if, on demurrer, the defendant prevails, the plaintiff's bill shall be dismissed: if the demurrer be over-ruled, the defendant is ordered to answer.

A plea may be either to the *jurisdiction*; showing that the court has no cognizance of the cause: or to the *person*; showing some disability in the plaintiff, as by outlawry, excommunication, and the like; or it is in *bar*; showing some matter wherefore the plaintiff can demand no relief, as an act of parliament, a fine, a release, or a former decree. And the truth of this plea the defendant is bound to prove, if put upon it by the plaintiff. But as bills are often of a complicated nature, and contain various matter, a man may plead as to part, demur as to part, and answer to the residue. But no exceptions to formal *minuties* in the pleadings will be here allowed; for the parties are at liberty, on the discovery of any errors in form, to amend them. (x)

An *answer* is the most usual defence that is made to a plaintiff's bill. It is given in upon oath, or the honour of a peer or peeress: but where there are amicable defendants, their answer is usually taken without oath by consent of

(w) 18 Rym. Fœd. 195.

(x) En cest court de chancellerie home ne serra prejudicé par son mispleading ou pur default de formes selonque le verite del mater. car il doit agarder selonque consens, et nemi ex rigore juris. Denevyte des courtes, edit. 1534, fol. 296, 297. Bro. Abr. tit. Jurisdiction, 50.

the plaintiff. This method of proceeding is taken from the ecclesiastical courts, like the rest of the practice in chancery: for there in almost every case the plaintiff may demand the \*oath of his adversary in supply of proof. [\*447] Formerly this was done in those courts with compurgators in the manner of our waging of law; but this has been long disused; and instead of it the present kind of purgation, by the single oath of the party himself, was introduced. This oath was made use of in the spiritual courts, as well in criminal cases of ecclesiastical cognizance, as in matters of civil right; and it was then usually denominated the oath *ex officio*: whereof the high commission court in particular made a most extravagant and illegal use; forming a court of inquisition, in which all persons were obliged to answer in cases of bare suspicion, if the commissioners thought proper to proceed against them *ex officio* for any supposed ecclesiastical enormities. But when the high commission court was abolished by statute 16 Car. I, c. 11, this oath *ex officio* was abolished with it; and it is also enacted by statute 13 Car. II, st. 1, c. 12, "that it shall not be lawful for any bishop or ecclesiastical judge to tender to any person the oath *ex officio*, or any other oath whereby the party may be charged or compelled to confess, accuse, or purge himself, of any criminal matter. But this does not extend to oaths in a civil suit, and therefore it is still the practice, both in the spiritual courts and in equity, to demand the personal answer of the party himself upon oath. Yet if in the bill any question be put, that tends to the discovery of any crime, the defendant may thereupon demur, as was before observed, and may refuse to answer.

If the defendant lives within twenty miles of London, he must be sworn before one of the masters of the court: if farther off, there may be a *dedimus potestatem* or commission to take his answer in the country, where the commissioners administer to him the usual oath; and then, the answer being sealed up, either one of the commissioners carries it up to the court: or it is sent by a messenger, who swears he received it from one of the commissioners, and that the same has not been opened or altered since he received it. An answer must [\*448] be signed by counsel, and must either deny or confess all the \*material parts of the bill; or it may confess and avoid, that is, justify or palliate the facts. If one of these is not done, the answer may be excepted to for insufficiency, and the defendant be compelled to put in a more sufficient answer. A defendant cannot pray anything in this his answer, but to be dismissed the court: if he has any relief to pray against the plaintiff, he must do it by an original bill of his own, which is called a *cross-bill*.

After answer put in, the plaintiff, upon payment of costs, may amend his bill, either by adding new parties or new matter, or both, upon the new lights given him by the defendant; and the defendant is obliged to answer afresh to such amended bill. But this must be before the plaintiff has replied to the defendant's answer, whereby the cause is at issue: for afterwards, if new matter arises which did not exist before, he must set it forth by a *supplemental bill*. There may be also a bill of *revivor* when the suit is abated by the death of any of the parties; in order to set the proceedings again in motion, without which they remain at a stand. And there is likewise a bill of *interpleader*, where a person who owes a debt or rent to one of the parties in suit, but, till the determination of it, he knows not to which, desires that they may interplead, that he may be safe in the payment. In this last case it is usual to order the money to be paid into court for the benefit of such of the parties to whom, upon hearing, the court shall decree it to be due. But this depends upon circumstances; and the plaintiff must also annex an *affidavit* to his bill, swearing that he does not collude with either of the parties. (10)

(10) The complainant in a bill of interpleader ought to pay into court the money due. Daniell, Ch. Prac., 4th ed., 1563, and cases. No interlocutory injunction of proceedings at law will be granted without such payment, unless in some other way the payment is secured. Daniell, 1567, and cases cited.

If the plaintiff finds sufficient matter confessed in the defendant's answer to ground a decree upon, he may proceed to the hearing of the cause upon bill and answer only. But in that case he must take the defendant's answer to be true in every point. Otherwise the course is for the plaintiff to reply generally to the answer, averring his bill to be true, certain and sufficient, and the defendant's answer to be \*directly the reverse; which he is ready to prove as the court shall award; upon which the defendant rejoins, [\*449] averring the like on his side; which is joining issue upon the facts in dispute. To prove which facts is the next concern.

This is done by examination of witnesses, and taking their *depositions* in writing, according to the manner of the civil law. And for that purpose *interrogatories* are framed, or questions in writing; which, and which only, are to be proposed to, and asked of, the witnesses in the cause. These interrogatories must be short and pertinent; not leading ones; (as, "did not you see this?" or, "did not you hear that?") for if they be such the depositions taken thereon will be suppressed and not suffered to be read. For the purpose of examining witnesses in or near London, there is an examiner's office appointed; but for such as live in the country, a commission to examine witnesses is usually granted to four commissioners, two named of each side, or any three or two of them, to take the depositions there. And if the witnesses reside beyond sea, a commission may be had to examine them there upon their own oaths, and (if foreigners) upon the oaths of skillful interpreters. And it hath been established (y) that the deposition of an heathen who believes in the Supreme Being, taken by commission in the most solemn manner according to the custom of his own country, may be read in evidence.

The commissioners are sworn to take the examinations truly and without partiality, and not to divulge them till published in the court of chancery; and their clerks are also sworn to secrecy. The witnesses are compellable by process of *subpoena*, as in the courts of common law, to appear and submit to examination. And when their depositions are taken, they are transmitted to the court with the same care that the answer of a defendant is sent.

\*If witnesses to a disputable fact are old and infirm, it is very usual to file a bill to perpetuate the testimony of those witnesses, although [\*450] no suit is depending; for, it may be, a man's antagonist only waits for the death of some of them to begin his suit. This is most frequent when lands are devised by will away from the heir at law; and the devisee, in order to perpetuate the testimony of the witnesses to such will, exhibits a bill in chancery against the heir, and sets forth the will *verbatim* therein, suggesting that the heir is inclined to dispute its validity; and then, the defendant having answered, they proceed to issue as in other cases, and examine the witnesses to the will; after which the cause is at an end, without proceeding to any decree, no relief being prayed by the bill; but the heir is entitled to his costs, even though he contests the will. This is what is usually meant by proving a will in chancery.

When all the witnesses are examined, then, and not before, the depositions may be published, by a rule to pass publication; after which they are open for the inspection of all the parties, and copies may be taken of them. The cause is then ripe to be set down for hearing, which may be done at the procurement of the plaintiff or defendant, before either the lord chancellor or the master of the rolls, according to the discretion of the clerk in court, regulated by the nature and importance of the suit, and the arrear of causes depending before each of them respectively. Concerning the authority of the master of the rolls, to hear and determine causes, and his general power in the court of chancery, there were (not many years since) divers questions and disputes very warmly agitated, to quiet which it was declared by statute 3 Geo. II, c. 30, that all orders and decrees by him made, except such as by the course of the

(y) *Ormichund v. Barker*, 1 Atk. 21.

court were appropriated to the great seal alone, should be deemed to be valid; subject nevertheless to be discharged or altered by the lord chancellor, and so as they shall not be enrolled, till the same are signed by his lordship. Either [\*451] party may be *subpoenaed* to hear judgment \*on the day so fixed for the hearing: and then, if the plaintiff does not attend, his bill is dismissed with costs; or, if the defendant makes default, a decree will be made against him, which will be final, unless he pays the plaintiff's costs of attendance, and shows good cause to the contrary on a day appointed by the court. A plaintiff's bill may also at any time be dismissed for want of prosecution, which is in the nature of a non-suit at law, if he suffers three terms to elapse without moving forward in the cause.

When there are cross causes, on a cross bill filed by the defendant against the plaintiff in the original cause, they are generally contrived to be brought on together, that the same hearing and the same decree may serve for both of them. The method of hearing causes in court is usually this. The parties on both sides appearing by their counsel, the plaintiff's bill is first opened, or briefly abridged, and the defendant's answer also, by the junior counsel on each side; after which the plaintiff's leading counsel states the case and the matters in issue, and the points of equity arising therefrom: and then such depositions as are called for by the plaintiff are read by one of the six clerks, and the plaintiff may also read such part of the defendant's answer as he thinks material or convenient: (z) and after this, the rest of the counsel for the plaintiff make their observations and arguments. Then the defendant's counsel go through the same process for him, except that they may not read any part of his answer; and the counsel for the plaintiff are heard in reply. When all are heard, the court pronounces the *decree*, adjusting every point in debate, according to equity and good conscience; which decree being usually very long, the minutes of it are taken down and read openly in court by the registrar. The matter of costs to be given to either party, is not here held to be a point of right, but merely discretionary (by the statute 17 Ric. II, c. 6), according to [\*452] the circumstances of the case, as they \*appear more or less favourable to the party vanquished. And yet the statute 15 Hen. VI, c. 4, seems expressly to direct, that as well damages as costs shall be given to the defendant, if wrongfully vexed in this court.

The chancellor's decree is either *interlocutory* or *final*. It very seldom happens that the first decree can be final, or conclude the cause; for, if any matter of fact is strongly controverted, this court is so sensible of the deficiency of trial by written depositions that it will not bind the parties thereby, but usually directs the matter to be tried by jury; especially such important facts as the validity of a will, or whether A is the heir at law to B, or the existence of a *modus decimandi*, or real and immemorial composition for tithes. But, as no jury can be summoned to attend this court, the fact is usually directed to be tried at the bar of the court of king's bench, or at the assizes upon a *feigned issue*. For (in order to bring it there, and have the point in dispute, and that only, put in issue) an action is brought, wherein the plaintiff, by a fiction, declares that he laid a wager of 5*l*. with the defendant that A was heir at law to B; and then avers that he is so; and therefore demands the 5*l*. The defendant admits the feigned wager, but avers that A is not the heir to B; and therefore that issue is joined, which is directed out of chancery to be tried; and thus the verdict of the jurors at law determines the fact in the court of equity. These feigned issues seem borrowed from the *sponsio judicialis* of the Romans: (a) and are also frequently used in the courts of law, by consent

(a) On a trial at law, if the plaintiff reads any part of the defendant's answer, he must read the whole of it; for, by reading any of it, he shows a reliance on the truth of the defendant's testimony, and makes the whole of his answer evidence.

(a) *Nota est sponsio judicialis*; "*spondere quingentos si meus sit? spondeo, si tuus sit. Et tu quoque spondere quingentos, ni tuus sit? spondeo, ni meus sit.*" Vide Helmeo. *Antiquitat. l. 2, t. 16, § 3* and Sigon. *de iudiciis*, l. 21, p. 468, citat. ibid.

of the parties to determine some disputed right without the formality of pleading, and thereby to save much time and expense in the decision of a cause.

So, likewise, if a question of mere law arises in the course of a cause, as whether, by the words of a will, an estate for life, or \*in tail is created, or whether a future interest devised by a testator shall operate as a remainder or an executory devise, it is the practice of this court to refer it to the opinion of the judges of the court of king's bench or common pleas, upon a case stated for that purpose, wherein all the material facts are admitted, and the point of law submitted to their decision; who thereupon hear it solemnly argued by counsel on both sides, and certify their opinion to the chancellor. And upon such certificate the decree is usually founded.

Another thing also retards the completion of decrees. Frequently long accounts are to be settled, incumbrances and debts to be inquired into, and a hundred little facts to be cleared up, before a decree can do full and sufficient justice. These matters are always, by the decree on the first hearing, referred to a master in chancery to examine; which examinations frequently last for years; and then he is to report the fact, as it appears to him, to the court. This report may be excepted to, disproved, and overruled; or otherwise, is confirmed and made absolute, by order of the court.

When all issues are tried and settled, and all references to the master ended, the cause is again brought to hearing upon the matters of equity reserved; and a final decree is made: the performance of which is enforced (if necessary) by commitment of the person, or sequestration of the person's estate. And if, by this decree, either party thinks himself aggrieved, he may petition the chancellor for a *rehearing*; whether it was heard before his lordship, or any of the judges, sitting for him, or before the master of the rolls. For whoever may have heard the cause, it is the chancellor's decree, and must be signed by him before it is enrolled; (b) which is done of course, unless a rehearing be desired. Every petition for a rehearing must be signed by two counsel of character, usually such as have been concerned in the cause, certifying that they apprehend the cause is proper to be reheard. And upon the \*rehearing, all the evidence taken in the cause, whether read before or not, is now admitted to be read; because it is the decree of the chancellor himself, who only now sits to hear reasons why it should not be enrolled and perfected; at which time all omissions of either evidence or argument may be supplied. (c) But, after the decree is once signed and enrolled, it cannot be reheard or rectified but by bill of review, or by appeal to the house of lords.

A bill of *review* may be had upon apparent error in judgment, appearing on the face of the decree; or by special leave of the court upon oath made of the discovery of new matter or evidence, which could not possibly be had or used at the time when the decree passed. But no new evidence or matter then in the knowledge of the parties, and which might have been used before, shall be a sufficient ground for a bill of review.

An *appeal* to parliament, that is to the house of lords, is the dernier resort of the subject who thinks himself aggrieved by an interlocutory order or final determination in this court: and it is effected by *petition* to the house of peers, and not by *writ of error*, as upon judgments at common law. This jurisdiction is said (d) to have begun in 18 Jac. I, and it is certain, that the first petition which appears in the records of parliament, was preferred in that year; (e) and that the first which was heard and determined (though the name of appeal was then a novelty) was presented a few months after; (f) both levelled against the lord chancellor, Bacon, for corruption and other misbehaviour. It was afterwards warmly controverted by the house of commons in the reign of Charles the Second. (g) But this dispute is now at rest: (h) it

(b) Stat. 3 Geo. II, c. 30. See page 440.

(c) Glib. Rep. 151, 152.

(d) Com. Jour. 13 Mar. 1704.

(e) Lords' Jour. 23 Mar. 1690.

(f) *Ibid.* 3, 11, 12 Dec. 1691.

(g) Com. Jour. 19 Nov. 1678, &c.

(h) Show. Parl. C. 81.

being obvious to the reason of all mankind, that, when the courts of equity became principal tribunals for deciding causes of property, a revision of their \*decrees (by way of appeal) became equally necessary, as a writ of error from the judgment of a court of law. And, upon the same principle, from decrees of the chancellor relating to the commissioners for the dissolution of chauntries, &c., under the statute 37 Hen. VIII, c. 4, (as well as for charitable uses, under the statute 43 Eliz. c. 4), an appeal to the king in parliament was always unquestionably allowed. (i) But no new evidence is admitted in the house of lords upon any account; this being a distinct jurisdiction: (k) which differs it very considerably from those instances, wherein the same jurisdiction revises and corrects its own acts, as in rehearings and bills of review. For it is a practice unknown to our law (though constantly followed in the spiritual courts), when a superior court is reviewing the sentence of an inferior, to examine the justice of the former decree by evidence that was never produced below. And thus much for the general method of proceeding in the courts of equity. (11)

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(i) Duke's Charitable Uses, 68.

(k) Gilb. Rep. 155, 156.

(11) Since the jurisdiction acts of 1873 and 1875, very little is left in England of the former chancery practice. The proceedings in equity are conformed to those at law, so far as the circumstances and the relief applied for will admit, and issues of fact may be tried by jury before the equity judge.

In many states of the American Union the distinction between law and equity is abolished, and the equity system, as a system of procedure, has ceased to exist. But the peculiar equitable remedies are still available, and are given in the law courts.

# APPENDIX.

## No. 1.

No. 1.

### PROCEEDINGS ON A WRIT OF RIGHT PATENT.

#### SECT. 1.—WRIT OF RIGHT PATENT IN THE COURT-BARON.

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth, to Willoughby, earl of Abingdon, greeting. We command you that without delay you hold full right to William Kent, Esquire, of one messuage and twenty acres of land with the appurtenances, in Dorchester, which he claims to hold of you by the free service of one penny yearly in lieu of all services, of which Richard Allen deforces him. And unless you do so, let the sheriff of Oxfordshire do it, that we no longer hear complaint thereof for defect of right. *Witness* ourself at Westminster, the twentieth day of August, in the thirtieth year of our reign.

Pledges of prosecution, { JOHN DOE,  
  { RICHARD ROE.

#### SECT. 2. WRIT OF TOLT, TO REMOVE IT INTO THE COUNTY COURT.

CHARLES MORTON, Esquire, sheriff of Oxfordshire, to John Long, bailiff, ex-  
tant of our lord the king and of myself, greeting. *Because* by the complaint  
of William Kent, Esquire, personally present at my county court, to wit, on  
Monday, the Sixth day of September, in the thirtieth year of the reign of our  
lord George the Second, by the grace of God, of Great Britain, France and  
Ireland king, defender of the faith, and so forth, at Oxford, in the shire-house  
there holden, I am informed, that although he himself the writ of our said  
lord the king of right patent directed to Willoughby, earl of Abingdon, for  
this that \*he should hold full right to the said William Kent, of one messuage  
and twenty acres of land, with the appurtenances, in Dorchester, within my  
said county, of which Richard Allen deforces him, hath brought to the said  
Willoughby, earl of Abingdon; yet for that the said Willoughby, earl of Abing-  
don, favoureth the said Richard Allen in this part, and hath hitherto delayed  
to do full right according to the exigence of the said writ, I command you on  
the part of our said lord the king, firmly enjoining, that in your proper person  
you go to the court-baron of the said Willoughby, earl of Abingdon, at Dor-  
chester aforesaid, and take away the plaint, which there is between the said  
William Kent and Richard Allen by the said writ, into my county court to be  
next holden; and summon by good summoners the said Richard Allen, that he  
be at my county court, on Monday, the fourth day of October next coming, at  
Oxford, in the shire-house there to be holden to answer to the said William  
Kent thereof. And have you there then the said plaint, the summoners, and  
this precept. *Given* in my county court, at Oxford, in the shire-house, the  
sixth day of September, in the year aforesaid.

[11]

#### SECT. 3. WRIT OF PONE, TO REMOVE IT INTO THE COURT OF COMMON PLEAS.

GEORGE the Second, by the grace of God, of Great Britain, France, and Ire-  
land king, defender of the faith, and so forth, to the sheriff of Oxfordshire,  
greeting. *Put* at the request of William Kent, before our justices at West-  
minster, on the morrow of All Souls, the plaint which is in your county court  
by our writ of right, between the said William Kent, demandant, and Rich-  
ard Allen, tenant, of one messuage and twenty acres of land, with the appur-  
tenances, in Dorchester; and summon by good summoners the said Richard  
Allen, that he be then there, to answer to the said William Kent thereof. And  
have you there the summoners and this writ. *Witness* ourself at Westminster,  
the tenth day of September, in the thirtieth year of our reign.

## No. 1.

## SECT. 4. WRIT OF RIGHT, QUA DOMINUS REMITT CURIAM.

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth, to the sheriff of Oxfordshire, greeting. *Command* Richard Allen, that he justly and without delay render unto William Kent one messuage and twenty acres of land, with the appurtenances in Dorchester, which he claims to be his right and inheritance, and whereupon he complains that the aforesaid Richard unjustly deforces him. And unless he shall so do, and \*if the said William shall give you security of prosecuting his claim, then summon by good summoners the said Richard, that he appear before our justices at Westminster, on the morrow of All Souls, to show wherefore he hath not done it. And have you there the summoners and this writ. *Witness* ourself at Westminster, the twentieth day of August, in the thirtieth year of our reign. Because Willoughby, earl of Abingdon, the chief lord of that fee, hath thereupon remised unto us his court.

Sheriff's return. Pledges of } John Doe. Summoners of the } John Den.  
prosecution. } Richard Roe, within-named Richard, } Richard Fen.

## SECT. 5. THE RECORD, WITH AWARD OF BATTEL.†

Plens at Westminster before Sir John Willes, knight, and his brethren justices of the bench of the lord the king at Westminster, of the term of Saint Michael, in the thirtieth year of the reign of the lord George the Second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, &c.

Writ. *Ozon*, } WILLIAM KENT, esquire, by James Parker, his attorney, demands to wit. } against Richard Allen, gentleman, one messuage and twenty acres of land, with the appurtenances in Dorchester, as his right and inheritance, by Dominus Remitt curiam. writ of the lord the king of right, because Willoughby, earl of Abingdon, the chief lord of that fee, hath now thereupon remised to the lord the king his court. And whereupon he saith that he himself was seized of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in the time of peace, in the time of the lord George the First, late king of Great Britain, by taking the esplees thereof to the value† [of ten shillings and more, in rents, corn and grass]. And that such is his right he offers [suit and good proof]. And the said Richard Allen, by Peter Jones, his attorney, comes and defends the right of the said William Kent, as his seisin, when [and where it shall behoove him], and all [that concerns it], and whatsoever [he ought to defend] and chiefly the tenements aforesaid, with the appurtenances, as of fee and right [namely, one messuage and twenty acres of land, with appurtenances in Dorchester]. And this he is ready to defend by the body of his freeman, George Rumbold by name, who is present here in court, ready to defend the same by his body, or in what manner soever the court of the lord the king shall consider that he ought to defend. \*And if any mischance should befall the said George (which God defend), he is ready to defend the same by another man, who [is bounden and able to defend it]. And the said William Kent saith, that the said Richard Allen unjustly defends the right of him the said William, and his seisin, &c., and all, &c., and whatsoever, &c., and chiefly of the tenements aforesaid with the appurtenances as of fee and right, &c., because he saith, that he himself was seized of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in the time of peace, in the time of the said lord George the First, late king of Great Britain, by taking the esplees thereof to the value, &c. And that such is his right, he is prepared to prove by the body of his freeman, Henry Broughton by name, who is present here in court ready to prove the same by his body, or in what manner soever the court of the lord the king shall consider that he ought to prove; and if any mischance should befall the said Henry (which God defend), he is ready to prove the same by another man, who, &c. And hereupon it is demanded of the said George and Henry, whether they are ready to make battle as they before have waged it; who say that they are. And the same George Rumbold giveth gage of defending, and the said Henry Broughton giveth gage of proving; and such engagement being given as the manner is, it is demanded of the said William Kent and Richard Allen, if they can say any thing wherefore battel ought not to be awarded in this case; who say that they cannot. Therefore it is considered, that battel be made thereon, &c. And the said George Rumbold findeth pledges of battel, to wit, Paul Jenkins and Charles Carter;

† As to battel, see page 337, n. 7.

‡ N. B. The clauses between hooks, in this and the subsequent numbers of the appendix, are usually no otherwise expressed in the Records than by an &c.



and the said Henry Broughton findeth also pledges of battel, to wit, Reginald Read and Simon Tayler. *And thereupon* day is here given as well to the said William Kent as to the said Richard Allen, to wit, on the morrow of Saint Martin next coming, by the assent as well of the said William Kent as of the said Richard Allen. And it is commanded that each of them then have here his champion, sufficiently furnished with competent armour as becomes him, and ready to make the battle aforesaid; and that the bodies of them in the mean time be safely kept, on peril that shall fall thereon. At which day here come as well the said William Kent as the said Richard Allen by their attorneys aforesaid, and the said George Rumbold and Henry Broughton in their proper persons likewise come, sufficiently furnished with competent armour as becomes them, ready to make the battle aforesaid, as they have before waged it. *And hereupon* day is further given by the court here, as well to the said William Kent as to the said Richard Allen, at Tothill, near the city of Westminster, in the county of Middlesex, to wit, on the morrow of the Purification of the Blessed Virgin Mary next coming, by the assent as well of the said William Kent as of the aforesaid Richard. And it is commanded, that each of them have then there his champion, armed in the form aforesaid, ready to make the battle aforesaid, and that their bodies in the meantime, &c. At which day here, to wit, at Tothill aforesaid, comes the said Richard Allen by his attorney aforesaid, and the said George Rumbold and Henry Broughton in their proper persons likewise come, sufficiently furnished with competent armour as becomes them, ready to make the battle aforesaid as they before had waged it. And the said William Kent being solemnly called doth not come, nor hath prosecuted his writ aforesaid. *Therefore it is considered*, that the same William and his pledges of prosecuting, to wit, John Doe and Richard Roe, be in mercy for his false complaint, and that the same Richard go thereof without a day, &c., and also that the said Richard do hold the tenements aforesaid with the appurtenances, to him and his heirs, quit of the said William and his heirs, forever, &c.

No. I.

Continuance.

Champions appear.

Adjournment to Tothill Fields.

[\*v]

Demandant nonsuit.

Final judgment for the tenant.

## SECT. 6. TRIAL BY THE GRAND ASSIZE.

—And the said Richard Allen, by Peter Jones, his attorney, comes and defends the right of the said William Kent, and his seisin, when, &c., and all, &c., and whatsoever, &c., and chiefly of the tenements aforesaid with the appurtenances, as of fee and right, &c., and puts himself upon the grand assize of the lord the king, and prays recognition to be made, whether he himself hath greater right to hold the tenements aforesaid with the appurtenances to him and his heirs as tenants thereof as he now holdeth them, or the said William to have the said tenements with the appurtenances, as he above demandeth them. And he tenders here in court six shillings and eight pence to the use of the lord the now king, &c., for that, to wit, it may be inquired of the time [of the seisin alleged by the said William]. And he therefore prays, that it may be inquired by the assize, whether the said William Kent was seized of the tenements aforesaid with the appurtenances in his demesne as of fee in the time of the said lord the king George the First, as the said William in his demand before hath alleged. *Therefore* it is commanded the sheriff, that he summon by good summoners four lawful knights of his county, girt with swords, that they be here on the octaves of Saint Hilary next coming, to make election of the assize aforesaid. The same day is given as well to the said William Kent as to the said Richard Allen here, &c. At which day here come as well the said William Kent, as the said Richard Allen; and the sheriff, to wit, Sir Adam Alstone, knight, now returns, that he had caused to be summoned Charles Stephens, Randel Wheler, Toby Cox, and Thomas Munday, four lawful knights of his county, girt with swords, by John Doe and Richard Roe his bailiffs, to be here at the said octaves of Saint Hilary, to do as the said writ thereof commands and requires; and that the said summoners, and each of them, are mainprized by John Day and James Fletcher. Whereupon the said Charles Stephens, Randel Wheler, Toby Cox, and Thomas Munday, four lawful knights of the county aforesaid, girt with swords, being called, in their proper persons come, and being sworn upon their oath in the presence of the parties aforesaid, chose of themselves and others twenty-four, to wit, Charles Stephens, Randel Wheler, Toby Cox, Thomas Munday, Oliver Greenway, John Boys, Charles Price, knights; Daniel Prince, William Day, Roger Lucas, Patrick Fleming, James Harris, John Richardson, Alexander Moore, Peter Payne, Robert Quin, Archibald Stuart, Bartholomew Norton, and Henry Davis, esquires; John Porter, Christopher Ball, Benjamin Robinson, Lewis Long, William Kirby, gentlemen, good and lawful men of the county aforesaid, who neither are of kin to the said William Kent nor to the said Richard

Defence.

Misc.

Tender of demt-mark.

Summons of the knights.

Return.

[\*vi]

Election of the recognitors.

<b>No. II.</b>	Allen, to make recognition of the grand assize aforesaid. <i>Therefore it is com-</i>
<b>Ventre facias.</b>	manded the sheriff, that he cause them to come here from the day of Easter in fifteen days, to make the recognition aforesaid. The same day is there given to the parties aforesaid. At which day here come as well the said William Kent as the said Richard Allen, by their attorneys aforesaid, and the recognitors of the assize, whereof mention is made above, being called, come, and certain of them, to wit. Charles Stephens, Randel Wheeler, Toby Cox, Thomas Munday, Charles Price, knights; Daniel Prince, Roger Lucas, William Day, James Harris, Peter Payne, Robert Quin, Henry Davis, John Porter, Christopher Ball, Lewis Long, and William Dirby, being elected, tried, and sworn upon their oath say, that the said William Kent hath more right to have the tenements aforesaid with the appurtenances to him and his heirs, as he demandeth the same, than the said Richard Allen to hold the same as he now holdeth them, according as the said William Kent by his writ aforesaid hath supposed. <i>Therefore it is considered</i> , that the said William Kent do recover his seisin against the said Richard Allen of the tenements aforesaid, with the appurtenances, to him and his heirs, quit of the said Richard Allen and his heirs forever; and the said Richard Allen in mercy, &c.
<b>Recognitors sworn.</b>	
<b>Verdict for the demandant.</b>	
<b>Judgment.</b>	

[\*vii]

\*No. II.

PROCEEDINGS IN AN ACTION OF TRESPASS IN EJECTMENT,  
BY ORIGINAL, IN THE KING'S BENCH.

SECT. 1. THE ORIGINAL WRIT.

*Si fecerit te  
securum.*

GEORGE the Second, by the grace of God, of Great Britain, France and Ireland, king, defender of the faith, and so forth, to the sheriff of Berkshire, greeting. *If* Richard Smith shall give you security of prosecuting his claim, then put by gage and safe pledges William Stiles, late of Newbury, gentleman, so that he be before us on the morrow of All-Souls, wheresoever we shall then be in England, to show wherefore with force and arms he entered into one messuage with the appurtenances, in Sutton, which John Rogers, esquire, hath demised to the aforesaid Richard, for a term which is not yet expired, and ejected him from his said farm, and other enormities to him did, to the great damage of the said Richard, and against our peace. And have you there the names of the pledges and this writ. *Witness* ourself at Westminster, the twelfth day of October, in the twenty-ninth year of our reign.

Sheriff's  
return.

Pledges of	{ JOHN DOE.	The within named	{ JOHN DEN.
prosecution,			

SECT. 2. COPY OF THE DECLARATION AGAINST THE CASUAL EJECTOR, WHO GIVES NOTICE THEREUPON TO THE TENANT IN POSSESSION.

*Michaelmas, the 29th of King George the Second.*

Declaration.

[\*viii]

*Berks,* } WILLIAM STILES, late of Newbury in the said county, gentleman, to wit. } was attached to answer Richard Smith, of a plea, wherefore with force and arms he entered into one messuage, with the appurtenances, in Sutton in the county aforesaid, which John Rogers, Esquire, demised to the said Richard Smith for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the lord the king, &c. And whereupon the said Richard by \*Robert Martin his attorney complains, that whereas the said John Rogers, on the first day of October, in the twenty-ninth year of the reign of the lord the king that now is, at Sutton aforesaid, had demised to the same Richard the tenement aforesaid, with the appurtenances, to have and to hold the said tenement, with the appurtenances, to the said Richard and his assigns, from the Feast of Saint Michael the Archangel then last past, to the end and term of five years from thence next following and fully to be complete and ended, by virtue of which demise the said Richard entered into the said tenement, with the appurtenances, and was thereof possessed; and the said Richard being so possessed thereof, the said William afterwards, that is to say, on the said first day of October in the said twenty-ninth year, with force and arms, that is to say, with swords, staves, and knives, entered into the said tenement, with the appurtenances, which the said John Rogers demised to the said Richard in form aforesaid for the term aforesaid, which is not yet expired, and ejected the said Richard out of his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the

said lord the king; whereby the said Richard saith, that he is injured and damaged to the value of twenty pounds. And thereupon he brings suit, &c.

No. II.

MARTIN, for the plaintiff,	} Pledges of	} JOHN DOE.
PETERS, for the defendant.		

MR. GEORGE SAUNDERS :

I am informed that you are in possession of, or claim title to, the premises Notice mentioned in this declaration of ejectment, or to some part thereof; and I, being sued in this action as a casual ejector, and having no claim or title to the same, do advise you to appear next Hilary Term, in his majesty's court of king's bench at Westminster, by some attorney of that court, and then and there, by a rule to be made of the same court, to cause yourself to be made defendant in my stead; otherwise I shall suffer judgment to be entered against me, and you will be turned out of possession.

Your loving friend,

5th January, 1756.

WILLIAM STILES.

\*SECT. 3. THE RULE OF COURT.

[\*ix]

*Hilary Term, in the twenty-ninth Year of King George the Second.*

*Berks,* } IT IS ORDERED by the court, by the assent of both parties, and their *Smith against*  
*to wit,* } attorneys, that George Saunders, gentleman, may be made defendant, *Stiles, for one*  
 in the place of the now defendant, William Stiles, and shall immediately ap- *messuage with*  
 pear to the plaintiff's action, and shall receive a declaration in a plea of tres- *the appurtenances in*  
 pass and ejectment of the tenements in question, and shall immediately plead *Sutton, on the de-*  
 thereto not guilty: and, upon the trial of the issue, shall confess lease, entry, *mise of John*  
 and ouster, and insist upon his title only. And if upon the trial of the issue, *Rogers.*  
 the said George do not confess lease, entry, and ouster, and by reason thereof *the plaintiff*  
 the plaintiff cannot prosecute his writ, then the taxation of costs upon such *non pros.*  
*shall cease,* and the said George shall pay such costs to the plaintiff, *as by the court*  
 as by the court of our lord the king here shall be taxed and adjudged, for such *his default in non-*  
 his default in non-performance of this rule; and judgment shall be entered *against the said*  
 against the said William Stiles, now the casual ejector, by default. And it is *further ordered,*  
 further ordered, that if, upon the trial of the said issue, a verdict shall be *given for the*  
 given for the defendant, or if the plaintiff shall not prosecute his writ upon *any other cause*  
 any other cause than for the not confessing lease, entry, and ouster, as afore- *said, then the*  
 said, then the lessor of the plaintiff shall pay costs, if the plaintiff does not pay *them.*

By the Court.

MARTIN, for the plaintiff.

NEWMAN, for the defendant.

SECT. 4. THE RECORD.

Pleas before the lord the king at Westminster, of the Term of Saint Hilary, in the twenty-ninth year of the reign of the lord George the Second, by the grace of God, of Great Britain, France and Ireland king, defender of the faith, &c.

*Berks,* } GEORGE SAUNDERS, late of Sutton, in the county aforesaid, gentle-  
*man,* was attached to answer Richard Smith, of a plea, whereof with  
 force and arms he entered into one messuage, with the appurtenances, in Sut-  
 ton, which John Rogers, Esq., hath demised to the said Richard, for a term  
 which is not yet expired, and ejected him from his said farm, and other wrongs  
 to him did, to the great damage of the said Richard, and against the peace of  
 the lord the king that \*now is. And whereupon the said Richard, by Robert  
 Martin, his attorney, complains, that whereas, the said John Rogers, on the  
 first day of October in the twenty-ninth year of the reign of the lord the  
 king that now is, at Sutton aforesaid, had demised to the said Richard the  
 tenement aforesaid, with the appurtenances, to have and to hold the said tenement,  
 with the appurtenances, to the said Richard and his assigns, from the  
 feast of Saint Michael the Archangel then last past, to the end and term of  
 five years from thence next following, and fully to be complete and ended; by  
 virtue of which demise the said Richard entered into the said tenement, with  
 the appurtenances, and was thereof possessed: and the said Richard being so  
 possessed thereof, the said George afterwards, that is to say, on the first day  
 of October in the said twenty-ninth year, with force and arms, that is to say,  
 with swords, staves, and knives, entered into the said tenement, with the  
 appurtenances, which the said John Rogers demised to the said Richard, in

[\*x]  
 Declaration, or  
 count.

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<u>No. II.</u>	form aforesaid, for the term aforesaid, which is not yet expired, and ejected the said Richard out of his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the said lord the king; whereby the said Richard saith that he is injured and endamaged to the value of twenty pounds: and thereupon he brings suit [and good proof.] And the aforesaid George Saunders, by Charles Newman, his attorney, comes and defends the force and injury, when [and where it shall behove him]; and saith that he is in no wise guilty of the trespass and ejectment aforesaid, as the Richard above complains against him; and thereof he puts himself upon the country; and the said Richard doth likewise the same; Therefore let a jury come thereupon before the lord the king, on the octave of the purification of the blessed Virgin Mary, wheresoever he shall then be in England, who neither [are of kin to the said Richard, nor to the said George], to recognize [whether the said George be guilty of the trespass and ejectment aforesaid]; because as well [the said George as the said Richard, between whom the difference is, have put themselves on the said jury]. The same day is there given to the parties aforesaid. <i>Afterwards</i> the process therein, being continued between the said parties of the plea aforesaid by the jury, is put between them in respite, before the lord the king shall then be in England; until the day of Easter in fifteen days, wheresoever the said lord the king shall then be in England; unless the justices of the lord the king, assigned to take assizes in the county aforesaid, shall have come before that time, to wit, on Monday the eighth of March, at Reading, in the said county, by the form of the statute [in that case provided], by reason of the default of the jurors [summoned to appear as aforesaid]. At which day, before the lord the king, at Westminster, come the parties aforesaid by their attorneys aforesaid; and the aforesaid justices of assize, before whom [the jury aforesaid came] sent here
Defence. Plea, not guilty. Issue.	their record before them, had in these words, to wit: <i>Afterwards</i> , at the day and place within contained, before Heneage Legger, esquire, one of the barons of the exchequer of the lord the king, and Sir John Eardly Wilmot, knight, one of the justices of the said lord the king, assigned to hold pleas before the king himself, justices of the said lord the king, assigned to take assizes at the county of Berks by the form of the statute [in that case provided], come as well the within-named Richard Smith, as the within-written George Saunders, by their attorneys within contained; and the jurors of the jury whereof mention is within made being called, certain of them, to wit, Charles Holloway, John Hooke, Peter Graham, Henry Cox, William Brown, and Francis Oakley, come, and are sworn upon the jury; and because the rest of the jurors of the same jury did not appear, therefore others of the bystanders being chosen by the sheriff, at the request of the said Richard Smith, and by the command of the justices aforesaid, are appointed anew, whose names are affixed to the panel within written, according to the form of the statute in such case made and provided; which said jurors so appointed anew, to wit, Roger Bacon, Thomas Small, Charles Pye, Edward Hawkins, Samuel Roberts, and Daniel Parker, being likewise called, come; and together with the other jurors aforesaid before impanelled and sworn, being elected, tried, and sworn to speak the truth of the matter within contained, upon their oath say, that the aforesaid George Saunders is guilty of the trespass and ejectment within-written, in manner and form as the aforesaid Richard Smith within complains against him; and assess the damages of the said Richard Smith, on occasion of that trespass and ejectment, besides his costs and charges which he hath been put unto about his suit in that behalf, to twelve-pence; and, for those costs and charges, to forty shillings. Whereupon, the said Richard Smith, by his attorney aforesaid, prayeth judgment against the said George Saunders, in and upon the verdict aforesaid, by the jurors aforesaid given, in the form aforesaid; and the said George Saunders, by his attorney aforesaid, saith that the court here ought not to proceed to give judgment upon the said verdict, and prayeth that judgment against him, the said George Saunders, in and upon the verdict aforesaid, by the jurors aforesaid, given in the form aforesaid, may be stayed, by reason that the said verdict is insufficient and erroneous, and that the same verdict may be quashed, and that the issue aforesaid may be tried anew by other jurors, to be afresh impanelled. And, because the court of the lord the king here is not yet advised of giving their judgment of and upon the premises, therefore day thereof is given as well to the said Richard Smith as the said George Saunders, before the lord the king, until the morrow of the ascension of our Lord, wheresoever the said lord the king shall then be in England, to hear their judgment of and upon the premises, for that the court of the lord the king is not yet advised thereof. At which day, before the lord the king, at Westminster, come the parties aforesaid, by their attorneys aforesaid; upon which, the record and matters aforesaid having been seen, and by the court of the lord the king now here fully under-
Verdict awarded.	[*xi]
Respite for default of jurors.	[*xii]
Nisi prius.	[*xii]
Tales de circumstantibus.	[*xii]
Verdict for the plaintiff.	[*xii]
Motion in arrest of judgment.	[*xii]
Continuance.	[*xii]
[*xii]	[*xii]

stood, and all and singular the premises having been examined, and mature deliberation being had thereupon, for that it seems to the court of the lord the king now here that the verdict aforesaid is in no wise insufficient or erroneous, and that the same ought not to be quashed, and that no new trial ought to be had of the issue aforesaid.—*Therefore it is considered*, that the said Richard do recover against the said George his term yet to come, of and in the said tenements, with the appurtenances, and the said damages assessed by the said jury in form aforesaid, and also twenty-seven pounds six shillings and eight-pence for his costs and charges aforesaid, by the court of the lord the king here awarded to the said Richard, with his assent, by way of increase; which said damages in the whole amount to twenty-nine pounds, seven shillings and eight-pence. *Capitator pro fine.* “And let the said George be taken [until he maketh fine to the lord the king].”† And hereupon the said Richard, by his attorney aforesaid, prayeth a writ of the lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have possession of his term aforesaid yet to come, of and in the tenements aforesaid, with the appurtenances; and it is granted unto him, returnable before the lord the king on the morrow of the Holy Trinity, wheresoever he shall then be in England. At which day, before the lord the king, at Westminster, cometh the said Richard, by his attorney aforesaid; and the sheriff, that is to say, Sir Thomas Reeve, knight, now sendeth that he, by virtue of the writ aforesaid, to him directed, on the ninth day of June last past, did cause the said Richard to have his possession of his term aforesaid yet to come, of and in the tenements aforesaid, with the appurtenances, as he was commanded. *Opinion of the court.* *Judgment for the plaintiff.* *Costs.* *Writ of possession.* *and return.*

## \*No. III.

[\*xiii]

## PROCEEDINGS ON AN ACTION OF DEBT IN THE COURT OF COMMON PLEAS; REMOVED INTO THE KING'S BENCH BY WRIT OF ERROR.

## SECT. 1. ORIGINAL.

GEORGE the Second, by the Grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire, greeting. *Præcipe.* Command Charles Long, late of Burford, gentleman, that justly and without delay he render to William Burton two hundred pounds, which he owes him and unjustly detains, as he saith. And unless he shall do so, and if the said William shall make you secure of prosecuting his claim, then summon by good summoners the aforesaid Charles, that he be before our justices at Westminster, on the octave of Saint Hilary to show wherefore he hath not done it. And have you there then the summoners and this writ. *Witness* ourself, at Westminster, the twenty-fourth day of December, in the twenty-eighth year of our reign.

Pledges of  
prosecu-  
tion, { JOHN DOE.  
          { RICHARD ROE.

Summoners of the  
within-named  
Charles Long, { ROGER MORRIS.  
                  { HENRY JOHNSON.

Sheriff's  
return.

## SECT. 2. PROCESS.

GEORGE the Second, by the grace of God, of Great Britain, France and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire, greeting. *Attachment.* Put by gage and safe pledges Charles Long, late of Burford, gentleman, that he be before our justices at Westminster, on the octave of the Purification of the blessed Mary, to answer to William Burton of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he saith; and to show wherefore he was not before our justices at Westminster on the octave of Saint Hilary, as he was summoned. And have there then the names of the pledges and this writ. *Witness*, Sir John Willea, knight, at Westminster, the twenty-third day of January, in the twenty-eighth year of our reign. *Pona.*

The within-named Charles Long } EDWARD LEIGH.  
is attached by pledges,               { ROBERT TANNER.

Sheriff's  
return.

\* GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire, greeting. We command you that you distrein Charles Long, late of Burford, *Distingas.* *["xiv"]*

† Now omitted. See page 398.

No. III.

gentleman, by all his lands and chattels within your bailiwick, so that neither he nor any one through him may lay hands on the same, until you shall receive from us another command thereupon; and that you answer to us of the issue of the same; and that you have his body before our justices at Westminster, from the day of Easter, in fifteen days, to answer to William Burton of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he saith, and to hear his judgment of his many defaults. *Witness*, Sir John Willes, knight, at Westminster, the twelfth day of February, in the twenty-eighth year of our reign.

Sheriff's  
return. *Nihil.*

The within-named Charles Long hath nothing in my bailiwick, whereby he may be distreined.

*Capias ad respondendum.*

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire, greeting. *We* command you, that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before our justices at Westminster from the day of Easter in five weeks, to answer to William Burton, gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he saith; and whereupon you have returned to our justices at Westminster, that the said Charles hath nothing in your bailiwick, whereby he may be distreined. And have you there then this writ. *Witness*, Sir John Willes, knight, at Westminster, the sixteenth day of April, in the twenty-eighth year of our reign.

Sheriff's re-  
turn. *Non est  
inventus.*  
*Testatum ca-  
pias.*

The within named Charles Long is not found in my bailiwick.

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Berkshire greeting. *We* command you, that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before our justices at Westminster, on the morrow of the Holy Trinity, to answer to William Burton, gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he saith; and whereupon our sheriff of Oxfordshire hath made a return to our justices of Westminster, at a certain day now past, that the *aforesaid* Charles is not found in his bailiwick; and thereupon it is testified in our said court, that the *aforesaid* Charles lurks, wanders, and runs about in your county. And have you there then this writ. *Witness*, Sir John Willes, knight, at Westminster, the seventh day of May, in the twenty-eighth year of our reign.

[\*xv]

Sheriff's re-  
turn. *Cepi  
corpus.*

By virtue of this writ to me directed, I have taken the body of the within named Charles Long; which I have ready at the day and place within contained, according as by this writ it is commanded me.

*Or, upon the Return of non est inventus upon the first capias, the plaintiff may sue out an alias and a pluries, and thence proceed to outlawry: thus:*

*Alias capias.*

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire greeting. *We* command you, as formerly we commanded you, that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before our justices at Westminster, on the morrow of the Holy Trinity, to answer to William Burton, gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he saith. And have you then there this writ. *Witness*, Sir John Willes, knight, at Westminster, the seventh day of May, in the twenty-eighth year of our reign.

Sheriff's re-  
turn. *Non est  
inventus.*  
*Pluries capias.*

The within named Charles Long is not found in my bailiwick.

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire greeting. *We* command you, as we have more than once commanded you, that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before our justices at Westminster, from the day of the Holy Trinity in three weeks, to answer to William Burton, gentleman, of a plea, that he render to him two

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hundred pounds, which he owes him and unjustly detains, as he saith. And have you there then this writ. *Witness*, Sir John Willes, knight, at Westminster, the thirtieth day of May, in the twenty-eighth year of our reign.

No. III

The within named Charles Long is not found in my bailiwick.

Sheriff's return. *Non est inventus.*

[\*xvi]

*Exigi facias.*

\*GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth: to the sheriff of Oxfordshire, greeting. We command you, that you cause Charles Long, late of Burford, gentleman, to be required from county court to county court, until, according to the law and custom of our realm of England, he be outlawed, if he doth not appear: and if he doth appear, then take him and cause him to be safely kept, so that you may have his body before our justices at Westminster, on the morrow of All Souls, to answer to William Burton, gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he saith; and whereupon you have returned to our justices at Westminster, from the day of the Holy Trinity in three weeks, that he is not found in your bailiwick. And have you then there this writ. *Witness*, Sir John Willes, knight, at Westminster, the eighteenth day of June, in the twenty-eighth year of our reign.

By virtue of this writ to me directed, at my county court held at Oxford, in the county of Oxford, on Thursday, the twenty-first day of June, in the twenty-ninth year of the reign of the lord the king within written, the within named Charles Long was required the first time, and did not appear: and at my county court held at Oxford aforesaid, on Thursday, the twenty-fourth day of June, in the year aforesaid, the said Charles Long was required the second time, and did not appear: and at my county court held at Oxford, aforesaid, on Thursday, the twenty-first day of August, in the year aforesaid, the said Charles Long was required the third time, and did not appear: and at my county court held at Oxford, aforesaid, on Thursday, the eighteenth day of September, in the year aforesaid, the said Charles Long was required the fourth time, and did not appear: and at my county court held at Oxford, aforesaid, on Thursday, the sixteenth day of October, in the year aforesaid, the said Charles Long was required the fifth time, and did not appear: therefore the said Charles Long, by the judgment of the coroners of the said lord the king, of the county aforesaid, according to the law and custom of the kingdom of England, is outlawed.

Sheriff's return.

*Primo exactus.*

*Secundo exactus. Tertio exactus.*

*Tertio exactus.*

*Quarto exactus.*

*Quinto exactus.*

*Ideo utlagatus.*

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth: to the sheriff of Oxfordshire, greeting. Whereas, by our writ we have lately commanded you that you should cause Charles Long, late of Burford, gentleman, to be required from county court to county court, until, according to the law and custom of our realm of England, he should be outlawed, if he did not appear: and if he did appear, then that you should take him and cause him to be safely kept, so that you might have his body before our justices at Westminster, on the morrow of all Souls, to answer to William Burton, gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he saith: Therefore we command you, by virtue of the statute in the thirty-first year of the lady Elizabeth, late queen of England, made and provided, that you cause the said Charles Long to be proclaimed upon three several days according to the form of that statute; (whereof one proclamation shall be made at or near the most usual door of the church of the parish wherein he inhabits) that he render himself unto you; so that you may have his body before our justices at Westminster at the day aforesaid, to answer the said William Burton of the plea aforesaid. And have you there then this writ. *Witness*, Sir John Willes, knight, at Westminster, the eighteenth day of June, in the twenty-eighth year of our reign.

Writ of proclamation.

[\*xvii]

By virtue of this writ to me directed, at my county court held at Oxford, in the county of Oxford, on Thursday the twenty-sixth day of June, in the twenty-ninth year of the reign of the lord and king within written, I caused to be proclaimed the first time; and at the general quarter sessions of the peace, held at Oxford aforesaid, on Tuesday, the fifteenth day of July, in the year aforesaid, I caused to be proclaimed the second time; and at the most usual door of the church of Burford within written, on Sunday the third day of August in the year aforesaid, immediately after divine service, one month at the least before the within named Charles Long was required the fifth time, I caused to be proclaimed the third time, that the said Charles Long should render himself unto me, as within it is commanded me.

Sheriff's return. *Proclamation facta.*

No. III.  
Capias utlo-  
gam.

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Berkshire, greeting. We command you, that you omit not by reason of any liberty of your county, but that you take Charles Long, late of Burford in the county of Oxford, gentleman, (being outlawed in the said county of Oxford, on Thursday the sixteenth day of October last past, at the suit of William Burton, gentleman, of a plea of debt, as the sheriff of Oxfordshire aforesaid returned to our justices at Westminster on the morrow of All Souls then next ensuing,) if the said Charles Long may be found in your bailiwick; and him safely keep, so that you may \*have his body before our justice at Westminster from the day of St. Martin in fifteen days to do and receive what our court shall consider concerning him in this behalf. Witness, Sir John Willes, knight, at Westminster, the sixth day of November, in the twenty-ninth year of our reign.

[\*xviii]

Sheriff's re-  
turn. Capi  
Corpus.

By virtue of this writ to me directed, I have taken the body of the within named Charles Long; which I have ready at the day and place within contained, according as by this writ it is commanded me.

### SECT. 3. †BILL OF MIDDLESEX, AND LATITAT THEREUPON IN THE COURT OF KING'S BENCH.

Bill at Middle-  
sex for tres-  
pass.

Middlesex, } THE SHERIFF is commanded that he take Charles Long, late of  
to wit. } Burford, in the county of Oxford, if he may be found in his baili-  
wick, and him safely keep, so that he may have his body before the lord and  
king at Westminster, on Wednesday next after fifteen days of Easter, to an-  
swer William Burton, gentleman, of a plea of trespass [and also to a bill of the  
said William against the aforesaid Charles, for two hundred pounds of debt,  
according to the custom of the court of the said lord and king, before the king  
himself to be exhibited]; and that he have there then this precept.

Ac etiam  
in debt.

Sheriff's re-  
turn. Non est  
inventus.

The within named Charles Long is not found in my bailiwick.

Latitat.

GEORGE the Second, by the grace of God, of Great Britain, France and Ireland king, defender of the faith, and so forth; to the sheriff of Berkshire greeting. Whereas we lately commanded our sheriff of Middlesex that he should take Charles Long, late of Burford, in the county of Oxford, if he might be found in his bailiwick, and him safely keep, so that he might be before us at Westminster, at a certain day now past, to answer unto William Burton, gentleman, of a plea of trespass [and also to a bill of the said William against the aforesaid Charles, for two hundred pounds of debt, according to the custom of our court before us to be exhibited]; and our said sheriff of Middlesex at that day returned to us that the aforesaid Charles was not found in his bailiwick; whereupon on the behalf of the aforesaid William in our court before us it is sufficiently attested that the aforesaid Charles lurks and runs about in your county: Therefore we command you, that you take him, if he may be found in \*your bailiwick, and him safely keep, so that you may have his body before us at Westminster, on Tuesday next after five weeks of Easter, to answer the aforesaid William of the plea [and bill] aforesaid; and have you there then this writ. Witness, Sir Dudley Ryder, knight, at Westminster, the eighteenth day of April, in the twenty-eighth year of our reign.

Ac etiam.

[\*xix]

Sheriff's re-  
turn.  
Capi corpus.

By virtue of this writ to me directed, I have taken the body of the within named Charles Long; which I have ready at the day and place within contained, according as by this writ it is commanded me.

### SECT. 4. WRIT OF QUO MINUS IN THE EXCHEQUER.

GEORGE the Second, by the grace of God, of Great Britain, France and Ireland king, defender of the faith, and so forth; to the sheriff of Berkshire greeting. We command you that you omit not by reason of any liberty of your county, but that you enter the same, and take Charles Long, late of Burford, in the county of Oxford, gentleman, wheresoever he shall be found in your bailiwick, and him safely keep, so that you may have his body before the barons of our exchequer at Westminster, on the morrow of the Holy Trinity, to answer William Burton, our debtor of a plea, that he render to him two hund-

† Note, that sections 3 and 4 are the usual method of process, to compel an appearance in the courts of king's bench and exchequer; in which the practice of those courts does principally differ from the court of common pleas; the subsequent stages of proceedings being nearly alike in them all.



red pounds which he owes him and unjustly detains, whereby he is the less able to satisfy us the debts which he owes us at our said exchequer, as he said he can reasonably show that the same he ought to render: and have you there this writ. *Witness*, Sir Thomas Parker, knight, at Westminster, the sixth day of May, in the twenty-eighth year of our reign.

No. III.

By virtue of this writ to me directed, I have taken the body of the within named Charles Long; which I have ready before the barons within written, according as within it is commanded me.

Sheriff's return.  
Cepi corpus.

SECT. 5. SPECIAL BAIL, ON THE ARREST OF THE DEFENDANT, PURSUANT TO THE TESTATUM CAPIAS.

KNOW ALL MEN by these presents, that we Charles Long, of Burford, in the county of Oxford, gentleman, Peter Hamond of Bix, in the said county, yeoman, and Edward Thomlinson, of Woodstock, in the said county, innholder, are held and firmly bound to Christopher Jones, esquire, sheriff of the county of Berks, in four hundred pounds of lawful money of Great Britain, to be paid to the said sheriff, or his certain attorney, executors, administrators, or assigns for which payment well and truly to be made, we bind ourselves and each of us by himself \*for the whole and in gross, our and every of our heirs, executors and administrators, firmly by these presents, sealed with our seals. Dated the fifteenth day of May, in the twenty-eighth year of the reign of our sovereign lord George the Second, by the grace of God, king of Great Britain, France and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand seven hundred and fifty-five.

Bail bond to the sheriff.

\*xx]

*The condition of this obligation is such, that if the above bounden Charles Long do appear before the justices of our sovereign lord the king, at Westminster, on the morrow of the Holy Trinity, to answer William Burton, gentleman, of a plea of debt of two hundred pounds, then this obligation shall be void and of none effect, or else shall be and remain in full force and virtue.*

Recognizance.

Sealed and delivered, being first  
duly stamped, in the presence  
of

CHARLES LONG. [L. s.]  
PETER HAMOND. [L. s.]  
EDWARD THOMLINSON. [L. s.]

HENRY SHAW.  
TIMOTHY GRIFFITH.

You Charles Long do acknowledge to owe unto the plaintiff four hundred pounds, and you John Rose and Peter Hamond do severally acknowledge to owe unto the same person the sum of two hundred pounds a piece, to be levied upon your several goods and chattels, lands and tenements, upon condition that, if the defendant be condemned in the action, he shall pay the condemnation, or render himself a prisoner in the Fleet for the same; and, if he fail so to do, you John Rose and Peter Hamond do undertake to do it for him.

of bail before the commissioner.

*Trinity Term, 28 Geo. II.*

*Berks, } On a Testatum Capias from Oxfordshire against Charles Long, late*  
*to wit. } of Burford, in the county of Oxford, gentleman, returnable on the*  
*morrow of the Holy Trinity, at the suit of William Burton, of a plea of debt*  
*of two hundred pounds:*

Bail plea.

*The bail are John Rose, of Witney, in the county of Oxford, esquire, Peter Hamond, of Bix, in the said county, yeoman.*

RICHARD PRICE, attorney }  
for the defendant.

The party himself in 400*l*.  
Each of the bail in 200*l*.

Taken and acknowledged the twenty-eighth day of May, in the year of our Lord one thousand seven hundred and fifty-five, *de bene esse*, before me,

ROBERT GROVE,  
one of the Commissioners

## No. III.

## \*SECT. 6. THE RECORD, AS REMOVED BY WRIT OF ERROR.

[\*xxi]  
Writ of error.

THE lord the king hath given in charge to his trusty and beloved Sir John Willes, knight, his writ closed in these words:—GEORGE the Second, by the grace of God, of Great Britain, France and Ireland king, defender of the faith, and so forth; to our trusty and beloved Sir John Willes, knight, greeting. *Because* in the record and process, and also in the giving of judgment of the plaint, which was in our court before you and your fellows, our justices of the bench by our writ, between William Burton, gentleman, and Charles Long, late of Burford, in the county of Oxford, gentleman, of a certain debt of two hundred pounds, which the said William demands of the said Charles, manifest error hath intervened, to the great damage of him, the said William, as we from his complaint are informed; we being willing that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, do command you, that if judgment thereof be given, then under your seal you do distinctly and openly send the record and process of the plaint aforesaid, with all things concerning them and this writ; so that we may have them from the day of Easter in fifteen days, wheresoever we shall then be in England; that the record and process aforesaid being inspected, we may cause to be done thereupon for correcting that error, what of right and according to the law and custom of our realm of England ought to be done. *Witness* ourself at Westminster, the twelfth day of February, in the twenty-ninth year of our reign.

Chief justice's  
return.  
The Record.

THE record and process whereof in the said writ mention above is made, follow in these words, to wit:

PLEAS at Westminster before Sir John Willes, knight, and his brethren, justices of the bench of the lord the king at Westminster, of the term of the Holy Trinity, in the twenty-eighth year of the reign of the lord GEORGE the Second, by the grace of God, of Great Britain, France and Ireland king, defender of the faith, &c.

Writ.

*Omn.* } CHARLES LONG, late of Burford, in the county aforesaid, gentleman,  
to wit. } was summoned to answer William Burton, of Yarnton, in the said

Declaration, or  
count, on a  
bond.  
[\*xxii]

county, gentleman, of a plea that he render unto him two hundred pounds, which he owes him and unjustly detains [as he saith]. *And whereupon* the said William, by Thomas Gough, his attorney, complains, that whereas, on the first day of December, in the year of our Lord \*one thousand seven hundred fifty-four, at Banbury, in this county, the said Charles by his writing obligatory did acknowledge himself to be bound to the said William in the said sum of two hundred pounds of lawful money of Great Britain, to be paid to the said William, whenever after the said Charles should be thereto required; nevertheless the said Charles (although often required) hath not paid to the said William the said sum of two hundred pounds, nor any part thereof, but hitherto altogether hath refused, and doth still refuse, to render the same; wherefore he saith that he is injured, and hath damage to the value of ten pounds: and thereupon he brings suit [and good proof]. *And* he brings here into court the writing obligatory aforesaid; which testifies the debt aforesaid in form aforesaid; the date whereof is the day and year before mentioned.

Profert in  
curia.

Defence.

*And* the aforesaid Charles, by Richard Price, his attorney, comes and defends the force and injury when [and where it shall behoove him], and craves oyer of the said writing obligatory, and it is read unto him [in the form aforesaid]: he likewise craves oyer of the condition of the said writing, and it is read unto him in these words: "The condition of this obligation is such, that if the above bounden Charles Long, his heirs, executors and administrators, and every of them, shall and do from time to time, and at all times hereafter, well and truly stand to, obey, observe, fulfil and keep, the award, arbitrament, order, rule, judgment, final end, and determination, of David Stiles of Woodstock, in the said county, clerk, and Henry Bacon, of Woodstock aforesaid, gentleman, (arbitrators indifferently nominated and chosen by and between the said Charles Long and the above-named William Burton, to arbitrate, award, order, rule, judge and determine of all and all manner of actions, cause or causes of action, suits, plaints, debts, duties, reckonings, accounts, controversies, trespasses and demands whatsoever had, moved or depending, or which might have been had, moved or depending, by and between the said parties, for any matter, cause or thing, from the beginning of the world until the day of the date hereof), which the said arbitrators shall make and publish, of or in the premises, in writing under their hands and seals, or otherwise by word of mouth, in the presence of two credible witnesses, on or before the

first day of January next ensuing the date hereof; then this obligation to be void and of none effect, or else to be and remain in full force and virtue." No. III.

*Which* being read and heard, the said Charles prays leave to imparl therein here until the octave of the Holy Trinity; and it is granted unto him. The same day is given to the said William Burton, here, &c. At which day, to wit, on the octave of the Holy Trinity, here comes as well the said William Burton as the said Charles Long, by their attorneys aforesaid: and hereupon the said William \*prays that the said Charles may answer to his writ and count aforesaid. And the said Charles defends the force and injury, when, &c., and saith, that the said William ought not to have or maintain his said action against him; because he saith, that the said David Stiles and Henry Bacon, the arbitrators before named in the said condition, did not make any such award, arbitrament, order, rule, judgment, final end or determination, of or in the premises above specified in the said condition, on or before the first day of January, in the condition aforesaid above mentioned, according to the form and effect of the said condition: and this he is ready to verify. Wherefore he prays judgment, whether the said William ought to have or maintain his said action thereof against him [and that he may go thereof without a day]. And the aforesaid William saith, that for any thing above alleged by the said Charles in pleadings he ought not to be precluded from having his said action thereof against him; because he saith, that after the making of the said writing obligatory, and before the said first day of January, to wit, on the twenty-sixth day of December, in the year aforesaid, at Banbury aforesaid, in the presence of two credible witnesses, namely, John Dew of Chalbury, in the county aforesaid, and Richard Morris, of Wyndham, in the county of Berks, the said arbitrators undertook the charge of the award, arbitrament, order, rule, judgment, final end and determination aforesaid, of and in the premises specified in the condition aforesaid; and then and there made and published their award by word of mouth in manner and form following, that is to say, the said arbitrators did award, order and adjudge, that he the said Charles Long should forthwith pay to the said William Burton the sum of seventy-five pounds, and that thereupon all differences between them at the time of the making the said writing obligatory should finally cease and determine. And the said William further saith that although he afterwards, to wit, on the sixth day of January, in the year of our Lord one thousand seven hundred and fifty-five, at Banbury aforesaid, requested him the said Charles to pay to him the said William the said seventy-five pounds, yet (by protestation that the said Charles hath not stood to, obeyed, observed, fulfilled or kept any part of the said award, which by him, the said Charles, ought to have been stood to, obeyed, observed, fulfilled and kept) for further plea therein he saith, that the said Charles the said seventy-five pounds to the said William hath not hitherto paid; and this he is ready to verify. Wherefore he prays judgment, and his debt aforesaid, together with his damages occasioned by the detention of the said debt, to be adjudged unto him, &c. And the aforesaid Charles saith that the plea aforesaid, by him the said William in manner and form aforesaid above in his replication pleaded, and the matter in the same contained, are in no wise sufficient in \*law for the said William to have or maintain his action aforesaid thereupon against him the said Charles; to which the said Charles hath no necessity, neither is he obliged by the law of the land, in any manner to answer; and this he is ready to verify. Wherefore, for want of a sufficient replication in this behalf, the said Charles, as aforesaid, prays judgment, and that the said William may be precluded from having his action aforesaid thereupon against him, &c. And the said Charles, according to the form of the statute in that case made and provided, shows to the court here the cause of demurrer following: to wit, that it doth not appear, by the replication aforesaid that the said arbitrators made the same award in the presence of two credible witnesses on or before the said first day of January, as they ought to have done, according to the form and effect of the condition aforesaid; and that the replication aforesaid is uncertain, insufficient and wants form. And the aforesaid William saith, that the plea aforesaid by him the said William in manner and form aforesaid above in his replication pleaded, and the matter in the same contained, are good and sufficient in law for the said William to have and maintain the said action of him the said William thereupon against the said Charles; which said plea and the matter therein contained, the said William is ready to verify and prove as the court shall award; and because the aforesaid Charles hath not answered to that plea, nor hath he hitherto in any manner denied the same, the said William as before prays judgment, and his debt aforesaid, together with his damages occasioned by the detention of that debt, to be adjudged unto him, &c. And because the justices here will advise themselves of and upon the premises before they give judgment thereupon, a day is

Imparience.  
Continuance.

[\*xxiii]  
Plea; no such award.

Replication setting forth an award.

Protestando.

Demurrer.

[\*xxiv]

Causes of demurrer.

Joinder in demurrer.

Continuance.

<u>No. III.</u>	thereupon given to the parties aforesaid here, until the morrow of All Soule, to hear their judgment thereupon, for that the said justices are not yet advised thereof. At which day here come as well the said Charles as the said William, by their said attorneys; and because the said justices here will farther advise themselves of and upon the premises before they give judgment thereupon, a day is farther given to the parties aforesaid here until the octave of St. Hilary, to hear their judgment thereupon, for that the said justices here are not yet advised thereof. At which day here come as well the said William Burton as the said Charles Long, by their said attorneys. <i>Wherefore</i> , the record and matters aforesaid having been seen, and by the justices here fully understood, and all and singular the premises being examined, and mature deliberation being had thereupon; for that it seems to the said justices here, that the said plea of the said William Burton before in his replication pleaded, and the matter therein contained, are not sufficient in law, to have and maintain the action of the aforesaid William against the aforesaid Charles; <i>therefore it is considered</i> that the aforesaid William *take nothing by his writ aforesaid, but that he and his pledges of prosecuting, to wit, John Doe and Richard Roe, be in mercy for his false complaint; and that the aforesaid Charles go thereof without a day &c. <i>And it is farther considered</i> , that the aforesaid Charles do recover against the aforesaid William eleven pounds and seven shillings, for his costs and charges by him about his defense in this behalf sustained, adjudged by the court here to the said Charles with his consent, according to the form of the statute in that case made and provided: and that the aforesaid Charles may have execution thereof, &c.
Opinion of the court.	
Replication insufficient.	
[*xxv] Judgment for the defendant. <i>Querens nihil capiat per breve.</i> Amercement. Costs.	
Execution.	
General error assigned.	<i>Afterwards</i> to wit, on Wednesday next after fifteen days of Easter in this same term before the lord the king, at Westminster, comes the aforesaid William Burton, by Peter Manwaring his attorney, and saith, that in the record and process aforesaid, and also in the giving of the judgment in the plaint aforesaid, it is manifestly erred in this: to wit, that the judgment aforesaid was given in form aforesaid for the said Charles Long against the aforesaid William Burton, where by the law of the land judgment should have been given for the said William Burton against the said Charles Long; and this he is ready to verify. <i>And</i> the said William prays the writ of the said lord the king, to warn the said Charles Long to be before the said lord the king, to hear the record and process aforesaid; and it is granted unto him; by which the sheriff aforesaid is commanded that by good [and lawful man of his bailwick] he cause the aforesaid Charles Long to know, that he be before the lord the king from the day of Easter in five weeks, wheresoever [he shall then be in England] to hear the record and process aforesaid, if [it shall have happened that in the same any error shall have intervened]; and farther [to do and receive what the court of the lord the king shall consider in his behalf.] The same day is given to the aforesaid William Burton. <i>At which day</i> before the lord the king, at Westminster, comes the aforesaid William Burton, by his attorney aforesaid; and the sheriff returns, that by virtue of the writ aforesaid to him directed, he had caused the said Charles Long to know, that he be before the lord the king at the time aforesaid in the said writ contained, by John Den and Richard Fen, good, &c, as by the same writ was commanded him; which said Charles Long according to the warning given him in this behalf, here cometh by Thomas Webb, his attorney. <i>Whereupon</i> the said William saith, that in the record and process aforesaid, and also in the giving of the judgment aforesaid, it is manifestly erred, alleging the error aforesaid by him in the form aforesaid alleged, and prays that the judgment aforesaid for the error aforesaid, and others, in the record and process aforesaid being, may be reversed, annulled and entirely for nothing esteemed, and that the said Charles *may rejoin to the errors aforesaid; and that the court of the said lord the king here may proceed to the examination as well of the record and process aforesaid, as of the matter aforesaid above for error assigned. <i>And</i> the said Charles saith, that neither in the record and process aforesaid, nor in the giving of the judgment aforesaid, in any thing is there erred; and he prays in like manner that the court of the said lord the king here may proceed to the examination as well of the record and process aforesaid, as of the matters aforesaid above for error assigned. <i>And because</i> the court of the lord the king here is not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid until the morrow of the Holy Trinity, before the lord the king wheresoever he shall then be in England, to hear their judgment of and upon the premises. for that the court of the lord the king here is not yet advised thereof. At which day before the lord the king, at Westminster, come the parties aforesaid by the attorneys aforesaid. <i>Whereupon</i> , as well the record and process aforesaid, and the judgment thereupon given, as the matters aforesaid by the said William above for error assigned, being seen,
Writ of Scire facias to hear errors.	
Sheriff's return; Scire fecit.	
Error assigned afresh.	
[*xxvi]	
Rejoinder; <i>In nullo est erratum.</i>	
Continuance.	
Opinion of the court.	

and by the court of the lord the king here being fully understood, and mature deliberation being thereupon had, for that it appears to the court of the lord the king here, that in the record and process aforesaid, and also in the giving of the judgment aforesaid, it is manifestly erred, *therefore it is considered*, that the judgment aforesaid for the error aforesaid, and others, in the record and process aforesaid, be reversed, annulled and entirely for nothing esteemed; and that the aforesaid William recover against the aforesaid Charles his debt aforesaid, and also fifty pounds for his damages which he hath sustained, as well on occasion of the detention of the said debt, as for his costs and charges unto which he hath been put about this suit in this behalf, to the said William with his consent by the court of the lord the king here adjudged. And the said Charles in mercy.

No. III.

Judgment of  
the common  
pleas reversed:-  
Judgment for  
the plaintiff.  
Costs.  
Defendant  
amerced.

## SECT. 7. PROCESS OF EXECUTION.

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire greeting. We command you, that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before us in three weeks from the day of the Holy Trinity, wheresoever we shall then be in England, to satisfy William Burton, for two hundred pounds debt, which the said William Burton hath lately recovered against him in our court before us, and also fifty pounds, which were \*adjudged in our said court before us, to the said William Burton for his damages which he hath sustained as well by occasion of the detention of the said debt, as for his costs and charges to which he hath been put about his suit in this behalf, whereof the said Charles Long is convicted, as it appears to us of record; and have you there then this writ. *Witness*, Sir Thomas Denison, knight, at Westminster, the nineteenth day of June, in the twenty-ninth year of our reign.

Writ of *copias  
ad satisfaciendum*.

[\*xxvii]

By virtue of this writ to me directed, I have taken the body of the within named Charles Long; which I have ready before the lord the king at Westminster, at the day within written, as within it is commanded me.

Sheriff's re-  
turn. *Cepi  
corpus.*

GEORGE the Second, by the grace of God, of Great Britain, France and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire, greeting. We command you that of the goods and chattels within your bailiwick of Charles Long, late of Burford, gentleman, you cause to be made two hundred pounds debt, which William Burton lately in our court before us at Westminster hath recovered against him, and also fifty pounds, which were adjudged in our court before us to the said William, for his damages which he hath sustained as well by occasion of the detention of his said debt, as for his costs and charges to which he hath been put about his suit in this behalf, whereof the said Charles Long is convicted, as it appears to us of record; and have that money before us in three weeks from the day of the Holy Trinity, wheresoever we shall then be in England, to render to the said William of his debt and damages aforesaid; and have there then this writ. *Witness*, Sir Thomas Denison, knight, at Westminster, the nineteenth day of June, in the twenty-ninth year of our reign.

Writ of *Fieri  
facias.*

By virtue of this writ to me directed, I have caused to be made of the goods and chattels of the within written Charles Long, two hundred and fifty pounds; which I have ready before the lord the king at Westminster, at the day within written, as it is within commanded me.

Sheriff's re-  
turn. *Fieri  
facti.*

†The senior puisne justice; there being no chief justice that term.



# COMMENTARIES ON THE LAWS OF ENGLAND.

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## BOOK THE FOURTH. OF PUBLIC WRONGS.

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### CHAPTER I. OF THE NATURE OF CRIMES AND THEIR PUNISHMENT.

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WE are now arrived at the fourth and last branch of these Commentaries, which treats of *public wrongs*, or *crimes* and *misdemeanors*. For we may remember that, in the beginning of the preceding book, (a) wrongs were divided into two species: the one *private* and the other *public*. Private wrongs, which are frequently termed civil injuries, were the subject of that entire book: we are now therefore, lastly, to proceed to the consideration of public wrongs, or crimes and misdemeanors; with the means of their prevention and punishment. In the pursuit of which subject I shall consider, in the *first* place, the general nature of crimes and punishments; *secondly*, the persons capable of committing crimes; *thirdly*, their several degrees of guilt, as principals, or accessories; *\*fourthly*, the several species of crimes, [\*2] with the punishment annexed to each by the laws of England; *fifthly*, the means of preventing their perpetration; and *sixthly*, the method of inflicting those punishments, which the law has annexed to each several crime and misdemeanor.

First, as to the general nature of crimes and their punishment; the discussion and admeasurement of which forms in every country the code of criminal law; or, as it is more usually denominated with us in England, the doctrine of the *pleas of the crown*; so called, because the king, in whom centers the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights, belonging to that community, and is therefore in all cases the proper prosecutor for every public offence. (b)

The knowledge of this branch of jurisprudence, which teaches the nature, extent, and degrees of every crime, and adjusts to it its adequate and necessary penalty, is of the utmost importance to every individual in the state. For (as a very great master of the crown law (c) has observed upon a similar occasion) no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude, that he may not at some time or other be deeply interested in these researches. The infirmities of the best among us, the vices, and ungovernable passions of others, the instability

(a) Book III, c. 1.

(b) See book I, p. 262.

(c) Sir Michael Foster, pref. to rep.

of all human affairs, and the numberless unforeseen events, which the compass of a day may bring forth, will teach us (upon a moment's reflection) that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is a matter of universal concern.

In proportion to the importance of the criminal law ought also to be the care and attention of the legislature in properly forming and enforcing it. It [3] should be founded upon principles that are permanent, uniform, \*and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind: though it sometimes (provided there be no transgression of these external boundaries) may be modified, narrowed, or enlarged, according to the local or occasional necessities of the state which it is meant to govern. And yet, either from a want of attention to these principles in the first concoction of the laws, and adopting in their stead the impetuous dictates of avarice, ambition, and revenge; from retaining the discordant political regulations, which successive conquerors or factions have established, in the various revolutions of government; from giving a lasting efficacy to sanctions that were intended to be temporary, and made (as Lord Bacon expresses it) merely upon the spur of the occasion; or from, lastly, too hastily employing such means as are greatly disproportionate to their end, in order to check the progress of some very prevalent offence: from some, or from all, of these causes, it hath happened, that the criminal law is in every country of Europe more rude and imperfect than the civil. I shall not here enter into any minute inquiries concerning the local constitutions of other nations: the inhumanity and mistaken policy of which have been sufficiently pointed out by ingenious writers of their own. (d) But even with us in England, where our crown law is with justice supposed to be more nearly advanced to perfection; where crimes are more accurately defined, and penalties less uncertain and arbitrary; where all our accusations are public, and our \*trials in the face of the world; where torture is unknown, and [4] every delinquent is judged by such of his equals, against whom he can form no exception nor even a personal dislike;—even here we shall occasionally find room to remark some particulars that seem to want revision and amendment. These have chiefly arisen from too scrupulous an adherence to some rules of the ancient common law, when the reasons have ceased upon which those rules were founded; from not repealing such of the old penal laws as are either obsolete or absurd; and from too little care and attention in framing and passing new ones. The enacting of penalties, to which a whole nation should be subject, ought not to be left as a matter of indifference to the passions or interests of a few, who upon temporary motives may prefer or support such a bill; but be calmly and maturely considered by persons who know what provisions the laws have already made to remedy the mischief complained of, who can from experience foresee the probable consequences of those which are now proposed, and who will judge without passion or prejudice how adequate they are to the evil. It is never usual in the house of peers even to read a private bill, which may affect the property of an individual, without first referring it to some of the learned judges, and hearing their report thereon. (e) And surely equal precaution is necessary, when laws are to be established, which may affect the property, the liberty, and perhaps even the lives of thousands. Had such a reference taken place, it is impossible that in the eighteenth century it could ever have been made a capital crime, to break down (however maliciously) the mound of a fish pond, whereby any fish shall escape; or to cut down a cherry tree in an orchard. (f) Were even a committee appointed but once in a hundred years to revise the criminal law, it could not have continued to this hour a felony, without benefit of clergy, to be seen for

(d) Baron Montesquieu, *marcus Beccaria, &c.*  
(f) Stat. 9 Geo. I. c. 22. 31 Geo. II. c. 42.

(e) See book II, p. 245.



one month in the company of persons who call themselves, or are called, Egyptians. (g)

It is true, that these outrageous penalties, being seldom or never inflicted, are hardly known to be law by the public; \*but that rather aggravates the mischief, by laying a snare for the unwary. Yet they cannot but occur to the observation of any one, who hath undertaken the task of examining the great outlines of the English law, and tracing them up to their principles: and it is the duty of such a one to hint them with decency to those, whose abilities and stations enable them to apply the remedy. (1) Having therefore premised this apology for some of the ensuing remarks, which might otherwise seem to savour of arrogance, I proceed now to consider (in the first place) the general nature of *crimes*.

I. A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous terms; though in common usage, the word "crimes" is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of "misdemeanors" only. (2)

The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs or civil injuries are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals: public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity. As, if I detain a field from another man, to which the law has given him a right, this is a civil injury, and not a crime: for here only the right of an individual is concerned, and it is immaterial to the public, which of us is in possession of the land; but treason, murder, and robbery are properly ranked among crimes; since, besides the injury done to individuals, they strike at the very being of society, which cannot possibly subsist where actions of this sort are suffered to escape with impunity. (3)

In all cases the crime includes an injury; every public offense is also a private wrong, and somewhat more; it affects the individual, and it likewise

(g) Stat. 5 Eliz. c. 20.

(1) This hint has been taken, at last, and a thorough revision has been made of the criminal law of England, relieving it of its worst and most barbarous features.

(2) Crimes are, in general, classified as felonies and misdemeanors. As to felony, as defined at the common law, see *post*, 94, note, where the enlarged American meaning is also explained. And see *Carpenter v. Nixon*, 5 Hill, 260. Offenses less than felonies are misdemeanors.

(3) The distinction between public crimes and private wrongs is to be found in positive law. "Whenever, therefore, the public deems that an act of wrong to individuals is of a nature requiring the public protection to be cast over the individual with respect to it, then the public makes the act punishable at its own suit; or, in other words, it makes it a crime." Bish. Cr. L., 4th ed., § 533; see *Ibid.*, 7th ed., vol. 1, § 82. The difference between crimes and civil injuries is not to be sought in a supposed difference between their tendencies, but in the difference between the modes in which they are respectively pursued, or wherein the sanction is applied in the two cases. An offense which is pursued at the discretion of the injured party, or his representative, is a civil injury. An offense which is pursued by the sovereign, or by the subordinate of the sovereign, is a crime. Austin, Jurisprudence, lecture xvii.

The meaning of the phrase, "high crimes and misdemeanors," underwent much discussion in the case of President Johnson, who was tried on articles of impeachment in 1868, but the result of the case was not such that any authoritative rule can be derived from it. See, upon the general subject, articles in the American Law Register, vol. vi (N. S.), pp. 257 and 641.

Wrongs done to individuals for which they may have a remedy by private action, but which involve no offense against the state, are usually spoken of as *torts*.

[\*6] affects the community. \*Thus treason, in imagining the king's death, involves in it conspiracy against an individual, which is also a civil injury; but, as this species of treason in its consequences principally tends to the dissolution of government, and the destruction thereby of the order and peace of society, this denominates it a crime of the highest magnitude. Murder is an injury to the life of an individual; but the law of society considers principally the loss which the state sustains by being deprived of a member, and the pernicious example thereby set for others to do the like. Robbery may be considered in the same view: it is an injury to *private* property; but were that all, a civil satisfaction in damages might atone for it: the *public* mischief is the thing, for the prevention of which our laws have made it a capital offence. In these gross and atrocious injuries the private wrong is swallowed up in the public: we seldom hear any mention made of satisfaction to the individual; the satisfaction to the community being so very great. And, indeed, as the public crime is not otherwise avenged than by forfeiture of life and property, it is impossible afterwards to make any reparation for the private wrong: which can only be had from the body or goods of the aggressor. (4) But there are crimes of an inferior nature, in which the public punishment is not so severe, but it affords room for a private compensation also; and herein the distinction of crimes from civil injuries is very apparent. For instance: in the case of battery, or beating another, the aggressor may be indicted for this at the suit of the king, for disturbing the public peace, and be punished criminally by fine and imprisonment; and the party beaten may also have his private remedy by action of trespass for the injury which he in particular sustains, and recover a civil satisfaction in damages. So, also, in case of a public nuisance, as digging a ditch across a highway, this is punishable by indictment, as a common offence to the whole kingdom and all his majesty's [\*7] subjects; but if any individual sustains any special \*damage thereby, as laming his horse, breaking his carriage, or the like, the offender may be compelled to make ample satisfaction, as well for the private injury as for the public wrong.

Upon the whole we may observe, that in taking cognizance of all wrongs, or unlawful acts, the law has a double view: viz., not only to redress the party injured, by either restoring to him his right, if possible; or by giving him an equivalent; the manner of doing which was the object of our inquiries in the preceding book of these Commentaries; but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws, which the sovereign power has thought proper to establish for the government and tranquility of the whole. What those breaches are, and how prevented or punished, are to be considered in the present book.

II. The nature of *crimes and misdemeanors* in general being thus ascertained and distinguished, I proceed, in the next place, to consider the general nature of *punishments*: which are evils or inconveniences, consequent upon crimes and misdemeanors; being devised, denounced, and inflicted by human laws, in consequence of disobedience or misbehavior in those, to regulate

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(4) One reason why a civil suit is not permitted until after the termination of a criminal prosecution is, that if the party injured were first to recover satisfaction in damages, he might not thereafter be disposed to pursue the criminal action. See *Cox v. Paxton*, 17 Ves., 329; *Crosby v. Leng*, 12 East, 409; *White v. Spettigue*, 18 M. & W., 603.

In the United States, where the management and control of prosecutions for offenses against the state are confided to officers chosen or appointed for the purpose, the civil remedy is not thus postponed. Parties injured by a felony are not permitted to compound with the offender, and to receive a compensation for suppressing a prosecution, or concealing the evidence of the crime; but they may demand and recover compensation for the private injury the crime has inflicted upon them, without awaiting the result of such action as the public prosecutor may see fit to institute. See *Plumer v. Smith*, 5 N. H., 553; *Boston, etc., R. R. Co. v. Dana*, 1 Gray, 83, and cases cited.

whose conduct such laws were respectively made. And herein we will briefly consider the *power*, the *end*, and the *measure* of human punishment.

1. As to the *power* of human punishment, or the right of the temporal legislator to inflict discretionary penalties for crimes and misdemeanors. (*h*) It is clear, that the right of punishing crimes against the laws of nature, as murder and the like, is in a state of mere nature vested in every individual. For it must be vested in somebody; otherwise the laws of nature would be vain and fruitless, if none were empowered to put them in execution: and if that power is vested in any *one*, it must also be vested in *all* mankind; \*since all [\*8] are by nature equal. Whereof the first murderer Cain was so sensible that we find him (*i*) expressing his apprehensions, that *whoever* should find him would slay him. In a state of society this right is transferred from individuals to the sovereign power; whereby men are prevented from being judges in their own causes, which is one of the evils that civil government was intended to remedy. Whatever power, therefore, individuals had of punishing offences against the law of nature, that is now vested in the magistrate alone; who bears the sword of justice by the consent of the whole community. And to this precedent natural power of individuals must be referred that right, which some have argued to belong to every state (though in fact, never exercised by any), of punishing not only their own subjects, but also foreign ambassadors, even with death itself; in case they have offended, not indeed against the municipal laws of the country, but against the divine laws of nature, and become liable thereby to forfeit their lives for their guilt. (*k*)

As to offences merely against the laws of society, which are only *mala prohibita*, and not *mala in se*; the temporal magistrate is also empowered to inflict coercive penalties for such transgressions; and this by the consent of individuals; who, in forming societies, did either tacitly or expressly invest the sovereign power with the right of making laws, and of enforcing obedience to them when made, by exercising, upon their non-observance, severities adequate to the evil. The lawfulness, therefore, of punishing such criminals is founded upon this principle, that the law by which they suffer was made by their own consent; it is a part of the original contract into which they entered, when first they engaged in society; it was calculated for, and has long contributed to their own security.

This right, therefore, being thus conferred by universal consent, gives to the state exactly the same power, and no more, over all its members, as each individual member had naturally over himself or others. Which has \*occa- [\*9] sioned some to doubt how far a human legislature ought to inflict capital punishments for *positive* offences; offences against the municipal law only, and not against the law of nature: since no individual has, naturally, a power of inflicting death upon himself or others for actions in themselves indifferent. With regard to offences *mala in se*, capital punishments are in some instances inflicted by the immediate *command* of God himself to all mankind; as in the case of murder, by the precept delivered to Noah, their common ancestor and representative, "whoso sheddeth man's blood, by man shall his blood be shed." (*l*) In other instances they are inflicted after the *example* of the Creator, in his positive code of laws for the regulation of the Jewish republic: as in the case of the crime against nature. But they are sometimes inflicted without such express warrant or example, at the will and discretion of the human legislature; as for forgery, for theft, and sometimes for offences of a lighter kind. Of these we are principally to speak; as these crimes are, none of them, offences against natural, but only against social rights; not even theft itself, unless it be accompanied with violence to one's house or person: all others being an in-

(A) See Grotius *de j. b. & p. l. 2, c. 20*. Puffendorf, *L. of Nat. & N. l. & c. 2*.  
(k) See book I, p. 254. (l) Gen. ix, 6.

(i) Gen. iv, 14.

fringement of that right of property, which, as we have formerly seen, (*m*) owes its origin not to the law of nature, but merely to civil society. (*5*)

The practice of inflicting capital punishments, for offences of human institution, is thus justified by that great and good man, Sir Matthew Hale: (*n*) "When offences grow enormous, frequent, and dangerous to a kingdom or state, destructive or highly pernicious to civil societies, and to the great insecurity and danger of the kingdom or its inhabitants, severe punishment, and even death itself, is necessary to be annexed to laws in many cases by the prudence of lawgivers." It is, therefore, the enormity, or dangerous tendency, of the crime that alone can warrant any earthly legislature in putting him to [*\*10*] death that commits it. \*It is not its frequency, only, or the difficulty of otherwise preventing it, that will excuse our attempting to prevent it by a wanton effusion of human blood. For, though the end of punishment is to deter men from offending, it can never follow from thence that it is lawful to deter them at any rate and by any means; since there may be unlawful methods of enforcing obedience even to the justest laws. Every humane legislator will be therefore extremely cautious of establishing laws that inflict the penalty of death, especially for slight offences, or such as are merely positive. He will expect a better reason for his so doing than that loose one which generally is given; that it is found by former experience that no lighter penalty will be effectual. For, is it found, upon farther experience, that capital punishments are more effectual? Was the vast territory of all the Russias worse regulated under the late empress Elizabeth, than under her more sanguinary predecessors? Is it now, under Catherine II, less civilized, less social, less secure? And yet we are assured that neither of these illustrious princesses have, throughout their whole administration, inflicted the penalty of death; and the latter has, upon full persuasion of its being useless, nay, even pernicious, given orders for abolishing it entirely throughout her extensive dominions. (*o*) But indeed, were capital punishments proved by experience to be a sure and effectual remedy, that would not prove the necessity (upon which the justice and propriety depend) of inflicting them upon all occasions when other expedients fail. I fear this reasoning would extend a great deal too far. For instance, the damage done to our public roads by loaded wagons is universally allowed, and many laws have been made to prevent it; none of which have hitherto proved effectual. But it does not therefore follow that it would be just for the legislature to inflict death upon every obstinate carrier, who defeats or eludes the provision of former statutes. Where the evil to be prevented is not adequate to the violence of the preventive, a sovereign that thinks seriously can [*\*11*] never justify such a law to the dictates of \*conscience and humanity. To shed the blood of our fellow creature is a matter that requires the greatest deliberation and the fullest conviction of our own authority: for life is the immediate gift of God to man; which neither he can resign, nor can it be taken from him, unless by the command or permission of Him who gave it; either expressly revealed, or collected from the laws of nature or society by clear and indisputable demonstration.

I would not be understood to *deny* the right of the legislature in any country to enforce its own laws by the death of the transgressor, though persons of some abilities have *doubted* it; but only to suggest a few hints for the consideration of such as are, or may hereafter become, legislators. When a question arises, whether death may be lawfully inflicted for this or that transgression, the wisdom of the laws must decide it; and to this public judgment or decision all private judgments must submit; else there is an end of the first prin-

(*m*) Book II. c. 1.

(*n*) 1 Hal. P. C. 13.

(*o*) Grand instructions for framing a new code of laws for the Russian empire, § 210.

(5) See book 2, p. 11 and note.

ciple of all society and government. The guilt of blood, if any, must lie at their doors, who misinterpret the extent of their warrant; and not at the doors of the subject who is bound to receive the interpretations that are given by the sovereign power.

2. As to the *end*, or final cause of human punishments. This is not by way of atonement or expiation for the crime committed; for that must be left to the just determination of the Supreme Being; but as a precaution against future offences of the same kind. This is effected three ways: either by the amendment of the offender himself; for which purpose all corporal punishments, fines, and temporary exile or imprisonment, are inflicted: or, by deterring others by the dread of his example from offending in the like way, "*ut pœna* (as Tully (*p*) expresses it) *ad paucos, metus ad omnes perveniat*;" which gives rise to all ignominious punishments, and to such executions of justice as are open and public: \*or, lastly, by depriving the party injuring of the [\*12] power to do future mischief; which is effected by either putting him to death or condemning him to perpetual confinement, slavery, or exile. The same one end, of preventing future crimes, is endeavoured to be answered by each of these three species of punishment. The public gains equal security, whether the offender himself be amended by wholesome correction, or whether he be disabled from doing any further harm: and if the penalty fails of both these effects, as it may do, still the terror of his example remains as a warning to other citizens. The method, however, of inflicting punishment ought always to be proportioned to the particular purpose it is meant to serve, and by no means to exceed it: therefore, the pains of death, and perpetual disability by exile, slavery, or imprisonment ought never to be inflicted, but when the offender appears incorrigible: which may be collected either from a repetition of minuter offences; or from the perpetration of some one crime of deep malignity, which of itself demonstrates a disposition without hope or probability of amendment; and in such cases it would be cruelty to the public to defer the punishment of such a criminal, till he had an opportunity of repeating perhaps the worst of villanies.

3. As to the *measure* of human punishments. From what has been observed in the former articles, we may collect, that the quantity of punishment can never be absolutely determined by any standing invariable rule; but it must be left to the arbitration of the legislature to inflict such penalties as are warranted by the laws of nature and society, and such as appear to be the best calculated to answer the end of precaution against future offences.

Hence it will be evident, that what some have so highly extolled for its equity, the *lex talionis*, or law of retaliation, can never be in all cases an adequate or permanent rule of punishment. In some cases, indeed, it seems to be dictated by natural reason; as in the case of conspiracies to do an injury, or false accusations of the innocent; to which we may add that law of the Jews and Egyptians, mentioned by \*Josephus and Diodorus Siculus, that whoever without sufficient cause was found with any mortal [\*13] poison in his custody, should himself be obliged to take it. But, in general, the difference of persons, place, time, provocation, or other circumstances, may enhance or mitigate the offence; and in such cases retaliation can never be a proper measure of justice. If a nobleman strikes a peasant, all mankind will see, that if a court of justice awards a return of the blow, it is more than a just compensation. On the other hand, retaliation may, sometimes, be too easy a sentence; as, if a man maliciously should put out the remaining eye of him who had lost one before, it is too slight a punishment for the maimer to lose only one of his: and therefore the law of the Locrians, which demanded an eye for an eye, was in this instance judiciously altered by decreeing, in imitation of Solon's laws, (*q*) that, he who struck out the eye of a one-eyed man, should lose both his own in return. Besides, there are very many crimes, that

(p) *Pro Cluentio*, 46.(q) *Pott. Ant. b. 1, c. 28.*

will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished with theft, defamation by defamation, forgery by forgery, adultery by adultery, and the like. And we may add, that those instances, wherein retaliation appears to be used, even by the divine authority, do not really proceed upon the rule of exact retribution, by doing to the criminal the same hurt he has done to his neighbour and no more; but this correspondence between the crime and punishment is barely a consequence from some other principle. Death is ordered to be punished with death; not because one is equivalent to the other, for that would be expiation, and not punishment. Nor is death always an equivalent for death: the execution of a needy, decrepit assassin is a poor satisfaction for the murder of a nobleman in the bloom of his youth, and full enjoyment of his friends, his honours, and his fortune. But the reason upon which this sentence is grounded seems to be, [\*14] that this is the highest penalty that man can inflict, \*and tends most to the security of mankind; by removing one murderer from the earth, and setting a dreadful example to deter others: so that even this grand instance proceeds upon other principles than those of retaliation. And truly if any measure of punishment is to be taken from the damage sustained by the sufferer, the punishment ought rather to exceed than equal the injury: since it seems contrary to reason and equity, that the guilty (if convicted) should suffer no more than the innocent has done before him; especially as the suffering of the innocent is past and irrevocable, that of the guilty is future, contingent, and liable to be escaped or evaded. With regard indeed to crimes that are incomplete, which consist merely in the intention, and are not yet carried into act, as conspiracies and the like; the innocent has a chance to frustrate or avoid the villainy, as the conspirator has also a chance to escape his punishment: and this may be one reason why the *lex talionis* is more proper to be inflicted, if at all, for crimes that consist in intention, than for such as are carried into act. It seems indeed consonant to natural reason, and has therefore been adopted as a maxim by several theoretical writers, (r) that the punishment due to the crime of which one falsely accuses another should be inflicted on the perjured informer. Accordingly, when it was attempted to introduce into England the law of retaliation, it was intended as a punishment for such only as preferred malicious accusations against others; it being enacted by statute 37 Edw. III. c. 18, that such as preferred any suggestions to the king's great council should put in sureties of taliation; that is, to incur the same pain that the other should have had in case the suggestions were found untrue. But, after one year's experience this punishment of taliation was rejected, and imprisonment adopted in its stead. (s)

But though from what has been said it appears that there cannot be any regular or determinate method of rating the \*quantity of punishments [\*15] for crimes, by any one uniform rule; but they must be referred to the will and discretion of the legislative power: yet there are some general principles, drawn from the nature and circumstances of the crime, that may be of some assistance in allotting it an adequate punishment.

As, first, with regard to the *object* of it; for the greater and more exalted the object of an injury is, the more care should be taken to prevent that injury, and of course under this aggravation the punishment should be more severe. Therefore treason in conspiring the *king's* death is, by the English law, punished with greater rigour than even actually killing any private subject. And yet, generally, a design to transgress is not so flagrant an enormity as the actual completion of that design. For evil, the nearer we approach it, is the more disagreeable and shocking; so that it requires more obstinacy in wickedness to perpetrate an unlawful action, than barely to entertain the thought of it: and it is an encouragement to repentance and remorse, even to the last stage of any crime, that it is never too late to retract; and that if a man stops even

here, it is better for him than if he proceeds: for which reason an attempt to rob, to ravish, or to kill, is far less penal than the actual robbery, rape, or murder. But in the case of a treasonable conspiracy, the object whereof is the king's majesty, the bare intention will deserve the highest degree of severity; not because the intention is equivalent to the act itself: but because the greatest rigour is no more than adequate to a treasonable purpose of the heart, and there is no greater left to inflict upon the actual execution itself.

Again: the violence of passion, or temptation, may sometimes alleviate a crime; as theft, in case of hunger, is far more worthy of compassion than when committed through avarice, or to supply one in luxurious excesses. To kill a man upon sudden and violent resentment, is less penal than upon cool, deliberate malice. The age, education, and character of the offender: the repetition (or otherwise) \*of the offence; the time, the place, the com- [\*16] pany wherein it was committed; all these, and a thousand other incidents, may aggravate or extenuate the crime. (t)

Further: as punishments are chiefly intended for the prevention of future crimes, it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness; (u) and among crimes of an equal malignity, those which a man has the most frequent and easy opportunities of committing, which cannot be so easily guarded against as others, and which, therefore, the offender has the strongest inducement to commit; according to what Cicero observes, (v) "*ea sunt animadvertenda peccata maxime, quæ difficillime præcaventur.*" Hence it is, that for a servant to rob his master is in more cases capital, than for a stranger: if a servant kills his master, it is a species of treason; (6) in another it is only murder; to steal a handkerchief or other trifle of above the value of twelve pence, privately from one's person, is made capital; (7) but to carry off a load of corn from an open field, though of fifty times greater value, is punished with transportation only. And in the island of Man this rule was formerly carried so far, that to take away a horse or ox was there no felony, but a trespass, because of the difficulty in that little territory to conceal them or carry them off: but to steal a pig or fowl, which is easily done, was a capital misdemeanor, and the offender was punished with death. (w)

Lastly: as a conclusion to the whole, we may observe that punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes, and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due \*dis- [\*17] tinctions of severity. It is the sentiment of an ingenious writer, who seems to have well studied the springs of human action, (x) that crimes are more effectually prevented by the *certainty*, than by the *severity*, of punishment. For the excessive severity of laws (says Montesquieu) (y) hinders their execution: when the punishment surpasses all measure, the public will frequently out of humanity prefer impunity to it. Thus also the statute 1 Mar. st. 1, c. 1, recites in its preamble, "that the state of every king consists more assuredly in the love of the subject towards their prince, than in the dread of laws made with rigorous pains; and that laws made for the preservation of the commonwealth without great penalties are more often obeyed and kept, than laws made with extreme punishments." Happy had it been for the nation, if

(t) Thus Demosthenes (in his oration against Midias), finely works up the aggravations of the insults he had received. "I was abused," says he, "by my enemy, in cold blood, out of malice, not by heat of wine, in the morning, publicly, before strangers as well as citizens; and that in the temple, whither the duty of my office called me."

(u) Beccar. c. 6.

(v) *Pro Sexto Roscio*, 40.

(w) 4 Inst. 283.

(x) Beccar. c. 7.

(y) Sp. L. b. 6, c. 13.

(6) This is no longer the law. What was formerly petit treason is now murder. 9 Geo. IV, c. 81, § 2.

(7) The capital punishment for this offence was abolished by statute 7 and 8 Geo. IV, c. 29.

the subsequent practice of that deluded princess in matters of religion, had been correspondent to these sentiments of herself and parliament, in matters of state and government! We may further observe that sanguinary laws are a bad symptom of the distemper of any state, or at least of its weak constitution. The laws of the Roman kings, and the twelve tables of the *decemviri*, were full of cruel punishments: the Porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period the republic flourished: under the emperors severe punishments were revived; and then the empire fell.

It is moreover absurd and impolitic to apply the same punishment to crimes of different malignity. A multitude of sanguinary laws (besides the doubt that may be entertained concerning the right of making them) do likewise prove a manifest defect either in the wisdom of the legislative or the strength of the executive power. It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium*, to every case of difficulty. It is, it must be owned, much *easier* to extirpate than to amend mankind: yet \*that magistrate must be esteemed [\*18] both a weak and cruel surgeon, who cuts off every limb, which through ignorance or indolence he will not attempt to cure. It has been therefore ingeniously proposed, (2) that in every state a scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least; but, if that be too romantic an idea, yet at least a wise legislator will mark the principal divisions, and not assign penalties of the first degree to offences of an inferior rank. Where men see no distinction made in the nature and gradations of punishment, the generality will be led to conclude there is no distinction in the guilt. Thus in France the punishment of robbery, either with or without murder, is the same: (a) hence it is, that though perhaps they are therefore subject to fewer robberies, yet they never rob but they also murder. In China, murderers are cut to pieces, and robbers not: hence in that country they never murder on the highway, though they often rob. And in England, besides the additional terrors of a speedy execution, and a subsequent exposure to dissection, robbers have a hope of transportation which seldom is extended to murderers. This has the same effect here as in China; in preventing frequent assassination and slaughter.

Yet, though in this instance we may glory in the wisdom of the English law, we shall find it more difficult to justify the frequency of capital punishment to be found therein; inflicted (perhaps inattentively) by a multitude of successive independent statutes, upon crimes very different in their natures. It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than a hundred and sixty have been declared by act of parliament (b) to be felonies without benefit of clergy; or, in words, to be worthy of instant death. So dreadful a list, instead of diminishing, increases the number [\*19] of offenders. (8) \*The injured, through compassion, will often forbear to prosecute; juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence; and judges, through compassion, will respite one half of the convicts, and recommend them to royal mercy. Among so many chances of escaping, the needy and hardened offender overlooks the multitude that suffer: he boldly engages in some desperate attempt, to relieve his wants or supply his vices; and, if unexpectedly the hand of justice overtakes him, he deems himself peculiarly unfortunate, in falling at last a sacrifice to those laws, which long impunity has taught him to contemn.

(2) Beccar. c. 6.

(a) Sp. L. b. 6, c. 16.

(b) See Ruffhead's index to the statutes, (tit. Felony), and the acts which have since been made.

(8) The legislature has at length been brought to see this truth, and has greatly diminished this fearful list.



## CHAPTER II. OF THE PERSONS CAPABLE OF COMMITTING CRIMES.

HAVING, in the preceding chapter, considered in general the nature of crimes and punishments, we are led, next, in the order of our distribution, to inquire what persons are, or are not, *capable* of committing crimes; or, which is all one, who are exempted from the censures of the law upon the commission of those acts, which in other persons would be severely punished. In the process of which inquiry, we must have recourse to particular and special exceptions: for the general rule is, that no person shall be excused from punishment for disobedience to the laws of his country, excepting such as are expressly defined and exempted by the laws themselves.

All the several pleas and excuses, which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, the want or defect of *will*. An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing \*that renders human action either praise-worthy or culpable. Indeed, to make a complete crime cognizable by [\*21] human laws, there must be both a will and an act. For, though, *in foro conscientiae*, a fixed design or will to do an unlawful act, is almost as heinous as the commission of it, yet, as no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reason, in all temporal jurisdictions, an *overt* act, or some open evidence of an intended crime, is necessary in order to demonstrate the depravity of the will, before the man is liable to punishment. And, as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.

Now there are three cases, in which the will does not join with the act: 1. Where there is a defect of understanding. For where there is no discernment, there is no choice; and where there is no choice, there can be no act of the will, which is nothing else but a determination of one's choice to do or to abstain from a particular action: he, therefore, that has no understanding can have no will to guide his conduct. 2. Where there is understanding and will sufficient, residing in the party; but not called forth and exerted at the time of the action done; which is the case of all offences committed by chance or ignorance. Here the will sits neuter; and neither concurs with the act, nor disagrees to it. 3. Where the action is constrained by some outward force and violence. Here the will counteracts the deed; and is so far from concurring with, that it loaths and disagrees to, what the man is obliged to perform. It will be the business of the present chapter briefly to consider all the several species of defect in will, as they fall under some one or other of these general heads: as infancy, idiocy, lunacy, and intoxication, which fall under the first class; misfortune and ignorance, which \*may be referred to the second; [\*22] and compulsion or necessity, which may properly rank in the third.

I. First, we will consider the case of *infancy* or nonage; which is a defect of the understanding. Infants, under the age of discretion, ought not to be punished by any criminal prosecution whatever. (a) What the age of discre-

(a) 1 Hawk. P. C. 2.

tion is, in various nations, is matter of some variety. The civil law distinguished the age of minors, or those under twenty-five years old, into three stages: *infantia*, from the birth till seven years of age; *pueritia*, from seven to fourteen; and *pubertas*, from fourteen upwards. The period of *pueritia*, or childhood, was again subdivided into two equal parts: from seven to ten and an half was *ætas infantis proxima*; from ten and an half to fourteen, was *ætas pubertati proxima*. During the first stage of infancy, and the next half stage of childhood, *infantis proxima*, they were not punishable for any crime. (b) During the other half stage of childhood, approaching to puberty, from ten and an half to fourteen, they were indeed punishable, if found to be *doli capaces*, or capable of mischief; but with many mitigations, and not with the utmost rigour of the law. (c) During the last stage (at the age of puberty, and afterwards), minors were liable to be punished, as well capitally as otherwise.

The law of England does in some cases privilege an infant, under the age of twenty-one, as to common misdemeanors, so as to escape fine, imprisonment, and the like; and particularly in cases of omission, as not repairing a bridge, or a highway, and other similar offences; (d) for, not having the command of his fortune until twenty-one, he wants the capacity to do those things which the law requires. But where there is any notorious breach of the peace, a riot, battery, or the like (which infants, when full grown, are at least as liable as [\*23] others to commit), for these an infant, above the age of fourteen, is equally liable to suffer, as a person of the full age of twenty-one.

With regard to capital crimes, the law is still more minute and circumspect; distinguishing with greater nicety the several degrees of age and discretion. By the ancient Saxon law, the age of twelve years was established for the age of possible discretion, when first the understanding might open; (e) and from thence till the offender was fourteen, it was *ætas pubertati proxima*, in which he might or might not be guilty of a crime, according to his natural capacity or incapacity. This was the dubious stage of discretion: but under twelve it was held that he could not be guilty in will, neither after fourteen could he be supposed innocent, of any capital crime which he in fact committed. But by the law, as it now stands, and has stood at least ever since the time of Edward the Third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in these cases our maxim is, that "*malitia supplet ætatem*." Under seven years of age indeed an infant cannot be guilty of felony; (f) for then a felonious discretion is almost an impossibility in nature: but at eight years old he may be guilty of felony. (g) Also, under fourteen, though an infant shall be *prima facie* adjudged to be *doli incapax*; yet, if it appear to the court and jury that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death. (1) Thus a girl of thirteen has been burnt for killing her mistress: and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged; because it appeared upon their trials, that the one hid himself, and the other hid the body he had

(b) Inst. 3. 20. 10.

(c) Ff. 20. 5. 14. 50. 17. 111. 47. 2. 33.

(d) 1 Hal. P. C. 20, 21, 22.

(e) LL. Atheletan. Wlk. 65.

(f) Mir. c. 4, § 16. 1 Hal. P. C. 27.

(g) Dalt. Just. c. 147.

(1) See upon this subject, *State v. Goin*, 9 Humph., 175; *People v. Randolph*, 2 Park. C. R., 174; *Commonwealth v. Green*, 2 Pick., 380. A male child under the age of fourteen is supposed incapable of committing a rape; but in Ohio it has been decided that this is but a presumption which may be overcome by evidence of maturity. *Williams v. State*, 14 Ohio, 223. So he may be convicted of an assault with intent to commit a rape. *People v. Randolph*, 2 Park. C. R., 174. An infant is liable civilly for his torts. *Humphrey v. Douglass*, 10 Vt., 71; *Bullock v. Babcock*, 3 Wend., 391; *Neal v. Gillett*, 23 Conn., 437. And this even though under fourteen years of age. *Huchting v. Engel*, 17 Wis., 290.

killed, which hiding manifested a consciousness of guilt, and a discretion \*to discern between good and evil. (h) And there was an instance in [24] the last century where a boy of eight years old was tried at Abingdon for firing two barns; and it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly. (i) Thus also in very modern times, a boy of ten years old was convicted on his own confession of murdering his bedfellow, there appearing in his whole behaviour plain tokens of a mischievous discretion; and, as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges, that he was a proper subject of capital punishment. (j) But in all such cases, the evidence of that malice which is to supply age, ought to be strong and clear beyond all doubt and contradiction.

II. The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, viz. in an *idiot* or a *lunatic*. For the rule of law as to the latter, which may easily be adapted also to the former, is, that, "*furiosus furor solum puniatur.*" In criminal cases therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. (k) (2) Also if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of non-sane memory, execution shall be stayed: for per-adventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged \*something in stay of judgment or execution. (l) Indeed, in the bloody reign of Henry the Eighth, a [25] statute was made, (m) which enacted that if a person, being *compos mentis*, should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law was repealed by the statute 1 and 2 P. and M., c. 10. For, as is observed by Sir Edward Coke, (n) "the execution of an offender is for example, *ut poena ad paucos, metus ad omnes perveniat*: but so it is not

(h) 1 Hal. P. C. 26, 27.

(i) Emllyn on 1 Hal. P. C. 25.

(j) Foster, 72.

(k) 8 Inst. 6.

(l) 1 Hal. P. C. 34.

(m) 23 H. VIII., c. 20.

(n) 3 Inst. 6.

(2) As to the degree of mental unsoundness which shall excuse a person from punishment for his acts, the works on medical jurisprudence and insanity will need to be consulted, and the case of *Freeman v. People*, 4 Denio, 9, and the trial of *Huntington*, will be found instructive, though they will probably leave upon the mind a painful sense of the difficulties surrounding this whole subject, and the impossibility of laying down definitions and abstract rules which can be easily and safely applied in practice. See also *McNaughton's Case*, 10 Cl. & Fin., 200.

As to the burden of proof when the defense of insanity is made to a criminal prosecution, see *Clark v. State*, 12 Ohio, 483, 494; *Loeffner v. State*, 10 Ohio St., 598; *Bond v. State*, 28 Ohio St., 349; *State v. Felter*, 83 Iowa, 49; *McKenzie v. State*, 42 Ga., 334; *Boswell v. Commonwealth*, 20 Gratt., 860; *Baccigalupo v. Commonwealth*, 33 Gratt., 807; S. C., 36 Am. Rep., 795; *State v. Hoyt*, 47 Conn., 581; *Wright v. People*, 4 Neb., 407; *State v. Pratt*, 1 Houst. C. C., 249; *Boswell v. State*, 63 Ala., 307; S. C., 35 Am. Rep., 20; *State v. Redemeier*, 71 Mo., 173; S. C., 36 Am. Rep., 462; *Webb v. State*, 9 Tex. App., 490; *Johnson v. State*, 10 Tex. App., 571; *State v. Coleman*, 27 La. Ann., 691; *State v. Strauder*, 11 W. Va., 745, 838; *Ortwein v. Commonwealth*, 76 Penn. St., 414; S. C., 18 Am. Rep., 420; *State v. Smith*, 58 Mo., 267; *People v. McDonell*, 47 Cal., 134; *Commonwealth v. Eddy*, 7 Gray, 583; *Polk v. State*, 19 Ind., 170; *Chase v. People*, 40 Ill., 352; *Stevens v. State*, 81 Ind., 485; *People v. Schryver*, 43 N. Y., 1; *State v. Pike*, 49 N. H., 399; *State v. Jones*, 50 N. H., 369; *People v. Garbutt*, 17 Mich., 9; *People v. Finley*, 38 Mich., 482; *Hopps v. People*, 31 Ill., 385; *State v. Klinger*, 43 Mo., 127; *State v. Crawford*, 11 Kan., 32; *Cunningham v. State*, 56 Miss., 269; S. C., 31 Am. Rep., 360.

when a madman is executed; but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others." But if there be any doubt, whether the party be *compos* or not, this shall be tried by jury. And if he be so found, a total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses: but, if a lunatic hath lucid intervals of understanding, he shall answer for what he does in those intervals as if he had no deficiency. (o) Yet, in the case of absolute madmen, as they are not answerable for their actions, they should not be permitted the liberty of acting unless under proper control; and in particular, they ought not to be suffered to go loose, to the terror of the king's subjects. It was the doctrine of our ancient law, that persons deprived of their reason might be confined till they recover their senses, (p) without waiting for the forms of a commission or other special authority from the crown: and now, by the vagrant acts, (q) a method is chalked out for imprisoning, chaining, and sending them to their proper homes.

III. Thirdly: as to artificial, voluntarily contracted madness, by *drunkenness* or intoxication, which, depriving men of their reason, puts them in a temporary frenzy; our law looks upon this as an aggravation of the offence, rather [\*28] \*than as an excuse for any criminal misbehaviour. A drunkard, says Sir Edward Coke, (r) who is *voluntarius dæmon*, hath no privilege thereby; but what hurt or ill soever he doth, his drunkenness doth aggravate it: *nam omne crimen ebrietas, et incendit et detegit*. It hath been observed, that the real use of strong liquors, and the abuse of them by drinking to excess, depend much upon the temperature of the climate in which we live. The same indulgence, which may be necessary to make the blood move in Norway, would make an Italian mad. A German, therefore, says the president Montesquieu, (s) drinks through custom, founded upon constitutional necessity; a Spaniard drinks through choice, or out of the mere wantonness of luxury: and drunkenness, he adds, ought to be more severely punished, where it makes men mischievous and mad, as in Spain and Italy, than where it only renders them stupid and heavy, as in Germany and more northern countries. And accordingly, in the warm climate of Greece, a law of Pittacus enacted, "that he who committed a crime when drunk, should receive a double punishment;" one for the crime itself, and the other for the ebriety which prompted him to commit it. (t) The Roman law, indeed, made great allowances for this vice: "*per vinum delapsis capitalis poena remittitur*." (u) But the law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is (though real), will not suffer any man thus to privilege one crime by another. (w) (3)

(o) 1 Hal. P. C. 81.

(p) Bro. Abr. 1, Corona, 101.

(t) Puff. L. of N. b. 8, c. 8.

(q) 17 Geo. II, c. 5.

(u) Fy. 49. 16. 6.

(r) 1 Inst. 247.

(w) Plowd. 19.

(s) Sp. L. b. 14, c. 12.

(3) A man who, by means of intoxication, voluntarily puts himself in condition to have no control of his actions, must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and when real it is so often resorted to as a means of nerving the person up to the commission of some desperate act, that the law cannot recognize it as an excuse for the commission of crime. U. S. v. Drew, 5 Mason, 28; Pirtle v. State, 9 Humph., 663; Commonwealth v. Hawkins, 8 Gray, 463; People v. Garbutt, 17 Mich., 9; Choice v. State, 31 Geo., 424; State v. Avery, 44 N. H., 392. Nevertheless, the drunkenness of the party is often an important consideration in criminal cases, where the guilty knowledge or intent constitutes the principal ingredient of the crime, so as to make the peculiar state and condition of the criminal's mind at the time, with reference to the act done, the important subject of inquiry. See Swan v. State, 4 Humph., 136; U. S. v. Roudenbush, 1 Bald., 517; Roberts v. People, 19 Mich., 401; Kelley v. State, 3 S. and M., 518. As in the case of passing counterfeit money: Pigman v. State, 14 Ohio, 555; or the appropriation of another's property which might be larceny or a trespass merely, according as the specific intent to steal was present or absent. Rex v. Pitman, 2 C. and P., 423. See further, O'Herrin v. State, 14 Ind., 420; State v. Cross,

IV. A fourth deficiency of will is where a man commits an unlawful act by *misfortune* or *chance*, and not by design. Here the will observes a total neutrality, and does not co-operate with the deed; which therefore wants one main ingredient of a crime. Of this, when it affects the life of another, we shall find more occasion to speak hereafter; at present only observing, that if any accidental mischief \*happens to follow from the performance of a [27] *lawful* act, the party stands excused from all guilt; but if a man be doing any thing *unlawful*, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for, being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour. (x)

V. Fifthly: *ignorance* or *mistake* is another defect of will; when a man, intending to do a lawful act, does that which is unlawful. For here, the deed and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act. But this must be an ignorance or mistake of fact and not an error in point of law. As if a man, intending to kill a thief or house breaker in his own house, by mistake kills one of his own family, this is no criminal action: (y) but if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does so; this is wilful murder. For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. *Ignorantia juris, quod quisque tenetur scire, neminem excusat*, is as well the maxim of our own law, (z) as it was of the Roman. (a) (4)

VI. A sixth species of defect of will is that arising from *compulsion* and inevitable *necessity*. These are constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will (if left to itself) would reject. As punishments are therefore only inflicted for the abuse of that free will which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion.

\*1. Of this nature, in the first place, is the obligation of *civil subjection*, whereby the inferior is constrained by the superior to act contrary [28] to what his own reason and inclination would suggest: as when a legislator establishes iniquity by a law, and commands the subject to do an act contrary

(x) 1 Hal. P. C. 30.

(y) Cro. Car. 538.

(z) Flowd. 245.

(a) 77. 22. 6. 2.

27 Mo., 333; *Golden v. State*, 25 Geo., 527; *Mooney v. State*, 33 Ala., 419; *Regina v. Cruse* 8 C. and P., 541; *State v. Garvey*, 11 Minn., 154; *People v. Harris*, 29 Cal., 678; *Bailey v. State*, 26 Ind., 423; *State v. Schingen*, 20 Wis., 74. Where insanity results from long continued intoxication, the insane person is no more to be punished for his acts than if the delirium had proceeded from causes not under his control. *U. S. v. Drew*, 5 Mason, 28; *State v. McCants*, 1 Spears, 384; *Bailey v. State*, 26 Ind., 423; *State v. Hundley*, 46 Mo., 414.

(4) Ignorance of the law, which every man is bound to know, excuses no man. See the maxim and illustrations in Broom's Legal Maxims.

And this maxim in criminal cases cannot often work a wrong, for there are few acts punishable criminally which a party can be excusable for committing, whether he is aware of the penalty or not. Nevertheless, the ignorance of the party may sometimes be ground for inflicting a nominal punishment, or recommending him to pardon. *Rex v. Lynn*, 3 T. R., 733; *Rex v. Bailey*, R. and Ry., 1; *Rex v. Esop*, 7 C. and P., 456. And in some cases where the intent is the essence of the crime, it may constitute a defense. As where a person is prosecuted for larceny for the conversion to his own use of money which he had found, and which he erroneously believed became his own by the finding. *The Queen v. Reed*, Car. and M., 306. Or where parties riotously destroy a house, in the mistaken belief that in law it belongs to one of them. *The Queen v. Langford*, Car. and M., 603. Or where a bankrupt, in honestly following the advice of counsel, withholds property from his schedule which ought to be included, and makes to the same an affidavit which in law is false. *U. S. v. Conner*, 8 McLean, 578.

to religion or sound morality. How far this excuse will be admitted *in foro conscientie*, or whether the inferior in this case is not bound to obey the divine rather than the human law, it is not my business to decide; though the question, I believe, among the casuists, will hardly bear a doubt. But, however that may be, obedience to the laws in being is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal. The sheriff who burnt Latimer and Ridley, in the bigoted days of Queen Mary, was not liable to punishment from Elizabeth, for executing so horrid an office; being justified by the commands of that magistracy which endeavoured to restore superstition under the holy auspices of its merciless sister, persecution.

As to persons in private relations; the principal case, where constraint of a superior is allowed as an excuse for criminal misconduct, is with regard to the matrimonial subjection of the wife to her husband; for neither a son nor a servant are excused for the commission of any crime, whether capital or otherwise, by the command or coercion of the parent or master; (b) though in some cases the command or authority of the husband, either expressed or implied, will privilege the wife from punishment, even for capital offences. And therefore if a woman commit theft, burglary or other civil offences against the laws of society, by the coercion of her husband; or even in his company, which the law construes a coercion; she is not guilty of any crime; being considered as acting by compulsion and not of her own will. (c) (5) Which doctrine is at least a thousand years old in this kingdom, being to be found among the laws of King \*Ina, the West Saxon. (d) And it appears that among the northern nations on the continent, this privilege extended to any woman transgressing in concert with a man, and to any servant that committed a joint offence with a freeman; the male or freeman only was punished, the female or slave dismissed: "*procul dubio quod alterum libertas, alterum necessitas impelleret.*" (e) But (besides that in our law, which is a stranger to slavery, no impunity is given to servants, who are as much free agents as their masters) even with regard to wives this rule admits of an exception in crimes that are *mala in se*, and prohibited by the law of nature, as murder and the like: not only because these are of a deeper dye, but also, since in a state of nature no one is in subjection to another, it would be unreasonable to screen an offender from the punishment due to natural crimes, by the refinements and subordinations of civil society. In treason, also (the highest crime which a member of society can, as such, be guilty of), no plea of coverture shall excuse the wife; no presumption of the husband's coercion shall extenuate her guilt: (f) as well because of the odiousness and dangerous consequences of the crime itself, as because the husband, having brought through the most sacred tie of social com-

(b) 1 Hawk. P. C. 2.  
(d) Cap. 57.

(c) 1. Hal P. C. 45.  
(e) Sternh. *de jure Sueon.* l. 2. c. 4.

(f) 1 Hal. P. C. 47.

(5) The husband must, however, be present when the offense is committed, or the presumption of coercion by him does not arise. *Rex v. Morris, Russ. and Ry.*, 270. As to what is sufficient presence, see *R. v. Connolly*, 2 Lew. C. C., 229. And even then the presumption is not a conclusive one, but only *prima facie*, and it may be shown by evidence that in fact the wife was the real criminal. *R. v. Hammond*, 1 Leach, 347; 1 Bish. Cr. L., 7th ed., §§ 859, 891a; Whart. Cr. L., § 2475. The wife may therefore be indicted and tried jointly with the husband, and must rely on the coercion for an acquittal when the proofs are adduced at the trial. *State v. Parkerson*, 1 Strob., 169; *Commonwealth v. Murphy*, 2 Gray, 510.

Coercion is not admitted as an excuse in the case of treason or murder. *Reg. v. Manning*, 2 C. and K., 887; and perhaps robbery should be added to this list. *Arch. Cr. L.*, 6; 1 Bish. Cr. L., 7th ed., § 358; *Rex v. Cruse*, 8 C. and P., 541. It is allowed in other felonies, and in misdemeanors generally. *R. v. Ingram*, 1 Salk., 884; *Commonwealth v. Neal*, 10 Mass., 152. But the case of keeping a brothel and gaming-house are exceptions. *R. v. Dixon*, 10 Mod., 336; *State v. Bentz*, 11 Mo., 27; *Commonwealth v. Lewis*, 1 Met., 151. And husband and wife may be jointly indicted and convicted of an assault: *Regina v. Cruse*, 8 C. and P., 541; or of keeping a liquor nuisance. *Commonwealth v. Tryon*, 99 Mass., 442.

munity by rebellion against the state, has no right to that obedience from a wife which he himself as a subject has forgotten to pay. In inferior misdemeanors, also, we may remark another exception; that a wife may be indicted and set in the pillory *with* her husband for keeping a brothel; for this is an offence touching the domestic economy or government of the house, in which the wife has a principal share; and is also such an offence as the law presumes to be generally conducted by the intrigues of the female sex. (g) And in all cases, where the wife offends alone, without the company or coercion of her husband, she is responsible for her offence as much as any feme-sole.

\*2. Another species of compulsion or necessity is what our law calls [*duress per minas*; (h) or threats and menaces, which induce a fear of death or other bodily harm, and which take away for that reason the guilt of many crimes and misdemeanors; at least before the human tribunal. But then that fear which compels a man to do an unwarrantable action ought to be just and well-grounded; such "*qui cadere possit in virum constantem, non timidum et meticulosum*," as Bracton expresses it, (i) in the words of the civil law. (k) Therefore, in time of war or rebellion, a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels, which would admit of no excuse in the time of peace. (l) (6) This however seems only, or at least principally, to hold as to positive crimes, so created by the laws of society; and which therefore society may excuse; but not as to natural offences so declared by the law of God, wherein human magistrates are only the executioners of divine punishment. And therefore though a man be violently assaulted, and hath no other possible means of escaping death, but by killing an innocent person; this fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent. (m) But in such a case he is permitted to kill the assailant; for there the law of nature and self-defence, its primary canon, have made him his own protector.

3. There is a third species of necessity, which may be distinguished from the actual compulsion of external force or fear; being the result of reason and reflection, which act upon and constrain a man's will, and oblige him to do an action which, without such obligation, would be criminal. And that is, when a man has his choice of two evils set before him, and, being under a necessity of choosing one, he chooses the \*least pernicious of the two. Here the will cannot be said freely to exert itself, being rather passive than active, [*or, if active, it is rather in rejecting the greater evil than in choosing the less*. Of this sort is that necessity, where a man by the commandment of the law is bound to arrest another for any capital offence, or to disperse a riot, and resistance is made to his authority: it is here justifiable and even necessary to beat, to wound or perhaps to kill the offenders, rather than permit the murderer to escape, or the riot to continue. For the preservation of the peace of the kingdom, and the apprehending of notorious malefactors, are of the utmost conse-

(g) 1 Hawk. P. C. 2, 3.  
(h) 1 Hal. P. C. 50.

(i) See book I, p. 131.

(j) 1, 2, f. 16.  
(m) 1 Hal. P. C. 51.

(k) JJ. 4, 2, 5 and 6.

The presumption of coercion will apply to admissions made by the wife in the husband's presence, calculated to exonerate him and inculpate herself. Reg. v. Laughner, 2 C. and K. 235. It is not necessary for the woman to prove an actual marriage in these cases; the jury may presume it from evidence of cohabitation and reputation. Rex v. Woodward, 8 C. and P., 561; Reg. v. Good, 1 C. and K., 185.

That an agent or other person acting under the authority of another is not excused from criminal liability by the command of his superior, see Commonwealth v. Hadley, 11 Met., 66; Kliffeld v. State, 4 How. Miss., 306; Hays v. State, 13 Mo., 246; State v. Bugbee, 23 Vt., 33; Barrow v. Page, 5 Hayw., 97. See, also, *post*, p. 37, n.

(6) Republica v. McCarty, 2 Dall., 86. "In the eye of the law nothing will excuse the act of joining an enemy, but the fear of immediate death; not the fear of any inferior personal injury, nor the apprehension of any outrage upon property." See, also, Rex v. McGrowth, 1 East, P. C., 71.

quence to the public; and therefore excuse the felony, which the killing would otherwise amount to. (n) (7)

4. There is yet another case of necessity, which has occasioned great speculation among the writers upon general law; viz., whether a man in extreme want of food or clothing may justify stealing either to relieve his present necessities. And this both Grotius (o) and Puffendorf, (p) together with many other of the foreign jurists, hold in the affirmative; maintaining by many ingenious, humane, and plausible reasons, that in such cases the community of goods, by a kind of tacit confession of society, is revived. And some even of our own lawyers have held the same, (q) though it seems to be an unwarranted doctrine, borrowed from the notions of some civilians: at least it is now antiquated, the law of England admitting no such excuse at present. (r) And this its doctrine is agreeable not only to the sentiments of many of the wisest ancients, particularly Cicero, (s) who holds that "*sum cuique incommodum ferendum est, potius quam de alterius commodis detrahendum*," but also to the Jewish law, as certified by King Solomon himself: (t) "if a [32] thief steals to satisfy his soul when he is hungry, he shall restore \*sevenfold, he shall give all the substance of his house:" which was the ordinary punishment for theft in that kingdom. And this is founded upon the highest reason: for men's properties would be under a strange insecurity, if liable to be invaded according to the wants of others, of which wants no man can possibly be an adequate judge, but the party himself who pleads them. In this country, especially, there would be a peculiar impropriety in admitting so dubious an excuse: for by our laws such sufficient provision is made for the poor by the power of the civil magistrate, that it is impossible that the most needy stranger should ever be reduced to the necessity of thieving to support nature. The case of a stranger is, by the way, the strongest instance put by Baron Puffendorf, and whereon he builds his principal arguments: which, however they may hold upon the continent, where the parsimonious industry of the natives orders every one to work or starve, yet must lose all their weight and efficacy in England, where charity is reduced to a system, and interwoven in our very constitution. Therefore, our laws ought by no means to be taxed with being unmerciful for denying this privilege to the necessitous; especially when we consider, that the king, on the representation of his ministers of justice, hath a power to soften the law, and to extend mercy in cases of peculiar hardship. An advantage which is wanting in many states, particularly those which are democratical; and these have in its stead introduced and adopted, in the body of the law itself, a multitude of circumstances tending to alleviate its rigour. But the founders of our constitution thought it better to vest in the crown the power of pardoning particular objects of compassion, than to countenance and establish theft by one general undistinguishing law.

VII. To these several cases, in which the incapacity of committing crimes arises from a deficiency of the will, we may add one more, in which the law supposes an incapacity of doing wrong, from the excellence and perfection of [33] the \*person; which extend as well to the will as to the other qualities of his mind. I mean the case of the king; who, by virtue of his royal prerogative, is not under the coercive power of the law; (u) which will not suppose him capable of committing a folly, much less a crime. We are therefore, out of reverence and decency, to forbear any idle inquiries, of what would be the consequence if the king was to act thus and thus: since the law deems so highly of his wisdom and virtue as not even to presume it possible for him to do any thing inconsistent with his station and dignity: and therefore has made no provisions to remedy such a grievance. But of this sufficient was said in a former volume, (v) to which I must refer the reader.

(n) 1 Hal. P. O. 52.

(o) Britton, c. 10.

(p) Prov. vi. 30.

(q) De fure b. and p. l. 2, c. 2.

(r) 1 Hal. P. O. 54.

(s) 1 Hal. P. O. 44.

(t) L. of Nat. and N. l. 2, c. 6.

(u) De off. l. 2, c. 5.

(v) Book I, ch. 7, page 244.

(7) See State v. Roane, 2 Dev., 58; Tate v. State, 5 Blackf., 78.



### CHAPTER III. OF PRINCIPALS AND ACCESSORIES.

It having been shown in the preceding chapter what persons are, or are not, upon account of their situation and circumstances, capable of committing crimes, we are next to make a few remarks on the different degrees of guilt among persons that are capable of offending, viz.: as *principal*, and as *accessory*.

1. A man may be *principal* in an offence in two degrees. A principal, in the first degree, is he that is the actor, or absolute perpetrator, of the crime; and, in the second degree, he who is present, aiding and abetting the fact to be done. (a) Which *presence* need not always be an actual immediate standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance. (b) (1) And this rule hath also other exceptions: for, in case of murder by poisoning, a man may be a principal felon by preparing and laying the poison, or persuading another to drink it (c) who is ignorant of its poisonous quality, (d) or giving it to him for that purpose; and yet not administer it himself, nor be present when the very deed of poisoning is committed. (e) And the same reasoning will hold, with regard to other murders committed in the absence\* of the murderer, by means which he had prepared beforehand, and which probably could not fail [\*35]

(a) 1 Hal. P. C. 615.

(b) Foster, 350.

(c) Kel. 52.

(d) Foster. 342.

(e) 3 Inst. 126.

(1) To be a principal in the first degree, it is not necessary that one should be actually present at the commission of the injury; as if one lay poison for another and the latter takes it. See *Rex v. Harley*, 4 C. & P., 369. If several combine to forge an instrument, each doing a separate part, and they are not together when the instrument is completed, all are guilty as principals. See *Rex v. Bingley, R. & R.*, 446. So, a person may be a principal if he acts by means of an insane or innocent person or an inanimate substance. See *Commonwealth v. Hill*, 11 Mass., 136; *Adams v. People*, 1 N. Y., 173; S. C., 45 Am. Dec., 468; *Reg. v. Michael*, 9 C. & P., 356; *R. v. Mazeau*, 9 C. & P., 676; *Reg. v. Clifford*, 2 C. & K., 202.

If the instrument so used is aware of his act, he is a principal in the first degree, and his employer, if present at the time of the commission of the offense, is principal in the second degree; if absent, an accessory before the fact. See *Rex v. Stewart, R. & R.*, 363; *Fost.*, 349. As to criminal liability of a master for the acts of his servant in his business, see *Com. v. Nichols*, 10 Met., 259; S. C., 43 Am. Dec., 432. Mere presence at the commission of a felony, if one takes no part in it and does not act in concert with the felons, does not make one a principal in the second degree. See *Connaught v. State*, 1 Wis., 159; *Plummer v. Commonwealth*, 1 Bush, 76; *People v. Ah Ping*, 27 Cal., 459; *State v. Maloy*, 44 Ia., 104.

To convict a person as principal in the second degree, it is not necessary to show actual assistance. It is enough if one's will contributed to the criminal act, and at the time was in position to render assistance to the perpetrator, if necessary. *Rex v. Owen*, 1 Mood. 96; *Commonwealth v. Knapp*, 9 Pick., 496; *Thompson v. Commonwealth*, 1 Metc. (Ky.), 18; *Rex v. Kelly, R. & R.*, 420.

Any concerted participation in a general felonious plan, provided there be constructive presence, is enough to warrant a conviction as a principal in the second degree. See *Rex v. Standby, R. & R.*, 305; *Rex v. Passey, T. C. & P.*, 282; *Rex v. Lockett, Ibid.*, 300. If one counsels another to commit suicide, and it is committed, the one so advising is guilty of murder. See *Commonwealth v. Bowen*, 13 Mass., 306. So, the seconds at a duel, if death ensue are held as principals for murder. *Reg. v. Young*, 8 C. & P., 644. In some states the distinction between a principal in the first and in the second degree is abolished by statute. All concerned in the commission of the offense, and all who aid or abet its commission, may be punished as principals.

A person may be principal in a crime in a state where, at the time, he is not, if he is instigator of the criminal act and accomplishes it through innocent agents. *People v. Adams*, 8 Denio, 190; S. C., 45 Am. Dec., 468.

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of their mischievous effect. As by laying a trap or pitfall for another, whereby he is killed: letting out a wild beast, with an intent to do mischief, or inciting a madman to commit murder, so that death thereupon ensues; in every of these cases the party offending is guilty of murder as a principal in the first degree. For he cannot be called an accessory; that necessarily pre-supposing a principal; and the poison, the pitfall, the beast, or the madman, cannot be held principals, being only the instruments of death. As therefore he must be certainly guilty either as principal or accessory, and cannot be so as accessory, it follows that he must be guilty as principal, and, if principal, then in the first degree; for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or assist. (f)

II. An *accessory* is he who is not the chief actor in the offence, nor present at its performance, but in some way concerned therein, either *before* or *after* the fact committed. In considering the nature of which degree of guilt, we will, first, examine what offences admit of accessories, and what not: secondly, who may be an accessory, *before* the fact: thirdly, who may be an accessory *after* it: and, lastly, how accessories, considered merely as such, and distinct from principals, are to be treated.

1. And, first, as to what offences admit of accessories, and what not. In high treason there are no accessories, but all are principals: the same acts, that make a man accessory in felony, making him a principal in high treason, upon account of the heinousness of the crime. (g) Besides it is to be considered, that the bare intent to commit treason is many times actual treason: as imagining the death of the king, or conspiring to take away his crown. And, as no one can advise and abet such a crime without an intention to have it done, [\*36] there can be no accessories before the fact; since the \*very advice and abetment amount to principal treason. But this will not hold in the inferior species of high treason, which do not amount to the legal idea of compassing the death of the king, queen, or prince. For in those no advice to commit them, unless the thing be actually performed, will make a man a principal traitor. (h) In petit treason, murder and felonies, with or without benefit of clergy, there may be accessories: except only in those offences which by judgment of law are sudden and unpremeditated, as manslaughter and the like; which therefore cannot have any accessories *before* the fact. (i) So, too, in petit larceny, and in all crimes under the degree of felony, there are no accessories either *before* or *after* the fact; but all persons concerned therein, if guilty at all, are principals; (k) the same rule holding with regard to the highest and lowest offences, though upon different reasons. In treason all are principals, *propter odium delicti*; in trespass all are principals, because the law, *quæ de minimis non curat*, does not descend to distinguish the different shades of guilt in petty misdemeanors. It is a maxim, that *accessorius sequitur naturam sui principalis*; (l) and therefore an accessory cannot be guilty of a higher crime than his principal; being only punished as a partaker of his guilt. So that if a servant instigates a stranger to kill his master, this being murder in the stranger as principal, of course the servant is accessory only to the crime of murder; though, had he been present and assisting, he would have been guilty as principal of petit treason, and the stranger of murder. (m)

2. As to the second point, who may be an accessory *before* the fact; Sir Matthew Hale (n) defines him to be one who being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime. Herein absence is necessary to make him an accessory: for if such procurer, or the like, be present, he is guilty of the crime as principal. If A then [\*37] advises B to kill another, and \*B does it in the absence of A, now B is principal and A is accessory in the murder. And this holds, even though the party killed be not *in rerum natura* at the time of the advice

(f) 1 Hal. P. C. 617. 2 Haw. P. C. 613.

(g) 1 Hal. P. C. 615.

(h) 1 Hal. P. C. 616.

(i) 1 Hal. P. C. 616.

(k) *Ibid.* 613.

(l) 3 Inst. 138.

(m) 3 Inst. 139.

1 Hal. P. C. 615.

(n) 2 Haw. P. C. 815.

(A) Foster. 362.

given. As if A, the reputed father, advises B, the mother of a bastard child, unborn, to strangle it when born, and she does so; A is accessory to this murder. (o) And it is also settled, (p) that whoever procureth a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact. It is likewise a rule, that he who in any wise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act; but is not accessory to any act distinct from the other. As if A commands B to beat C, and B beats him so that he dies: B is guilty of murder as principal, and A as accessory. (2) But if A commands B to burn C's house; and he, in so doing, commit a robbery; now A, though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and un consequential nature. (q) (3) But if the felony committed be the same in substance with that which is commanded, and only varying in some circumstantial matters; as if, upon a command to poison Titius, he is stabbed or shot, and dies: the commander is still accessory to the murder; for the substance of the thing commanded was the death of Titius, and the manner of its execution is a mere collateral circumstance. (r)

3. An accessory *after* the fact may be, where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. (s) Therefore, to make an accessory *ex post facto*, it is in the first place requisite that he knows of the felony committed. (t) (4) In the next place he must receive, relieve, comfort, or assist him. And generally, any assistance whatever, given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the assistor an accessory. As furnishing him with a horse to escape his \*pursuers, money or victuals to support him, a house or other [\*38] shelter to conceal him, or open force and violence to rescue or protect him. (u) So likewise to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man an accessory to the felony. But to relieve a felon in gaol with clothes or other necessities, is no offence; for the crime imputable to this species of accessory is the hinderance of public justice, by assisting the felon to escape the vengeance of the law. (v) To buy or receive stolen goods, knowing them to be stolen, falls under none of these descriptions; it was therefore at common law a mere misdemeanor, and made not the receiver accessory to the theft, because he received the *goods* only, and not the *felon*: (w) but now by the statutes 5 Ann. c. 31, and 4 Geo. I, c. 11, all such receivers are made accessories (where the principal felony admits of accessories), (x) and may be transported for fourteen years; and, in the case of receiving linen goods stolen from the bleaching-grounds, are by statute 18 Geo. II, c. 27, declared felons without benefit of clergy. (5) In France such

(o) Dyer, 186.

(p) Foster, 125.

(q) 1 Hal. P. C. 617.

(r) 2 Hawk. P. C. 316.

(s) 1 Hal. P. C. 618.

(t) 2 Hawk. P. C. 319.

(u) *Ibid.* 317, 318.

(v) 1 Hal. P. C. 620, 621.

(w) *Ibid.* 620.

(x) Foster, 72.

(2) It is no excuse for the party beating in such a case, that the command was by a master to his servant, by a parent to his child, or by any other person occupying a position of authority; if the beating was unwarranted by law, both are criminally responsible. *Commonwealth v. Drew*, 3 Cush., 279; *Hays v. State*, 13 Mo., 246; *State v. Bell*, 5 Port., 365; *Mitchell v. Harmony*, 13 How., 115; *State v. Bugbee*, 23 Vt., 32; *Curtis v. Knox*, 2 Denio, 341.

(3) See *Regina v. Taunton*, 9 C. and P., 809. Where the offense committed is not the precise one planned and advised, Mr. Justice Foster says the proper criterion to determine whether the adviser is involved in the legal guilt or not, is, "Did the principal commit the offense he stands charged with under the influence of the flagitious advice; and was the event, in the ordinary course of things, a probable consequence of that felony? or did he, following the suggestions of his own wicked heart, willfully and knowingly commit a felony of another kind?" *Fost.*, 372.

As to accessories in general, see 1 Bish. Cr. L., 7th ed., ch. 47 and 48; 1 Arch. Cr. L., ch. 1; 1 Russ. on Cr., ch. 2.

(4) See 1 Hale, P. C. 323, 623; Whart. Cr. L. § 146; 1 Bish. Cr. L., 7th ed., §§ 692, 693.

(5) These statutory provisions are repealed, and the death penalty abolished. The offense is now punished under statute 24 and 25 Vic. c. 96.

receivers are punished with death: and the Gothic constitutions distinguished also three sorts of thieves, "*unum qui consilium daret, alterum qui contrectaret, tertium qui receptaret et occuleret; pari pœnæ singulos obnoxios.*" (y)

The felony must be complete at the time of the assistance given; else it makes not the assistant an accessory. As if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent: this does not make him accessory to the homicide; for, till death ensues, there is no felony committed. (z) But so strict is the law where a felony is actually complete, in order to do effectual justice, that the nearest relations are not suffered to aid or receive one another. (8) If the parent assists his child, or the child his parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband relieves [39] his wife, who have any of them committed a \*felony, the receivers become accessories *ex post facto*. (a) But a feme-covert cannot become an accessory by the receipt and concealment of her husband; for she is presumed to act under his coercion, and therefore she is not bound, neither ought she, to discover her lord. (b)

4. The last point of inquiry is, how accessories are to be treated, considered distinct from principals. And the general rule of the ancient law (borrowed from the Gothic constitutions), (c) is this, that accessories shall suffer the same punishment as their principals: if one be liable to death, the other is also liable: (d) as, by the laws of Athens, delinquents and their abettors were to receive the same punishment. (e) Why, then, it may be asked, are such elaborate distinctions made between accessories and principals, if both are to suffer the same punishment? For these reasons: 1. To distinguish the nature and denomination of crimes, that the accused may know how to defend himself, when indicted; the commission of an actual robbery being quite a different accusation from that of harboring the robber. 2. Because, though by the ancient common law the rule is as before laid down, that both shall be punished alike, yet now by the statutes relating to the benefit of clergy a distinction is made between them; accessories *after* the fact being still allowed the benefit of clergy in all cases, except horse-stealing (f) and stealing of linen from bleaching-grounds: (g) which is denied to the principals and accessories *before* the fact, in many cases, as, among others, in petit treason, murder, robbery, and willful burning. (h) And perhaps if a distinction were constantly to be made between the punishment of principals and accessories, even *before* the fact, the latter to be treated with a little less severity than the former, it might prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself; as his danger would [40] be greater \*than that of his accomplices, by reason of the difference of his punishment. (i) 3. Because formerly no man could be tried as accessory till after the principal was convicted, or at least he must have been tried at the same time with him: though that law is now much altered, as will be shown more fully in its proper place. 4. Because, though a man be indicted as accessory and acquitted, he may afterwards be indicted as principal: for an acquittal of receiving or counselling a felon is no acquittal of the felony itself; but it is matter of some doubt, whether, if a man be acquitted as principal, he can be afterwards indicted as accessory before the fact; since those offences are frequently very nearly allied, and therefore an acquittal of the guilt of one may be an acquittal of the other also. (k) (7) But it is clearly held, that one

(y) *Sternhook, de jure. Goth. l. 3, c. 5.*

(z) 2 Hawk. P. C. 330.

(8) 3 Inst. 108. 2 Hawk. P. C. 330.

(b) 1 Hal. P. C. 631.

(c) See *Sternhook, ibid.*

(d) 3 Inst. 188.

(e) *Pott Antiq. b. 1, c. 26.*

(f) Stat. 31 Eliz. c. 12.

(g) Stat. 18 Geo. II, c. 27.

(h) 1 Hal. P. C. 615.

(i) *Beccar. c. 37.*

(k) 1 Hal. P. C. 636, 636. 2 Hawk. P. C. 373. Foster, 361.

(6) This has been changed by statute in some states so that near relatives may aid each other in such cases without becoming accessories after the fact.

(7) This is disputed by Hawkins and Foster. Hawkins, b. 2, c. 35, § 1; Foster, 361.

acquitted as a principal may be indicted as an accessory *after* the fact; since that is always an offence of a different species of guilt, principally tending to evade the public justice, and is subsequent in its commencement to the other. Upon these reasons, the distinction of principal and accessory will appear to be highly necessary; though the punishment is still much the same with regard to principals, and such accessories as offend *before* the fact is committed. (8)

## CHAPTER IV.

## OF OFFENCES AGAINST GOD AND RELIGION.

In the present chapter we are to enter upon the detail of the several species of crimes and misdemeanors, with the punishments annexed to each by the laws of England. It was observed in the beginning of this book, (a) that crimes and misdemeanors are a breach and violation of the public rights and duties owing to the whole community, considered as a community, in its social aggregate capacity. And in the very entrance of these Commentaries (b) it was shown that human laws can have no concern with any but social and relative duties, being intended only to regulate the conduct of man, considered under various relations, as a member of civil society. All crimes ought therefore to be estimated merely according to the mischiefs which they produce in civil society; (c) and of consequence private vices or breach of mere absolute duties, which man is bound to perform considered only as an individual, are not, cannot be, the object of any municipal law, any farther than as by their evil example, or other pernicious effects, they may prejudice the community, and thereby become a species of public crimes. Thus the vice of drunkenness, if committed privately and alone, is beyond the knowledge, and of course beyond the reach of human tribunals: but if committed publicly, in the face of the world, its evil example makes it liable to temporal censures. The vice of lying, which consists (abstractedly taken) in a criminal violation of truth, and therefore in any \*shape is derogatory from sound morality, is not however taken notice of by our law, unless it carries with it some public inconvenience, as spreading false news; or some social injury, as slander and malicious prosecution, for which a private recompense is given. And yet drunkenness and malevolent lying are, *in foro conscientiæ*, as thoroughly criminal when they are not, as when they are, attended with public inconvenience. The only difference is, that both public and private vices are subject to the venge-

(a) See page 5.

(b) See book I, pages 123, 124.

(c) Beccar. c. 8.

(8) By statute 24 and 25 Vic., c. 94, an accessory before the fact to a felony may be indicted, tried, and punished as if he were a principal felon; and, by section 2, whoever shall counsel, procure or command any other person to commit a felony, shall be guilty of felony, and may be punished either as accessory before the fact, or for a substantive felony, and whether the principal felon is previously convicted, or is amenable to justice or not. And, by section 3, accessories after the fact to a felony may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not be previously convicted, or amenable to justice or not.

In a number of the United States there are similar modifications of the common law relating to this subject. For the rule, in the absence of such statutes, see *Stoops v. Commonwealth*, 7 S. & R., 491; *Commonwealth v. Knapp*, 10 Pick., 477; *State v. Duncan*, 6 Ired., 98; *Holmes v. Commonwealth*, 25 Penn. St., 221.

As to charging accessories with a substantive felony, under statutes permitting that course, see *State v. Weston*, 9 Conn., 527; *Noland v. State*, 19 Ohio, 181; *Shannon v. People*, 5 Mich., 71.

ance of eternal justice; and public vices are besides liable to the temporal punishments of human tribunals.

On the other hand, there are some misdemeanors which are punished by the municipal law, that have in themselves nothing criminal, but are made unlawful by the positive constitutions of the state for public convenience; such as poaching, exportation of wool, and the like. These are naturally no offences at all; but their whole criminality consists in the disobedience to the supreme power, which has an undoubted right, for the well-being and peace of the community, to make some things unlawful which were in themselves indifferent. Upon the whole, therefore, though part of the offences to be enumerated in the following sheets are offences against the revealed law of God, others against the law of nature, and some are offences against neither; yet, in a treatise of municipal law, we must consider them all as deriving their particular guilt, here punishable, from the law of man.

Having premised this caution, I shall next proceed to distribute the several offences, which are either directly or by consequence injurious to civil society, and therefore punishable by the laws of England, under the following general heads: first, those which are more immediately injurious to God and his holy religion; secondly, such as violate and transgress the law of nations; thirdly, such as more especially affect the sovereign executive power of the state, or the [\*43] king and his government; fourthly, such as more directly \*infringe the rights of the public or commonwealth; and lastly, such as derogate from those rights and duties which are owing to particular individuals, and in the preservation and vindication of which the community is deeply interested.

First, then, of such crimes and misdemeanors as more immediately offend Almighty God, by openly transgressing the precepts of religion, either natural or revealed: and mediately, by their bad example and consequence, the law of society also: which constitutes that guilt in the action which human tribunals are to censure.

I. Of this species the first is that of *apostasy*, or a total renunciation of Christianity, by embracing either a false religion, or no religion at all. This offence can only take place in such as have once professed the true religion. The perversion of a Christian to Judaism, paganism, or other false religion, was punished by the emperors Constantius and Julian with confiscation of goods; (d) to which the emperors Theodosius and Valentinian added capital punishment, in case the apostate endeavoured to pervert others to the same iniquity: (e) a punishment too severe for any temporal laws to inflict upon any spiritual offence; and yet the zeal of our ancestors imported it into this country; for we find by Bracton (f) that in his time apostates were to be burnt to death. Doubtless the preservation of Christianity, as a national religion, is, abstracted from its own intrinsic truth, of the utmost consequence to the civil state: which a single instance will sufficiently demonstrate. The belief of a future state of rewards and punishments, the entertaining just ideas of the moral attributes of the Supreme Being, and a firm persuasion that he superintends and will finally compensate every action in human life (all which are clearly revealed in the doctrines, and forcibly inculcated by the precepts, of our Saviour Christ), these are the grand foundation of all judicial oaths; which call God to witness the truth of those facts, which perhaps may be only known to him and the party [\*44] attesting: all moral evidence, \*therefore, all confidence in human veracity, must be weakened by apostasy, and overthrown by total infidelity. (g) Wherefore all affronts to Christianity, or endeavours to depreciate its efficacy, in those who have once professed it, are highly deserving of censure. But yet the loss of life is a heavier penalty than the offence, taken in a civil

(d) Cod. l. 7, 1.

(e) *Ibid.* 6.

(f) l. 2, c. 9.

(g) *Utiles esse opiniones has, quis negat, cum intelligat, quam multa firmentur jurejurando; quantas salutis sint fœderum religiones; quam multos divini supplicii metus a scelere revocant: quamque sancta sit societas civium inter ipso, Deo immortalibus interpositis tum judiciis, tum testibus ?* *Os. de L. l. 7.*

light, deserves: and, taken in a spiritual light, our laws have no jurisdiction over it. This punishment therefore has long ago become obsolete; and the offence of apostasy was for along time the object only of the ecclesiastical courts, which corrected the offender *pro salute animæ*. But about the close of the last century, the civil liberties to which we were then restored being used as a cloak of maliciousness, and the most horrid doctrines subversive of all religion being publicly avowed both in discourse and writings, it was thought necessary again for the civil power to interpose, by not admitting those miscreants (*h*) to the privileges of society, who maintained such principles as destroyed all moral obligation. To this end it was enacted by statute 9 and 10 Wm. III, c. 32, that if any person educated in, or having made profession of, the Christian religion, shall, by writing, printing, teaching, or advised speaking, deny the Christian religion to be true, or the holy scriptures to be of divine authority, he shall upon the first offence, be rendered incapable to hold any office or place of trust; and for the second, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and shall suffer three years' imprisonment without bail. To give room, however, for repentance, if, within four months after the first conviction, the delinquent will in open court publicly renounce his error, he is discharged for that once from all disabilities.

II. A second offence is that of *heresy*, which consists not in a total denial of Christianity, but of some of its essential \*doctrines, publicly and obstinately avowed; being defined by Sir Matthew Hale, "*sententia rerum divinarum humano sensu excogitata, palam docta et pertinaciter defensa.*" (*i*) [\*45] And here it must also be acknowledged that particular modes of belief or unbelief, not tending to overturn Christianity itself, or to sap the foundations of morality, are by no means the object of coercion by the civil magistrate. What doctrine shall therefore be adjudged heresy was left by our old constitution to the determination of the ecclesiastical judge; who had herein a most arbitrary latitude allowed him. For the general definition of an heretic given by Lyndewode, (*k*) extends to the smallest deviation from the doctrines of holy church: "*hæreticus est qui dubitat de fide catholica, et qui negligit servare ea, quæ Romana ecclesia statuit, seu servare decreverat.*" Or, as the statute 2 Hen. IV, c. 15, expresses it in English, "teachers of erroneous opinions, contrary to the faith and blessed determinations of the holy church." Very contrary this to the usage of the first general councils, which defined all heretical doctrines with the utmost precision and exactness. And what ought to have alleviated the punishment, the uncertainty of the crime, seems to have enhanced it in those days of blind zeal and pious cruelty. It is true that the sanctimonious hypocrisy of the canonists went at first no farther than enjoining penance, excommunication, and ecclesiastical deprivation for heresy; though afterwards they proceeded boldly to imprisonment by the ordinary, and confiscation of goods *in pios usus*. But in the mean time they had prevailed upon the weakness of bigoted princes to make the civil power subservient to their purposes, by making heresy not only a temporal, but even a capital offence: the Romish ecclesiastics determining, without appeal, whatever they pleased to be heresy, and shifting off to the secular arm the odium and drudgery of executions; with which they themselves were too tender and delicate to intermeddle. Nay, they pretended to intercede and pray, on behalf of the convicted heretic, *ut citra mortis periculum sententia circa eum moderatur*: (*l*) well \*knowing at the same time that they were delivering the unhappy [\*46] victim to certain death. Hence the capital punishments inflicted on the ancient Donatists and Manichæans by the emperors Theodosius and Justinian; (*m*) hence also the constitution of the emperor Frederic mentioned by Lyndewode, (*n*) adjudging all persons without distinction to be burnt with

(h) *Mescrepans* in our ancient law books is the name of unbelievers.

(k) *Cap. de hæreticis.*

(l) *Decretal. l. 1, t. 40, c. 27.*

(m) *Cod. l. 1, tit. 5.*

(n) *c. de hæreticis.*

fire, who were convicted of heresy by the ecclesiastical judge. The same emperor, in another constitution, (o) ordained that if any temporal lord, when admonished by the church, should neglect to clear his territories of heretics within a year, it should be lawful for good catholics to seize and occupy the lands, and utterly to exterminate the heretical possessors. And upon this foundation was built that arbitrary power, so long claimed and so fatally exerted by the pope, of disposing even of the kingdoms of refractory princes to more dutiful sons of the church. The immediate event of this constitution was something singular, and may serve to illustrate at once the gratitude of the holy see, and the just punishment of the royal bigot: for upon the authority of this very constitution, the pope afterwards expelled this very emperor Frederic from his kingdom of Sicily, and gave it to Charles of Anjou. (p)

Christianity being thus deformed by the demon of persecution upon the continent, we cannot expect that our own island should be entirely free from the same scourge. And therefore we find among our ancient precedents (q) a writ *de hæretico comburendo*, which is thought by some to be as ancient as the common law itself. However, it appears from thence, that the conviction of heresy by the common law was not in any petty ecclesiastical court, but before the archbishop himself, in a provincial synod; and that the delinquent was delivered over to the king, to do as he should please with him: so that the crown had a control over the spiritual power, and might pardon the convict by issuing no process against him; the writ *de hæretico comburendo* being not a writ [ \*47 ] \*of course, but issuing only by the special direction of the king in council. (r) But in the reign of Henry the Fourth, when the eyes of the Christian world began to open, and the seeds of the protestant religion (though under the opprobrious name of lollardy) (s) took root in the kingdom; the clergy taking advantage from the king's dubious title to demand an increase of their own power, obtained an act of parliament, (t) which sharpened the edge of persecution to its utmost keenness. For, by that statute, the diocesan alone, without the intervention of a synod, might convict of heretical tenets: and unless the convict abjured his opinions, or if after abjuration he relapsed, the sheriff was bound, *ex officio*, if required by the bishop, to commit the unhappy victim to the flames, without waiting for the consent of the crown. By the statute 2 Hen. V, c. 7, lollardy was also made a temporal offence, and indictable in the king's courts; which did not thereby gain an exclusive, but only a concurrent, jurisdiction with the bishop's consistory.

Afterwards, when the final reformation of religion began to advance, the power of the ecclesiastics was somewhat moderated: for though what heresy is, was not then precisely defined, yet we were told in some points what it is not; the statute 25 Hen. VIII, c. 14, declaring that offences against the see of Rome are not heresy; and the ordinary being thereby restrained from proceeding in any case upon mere suspicion; that is, unless the party be accused by two credible witnesses, or an indictment of heresy be first previously found in the king's courts of common law. And yet the spirit of persecution was not then abated, but only diverted into a lay channel. For in six years afterwards, by statute 31 Hen. VIII, c. 14, the bloody law of the six articles was made, [\*48] which established the six most contested points of \*popery, transubstantiation, communion in one kind, the celibacy of the clergy, monastic vows, the sacrifice of the mass, and auricular confession; which points were determined and resolved by the most godly study, pain, and travail of his majesty: for which his most humble and obedient subjects, the lords *spiritual* and temporal, and the commons in parliament assembled, did not only render and give unto his highness their most high and hearty thanks," but did also

(o) Cod 1, 5, 4.

(p) Baldus in Cod. 1, 5, 4.

(q) F. N. B. 269.

(r) 1 Hal. P. C. 305.

(s) So called from *lollum* or *tares*, (an etymology which was afterwards devised in order to justify the burning of them, Matth. xiii. 30) but from one Walter Lolhard, a German reformer, A. D. 1515. Mod. Un. Hist. xxvi, 18. Spelm. Gloss. 871.

(t) 2 Hen. IV, c. 15.



enact and declare all oppugners of the first to be heretics, and to be burnt with fire; and of the five last to be felons, and to suffer death. The same statute established a new and mixed jurisdiction of clergy and laity for the trial and conviction of heretics; the reigning prince being then equally intent on destroying the supremacy of the bishops of Rome, and establishing all other their corruptions of the Christian religion.

I shall not perplex this detail with the various repeals and revivals of these sanguinary laws in the two succeeding reigns; but shall proceed directly to the reign of Queen Elizabeth; when the reformation was finally established with temper and decency, unsullied with party rancour, or personal caprice and resentment. By statute 1 Eliz., c. 1, all former statutes relating to heresy are repealed, which leaves the jurisdiction of heresy as it stood at common law; viz., as to the infliction of common censures, in the ecclesiastical courts; and in case of burning the heretic, in the provincial senate only. (u) Sir Matthew Hale is indeed of a different opinion, and holds that such power resided in the diocesan also, though he agrees that, in either case, the writ *de hæretico comburendo* was not demandable of common right, but grantable or otherwise merely at the king's discretion. (v) But the principal point now gained was, that by this statute a boundary is for the first time set to what shall be accounted heresy; nothing for the future being to be so determined, but only such tenets, which have been heretofore so declared: 1. By the words of the canonical scriptures; 2. By the first four general councils, or such \*others [\*49] as have only used the words of the holy scriptures; or, 3. Which shall hereafter be so declared by the parliament, with the assent of the clergy in convocation. Thus was heresy reduced to a greater certainty than before; though it might not have been the worse to have defined it in terms still more precise and particular: as a man continued still liable to be burnt for what perhaps he did not understand to be heresy till the ecclesiastical judge so interpreted the words of the canonical scriptures.

For the writ *de hæretico comburendo* remained still in force; and we have instances of its being put in execution upon two anabaptists in the seventeenth of Elizabeth, and two arians in the ninth of James the First. But it was totally abolished, and heresy again subjected only to ecclesiastical correction, *pro salute animæ*, by virtue of the statute 29 Car. II, c. 9. For in one and the same reign, our lands were delivered from the slavery of military tenures, our bodies from arbitrary imprisonment by the *habeas corpus* act, and our minds from the tyranny of superstitious bigotry, by demolishing this last badge of persecution in the English law.

In what I have now said, I would not be understood to derogate from the just rights of the national church, or to favor a loose latitude of propagating any crude, undigested sentiments, in religious matters. Of propagating, I say; for the bare entertaining them, without an endeavor to diffuse them, seems hardly cognizable by any human authority. I only mean to illustrate the excellence of our present establishment, by looking back to former times. Every thing is now as it should be, with respect to the spiritual cognizance, and spiritual punishment, of heresy: unless perhaps that the crime ought to be more strictly defined, and no prosecution permitted, even in the ecclesiastical courts, till the tenets in question are by proper authority previously declared to be heretical. Under these restrictions it seems necessary, for the support of the national religion, that the officers of the church should have power to censure heretics; yet not to harass them with temporal penalties, much less to exterminate or \*destroy them. The legislature hath indeed thought it proper, that the civil magistrate should again interpose, with regard to [\*50] one species of heresy very prevalent in modern times; for by statute 9 and 10 Wm. III, c. 32, if any person educated in the Christian religion, or professing the same, shall, by writing, printing, teaching, or advised speaking, deny

(u) 5 Rep. 23. 12 Rep. 56. 92.

(v) 1 Hal. P. C. 405.

any one of the persons in the holy trinity to be God, or maintain that there are more gods than one, he shall undergo the same penalties and incapacities, which were just now mentioned to be inflicted on apostacy by the same statute. (1) And thus much for the crime of heresy.

III. Another species of offences against religion are those which affect the *established church*. And these are either positive or negative; positive, by reviling its ordinances; or negative, by non-conformity to its worship. Of both of these in their order.

1. And, first, of the offence of *reviling the ordinances* of the church. (2) This is a crime of a much grosser nature than the other of mere non-conformity, since it carries with it the utmost indecency, arrogance, and ingratitude; indecency, by setting up private judgment in virulent and factious opposition to public authority; arrogance, by treating with contempt and rudeness what has at least a better chance to be right than the singular notions of any particular man; and ingratitude, by denying that indulgence and undisturbed liberty of conscience to the members of the national church, which the retainers to every petty conventicle enjoy. However, it is provided by statutes 1 Edw. VI, c. 1, and 1 Eliz. c. 1, that whoever reviles the sacrament of the Lord's supper shall be punished by fine and imprisonment; and by statute 1 Eliz. c. 2, if any minister shall speak any thing in derogation of the book of common prayer, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the second; and if he be beneficed, he shall for the first offence be imprisoned six months, and forfeit a year's value of his benefice: for the second offence he shall be deprived, and suffer one year's imprisonment: and for the third, he shall in like manner be deprived, and suffer imprisonment for life. \*And if any person whatsoever shall, in plays, songs, or other open words, speak any thing in derogation, depraving, or despising of the said book, or shall forcibly prevent the reading of it, or cause any other service to be used in its stead, he shall forfeit for the first offence an hundred marks; for the second, four hundred; and for the third, shall forfeit all his goods and chattels, and suffer imprisonment for life. (3) These penalties were framed in the infancy of our present establishment, when the disciples of Rome and of Geneva united in inveighing with the utmost bitterness against the English liturgy; and the terror of these laws (for they seldom, if ever, were fully executed) proved a principal means, under Providence, of preserving the purity as well as decency of our national worship. Nor can their continuance to this time (of the milder penalties at least) be thought too severe and intolerant so far as they are levelled at the offence, not of *thinking* differently from the national church, but of *railing* at that church and *obstructing* its ordinances, for not submitting its public judgment to the private opinion of others. For, though it is clear that no restraint should be laid upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship; yet contumely and contempt are what no establishment can tolerate. (w) A rigid attachment to trifles, and an intemperate zeal for reforming them, are equally ridiculous and absurd; but the latter is at present the less excusable, because from political reasons, sufficiently hinted at in a former volume, (x) it would now be extremely unadvisable to make any alterations in the service of the church; unless by its own consent, or un-

(w) By an ordinance 28 Aug. 1645, which continued till the restoration, to preach, write, or print any thing in derogation or depraving of the *directory*, for the then established presbyterian worship, subjected the offender upon indictment to a discretionary fine, not exceeding 50*l*. (Scobell 98.)

(x) Book I, p. 98.

(1) This enactment, so far as it affected Unitarians was repealed by the 58 Geo. III, c. 160.

(2) On the general subject of religious liberty, see Cooley, Const. Lim., ch. 13.

(3) Repealed as far as relates to protestant dissenters, by the 31 Geo. III, c. 32.

less it can be shown that some manifest impiety or shocking absurdity will follow from continuing the present forms.

2. Non-conformity to the worship of the church is the other, or negative branch of this offence. And for this there is much more to be pleaded than for the former; being a \*matter of private conscience, to the scruples [\*52] of which our present laws have shown a very just and Christian indulgence. For undoubtedly all persecution and oppression of weak consciences, on the score of religious persuasions, are highly unjustifiable upon every principle of natural reason, civil liberty, or sound religion. But care must be taken not to carry this indulgence into such extremes, as may endanger the national church: there is always a difference to be made between toleration and establishment.

Non-conformists are of two sorts: first, such as absent themselves from divine worship in the established church, through total irreligion, and attend the service of no other persuasion. These, by the statutes of 1 Eliz. c. 2, 23 Eliz. c. 1, and 3 Jac. I, c. 4, forfeit one shilling to the poor every Lord's day they so absent themselves, and 20*l.* to the king if they continue such default for a month together. And if they keep any inmate, thus irreligiously disposed, in their houses, they forfeit 10*l.* per month.

The second species of non-conformists are those who offend through a mistaken or perverse zeal. Such were esteemed by our laws, enacted since the time of the reformation, to be papists and protestant dissenters; both of whom were supposed to be equally schismatics in not communicating with the national church; with this difference, that the papists divided from it upon material, though erroneous reasons; but many of the dissenters upon matters of indifference, or, in other words, upon no reason at all. Yet certainly our ancestors were mistaken in their plans of compulsion and intolerance. The sin of schism, as such, is by no means the object of temporal coercion and punishment. If through weakness of intellect, through misdirected piety, through perverseness and acerbity of temper, or (which is often the case,) through a prospect of secular advantage in herding with a party, men quarrel with the ecclesiastical establishment, the civil magistrate has nothing to do with it, unless their tenets and practice are such as to threaten ruin or disturbance to the state. He is bound, indeed, to protect the established church; \*and, if this can be better effected, by admitting none but its genuine members [\*53] to offices of trust and emolument, he is certainly at liberty so to do: the disposal of offices being matter of favour and discretion. But, this point being once secured, all persecution for diversity of opinions, however ridiculous and absurd they may be, is contrary to every principle of sound policy and civil freedom. The names and subordination of the clergy, the posture of devotion, the materials and colour of the minister's garment, the joining in a known or an unknown form of prayer, and other matters of the same kind, must be left to the option of every man's private judgment.

With regard, therefore, to *protestant dissenters*, although the experience of their turbulent disposition in former times occasioned several disabilities and restrictions (which I shall not undertake to justify) to be laid upon them by abundance of statutes (y) yet at length the legislature, with a spirit of true magnanimity, extended that indulgence to these sectaries, which they themselves, when in power, had held to be countenancing schism, and denied to the church of England. (z) The penalties are conditionally suspended by the statute 1 W. & M. st. 1, c. 18, "for exempting their majesties' protestant subjects, dissenting from the church of England, from the penalties of certain laws," commonly called the toleration act; which is confirmed by statute 10 Ann. c. 2, and declares that neither the laws above mentioned, nor the statutes 1

(y) 23 Eliz. c. 1. 29 Eliz. c. 6. 35 Eliz. c. 1. 29 Car. II, c. 1.

(z) The ordinance of 1545 (before cited) inflicted imprisonment for a year on the third offence, and pecuniary penalties on the former two, in case of using the book of common prayer, not only in a place of public worship but also in any private family.

Eliz. c. 2, § 14, 3 Jac. I, c. 4 and 5, nor any other penal laws made against popish recusants (except the test acts), shall extend to any dissenters, other than papists and such as deny the trinity; provided, *first*, that they take the oaths of allegiance and supremacy (or make a similar affirmation, being quakers) (a) and subscribe the declaration against popery; *second*, that they repair to some congregation certified to and registered in the court of the bishop or archdeacon, or at the county sessions; *third*, that the doors of such meeting-house shall be unlocked, unbarred, and unbolted; in default of which [\*54] the persons meeting there are still liable to all the penalties of the former acts. Dissenting teachers in order to be exempted from the penalties of the statutes 13 and 14 Car. II, c. 4, 15 Car. II, c. 6, 17 Car. II, c. 2, and 22 Car. II, c. 1, are also to subscribe the articles of religion mentioned in the statute 13 Eliz. c. 12 (which only concern the confession of the true Christian faith, and the doctrine of the sacraments), with an express exception of those relating to the government and powers of the church, and to infant baptism; or if they scruple subscribing the same, shall make and subscribe the declaration prescribed by statute 19 Geo. III, c. 44, professing themselves to be Christians and protestants, and that they believe the scriptures to contain the revealed will of God, and to be the rule of doctrine and practice. Thus, though the crime of non-conformity is by no means universally abrogated, it is suspended and ceases to exist with regard to these protestant dissenters, during their compliance with the conditions imposed by these acts; and, under these conditions, all persons who will approve themselves no papists or oppugners of the trinity, are left at full liberty to act as their consciences shall direct them, in the matter of religious worship. And if any person shall wilfully, maliciously, or contemptuously disturb any congregation, assembled in any church or permitted meeting-house, or shall misuse any preacher or teacher there, he shall (by virtue of the same statute, 1 W. and M.) be bound over to the sessions of the peace, and forfeit twenty pounds. But by statute 5 Geo. I, c. 4, no mayor or principal magistrate must appear at any dissenting meeting with the ensigns of his office, (b) on pain of disability to hold that or any other office: the legislature judging it a matter of propriety, that a mode of worship set up in opposition to the national, when allowed to be exercised in peace, should be exercised also with decency, gratitude and humility. Dissenters, also, who subscribe the declaration of the act 19 Geo. III, are exempted (unless in the case of endowed schools, and colleges), from the penalties of the statutes 13 and 14 Car. II, c. 4, and 17 Car. II, c. 2, which prohibit (upon pain of fine and imprisonment) all persons from teaching school, unless they be [\*55] licensed by the ordinary, and \*subscribe a declaration of conformity to the liturgy of the church, and reverently frequent divine service, *established* by the laws of this kingdom. (4)

As to *papists*, what has been said of the protestant dissenters would hold equally strong for a general toleration of them; provided their separation was founded only upon difference of opinion in religion, and their principles did not also extend to a subversion of the civil government. If once they could be brought to renounce the supremacy of the pope, they might quietly enjoy their seven sacraments, their purgatory, and auricular confession; their worship of reliques and images; nay, even their transubstantiation. But while

(a) See stat. 8 Geo. I, c. 6.

(b) Sir Humphrey Edwin, a lord mayor of London, had the imprudence soon after the toleration act to go to a presbyterian meeting-house in his formalities; which is alluded to by Dean Swift, in his *tale of a tub*, under the allegory of Jack getting on a great horse, and eating custard.

(4) The statutes here mentioned, and others operating as restraints and impediments to the religious worship and education of persons not in communion with the established church, are nearly all repealed. See statutes 9 Geo. IV., c. 17; 8 and 9 Vic., c. 103; 9 and 10 Vic., c. 59; 29 and 30 Vic., c. 53; 30 and 31 Vic., c. 63. For an account of the modern advance of religious liberty in England, see May, *Const. Hist.*, cc. 12-14.

they acknowledge a foreign power, superior to the sovereignty of the kingdom, they cannot complain if the laws of that kingdom will not treat them upon the footing of good subjects.

Let us therefore now take a view of the laws in force against the papists; who may be divided into three classes, persons professing popery, popish recusants convict, and popish priests. 1. *Persons professing the popish religion*, besides the former penalties for not frequenting their parish church, are disabled from taking their lands either by descent or purchase, after eighteen years of age, until they renounce their errors; they must at the age of twenty-one register their estates before acquired, and all future conveyances and wills relating to them; they are incapable of presenting to any advowson, or granting to any other person any avoidance of the same; they may not teach or keep any school under pain of perpetual imprisonment; and if they willingly, say or hear mass, they forfeit, the one two hundred, and the other one hundred marks, and each shall suffer a year's imprisonment. Thus much for persons who, from the misfortune of family prejudices or otherwise, have conceived an unhappy attachment to the Romish church from their infancy, and publicly profess its errors. But if any evil industry is used to rivet these errors upon them, if any person sends another abroad to be educated in the popish religion, or to reside in any religious house abroad for that purpose, or contributes to their maintenance when there; \*both the sender, the [\*56] sent, and the contributor, are disabled to sue in law or equity, to be executor or administrator to any person, to take any legacy or deed of gift, and to bear any office in the realm, and shall forfeit all their goods and chattels, and likewise all their real estate for life. And where these errors are also aggravated by apostasy, or perversion, where a person is reconciled to the see of Rome, or procures others to be reconciled, the offence amounts to high treason. 2. *Popish recusants*, convicted in a court of law of not attending the service of the church of England, are subject to the following disabilities, penalties, and forfeitures, over and above those before mentioned. They are considered as persons excommunicated; they can hold no office or employment; they must not keep arms in their houses, but the same may be seized by the justices of the peace; they may not come within ten miles of London, on pain of 100*l.*; they can bring no action at law, or suit in equity; they are not permitted to travel above five miles from home, unless by license, upon pain of forfeiting all their goods; and they may not come to court under pain of 100*l.* No marriage or burial of such recusant, or baptism of his child, shall be had otherwise than by the ministers of the church of England, under other severe penalties. A married woman, when recusant, shall forfeit two-thirds of her dower or jointure, may not be executrix or administratrix to her husband, nor have any part of his goods; and during the coverture may be kept in prison, unless her husband redeems her at the rate of 10*l.* a month, or the third part of all his lands. And, lastly, as a feme-covert recusant may be imprisoned, so all others must, within three months after conviction, either submit and renounce their errors, or, if required so to do by four justices, must abjure and renounce the realm; and if they do not depart, or if they return without the king's license, they shall be guilty of felony, and suffer death as felons without benefit of clergy. There is also an inferior species of recusancy (refusing to make the declaration against popery, enjoined by statute 30 Car. II, st. 2, when tendered by the proper magistrate), which, if the party resides within ten miles of London, makes him an absolute recusant convict; or if at a greater distance, suspends him from having any seat in \*parliament, keeping arms in his house, or any horse above the value of five [\*57] pounds. This is the state, by the laws now in being, (c) of a lay papist. But, 3. The remaining species or degree, viz., *popish priests*, are in a still more

(c) Stat. 28 Eliz. c. 1. 27 Eliz. c. 2. 29 Eliz. c. 6. 35 Eliz. c. 2. 1 Jac. I. c. 4. 3 Jac. I. c. 4 and 5. 7 Jac. I. c. 6. 3 Car. I. c. 3. 25 Car. II, c. 2. 30 Car. II, st. 2. 1 W. and M. c. 9. 15 and 36. 11 and 12 Wm. III, c. 4. 13 Ann. st. 2, c. 14. 1 Geo. I, st. 2, c. 55. 3 Geo. I. c. 18. 11 Geo. II, c. 17.

dangerous condition. For by statute 11 and 12 Wm. III, c. 4, popish priests or bishops, celebrating mass, or exercising any part of their functions in England, except in the houses of ambassadors, are liable to perpetual imprisonment. And by the statute 27 Eliz. c. 2, any popish priests, born in the dominions of the crown of England, who shall come over hither from beyond sea (unless driven by stress of weather, and tarrying only a reasonable time, (d) or shall be in England three days without conforming and taking the oaths), is guilty of high treason: and all persons harbouring him are guilty of felony without the benefit of clergy.

This is a short summary of the laws against the papists, under their three several classes, of persons professing the popish religion, popish recusants convict, and popish priests. Of which the president Montesquieu observes, (e) that they are so rigorous, though not professedly of the sanguinary kind, that they do all the hurt that can possibly be done in cold blood. But, in answer to this, it may be observed (what foreigners who only judge from our statute-book are not fully apprized of), that these laws are seldom exerted to their utmost rigour: and, indeed if they were, it would be very difficult to excuse them. For they are rather to be accounted for from their history, and the urgency of the times which produced them, than to be approved (upon a cool review) as a standing system of law. The restless machinations of the jesuits during the reign of Elizabeth, the turbulence and uneasiness of the papists under the new religious establishment, and the boldness of their hopes and wishes for the succession of the queen of Scots, obliged the parliament to counteract so dangerous a spirit by laws of a great, and then perhaps necessary, severity. The [\*58] powder-treason, in the succeeding reign, struck a panic into \*James I. which operated in different ways: it occasioned the enacting of new laws against the papists; but deterred him from putting them into execution. The intrigues of Queen Henrietta in the reign of Charles I, the prospect of a popish successor in that of Charles II, the assassination-plot in the reign of King William, and the avowed claim of a popish pretender to the crown in that and subsequent reigns, will account for the extension of these penalties at those several periods of our history. But if a time should ever arrive, and perhaps it is not very distant, when all fears of a pretender shall have vanished, and the power and influence of the pope shall become feeble, ridiculous, and despicable, not only in England, but in every kingdom of Europe; it probably would not then be amiss to review and soften these rigorous edicts: at least till the *civil* principles of the Roman catholics called again upon the legislature to renew them: for it ought not to be left in the breast of every merciless bigot to drag down the vengeance of these occasional laws upon inoffensive, though mistaken, subjects; in opposition to the lenient inclinations of the civil magistrate, and to the destruction of every principle of toleration and religious liberty.

This hath partly been done by statute 18 Geo. III, c. 60, with regard to such papists as duly take the oath therein prescribed, of allegiance to his majesty, abjuration of the pretender, renunciation of the pope's civil power, and abhorrence of the doctrines of destroying and not keeping faith with heretics, and deposing or murdering princes excommunicated by authority of the see of Rome: in respect of whom only the statute of 11 and 12 Wm. III is repealed, so far as it disables them from purchasing or inheriting, or authorizes the apprehending or prosecuting the popish clergy, or subjects to perpetual imprisonment either them or any teachers of youth. (5)

(d) Raym. 377, Latch. 1.

(e) Sp. L. b. 19, c. 37.

(5) The restrictions, penalties and disabilities, imposed by statute upon persons professing the Roman Catholic religion, are now nearly all removed. See statutes 10 Geo. IV, c. 7; 7 and 8 Vic., c. 102; 9 and 10 Vic., c. 59; 29 and 30 Vic., c. 22; 30 and 31 Vic., c. 63; May's Const. Hist., cc. 12-14.

In order the better to secure the established church against perils from non-conformists of all denominations, infidels, Turks, Jews, heretics, papists, and sectaries, there are however two bulwarks erected; called the *corporation* and *test* acts: (6) by the former of which (f) no person can be legally elected to any office relating to the government of any city or corporation, unless, within a twelvemonth before he has received the sacrament of the Lord's supper, according to the rites of the church of England; and he is also enjoined to take the oaths of allegiance and supremacy at the \*same time that he takes the oath of office: or, in default of either of these requisites, such [59] election shall be void. The other, called the test act, (g) directs all officers, civil and military, to take the oaths and make the declaration against transubstantiation, in any of the king's courts at Westminster, or at the quarter sessions, within six calendar months after their admission; and also within the same time to receive the sacrament of the Lord's supper, according to the usage of the church of England, in some public church, immediately after divine service and sermon, and to deliver into court a certificate thereof signed by the minister and church warden, and also to prove the same by two credible witnesses; upon forfeiture of 500*l.* and disability to hold the said office. And of much the same nature with these, is the statute 7 Jac. I, c. 2, which permits no persons to be naturalized or restored in blood, but such as undergo a like test: which test having been removed in 1753, in favor of the Jews, was the next session of parliament restored again with some precipitation.

Thus much for offences, which strike at our national religion, or the doctrine and discipline of the church of England in particular. I proceed now to consider some gross impieties and general immoralities, which are taken notice of and punished by our municipal law; frequently in concurrence with the ecclesiastical, to which the censure of many of them does also of right appertain; though with a view somewhat different: the spiritual court punishing all sinful enormities for the sake of reforming the private sinner, *pro salute animas*; while the temporal courts resent the public affront to religion and morality on which all government must depend for support, and correct more for the sake of example than private amendment.

IV. The fourth species of offences, therefore, more immediately against God and religion, is that of *blasphemy* against the Almighty, by denying his being or providence; or by contumelious reproaches of our Saviour Christ. (7) Whither also may be referred all profane scoffing at the holy scripture, or exposing it to contempt and ridicule. These are offences punishable at common law by fine and imprisonment, or other infamous corporal punishment; (h) for Christianity is part of the laws of England. (i)

V. Somewhat allied to this, though in an inferior degree, is the offence of profane and common *swearing* and *\*cursing*. By the last statute against which, 19 Geo. II, c. 21, which repeals all former ones, every labourer, [\*60]

(f) Stat. 13 Car. II. st. 2, c. 1.

(h) 1 Hawk. P. C. 5.

(g) Stat. 25 Car. II, c. 2, explained by 9 Geo. II, c. 26.

(i) 1 Vent. 293. 2 Strange, 594.

(6) But these "bulwarks" of the church, having become generally odious, were in 1828 repealed, with the consent even of the prelates, and to the general satisfaction of the nation.

(7) The law on the subject of blasphemy is so fully considered in the cases of *People v. Ruggles*, 8 Johns., 290; *State v. Chandler*, 2 Harr., 553; *Updegraph v. Commonwealth*, 11 S. & R., 894; and *Commonwealth v. Kneeland*, 20 Pick., 206, as to leave little to be added by other authorities.

The doctrine of our commentator, that "Christianity is part of the law of England," is true in the qualified sense that the law takes notice of the fact that Christianity is the prevailing religion among the people, and that evil speech concerning the Being who is the object of adoration by the Christian, and malicious reproach or profane ridicule of Christ or the books of the Bible, have an evil effect in sapping the foundations of society and of public order, and are therefore properly punished as crimes. And the punishment of the lower species of profanity may be referred to the same principle. See upon this subject *Cooley's Const. Lim.*, 472, *et seq.*; 2 Bish. Cr. L., 7th ed., ch. 6.

sailor, or soldier profanely cursing or swearing shall forfeit 1*s.*; every other person under the degree of a gentleman 2*s.*; and every gentleman or person of superior rank 5*s.* to the poor of the parish; and, on the second conviction, double; and, for every subsequent offence, treble the sum first forfeited; with all charges of conviction: and in default of payment shall be sent to the house of correction for ten days. Any justice of the peace may convict upon his own hearing, or the testimony of one witness; and any constable or peace officer, upon his own hearing, may secure any offender and carry him before a justice, and there convict him. If the justice omits his duty, he forfeits 5*l.* and the constable 40*s.* And the act is to be read in all parish churches and public chapels, the Sunday after every quarter-day, on pain of 5*l.* to be levied by warrant from any justice. (8) Besides this punishment for taking God's name in vain in common discourse, it is enacted by statute 3 Jac. I, c. 21, that if in any stage-play, interlude, or show, the name of the holy trinity or any of the persons therein, be jestingly or profanely used, the offender shall forfeit 10*l.*, one moiety to the king, and the other to the informer.

VI. A sixth species of offence against God and religion, of which our ancient books are full, is a crime of which one knows not well what account to give. I mean the offence of *witchcraft, conjuration, enchantment or sorcery*. To deny the possibility, nay, actual existence, of witchcraft and sorcery, is at once flatly to contradict the revealed word of God, in various passages both of the Old and New Testament: and the thing itself is a truth to which every nation in the world hath in its turn borne testimony, either by examples seemingly well attested, or by prohibitory laws; which at least suppose the possibility of commerce with evil spirits. The civil law punishes with death not only the sorcerers themselves, but also those who consult them, (j) imitating in the former the express law of God, (k) "thou shalt not suffer a witch to live." And [\*61] our own laws, both before and since the conquest, have been \*equally penal; ranking this crime in the same class with heresy, and condemning both to the flames. (l) The president Montesquieu (m) ranks them also both together, but with a very different view; laying it down as an important maxim, that we ought to be very circumspect in the prosecution of magic and heresy; because the most unexceptionable conduct, the purest morals, and the constant practice of every duty in life, are not a sufficient security against the suspicion of crimes like these. And indeed the ridiculous stories that are generally told, and the many impostures and delusions that have been discovered in all ages, are enough to demolish all faith in such a dubious crime; if the contrary evidence were not also extremely strong. Wherefore it seems to be the most eligible way to conclude, with an ingenious writer of our own, (n) that in general there has been such a thing as witchcraft; though one cannot give credit to any particular modern instance of it.

Our forefathers were stronger believers, when they enacted by statute 33 Hen. VIII, c. 8, all witchcraft and sorcery to be felony without benefit of clergy; and again by statute 1 Jac. I, c. 12, that all persons invoking any evil spirit, or consulting, covenanting with, entertaining, employing, feeding, or rewarding any evil spirit; or taking up dead bodies from their graves to be used in any witchcraft, sorcery, charm, or enchantment; or killing or otherwise hurting any person by such infernal arts, should be guilty of felony without benefit of clergy, and suffer death. And, if any person should attempt by sorcery to discover hidden treasure, or to restore stolen goods, or to provoke unlawful love, or to hurt any man or beast, though the same were not effected, he or she should suffer imprisonment and pillory for the first offence, and death for the second. These acts continued in force till lately, to the terror of all ancient females.

(j) Cod. 1. 9, c. 18.

(k) Exod. xxii, 18.

(l) 3 Inst. 44.

(m) Sp. L. b. 22, a. 8.

(n) Mr. Addison, Spect. No. 17.

(8) This provision is repealed.



in the kingdom: and many poor wretches were sacrificed thereby to the prejudice of their neighbours, and their own illusions; not a few having, by some means or other confessed the fact at the gallows. But all executions for this dubious crime are now at an end; our legislature having at length followed the wise example of \*Louis XIV, in France, who thought proper by an edict to [\*62] restrain the tribunals of justice from receiving informations of witchcraft.

(o) And accordingly it is with us enacted by statute 9 Geo. II, c. 5, that no prosecution shall for the future be carried on against any persons for conjuration, witchcraft, sorcery, or enchantment. But the misdemeanor of persons pretending to use witchcraft, tell fortunes, or discover stolen goods by skill in the occult sciences, is still deservedly punished with a year's imprisonment, and standing four times in the pillory. (9)

VII. A seventh species of offenders in this class are all *religious imposters*; such as falsely pretend an extraordinary commission from heaven; or terrify and abuse the people with false denunciations of judgments. These, as tending to subvert all religion, by bringing it into ridicule and contempt, are punishable by the temporal courts with fine, imprisonment, and infamous corporal punishment. (p)

VIII. Simony, or the corrupt presentation of any one to an ecclesiastical benefice for gift or reward, is also to be considered as an offence against religion; as well by reason of the sacredness of the charge which is thus profanely bought and sold, as because it is always attended with perjury in the person presented. (q) The statute 31 Eliz. c. 6 (which, so far as it relates to the forfeiture of the right of presentation, was considered in a former book), (r) enacts, that if any patron, for money or any other corrupt consideration or promise, directly or indirectly given, shall present, admit, institute, induct, install, or collate any person to an ecclesiastical benefice or dignity, both the giver and taker shall forfeit two years value of the benefice or dignity; one moiety to the king, and the other to any one who will sue for the same. If persons also corruptly resign or exchange their benefices, both the giver and the taker shall in like manner forfeit double the value of the money or other corrupt consideration. And persons who shall \*corruptly ordain or license any minister or procure him to be ordained or licensed (which is the true idea of simony), [\*63] shall incur a like forfeiture of forty pounds; and the minister himself of ten pounds, besides an incapacity to hold any ecclesiastical preferment for seven years afterwards. Corrupt elections and resignations in colleges, hospitals, and other eleemosynary corporations, are also punished by the same statute with forfeiture of the double value, vacating the place or office, and devolution of the right of election for that turn to the crown.

IX. Profanation of the Lord's day, vulgarly (but improperly) called *Sabbath breaking*, is a ninth offence against God and religion, punished by the municipal law of England. (10) For, besides the notorious indecency and

(o) Voltaire *siècl. Louis XIV.* ch. 29. *Mod. Un. Hist.* xxv, 215. Yet Voughlans (*de droit criminel*, 353, 459), still reckons up sorcery and witchcraft among the crimes punishable in France.

(p) 1 Hawk. P. C. 7.

(q) 3 Inst. 156.

(r) See book II, p. 279.

(9) The vagrant act treats these as rogues and vagabonds, and restrains and punishes them accordingly.

(10) In the United States generally, by statute, persons are prohibited by law from following their ordinary calling on Sunday, and contracts entered into on that day are made void. These statutes have sometimes been assailed as unconstitutional, because encroaching upon religious liberty; but the courts have sustained them. *Commonwealth v. Wolf*, 8 S. & R., 48; *Commonwealth v. Lisher*, 17 S. & R., 155; *Shover v. State*, 10 Ark., 259; *Vogelsong v. State*, 9 Ind., 112; *State v. Ambs*, 20 Mo., 214; *Cincinnati v. Rice*, 15 Ohio, 225; *Specht v. Commonwealth*, 8 Penn. St., 312.

As to exceptions in such statutes of works of necessity or charity, see *Commonwealth v. Knox*, 16 Mass., 76; *Myers v. State*, 1 Conn., 502; *Murray v. Commonwealth*, 24 Penn. St., 270; *Allen v. Duffie*, 43 Mich., 1; S. C., 38 Am. Rep., 159; *Mueller v. State*, 76 Ind., 810; S. C., 40 Am. Rep., 245; *Bucher v. Railroad Co.*, 131 Mass., 156; S. C., 41 Am. Rep., 216; *Yousoaki v. State*, 79 Ind., 898; S. C., 41 Am. Rep., 614; *Dale v. Knapp*, 98 Penn. St., 889.

scandal of permitting any secular business to be publicly transacted on that day, in a country professing Christianity, and the corruption of morals which usually follows its profanation, the keeping one day in the seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes; which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit: it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness: it imprints on the minds of the people that sense of their duty to God, so necessary to make them good citizens; but which yet would be worn out and defaced by an unremitted continuance of labour, without any stated times of recalling them to the worship of their Maker. And therefore the laws of King Athelstan (s) forbade all merchandizing on the Lord's day, under very severe penalties. And by the statute 27 Hen. VI, c. 5, no fair or market shall be held on the principal festivals, Good Friday, or any Sunday (except the four Sundays in harvest), on pain of forfeiting the goods exposed to sale. And since, by the statute 1 Car. I, c. 1, no person shall assemble out of their own parishes, for any sport whatsoever upon this day; nor, in their parishes, shall use any bull or [\*64] \*bear-baiting, interludes, plays, or other *unlawful* exercises, or pastimes; on pain that every offender shall pay 3s. 4d. to the poor. This statute does not prohibit, but rather impliedly allows, any innocent recreation or amusement, within their respective parishes, even on the Lord's day, after divine service is over. But by statute 29 Car. II, c. 7, no person is allowed to *work* on the Lord's day, or use any boat or barge, or expose any goods to sale; except meat in public houses, milk at certain hours, and works of necessity or charity, on forfeiture of 5s. Nor shall any drover, carrier, or the like, travel upon that day, under pain of twenty shillings.

X. Drunkenness is also punished by statute 4 Jac. I, c. 5, with the forfeiture of 5s.; or the sitting six hours in the stocks: by which time the statute presumes the offender will have regained his senses, and not be liable to do mischief to his neighbours. And there are many wholesome statutes, by way of prevention, chiefly passed in the same reign of King James I, which regulate the licensing of alehouses, and punish persons found tippling therein; or the master of such houses permitting them.

XI. The last offence which I shall mention, more immediately against religion and morality, and cognizable by the temporal courts, is that of open and notorious *lewdness*; either by frequenting houses of ill-fame, which is an indictable offence; (t) (11) or by some grossly scandalous and public indecency for which the punishment is by fine and imprisonment. (u) (12) In the year

(s) C. 24.

(t) Poph. 203.

(u) 1 Sid. 168.

(11) The keeping of a bawdy-house is a nuisance at the common law, and indictable as such. *Smith v. State*, 6 Gill, 425; *Smith v. Commonwealth*, 6 B. Monr., 21; *State v. Evans*, 5 Ired., 603; *Commonwealth v. Harrington*, 8 Pick., 26; *People v. Erwin*, 4 Denio, 129. And any form of open and notorious lewdness and indecency. See the following note. And probably frequenting houses of ill-fame may be so open and scandalous as to constitute a public offense, also, but single acts of private lewdness certainly are not such at the common law.

(12) The indecent exposure of one's person to public view is an indictable offense at common law. 1 Sid., 168; *Britain v. State*, 3 Humph., 203; *State v. Roper*, 1 Dev. and Bat., 208; *State v. Rose*, 32 Mo., 560. It would seem, however, that the exposure must be such as would be offensive to more than one person. See *Commonwealth v. Catlin*, 1 Mass., 8; *State v. Millard*, 18 Vt., 574. Publishing obscene books and pictures was indictable at common law. *Commonwealth v. Holmes*, 17 Mass., 336; *Commonwealth v. Sharpless*, 2 S. and R., 91. It is also in many states made indictable by statute. To procure the seduction of a woman, or to lead one into prostitution, or to conspire to seduce one, are crimes at common law. 8 Burr., 1434. As to the force of American statutes punishing enticement for purposes of prostitution, see *Kauffman v. People*, 18 N. Y. (Sup. Ct.),

1650, when the ruling powers found it for their interest to put on the semblance of a very extraordinary strictness and purity of morals, not only incest and wilful adultery were made capital crimes; but also the repeated act of keeping a brothel, or committing fornication, were (upon a second conviction) made felony without benefit of clergy. (w) But at the restoration, when men, from an abhorrence of the hypocrisy of the late times, fell into a contrary extreme of licentiousness, it was not thought proper to renew a law of \*such unfashionable rigour. And these offences have been ever since left to the [35] feeble coercion of the spiritual court, according to the rules of the canon law; a law which has treated the offence of incontinence, nay, even adultery itself, with a great degree of tenderness and lenity; owing perhaps to the constrained celibacy of its first compilers. The temporal courts therefore take no cognizance of the crime of adultery, otherwise than as a private injury. (x) (13)

But, before we quit this subject, we must take notice of the temporal punishment for having *bastard children*, considered in a criminal light; for with regard to the maintenance of such illegitimate offspring, which is a civil concern, we have formerly spoken at large. (y) By the statute 18 Eliz. c. 3, two justices may take order for the punishment of the mother and reputed father; but that that punishment shall be is not therein ascertained; though the contemporary exposition was that a corporal punishment was intended. (z) By statute 7 Jac. I, c. 4, a specific punishment (viz., commitment to the house of correction) is inflicted on the woman only. But in both cases it seems that the penalty can only be inflicted if the bastard becomes chargeable to the parish; for otherwise the very maintenance of the child is considered as a degree of punishment. By the last-mentioned statute the justices may commit the mother to the house of correction, there to be punished and set on work for one year; and, in case of a second offence, till she find sureties never to offend again. (14)

## CHAPTER V.

### OF OFFENCES AGAINST THE LAW OF NATIONS.

ACCORDING to the method marked out in the preceding chapter, we are next to consider the offences more immediately repugnant to that universal law of society which regulates the mutual intercourse between one state and another;

(w) Soobell, 121.

(x) See book III, p. 129.

(y) See book I, p. 452.

(z) Dalt. Just. ch. 11.

32; *People v. Roderigas*, 49 Cal., 9; *Osborn v. State*, 52 Ind., 526; *People v. Carrier*, 46 Mich., 442.

Under the old English law there was in strictness no property in a dead body. Burial rights were within the cognizance of ecclesiastical courts. But removal of a dead body and stealing the grave clothes were indictable offenses. In the United States it has been held that there is a quasi-property in a dead body; that relatives have rights over it which a court of equity will protect, and enjoin the removal of dead bodies against their will. See *Pierce v. Proprietors, &c.*, 10 R. I, 227; S. C., 14 Am. Rep., 667; *Bogert v. Indianapolis*, 13 Ind., 134, 138; *Guthrie v. Weaver*, 1 Mo. App., 136; *Wynkoop v. Wynkoop*, 42 Penn. St., 293; *Meagher v. Driscoll*, 99 Mass., 281. In the United States the violation of graves and defacing of monuments, &c., is generally made criminal by statute.

(13) Adultery and seduction are punished criminally in some of the United States. In others the only redress is by civil action for the recovery of damages.

(14) The statute 7 James I, c. 4, was repealed by 50 Geo. III, c. 51, which made new provisions for these cases.

In the United States the statutes upon the subject of bastard children do not usually go much beyond the protection of the public against the bastard becoming a public charge. With this object in view proceedings may be taken against the putative father, and he may be compelled to support the child, either alone or with the assistance of the mother.

those, I mean, which are particularly animadverted on, as such, by the English law. (1)

The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; (a) in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each. (b) This general law is founded upon this principle, that different nations ought in time of peace to do one another all the good they can, and in time of war as little harm as possible, without prejudice to their own real interests. (c) And, as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those [\*67] \*principles of natural justice, in which all the learned of every nation agree; or they depend upon mutual compacts or treaties between the respective communities; in the construction of which there is also no judge to resort to, but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject.

In arbitrary states, this law, wherever it contradicts, or is not provided for by, the municipal law of the country, is enforced by the royal power; but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom: without which it must cease to be a part of the civilized world. Thus, in mercantile questions, such as bills of exchange, and the like; in all marine causes, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature; the law merchant, (d) which is a branch of the law of nations, is regularly and constantly adhered to. So, too, in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, there is no other rule of decision but this great universal law, collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of. (2)

But though in civil transactions and questions of property between the subjects of different states, the law of nations has much scope and extent, as adopted by the law of England; yet the present branch of our inquiries [\*68] will fall \*within a narrow compass, as offences against the law of nations can rarely be the object of the criminal law of any particular state. For offences against this law are principally incident to whole states or nations, in which case recourse can only be had to war; which is an appeal to the God of hosts, to punish such infractions of public faith as are committed by one independent people against another: neither state having any superior jurisdiction to resort to upon earth for justice. But where the individuals of any state violate this general law, it is then the interest as well as duty of the government, under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained. For in vain would

(a) *JY.* 1, 1, 2.

(b) See book I, p. 43.

(c) *Sp. L.* b. 1, a. 2.

(d) See book I, p. 272.

(1) The offenses enumerated in this chapter are in the United States cognizable by the federal courts. They will be found treated of by Mr. Wheaton in his *International Law*, as well as in other treatises on that subject, and those on criminal law.

(2) The ransom of ships is forbidden by statute 38 Geo III, c. 66, and contracts and securities for that purpose are made void.

nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two states in a war. It is therefore incumbent upon the nation injured, first to demand satisfaction and justice to be done on the offender, by the state to which he belongs, and, if that be refused or neglected, the sovereign then avows himself an accomplice or abettor of his subject's crime, and draws upon his community the calamities of foreign war.

The principal offences against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds: 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and 3. Piracy.

I. As to the first, *violation of safe-conducts or passports*, expressly granted by the king or his ambassadors (*e*) to the subjects of a foreign power in time of mutual war; or committing acts of hostilities against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct: these are breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another: and such offences may, according to the writers upon the law of nations, be a just ground of a national war; since it is not in the power of \*the foreign prince to cause justice to be done to his subjects by the very individual delin- [\*69] quent, but he must require it of the whole community. And as during the continuance of any safe-conduct, either express or implied, the foreigner is under the protection of the king and the law: and, more especially, as it is one of the articles of *magna carta*, (*f*) that foreign merchants should be entitled to safe-conduct and security throughout the kingdom; there is no question but that any violation of either the person or property of such foreigner may be punished by indictment in the name of the king, whose honor is more particularly engaged in supporting his own safe conduct. And, when this malicious rapacity was not confined to private individuals, but broke out into general hostilities, by the statute 2 Hen. V, st. 1, c. 6, breaking of truce and safe conducts, or abetting and receiving the truce-breakers, was (in affirmance and support of the law of nations) declared to be high treason against the crown and dignity of the king; and conservators of truce and safe-conducts were appointed in every port, and empowered to hear and determine such treasons, (when committed at sea) according to the ancient marine law then practiced in the admiral's court; and, together with two men learned in the law of the land, to hear and determine according to that law the same treasons when committed within the body of any county. Which statute, so far as it made these offences amount to treason, was suspended by 14 Hen. VI, c. 8, and repealed by 20 Hen. VI, c. 11, but revived by 29 Hen. VI, c. 2, which gave the same powers to the lord chancellor, associated with either of the chief justices, as belonged to the conservators of truce and their assessors; and enacted that, notwithstanding the party be convicted of treason, the injured stranger should have restitution out of his effects, prior to any claim of the crown. And it is farther enacted by the statute 31 Hen. VI, c. 4, that if any of the king's subjects attempt or offend upon the sea, or in any port within the king's obedience, against any stranger in amity, league, or truce, or under safe-conduct; and especially by attaching \*his person, or spoiling him, or robbing him [\*70] of his goods, the lord chancellor, with any of the justices of either the king's bench or common pleas, may cause full restitution and amends to be made to the party injured.

It is to be observed, that the suspending and repealing acts of 14 and 20 Hen. VI, and also the reviving act of 29 Hen. VI, were only temporary, so that it should seem that, after the expiration of them all, the statute 2 Hen. V continued in full force; but yet it is considered as extinct by the statute 14 Edw. IV, c. 4, which revives and confirms all statutes and ordinances, made before the accession of the house of York, against breakers of amities, truces,

(e) See book I, page 360.

(f) 9 Hen. III, c. 20. See book I, page 360, &c.

leagues, and safe-conducts, with an express exception to the statute of 2 Hen. V. But (however that may be) I apprehend it was finally repealed by the general statutes of Edw. VI, and Queen Mary, for abolishing new-created treasons; though Sir Matthew Hale seems to question it as to treasons committed on the sea. (g) But certainly the statute of 31 Hen. VI remains in full force to this day.

II. As to the rights of *ambassadors*, which are also established by the law of nations, and are therefore matter of universal concern, they have formerly been treated of at large. (h) It may here be sufficient to remark, that the common law of England recognizes them in their full extent, by immediately stopping all legal process sued out through the ignorance or rashness of individuals, which may intrench upon the immunities of a foreign minister or any of his train. And, the more effectually to enforce the law of nations in this respect, when violated through wantonness or insolence, it is declared, by the statute of 7 Ann. c. 12, that all process whereby the person of any ambassador, or of his domestic or domestic servant, may be arrested, or his goods distrained or seised, shall be utterly null and void; and that all persons prosecuting, soliciting, or executing such process, being convicted by confession or the oath of one witness, before the \*lord chancellor and the chief justices, or any two of them, shall be deemed violators of the laws of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment as the said judges, or any two of them, shall think fit. (i) (3) Thus, in cases of extraordinary outrage, for which the law hath provided no special penalty, the legislature hath intrusted to the three principal judges of the kingdom an unlimited power of proportioning the punishment to the crime.

III. Lastly, the crime of *piracy*, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to Sir Edward Coke, (k) *hostis humani generis*. As, therefore, he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self-defence, to inflict that punishment upon him which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property.

By the ancient common law, piracy, if committed by a subject, was held to be a species of treason, being contrary to his natural allegiance; and by an alien, to be felony only; but now, since the statute of treasons, 25 Edw. III, c. 2, it is held to be only felony in a subject (l). Formerly it was only cognizable by the admiralty courts, which proceed by the rules of the civil law. (m) But it being inconsistent with the liberties of the nation that any man's life

(g) 1 Hal. P. C. 267. (h) See book I, p. 253. (i) See the occasion of making this statute, book I, p. 255.  
(k) 3 Inst. 113. (l) *Ibid.* (m) 1 Hawk. P. C. 98.

(3) For similar statutory provisions in the United States, see act of April 30, 1790, 1 Stat. at Large, 117; Brightly's Dig., 40.

As to privileges of foreign ambassadors and consuls, see Const. U. S., art. 3, § 2; Rev. Stat. 1878, §§ 563, 687, 4062, *et seq.* A foreign minister is protected from arrest and his goods from seizure. R. S., § 4062, *et seq.* His household and the attaches of the legation are likewise protected. *United States v. Benner*, 1 Bald., 240; *Same v. Lafontaine*, 4 Cranch C. C., 173; *Same v. Jeffers*, 4 Cranch C. C., 704; *Ex parte Cabrera*, 1 Wash. C. C., 232. The protection exists even after the minister has his passports. *Dupont v. Pichon*, 4 Dall., 321. And when a minister is passing through the country accredited to another. *Holbrook v. Henderson*, 4 Sandf., 619. The minister's property is identified with his person in protection. *United States v. Hand*, 2 Wash. C. C., 435. Ignorance is not a defense to an action for injury to a minister. *United States v. Ortega*, 4 Wash. C. C., 531; *Same v. Liddle*, 2 Wash. C. C., 205. A consul has not the same privilege, but he can only be sued in the federal courts. *United States v. Ravara*, 2 Dall., 297; *Davis v. Packard*, 7 Pet., 276.

Recognition of foreign representatives by the president is conclusive upon the judiciary. *United States v. Ortega*, *supra*. See in general, note to same case, 11 Wheat., 468.

should be taken away unless by the judgment of his peers, or of the common law of the land, the statute 28 Hen. VIII, c. 15, established a new jurisdiction for this purpose, which proceeds according to the course of the common law, and of which we shall say more hereafter.

\*The offence of piracy, by common law, consists in committing those [\*72] acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there. (n) But, by statute some other offences are made piracy also; as, by statute 11 and 12 Wm. III, c. 7, if any natural born subject commits any act of hostility upon the high seas against others of his majesty's subjects, under colour of a commission from any foreign power; this, though it would only be an act of war in an alien, shall be construed piracy in a subject. And, farther, any commander, or other seafaring person, betraying his trust, and running away with any ship, boat, ordnance, ammunition or goods; or yielding them up voluntarily to a pirate, or conspiring to do these acts; or any person assaulting the commander of a vessel to hinder him from fighting in defence of his ship, or confining him, or making, or endeavoring to make a revolt on board; shall, for each of these offences, be adjudged a pirate, felon and robber, and shall suffer death, whether he be principal, or merely accessory, by setting forth such pirates, or abetting them before the fact, or receiving or concealing them or their goods after it. And the statute 4 Geo. I, c. 11, expressly excludes the principals from the benefit of clergy. By the statute 8 Geo. I, c. 24, the trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in any wise consulting, combining, confederating, or corresponding with them: or the forcibly boarding any merchant vessel, though without seizing or carrying her off, and destroying or throwing any of the goods overboard, shall be deemed piracy: and such accessories to piracy as are described by the statute of King William are declared to be principal pirates, and all parties convicted by virtue of this act are made felons without benefit of clergy. By the same statutes also (to encourage the defence of merchant vessels against pirates), the commanders or seamen wounded, and the widows of such seamen as are slain, in any piratical engagement, shall be entitled to a bounty, to \*be divided among them, not exceeding one-fiftieth [\*73] part of the value of the cargo on board: and such wounded seamen shall be entitled to the pension of Greenwich hospital: which no other seamen are, except only such as have served in a ship of war. And if the commander shall behave cowardly, by not defending the ship, if she carries guns or arms, or shall discharge the mariners from fighting, so that the ship falls into the hands of pirates, such commander shall forfeit all his wages, and suffer six months' imprisonment. Lastly, by statute 18 Geo. II, c. 30, any natural born subject or denizen, who in time of war shall commit hostilities at sea against any of his fellow-subjects, or shall assist an enemy on that element, is liable to be tried and convicted as a pirate. (4)

These are the principal cases, in which the statute law of England interposes to aid and enforce the law of nations, as a part of the common law: by inflicting an adequate punishment upon offences against that universal law, com-

(n) 1 Hawk. P. C. 100.

(4) Piracy is punished in the United States in the federal courts. The laws of congress prescribe what acts shall be punishable as piracy; and the act of April 30, 1790, 1 Stat. at large, 113; that of May 15, 1820; 3 *id.*, 300; that of August 8, 1848, 9 *id.*, 73; and that of March 8, 1847, *id.*, 175, are referred to for particulars. The act of 1820 makes the slave trade piracy. The act of March 8, 1819, which was only temporary, provided for the punishment of offenses which were piracy by the laws of nations: as to which see U. S. v. Smith, 5 Wheat., 153; and U. S. v. Furlong, *id.*, 184; The Marianna Flora, 11 *id.*, 1. And as to piracy under the act of 1790, see U. S. v. Palmer, 3 Wheat., 610; U. S. v. Klintonck, 5 *id.*, 144; U. S. v. Furlong, *id.*, 184.

The slave trade is made piracy by English statutes. See statute 6 and 7 Vic., c. 86.

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mitted by private persons. We shall proceed in the next chapter to consider offences which more immediately affect the sovereign executive power of our own particular state, or the king and government; which species of crimes branches itself into a much larger extent than either of those which we have already treated.

## CHAPTER VI. OF HIGH TREASON.

THE third general division of crimes consists of such as more especially affect the supreme executive power, or the king and his government; which amount either to a total renunciation of that allegiance, or at the least to a criminal neglect of that duty, which is due from every subject to his sovereign. In a former part of these Commentaries (a) we had occasion to mention the nature of allegiance, as the tie or *ligamen* which binds every subject to be true and faithful to his sovereign *liege* lord the king, in return for that protection which is afforded him; and truth and faith to bear of life and limb, and earthly honour; and not to know or hear of any ill intended him, without defending him therefrom. And this allegiance, we may remember, was distinguished into two species: the one natural and perpetual, which is inherent only in natives of the king's dominions; the other local and temporary, which is incident to aliens also. Every offence, therefore, more immediately affecting the royal person, his crown, or dignity, is in some degree a breach of this duty of allegiance, whether natural or innate, or local and acquired by residence: and these may be distinguished into four kinds; 1. Treason. 2. Felonies injurious to the king's prerogative. 3. *Præmunire*. 4. Other misprisions and contempts. Of which crimes, the first and principal is that of treason.

\*Treason, *proditio*, in its very name (which is borrowed from the [\*75] French) imports a betraying, treachery, or breach of faith. It therefore happens only between allies, saith the Mirror: (b) for treason is indeed a general appellation made use of by the law, to denote not only offences against the king and government, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior, between whom and himself there subsists a natural, a civil, or even a spiritual relation: and the inferior so abuses that confidence, so forgets the obligations of duty, subjection and allegiance, as to destroy the life of any such superior or lord. (c) This is looked upon as proceeding from the same principle of treachery, in private life, as would have urged him who harbours it to have conspired in public against his liege lord and sovereign; and therefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary: these being breaches of the lower allegiance, of private and domestic faith, are denominated *petit* treasons. (1) But when disloyalty so rears its crest as to attack even majesty itself, it is called by way of eminent distinction *high* treason *alta proditio*; being equivalent to the *crimen læsæ majestatis* of the Romans, as Glanvil (d) denominates it also in our English law.

As this is the highest civil crime which (considered as a member of the community) any man can possibly commit, it ought therefore to be the most precisely ascertained. For if the crime of high treason be indeterminate, this alone (says the president Montesquieu) is sufficient to make any government degenerate into arbitrary power. (e) And yet, by the ancient common law,

(a) Book I. ch. 10.

(b) C. 1. § 7.

(c) *L.L. Aelfredi*. c. 4. *Aethelst.* c. 4. *Canutt.* c. 54, 61.

(d) *L. 1. c. 2.*

(e) *Sp. L. b. 12. c. 7.*

(1) This offense is not recognized in the United States, and is now abolished in England.



there was a great latitude left in the breast of the judges to determine what was treason or not so: whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons; that is, to raise, by force and arbitrary constructions, offences into the \*crime and punishment of [76] treason which never were suspected to be such. Thus the *accroaching* was in the 21 Edw. III held to be treason in a knight of Hertfordshire, who forcibly assaulted and detained one of the king's subjects till he paid him 90*l.*: (f) a crime, it must be owned, well deserving of punishment; but which seems to be of a complexion very different from that of treason. Killing the king's father, or brother, or even his messenger, has also fallen under the same denomination. (g) The latter of which is almost as tyrannical a doctrine as that of the imperial constitution of Arcadius and Honorius, which determines that any attempts or designs against the ministers of the prince shall be treason. (h) But, however, to prevent the inconveniences which began to arise in England from this multitude of constructive treasons, the statute 25 Edw. III, c. 2, was made; which defines what offences only for the future should be held to be treason: in like manner as the *lex Julia majestatis* among the Romans, promulgued by Augustus Cæsar, comprehended all the ancient laws, that had before been enacted to punish transgressors against the state. (i) This statute must therefore be our text and guide, in order to examine into the several species of high treason. And we shall find that it comprehends all kinds of high treason under seven distinct branches.

1. "When a man doth compass or imagine the death of our lord the king, of our lady his queen, or of their eldest son and heir." Under this description it is held that a queen regnant (such as Queen Elizabeth and Queen Anne) is within the words of the act, being invested with royal power, and entitled to the allegiance of her subjects: (j) but the husband of such a queen is not comprised within these words, \*and therefore no treason can be committed [77] against him. (k) The king here intended is the king in possession, without any respect to his title; for it is held, that a king *de facto* and not *de jure*, or, in other words, an usurper that hath got possession of the throne, is a king within the meaning of the statute: as there is a temporary allegiance due to him, for his administration of the government and temporary protection of the public: and, therefore, treasons committed against Henry VI were punished under Edward IV, though all the line of Lancaster had been previously declared usurpers by act of parliament. But the most rightful heir of the crown, or king *de jure* and not *de facto*, who hath never had plenary possession of the throne, as was the case of the house of York during the three reigns of the line of Lancaster, is not a king within this statute against whom treasons may be committed. (l) And a very sensible writer on the crown-law carries the point of possession so far, that he holds, (m) that a king out of possession is so far from having any right to our allegiance, by any other title which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him. A doctrine which he grounds upon the statute 11 Hen. VII, c. 1, which is declaratory of the common law, and pronounces all subjects exoused from any penalty or forfeiture, which do assist and obey a king *de facto*. But, in truth, this seems to be confounding all notions of right and wrong; and the consequence would be, that when Cromwell had murdered the elder Charles, and usurped the power (though not the name) of king, the people were bound in duty to hinder the son's restoration: and were the

(f) 1 Hal. P. C. 80.

(g) Britt. c. 33. 1 Hawk. P. C. 34.

(h) Qui de nece virorum illustrium, qui consiliis et consistoria nostro intersunt, senatorum etiam (nam et ipsi pars corporis nostri sunt) vel cujus libet postremo, qui militat nobiscum cogitaverit: (eadem enim severitate voluntatem sceleris, qua effectum puniri jura voluerint) ipse quidem, utpote majestatis reus, gladio feriat, bonis ejus omnibus fisco nostro addictis. (Cod. 9, 8, 5.)

(i) Gravina. Orig. 1. § 34.

(j) 1 Hal. P. C. 101.

(k) 3 Inst. 7. 1 Hal. P. C. 106.

(l) 3 Inst. 7. 1 Hal. P. C. 104.

(m) 1 Hawk. P. C. 35

king of Poland or Morocco to invade this kingdom, and by any means to get possession of the crown (a term, by the way, of very loose and indistinct signification), the subject would be bound by his allegiance to fight for his natural prince to-day, and by the same duty of allegiance to fight against him to-morrow. The true distinction seems to be, that the statute of Henry [\*78] the Seventh does by no means *command* any opposition to a king *de jure*; but *excuses* the obedience paid to a king *de facto*. When, therefore, an usurper is in possession, the subject is *excused* and *justified* in obeying and giving him assistance: otherwise, under an usurpation, no man could be safe: if the lawful prince had a right to hang him for obedience to the powers in being, as the usurper would certainly do for disobedience. Nay, farther, as the mass of people are imperfect judges of title, of which in all cases possession is *prima facie* evidence, the law compels no man to yield obedience to that prince whose right is by want of possession rendered uncertain and disputable, till Providence shall think fit to interpose in his favour, and decide the ambiguous claim: and, therefore, till he is entitled to such allegiance by possession, no treason can be committed against him. Lastly, a king, who has resigned his crown, such resignation being admitted and ratified in parliament, is, according to Sir Matthew Hale, no longer the object of treason. (n) And the same reason holds, in case a king abdicates the government; or, by actions subversive of the constitution, virtually renounces the authority which he claims by that very constitution: since, as was formerly observed, (o) when the fact of abdication is once established, and determined by the proper judges, the consequence necessarily follows, that the throne is thereby vacant, and he is no longer king.

Let us next see, what is a *compassing* or *imagining* the death of the king, &c. These are synonymous terms; the word *compass* signifying the purpose or design of the mind or will (p) and not, as in common speech, the carrying such design to effect. (q) And therefore an accidental stroke, which may mortally wound the sovereign, *per infortuniam*, without any traitorous intent, is no treason: as was the case of Sir Walter Tyrrel, who, by the command of King William Rufus, \*shooting at a hart, the arrow glanced against a tree, [\*79] and killed the king upon the spot. (r) But, as this compassing or imagining is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by some open, or *overt* act. (2) And yet the tyrant Dionysius is recorded (s) to have executed a subject, barely for dreaming that he had killed him; which was held of sufficient proof, that he had thought thereof in his waking hours. But such is not the temper of the English law; and therefore, in this, and the three next species of treason, it is necessary that there appear an open or *overt* act of a more full and explicit nature, to convict the traitor upon. The statute expressly requires that the accused "be thereof, upon sufficient proof, attainted of some open act by men of his own condition." Thus, to provide weapons or ammunition for the purpose of killing the king is held to be a palpable overt act of treason in imagining his death. (t) To conspire to imprison the king by force, and move towards it by assembling company, is an overt act of compassing the king's death; (u) for all force, used to the person of the king, in its consequence may tend to his death, and is a strong presumption of something worse intended than the present force, by such as have so far thrown off their bounden duty

(n) 1 Hal. P. C. 104. (o) Book I, page 212.  
 (p) By the ancient law compassing or intending the death of any man, demonstrated by some evident fact, was equally penal as homicide itself. (3 Inst. 5.)  
 (q) 1 Hal. P. C. 107.  
 (r) 3 Inst. 6. (s) Plutarch *in vit.* (t) 3 Inst. 12. (u) 1 Hal. P. C. 109.

(2) See Foster C. L., 194. The most thorough examination and discussion of the law of high treason is to be found in the report of Hardy's Case, 24 State Trials, 199, in which Mr. Erskine made one of his finest displays of matchless ability as an advocate. See also Burr's Trial.

to their sovereign; it being an old observation, that there is generally but a short interval between the prisons and the graves of princes. There is no question, also, but that taking any measures to render such treasonable purposes effectual, as assembling and consulting on the means to kill the king, is a sufficient overt act of high treason. (w)

How far mere words, spoken by an individual, and not relative to any treasonable act or design then in agitation, shall amount to treason, has been formerly matter of doubt. We have two instances in the reign of Edward the Fourth, \*of persons executed for treasonable words: the one a citizen of London who said he would make his son heir of the crown, [\*80] being the sign of the house in which he lived; the other a gentleman whose favorite buck the king killed in hunting, whereupon he wished it, horns and all, in the king's belly. These were esteemed hard cases: and the chief justice, Markham, rather chose to leave his place than assent to the latter judgment (x) But now it seems clearly to be agreed, that by the common law and the statute of Edward III, words spoken amount to only a high misdemeanor, and no treason. For they may be spoken in heat, without any intention, or be mistaken perverted, or mis-remembered by the hearers; their meaning depends always on their connection with other words and things; they may signify differently even according to the tone of voice with which they are delivered; and sometimes silence itself is more expressive than any discourse. As, therefore, there can be nothing more equivocal and ambiguous than words, it would indeed be unreasonable to make them amount to high treason. And accordingly in 4 Car. I, on a reference to all the judges, concerning some very atrocious words spoken by one Pyne, they certified to the king, "that though the words were as wicked as might be, yet they were no treason: for unless it be by some particular statute, no words will be treason." (y) If the words be set down in writing, it argues more deliberate intention: and it has been held that writing is an overt act of treason: for *scribere est agere*. But even in this case the bare words are not the treason, but the deliberate act of writing them. And such writing, though unpublished, has in some arbitrary reigns convicted its author of treason: particularly in the cases of one Peachum, a clergyman, for treasonable passages in a sermon never preached; (z) and of Algernon Sydney, for some papers found in his closet; which, had they been plainly relative to any previous formed design of dethroning or murdering the king, might doubtless have been properly read in evidence as overt \*acts [\*81] of that treason, which was specially laid in the indictment. (a) But being merely speculative, without any intention (so far as appeared) of making any public use of them, the convicting the authors of treason upon such an insufficient foundation has been universally disapproved. Peachum was therefore pardoned: and though Sydney indeed was executed, yet it was to the general discontent of the nation; and his attainder was afterwards reversed by parliament. There was then no manner of doubt, but that the publication of such a treasonable writing was a sufficient overt act of treason at the common law; (b) though of late even that has been questioned.

2. The second species of treason is, "if a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir." By the king's companion is meant his wife; and by violation is understood carnal knowledge, as well without force, as with it: and this is high treason in both parties, if both be consenting; as some of the wives of Henry the Eighth by fatal experience evinced. The plain intention of this law is to guard the blood royal from any suspicion of bastardy, whereby the succession to the crown might be rendered dubious: and therefore, when this reason ceases, the law ceases with it; for to violate a queen or princess-dowager is

(w) 1 Hawk. P. C. 88. 1 Hal. P. C. 119.

(x) 1 Hal. P. C. 115.

(y) 1 Hal. P. C. 118. 1 Hawk. P. C. 88.

(z) *Ibid.*

(a) Foster, 126.

held to be no treason: (c) in like manner as, by the feudal law, it was a felony and attended with a forfeiture of the fief, if the vassal vitiated the wife or daughter of his lord; (d) but not so, if he only vitiated his widow. (e)

3. The third species of treason is "if a man do levy war against our lord the king in his realm." And this may be done by taking arms, not only to dethrone the king, but under pretence to reform religion, or the laws, or to remove evil counsellors, or other grievances, whether real or pretended. (f) For the law [\*82] does not, neither can it, permit any private man, or set of men, to interfere forcibly in matters of such high importance; especially as it has established a sufficient power, for these purposes, in the high court of parliament: neither does the constitution justify any private or particular resistance for private or particular grievances; though in cases of national oppression the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the king and his people. To resist the king's forces by defending a castle against them, is a levying of war; and so is an insurrection with an avowed design to pull down all inclosures, all brothels, and the like; the universality of the design making it a rebellion against the state, an usurpation of the powers of government, and an insolent invasion of the king's authority. (g) But, a tumult, with a view to pull down a particular house, or lay open a particular inclosure, amounts at most to a riot; this being no general defiance of public government. So, if two subjects quarrel and levy war against each other (in that spirit of private war, which prevailed all over Europe (h) in the early feudal times), it is only a great riot and contempt, and no treason. Thus it happened between the earls of Hereford and Gloucester, in 20 Edw. I, who raised each a little army, and committed outrages upon each other's lands, burning houses, attended with the loss of many lives: yet this was held to be no high treason, but only a great misdemeanor. (i) A bare conspiracy to levy war does not amount to this species of treason; but (if particularly pointed at the person of the king or his government) it falls within the first, of compassing or imagining the king's death. (k)

4. "If a man be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere," he is also declared guilty of high treason. This must likewise be proved by some overt act, as by giving them intelligence, (3) by sending them provisions, by selling them arms, by treacherously surrendering a fortress, or the like. (l) By enemies are here understood the subjects of foreign powers with whom we are at open war. As

(c) 2 Inst. 9. (d) *Feud.* l. 1, § 4. (e) *Ibid.* § 21. (f) 1 Hawk. P. C. 37. (g) 1 Hal. P. C. 122.  
(h) Robertson, Ch. V, l. 45, 296. (i) 1 Hal. P. C. 126. (k) 2 Inst. 2. Foster, 211, 212. (l) 2 Inst. 14.

(3) Treason against the United States is very carefully defined and limited by the constitution, and it can consist "only in levying war against them, or in adhering to their enemies, giving them aid and comfort." Const. of United States, art. 3, § 3. And by the same section, "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." See, also, act of April 30, 1790 (1 Stat. at Large 112), prescribing the penalty of death for this offense.

The question, what is treason under the constitution, was considered in *Ex parte Bollman*, 4 Cranch, 75, and it was there held that a conspiracy to subvert the government by force is not treason, but that war must be actually levied. See also *U. S. v. Hanway*, 2 Wall. Jr., 139; *Republica v. Carlisle*, 1 Dall., 35. In *Fries' Case* (Whart. State Trials, 634), Judge Chase, of the United States supreme court, charged the jury, among other things, as follows:

"It is the opinion of the court that any insurrection or rising of any body of people, within the United States, to attain or effect by force or violence any object of a great public nature, or of public and general (or national) concern, is a levying of war against the United States within the contemplation and construction of the constitution.

"On this general position the court are of opinion that any such insurrection or rising to resist, or to prevent by force or violence, the execution of any statute of the United States, for levying or collecting taxes, duties, imposts or excises; or for calling forth the militia to execute the laws of the Union, or for any other object of a general nature or national concern, under any pretence, as that the statute was unjust, burthensome, oppressive or unconstitutional, is a levying of war against the United States within the contemplation and construction

to foreign pirates or robbers, who may happen to invade our coasts, without any open hostilities between their nation and our own, and without any commission from any prince or state at enmity with the crown of Great Britain, the giving them any assistance is also clearly treason; either in the light of adhering to the public enemies of the king and kingdom, (m) or else in that of levying war against his majesty. And, most indisputably, the same acts of adherence or aid, which (when applied to foreign enemies) will constitute treason under this branch of the statute, will (when afforded to our own fellow-subjects in actual rebellion at home) amount to high treason under the description of levying war against the king. (n) But to relieve a rebel, fled out of the kingdom, is no treason: for the statute is taken strictly, and a rebel is not an *enemy*: an enemy being always the subject of some foreign prince, and one who owes no allegiance to the crown of England. (o) And if a person be under circumstances of actual force and constraint, through a well grounded apprehension of injury to his life or person, this fear or compulsion will excuse his even joining with either rebels or enemies in the kingdom, provided he leaves them whenever he hath a safe opportunity. (p)

5. "If a man counterfeit the king's great or privy seal," this is also high treason. But if a man takes wax bearing the impression of the great seal off from one patent, and fixes it on another, this is held to be only an abuse of the seal, and not a counterfeiting of it: as was the case of a certain chaplain, who in such manner framed a dispensation for non-residence. But the knavish artifice of a lawyer much exceeded this of the divine. One of the clerks in chancery glued together two pieces of parchment, on the uppermost of which he wrote a patent, to which he regularly obtained the great seal, the label going through both the skins. He \*then dissolved the cement; and taking off [\*84] the written patent, on the blank skin wrote a fresh patent, of a different import from the former, and published it as true. This was held no counterfeiting of the great seal, but only a great misprision; and Sir Edward

(m) Foster, 212.

(n) *Ibid.* 212.

(o) 1 Hawk. P. C. 32.

(p) Foster, 212.

tion of the constitution. The reason for this opinion is, that an insurrection to resist or prevent by force the execution of any statute of the United States has a direct tendency to dissolve all the bands of society, to destroy all order and all laws, and also all security for the lives, liberties and property of the citizens of the United States.

"The court are of opinion that military weapons (as guns and swords, mentioned in the indictment) are not necessary to make such insurrection or rising amount to a levying war, because numbers may supply the want of weapons and other instruments may effect the intended mischief. The legal guilt of levying war may be incurred without the use of military weapons or military array.

"The court are of the opinion that the assembling of bodies of men, armed and arrayed in a warlike manner, for purposes only of a private nature, is not treason, although the judges or other peace officers should be insulted or resisted, or even great outrages committed to the persons or property of our citizens.

"The true criterion whether acts committed are treason or a less offense (as a riot) is the *quo animo*, or the intention, with which the people did assemble. When the intention is universal or general, as to effect some object of a general public nature, it will be treason, and cannot be considered, construed, or reduced to a riot. The commission of any number of felonies, riots, or other misdemeanors, cannot alter their nature, so as to make them amount to treason; and on the other hand, if the intention and acts combined amount to a treason, they cannot be sunk down to a felony or riot. The intention with which any acts (as felonies, the destruction of property or the like) are done, will show to what class of crimes the case belongs." See also *U. S. v. Hanway*, 2 Wall. Jr., 139; *U. S. v. Mitchell*, 2 Dall. 848; *U. S. v. Vigol*, *id.* 846; *U. S. v. Hoxie*, 1 Paine, 265; *U. S. v. Greathouse*, 2 Abb. U. S. 364; *Shortridge v. Macon*, Chase, 136. And as to what is adhering to the enemies of the United States, see, *U. S. v. Pryor*, 3 Wash. C. C., 234. And see 2 Blash. Cr. L., 7th ed. ch. 46; Whart. Cr. L. § 2718, *et seq.*

Attainder of treason against the United States works corruption of blood, or forfeiture, only during the life of the person attainted. Const., art. 3 § 8.

Treason may be also committed against the several states. The crime is generally defined and limited in the state constitutions in the same manner as in the constitution of the United States, and the punishment prescribed is the same.

Coke (g) mentions it with some indignation, that the party was living at that day.

6. The sixth species of treason under this statute, is "if a man counterfeit the king's money: and if a man bring false money into the realm counterfeit to the money of England, knowing the money to be false, to merchandise and make payment withal." As to the first branch, counterfeiting the king's money; this is treason, whether the false money be uttered in payment or not. Also, if the king's own minters alter the standard or alloy established by law, it is treason. But gold and silver money only are held to be within the statute. (r) With regard likewise to the second branch, importing foreign counterfeit money, in order to utter it here; it is held that uttering it, without importing it, is not within the statute. (s) But of this we shall presently say more. (4)

7. The last species of treason ascertained by the statute, is, "if a man slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices." These high magistrates, as they represent the king's majesty during the execution of their offices, are therefore for the time equally regarded by the law. But this statute extends only to the actual killing of them, and not wounding, or a bare attempt to kill them. It extends also only to the officers therein specified; and therefore the barons of exchequer, as such, are not within the protection of this act: (t) but the lord keeper or commissioners of the great seal now seem to be within it, by virtue of the statutes 5 Eliz. c. 18, and 1 W. and M. c. 21.

[\*85] \*Thus careful was the legislature, in the reign of Edward the Third, to specify and reduce to a certainty the vague notions of treason that had formerly prevailed in our courts. But the act does not stop here, but goes on. "Because other like cases of treason may happen in time to come, which cannot be thought of nor declared at present, it is accorded, that if any other case supposed to be treason, which is not above specified, doth happen before any judge; the judge shall tarry without going to judgment of the treason, till the cause be showed and declared before the king and his parliament, whether it ought to be judged treason, or other felony." Sir Matthew Hale (u) is very high in his encomiums on the great wisdom and care of the parliament, in thus keeping judges within the proper bounds and limits of this act, by not suffering them to run out (upon their own opinions) into constructive treasons, though in cases that seem to them to have a like parity of reason, but reserving them to the decision of parliament. This is a great security to the public, the judges, and even this sacred act itself; and leaves a weighty *memento* to judges to be careful and not over-hasty in letting in treasons by construction or interpretation, especially in new cases that have not been resolved and settled. 2. He observes, that as the authoritative decision of these *casus omissi* is reserved to the king and parliament, the most regular way to do it is by a new declarative act; and therefore the opinion of any one or of both houses, though of very respectable weight, is not that solemn declaration referred to by this act, as the only criterion for judging of future treasons.

In consequence of this power, not, indeed, originally granted by the statute of Edward III, but constitutionally inherent in every subsequent parliament (which cannot be abridged of any rights by the act of a precedent one), the legislature was extremely liberal in declaring new treasons in the unfortunate reign of King Richard the Second; as, particularly, the killing of an ambassador was made so; \*which seems to be founded upon better reason than [\*86] the multitude of other points, that were then strained up to this high

(g) 3 Inst. 16. (r) 1 Hawk. P. C. 43. (s) *Ibid.* 43. (t) 1 Hal. P. C. 281. (u) 1 Hal. P. C. 282.

(4) In the United States, counterfeiting and kindred offenses are not treason, but are felonies.

offence; the most arbitrary and absurd of all which was by the statute 21 Ric. II, c. 8, which made the bare purpose and intent of killing or deposing the king, without any overt act to demonstrate it, high treason. And yet so little effect have over-violent laws to prevent any crime, that within two years afterwards this very prince was both deposed and murdered. And in the first year of his successor's reign, an act was passed, (v) reciting "that no man knew how he ought to behave himself, to do, speak, or say, for doubt of such pains of treason; and therefore it was accorded, that in no time to come any treason be judged otherwise than was ordained by the statute of King Edward the Third." This at once swept away the whole load of extravagant treasons introduced in the time of Richard the Second.

But afterwards, between the reign of Henry the Fourth and Queen Mary, and particularly in the bloody reign of Henry the Eighth, the spirit of inventing new and strange treasons was revived: among which we may reckon the offences of clipping money; breaking prison or rescue, when the prisoner is committed for treason; burning houses to extort money; stealing cattle by Welshmen; counterfeiting foreign coin; wilful poisoning; execrations against the king, calling him opprobrious names by public writing; counterfeiting the sign manual or signet; refusing to abjure the pope; deflowering or marrying, without the royal license, any of the king's children, sisters, aunts, nephews, or nieces; bare solicitation of the chastity of the queen or princess, or advances made by themselves; marrying with the king by a woman not a virgin, without previously discovering to him such her unchaste life; judging or *believing* (manifested by any overt act) the king to have been lawfully married to Ann of Cleves; derogating from the king's royal style and title; impugning his supremacy; and assembling riotously to the \*number of twelve, and [\*87] not dispersing upon proclamation: all which new-fangled treasons were totally abrogated by the statute 1 Mar. c. 1, which once more reduced all treasons to the standard of the statute 25 Edw. III. Since which time, though the legislature has been more cautious in creating new offences of this kind, yet the number is very considerably increased, as we shall find upon a short review.

These new treasons, created since the statute 1 Mar. c. 1, and not comprehended under the description of statute 25 Edw. III, I shall comprise under three heads. 1. Such as relate to papists. 2. Such as relate to falsifying the coin, or other royal signatures. 3. Such as are created for the security of the protestant succession in the house of Hanover.

1. The first species, relating to *papists*, was considered in a preceding chapter, among the penalties incurred by that branch of non-conformists to the national church; wherein we have only to remember, that by statute 5 Eliz. c. 1, to defend the pope's jurisdiction in this realm, is, for the first time, a heavy misdemeanor: and, if the offence be repeated, it is high treason. Also by statute 27 Eliz. c. 2, if any popish priest, born in the dominions of the crown of England, shall come over hither from beyond the seas, unless driven by stress of weather, (w) and departing in a reasonable time; (x) or shall tarry here three days without conforming to the church, and taking the oaths; he is guilty of high treason. And by statute 3 Jac. I, c. 4, if any natural-born subject be withdrawn from his allegiance, and reconciled to the pope or see of Rome, or any other prince or state, both he and all such as procure such reconciliation shall incur the guilt of high treason. These were mentioned under the division before referred to, as spiritual offences, and I now repeat them as temporal ones also; the reason of distinguishing these overt acts of popery from all others, by setting the mark of high treason upon them, being certainly on a civil, and not on a religious account. For every popish priest of course renounces his allegiance to his \*temporal sovereign upon taking orders; that being inconsistent with his new engagements of canonical obedience to the [\*88]

(v) Stat. 1 Hen. IV, c. 10.

(w) Sir T. Raym. 377.

(x) Latch. 1  
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pope; and the same may be said of an obstinate defence of his authority here, or a formal reconciliation to the see of Rome, which the statute construes to be a withdrawing from one's natural allegiance; and therefore, besides being reconciled "to the pope," it also adds, "or any other prince or state."

2. With regard to treasons relative to the *coin* or other *royal signatures*, we may recollect that the only two offences respecting the coinage, which are made treason by the statute 25 Edw. III, are the actual counterfeiting the gold and silver coin of this kingdom; or the importing of such counterfeit money with intent to utter it, knowing it to be false. But, these not being found sufficient to restrain the evil practices of coiners and false moneyers, other statutes have been since made for that purpose. The crime itself is made a species of high treason; as being a breach of allegiance by infringing the king's prerogative, and assuming one of the attributes of the sovereign, to whom alone it belongs, to set the value and denomination of coin made at home, or to fix the currency of foreign money: and besides, as all money which bears the stamp of the kingdom is sent into the world upon the public faith, as containing metal of a particular weight and standard, whoever falsifies this is an offender against the state, by contributing to render that public faith suspected. And upon the same reasons, by a law of the emperor Constantine, (y) false coiners were declared guilty of high treason, and were condemned to be burnt alive: as, by the laws of Athens (z) all counterfeiters, debasers, and diminishers of the current coin were subjected to capital punishment. However, it must be owned that this method of reasoning is a little overstrained: counterfeiting or debasing the coin being usually practiced rather for the sake of private and unlawful lucre, than out of any disaffection to the sovereign.

[\*89] And \*therefore, both this and its kindred species of treason, that of counterfeiting the seals of the crown or other royal signatures, seem better denominated by the later civilians a branch of the *crimen falsi* or forgery (in which they are followed by Glanvil, (a) Bracton, (b) and Fleta) (c) than by Constantine and our Edward the Third, a species of the *crimen lase majestatis*, or high treason. For this confounds the distinction and proportion of offences; and, by affixing the same ideas of guilt upon the man who coins a leaden groat and him who assassinates his sovereign, takes off from that horror which ought to attend the very mention of the crime of high treason, and makes it more familiar to the subject. Before the statute 25 Edw. III, the offence of counterfeiting the coin was held to be only a species of petit treason; (d) but subsequent acts in their new extensions of the offence have followed the example of that statute, and have made it equally high treason with an endeavour to subvert the government, though not quite equal in its punishment.

In consequence of the principle thus adopted, the statute 1 Mar. c. 1, having at one stroke repealed all intermediate treasons created since the 25 Edw. III, it was thought expedient by statute 1 Mar. st. 2, c. 6, to revive two species, viz.: 1. That if any person falsely forge or counterfeit any such kind of coin of gold or silver, as is not the proper coin of this realm, but shall be current within this realm by consent of the crown; or, 2, shall falsely forge or counterfeit the sign manual, privy signet, or privy seal; such offences shall be deemed high treason. And by statute 1 and 2 P. and M. c. 11, if any persons do bring into this realm such false or counterfeit foreign money, being current here, knowing the same to be false, with intent to utter the same in payment, they shall be deemed offenders in high treason. The money referred to in these statutes must be such as is absolutely current here, in all payments, by the king's proclamation; of which there is none at present, Portugal money being only taken by consent, as approaching the nearest to our standard: and falling in well enough with our divisions of money into pounds and shillings: there-

(y) C. 9, 24. 2 Cod. Theod. de falsa moneta, l. 2.  
(z) L. 14, c. 7.

(b) L. 2, c. 3, §§ 1 and 2.

(c) Pott. Ant. b. 1, c. 22.  
(d) 1 Hal. P. C. 224.



fore to counterfeit it is not high treason, but another inferior offence. \*Clipping or defacing the genuine coin was not hitherto included in these statutes; though an offence equally pernicious to trade, and an equal insult upon the prerogative, as well as personal affront to the sovereign; whose very image ought to be had in reverence by all loyal subjects. And therefore among the Romans, (e) defacing or even melting down the emperor's statues was made treason by the Julian law; together with other offences of the like sort, according to that vague conclusion, "*aliudve quid simile, si admiserint.*" And now, in England, by statutes 5 Eliz. c. 11, clipping, washing, rounding, or filing, for wicked gain's sake, any of the money of this realm, or other money suffered to be current here, shall be adjudged to be high treason; and by statute 18 Eliz. c. 1 (because "the same law, being penal, ought to be taken and expounded strictly according to the words thereof, and the like offences, not by any equity to receive the like punishment or pains"), the same species of offences is therefore described in other more general words, viz.: impairing, diminishing, falsifying, scaling, and lightening; and made liable to the same penalties. By statute 8 and 9 Wm. III., c. 26, made perpetual by 7 Ann. c. 25, whoever without proper authority, shall knowingly make or mend, or assist in so doing, or shall buy, sell, conceal, hide, or knowingly have in his possession, any implements of coinage specified in the act, or other tools or instruments proper only for the coinage of money; (5) or shall convey the same out of the king's mint; he, together with his counsellors, procurers, aiders, and abettors, shall be guilty of high treason, which is by much the severest branch of the coinage law. The statute goes on farther, and enacts that to mark any coin on the edges with letters, or otherwise in imitation of those used in the mint; or to colour, guild, or case over any coin resembling the current coin, or even round blanks of base metal; shall be construed high treason. But all prosecutions on this act are to be commenced within *three* \*months after the commission of the offence, except those for making or mending any coining tool or instrument, or for marking money round the edges; which are directed to be commenced within *six* months after the offence committed. (f) And, lastly, by statute 15 and 16 Geo. II., c. 28, if any person colours or alters any shilling or sixpence, either lawful or counterfeit, to make them respectively resemble a guinea or half guinea; or any halfpenny or farthing to make them respectively resemble a shilling or sixpence; this is also high treason: but the offender shall be pardoned, in case (being out of prison) he discovers and convicts two other offenders of the same kind. (6)

3. The other new species of high treason is such as is created for the security of the *protestant succession* over and above such treasons against the king and government as were comprised under the statute 25 Edw. III. For this purpose, after the act of settlement was made, for transferring the crown to the illustrious house of Hanover, it was enacted by statute 13 and 14 Wm. III., c. 3, that the pretended Prince of Wales, who was then thirteen years of age, and had assumed the title of King James III., should be attainted of high treason; and it was made high treason for any of the king's subjects, by letters,

(e) 77. 43, 4, 6.

(f) Stat. 7 Ann. c. 25.

(6) This offense is now reduced to felony in England.

(6) The counterfeiting, etc. of copper coin, the making, mending, etc., of tools or implements for the purpose, and having the same in custody without lawful excuse, etc., were made punishable as felonies under statute 2 Wm. IV., c. 84. The uttering or putting in circulation of counterfeit copper coin was not before indictable at all: *Rex v. Curwan*, 1 East P. C., 182; and the making, etc., of tools, etc., for counterfeiting the copper coin was a common-law misdemeanor only. Offenses against the currency are punishable in the federal courts of the United States, under various acts of congress, as statutory offenses. But they may also be punished by the states; the same act constituting an offense against each sovereignty. *Fox v. Ohio*, 5 How., 410; *U. S. v. Marigold*, 9 How., 560; *Moore v. People*, 14 How., 18.

messages, or otherwise, to hold correspondence with him, or any person employed by him, or to remit any money for his use, knowing the same to be for his service. And by statute 17 Geo. II, c. 39, it is enacted, that if any of the sons of the pretender shall land or attempt to land in this kingdom, or be found in Great Britain, or Ireland, or any of the dominions belonging to the same, he shall be judged attainted of high treason, and suffer the pains thereof. And to correspond with them, or to remit money for their use, is made high treason in the same manner as it was to correspond with the father. By the statute 1 Ann. st. 2, c. 17, if any person shall endeavor to deprive or hinder any person, being the next in succession to the crown according to the limitations of the act of settlement, from succeeding to the crown, and shall maliciously and directly attempt the same by any \*overt act, such offence [92] shall be high treason. And by statute 6 Ann. c. 7, if any person shall maliciously, advisedly, and directly, by writing or printing, maintain and affirm, that any other person hath any right or title to the crown of this realm, otherwise than according to the act of settlement; or that the kings of this realm with the authority of parliament are not able to make laws and statutes, to bind the crown and the descent thereof; such person shall be guilty of high treason. This offence (or indeed maintaining this doctrine in any wise, that the king and parliament cannot limit the crown) was once before made high treason by statute 13 Eliz. c. 1, during the life of that princess. And after her decease it continued a high misdemeanor, punishable with forfeiture of goods and chattels, even in the most flourishing æra of indefeasible hereditary right and *jure divino* succession. But it was again raised into high treason, by the statute of Anne before mentioned, at the time of a projected invasion in favour of the then pretender; and upon this statute one Matthews, a printer, was convicted and executed in 1719, for printing a treasonable pamphlet, entitled "*Vox populi vox Dei*." (g)

Thus much for the crime of treason, or *læsæ majestatis*, in all its branches; which consists, we may observe, originally, in grossly counteracting that allegiance which is due from the subject by either birth or residence; though, in some instances, the zeal of our legislators to stop the progress of some highly pernicious practices has occasioned them a little to depart from this its primitive idea. But of this enough has been hinted already: it is now time to pass on from defining the crime to describing its punishment.

The punishment of high treason in general is very solemn and terrible. 1. That the offender be drawn to the gallows, and not be carried or walk; though usually (by connivance, (h) at length ripened by humanity into law) a sledge or hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement. (i) 2. That he \*be [93] hanged by the neck, and then cut down alive. 3. That his entrails be taken out and burned, while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the king's disposal. (k) (7)

The king may, and often doth, discharge all the punishment, except beheading, especially where any of noble blood are attainted. For beheading, being part of the judgment, that may be executed, though all the rest be omitted by the king's command. (l) But where beheading is no part of the judgment, as in murder or other felonies, it hath been said that the king cannot change the judgment, although at the request of the party, from one species of death to another. (m) But of this we shall say more hereafter. (n)

(g) State Tr. ix. 690. (h) 33 Ass. pl. 7. (i) 1 Hal. P. C. 382.  
(k) This punishment for treason, Sir Edward Coke tells us, is warranted by divers examples in Scripture; for Joab was drawn, Bithan was hanged, Judas was embowelled, and so of the rest. (3 Inst. 211.)  
(l) 1 Hal. P. C. 351. (m) 3 Inst. 52. (n) See ch. 82.

(7) The punishment for treason was changed to hanging in case of women by stat. 20 Geo. III, c. 48, and in case of men by stat. 54 Geo. III, c. 146.

In the case of coining, which is a treason of a different complexion from the rest, the punishment is milder for male offenders; being only to be drawn and hanged by the neck till dead. (o) But in treasons of every kind the punishment of women is the same, and different from that of men. For as the decency due to the sex forbids the exposing and publicly mangling their bodies, their sentence (which is to the full as terrible to sensation as the other) is to be drawn to the gallows, and there to be burned alive. (p)

The consequence of this judgment (attainder, forfeiture, and corruption of blood) must be referred to the latter end of this book, when we shall treat of them all together, as well in treason as in other offences.

## CHAPTER VII.

### OF FELONIES INJURIOUS TO THE KING'S PREROGATIVE.

As, according to the method I have adopted, we are next to consider such *felonies* as are more immediately injurious to the king's prerogative, it will not be amiss here, at our first entrance upon this crime, to inquire briefly into the nature and meaning of *felony*: before we proceed upon any of the particular branches into which it is divided.

Felony, in the general acception of our English law, comprises every species of crime, which occasioned at common law the forfeiture of lands or goods. (1) This most frequently happens in those crimes, for which a capital punishment either is or was liable to be inflicted: for those felonies which are called clergyable, or to which the benefit of clergy extends, were anciently punished with death, in all lay, or unlearned offenders; though now by the statute-law that punishment is for the first offence universally remitted. Treason itself, says Sir Edward Coke, (a) was anciently comprised under the name felony: and in confirmation of this we may observe that the statute of treasons, 25 Edw. III, c. 2, speaking of some dubious crimes, directs a reference to parliament; \*that it may there be adjudged, "whether they be [\*95] treason, or other felony." All treasons, therefore, strictly speaking, are felonies; though all felonies are not treasons. And to this also we may add, that not only all offences, now capital, are in some degree or other felony; but that this is likewise the case with some other offences, which are not punished with death; as suicide, where the party is already dead; homicide by chance medley, or in self-defence; and petit larceny or pilfering: all which are (strictly speaking) felonies, as they subject the committers of them to forfeitures. So that upon the whole the only adequate definition of felony seems to be that which is before laid down; viz., an offence which occasions a total

(o) 1 Hal. P. C. 351.

(p) 2 Hal. P. C. 350.

(a) 3 Inst. 15.

(1) In some of the United States by statute the term "felony" is made to embrace all offenses for which a specified punishment may be imposed; *e. g.*, imprisonment in the state penitentiary. *People v. Van Steenburgh*, 1 Park. C. R., 39. In the absence of such statutory definition, those offenses are felonies which were so at the common law. *Ward v. People*, 3 Hill, 395; *Drennan v. People*, 10 Mich., 169; though in Ohio, where all offenses are statutory, it has been said that "the term *felony* has no distinct and well-defined meaning applicable to our system of criminal jurisprudence. In England it has a well-known and extensive signification, and comprises every species of crime which, at common law, worked a forfeiture of goods and lands. But under our criminal code the word *felonious*, though occasionally used, expresses a signification no less vague and indefinite than the word *criminal*." *Matthews v. State*, 4 Ohio St. 539.

forfeiture of either lands, or goods, or both, at the common law; and to which capital or other punishment may be superadded, according to the degree of guilt.

To explain this matter a little farther: the word *felony* or *felonia* is of undoubted feudal origin, being frequently to be met with in the books of feuds, &c.; but the derivation of it has much puzzled the juridical lexicographers, Præteus, Calvinus and the rest: some deriving it from the Greek *φῆλος*, an imposter or deceiver; others from the Latin *fallo*, *fefelli*, to countenance which they would have it called *fallonia*. Sir Edward Coke, as his manner is, has given us a still stranger etymology; (b) that it is *crimen anima felleo perpetratum*, with a bitter or gallish inclination. But all of them agree in the description, that it is such a crime as occasions a forfeiture of all the offender's lands or goods. And this gives great probability to Sir Henry Spelman's Teutonic or German derivation of it: (c) in which language indeed, as the word is of clearly feudal original, we ought rather to look for its signification, than among the Greeks and Romans. Fe-lon then, according to him, is derived from two northern words: *fiz*, which signifies (we well know) the fief, feud, or beneficiary estate; and *lou*, which signifies price or value. Felony is therefore the same as *pretium feudi*, the \*consideration for which a man [96] gives up his fief; as we say in common speech, such an act is as much as your life or estate is worth. In this sense it will clearly signify the feudal forfeiture, or act by which an estate is forfeited, or escheats to the lord.

To confirm this we may observe, that it is, in this sense, of forfeiture to the lord, that the feudal writers constantly use it. For all those acts, whether of a criminal nature or not, which at this day are generally forfeitures of copyhold estates, (d) are styled *felonia* in the feudal law: "*scilicet per quas feudum amittitur.*" (e) As "*si domino deservire noluerit; (f) si per annum et diem cessaverit in patenda investitura: (g) si dominum ejuraverit, i. e., negaverit se a domino feudum habere; (h) si a domino, in jus eum vocante, ter citatus non comparuerit;*" (i) all these, with many others, are still causes of forfeiture in our copyhold estates, and were denominated felonies by the feudal constitutions. So likewise injuries of a more substantial or criminal nature were denominated felonies, that is, forfeitures: as assaulting or beating the lord; (k) vitiating his wife or daughter, "*si dominum cucurbitaverit, i. e., cum uxore ejus concubuerit;*" (l) all these are esteemed felonies, and the latter is expressly so denominated, "*si fecerit felonium, dominum forte cucurbitando.*" (m) And as these contempts, or smaller offences, were felonies or acts of forfeiture, of course greater crimes, as murder and robbery, fell under the same denomination. On the other hand, the lord might be guilty of felony, or forfeit his seigniority to the vassal, by the same acts as the vassal would have forfeited his feud to the lord. "*Si dominus commiserit feloniam, per quam vassalus amitteret feudum si eam commiserit in dominum, feudi proprietatem etiam dominus perdere debet.*" (n) One instance given of this sort of felony in the lord is beating the servant of his vassal, so that he loses his service; which seems [97] merely in the nature of a civil \*injury, so far as it respects the vassal. And all these felonies were to be determined "*per laudamentum sive judicium parium suorum*" in the lords court; as with us forfeiture of copyhold lands are presentable by the homage in the court-baron.

Felony and the act of forfeiture to the lord, being thus synonymous terms in the feudal law, we may easily trace the reason why, upon the introduction of that law into England, those crimes which induced such forfeiture or escheat of lands (and, by small deflection from the original sense, such as induced the forfeiture of goods also) were denominated felonies. Thus it was said, that suicide, robbery and rape, were felonies; that is, the consequence of such

(b) 1 Inst. 391.

(d) See book II, page 284.

(e) *Feud. l. 2, t. 16, in cal.*

(f) *Ibid. l. 2, t. 26, § 2.*

(g) *Ibid. l. 2, t. 26, § 2.*

(h) *Ibid. l. 2, t. 26, § 2.*

(i) *Ibid. l. 2, t. 26, § 2.*

(j) *Ibid. l. 2, t. 26, § 2.*

(k) *Ibid. l. 2, t. 26, § 2.*

(l) *Ibid. l. 2, t. 26, § 2.*

(m) *Ibid. l. 2, t. 26, § 2.*

(n) *Ibid. l. 2, t. 26, § 2.*

crimes was forfeiture; till by long use we began to signify by the term of felony the actual crime committed, and not the penal consequence. And upon this system only can we account for the cause, why treason in ancient times was held to be a species of felony: viz., because it induced a forfeiture.

Hence it follows, that capital punishment does by no means enter into the true idea and definition of felony. Felony may be without inflicting capital punishment, as in the cases instanced of self-murder, excusable homicide and petit larceny: and it is possible that capital punishments may be inflicted, and yet the offence be no felony; as in case of heresy by the common law, which though capital, never worked any forfeiture of lands or goods, (o) an inseparable incident to felony. And of the same nature was the punishment of standing mute, without pleading to an indictment, which at common law was capital, but without any forfeiture, and therefore such standing mute was no felony. In short, the true criterion of felony is forfeiture; for, as Sir Edward Coke justly observes (p) in all felonies which are punishable with death, the offender loses all his lands in fee-simple, and also his goods and chattels; in such as are not so punishable, his goods and chattels only.

\*The idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this [\*98] usage the interpretations of the law do now conform. And, therefore, if a statute makes any new offence felony, the law (q) implies that it shall be punished with death, viz., by hanging as well as with forfeiture: unless the offender prays the benefit of clergy which all felons are entitled once to have, provided the same is not expressly taken away by statute. And in compliance herewith, I shall for the future consider it also in the same light, as a general term, including all capital crimes below treason; having premised thus much concerning the true nature and original meaning of felony, in order to account for the reason of those instances I have mentioned, of felonies that are not capital, and capital offences that are not felonies: which seem at first view repugnant to the general idea which we now entertain of felony, as a crime to be punished by death: whereas properly it is a crime to be punished by forfeiture, and to which death may, or may not be, though it generally is, superadded.

I proceed now to consider such felonies as are more immediately injurious to the king's prerogative. These are, 1. Offences relating to the coin, not amounting to treason. 2. Offences against the king's council. 3. The offence of serving a foreign prince. 4. The offence of embezzling or destroying the king's armour or stores of war. To which may be added a fifth, 5. Desertion from the king's armies in time of war.

1. Offences relating to the coin, under which may be ranked some inferior misdemeanors not amounting to felony, are thus declared by a series of statutes which I shall recite in the order of time. And first, by statute 27 Edw. I, c. 3, none shall bring pollards and crockards, which were foreign coins of base metal, into the realm on pain of forfeiture of life and goods. By statute 9 Edw. III, st. 2, no sterling money shall be melted down, upon pain of forfeiture thereof. \*By statute 17 Edw. III, none shall be so hardy to bring [ \*99 ] false and ill money into the realm, on pain or forfeiture of life and member by the persons importing, and the searchers permitting such importation. By statute 3 Hen. V, st. 1, to make, coin, buy, or bring into the realm any gally-halfpence, suskins, or dotkins, in order to utter them, is felony; and knowingly to receive or pay either them or *blanks* (r) is forfeiture of an hundred shillings. By statute 14 Eliz. c. 3, such as forge any foreign coin, although it be not made current here by proclamation, shall (with their aiders and abettors) be guilty of misprision of treason, a crime which we shall hereafter consider. By statute 13 and 14 Car. II, c. 31, the offence of melting down any

(o) 3 Inst. 43.

(p) 1 Inst. 301.

(q) 1 Hawk. P. C. 107. 2 Hawk. P. C. 444.

(r) 2 Stat. Hen. VI, c. 3.

current silver money shall be punished with forfeiture of the same, and also the double value: and the offender, if a freeman of any town, shall be disfranchised; if not, shall suffer six months' imprisonment. By statute 6 and 7 Wm. III, c. 17, if any person buys or sells, or knowingly has in his custody, any clippings, or filings, of the coin, he shall forfeit the same and 500*l.*; one moiety to the king, and the other to the informer; and be branded in the cheek with the letter R. By statute 8 and 9 Wm. III, c. 26, if any person shall blanch or whiten copper for sale (which makes it resemble silver); or buy or sell, or offer to sell any malleable composition, which shall be heavier than silver, and look, touch, and wear like gold, but be beneath the standard: or if any person shall receive or pay at a less rate than it imports to be of (which demonstrates a consciousness of its baseness, and a fraudulent design,) any counterfeit or diminished milled money of this kingdom, not being cut in pieces (an operation which is expressly directed to be performed when any such money shall be produced in evidence, and which any person to whom any gold or silver money is tendered, is empowered by statutes 9 and 10 Wm. III, c. 21, 13 Geo. III, c. 71, and 14 Geo. III, c. 70, to perform at his own hazard, and the officers of the exchequer and receivers general of the taxes are particularly required to perform): all such persons shall be guilty of felony; and may be prosecuted for the same at any time within three months after the offence committed. [\*100] But these precautions not being found sufficient to prevent the uttering of false or diminished money, which was only a misdemeanor at common law, it is enacted by statute 15 and 16 Geo. II, c. 28, that if any person shall utter or tender in payment any counterfeit coin, knowing it so to be, he shall for the first offence be imprisoned six months, and find sureties for his good behaviour for six months more; for the second offence, shall be imprisoned two years, and find sureties for two years longer; and for the third offence shall be guilty of felony without benefit of clergy. Also, if a person knowingly tenders in payment any counterfeit money, and at the same time has more in his custody; or shall, within ten days after, knowingly tender other false money; he shall be deemed a common utterer of counterfeit money, and shall for the first offence be imprisoned one year, and find sureties for his good behaviour for two years longer; and for the second, be guilty of felony without benefit of clergy. By the same statute it is also enacted, that if any person counterfeits the copper coin, he shall suffer two years' imprisonment, and find sureties for two years more. By statute 11 Geo. III, c. 40, persons counterfeiting copper half-pence or farthings, with their abettors; or buying, selling, receiving, or putting off any counterfeit copper money (not being cut in pieces or melted down) at a less value than it imports to be off; shall be guilty of single felony. And by a temporary statute (14 Geo. III, c. 42), if any quantity of money, exceeding the sum of five pounds, being or purporting to be the silver coin of this realm, but below the standard of the mint in weight or fineness, shall be imported into Great Britain or Ireland, the same shall be forfeited in equal moieties to the crown and prosecutor. Thus much for offences relating to the coin, as well misdemeanors as felonies, which I thought it most convenient to consider in one and the same view. (2)

2. Felonies, against the king's *counsel*, (a) are these. First, by statute 3 Hen. VII, c. 14, if any sworn servant of the king's household conspires or confederates to kill any lord of this \*realm, or other person sworn of the [\*101] king's council, he shall be guilty of felony. Secondly, by statute 9

(a) See book I, page 334.

(2) This subject is now covered by statute 24 and 25 Vic., c. 99, and the statutes mentioned in the text are repealed.

Ann. c. 16, to assault, strike, wound, or attempt to kill, any privy councillor in the execution of his office, is made felony without benefit of clergy. (3)

3. Felonies in *serving foreign states*, which service is generally inconsistent with allegiance to one's natural prince, are restrained and punished by statute 3 Jac. I, c. 4, which makes it felony for any persons whatever to go out of the realm, to serve any foreign prince, without having first taken the oath of allegiance before his departure. And it is felony also for any gentleman, or person of higher degree, or who hath borne any office in the army, to go out of the realm to serve such foreign prince or state, without previously entering into a bond, with two sureties, not to be reconciled to the see of Rome, or enter into any conspiracy against his natural sovereign. And further, by statute 9 Geo. II, c. 30, enforced by statute 29 Geo. II, c. 17, if any subject of Great Britain shall enlist himself, or if any person shall procure him to be enlisted, in any foreign service, or detain or embark him for that purpose, without license under the king's sign manual, he shall be guilty of felony without benefit of clergy; but if the person so enlisted or enticed shall discover his seducer within fifteen days, so as he may be apprehended and convicted of the same, he shall be indemnified. By the statute 29 Geo. II, c. 17, it is moreover enacted, that to serve under the French King, as a military officer, shall be felony without benefit of clergy; and to enter into the Scotch brigade in the Dutch service, without previously taking the oaths of allegiance and abjuration, shall be a forfeiture of 500*l*. (4)

4. Felony by *embezzling or destroying* the king's *armour or warlike stores* is, in the first place, so declared to be by statute 31 Eliz. c. 4, which enacts, that if any person having the charge or custody of the king's armour, ordinance, ammunition, or habiliments of war, or of any victual provided for victualling the king's soldiers or mariners, shall either for gain, or to impede his majesty's service, embezzle the same \*to the value of twenty shillings, [\*102] such offence shall be felony. And the statute 22 Car. II, c. 5, takes away the benefit of clergy for this offence, (5) and from stealing the king's naval stores to the value of twenty shillings; with a power for the judge, after sentence, to transport the offender for seven years. Other inferior embezzlements and misdemeanors, that fall under this denomination, are punished by statutes 9 and 10 Wm. III, c. 41, 1 Geo. I, c. 25, 9 Geo. I, c. 8, and 17 Geo. II, c. 40, with fine, corporal punishment, and imprisonment. And by statute 12 Geo. III, c. 24, to set on fire, burn, or destroy any of his majesty's ships of war, whether built, building, or repairing; or any of the king's arsenals, magazines, dock-yards, rope-yards, or victualling offices, or materials thereunto belonging; or military, naval, or victualling stores, or ammunition; or causing, aiding, procuring, abetting, or assisting in, such offence; shall be felony without benefit of clergy.

5. Desertion from the king's armies in time of war, whether by land or sea, in England or in parts beyond the sea, is by the standing laws of the land (exclusive of the annual acts of parliament, to punish mutiny and desertion), and particularly by statute 18 Hen. VI, c. 19, and 5 Eliz. c. 5, made felony, but not without benefit of clergy. But by the statute 2 and 3 Edw. VI, c. 2, clergy is taken away from such deserters, and the offence is made triable by the justices of every shire. The same statutes punish other inferior military offences with fines, imprisonment, and other penalties. (6)

(3) All attempts to commit murder are now punishable without any distinction respecting the rank of the party, except in the case of the king and the royal family. See statute 24 and 25 Vic., c. 100.

(4) The statutes 9 Geo. II, and 29 Geo. II, are repealed.

(5) This provision was repealed by statutes 5 Geo. IV, c. 58.

(6) There are also statutes for punishing attempts to seduce from their duty and allegiance persons serving in the military and naval forces.

## CHAPTER VIII OF PRÆMUNIRE.

A THIRD species of offence more immediately affecting the king, and his government, though not subject to capital punishment, is that of *præmunire*; so called from the words of the writ preparatory to the prosecution thereof: "*præmunire (a) facias A B*" cause A B to be forewarned that he appear before us to answer the contempt wherewith he stands charged: which contempt is particularly recited in the preamble to the writ. (b) It took its original from the exorbitant power claimed and exercised in England by the pope, which even in the days of blind zeal, was too heavy for our ancestors to bear. (1)

It may justly be observed, that religious principles, which (when genuine and pure) have an evident tendency to make their professors better citizens as well as better men, have (when perverted and erroneous) been usually subversive of civil government, and been made both the cloak and the instrument of every pernicious design that can be harboured in the heart of man. The unbounded authority that was exercised by the Druids in the west, under the influence of pagan superstition, and the terrible ravages committed by the Saracens in the east, to propagate the religion of Mahomet, both witness to the truth of that ancient universal observation, that in all ages and in all countries, civil and ecclesiastical tyranny are mutually productive of each other. It is therefore the glory of the church of England, that she inculcates due obedience to lawful [\*104] authority, and hath been (as her prelates on \*a trying occasion once expressed it) (c) in her principles and practice ever most unquestionably loyal. The clergy of her persuasion, holy in their doctrines and unblemished in their lives and conversation, are also moderate in their ambition, and entertain just notions of the ties of society and the rights of civil government. As in matters of faith and morality they acknowledge no guide but the Scriptures, so, in matters of external polity and of private right, they derive all their title from the civil magistrate; they look up to the king as their head, to the parliament as their lawgiver, and pride themselves in nothing more justly, than in being true members of the church emphatically *by law* established. Whereas the notions of ecclesiastical liberty, in those who differ from them, as well in one extreme as the other (for I here only speak of extremes), are equally and totally destructive of those ties and obligations by which all society is kept together; equally encroaching on those rights which reason and the original contract of every free state in the universe have vested in the sovereign power; and equally aiming at a distinct independent supremacy of their own, where spiritual men and spiritual causes are concerned. The dreadful effects of such a religious bigotry, when actuated by erroneous principles, even of the protestant kind, are sufficiently evident from the history of the anabaptists in Germany, the covenanters in Scotland, and that deluge of sectaries in England, who murdered their sovereign, overturned the church and monarchy, shook every pillar of law, justice, and private property, and most devoutly established a kingdom of the saints in their stead. But these horrid devastations, the effects of mere madness, or of zeal that was nearly allied to it, though violent and tumultuous, were but of a short duration. Whereas, the progress of the papal policy, long actuated by the steady counsels of successive pontiffs, took deeper root, and was at length in some places with diffi-

(a) A barbarous word for *præmoneri*.  
(c) Address to James II, 1687.

(b) *Old Nat. Brev.* 101, edit. 1584.

(1) This chapter is wholly inapplicable in the United States.



culty, in others never yet, extirpated. For this we might call to witness the black intrigues of the jesuits, so lately triumphant over Christendom, but now universally abandoned by even the Roman Catholic powers; but the subject of our present \*chapter rather leads us to consider the vast strides which [105] were formerly made in this kingdom by the popish clergy; how nearly they arrived to effecting their grand design; some few of the means they made use of for establishing their plan; and how almost all of them have been defeated or converted to better purposes, by the vigour of our free constitution, and the wisdom of successive parliaments.

The ancient British church, by whomsoever planted, was a stranger to the bishop of Rome, and all his pretended authority. But the pagan Saxon invaders, having driven the professors of Christianity to the remotest corners of our island, their own conversion was afterwards effected by Augustin the monk, and other missionaries from the court of Rome. This naturally introduced some few of the papal corruptions in point of faith and doctrine; but we read of no civil authority claimed by the pope in these kingdoms, till the æra of the Norman conquest; when the then reigning pontiff, having favoured Duke William in his projected invasion, by blessing his host and consecrating his banners, took that opportunity also of establishing his spiritual encroachments: and was even permitted so to do by the policy of the conqueror, in order more effectually to humble the Saxon clergy and aggrandize his Norman prelates; prelates, who, being bred abroad in the doctrine and practice of slavery, had contracted a reverence and regard for it, and took a pleasure in riveting the chains of a free-born people.

The most stable foundation of legal and rational government is a due subordination of rank, and a gradual scale of authority; and tyranny, also, itself is most surely supported by a regular increase of despotism, rising from the slave to the sultan: with this difference, however, that the measure of obedience in the one is grounded on the principles of society, and is extended no farther than reason and necessity will warrant: in the other it is limited only by absolute will and pleasure, without permitting the inferior to examine the title upon which it is founded. More effectually, therefore, to enslave the consciences and minds of the people, the Romish \*clergy themselves paid [106] the most implicit obedience to their own superiors or prelates; and they, in their turn, were as blindly devoted to the will of the sovereign pontiff, whose decisions they held to be infallible, and his authority co-extensive with the Christian world. Hence his legates *a latere* were introduced into every kingdom of Europe, his bulls and decretal epistles became the rule both of faith and discipline, his judgment was the final resort in all cases of doubt or difficulty, his decrees were enforced by anathemas and spiritual censures, he dethroned even kings that were refractory, and denied to whole kingdoms (when undutiful) the exercise of Christian ordinances, and the benefits of the gospel of God.

But, though the being spiritual head of the church was a thing of great sound, and of greater authority, among men of conscience and piety, yet the court of Rome was fully apprised that (among the bulk of mankind) power cannot be maintained without property; and therefore its attention began very early to be riveted upon every method that promised pecuniary advantage. The doctrine of purgatory was introduced, and with it the purchase of masses to redeem the souls of the deceased. New-fangled offences were created, and indulgences were sold to the wealthy, for liberty to sin without danger. The canon law took cognizance of crimes, enjoined penance *pro salute animæ*, and commuted that penance for money. Non-residence and pluralities among the clergy, and marriages among the laity, related within the seventh degree, were strictly prohibited by canon; but dispensations were seldom denied to those who could afford to buy them. In short, all the wealth of Christendom was gradually drained by a thousand channels into the coffers of the holy see.

The establishment also of the feudal system in most of the governments of Europe, whereby the lands of all private proprietors were declared to be holden of the prince, gave a hint to the court of Rome for usurping a similar authority over all the preferments of the church; which began first in Italy, and [\*107] gradually spread itself to England. The pope became a \*feudal lord; and all ordinary patrons were to hold their right of patronage under this universal superior. Estates held by feudal tenure, being originally gratuitous donations, were at that time denominated *beneficia*; their very name as well as constitution was borrowed, and the care of the souls of a parish thence came to be denominated a *benefice*. Lay fees were conferred by investiture or delivery of corporal possession; and spiritual benefices, which at first were universally donative, now received in like manner a spiritual investiture, by institution from the bishop, and induction under his authority. As lands escheated to the lord, in defect of a legal tenant, so benefices lapsed to the bishop upon non-presentation by the patron, in the nature of a spiritual escheat. The annual tenths collected from the clergy were equivalent to the feudal render, or rent, reserved upon a grant; the oath of canonical obedience was copied from the oath of fealty required from the vassal by his superior; and the *primer seisins* of our military tenures, whereby the first profits of an heir's estate were cruelly extorted by his lord, gave birth to as cruel an exaction of first fruits from the beneficed clergy. And the occasional aids and talliages, levied by the prince on his vassals, gave a handle to the pope to levy, by the means of his legates *a latere*, peter-pence and other taxations.

At length the holy father went a step beyond any example of either emperor or feudal lord. He reserved to himself, by his own apostolical authority, (d) the presentation to all benefices which became vacant while the incumbent was attending the court of Rome upon any occasion, or on his journey thither, or back again: and moreover such also as became vacant by his promotion to a bishopric or abbey: "*etiamsi ad illa personæ consueverint et debuerint per electionem aut quemvis alium modum assumi.*" And this last, the canonists declared, was no detriment at all to the patron, being only like the change of a life in a feudal estate by the lord. Dispensations to avoid these vacancies begat the doctrine of *commendams*: and papal *provisions* were the previous nomination to such benefices, by a kind of anticipation, before they \*became [\*108] actually void: though afterwards indiscriminately applied to any right of patronage exerted or usurped by the pope. In consequence of which the best livings were filled by Italian and other foreign clergy, equally unskilled in and averse to the laws and constitution of England. The very nomination to bishoprics, that ancient prerogative of the crown, was wrested from King Henry the First, and afterwards from his successor King John; and seemingly, indeed, conferred on the chapters belonging to each see; but by means of the frequent appeals to Rome, through the intricacy of the laws which regulated canonical elections, was eventually vested in the pope. And, to sum up this head with a transaction most unparalleled and astonishing in its kind, Pope Innocent III had at length the effrontery to demand, and King John had the meanness to consent to, a resignation of his crown to the Pope, whereby England was to become forever St. Peter's patrimony; and the dastardly monarch reaccepted his sceptre from the hands of the papal legate, to hold as the vassal of the holy see, at the annual rent of a thousand marks.

Another engine set on foot, or at least greatly improved, by the court of Rome, was a master-piece of papal policy. Not content with the ample provision of tithes, which the law of the land had given to the parochial clergy, they endeavoured to grasp at the lands and inheritances of the kingdom, and (had not the legislature withstood them) would by this time have probably been masters of every foot of ground in the kingdom. To this end they introduced the monks of the Benedictine and other rules, men of sour and aust-

(d) *Estrova. l. 2, c. 2, a. 12.*

tere religion, separated from the world and its concerns by a vow of perpetual celibacy, yet fascinating the minds of the people by pretences to extraordinary sanctity, while all their aim was to aggrandize the power and extend the influence of their grand superior, the pope. And as, in those times of civil tumult, great rapines and violence were daily committed by overgrown lords and their adherents, they were taught to believe, that founding a monastery a little before their death would atone for a life of incontinence, disorder and bloodshed. Hence innumerable abbeys and religious houses were built within a \*century after the conquest, and endowed, not only with the tithes of [\*109] parishes which were ravished from the secular clergy, but also with lands, manors, lordships, and extensive baronies. And the doctrine inculcated was, that whatever was so given to, or purchased by, the monks and friars, was consecrated to God himself; and that to alienate or take it away was no less than the sin of sacrilege.

I might here have enlarged upon other contrivances, which will occur to the recollection of the reader, set on foot by the court of Rome, for effecting an entire exemption of its clergy from any intercourse with the civil magistrate: such as the separation of the ecclesiastical court from the temporal; the appointment of its judges by merely spiritual authority without any interposition from the crown; the exclusive jurisdiction it claimed over all ecclesiastical persons and causes; and the *privilegium clericale*, or benefit of clergy, which delivered all clerks from any trial or punishment except before their own tribunal. But the history and progress of ecclesiastical courts, (e) as well as of purchases in mortmain, (f) have already been fully discussed in the preceding book: and we shall have an opportunity of examining at large the nature of the *privilegium clericale* in the progress of the present one. And therefore I shall only observe at present, that notwithstanding this plan of pontifical power was so deeply laid, and so indefatigably pursued by the unwearied politics of the court of Rome through a long succession of ages; notwithstanding it was polished and improved by the united endeavours of a body of men, who engrossed all the learning of Europe for centuries together; notwithstanding it was firmly and resolutely executed by persons the best calculated for establishing tyranny and despotism, being fired with a bigoted enthusiasm (which prevailed not only among the weak and simple, but even among those of the best natural and acquired endowments), unconnected with their fellow subjects, and totally indifferent what might befall that posterity to which they bore no endearing relation:—yet it vanished into \*nothing, when the [\*110] eyes of the people were a little enlightened, and they set themselves with vigour to oppose it. So vain and ridiculous is the attempt to live in society, without acknowledging the obligations which it lays us under; and to affect an entire independence of that civil state which protects us in all our rights, and gives us every other liberty, that only excepted of despising the laws of the community.

Having thus, in some degree, endeavoured to trace out the original and subsequent progress of the papal usurpations in England, let us now return to the statutes of *præmunire*, which were framed to encounter this overgrown, yet increasing evil. King Edward I, a wise and magnanimous prince, set himself in earnest to shake off this servile yoke. (g) He would not suffer his bishops to attend a general council, till they had sworn not to receive the papal benediction. He made light of all papal bulles and processes: attacking Scotland in defiance of one; and seizing the temporalities of his clergy, who under pretence of another, refused to pay a tax imposed by parliament. He strengthened the statutes of mortmain; thereby closing the great gulph in which all the lands of the kingdom were in danger of being swallowed. And, one of his subjects having obtained a bulle of excommunication against another, he or-

(e) See Book III, p. 61.

(f) See Book II, p. 368.

(g) Dav. 83, &amp;c.

dered him to be executed as a traitor, according to the ancient law. (h) And in the thirty-fifth year of his reign was made the first statute against papal provisions, being, according to Sir Edward Coke, (i) the foundation of all the subsequent statutes of *præmunire*, which we rank as an offence immediately against the king, because every encouragement of the papal power is a diminution of the authority of the crown.

In the weak reign of Edward the Second the pope again endeavored to encroach, but the parliament manfully withstood him; and it was one of the principal articles charged against that unhappy prince, that he had given allowance to the bulles of the see of Rome. But Edward the Third was of a temper [\*111] extremely different: and to remedy these \*inconveniences first by gentle means, he and his nobility wrote an expostulation to the pope: but receiving a menacing and contemptuous answer, withal acquainting him, that the emperor (who a few years before, at the diet of Nuremberg, A. D. 1323, had established a law against provisions), (k) and also the king of France, had lately submitted to the holy see; the king replied, that if both the emperor and the French king should take the pope's part, he was ready to give battle to them both, in defence of the liberties of the crown. Hereupon more sharp and penal laws were devised against provisors, (l) which enact severally, that the court of Rome shall not present or collate to any bishopric or living in England; and that whoever disturbs any patron in the presentation to a living by virtue of a papal provision, such provisor shall pay fine and ransom to the king at his will, and be imprisoned till he renounces such provision: and the same punishment is inflicted on such as cite the king, or any of his subjects, to answer in the court of Rome. And when the holy see resented these proceedings, and Pope Urban V attempted to revive the vassalage and annual rent to which King John had subjected his kingdom, it was unanimously agreed by all the estates of the realm in parliament assembled (40 Edw. III), that King John's donation was null and void, being without the concurrence of parliament, and contrary to his coronation oath: and all the temporal nobility and commons engaged, that if the pope should endeavour, by process or otherwise, to maintain these usurpations, they would resist and withstand him with all their power. (m)

In the reign of Richard the Second it was found necessary to sharpen and strengthen these laws, and therefore it was enacted by statutes 3 Ric. II, c. 3, and 7 Ric. II, c. 12, first, that no alien should be capable of letting his benefice to farm; in order to compel such as had crept in, at least to reside on their [\*112] preferments: and, afterwards, that no alien \*should be capable to be presented to any ecclesiastical preferment, under the penalty of the statutes of provisors. By the statute 12 Ric. II, c. 15, all liegemen of the king, accepting of a living by any foreign provision, are put out of the king's protection, and the benefices made void. To which the statute 13 Ric. II, st. 2, c. 2, adds banishment and forfeiture of lands and goods: and, by chapter 3 of the same statute, any person bringing over any citation or excommunication from beyond sea, on account of the execution of the foregoing statutes of provisors, shall be imprisoned, forfeit his goods and lands, and moreover suffer pain of life and member.

In the writ for the execution of all these statutes, the words *præmunire facias*, being (as we said) used to command a citation of the party, have denominated, in common speech, not only the writ, but the offense itself of maintaining the papal power, by the name of *præmunire*. And accordingly the next statute I shall mention, which is generally referred to by all subsequent statutes, is usually called the statute of *præmunire*. It is the statute 16 Ric. II, c. 5, which enacts, that whoever procures at Rome, or elsewhere, any translations, processes, excommunications, bulles, instruments, or other

(h) Bro. Abr. tit. *Corona*. 115. *Treason*. 14. 5 Rep. p. 1, fol. 12. 3 Ann. 12.

(i) 3 Inst. 583.

(k) Mod. Un. Hist. xxix. 298.

(l) Stat. 25 Edw. III, st. 4. 27 Edw. III, st. 1, c. 1. 38 Edw. III, st. 1, c. 4, and st. 2 c. 1, 2, 3, 4.

(m) *Sold. in Flet.* 10, 4.

things which touch the king, against him, his crown, and realm, and all persons aiding and assisting therein, shall be put out of the king's protection, their lands and goods forfeited to the king's use, and they shall be attached by their bodies to answer to the king and his council: or process of *præmunire facias* shall be made out against them as in other cases of provisors.

By the statute 2 Hen. IV, c. 3, all persons who accept any provision from the pope, to be exempt from canonical obedience to their proper ordinary, are also subjected to the penalties of *præmunire*. And this is the last of our ancient statutes touching this offence; the usurped civil power of the bishop of Rome being pretty well broken down by these statutes, as his usurped religious power was in about a century afterwards; the spirit of the nation being so much raised \*against foreigners, that about this time, in the reign of [\*113] Henry the Fifth, the alien priories, or abbeys for foreign monks, were suppressed, and their lands given to the crown. And no farther attempts were afterwards made in support of these foreign jurisdictions.

A learned writer, before referred to, is therefore greatly mistaken, when he says, (n) that in Henry the Sixth's time the Archbishop of Canterbury and other bishops offered to the king a large supply if he would consent that all laws against provisors, and especially the statute 16 Ric. II, might be repealed; but that this motion was rejected. This account is incorrect in all its branches. For, first, the application, which he probably means, was not made by the bishops only, but by the unanimous consent of a provincial synod, assembled in 1439 (18 Hen. VI), that very synod which at the same time refused to confirm and allow a papal bulle, which then was laid before them. Next, the purport of it was not to procure a repeal of the statutes against provisors, or that of Richard II in particular; but to request that the penalties thereof, which by forced construction were applied to all that sued in the spiritual, and even in many temporal courts of this realm, might be turned against the proper objects only; those who appealed to Rome, or to any foreign jurisdiction; the tenor of the petition being, "that those penalties should be taken to extend only to those that commenced any suits or procured any writs or public instruments at Rome or elsewhere out of England; and that no one should be prosecuted upon that statute for any suit in the spiritual courts or lay jurisdictions of this kingdom." Lastly, the motion was so far from being rejected, that the king promised to recommend it to the next parliament, and in the mean time that no one should be molested upon this account. And the clergy were so satisfied with their success, that they granted to the king a whole tenth upon this occasion. (o)

\*And, indeed, so far was the archbishop, who presided in this synod, from countenancing the usurped power of the pope in this realm, that [\*114] he was ever a firm opposer of it. And, particularly in the reign of Henry the Fifth, he prevented the king's uncle from being then made a cardinal, and legate *a latere* from the pope; upon the mere principle of its being within the mischief of papal provisions, and derogatory from the liberties of the English church and nation. For, as he expressed himself to the king in his letter upon that subject, "he was bound to oppose it by his ligeance, and also to quit himself to God and the church of this land, of which God and the king had made him governor." This was not the language of a prelate addicted to the slavery of the see of Rome; but of one who was indeed of principles so very opposite to the papal usurpations, that in the year preceding this synod (17 Hen. VI), he refused to consecrate a bishop of Ely, that was nominated by Pope Eugenius IV. A conduct quite consonant to his former behaviour, in 6 Hen. VI. when he refused to obey the commands of Pope Martin V, who had required him to exert his endeavours to repeal the statute of *præmunire* ("*exécrabile illud statutum*," as the holy father phrases it); which refusal so far exasperated the court of Rome against him, that at length the pope issued a

(n) Dav. 96.

(o) Will. Concl. Mag. Brit. III. 532.

bulle to suspend him from his office and authority, which the archbishop disregarded, and appealed to a general council. And so sensible were the nation of their primate's merits, that the lords spiritual and temporal, and also the university of Oxford, wrote letters to the pope in his defence; and the house of commons addressed the king, to send an ambassador forthwith to his holiness, on behalf of the archbishop, who had incurred the displeasure of the pope for opposing the excessive power of the court of Rome. (p)

[\*115] \*This then is the original meaning of the offence, which we call *præmunire*, viz.: introducing a foreign power into this land, and creating *imperium in imperio*, by paying that obedience to papal process, which constitutionally belonged to the king alone, long before the reformation in the reign of Henry the Eighth: at which time the penalties of *præmunire* were indeed extended to more papal abuses than before; as the kingdom then entirely renounced the authority of the see of Rome, though not at all the corrupted doctrines of the Roman church. And therefore by the several statutes of 24 Hen. VIII, c. 12, and 25 Hen. VIII, cc. 19 and 21, to appeal to Rome from any of the king's courts, which (though illegal before) had at times been connived at; to sue to Rome for any license or dispensation; or to obey any process from thence; are made liable to the pains of *præmunire*. And, in order to restore to the king in effect the nomination of vacant bishoprics, and yet keep up the established forms, it is enacted by statute 25 Hen. VIII, c. 20, that if the dean and chapter refuse to elect the person named by the king, or any archbishop or bishop to confirm or consecrate him, they shall fall within the penalties of the statutes of *præmunire*. Also by statute 5 Eliz. c. 1, to refuse the oath of supremacy will incur the pains of *præmunire*; and to defend the pope's jurisdiction in this realm, is a *præmunire* for the first offence, and high treason for the second. So, too, by statute 13 Eliz. c. 2, if any one import any *agnus Dei*, crosses, beads, or other superstitious things pretended to be hallowed by the bishop of Rome, and tender the same to be used; or receive the same with such intent, and not discover the offender; or if a justice of the peace, knowing thereof, shall not within fourteen days declare it to a privy counsellor; they all incur *præmunire*. But importing or selling mass-books, or other popish books, is by statute 3 Jac. I, c. 5, § 25, only liable to a penalty of forty shillings. Lastly, to contribute to the maintenance of a jesuit's college, or any popish seminary whatever beyond sea; or any person in the same; or to contribute to the maintenance of any jesuit or popish priest in England, is, by statute 27 Eliz. c. 2, made liable to the penalties of *præmunire*.

[\*116] \*Thus far the penalties of *præmunire* seem to have kept within the proper bounds of their original institution, the depressing the power of the pope; but, they being pains of no inconsiderable consequence, it has been thought fit to apply the same to other heinous offences; some of which bear more, and some less, relation to this original offence, and some no relation at all.

Thus, 1. By the statute 1 and 2 P. and M. c. 8, to molest the possessors of abbey lands granted by parliament to Henry the Eighth and Edward the Sixth, is a *præmunire*. 2. So likewise is the offence of acting as a broker or agent in any usurious contract, when above ten *per cent.* interest is taken, by statute 13 Eliz. c. 8. 3. To obtain any stay of proceedings, other than by arrest of judgment or writ of error, in any suit for a monopoly, is likewise a *præmunire* by statute 21 Jac. I, c. 3. 4. To obtain an exclusive patent for the sole making or importation of gunpowder or arms, or to hinder others from importing them, is also a *præmunire* by two statutes: the one 16 Car. I, c. 21,

(p) See Wilk. *Concill. Mag. Br.* vol. III. *passim*, and Dr. Duck's life of Archbishop Chichele, who was the prelate here spoken of, and the munificent founder of All Souls college in Oxford; in vindication of whose memory the author hopes to be excused this digression; if indeed it be a digression to show how contrary to the sentiments of so learned and pious a prelate, even in the days of popery, those usurpations were, which the statutes of *præmunire* and provisors were made to restrain.

the other 1 Jac. II, c. 8. 5. On the abolition by statute 12 Car. II, c. 24, of purveyance, (q) and the prerogative of pre-emption, or taking any victual, beasts, or goods for the king's use, at a stated price, without consent of the proprietor, the exertion of any such power for the future was declared to incur the penalties of *præmunire*. 6. To assert maliciously and advisedly, by speaking or writing, that both or either house of parliament have a legislative authority without the king, is declared a *præmunire* by statute 13 Car. II, c. 1. 7. By the *habeas corpus* act also, 31 Car. II, c. 2, it is a *præmunire*, and incapable of the king's pardon, besides other heavy penalties, (r) to send any subject of this realm a prisoner into parts beyond the seas. 8. By the statute 1 W. and M. st. 1, c. 8, persons of eighteen years of age, refusing to take the new oaths of allegiance, as well as supremacy, upon tender by the proper magistrate, are subject to the penalties of a *præmunire*; and by statute 7 and \*8 Wm. III, c. 24, serjeants, counsellors, proctors, attorneys, and all officers of courts, practising without having taken the oaths of allegiance and supremacy, and subscribed the declaration against popery, are guilty of a *præmunire*, whether the oaths be tendered or no. 9. By the statute 6 Ann. c. 7, to assert maliciously and directly, by preaching, teaching, or advised speaking, that the then pretended prince of Wales, or any person other than according to the acts of settlement and union, hath any right to the throne of these kingdoms; or that the king and parliament cannot make laws to limit the descent of the crown; such preaching, teaching, or advised speaking is a *præmunire*; as writing, printing, or publishing the same doctrines amounted, we may remember, to high treason. 10. By statute 6 Ann. c. 23, if the assembly of peers in Scotland, convened to elect their sixteen representatives in the British parliament, shall presume to treat of any other matter save only the election, they incur the penalties of a *præmunire*. 11. The statute 6 Geo. I, c. 18 (enacted in the year after the infamous south-sea project had beggared half the nation), makes all unwarrantable undertakings by unlawful subscriptions, then commonly known by the names of bubbles, subject to the penalties of a *præmunire*. 12. The statute 12 Geo. III, c. 11, subjects to the penalties of the statute of *præmunire* all such as knowingly and wilfully solemnize, assist or are present at any forbidden marriage of such of the descendants of the body of King George II, as are by that act prohibited to contract matrimony without the consent of the crown. (s)

Having thus inquired into the nature and several species of *præmunire*, its punishment may be gathered from the foregoing statutes, which are thus shortly summed up by Sir Edward Coke: (t) "that from the conviction, the defendant shall be out of the king's protection, and his lands and tenements, goods and chattels, forfeited to the king: and that his body shall remain in prison at the king's pleasure: \*or (as other authorities have it) during life." (u) both which amount to the same thing, as the king, by his prerogative, may any time remit the whole, or any part, of the punishment, except in the case of transgressing the statute of *habeas corpus*. These forfeitures here inflicted do not (by the way) bring this offence within our former definition of felony; being inflicted by particular statutes, and not by the common law. But so odious, Sir Edward Coke adds, was this offence of *præmunire*, that a man that was attainted of the same might have been slain by any other man without danger of law; because it was provided by law, (v) that any man might do to him as to the king's enemy; and any man may lawfully kill an enemy. However, the position itself, that it is at any time lawful to kill an enemy, is by no means tenable: it is only lawful, by the law of nature and nations, to kill him in the heat of battle, or for necessary self-defence. And to obviate such savage and mistaken notions, (x) the statute 5 Eliz. c. 1, provides, that it shall not be lawful to kill any person attainted in a *præmunire*, any law, statute, opinion,

(q) See book I, page 287.

(r) 1 Inst. 139.

(s) See book I, page 138. Book III, page 187.

(t) 1 Bulst. 199

(u) Stat. 25 Edw. III, st. 5, c. 24.

(v) See book I, ch. 4.

(w) Bro. Abr. t. Corone, 199.

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or exposition of law to the contrary notwithstanding. But still such delinquent, though protected as a part of the public from public wrongs, can bring no action for any private injury, how atrocious soever, being so far out of the protection of the law, that it will not guard his civil rights, nor remedy any grievance which he as an individual may suffer. And no man, knowing him to be guilty, can with safety give him comfort, aid, or relief. (y)

## CHAPTER IX.

### OF MISPRISIONS AND CONTEMPTS AFFECTING THE KING AND GOVERNMENT.

THE fourth species of offences more immediately against the king and government are entitled misprisions and contempts.

Misprisions (a term derived from the old French, *mespris*, a neglect or contempt) are, in the acceptation of our law, generally understood to be all such high offences as are under the degree of capital, but nearly bordering thereon: and it is said, that a misprision is contained in every treason and felony whatsoever: and that if the king so please, the offender may be proceeded against for the misprision only. (a) And upon the same principle, while the jurisdiction of the star-chamber subsisted, it was held that the king might remit a prosecution for treason, and cause the delinquent to be censured in that court, merely for a high misdemeanor: as happened in the case of Roger, earl of Rutland, in 43 Eliz., who was concerned in the earl of Essex's rebellion. (b) Misprisions are generally divided into two sorts: negative, which consist in the concealment of something which ought to be revealed; and positive, which consist in the commission of something which ought not to be done.

[\*120] \*I. Of the first, or negative kind, is what is called *misprision of treason*; (1) consisting in the bare knowledge and concealment of treason, without any degree of assent thereto: for any assent makes the party a principal traitor; as indeed the concealment, which was construed aiding and abetting, did at the common law: in like manner as the knowledge of a plot against the state, and not revealing it, was a capital crime at Florence and in other states of Italy. (c) But it is now enacted by the statute 1 and 2 P. and M. c. 10, that a bare concealment of treason shall be only held a misprision. This concealment becomes criminal, if the party apprized of the treason does not, as soon as conveniently may be, reveal it to some judge of assize or justice of the peace. (d) But if there be any probable circumstances of assent, as if one goes to a treasonable meeting, knowing before-hand that a conspiracy is intended against the king; or, being in such company once by accident, and having heard such treasonable conspiracy, meets the same company again, and hears more of it, but conceals it; this is an implied assent in law, and makes the concealer guilty of actual high treason. (e)

There is also one positive misprision of treason, created so by act of parliament. The statute 13 Eliz. c. 2, enacts, that those who forge foreign coin, not

(y) 1 Hawk. P. C. 55.

(a) Year-book, 2 Ric. III, 10. Staundf. P. C. 37. Kel. 71. 1 Hal. P. C. 374. 1 Hawk. P. C. 55, 56.

(b) Hudson of the court of star-chamber. *M.S. in Mss. Brit.*

(c) Gulicard. Hist. b. 3 and 12.

(d) 1 Hal. P. C. 372.

(e) 1 Hawk. P. C. 56.

(1) Misprision of treason against the United States is defined by the act of congress of April 30 1790 (1 Stat. at Large, 112), and made punishable by imprisonment not exceeding seven years, and by fine not exceeding one thousand dollars. Rev. Stat. U. S., 1878, § 5383.



current in this kingdom, their aiders, abettors, and procurers, shall all be guilty of misprision of treason. (2) For, though the law would not put foreign coin upon quite the same footing as our own; yet if the circumstances of trade concur, the falsifying it may be attended with consequences almost equally pernicious to the public; as the counterfeiting of Portugal money would be at present; and therefore the law has made it an offence just below capital, and that is all. For the punishment of misprision of treason is loss of the profits of land during life, forfeiture of goods, and imprisonment during life. (f) (3) Which total forfeiture of the goods was originally inflicted while \*the [121] offence amounted to principal treason, and of course included in it a felony, by the common law; and therefore is no exception to the general rule laid down in a former chapter, (g) that wherever an offence is punished by such total forfeiture, it is felony at the common law.

*Misprision of felony* is also the concealment of a felony which a man knows, but never assented to; for if he assented, this makes him either principal or accessory. And the punishment of this, in a public officer, by the statute West. 1, 3 Edw. I, c. 9, is imprisonment for a year and a day; in a common person, imprisonment for a less, discretionary time; and, in both, fine and ransom at the king's pleasure: which pleasure of the king must be observed, once for all, not to signify any extra-judicial will of the sovereign, but such as is declared by his representatives, the judges in his courts of justice; "*voluntas regis in curia, non in camera.*" (h)

There is also another species of negative misprisions: namely, the *concealing of treasure-trove*, which belongs to the king or his grantees by prerogative royal: the concealment of which was formerly punishable by death; (i) but now only by fine and imprisonment. (j)

II. Misprisions, which are merely positive, are generally denominated *contempts* or *high misdemeanors*; of which

1. The first and principal is the *mal-administration* of such high officers, as are in public trust and employment. This is usually punished by the method of parliamentary impeachment: (4) wherein such penalties, short of death, are inflicted, as to the wisdom of the house of peers shall seem proper; consisting usually of banishment, imprisonment, fines, or perpetual disability. Hitherto also may be referred the \*offence of *embezzling the public money*, called [122] among the Romans *peculatus*, which the Julian law punished with death in a magistrate, and with deportation, or banishment, in a private person. (k) With us it is not a capital crime, but subjects the committer of it to a discretionary fine and imprisonment. (5) Other misprisions are, in general, such contempts of the executive magistrate as demonstrate themselves by

(f) 1 Hal. P. C. 374.  
(k) Inst. 4, 12, 2.

(g) See page 94.

(h) 1 Hal. P. C. 375.

(i) Glan. l. 1, c. 2.

(j) 3 Inst. 133.

(2) By subsequent statutes the offense is made felony, or, in case of copper coin, misdemeanor.

(3) This is only in case of high treason. Misprision of a lower degree is punishable only by fine and imprisonment.

(4) In the United States "The president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors." Const. of U. S., art. 2, § 4. The senate is the tribunal to try impeachments; the chief justice presiding when the president is on trial. Judgment in case of conviction shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law. Const., art. 1, § 8.

In the several states a similar tribunal is empowered to try state officers on impeachments.

For very full discussion of the law of impeachment, see *The Trial of Andrew Johnson*, 1868, 3 vols. Also, articles in 6 Am. Law Reg. (N S.), 257 and 641.

(5) See statute 24 and 25 Vic., c. 96, s. 70.

some arrogant and undutiful behaviour towards the king and government. These are,

2. Contempts against the king's *prerogative*. As, by refusing to assist him for the good of the public; either in his councils, by advice, if called upon; or in his wars by personal service for defence of the realm, against a rebellion or invasion. (l) Under which class may be ranked the neglecting to join the *posse comitatus*, or power of the county, being thereunto required by the sheriff or justices, according to the statute 2 Hen. V, c. 8, which is a duty incumbent upon all that are fifteen years of age, under the degree of nobility, and able to travel. (m) Contempts against the prerogative may also be, by preferring the interests of a foreign potentate to those of our own, or doing or receiving any thing that may create an undue influence in favour of such extrinsic power; as, by taking a pension from any foreign prince without the consent of the king. (n) Or, by disobeying the king's lawful commands; whether by writ, issuing out of his courts of justice, or by a summons to attend his privy council, or by letters from the king to a subject commanding him to return from beyond seas (for disobedience to which his lands shall be seized till he does return, and himself afterwards punished), or by his writ of *ne exeat regnum*, or proclamation, commanding the subject to stay at home. (o) Disobedience to any of these commands is a high misprision and contempt; and so, lastly, is disobedience to any act of parliament, where no particular penalty is assigned: for then it is punishable, like the rest of [\*123] \*these contempts, by fine and imprisonment, at the discretion of the king's courts of justice. (p)

3. Contempts and misprisions against the king's *person* and *government* may be by speaking or writing against them, cursing or wishing him ill, giving out scandalous stories concerning him, or doing any thing that may tend to lessen him in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people. It has been also held an offence of this species to drink to the pious memory of a traitor; or for a clergyman to absolve persons at the gallows, who there persist in the treasons for which they die, these being acts which impliedly encourage rebellion. And for this species of contempt a man may not only be fined and imprisoned, but suffer the pillory (q) or other infamous corporal punishment: (r) in like manner, as in the ancient German empire, such persons as endeavored to sow sedition, and disturb the public tranquility, were condemned to become the objects of public notoriety and derision, by carrying a dog upon their shoulders from one great town to another. The emperors Otho I and Frederic Barbarossa inflicted this punishment on noblemen of the highest rank. (r)

4. Contempts against the king's *title*, not amounting to treason or *proemunire*, are the denial of his right to the crown in common and unadvised discourse; for, if it be by advisedly speaking, we have seen (s) that it amounts to a *proemunire*. This heedless species of contempt is however punished by our law with fine and imprisonment. Likewise if any person shall in any wise hold, affirm, or maintain, that the common law of this realm, not altered by parliament, ought not to direct the right of the crown of England; this is a misdemeanor, by statute 13 Eliz. c. 1, and punishable with forfeiture of goods and chattels. A contempt may also arise from refusing or neglecting to take the oaths, appointed by statute for the better securing the government; [\*124] and yet \*acting in a public office, place of trust, or other capacity, for which the said oaths are required to be taken; viz. those of allegiance, supremacy and abjuration; which must be taken within six calendar months

(l) 1 Hawk. P. C. 69.  
(p) 1 Hawk. P. C. 60.

(m) Lamb. Eir. 228.  
(q) *Ibid.*

(n) 3 Inst. 144.  
(r) Mod. Un. Hist. xxix, 28, 119.

(o) See book I, page 208.  
(s) See page 91.

(6) The punishment of the pillory was finally altogether abolished by statute 1 Vic. c. 28.

after admission. The penalties for this contempt, inflicted by statute 1 Geo. I, st. 2, c. 13, are very little, if any thing short of those of *præmunire*: being an incapacity to hold the said offices, or any other; to prosecute any suit; to be guardian or executor; to take any legacy or deed of gift; and to vote at any election for members of parliament: and after conviction the offender shall also forfeit 500*l.* to him or them that will sue for the same. Members on the foundation of any college in the two universities, who by this statute are bound to take the oaths, must also register a certificate thereof in the college-register, within one month after; otherwise, if the electors do not remove him, and elect another within twelve months, or after, the king may nominate a person to succeed him by his great seal or sign manual. Besides thus taking the oaths for offices, any two justices of the peace may by the same statute summon, and tender the oaths to, any person whom they shall suspect to be disaffected: and every person refusing the same, who is properly called a non-juror, shall be adjudged a popish recusant convict, and subjected to the same penalties that were mentioned in a former chapter: (z) which in the end may amount to the alternative of abjuring the realm, or suffering death as a felon. (7)

5. Contempts against the king's *palaces* or *courts of justice*, have been always looked upon as high misprisions: and by the ancient law, before the conquest, fighting in the king's palace, or before the king's judges, was punished with death. (u) So, too, in the old Gothic constitutions, there were many places privileged by law, *quibus major reverentia et securitas debetur, ut templa et judicia, quæ sancta habebantur,—arces et aula regis,—denique locus quilibet præsentis aut adventantis rege.* (v) And at present, with us, by the statute \*33 Hen. VIII, c. 12, malicious striking in the king's palace, wherein his royal person resides, whereby blood is drawn, is punishable by per- [\*125]petual imprisonment, and fine at the king's pleasure; and also with loss of the offender's right hand, the solemn execution of which sentence is prescribed in the statute at length.

But *striking* in the king's superior courts of justice, in Westminster-hall, or at the assizes, is made still more penal than even in the king's palace. The reason seems to be, that those courts, being anciently held in the king's palace, and before the king himself, striking there included the former contempt against the king's palace, and something more; viz., the disturbance of public justice. For this reason, by the ancient common law before the conquest, (w) striking in the king's courts of justice, or drawing a sword therein, was a capital felony: and our modern law retains so much of the ancient severity as only to exchange the loss of life for the loss of the offending limb. Therefore a stroke or blow in such a court of justice, whether blood be drawn or not, or even assaulting a judge sitting in the court, by drawing a weapon, without any blow struck, is punishable with the loss of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of his lands during life. (x) A *rescue* also of a prisoner from any of the said courts, without striking a blow, is punished with perpetual imprisonment, and forfeiture of goods, and of the profits of lands during life; (y) being looked upon as an offence of the same nature with the last; but only, as no blow is actually given,

(z) See page 55.

(u) 3 Inst. 140. *LL. Alured. cap. 7 and 34.*

(v) *Stiernh. de jure Goth. l. 3, c. 3.*

(w) *LL. Inoc. c. 6. LL. Canut. 56. LL. Alured. c. 7.*

(x) *Staund. P. C. 38. 3 Inst. 140, 141.*

(y) 1 *Hawk. P. C. 57.*

(7) By statute 10 Geo. IV, c. 7, assuming any ecclesiastical title established in England was made punishable by a fine of 100*l.* In 1850 the pope issued a brief which, while evading this statute appointed catholic bishops with territorial designations different from those of the established church, and they were enthroned with great pomp. This led to statute 14 and 15 Vic., c. 60, which forbade all such titles, and declared this and all similar briefs illegal and void. The statute, however, has been substantially a dead letter, and is important only as a protest of the English nation against any assumption of authority by the pope within the realm.

the amputation of the hand is excused. For the like reason, an affray, or riot, near the said courts, but out of their actual view, is punished only with fine and imprisonment. (z) (8)

[\*126] \*Not only such as are guilty of an actual violence, but of threatening or reproachful words to any judge sitting in the courts, are guilty of a high misprision, and have been punished with large fines, imprisonment, and corporal punishment. (a) And, even in the inferior courts of the king, an affray or contemptuous behaviour is punishable with a fine by the judges there sitting; as by the steward in a court-leet, or the like. (b)

Likewise all such as are guilty of any injurious treatment to those who are immediately under the protection of a court of justice, are punishable by fine and imprisonment: as if a man assaults or threatens his adversary for suing him, a counsellor or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer for keeping him in custody, and properly executing his duty: (c) which offences, when they proceed farther than bare threats, were punished in the Gothic constitutions with exile and forfeiture of goods. (d)

Lastly, to endeavour to dissuade a witness from giving evidence; to disclose an examination before the privy council; or, to advise a prisoner to stand mute (all of which are impediments of justice); are high misprisions, and contempts of the king's courts, and punishable by fine and imprisonment. (e) And anciently it was held, that if one of the grand jury disclosed, to any person indicted, the evidence that appeared against him, he was thereby made accessory to the offence, if felony: and in treason a principal. And at this day it is agreed that he is guilty of a high misprision, (e) and liable to be fined and imprisoned. (f) (10)

## CHAPTER X.

### OF OFFENCES AGAINST PUBLIC JUSTICE.

THE order of our distribution will next lead us to take into consideration such crimes and misdemeanors as more especially affect the *commonwealth*, or public polity of the kingdom: which, however, as well as those which are peculiarly pointed against the lives and security of private subjects, are also offences against the king, as the *pater-familias* of the nation: to whom it appertains by his regal office to protect the community, and each individual therein, from every degree of injurious violence, by executing those laws which the people themselves in conjunction with him have enacted; or at least have consented to, by an agreement either expressly made in the persons of their rep-

(g) Cro. Car. 373.

(a) *Ibid.* 503.

(b) 1 Hawk. P. C. 52.

(c) 3 Inst. 141, 142.

(d) *Stiernh. de jure Goth.* l. 2, c. 2.

(e) See Bar. 312. 27 Ass. pl. 44, § 4, fol. 123.

(f) 1 Hawk. P. C. 59.

(8) As to contempts of court and the methods of punishment, see Whart. Cr. L., § 3436, *et seq.*; 2 Bish. Cr. L., 7th ed., ch. 12.

(9) To prevent or attempt to prevent the attendance of a witness is an indictable offense. *State v. Keeyes*, 8 Vt., 57; *State v. Carpenter*, 20 Vt., 9; *State v. Early*, 8 Harr. (Del.), 562; *King v. Chandler*, 8 Mod., 336. So is the making and publishing false affidavits, whether in the course of a suit or in any other proceedings in which affidavits are necessary or proper. *Omealy v. Newell*, 8 East, 364; *Regina v. Chapman*, 2 C. and K., 846; *Rump v. Commonwealth*, 80 Penn. St., 475.

(10) There is an exception to this rule in the case of a witness before the grand jury who is indicted for perjury. The jurors in this case are not only competent but compellable to give evidence of what was sworn to before them. *State v. Offutt*, 4 Blackf., 355; *State v. Fassett*, 16 Conn., 457; *State v. Broughton*, 7 Ired., 96; *Huidekoper v. Cotton*, 8 Watts, 56.

representatives, or by a tacit and implied consent presumed from and proved by immemorial usage.

The species of crimes which we have now before us is subdivided into such a number of inferior and subordinate classes, that it would much exceed the bounds of an elementary treatise, and be insupportably tedious to the reader, were I to examine them all minutely, or with any degree of critical accuracy. I shall therefore confine myself principally to general definitions, or descriptions of this great variety of offences, and to the punishments inflicted by law for each particular offence; with now and then a few incidental observations: referring the student for more particulars to other voluminous authors; who have treated of these subjects with greater precision and more in detail than is consistent with the plan of these Commentaries.

The crimes and misdemeanors that more especially affect the commonwealth, may be divided into five species, viz.: \*offences against public *justice*, against the public *peace*, against public *trade*, against the public *health*, and against the public *police* or *economy*: of each of which we will take a cursory view in their order.

First, then, of offences against public *justice*: some of which are felonies, whose punishment may extend to death; others only misdemeanors. I shall begin with those that are most penal, and descend gradually to such as are of less malignity.

1. Embezzling or vacating *records*, or falsifying certain other proceedings in a court of judicature, is a felonious offence against public justice. It is enacted by statute 8 Hen. VI, c. 12, that if any clerk, or other person, shall wilfully take away, withdraw, or avoid any record or process in the superior courts of justice in Westminster-hall, by reason whereof the judgment shall be reversed or not take effect; it shall be felony not only in the principal actors, but also in their procurers and abettors. And this may be tried either in the king's bench or common pleas, by a jury *de medietate*: half officers of any of the superior courts, and the other half common jurors. (1) Likewise by statute 21 Jac. I, c. 26, to acknowledge any fine, recovery, deed enrolled, statute, recognizance, bail, or judgment, in the name of another person not privy to the same, is felony without benefit of clergy. Which law extends only to proceedings in the courts themselves: but by statute 4 W. and M. c. 4, to personate any other person (as bail) before any judge of assize or other commissioner authorized to take bail in the country, is also felony. (2) For no man's property would be safe, if records might be suppressed or falsified, or persons' names be falsely usurped in courts or before their public officers.

2. To prevent abuses by the extensive power which the law is obliged to repose in gaolers, it is enacted by statute 14 Edw. III, c. 10, that if any *gaoler* by too great duress of imprisonment makes any prisoner, that he hath in ward, \*become an *approver* or an *appellor* against his will; that is, as we shall see hereafter, to accuse and turn evidence against some other person; [\*129] it is felony in the gaoler. (3) For, as Sir Edward Coke observes, (a) it is not lawful to induce or excite any man even to a just accusation of another; much less to do it by duress of imprisonment; and least of all by a gaoler, to whom the prisoner is committed for safe custody.

(a) 3 Inst. 91.

(1) This statute is now repealed. For statutes for the punishment of offenses of the character mentioned in the text, and others of a somewhat similar nature, see statutes 7 and 8 Geo. IV, c. 29; 1 Vic., c. 90; 1 and 2 Vic., c. 94; 7 and 8 Vic., c. 19; 14 and 15 Vic., c. 99, and 16 and 17 Vic., c. 99; and 25 Vic., c. 98, s. 80; 24 and 25 Vic., c. 98.

(2) The statute now in force for the punishment of this offense, is 24 and 25 Vic., c. 98, s. 84.

The false personation of voters at elections was made a misdemeanor by statute 6 and 7 Vic., c. 18, § 33. It is also a statutory crime in the United States.

(3) This statute is now repealed.

3. A third offence against public justice is *obstructing* the execution of lawful process. This is at all times an offence of a very high and presumptuous nature; but more particularly so, when it is an obstruction of an arrest upon criminal process. And it hath been holden, that the party opposing such arrest becomes thereby *particeps criminis*; that is, an accessory in felony, and a principal in high treason. (b) Formerly one of the greatest obstructions to public justice, both of the civil and criminal kind, was the multitude of pretended privileged places, where indigent persons assembled together to shelter themselves from justice (especially in London and Southwark), under the pretext of their having been ancient palaces of the crown, or the like: (c) all of which sanctuaries for iniquity are now demolished, and the opposing of any process therein is made highly penal, by the statutes 8 and 9 Wm. III, c. 27, 9 Geo. I, c. 28, and 11 Geo. I, c. 22, which enact, that persons opposing the execution of any process in such pretended privileged places within the bills of mortality, or abusing any officer in his endeavours to execute his duty therein, so that he receives bodily hurt, shall be guilty of felony, and transported for seven years: and persons in disguise, joining in or abetting any riot or tumult on such account, or opposing any process, or assaulting and abusing any officer executing or for having executed the same, shall be felons without benefit of clergy. (4)

4. An escape of a person arrested upon criminal process by eluding the vigilance of his keepers before he is put in hold, is also an offence against public [\*130] justice, and the party himself is punishable by fine or imprisonment. (d) (5). But the officer permitting such escape, either by negligence or connivance, is much more culpable than the prisoner; the natural desire of liberty pleading strongly in his behalf, though he ought in strictness of law to submit himself quietly to custody, till cleared by the due course of justice. Officers therefore who, after arrest, negligently permit a felon to escape, are also punishable by fine: (e) but voluntary escapes, by consent and connivance of the officer, are a much more serious offence: for it is generally agreed that such escapes amount to the same kind of offence, and are punishable in the same degree, as the offence of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or trespass. And this whether he were actually committed to gaol, or only under a bare arrest. (f) But the officer cannot be thus punished, till the original delinquent hath actually received judgment or been attainted upon verdict, confession, or outlawry, of the crime for which he was so committed or arrested: otherwise it may happen, that the officer might be punished for treason or felony, and the person arrested and escaping might turn out to be an innocent man. But, before the conviction of the principal party, the officer thus neglecting his duty may be fined and imprisoned for a misdemeanor. (g) (6)

(b) 2 Hawk. P. C. 121.

(c) Such as *White-Friars*, and its environs; the *Savoy*; and the *Mint*, in Southwark.

(d) 2 Hawk. P. C. 122.

(e) 1 Hal. P. C. 600.

(f) 1 Hal. P. C. 590.

(g) 1 Hal. P. C. 596, 598.

2 Hawk. P. C. 134, 135.

(4) For provisions punishing similar offenses, see statute 24 and 25 Vic., c. 100. The willful refusal to aid a peace officer in the performance of his duty, when requested, is a misdemeanor at common law. *Regina v. Brown*, 1 C. & M., 314.

(5) See statute 14 and 15 Vic., c. 100, § 29. A prisoner confined on a void warrant may lawfully break prison and escape. *State v. Leach*, 7 Conn. 452; S. C., 18 Am. Dec., 118.

(6) Mr. Bishop, in his treatise on Criminal Law, discusses fully this subject, with the following result: "To constitute an escape, there must be an actual arrest and a legal and continuing imprisonment. The arrest must be for some criminal offense which justifies imprisonment. No escape is a felony, unless the cause for which the prisoner is detained was actually a felony at the time of the escape. A private person, a jailer *de facto* or his deputies, but not his mere servant, may be liable for an escape. The rule is, that whenever any person has another lawfully in his custody, whether the arrest is made by himself or another, he is guilty of an escape if he allows him to go at large before delivering him into the custody of some legally constituted authority. The escape is a misdemeanor in the prisoner, apart from the charge upon which he is held. See, generally upon the subject,

5. Breach of prison by the offender himself, when committed for any cause, was felony at the common law: (*h*) or even conspiring to break it. (*i*) But this severity is mitigated by the statute *de frangentibus prisonam*, 1 Edw. II, st. 2, which enacts that no person shall have judgment of life or member for breaking prison, unless committed for some capital offence. So that to break prison and escape, when lawfully committed for any treason or felony, remains still felony as at the common law; and to break prison (whether it be the county-gaol, the stocks, or other usual place of security), when lawfully confined upon any other inferior charge, is still \*punishable as a high misdemeanor by [\*131] fine and imprisonment. For the statute which ordains that such [\*131] offence shall be no longer capital, never meant to exempt it entirely from every degree of punishment. (*j*) (*k*)

6. Rescue is the forcibly and knowingly freeing another from an arrest or imprisonment; and it is generally the same offence in the stranger so rescuing, as it would have been in a gaoler to have *voluntarily* permitted an escape. A rescue, therefore, of one apprehended for felony, is felony; for treason, treason; and for a misdemeanor, a misdemeanor also. But here, likewise, as upon voluntary escapes, the principal must first be attainted or receive judgment before the rescuer can be punished: and for the same reason; because, perhaps, in fact, it may turn out there has been no offence committed. (*k*) By statutes 11 Geo. II, c. 26, and 24 Geo. II, c. 40, if five or more persons assemble to rescue any retailers of spirituous liquors, or to assault the informers against them, it is felony, and subject to transportation for seven years. By the statute 16 Geo. II, c. 31, to convey to any prisoner in custody for treason or felony any arms, instruments of escape, or disguise, without the knowledge of the gaoler, though no escape be attempted, or any way to assist such prisoner to attempt an escape, though no escape be actually made, is felony, and subjects the offender to transportation for seven years: or, if the prisoner be in custody for petit larceny, or other inferior offence, or charged with a debt of 100*l*., it is then a misdemeanor punishable with fine and imprisonment. And by several special statutes (*l*), to rescue, or attempt to rescue, any person committed for the offences enumerated in those acts, is felony without benefit of clergy; and to rescue, or attempt to rescue, the body of a felon executed for murder, a single felony, and subject to transportation for seven years. Nay, even if any person be charged with any of the offences against the black-act, 9 Geo. I, c. 22, and being required by order \*of the privy council to surrender himself, neglects so to do for forty days, both he and all that knowingly [\*132] conceal, aid, abet, or succour him, are felons, without benefit of clergy. (*8*)

7. Another capital offence against public justice is the *returning from transportation*, or being seen at large in Great Britain, before the expiration of the

(A) 1 Hal. P. C. 607. (i) Bract. 1, 3, c. 2.  
 (j) 2 Hawk. P. C. 136. (k) 1 Hal. P. C. 607. Fost. 344.  
 (l) 6 Geo. I, c. 22. (Transportation.) 9 Geo. I, c. 22. (Black-act.) 6 Geo. II, c. 20. (Destroying turnpikes, &c.) 19 Geo. II, c. 34. (Smuggling. See the 53 Geo. III, c. 143, s. 11.) 25 Geo. II, c. 37. (Murder.) 27 Geo. II, c. 15. (Black-act.)

State v. Doud, 7 Conn., 884; Colby v. Sampson, 5 Mass., 810; Commonwealth v. Farrell, 5 Allen, 130. And as to liability of deputies for escape, State v. Errickson, 53 N. J., 421; Kavanaugh v. State, 41 Ala., 399.

(7) On the old authorities the commitment must be for a criminal offense and the imprisonment must be lawful. If there is no proper warrant, or no legal right to detain without a warrant, there can be no breach of prison, but if the commitment is legal, any breach constitutes the offense. Prison is held to be any place where one is under lawful arrest. There must be actual breaking, some force or violence; not such as is implied by law. As, if one walk out of prison through an open door, there is no prison breach. It is an escape simply. The breaking must be by the prisoner, or with his privy. Offense is not committed if the prison is broken by others not in privy with him, or by fire or lightning, and then the prisoner escape. See People v. Duell, 3 Johns., 449; Commonwealth v. Briggs, 5 Met., 559. A prison breach is a misdemeanor when the imprisonment is on civil process. Reg. v. Allan, 1 C. & M., 295.

(8) These statutes are since repealed or essentially changed.

term for which the offender was ordered to be transported, or had agreed to transport himself. This is made felony without benefit of clergy in all cases, by statutes 4 Geo. I, c. 11, 6 Geo. I, c. 23, 16 Geo. II, c. 15, and 8 Geo. III, c. 15, as is also the assisting them to escape from such as are conveying them to the port of transportation. (9)

8. An eighth is that of *taking a reward*, under pretence of *helping* the owner to his *stolen goods*. This was a contrivance carried to a great length of villainy in the beginning of the reign of George the First; the confederates of the felons thus disposing of stolen goods at a cheap rate, to the owners themselves, and thereby stifling all farther inquiry. The famous Jonathan Wild had under him a well disciplined corps of thieves, who brought in all their spoils to him; and he kept a sort of public office for restoring them to the owners at half price. To prevent which audacious practice, to the ruin and in defiance of public justice, it was enacted by statute 4 Geo. I, c. 11, that whoever shall take a reward under the pretence of helping any one to stolen goods, shall suffer as the felon who stole them; unless he causes such principal felon to be apprehended and brought to trial, and also gives evidence against them. Wild, still continuing in his old practice, was upon this statute at last convicted and executed. (m) (10)

9. Receiving of stolen goods, *knowing them to be stolen*, is also a high misdemeanor and affront to public justice. We have seen in a former chapter, (n) that this offence, which is only a misdemeanor at common law, by the statute 3 and 4 W. and M. c. 9, and 5 Ann. c. 31, makes the offender accessory to the [\*133] theft and felony. But because the accessory cannot in general be tried, unless with the principal, or after the principal is convicted, the receivers by that means frequently eluded justice. To remedy which, it is enacted by statute 1 Ann. c. 9, and 5 Ann. c. 31, that such receivers may still be prosecuted for a misdemeanor, and punished by fine and imprisonment, though the principal felon be not before taken so as to be prosecuted and convicted. And, in case of receiving stolen lead, iron, and certain other metals, such offence is by statute 29 Geo. II, c. 30, punishable by transportation for fourteen years. (o) So that now the prosecutor has two methods in his choice: either to punish the receivers for the misdemeanor immediately, before the thief is taken; (p) or to wait till the felon is convicted, and then punish them as accessories to the felony. But it is provided by the same statutes, that he shall only make use of one, and not both of these methods of punishment. By the same statute, also, 29 Geo. II, c. 30, persons having lead, iron, and other metals in their custody, and not giving a satisfactory account how they came by the same, are guilty of a misdemeanor, and punishable by fine or imprisonment. And by statute 10 Geo. III, c. 48, all knowing receivers of stolen plate or jewels, taken by robbery on the highway, or when a burglary accompanies the stealing, may be tried as well before as after the conviction of the principal,

(m) See stat. 6 Geo. I, c. 23, § 9.

(n) See page 28.

(o) See also statute 3 Geo. III, c. 23, § 13, for the punishment of receivers of goods stolen by bumboats, &c., in the Thames.

(p) Foster, 373.

(9) These offenses are no longer capital.

(10) By statute 24 and 25 Vic., c. 96, s. 151, persons corruptly taking money or reward on pretence of helping any person to property which has been stolen, embezzled, etc., unless they shall use all due diligence to bring the offenders to trial, are made guilty of felony. See Reg. v. King, 1 Cox C. C., 86; Reg. v. Pascoe, 1 Den. C. C., 456. And by section 50, any person advertising a reward for the return of property stolen or lost, and using words purporting that no questions will be asked, or that a reward will be given for the property stolen or lost, without seizing or making any inquiry after the person producing it, or promising to return to any pawnbroker or other person money advanced or paid by him on such property, or any other sum or reward for the return of such property, and any person publishing such advertisement is made subject to a fine of 50*l*.



and whether he be in or out of custody; and, if convicted, shall be adjudged guilty of felony, and transported for fourteen years. (11)

10. Of a nature somewhat similar to the two last is the offence of *theft bote*, which is where the party robbed not only knows the felon, but also takes his goods again, or other amends upon agreement not to prosecute. This is frequently called compounding of felony; and formerly was held to make a man an accessory; but it is now punished only with fine and imprisonment. (q) This perversion of justice, in the old Gothic constitutions, was liable to the most severe and infamous punishment. And the Salic law, "*latroni eum \*similem habuit, qui fertum celare vellet, et occulte sine judice compositionem ejus admittere.*" (r) By statute 25 Geo. II, c. 36, even to advertise [\*134] a reward for the return of things stolen, with no questions asked, or words to the same purport, subjects the advertiser and the printer to a forfeiture of 50*l*. each. (12)

11. Common *barretry* is the offence of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise. (s) (13) The punishment for this offence, in a common person, is by fine and imprisonment; but if the offender (as is too frequently the case) belongs to the profession of the law, a barrator who is thus able as well as willing to do mischief, ought also to be disabled from practising for the future. (t) And, indeed, it is enacted by statute 12 Geo. I, c. 29, that if any one who hath been convicted of forgery, perjury, subordination of perjury, or common barretry, shall practice as an attorney, solicitor, or agent, in any suit; the court, upon complaint, shall examine it in a summary way; and, if proved, shall direct the offender to be transported for seven years. Hereunto may also be referred another offence, of equal malignity and audaciousness; that of suing another in the name of a fictitious plaintiff; either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the king's superior courts, is left, as a high contempt, to be punished at their discretion. But in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it is directed by statute 8 Eliz. c. 2, to be punished by six months' imprisonment, and treble damages to the party injured.

12. Maintenance is an offence that bears a near relation to the former; being an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it: (u) a practice that was greatly encouraged by the first introduction of uses. (w) This is an offence against public justice, as it \*keeps alive strife [\*135] and contention, and perverts the remedial process of the law into an engine of oppression. And, therefore, by the Roman law, it was a species of the *crimen falsi* to enter into any confederacy, or do any act to support another's lawsuit, by money, witnesses, or patronage. (x) A man may, however,

(g) 1 Hawk. P. C. 135.  
(h) *Ibid.* 234.

(r) *Stiernh. de jure Goth.* l. 2, c. 5.  
(w) Dr. and St. 308.

(e) 1 Hawk. P. C. 242.  
(w) *Ibid.* 48, 10, 28.

(11) These offences are covered by statutes 24 and 25 Vic., c. 96. The punishment is penal servitude or imprisonment, and in case of males under sixteen years of age, with or without whipping. Statutes for the punishment of these offences are general in the United States.

(12) See also stat. 24 and 25 Vic., c. 96, § 102.

(13) 1 Hawkins P. C., ch. 81, defines a barrator to be one who is a common mover, exciter or maintainer of suits or quarrels in courts or in the country, including all kinds of disturbances of the peace, and spreading false rumors and calumnies through which discord may arise among neighbors. Though it has been held that, to be a barrator, one must not sue in his own right, if the suits are oppressive and merely to harass and annoy, it would seem to be barratry. See *Commonwealth v. McCulloch*, 15 Mass., 227. One act is not enough to make a barrator. It would seem there must be three. *State v. Chitty*, 1 Bailey, 379; *Commonwealth v. Pray*, 18 Pick., 859; *Commonwealth v. Davis*, 11 Pick., 483; *Commonwealth v. Mohn*, 52 Penn. St., 243; *Commonwealth v. Tubbs*, 1 Cush., 2; and on the whole subject, *Rex v. Urlyn*, 2 Saund., 308, and note.

maintain the suit of his near kinsman, servant, or poor neighbour, out of charity and compassion, with impunity. Otherwise, the punishment by common law is fine and imprisonment; (y) and by the statute 32 Hen. VIII, c. 9, a forfeiture of ten pounds.

13. Champerty, *campi-partitio*, is a species of maintenance, and punished in the same manner: (z) being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense. (a) Thus, *champart*, in the French law, signifies a similar division of profits, being a part of the crop annually due to the landlord by bargain or custom. In our sense of the word it signifies the purchasing of a suit, or right of suing: (14) a practice so much abhorred by our law, that it is one main reason why a *chose* in action, or thing of which one hath the right but not the possession, is not assignable at common law; because no man should purchase any pretence to sue in another's right. These pests of civil society, that are perpetually endeavoring to disturb the repose of their neighbours, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted on by the Roman law, "*qui improbe cœunt in alienam litem, ut quic quid ex condemnatione in rem ipsius redactum fuerit inter eos communicaretur, lege Julia de vi privata tenentur*;" (b) and they were punished by the forfeiture of a third part of their goods, and perpetual infamy. Hitherto, also, must be referred the provision of the statute 32 Hen. VIII, c. 9, that no one shall sell or purchase any pretended right or [\*136] title to land, unless the vendor \*hath received the profits thereof for one whole year before such grant, or hath been in actual possession of the land, or of the reversion or remainder; on pain that both purchaser and vender shall each forfeit the value of such land to the king and the prosecutor. These offences relate chiefly to the commencement of *civil* suits; but,

14. *Compounding of informations* upon penal statutes is an offence of an equivalent nature in *criminal* causes; and is, besides, an additional misdemeanor against public justice, by contributing to make the laws odious to the people. At once, therefore, to discourage malicious informers, and to provide that offences, when once discovered, shall be duly prosecuted, it is enacted by statute 18 Eliz. c. 5, that if any person, informing under pretence of any penal law, makes any composition without leave of the court, or takes any money or promise from the defendant to excuse him (which demonstrates his intent in commencing the prosecution to be merely to serve his own ends, and not for the public good), he shall forfeit 10*l.*, shall stand two hours on the pillory, and shall be forever disabled to sue on any popular or penal statute. (15)

15. A conspiracy, also, to indict an innocent man of felony falsely and maliciously, who is accordingly indicted and acquitted, is a farther abuse and perversion of public justice; (16) for which the party injured may either have a

(y) Hawk. P. C. 265.

(z) *Ibid.* 267.

(a) Stat. of conspirat. 23 Ed. I.

(b) *Jy.* 48, 7, a.

(14) This subject is fully discussed by Mr. Bishop.

The tendency of late has been to confine these offences within bounds somewhat narrower than those indicated by the older authorities.

(15) This subject was considered and the previous cases examined by Ch. J. Tindal, in *Keir v. Leeman*, 9 Q. B., 592, where the conclusion was that "in all offenses which involve damages to an injured party, for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise and settle his private damage in any way he may think fit;" but that an agreement to pay money in consideration of a prosecution for riot and assault being abandoned, was illegal and void. On the same subject, see *Jones v. Rice*, 18 Pick., 440.

(16) This offense is not confined to the instance given above. 1 Hawkins P. C., c. 72, states that all conspiracies whatsoever, wrongfully to prejudice the rights of a third person, are highly criminal at law. In *Commonwealth v. Hunt*, 4 Met., 111; S. C., 38 Am. Dec., 846, it is said: "It is a criminal and indictable offense for two or more to confederate and combine together by concerted means to do that which is unlawful and criminal, to the injury of the public, or portions or classes of the community, or even to the rights of the individ-

civil action by writ of conspiracy (of which we spoke in the preceding book), (c) or the conspirators, for there must be at least two to form a conspiracy, may be indicted at the suit of the king, and were by the ancient common law (d) to receive what is called the *villanous* judgment; viz., to lose their *liberam legem*, whereby they are discredited and disabled as jurors or witnesses; to forfeit their goods and chattels, and lands for life; to have those lands wasted, their houses razed, their trees rooted up, and their own bodies committed to prison. (e) But it now is the better opinion, that the villanous judgment is by long disuse become obsolete; it not having been pronounced for some ages: but instead thereof the delinquents are usually sentenced [\*137] to imprisonment, fine, and pillory. To this head may be referred the offence of sending letters, threatening to accuse any person of a crime punishable with death, transportation, pillory, or other infamous punishment, with a view to extort from him any money or other valuable chattels. This is punishable by statute 30 Geo. II, c. 24, at the discretion of the court, with fine, imprisonment, pillory, whipping, or transportation for seven years. (17)

16. The next offence against public justice is when the suit is past its commencement, and come to trial. And that is, the crime of willful and corrupt *perjury*: which is defined by Sir Edward Coke, (f) to be a crime committed when a *lawful* oath is administered, in some *judicial* proceeding, to a person who swears *willfully*, *absolutely*, and *falsely*, in a matter *material* to the issue or point in question. The law takes no notice of any perjury but such as is committed in some court of justice, having power to administer an oath; or before some magistrate or proper officer, invested with a similar authority, in some proceedings relative to a civil suit or a criminal prosecution: for it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them. (18) For which reason it is much to be questioned, how far

(c) See book III, 126. (d) Bro. Abr. tit. *Conspiracy*, 26. (e) 1 Hawk. P. C. 193. (f) 3 Inst. 164.

ual." \* \* "A conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means." See further, on what constitutes this offense, *O'Connell v. Queen*, 11 Cl. & Fin., 155; *Collins v. Commonwealth*, 8 Serg. & R., 220; *Mifflin v. Commonwealth*, 5 W. & S., 461; S. C., 40 Am. Dec., 527; *State v. Rowley*, 12 Conn., 101; *Alderman v. People*, 4 Mich., 414; *State v. Younger*, 1 Dev., 357; S. C., 17 Am. Dec., 571; *State v. Murphy*, 6 Ala., 765; S. C., 41 Am. Dec., 79; *People v. Mather*, 4 Wend., 229; S. C., 21 Am. Dec., 122; *State v. Rickey*, 4 Halst., 293; *State v. Straw*, 42 N. H., 393; *Smith v. People*, 25 Ill., 17; *People v. Powell*, 63 N. Y., 88. The thing proposed to be done by conspirators need not be an indictable offense. *State v. Burnham*, 15 N. H., 396; *State v. Buchanan*, 5 Har. & J., 217; S. C., 9 Am. Dec., 534; *State v. Rowley*, 12 Conn., 101. Conspiracy must be the act of more than one person, but husband and wife, without others, cannot commit the offense. 1 Hawkins P. C., ch. 72. The mere combination completes the crime. The intended acts need not be done. *Rex v. Best*, 1 Salk., 174; *Commonwealth v. Judd*, 2 Mass., 329; *Hazen v. Commonwealth*, 23 Penn. St., 355. If two are jointly charged with conspiracy, the acquittal of one works the acquittal of both. *State v. Tom*, 2 Dev., 569. But one may be convicted after the other is dead. *Reg. v. Kenrick*, 1 Dav. & M., 208; *Rex v. Nicolls*, 2 Stra., 1227. All concerned in one conspiracy need not be indicted or tried together. *Rex v. Cooke*, 5 B. & C., 538.

(17) Stat. 24 and 25 Vic., c. 100, covers this subject.

(18) The oath must be taken in the course of justice. *Commonwealth v. Warden*, 11 Met., 406. But every one who appears in any court and is duly sworn, whether compellable to testify or not, is liable for perjury if he willfully swears falsely. *Commonwealth v. Knight*, 12 Mass., 274; *Chamberlain v. People*, 23 N. Y., 85. Even though he be a witness for himself when, legally, his evidence is not admissible. *State v. Molier*, 1 Dev., 263; *VanSteenbergh v. Kortz*, 10 Johns., 167. The oath must be administered by an officer duly authorized. *Rex v. Hanks*, 3 C. & P., 419; *McGregor v. State*, 1 Ind., 232; *State v. McCroskey*, 3 McCord, 303. The case must be one over which the magistrate before whom it is has jurisdiction. *State v. Hayward*, 1 Nott & McCord, 546; *State v. Furlong*, 26 Me., 69; *Commonwealth v. White*, 8 Pick., 453. As to sufficiency of allegation of jurisdiction, see *Commonwealth v. Knight*, 12 Mass., 273; S. C., 7 Am. Dec., 72. An unnecessary and unimportant oath to a bill in equity, though false, is not perjury. *Gaige v. People*, 25 Mich., 30.

any magistrate is justifiable in taking a voluntary *affidavit* in any extra-judicial matter, as is now too frequent upon every petty occasion: since it is more than possible, that by such idle oaths a man may frequently *in foro conscientie* incur the guilt, and at the same time evade the temporal penalties, of perjury. The perjury must also be corrupt, (that is, committed *malo animo*), wilful, positive, and absolute: (19) not upon surprise, or the like: it also must be in some point material to the question in dispute; (20) for if it only be in some trifling collateral circumstance, to which no regard is paid, it is no more penal than in the voluntary extra-judicial oaths before mentioned. *Subornation* of perjury is the offence of procuring [\*138] another to \*take such a false oath, as constitutes perjury in the principal. (21) The punishment of perjury and subornation, at common law, has been various. It was anciently death; afterwards banishment, or cutting out the tongue; then forfeiture of goods; and now it is fine and imprisonment, and never more to be capable of bearing testimony. (g) But the statute of 5 Eliz. c. 9 (if the offender be prosecuted thereon), inflicts the penalty of perpetual infamy, and a fine of 40*l.* on the suborner: and, in default of payment, imprisonment for six months, and to stand with both ears nailed to the pillory. Perjury itself is thereby punished with six months' imprisonment, perpetual infamy, and a fine of 20*l.*, or to have both ears nailed to the pillory. But the prosecution is usually carried on for the offence at common

(g) 3 Inst. 168.

(19) Mere negligence or carelessness in swearing to the witness' belief, when proper pains would have enabled him to ascertain the truth to be otherwise, seems not to be perjury, inasmuch as the specific willful intent is wanting. *U. S. v. Shellmire*, 1 Bald., 378; *U. S. v. Babcock*, 4 McLean, 118; *State v. Cockran*, 1 Bailey, 60. See *State v. Lea*, 3 Ala., 603; *Commonwealth v. Brady*, 5 Gray, 78.

(20) That the testimony should be pertinent and material, see *State v. Dodd*, 3 Murph., 226; *Commonwealth v. Parker*, 2 Cush., 212; *Bullock v. Koon*, 4 Wend., 531; *Pollard v. People*, 69 Ill., 148; *Nelson v. State*, 47 Miss., 621; *State v. Mooney*, 65 Mo., 494; *Plath v. Braunsdorff*, 40 Wis., 107; *State v. Mumford*, 1 Dev., 519; 8 C. C., 17 Am. Dec., 573.

"It seemeth clear that if the oath for which a man is indicted for perjury be wholly foreign from that purpose, or altogether immaterial, and neither any way pertinent to the matter in question, nor tending to aggravate or extenuate the damages, nor likely to induce the jury to give a readier credit to the substantial part of the evidence, it cannot amount to perjury, because it is merely idle and insignificant." 1 Hawk. P. C., ch. 65, § 8. But the testimony may be material enough to warrant an indictment for perjury, if it affect any collateral issue in the case. *State v. Keenan*, 8 Rich., 456; *State v. Lavalley*, 9 Mo., 824; *State v. Shupe*, 16 Ia., 38; *Commonwealth v. Pollard*, 12 Met., 225; *Commonwealth v. Grant*, 116 Mass., 17. The late English cases qualify the doctrine as stated by Hawkins. In *Reg. v. Mullany, Leigh & C.*, 593, it was held that any false testimony in a judicial proceeding, with intent to mislead, whether material or not, would amount to perjury. In *Reg. v. Gibbon, Leigh & C.*, 109, it was held that certain evidence had been wrongly admitted, but that the witness might be indicted for perjury on it. In *Reg. v. Philpott*, 5 Cox C. C., 363; 3 C. C. & K., 135; on which the foregoing depend, the court uses this language: "This brings us to the question whether it is less perjury if the document turns out not to be admissible in evidence, and the judge has done wrong in admitting it. If that were so, it would, as has been already observed, make the commission of the offense depend upon the decision of a nice question of law upon a bill of exceptions in the house of lords. Here the evidence was offered to procure the admission of a document; that document, if admissible, would be material to the question being tried; and the evidence was false. Here, therefore, are all the elements of the crime of perjury." Mr. Bishop, Cr. L., 5th ed., § 1036, says: "The true view is to consider whether the evidence, assuming it to have been rightly admitted, could have properly influenced the judge or the jury, to whom it was addressed. If it could, and it is false, it should subject the witness to indictment." See *Ibid.*, 7th ed., § 1030, *et seq.*

By statutes in most of the United States the offense is made broader, and includes false affidavits made in matters outside of, as well as in, court proceedings.

(21) To constitute subornation of perjury, the party charged must have procured the commission of perjury by inciting, instigating or persuading the guilty party to commit the crime. *Commonwealth v. Douglass*, 5 Met., 241; *United States v. Staats*, 8 How., 41; *Commonwealth v. Smith*, 11 Allen, 243. Mere solicitation is a misdemeanor at common law. *Reg. v. Darby*, 7 Mod., 100.

law; especially as to the penalties before inflicted, the statute 3 Geo. II, c. 25, superadds a power for the court to order the offender to be sent to the house of correction for a term not exceeding seven years, or to be transported for the same period; and makes it felony without benefit of clergy to return or escape within the time. (22) It has sometimes been wished that perjury, at least upon capital accusations, whereby another's life has been or might have been destroyed, was also rendered capital, upon a principle of retaliation: as it is in all cases by the laws of France. (h) And certainly the odiousness of the crime pleads strongly in behalf of the French law. But it is to be considered, that there they admit witnesses to be heard only on the side of the prosecution, and use the rack to extort a confession from the accused. In such a constitution, therefore, it is necessary to throw the dread of capital punishment into the other scale, in order to keep in awe the witnesses for the crown, on whom alone the prisoner's fate depends; so naturally does one cruel law beget another. But corporal and pecuniary punishments, exile and perpetual infamy, are more suited to the genius of the English law: where the fact is openly discussed between witnesses on both sides, and the evidence for the crown may be contradicted and disproved by those of the prisoner. Where \*indeed, the death of an innocent person has actually been the consequence of such wilful perjury, it falls within the guilt of deliberate [\*139] murder, and deserves an equal punishment: which our ancient law in fact inflicted. (i) But the mere attempt to destroy life by other means not being capital, there is no reason that an attempt by perjury should; much less that this crime should in all judicial cases be punished with death. For to multiply capital punishments lessens their effect, when applied to crimes of the deepest dye; and detestable as perjury is, it is not by any means to be compared with some other offences, for which only death can be inflicted; and therefore it seems already (except perhaps in the instance of deliberate murder by perjury) very properly punished by our present law, which has adopted the opinion of Cicero, (k) derived from the law of the twelve tables, "*perjurii poena divina, exitium; humana, dedecus.*"

17. Bribery is the next species of offence against public justice; which is when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behaviour in his office. (l) (23) In the East it is the custom never to petition any superior for justice, not excepting their kings, without a present. This is calculated for the genius of despotic countries; where the true principles of government are never understood; and it is imagined that there is no obligation from the superior to the inferior, no relative duty owing from the governor to the governed. The Roman law, though it contained many severe injunctions against bribery, as well for selling a man's vote in the senate or other public assembly, as for the bartering of common justice, yet, by a strange indulgence in one instance, it tacitly encouraged this practice: allowing the magistrate to receive small presents, provided they did not in the whole exceed a hundred crowns in the

(h) Montesq. Sp. L. b. 20, c. 11.

(i) Britton, c. 5.

(k) De Leg. 2, 2.

(l) 1 Haw. P. C. 168.

(22) See, as to these offenses, stat. 20 and 21 Vic., c. 8; 27 and 28 Vic., c. 47.

(23) The offense of bribery is not confined to influencing judicial officers. "Any attempt to influence an officer in his official conduct, whether in the executive, legislative or judicial department of the government, by the offer of a reward or pecuniary compensation, is an indictable common law misdemeanor." State v. Ellis, 33 N. J., 102; Rex v. Plympton, Lord Raym., 1377; People ex rel. Purley, 2 Cal., 564; U. S. v. Worrall, 2 Dall., 385. Whether the proposal to receive a bribe is a misdemeanor, see Walsh v. People, 65 Ill., 53; Hutchinson v. State, 86 Tex., 293. An unsuccessful attempt to bribe is an offense. Barefield v. State, 14 Ala., 603. See Rex v. Vaughan, Burr, 2494.

It is a species of bribery for a candidate for office to get votes by offering, if elected, to donate a sum of money to an individual, or to a public corporation. State v. Purdy, 36 Wis., 213. See Harvey v. Tama County, 53 Iowa, 228; State v. Collier, 73 Mo., 18; S. C., 37 Am. Rep., 417; State v. Church, 5 Oreg., 375.

year: (*m*) not considering the insinuating nature and gigantic progress of this vice, when once admitted. Plato therefore more wisely, in his ideal republic, [*\*140*] (*n*) \*orders those who take presents for doing their duty to be punished in the severest manner: and by the laws of Athens he that offered was also prosecuted, as well as he that received a bribe. (*o*) In England this offence of taking bribes is punished, in inferior officers, with fine and imprisonment; and in those who offer a bribe, though not taken, the same. (*p*) But in judges, especially the superior ones, it hath been always looked upon as so heinous an offence, that the chief justice Thorp was hanged for it in the reign of Edward III. By a statute (*q*) 11 Hen. IV, all judges and officers of the king, convicted of bribery, shall forfeit treble the bribe, be punished at the king's will, and be discharged from the king's service forever. (24) And some notable examples have been made in parliament, of persons in the highest stations, and otherwise very eminent and able, contaminated with this sordid vice.

18. Embracery is an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like. (*r*) The punishment for the person embracing is by fine and imprisonment; and for the juror so embraced, if it be by taking money, the punishment is (by divers statutes of the reign of Edward III) perpetual infamy, imprisonment for a year, and forfeiture of the tenfold value.

19. The *false verdict* of jurors, whether occasioned by embracery or not, was anciently considered as criminal, and therefore exemplarily punished by attain in the manner formerly mentioned. (*s*)

20. Another offence of the same species is the *negligence of public officers*, intrusted with the administration of justice, as sheriffs, coroners, constables and the like, which makes the offender liable to be fined; and in very notorious cases will amount to a forfeiture of his office, if it be a beneficial one. (*t*) [*\*141*] Also the omitting to apprehend persons offering stolen \*iron, lead and other metals to sale, is a misdemeanor, and punishable by a stated fine, or imprisonment, in pursuance of the statute 29 Geo. II, c. 80.

21. There is yet another offence against public justice, which is a crime of deep malignity; and so much the deeper, as there are many opportunities of putting it in practice, and the power and wealth of the offenders may often deter the injured from a legal prosecution. This is the *oppression* and tyrannical partiality of judges, justices, and other *magistrates*, in the administration and under the colour of their office. However, when prosecuted, either by impeachment in parliament, or by information in the court of the king's bench (according to the rank of the offenders), it is sure to be severely punished with forfeiture of their offices (either consequential or immediate), fines, imprisonment, or other discretionary censure, regulated by the nature and aggravations of the offence committed.

22. Lastly, *extortion* is an abuse of public justice, which consists in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due. (*u*) The punishment is fine and imprisonment, and sometimes a forfeiture of the office. (25)

(*m*) *Ff.* 48, 11, 6.

(*n*) *De Leg.* l. 12.

(*o*) Pott. Antiq. b. 1, c. 23.

(*p*) 3 Inst. 147.

(*q*) *Ibid.* 146.

(*r*) 1 Hawk. P. C. 259.

(*s*) See book III, pp. 402, 408.

(*t*) 1 Hawk. P. C. 108.

(*u*) 1 Hawk. P. C. 170.

(24) This statute is repealed.

(25) Extorting an agreement to pay money or deliver something of value seems not sufficient to make out the offense. *Commonwealth v. Cony*, 2 Mass., 523; *Commonwealth v. Pease*, 16 Mass., 91. Nor does the receiving of a reward voluntarily given. *State v. Stotta*, 5 Blackf., 460; *Evans v. Trenton*, 24 N. J., 764. A custom to take larger fees than the law permits is no defense to the officer who has demanded and received them. *Lincoln v. Shaw*, 17 Mass., 410; *Commonwealth v. Bagley*, 7 Pick., 279. The taking must be willful

## CHAPTER XI.

## OF OFFENCES AGAINST THE PUBLIC PEACE.

WE are next to consider offences against the public *peace*; the conservation of which is intrusted to the king and his officers, in the manner and for the reasons which were formerly mentioned at large. (a) These offences are either such as are an actual breach of the peace, or constructively so, by tending to make others break it. Both of these species are also either felonious, or not felonious. The felonious breaches of the peace are strained up to that degree of malignity by virtue of several modern statutes: and, particularly,

1. The *riotous assembling* of twelve persons, or more, and not dispersing upon proclamation. This was first made high treason by statute 3 and 4 Edw. VI, c. 5, when the king was a minor, and a change in religion to be effected; but that statute was repealed by the statute 1 Mar. c. 1, among the other treasons created since the 25 Edw. III: though the prohibition was in substance re-enacted, with an inferior degree of punishment, by statute 1 Mar. st. 2, c. 12, which made the same offence a single felony. These statutes specified and particularized the nature of the riots they were meant to suppress; as, for example, such as were set on foot with intention to offer violence to the privy council, or to change the laws of the kingdom, or for certain other specific purposes: in which cases, if the persons were commanded, by proclamation, to disperse, and they did not, it was, by the statute of Mary, made felony, but within the benefit of clergy; and \*also the act indemnified the peace officers and their assistants, if they killed any of the mob in endeavouring to suppress such riot. This was thought a necessary security in that sanguinary reign, when popery was intended to be re-established, which was likely to produce great discontents: but at first it was made only for a year, and was afterwards continued for that queen's life. And, by statute 1 Eliz. c. 16, when a reformation in religion was to be once more attempted, it was revived and continued during her life also; and then expired. From the accession of James the First to the death of Queen Anne, it was never once thought expedient to revive it; but in the first year of George the First, it was judged necessary, in order to support the execution of the act of settlement, to renew it, and at one stroke to make it perpetual, with large additions. For, whereas, the former acts expressly defined and specified what should be accounted a riot, the statute 1 Geo. I, stat. 2, c. 5, enacts, generally, that if any twelve persons are unlawfully assembled to the disturbance of the peace, and any one justice of the peace, sheriff, under-sheriff, or mayor of a town, shall think proper to command them, by proclamation, to disperse, if they contemn his orders and continue together for one hour afterwards, such contempt shall be felony, without benefit of clergy. (1) And, farther, if the reading of the proclamation be by force opposed, or the reader be in any manner wilfully hindered from the reading of it, such opposers and hinderers are felons, without benefit of clergy: and all persons to whom such proclamation *ought to have been made*, and knowing of such hinderance, and not dispersing, are

(a) Book I, pp. 118, 208, 350.

and corrupt. *State v. Gardner*, 2 Mo., 23; *People v. Coon*, 15 Wend., 277; *United States v. Waltz*, 3 Sawy., 478.

In the United States corrupt misconduct by judges of courts of record is punishable by impeachment. Inferior judicial officers are punishable by indictment, and possibly in some states by impeachment.

(1) The punishment is now reduced to transportation or imprisonment (statute 1 Vic., c. 91), or penal servitude may be substituted. Statute 16 and 17 Vic., c. 99.

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felons, without benefit of clergy. There is the like indemnifying clause, in case any of the mob be unfortunately killed in the endeavour to disperse them: being copied from the act of Queen Mary. And, by a subsequent clause of the new act, if any person, so riotously assembled, begin, even before proclamation, to pull down any church, chapel, meeting-house, dwelling-house, or out-houses, they shall be felons, without benefit of clergy. (2)

2. By statute 1 Hen. VII, c. 7, *unlawful hunting* in any legal forest, park, or [ \*144 ] warren, not being the king's property, *\*by night*, or with *painted faces*, was declared to be single felony. But now, by the statute 9 Geo. I, c. 22, to appear armed in any inclosed forest or place, where deer are usually kept, or in any warren for hares or conies, or in any high road, open heath, common, or down, by day or night, with faces blacked, or otherwise *disguised*, or (being so disguised) to hunt, wound, kill, or steal any deer, to rob a warren or to steal fish, or to procure, by gift or promise of reward, any person to join them in such unlawful act, is felony without benefit of clergy. (3) I mention these offences in this place, not on account of the damage thereby done to private property, but of the manner in which that damage is committed: namely, with the face blacked or with other disguise, and being armed with offensive weapons, to the breach of the public peace and the terror of his majesty's subjects.

3. Also by the same statute, 9 Geo. I, c. 22, amended by statute 27 Geo. II, c. 15, knowingly to send any *letter* without a name, or with a fictitious name, *demanding* money, venison, or any other valuable thing, or *threatening* (without any demand) to kill any of the king's subjects, or to fire their houses, out-houses, barns, or ricks, is made felony without benefit of clergy. (4) This offence was formerly high treason by the statute 8 Hen. VI, c. 6.

4. To pull down or destroy any *lock, sluice or floodgate*, erected by authority of parliament on a navigable river, is, by statute 1 Geo. II, st. 2, c. 19, made felony, punishable with transportation for seven years. By the statute 8 Geo. II, c. 20, the offence of destroying such works, or rescuing any person in custody for the same, is made felony without benefit of clergy; and it may be inquired of and tried in any adjacent county, as if the fact had been therein committed. By the statute 4 Geo. III, c. 12, maliciously to damage or destroy any banks, sluices, or other works on such navigable river, to open the flood-gates or otherwise obstruct the navigation, is again made felony, punishable [ \*145 ] with transportation for seven years. And by the statute 7 Geo. III, c. 40 \*(which repeals all former acts relating to turnpikes), maliciously to pull down or otherwise destroy any *turnpike-gate* or fence, toll-house, or weighing engine thereunto belonging, erected by authority of parliament, or to rescue any person in custody for the same, is made felony without benefit of clergy; and the indictment may be inquired of and tried in any adjacent county. (5) The remaining offences against the public peace are merely misdemeanors and no felonies; as,

5. Affrays (from *affraier*, to terrify) are the fighting of two or more persons in some public place, (6) to the terror of his majesty's subjects; for, if the

(2) Subsequent statutes embrace other cases than these here mentioned, and the punishment is now reduced to penal servitude.

(3) The statutes relating to these offenses were repealed and consolidated by 7 and 8 Geo. IV, cc. 27 and 29, and the punishments greatly mitigated.

(4) This subject is covered by statute 24 and 25 Vic., cc. 96, 97, 100.

(5) Upon the subject of this paragraph, see statute 24 and 25 Vic., c. 97.

(6) To be public, the place must be one where the public may go at will without invitation. Thus, a field surrounded by forest, a mile from any highway or public place, does not lose its character as private by the casual presence of three persons. *Taylor v. The State*, 22 Ala., 15. But, where a fight took place in an enclosed lot, ninety feet from the street and visible from it, although no person in the street was shown to have seen the encounter, the spot was held a public place and the fight an affray. *Carwile v. The State*, 35 Ala., 392. And it has been held that a legal highway, if sufficiently secluded, is not neces-



fighting be in private, it is no *affray*, but an *assault*. (b) Affrays may be suppressed by any private person present, who is justifiable in endeavouring to part the combatants, whatever consequence may ensue. (c) But more especially the constable, or other similar officer, however denominated, is bound to keep the peace; and to that purpose may break open doors to suppress an affray, or apprehend the affrayers; and may either carry them before a justice, or imprison them by his own authority for a convenient space till the heat is over; and may then perhaps also make them find sureties for the peace. (d) The punishment of common affrays is by fine and imprisonment; the measure of which must be regulated by the circumstances of the case; for, where there is any material aggravation, the punishment proportionably increases. As where two persons coolly and deliberately engage in a duel; this being attended with an apparent intention and danger of murder, and being a high contempt of the justice of the nation, is a strong aggravation of the affray, though no mischief has actually ensued. (e) Another aggravation is when thereby the officers of justice are disturbed in the due execution of their office: or where a respect to the particular place ought to restrain and regulate men's behaviour, more than in common ones; as in the king's court and the like. And upon the same account also all affrays in a church or church-yard are esteemed very heinous offences, as being indignities to him to whose service those places are consecrated. Therefore mere quarrelsome words, which are [\*146] neither an affray nor an offence in any other place, are penal here. For it is enacted by statute 5 and 6 Edw. VI, c. 4, that if any person shall, by words only, quarrel, chide, or brawl, in a church or church-yard, the ordinary shall suspend him, if a layman, *ab ingressu ecclesie*; and, if a clerk in orders, from the ministration of his office during pleasure. And if any person in such church or church-yard proceeds to smite or lay violent hands upon another, he shall be excommunicated *ipso facto*; or if he strikes him with a weapon, or draws any weapon, with intent to strike, he shall, besides excommunication (being convicted by a jury), have one of his ears cut off: or, having no ears, be branded with the letter F in his cheek. (7) Two persons may be guilty of an affray: but,

6. *Riots, routs, and unlawful assemblies*, must have three persons at least to constitute them. An *unlawful assembly* is when three or more do assemble themselves together to do an unlawful act, as to pull down enclosures, to destroy a warren or the game therein; and part without doing it, or making any motion towards it. (f) (8) A *rout* is where three or more meet to do an

(b) 1 Hawk. P. C. 134.

(c) *Ibid.* 136.

(d) *Ibid.* 137.

(e) *Ibid.* 138.

(f) 3 Inst. 176.

sarilly a public place. *State v. Weekly*, 29 Ind., 206. As illustrating what is held to be a public place, see, where gaming has been the offense charged, *Windham v. State*, 26 Ala., 69; *McCauley v. State*, 26 Ala., 185; *Burdine v. State*, 25 Ala., 60; *Roquemore v. State*, 19 Ala., 528; *Clarke v. State*, 12 Ala., 492; *Lowrie v. State*, 43 Tex., 602; *Smith v. State*, 53 Ala., 384. And where indecent exposure has been the charge: *Reg. v. Orchard*, 3 Cox C. C., 248, and *Reg. v. Holmes*, 3 C. & K., 360, where an omnibus was held to be a public place.

(7) A clergyman may be guilty of brawling who addresses a public reproof to a parishioner during his sermon, without any just cause or provocation, and with great warmth of passion, and a loud voice. *Cox v. Goodday*, 2 Hagg. Cons., 138. On this subject, see statute 23 and 24 Vic., c. 32.

The statute 5 Edw. VI, c. 4, so far as relates to the punishment of persons convicted of striking with any weapon, or drawing any weapon with intent to strike, as therein mentioned, was repealed by 9 Geo. IV, c. 31, s. 1. And so far as relates to persons not in holy orders, it was repealed by statute 23 and 24 Vic., c. 32, § 5.

(8) "Also an assembly of a man's friends for the defense of his person against those who threaten to beat him, if he go to such a market, etc., is unlawful; for he who is in fear of such insults must provide for his safety by demanding the surety of the peace against the persons by whom he is threatened, and not make use of such violent methods which cannot but be attended with the danger of raising tumults and disorders to the disturbance of the public peace; yet an assembly of a man's friends in his own house, for the defense of

unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common or of way; and make some advances towards it.<sup>(p)</sup> A riot is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel: <sup>(h)</sup> as if they beat a man; or hunt and kill game in another's park, chase, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner. <sup>(9)</sup> The punishment of unlawful assemblies, if to the number of twelve, we have just now seen, may be capital, according to the circumstances that attend it; but, from the number of three to eleven, is by fine and imprisonment only. The same is the case in riots and [\*147] routs by the common law; to \*which the pillory <sup>(10)</sup> in very enormous cases has been sometimes superadded. <sup>(i)</sup> And by the statute 13 Hen.

(g) Bro. Abr. t. Riot, 4, 5.

(A) 3 Inst 176.

(i) 1 Hawk. P. C. 159.

the possession thereof, against those who threaten to make an unlawful entry thereinto, or for the defense of his person against those who threaten to beat him therein, is indulged by law; for a man's house is looked upon as his castle." 1 Hawk. P. C., ch. 65, § 10.

"What is thus said by Hawkins about an assemblage to defend a man's castle is clearly correct. The other branch of the doctrine of this eminent author doubtless needs some qualification. For plainly there may be circumstances in which a man may receive the assistance of his friends in the defense merely of his person, without exposing them to indictment for unlawful assembly." 2 Bish. C. L., 5th ed., § 1259.

(9) At common law, two could not be guilty of riot. *R. v. Heaps*, 2 Salk., 374, and *State v. Turpin*, 4 Blackf., 72; where three were indicted and but one found guilty, and it was held no sentence could be pronounced. Where several were indicted and two found guilty, no judgment should be given; otherwise, if the indictment had been against the two and divers others, etc., and upon that indictment verdict as above. *Rex v. Sudbury*, 12 Mod., 262. Where six were indicted and two died before trial, two acquitted, and two were found guilty, the two latter could be sentenced. *Rex v. Scott*, 3 Burr., 1262. Where three were indicted and one was tried separately and found guilty, the others not having been tried, judgment was pronounced, though at a subsequent trial one of the others was acquitted. *State v. Allison*, 3 Yerg., 428. To convict of rioting, it is enough if a person is present giving aid and countenance to the disturbance, without being himself active in the riot. *Williams v. State*, 9 Mo., 270; *State v. Straw*, 33 Me., 554. Where three combine to do an unlawful act, all are guilty, though only one threatens violence. *Bell v. Mallory*, 61 Ill., 167. One who, by a speech, stirs up a riot, but is absent from the actual disturbance, is guilty of rioting, if the speech and the disturbance are inseparably connected. *R. v. Sharpe*, 8 Cox C. C., 288. Acquiescence must be explained, to prevent a bystander at a riot from being held guilty. *Pennsylvania v. Craig*, Addison, 190; but it is held not to be law that all present and not engaged in suppressing a riot, are guilty. *State v. McBride*, 19 Mo., 289.

To constitute a riot, the act must be such as to inspire terror. 1 Hawk. P. C., ch. 65, § 5; *R. v. Soley*, 2 Salk., 594; *R. v. Hughes*, 4 C. & P., 878. If the tendency of an unlawful act of several persons is to inspire terror, and they execute their purpose, it is enough, although the act does not in fact frighten a large number of people. *State v. Alexander*, 7 Rich., 5. So where a number of armed men in a violent way come to search a house, they may be guilty of riot though the owner of the house treated them hospitably: *Sanders v. State*, 60 Ga., 126; and see *Baukus v. State*, 4 Ind., 114, where persons were, under a statute, held guilty of riot for a mock serenade at night.

The act need not be in itself unlawful if it is done in a turbulent manner. "It is no way material whether the act intended to be done by such an assembly be of itself lawful or unlawful, from whence it follows that if more than three persons assist a man to make a forcible entry into lands to which one of them has a good right of entry, or if a like number in a violent and tumultuous manner join together in removing a nuisance or other thing, which may be lawfully done in a peaceful manner, they are as properly rioters as if the act intended to be done by them was never so unlawful, for the law will not suffer persons to seek redress of their private grievances by such dangerous disturbances of the public peace; however, the justice of the quarrel in which such an assembly doth engage is certainly a great mitigation of the offense." 1 Hawk. P. C., ch. 65, § 7; *Kiphart v. State*, 49 Ind., 273; *State v. Brooks*, 1 Hill (S. C.), 361. So an officer may be guilty of riot in serving process. *Douglass v. State*, 6 Yerg., 525.

A combination of persons, lawful in the first instance, may become guilty of riot by subsequent unlawful action, and this though they do not fully carry out the wrong purpose. *State v. Snow*, 18 Me., 846. It has been held that, to constitute riot, it is enough if the facts charged constitute an attempt to commit an act of violence. *State v. York*, 70 N. C., 66.

(10) Since abolished

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IV, c. 7, any two justices, together with the sheriff or under-sheriff of the county, may come with the *posse comitatus*, if need be, and suppress any such riot, assembly, or rout, arrest the rioters, and record upon the spot the nature and circumstances of the whole transaction; which record alone shall be a sufficient conviction of the offenders. In the interpretation of which statute it hath been holden, that all persons, noblemen and others, except women, clergymen, persons decrepit, and infants under fifteen, are bound to attend the justices in suppressing a riot, upon pain of fine and imprisonment; and that any battery, wounding, or killing the rioters, that may happen in suppressing the riot, is justifiable. (j) So that our ancient law, previous to the modern riot act, seems pretty well to have guarded against any violent breach of the public peace; especially as any riotous assembly on a public or general account, as to redress grievances or pull down all enclosures, and also resisting the king's forces if sent to keep the peace, may amount to overt acts of high treason, by levying war against the king.

7. Nearly related to this head of riots is the offence of *tumultuous petitioning*; which was carried to an enormous height in the times preceding the grand rebellion. Wherefore by statute 13 Car II, st. 1, c. 5, it is enacted, that not more than twenty names shall be signed to any petition to the king or either house of parliament, for any alteration of matters established by law in church or state; unless the contents thereof be previously approved, in the country, by three justices, or the majority of the grand jury at the assizes or quarter sessions; and, in London, by the lord mayor, aldermen and common council, (k) and that no petition shall be delivered by a company of more than ten persons; on pain \*in either case of incurring a penalty not exceed- [\*148] ing 100*l.* and three months' imprisonment. (11)

8. An eighth offence against the public peace is that of a *forcible entry or detainer*; which is committed by violently taking or keeping possession of lands and tenements, with menaces, force and arms, and without the authority of law. This was formerly allowable to every person disseised, or turned out of possession, unless his entry was taken away or barred by his own neglect, or other circumstances; which were explained more at large in a former book. (l) But this being found very prejudicial to the public peace, it was thought necessary by several statutes to restrain all persons from the use of such violent methods, even of doing themselves justice; and much more if they have no justice in their claim. (m) So that the entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained with force, with violence, and unusual weapons. By the statute 5 Ric. II, st. 1, c. 8, all forcible entries are punished with imprisonment and ransom at the king's will. And by the several statutes of 15 Ric. II, c. 2, 8 Hen. VI, c. 9, 31 Eliz. c. 11, and 21 Jac. I, c. 15, upon any forcible entry, or forcible detainer after peaceable entry, into any lands, or benefices of the church, one or more justices of the peace, taking sufficient power of the county, may go to the place, and there record the force upon his own view, as in case of riots; and upon such conviction may commit the offender to gaol, till he makes fine and ransom to the king. And moreover the justice or justices have power to summon a jury to try the forcible entry or detainer complained of: and if the same be found by that jury, then, besides the fine on the offender, the justices shall make restitution by the sheriff of the possession, without inquiring into the merits of the title: for the force is the only thing to be tried, punished, and remedied by them: and the same may be done by indictment at the general

(j) 1 Hal. P. C. 495. 1 Hawk. P. C. 161.

(k) This may be one reason (among others) why the corporation of London has, since the Restoration, usually taken the lead in petitions to parliament for the alteration of any established law.

(l) See book III, page 174, &c.

(m) 1 Hawk. P. C. 141.

sessions. But this provision does not extend to such as endeavour to maintain possession by force, where they \*themselves, or their ancestors, have [\*149] been in the peaceable enjoyment of the lands and tenements for three years immediately preceding. (n) (12)

9. The offence of *riding or going armed*, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the statute of Northampton, 2 Edw. III, c. 3, upon pain of forfeiture of the arms, and imprisonment during the king's pleasure, in like manner, as by the laws of Solon, every Athenian was finable who walked about the city in armour. (o)

10. *Spreading false news*, to make discord between the king and nobility, or concerning any great man of the realm, is punishable by common law (p) with fine and imprisonment; which is confirmed by statutes Westm. 1, 3 Edw. I, c. 34, 2 Ric. II, st. 1, c. 5, and 12 Ric. II, c. 11.

11. *False and pretended prophecies*, with intent to disturb the peace, are equally unlawful, and more penal; as they raise enthusiastic jealousies in the people, and terrify them with imaginary fears. They are therefore punished by our law, upon the same principle that spreading of public news of any kind, without communicating it first to the magistrate, was prohibited by the ancient Gauls. (q) Such false and pretended prophecies were punished capitally by statute 1 Edw. VI, c. 12, which was repealed in the reign of Queen Mary. And now by the statute, 15 Eliz. c. 15, the penalty for the first offence is a fine of ten pounds and one year's imprisonment; for the second, forfeiture of all goods and chattels, and imprisonment during life.

\*12. Besides actual breaches of the peace, any thing that tends to [\*150] provoke or excite others to break it, is an offence of the same denomination. Therefore, *challenges to fight*, either by word or letter, or to be the bearer of such a challenge, are punishable by fine and imprisonment, according to the circumstances of the offence. (r) (13) If this challenge arises on account of any money won at gaming, or if any assault or affray happen upon such account, the offender, by statute 9 Ann. c. 14, shall forfeit all his goods to the crown, and suffer two years' imprisonment.

13. Of a nature very similar to challenges are, *libels, libelli famosi*, which, taken in their largest and most extensive sense, signify any writings, pictures,

(n) Holding over by force, where the tenant's title was under a lease, now expired, is said to be a forcible detainer. (Cro. Jac. 199.)

(o) Fort. Antiq. b. 1. c. 26.

(p) 2 Inst. 226. 3 Inst. 198.

(q) "Habent legis sanctum, et quis quid de republica a finitimis rumore aut fama accepit, uti ad magistratum deferat, neve cum alio communicet: quod saepe homines temerarios atque imperitos falsis rumoribus terrent, et ad facinus impellit, et de summis rebus consilium capere cognitum est." Oms. de bell. Gall. lib. 6, cap. 19.

(r) 1 Hawk. P. C. 135, 138.

(12) A forcible entry and detainer is indictable at common law as a misdemeanor. *State v. Wilson*, 3 Mo., 125; *Com. v. Shattuck*, 4 Cush., 141; *Henderson's Case*, 8 Grat., 708.

(13) Challenging to a duel, or trying to provoke a challenge, is an indictable misdemeanor at common law. *Rex v. Phillips*, 6 East, 464; *Reg. v. Langley*, 2 Ld. Raym., 1034; *State v. Perkins*, 6 Blackf., 20; *State v. Farrier*, 1 Hawks, 487. The mere sending a letter tending to provoke a challenge, though it do not reach its destination, is a misdemeanor. *Rex v. Williams*, 2 Camp., 506. If the meaning is plain, the words of a challenge are unimportant. *Ivey v. State*, 12 Ala., 276; *Com. v. Pope*, 3 Dana, 418; and see *Aulger v. People*, 84 Ill., 486. A challenge to fight outside the state is indictable. *State v. Farrier*, 1 Hawks, 487.

Wherever two persons, in cold blood, meet and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder. 1 Hawk. P. C., ch. 31, § 21; and see 1 Bish. Cr. L., 5th ed., § 311; 2 How. St. Tr., 1083. All persons present, countenancing a duel, if death ensue, are guilty of murder as principals in the second degree. 1 Hawk. P. C., ch. 31, § 31; *Reg. v. Young*, 8 C. & P., 644; *Reg. v. Cuddy*, 1 C. & K., 210; and see *Reg. v. Barronet*, Dears. Cr. C., 51.

In many of the United States duelling and challenging to fight are the subject of statutory enactments. As throwing light on some such statutes, see *Harris v. State*, 58 Ga., 333; *Royall v. Thomas*, 28 Gratt., 180; *State v. Dupont*, 2 McCord, 334; *Moody v. Com.*, 4 Met. (Ky.), 1.

or the like, of an immoral or illegal tendency; but, in the sense under which we are now to consider them, are malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule. (s) (14) The direct tendency of these libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed. The communication of a libel to any one person is a publication in the eye of the law: (t) and therefore the sending an abusive private letter to a man is as much a libel as if it were openly printed, for it equally tends to a breach of the peace. (u) For the same reason it is immaterial with respect to the essence of a libel, whether the matter of it be true or false; (v) since the provocation, and not the falsity, is the thing to be punished criminally: though doubtless, the falsehood of it may aggravate its guilt and enhance its punishment. In a civil action, we may remember, a libel must appear to be false, as well as scandalous; (w) for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever offence it may be against the public peace; [\*151] and therefore, upon a civil action, the truth of the accusation may be pleaded in bar of the suit. But, in a criminal prosecution, the tendency which all libels have to create animosities, and to disturb the public peace, is the whole that the law considers. And, therefore, in such prosecutions, the only points to be inquired into are, first, the making or publishing of the book or writing: and, secondly, whether the matter be criminal: and, if both these points are against the defendant, the offence against the public is complete. The punishment of such libellers, for either making, repeating, printing, or publishing the libel, is fine, and such corporal punishment as the court in its discretion shall inflict: regarding the quantity of the offence, and the quality of the offender. (x) By the law of the twelve tables at Rome, libels, which affected the reputation of another, were made a capital offence: but, before the reign of Augustus, the punishment became corporal only. (y) Under the emperor Valentinian (z) it was again made capital, not only to write, but to

(s) 1 Hawk. P. C. 128. (t) Moor, 813. (u) 2 Brownl. 151. 13 Rep. 35. Hob. 315. Poph. 129. 1 Hawk. P. C. 196. (v) Moor, 627. 5 Rep. 125.  
11 Mod. 99. (w) See book III, page 125. (x) 1 Hawk. P. C. 196.

(y) *Quinetiam lex*  
*Poenaeque lata, malo quae nollet carmine quinquam*  
*Describi:—vertens modum formidine fustia.*—Hor. ad Aug. 153.

(z) Cod. 9, 36.

(14) Up to 1792 it had been held that, in a criminal prosecution for libel, the court was to decide whether any given fact was an excuse for a libel. The jury could simply find whether any fact alleged as an excuse was true; it could not decide whether a writing was criminal. "If satisfied with the evidence of publication and the meaning and innuendoes were as stated, they (the jury) ought to find the defendant guilty; the question of law was upon the record for the judgment of the court." *Rex v. Withers*, 3 T. R., 428; *Rex v. Dean of St. Asaph*, 3 T. R., 428 n. To obviate the results of this doctrine, a statute 32 Geo. III, c. 60, provided that the jury might give a "general verdict of guilty or not guilty upon the whole matter put in issue, and should not be required or directed by the court or judges to find the defendant guilty merely on the proof of the publication by the defendant of the paper charged to be a libel, and of the sense ascribed in the indictment or information."

The act above mentioned in this note is what is known as Mr. Fox's Libel Act, and was passed to put an end to a violent controversy in which the judges were charged with perverting the common law. A still more recent statute (6 and 7 Vic., c. 96, s. 6), provides that on the trial of any indictment or information for libel, the defendant having properly pleaded, the truth of the matter charged may be inquired into, but shall not amount to a defense unless it was for the public benefit that the matter charged should be published; and to enable the defendant to give the truth in evidence as a defense, he must in pleading allege the truth of such matters, and that it was for the public benefit that the matters charged should be published; and if, after such plea, the defendant is convicted, the court may, in pronouncing sentence, consider whether the guilt of the defendant is aggravated or mitigated by the plea. The defendant, in addition, may plead not guilty.

In the United States generally, the truth of the alleged libellous matter is made a defense where the publication is made with good motives and for justifiable ends. See *Townsend on Slander and Libel*; 2 Bish. Cr. L., 7th ed., § 920; *Whart. Cr. L.*, § 2526, et seq.; *Cooley*

publish, or even to omit destroying them. Our law, in this and many other respects, corresponds rather with the middle age of Roman jurisprudence, when liberty, learning and humanity were in their full vigour, than with the cruel edicts that were established in the dark and tyrannical ages of the ancient *decemviri*, or the later emperors.

In this and the other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, some with a greater, others with a less, degree of severity; the *liberty of the press*, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and \*not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, (a) is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free-will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or enquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects. A man (says a \*fine writer on this subject) may be allowed to [\*152] keep poisons in his closet, but not publicly to vend them as cordials. And to this we may add, that the only plausible argument heretofore used for the restraining the just freedom of the press, "that it was necessary to prevent the daily abuse of it," will entirely lose its force, when it is shown (by a seasonable exertion of the laws) that the press cannot be abused to any bad purpose without incurring a suitable punishment: whereas it never can be used to any good one, when under the control of an inspector. So true it will be found, that to censure the licentiousness, is to maintain the liberty, of the press. (15)

(a) The art of printing, soon after its introduction, was looked upon (as well in England as in other countries) as merely a matter of state, and subject to the coercion of the crown. It was therefore regulated with us by the king's proclamations, prohibitions, charters of privilege and of licence, and, finally, by the decrees of the court of star-chamber; which limited the number of printers, and of presses which each should employ, and prohibited new publications, unless previously approved by proper licensers. On the demolition of this odious jurisdiction in 1641, the long parliament of Charles I. after their rupture with that prince, assumed the same powers as the star-chamber exercised with respect to the licensing of books: and in 1643, 1647, 1649, and 1652 (Scobell, i. 44, 184; ii. 88, 230), issued their ordinances for that purpose, founded principally on the star-chamber decree of 1637. In 1662 was passed the statute 13 and 14 Car. II. c. 33, which (with some few alterations) was copied from the parliamentary ordinances. This act expired in 1679, but was revived by statute 1 Jac. II. c. 17, and continued till 1692. It was then continued for two years longer by statute 4 W. and M., c. 24; but though frequent attempts were made by the government to revive it, in the subsequent part of that reign: Com. Journ. 11 Feb. 1694; 26 Nov. 1695; 28 Oct. 1696; 9 Feb. 1697; 31 Jan. 1698; yet the parliament resisted it so strongly that it finally expired, and the press became properly free, in 1694; and has ever since so continued.

Const. Lim., 424, 438, 464. And, as to what shall establish good motives and justifiable ends, see King v. Root, 4 Wend., 113; Commonwealth v. Bonner, 9 Met., 410; Regina v. Newman, 1 El. & Bl., 268 and 558; Barthelemy v. People, 2 Hill, 248; State v. White, 7 Ired., 180; Commonwealth v. Snelling, 15 Pick., 337.

(15) It may well be doubted, however, if attempts to restrain the licentiousness of the press through criminal prosecutions usually serve a beneficial purpose. The attempt by the government of the United States, by means of the "Sedition Act," during the administration of the first Adams, was so conspicuous and mortifying a failure, that it is not likely to be soon repeated. The excesses of the press seem to be best restrained by public sentiment, and by the infliction of damages at the hands of a jury where private character is unjustly assailed.



## CHAPTER XII.

## OF OFFENCES AGAINST PUBLIC TRADE.

OFFENCES against public trade, like those of the preceding classes, are either felonious, or not felonious. Of the first sort are,

1. Owling, so called from its being usually carried on in the night, which is the offence of transporting wool or sheep out of this kingdom, to the detriment of its staple manufacture. This was forbidden at common law, (a) and more particularly by statute 11 Edw. III, c. 1, when the importance of our woollen manufacture was first attended to; and there are now many later statutes relating to this offence, the most useful and principal of which are those enacted in the reign of Queen Elizabeth and since. The statute 8 Eliz. c. 3, makes the transportation of live sheep, or embarking them on board any ship, for the first offence forfeiture of goods, and imprisonment for a year, and that at the end of the year the left hand shall be cut off in some public market, and shall be there nailed up in the openest place; and the second offence is felony. The statutes 12 Car. II, c. 32, and 7 and 8 Wm. III, c. 28, make the exportation of wool, sheep, or fuller's earth, liable to pecuniary penalties, and the forfeiture of goods, and three years imprisonment to the master and all the mariners. And the statute 4 Geo. I, c. 11 (amended and farther enforced by 12 Geo. \*II, c. 21, and 19 Geo. II, c. 34), makes it transportation for seven [\*155] years if the penalties be not paid. (1)

2. Smuggling, or the offence of importing goods without paying the duties imposed thereon by the laws of the custom and excise, is an offence generally connected and carried on hand in hand with the former. This is restrained by a great variety of statutes, which inflict pecuniary penalties and seizure of the goods for clandestine smuggling; and affix the guilt of felony, with transportation for seven years, upon more open, daring, and avowed practices: but the last of them, 19 Geo. II, c. 34, is for this purpose *instar omnium*; for it makes all forcible acts of smuggling, carried on in defiance of the laws, or even in disguise to evade them, felony without benefit of clergy; enacting, that if three or more persons shall assemble, with fire-arms or other offensive weapons, to assist in the illegal exportation or importation of goods, or in rescuing the same after seizure, or in rescuing offenders in custody for such offences; or shall pass with such goods in disguise; or shall wound, shoot at, or assault any officers of the revenue when in the execution of their duty; such persons shall be felons without the benefit of clergy. As to that branch of the statute which required any person, charged upon oath as a smuggler, under pain of death to surrender himself upon proclamation, it seems to be expired; as the subsequent statutes (b) which continue the original act to the present time, do in terms continue only so much of the said act as relates to the *punishment* of offenders, and not to the extraordinary method of apprehending or causing them to surrender: and for offences of this positive species, where punishment (though necessary) is rendered so by the laws themselves, which by imposing high duties on commodities increase the temptation to evade them, we cannot surely be too cautious in inflicting the penalty of death. (c) (2)

(a) Mir. C. 1. § 3.

(b) Stat. 26 Geo. I, c. 32. 32 Geo. II, c. 18. 4. Geo. III, c. 12.

(c) See book I, p. 317. Beccar. c. 33.

(1) These statutes are since repealed.

(2) The present law on this subject is in 16 and 17 Vic., c. 107. The punishments are greatly mitigated.

[\*156] \*3. Another offence against public trade is fraudulent *bankruptcy*, which was sufficiently spoken of in a former volume; (d) I shall therefore now barely mention the several species of fraud taken notice of by the statute law, viz.: the bankrupt's neglect of surrendering himself to his creditors; his non-conformity to the directions of the several statutes; his concealing or embezzling his effects to the value of 20*l*.; and his withholding any books or writings with intent to defraud his creditors: all which the policy of our commercial country has made felony without benefit of clergy. (e) (3) And indeed it is allowed by such as are the most averse to the infliction of capital punishment, that the offence of fraudulent bankruptcy, being an atrocious species of the *crimen falsi*, ought to be put upon a level with those of forgery and falsifying the coin. (f) And even without actual fraud, if the bankrupt cannot make it appear that he is disabled from paying his debts by some casual loss, he shall by the statute 21 Jac. I, c. 19, be set on the pillory for two hours, with one of his ears nailed to the same, and cut off. To this head we may also subjoin, that by statute 32 Geo. II, c. 28, it is felony punishable by transportation for seven years, if a prisoner, charged in execution for any debt under 100*l*., neglects or refuses on demand to discover and deliver up his effects for the benefit of his creditors. And these are the only felonious offences against public trade; the residue being mere misdemeanors; as,

4. Usury, which is an unlawful contract upon the loan of money, to receive the same again with exorbitant increase. Of this also we had occasion to discourse at large in a former volume. (g) We there observed that by statute 37 Hen. VIII, c. 9, the rate of interest was fixed at 10*l*. *per cent. per annum*, which the statute 13 Eliz., c. 8, confirms: and ordains that all brokers shall be guilty of a *præmunire* that transact any contracts for more, and the securities themselves shall be void. The statute 21 Jac. I, c. 17, reduced interest to eight *per cent.*; and, it having been lowered in 1650, during the usurpation, to six *per cent.*, the same reduction was re-enacted after the restoration by statute 12 Car. II, c. 13; and, lastly, the statute 12 Ann. st. 2, c. 16, has reduced it to five *per cent.* Wherefore, not only all contracts for taking more are in themselves [\*157] totally void, but also the lender shall forfeit treble the money borrowed. (4) Also, if any scrivener or broker takes more than five shillings *per cent.* procuration money, or more than twelve pence for making a bond, he shall forfeit 20*l*. with costs, and shall suffer imprisonment for half a year. And by statute 17 Geo. III, c. 28, to take more than ten shillings *per cent.* for procuring any money to be advanced on any life-annuity, is made an indictable misdemeanor, and punishable with fine and imprisonment: as is also the offence of procuring or soliciting any infant to grant any life-annuity; or to promise, or otherwise engage to ratify it when he comes of age.

5. Cheating is another offence, more immediately against public trade; as that cannot be carried on without a punctilious regard to common honesty, and faith between man and man. Hither, therefore, may be referred that prodigious multitude of statutes, which are made to restrain and punish deceits in particular trades, and which are enumerated by Hawkins and Burn, but are chiefly of use among the traders themselves. The offence also of *breaking the assize* of bread, or the rules laid down by law, and particularly by the statutes 31 Geo. II, c. 29, 3 Geo. III, c. 11, and 13 Geo. III, c. 62, for ascertaining its price in every given quantity, is reducible to this head of cheating; as is likewise in a peculiar manner the offence of selling by *false weights and*

(d) See book II, page 481, 482.  
(g) See book II, page 455, &c.

(e) Stat. 5 Geo. II, c. 30.

(f) Beccar. c. 24.

(3) The previous statutes on the subject of bankruptcy were superseded by the bankrupt law which took effect Jan. 1, 1870. The penalties are now much less severe than those specified in the text.

(4) Securities are no longer void for usury. Stat. 17 and 18 Vic., c. 90.

As to usury in general, see Book II, 455, *et seq.*



*measures*; the standard of which fell under our consideration in a former volume. (h) The punishment of bakers breaking the assize was anciently to stand in the pillory, by statute 51 Henry III, st. 6, and for brewers (by the same act), to stand in the tumbrel or dungcart: (i) which, as we learn from domesday book, was the punishment for knavish brewers in the city of Chester, so early as the reign of Edward the Confessor. "*Malam cerevisiam faciens, in cathedra ponebatur stercoris.*" (j) But now the general punishment for all frauds \*of this kind, if indicted (as they may be) at common law, is by fine and imprisonment: though the easier and more usual [\*158] way is by levying on a summary conviction, by distress and sale, the forfeitures imposed by the several acts of parliament. Lastly, any deceitful practice, in cozening another by artful means, whether in matters of trade or otherwise, as by playing with false dice, or the like, is punishable with fine, imprisonment, and pillory. (k) (5) And by the statutes 33 Hen. VIII, c. 1, and 30 Geo. II, c. 24, if any man defrauds another of any valuable chattels by colour of any false token, counterfeit letter, or false pretence, or pawns or disposes of another's goods without the consent of the owner, he shall suffer such punishment by imprisonment, fine, pillory, transportation, whipping, or other corporal pain, as the court shall direct. (6)

The offence of *forestalling* the market is also an offence against public trade. This, which (as well as the two following) is also an offence at common law, (l) was described by statute 5 and 6 Edw. VI, c. 14, to be the buying or contracting for any merchandize or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price, when there: any of which practices make the market dearer to the fair trader. (7)

7. Regrating was described by the same statute to be the buying of corn, or other dead victual, in any market, and selling it again in the same market, or within four miles of the place. For this also enhances the price of the provisions, as every successive seller must have a successive profit.

8. Engrossing was also described to be the getting into one's possession, or buying up, large quantities of corn, or other dead victual, with intent to sell them again. This must of course be injurious to the public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion. And so the total engrossing of any other commodity, with intent to sell it at an unreasonable \*price, is an offence indictable and finable [\*159] at the common law. (m) And the general penalty for these three offences by 12 Geo. III, c. 71, is, as in other minute misdemeanors, discretionary fine and imprisonment. (n) Among the Romans these offences, and other malpractices to raise the price of provisions, were punished by a pecuniary mulct. "*Pœna viginti aureorum statuitur adversus eum, qui contra annonam fecerit, societatem coierit quo annona carior fiat.*" (o)

(h) See book I, page 274.

(i) 2 Inst. 219.

(j) Seld. tit. of Hon. b. 2, c. 5, § 2.

(k) 1 Hawk. P. C. 186.

(l) 1 Hawk. P. C. 234.

(m) Cro. Car. 282.

(n) 1 Hawk. P. C. 285.

(o) Fy. 45, 12, 2.

(5) Frauds upon public justice and such as affect the crown and public, though arising from some particular transaction with an individual, are indictable as cheats at common law. 1 Russell on Crimes, 285. Under this head come such cheats as are effected by means of false tokens, measures or weights, and false dice. Russell, 289.

(6) By statute 24 and 25 Vic., c. 96, s. 88, "Whosoever shall, by any false pretence, obtain from any other person any chattel, money or valuable security with intent to defraud, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

See, as to this offense, 1 Bish. Cr. L. § 518; 2 Russ. on Crimes, 286, *et seq.*

(7) This and the two following offenses are now done away with by statute 7 and 8 Vic., c. 24.

9. Monopolies are much the same offence in other branches of trade, that engrossing is in provisions: being a license or privilege allowed by the king for the sole buying and selling, making, working or using of any thing whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before. (p) These had been carried to an enormous height during the reign of Queen Elizabeth; and were heavily complained of by Sir Edward Coke, (q) in the beginning of the reign of King James the First: but were in great measure remedied by statute 21 Jac. I., c. 3, (8) which declares such monopolies to be contrary to law and void (except as to patents, not exceeding the grant of fourteen years, to the authors of new inventions; and except also patents concerning printing, saltpetre, gunpowder, great ordnance and shot); and monopolists are punished with the forfeiture of treble damages and double costs, to those whom they attempt to disturb; and if they procure any action, brought against them for these damages, to be stayed by any extra-judicial order, other than of the court wherein it is brought, they incur the penalties of *præmunire*. Combinations, also, among victuallers or artificers, to raise the price of provisions, or any commodities, or the rate of labor, (9) are in many cases severely punished by particular statutes; and in general by statute 2 and 3 Edw. VI., c. 15, with the forfeiture of 10*l.*, or twenty-one days' imprisonment with an allowance of only bread and water, for the first offence; 20*l.* or the pillory, for the second; and [\*160] 40*l.* for the third, or else the pillory, loss of one ear and perpetual infamy. In the same manner by a constitution of the Emperor Zeno, (r) all monopolies and combinations to keep up the price of merchandise, provisions or workmanship, were prohibited upon pain of forfeiture of goods and perpetual banishment. (10)

10. To exercise a *trade* in any town, without having previously served as an *apprentice* for seven years, (s) is looked upon to be detrimental to public

(p) 1 Hawk. P. C. 321.

(q) 3 Inst. 181.

(r) Cod. 4, 59, 1.

(s) See book I, page 437.

(8) Amended by statute 5 and 6 Wm. 4. c. 83. See also statute 7 and 8 Vic., c. 24.

(9) All prior acts relative to labor combinations were repealed by 6 Geo. IV., c. 129. See further in reference to the matter, 9 Geo. IV., c. 31; and 22 Vic., c. 84, and 24 and 25 Vic., c. 100.

(10) The following is an important recent enactment—34 and 35 Vic., c. 32—for the protection of both employers and laborers, against unlawful combinations and attempts at intimidation.

Be it enacted, etc.:

1. Any person who shall do any one or more of the following acts, that is to say:

(1) Use violence to any person or any property;  
(2) Threaten or intimidate any person in such manner as would justify a justice of the peace, on complaint made to him, to bind over the person so threatening or intimidating to keep the peace;

(3) Molest or obstruct any person in manner defined by this section.

With a view to coerce such person;

(1) Being a master, to dismiss or cease to employ any workman, or, being a workman, to quit any employment, or to return work before it is finished;

(2) Being a master, not to offer, or, being a workman, not to accept any employment or work;

(3) Being a master or workman, to belong or not to belong to any temporary or permanent association or combination;

(4) Being a master or workman, to pay any fine or penalty imposed by any temporary or permanent association or combination;

(5) Being a master, to alter the mode of carrying on his business, or the number or description of any persons employed by him,

Shall be liable to imprisonment, with or without hard labor, for a term not exceeding three months.

A person shall, for the purposes of this act, be deemed to molest or obstruct another person in any of the following cases, that is to say:

(1) If he persistently follow such person about from place to place;

(2) If he hide any tools, clothes or other property owned or used by such person, or deprive him of or hinder him in the use thereof;

(3) If he watch or beset the house or other place where such person resides or works

trade, upon the supposed want of sufficient skill in the trader: and therefore is punished by statute 5 Eliz. c. 4, with the forfeiture of forty shillings by the month. (11)

11. Lastly, to prevent the destruction of our home manufactures by *transporting and seducing our artists* to settle abroad, it is provided by statute 5 Geo. I, c. 27, that such as so entice or seduce them shall be fined 100*l.*, and be imprisoned three months: and for the second offence shall be fined at discretion, and be imprisoned a year: and the artificers, so going into foreign countries, and not returning within six months after warning given them by the British ambassador where they reside, shall be deemed aliens, and forfeit all their lands and goods, and shall be incapable of any legacy or gift. By statute 23 Geo. II, c. 13, the seducers incur, for the first offence, a forfeiture of 500*l.* for each artificer contracted with to be sent abroad, and imprisoned for twelve months: and for the second 1,000*l.*, and are liable to two years' imprisonment: and by the same statute, connected with 14 Geo. III, c. 71, if any person exports any tools or utensils used in the silk, linen, cotton, or woollen manufactures (except wool-cards to North America), (t) he forfeits the same and 200*l.*, and the captain of the ship (having knowledge thereof) 100*l.*; and if any captain of a king's ship, or officer of the customs, knowingly suffers such exportation, he forfeits 100*l.* and his employment; and is for ever made incapable of bearing any public office; and every person collecting such tools or utensils in order to export the same, shall, on conviction at the assizes, forfeit such tools, and also 200*l.* (12)

### CHAPTER XIII.

## OF OFFENCES AGAINST THE PUBLIC HEALTH, AND THE PUBLIC POLICE OR ECONOMY.

THE fourth species of offences more especially affecting the commonwealth, are such as are against the public *health* of the nation; a concern of the highest importance, and for the preservation of which there are in many countries special magistrates or curators appointed.

1. The first of these offences is a felony; but, by the blessing of Providence, for more than a century past, incapable of being committed in this nation. For by statute 1 Jac. I, c. 31, it is enacted, that if any person infected with the plague, or dwelling in any infected house, be commanded by the mayor or constable, or other head officer of his town or vill, to keep his house, and shall venture to disobey it, he may be enforced, by the watchman appointed on such melancholy occasions, to obey such necessary command: and if any

(t) Stat. 15 Geo. III, c. 5.

or carries on business, or happens to be, or the approach to such house or place, or if, with two or more other persons, he follow such person in a disorderly manner in or through any street or road.

Nothing in this section shall prevent any person from being liable under any other act or otherwise to any other or higher punishment than is provided for any offense by this section, so that no person be punished twice for the same offense.

Provided, that no person shall be liable to any punishment for doing or conspiring to do any act on the ground that such act restrains or tends to restrain the free course of trade, unless such act is one of the acts hereinbefore specified in this section, and is done with the object of coercing as hereinbefore mentioned.

(11) The part of this statute here referred to was repealed by statute 54 Geo. III, c. 96,

a. 1.

(12) All statutes prohibiting artificers from going abroad are repealed by statute 5 Geo. IV, c. 97, and 6 and 7 Vic., c. 84.

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hurt ensue by such enforcement, the watchmen are thereby indemnified. And farther, if such person so commanded to confine himself goes abroad, and converses in company, if he has no plague sore upon him, he shall be punished as a vagabond by whipping, and be bound to his good behaviour; but, if he has any infectious sore upon him, uncured, he then shall be guilty of felony. By the statute 26 Geo. II, c. 6 (explained and amended by 29 Geo. II, c. 8), the [\*162] "method of performing *quarantine*, or forty days' probation, by ships coming from infected countries, is put in a much more regular and effectual order than formerly, and masters of ships coming from infected places, and disobeying the directions there given, or having the plague on board and concealing it, are guilty of felony, without benefit of clergy. The same penalty also attends persons escaping from the *lazarets*, or places wherein quarantine is to be performed; and officers and watchmen neglecting their duty; and persons conveying goods or letters from ships performing quarantine. (1)

2. A second, but much inferior species of offence against public health is the selling of *unwholesome provisions*. (2) To prevent which the statute 51 Hen. III, st. 6, and the ordinance for bakers, c. 7, prohibit the sale of corrupted wine, contagious or unwholesome flesh, or flesh that is bought of a Jew; under pain of amercement for the first offence, pillory for the second, fine and imprisonment for the third, and abjuration of the town for the fourth. And by the statute 12 Car. II, c. 25, s. 11, any brewing or adulteration of wine is punished with the forfeiture of 100*l.* if done by the wholesale merchant; and 40*l.* if done by the vintner or retail trader. These are all the offences which may properly be said to respect the public health. (3)

V. The last species of offences which especially affect the commonwealth, are those against the public *police* or *economy*. By the public police and economy I mean the due regulation and domestic order of the kingdom; whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious and inoffensive in their respective stations. This head of offences must therefore be very miscellaneous, as it comprises all such crimes as especially affect public society, and are not comprehended under any of the four preceding species. These amount,

(1) Other statutes imposing lighter punishments now take the place of those mentioned in the text.

Vaccination of children was made compulsory by statute 16 and 17 Vic., c. 100, § 9.

(2) Where a contractor was indicted for selling bad bread to prisoners of war, the court held that the giving of any person unwholesome victuals not fit for man to eat, *lucri causa*, or from malice or deceit, is an indictable offense. *Treeve's Case*, 2 East P. C., 821. So where lumps of crude alum were mixed with bread sent to a charity school. *R. v. Dixon*, 8 M. & Sel., 11. A principal is liable for his agent's sale of noxious provisions, if by ordinary care he could have ascertained the condition of the food sold. *Hunter v. State*, 1 Head, 161. On the ground that mixing any poisonous ingredient with food or drink is indictable, throwing a dead animal into a well from which a family was known to drink, was held an offense. *State v. Buckman*, 8 N. H., 203. The sale of bad food is not only an offense at common law (*State v. Smith*, 8 Hawks, 373; *R. v. Stevenson*, 3 F. & F., 106), but knowingly carrying to market meat unfit for human food, is likewise an offense. *R. v. Jarvis*, 3 F. & F., 103; not, however, if the meat is meant for feeding animals. *R. v. Crawley*, 3 F. & F., 109. So, where the sale of bad food was to a wholesale dealer, the ignorance of the seller as to the person to use the food is no excuse, if he sells knowing the state of the provisions. *People v. Parker*, 38 N. Y., 85. The food must be in such condition as to affect the health of those using it. *State v. Norton*, 2 Ired., 40. Where a miller was charged in an indictment with delivering four bushels of musty, unwholesome, mixed oat and barley meal, after receiving four bushels of barley to grind, without stating that the meal was to be used for human food, held no offense was stated. If it had been a mill to which the inhabitants were bound to resort for grinding, query? citing *R. v. Wheatley*, 2 Burr., 1175; *R. v. Haynes*, 4 M. & Sel., 214.

(3) See also the statutes 1 W. and M., st. 1. c. 84, s. 20; 3 Geo. IV, c. 106; 6 and 7 Wm. IV, c. 37; 7 and 8 Vic., c. 24; 24 and 25 Vic., c. 100, § 24.

some of them to felony, and others to misdemeanors only. Among the former are,

\*1. The offence of *clandestine marriages*: for by the statute 26 Geo. II, c. 33, 1. To solemnize marriage in any other place besides a church, [\*163] or public chapel wherein banns have been usually published, except by license from the archbishop of Canterbury; and, 2. To solemnize marriage in such church or chapel without due publication of banns, or license obtained from a proper authority; do both of them not only render the marriage void, but subject the person solemnizing it to felony, punished by transportation for fourteen years; as, by three former statutes, (a) he and his assistants were subject to a pecuniary forfeiture of 100*l*. 3. To make a false entry in a marriage register; to alter it when made; to forge, or counterfeit such entry, or a marriage license; to cause or procure, or act or assist in such forgery; to utter the same as true, knowing it to be counterfeit; or to destroy or procure the destruction of any register, in order to vacate any marriage, or subject any person to the penalties of this act; all these offences, knowingly and wilfully committed, subject the party to the guilt of felony without benefit of clergy. (4)

2. Another felonious offence, with regard to this holy estate of matrimony, is what some have corruptly called *bigamy*, which properly signifies being twice married; but is more justly denominated *polygamy*, or having a plurality of wives at once. (b) Such second marriage, living the former husband or wife, is simply void, and a mere nullity, by the \*ecclesiastical law of England: and yet the legislature has thought it just to make it felony, [\*164] by reason of its being so great a violation of the public economy and decency of a well-ordered state. For polygamy can never be endured under any rational civil establishment, whatever specious reasons may be urged for it by the eastern nations, the fallaciousness of which has been fully proved by many sensible writers: but in northern countries the very nature of the climate seems to reclaim against it; it never having obtained in this part of the world, even from the time of our German ancestors, who, as Tacitus informs us, (c) "*prope soli barbarorum singulis uxoribus contenti sunt.*" It is therefore punished by the laws both of ancient and modern Sweden with death. (d) And with us in England it is enacted by statute 1 Jac. I, c. 11, that if any person, being married, do afterwards marry again, the former husband or wife being alive, it is felony; but within the benefit of clergy. The first wife in this case shall not be admitted as a witness against her husband, because she is the true wife, but the second may, for she is indeed no wife at all; (e) and so *vice versa*, of a second husband. This act makes an exception to five cases, in which such second marriage, though in the three first it is void, is yet no felony. (f) 1. Where either party hath been continually *abroad* for seven years, whether the party in England hath notice of the other's being living or no. 2. Where either of the parties hath been absent from the other seven years *within* this kingdom, and the remaining party hath had no knowledge of the other's being alive within that time. 3. Where there is a divorce (or separation *a mensa et*

(a) 6 and 7 Wm. III, c. 6. 7 and 8 Wm. III, c. 35. 10 Ann. c. 19, § 176.

(b) 8 Inst. 88. Bigamy, according to the canonists, consisted in marrying two virgins successively, one after the death of the other, or once marrying a widow. Such were esteemed incapable of orders, &c.; and by a canon of the council of Lyons, A. D. 1274, held under Pope Gregory X, were *omni privilegio clericali nudati, et coercioni fori secularis addicti* (6 Decretal. 1, 13). This canon was adopted and explained in England, by statute 4 Edw. I, st. 3, c. 5, and *bigamy* thereupon became no uncommon counter-plea to the claim of the benefit of clergy. M. 40 Edw. III, 42; M. 11 Hen. IV, 11, 48. M. 13 Hen. IV, 6; Staundf. P. C. 134. The cognizance of the plea of *bigamy* was declared by statute 18 Edw. III, st. 3, c. 2, to belong to the court christian, like that of *bastardy*. But by statute 1 Edw. VI, c. 12, § 16, *bigamy* was declared to be no longer an impediment to the claim of clergy. See Dal. 21; Dyer, 201.

(c) Du mor. Germ. 18.

(d) Stiernh. de jure Sueon. l. 3, c. 2.

(e) 1 Hal. P. C. 608.

(f) 8 Inst. 88. Kal. 27. 1 Hal. P. C. 604.

(4) The law on this subject is much modified by subsequent statutes. See statute 4 Geo. IV, c. 76; 6 and 7 Wm. IV, c. 85; 7 Wm. IV and 1 Vic., c. 22; 3 and 4 Vic., c. 72; and 24 and 25 Vic., c. 98. Marriages solemnized knowingly except in the manner provided are void, and the persons officiating are guilty of felony.

*thoro*) by sentence in the ecclesiastical court. 4. Where the first marriage is declared absolutely void by any such sentence, and the party loosed a *vinculo*. Or, 5. Where either of the parties was under the age of consent at the time of the first marriage, for in such case the first marriage was avoidable by the disagreement of either party, which the second marriage very clearly amounts to. [\*165] But \*if at the age of consent the parties had agreed to the marriage, which completes the contract, and is indeed the real marriage; and afterwards one of them should marry again; I should apprehend that such second marriage would be within the reason and penalties of the act. (5)

3. A third species of felony against the good order and economy of the kingdom, is by idle *soldiers* and *mariners wandering* about the realm, or persons pretending so to be, and abusing the name of that honorable profession. (6) Such a one not having a testimonial or pass from a justice of the peace limiting the time of his passage; or exceeding the time limited for fourteen days, unless he falls sick; or forging such testimonial; is by statute 39 Eliz. c. 17, made guilty of felony without benefit of clergy. This sanguinary law, though in practice deservedly antiquated, still remains a disgrace to our statute-book; yet attended with this mitigation, that the offender may be delivered, if any honest freeholder or other person of substance will take him into his service and he abides in the same for one year; unless licensed to depart by his employer, who in such case shall forfeit ten pounds. (6)

4. Outlandish persons calling themselves *Egyptians* or *gypsies*, are another object of the severity of some of our unrepealed statutes. These are a strange kind of commonwealth among themselves of wandering imposters and jugglers, who were first taken notice of in Germany about the beginning of the fifteenth century, and have since spread themselves all over Europe. Munster (h) who is followed and relied upon by Spelman (i) and other writers, fixes the time of their first appearance to the year 1417; under passports real or pretended, from the emperor Sigismund, king of Hungary. And Pope Pius II (who died A. D. 1464) mentions them in his history as thieves and vagabonds, then wandering with their families over Europe under the name of *Zigari*; and whom [\*166] he supposes to have migrated from the country of \*Zigi, which nearly answers to the modern Circassia. In the compass of a few years they gained such a number of idle proselytes (who imitated their language and complexion, and betook themselves to the same arts of chiromancy, begging,

(g) 3 Inst. 88.

(h) Cosmogr. l. 2.

(i) Gloss. 128.

(5) Of the previous statute, 9 Geo. IV, c. 81, which was superseded by this, Mr. Chitty says that three important improvements were introduced by it. "First, the offense is now punishable wherever committed; formerly it was not punishable at all, if committed out of the jurisdiction of England. Secondly, the absence of one party for seven years abroad will not now excuse the second marriage, if such party be known by the other party to have been alive within that period: formerly the mere absence was a protection, though the absent party was well known by the other to be living. Thirdly, a divorce *a vinculo* alone will now justify the second marriage; formerly a divorce *a mensa et thoro* was held sufficient. 1 East P. C., 466. In a prosecution for bigamy it has been said, that a marriage in fact must be proved: *Morris v. Miller*, 4 Burr. 2057; but see *Truman's Case*, 1 East P. C., 470; but if proved by a person who was present, it does not seem necessary to prove the registry or license: *Rex v. Allison*, R. & R. C. C., 109; and it matters not that the first marriage is voidable, by reason of affinity, etc. 3 Inst., 88. Parties who are within age at the time of the first marriage (subsequently affirming the union by their consent) will be liable to be punished for bigamy if they break that contract and marry again. 1 East P. C., 468. On an indictment for bigamy, where the first marriage is in England, it is not a valid defense to prove a divorce *a vinculo* out of England before the second marriage, founded on grounds on which a divorce *a vinculo* could not be obtained in England. *Rex v. Lolley*, R. & R. C. C., 237, cited in *Tovey v. Lindsay*, 1 Dow, 117. The burthen of proving the first marriage to have been legal lies upon the prosecutor. *Rex v. James*, R. & R. C. C., 17; *Rex v. Morton*, *id.*, 19; *Rex v. Butler*, *id.*, 61."

The offense of bigamy is made a felony by statutes in the several states of the American Union. Bish. Stat. Cr., § 577, *et seq.*

(6) This act is repealed.

and pilfering), that they became troublesome, and even formidable to most of the states of Europe. Hence they were expelled from France in the year 1560, and from Spain in 1591. (k) And the government in England took the alarm much earlier: for in 1530 they are described by statute 22 Hen. VIII, c. 10, as "outlandish people, calling themselves Egyptians, using no craft nor feat of merchandise, who have come into this realm and gone from shire to shire and place to place in great company, and used great, subtil and crafty means to deceive the people; bearing them in hand, that they by palmestry could tell men's and women's fortunes; and so many times by craft and subtilty have deceived the people of their money, and also have committed many heinous felonies and robberies." Wherefore they are directed to avoid the realm, and not to return under pain of imprisonment, and forfeiture of their goods and chattels: and upon their trials for any felony which they may have committed, they shall not be entitled to a jury *de medietate linguae*. And afterwards it is enacted by statutes 1 and 2 P. and M., c. 4, and 5 Eliz. c. 20, that if any such persons shall be imported into this kingdom, the importer shall forfeit 40*l*. And if the Egyptians themselves remain one month in this kingdom, or if any person being fourteen years old (whether natural-born, subject or stranger), which hath been seen or found in the fellowship of such Egyptians, or which hath disguised him or herself like them, shall remain in the same one month, at one or several times, it is felony without benefit of clergy: and Sir Matthew Hale informs us, (l) that at one Suffolk assizes no less than thirteen gypsies were executed upon these statutes a few years before the restoration. But, to the honour of our \*national humanity, there are no instances more [\*167] modern than this, of carrying these laws into practice. (7)

5. To descend next to offences whose punishment is short of death. *Common nuisances* are a species of offences against the public order and economical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires. (m) The nature of *common* nuisances, and their distinction from *private* nuisances, were explained in the preceding book: (n) when we considered more particularly the nature of the private sort, as a civil injury to individuals. I shall here only remind the student, that common nuisances are such inconvenient or troublesome offences, as annoy the whole community in general, and not merely some particular person; and therefore are indictable only, and not actionable; as it would be unreasonable to multiply suits, by giving every man a separate right of action, for what damifies him in common only with the rest of his fellow-subjects. Of this nature are 1. Annoyances in *highways, bridges*, and public *rivers*, (8) by rendering the same inconvenient or dangerous to pass, either positively, by actual obstructions; or negatively, by want of reparations. For both of these, the person so obstructing, or such individuals as are bound to repair and cleanse them, or (in default of these last) the parish at large, may be indicted, distrained to repair and amend them, and in some cases fined. And a presentment thereof by a judge of assize, &c., or a justice of the peace, shall be in

(k) Dufresne, *Gloss.* 1. 200.

(l) 1 Hal. P. C. 671.

(m) 1 Hawk. P. C. 197.

(n) Book III, page 216.

(7) Statute 5 Eliz. c. 20, is repealed, and gypsies are now only punishable under the vagrant acts.

(8) An obstruction to navigation is indictable, though in some ways it may be advantageous. *R. v. Ward*, 4 A. & E., 384. A dam is an obstruction for which the owner is indictable. *Renwick v. Morris*, 7 Hill, 575; but though a vessel sunk by accident may be an obstruction, the owner is not indictable for his failure to remove it. *R. v. Watts*, 2 Esp., 675. So, a vessel aground in a channel where she ordinarily can safely go, may be an obstruction to navigation, but her owner is not liable for the injury caused thereby to another vessel. *Cummins v. Spruance*, 4 Harr. (Del.), 315; and see *Reg. v. Betts*, 16 Q. B., 1022, 1087; *Works v. Junction R. R. Co.*, 5 McLean, 425; *Rex v. Watts*, 1 M. & M., 281.

all respects equivalent to an indictment. (o) (9) Where there is a house erected, or an inclosure made, upon any part of the king's demesnes, or of an highway, or common street, or public water, or such like public things, it is properly called a *purpresture*. (p) (10) 2. All those kind of nuisances (such as offensive trades and manufactures), which when injurious to a private man [\*168] are actionable, are, when detrimental to the public, \*punishable by public prosecution, and subject to fine according to the quantity of the misdemeanor: and particularly the keeping of hogs in any city or market town is indictable as a public nuisance. (q) (11) 3. All disorderly *inns* or *ale-houses*, *badwy-houses*, *gaming-houses*, *stage-plays*, unlicensed booths and stages for *rope-dancers*, *mountebanks*, and the like, are public nuisances, and may upon indictment be suppressed and fined. (r) Inns, in particular, being intended for the lodging and receipt of travellers, may be indicted, suppressed, and the inn-keepers fined, if they refuse to entertain a traveller without a very sufficient cause: for thus to frustrate the end of their institution is held to be disorderly behaviour. (s) Thus, too, the hospitable laws of Norway punish in the severest degree such inn-keepers as refuse to furnish accommodations at a

(o) Stat. 7 Geo. III, c. 42.  
(q) Salk. 460.

(p) Co. Litt. 277, from the French *pourpris*, an enclosure.  
(r) 1 Hawk. P. C. 198, 225.

(s) *Ibid.* 225.

(9) By the highway act, 5 and 6 Wm. IV, c. 50, the proceeding by presentment for the non-repair of highways is abolished, and a summary mode of proceeding before magistrates substituted. See also statutes 25 and 26 Vic., c. 61.

(10) The primary object of a highway is the passage of the public; whatever interferes with it unnecessarily is a nuisance. It is an indictable offense to keep one or more wagons constantly in a narrow street loading and unloading goods, so blocking the street that carriages can not pass on that side at all, though there is room on the other. *R. v. Russell*, 6 East, 427. So, when stage coaches waiting for passengers are accustomed to stand in a public place in so great numbers as to obstruct the passage. *R. v. Cross*, 8 Camp., 224. It is a nuisance for a timber merchant with a small yard to deposit habitually long timber in the street till it can be cut small enough to go in the yard. 8 Camp., 230. So, building a wall ten feet over the line of the road and ten rods along it: *State v. Knapp*, 6 Conn., 415; erecting gates across a highway, though the public can pass through them: *Henline v. People*, 81 Ill., 269; building a wall so as to encroach upon the limits of a highway, though the space enclosed can not, from its nature, be used as a road. *Com. v. King*, 13 Met., 115; erecting a fence across a town way where all citizens had a right to pass. *Com. v. Gowen*, 7 Mass., 378. So, the steps of a house projecting into a highway may form an indictable obstruction. *Com. v. Blaisdell*, 107 Mass., 234. Where the refuse from a distillery was conveyed in pipes to casks placed in wagons standing in the public street in front of the distillery, and the customers' wagons came in great numbers, and their drivers, in waiting their turns, created much disturbance; where this was done systematically, the distillers were held guilty of nuisance. *People v. Cunningham*, 1 Den., 524. It is a nuisance to obstruct the streets with goods at auction sales. *Com. v. Passmore*, 1 S. & R., 219; or at constable's sales on execution: *Com. v. Milliman*, 18 S. & R., 403; or by collecting a crowd through violent or indecent language. *Barker v. Commonwealth*, 19 Penn. St., 412. It is not an offense for one to fail to remove from the line of a road an obstruction which was there when the road was laid out: *People v. Young*, 73 Ill., 411; nor for one to obstruct a highway impassable from natural obstacles: *State v. Shinkle*, 40 Ia., 181; but where a road, as laid out, is impassable, and for many years another line has been used, the owner of the land may not fence off the road commonly travelled. *State v. McGee*, 40 Ia., 595.

That a nuisance is not legalized by length of time, see *Mills v. Hall*, 9 Wend., 315; *Commonwealth v. Upton*, 6 Gray, 473; *People v. Cunningham*, 1 Denio, 524; *Douglass v. State*, 4 Wis., 387.

(11) Generally, the carrying on of an offensive trade or manufacture in such a place and manner as to disturb the public is a nuisance. Where the odors from a factory were intensely disagreeable to the neighborhood, it was held that the odors need not be unwholesome to make the factory a nuisance. *Peake*, 91; *R. v. Neil*, 2 C. & P., 485; and in the latter case it is held that the existence of other factories near by, which diffuse offensive odors, is no defense; and see *R. v. Davey*, 5 Esp., 217.

As to nuisances by offensive trades and manufactures, see "The Sanitary Act of 1866," 29 and 30 Vic., c. 90; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas., 642. And on the same subject reference may also be had to *Commonwealth v. Brown*, 13 Met., 365; *Smith v. Commonwealth*, 6 B. Monr., 21; *People v. Cunningham*, 1 Denio, 524; *Moses v. State*, 58 Ind., 185.



just and reasonable price. (t) 4. By statute 10 and 11 Wm. III, c. 17, all *lotteries* are declared to be public nuisances, and all grants, patents, or licenses for the same to be contrary to law. But, as state-lotteries have, for many years past, been found a ready mode for raising the supply, an act was made, 19 Geo. III, c. 21, to license and regulate the keepers of such lottery-offices. (12) 5. The making and selling of *fire-works*, and *squibs*, or throwing them about in any street, is, on account of the danger that may ensue to any thatched or timber buildings, declared to be a common nuisance, by statute 9 and 10 Wm. III, c. 7, and therefore is punishable by fine. And to this head we may refer (though not declared a common nuisance) the making, keeping, or carriage of too large a quantity of *gunpowder* at one time, or in one place or vehicle; which is prohibited by statute 12 Geo. III, c. 61, under heavy penalties and forfeiture. (13) 6. *Eaves-droppers*, or such as listen under walls or windows or the eaves of a house to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance and presentable at the court-leet: (u) or are indictable at the sessions, and punishable by fine and finding sureties for their good behaviour. (v) 7. Lastly, a *common scold*, *communis rixatrix* (for our law-latin confines it to the feminine gender), is a public nuisance to her neighborhood. For which offence she may be indicted: (w) (14) \*and if convicted, shall (x) be sentenced to be placed [\*169] in a certain engine of correction called the trebucket, castigatory, or *cucking stool*, which in the Saxon language is said to signify the scolding stool; though now it is frequently corrupted into *ducking stool*, because the residue of the judgment is, that, when she is so placed therein, she shall be plunged in the water for her punishment. (y)

6. Idleness in any person whatsoever is also a high offence against the public economy. In China it is a maxim, that if there be a man who does not work, or a woman that is idle, in the empire, somebody must suffer cold or hunger: the produce of the lands not being more than sufficient, with culture, to maintain the inhabitants: and therefore, though the idle person may shift off the want from himself, yet it must in the end fall somewhere. The court also of Areopagus at Athens punished idleness, and exerted a right of examining every citizen in what manner he spent his time; the intention of which was, (z) that the Athenians, knowing that they were to give an account of their occupations, should follow only such as were laudable, and that there might be no room left for such as lived by unlawful arts. The civil law expelled all sturdy vagrants from the city: (a) and, in our own law, all idle persons or vagabonds, whom our ancient statutes describe to be "such as wake on the night and sleep on the day, and haunt customable taverns, and ale-houses, and routs about; and no man wot from whence they come ne whither they go," or such as are more particularly described by statute 17 Geo. II, c. 5, and divided into three classes, *idle* and *disorderly* persons, *rogues* and *vagabonds* and *incorrigible rogues*;—all these are offenders against the good order, and blemishes in the government, of any kingdom. They are therefore all punished by the statute last mentioned; that is to say, idle and disorderly

(t) Stiernh. *de jure Sueon.* l. 2, c. 9.

(u) Kitch. of courts, 20.

(v) *Ibid.* 1 Hawk. P. C. 132.

(w) 1 Mod. 21.

(x) 1 Hawk. P. C. 198, 200.

(y) 3 Inst. 219.

(z) Valer. Maxim. l. 2, c. 6.

(a) Nov. 80, c. 5.

(13) Since repealed. And statute 6 Geo. IV, c. 60, entirely abolishes state lotteries.

At an early day lotteries were sometimes authorized in the United States for public purposes. See *Clark v. Washington*, 12 Wheat., 40. But now in nearly every state lotteries are prohibited by constitutional provisions; and it is held that, under its police power, the state may annul previous grants of the right to set up lotteries. *Stone v. Mississippi*, 101 U. S., 814.

(14) See statute 28 and 24 Vic., c. 139, and the acts amendatory thereof. See also *Williams v. East India Co.*, 3 East, 192, 201; *People v. Sands*, 1 Johns., 78; S. C., 3 Am. Dec., 296.

(14) *James v. Commonwealth*, 12 S. & R., 220; *U. S. v. Royall*, 3 Cranch C. C., 620.

derly persons with one month's imprisonment in the house of correction; rogues and vagabonds with whipping and imprisonment not exceeding six [\*170] months; and incorrigible rogues with the like discipline and confinement, not exceeding two years; the breach and escape from which confinement in one of an inferior class, ranks him among incorrigible rogues; and in a rogue (before incorrigible) makes him a felon and liable to be transported for seven years. Persons harboring vagrants are liable to a fine of forty shillings, and to pay all expenses brought upon the parish thereby; in the same manner as, by our ancient laws, whoever harboured any stranger for more than two nights, was answerable to the public for any offence that such his inmate might commit. (b) (15)

7. Under the head of public economy may also be properly ranked all sumptuary laws against *luxury*, and extravagant expenses in dress, diet, and the like; concerning the general utility of which to a state, there is much controversy among the political writers. Baron Montesquieu lays it down, (c) that luxury is necessary in monarchies, as in France; but ruinous to democracies, as in Holland. With regard therefore to England, whose government is compounded of both species, it may still be a dubious question how far private luxury is a public evil; and as such cognizable by public laws. And indeed our legislators have several times changed their sentiments as to this point; for formerly there were a multitude of penal laws existing, to restrain excess in apparel; (d) chiefly made in the reigns of Edward the Third, Edward the Fourth and Henry the Eighth, against piked shoes, short doublets, and long coats; all of which were repealed by statute 1 Jac. I, c. 25. But, as to excess in diet there still remains one ancient statute unrepealed, 10 Edward III, st. 3, which ordains, that no man shall be served at dinner or supper, with more than two courses; except upon some great holidays there specified, in which he may be served with three.

8. Next to that of luxury naturally follows the offence of *gaming*, which is [\*171] generally introduced to supply or retrieve the expenses occasioned by the former: it being a kind of tacit confession, that the company engaged therein do, in general, exceed the bounds of their respective fortunes; and therefore they cast lots to determine upon whom the ruin shall at present fall, that the rest may be saved a little longer. But, taken in any light, it is an offence of the most alarming nature; tending by necessary consequence to promote public idleness, theft and debauchery among those of a lower class; and, among persons of a superior rank, it hath frequently been attended with the sudden ruin and desolation of ancient and opulent families, an abandoned prostitution of every principle of honor and virtue, and too often hath ended in self-murder. (16) To restrain this pernicious vice among the inferior sort of people, the statute 33 Hen. VIII, c. 9 was made; which prohibits to all but gentlemen the games of tennis, tables, cards, dice, bowls and other unlawful diversions there specified, (e) unless in the time of Christmas, under pecuniary pains and imprisonment. And the same law, and also the statute 30 Geo. II, c. 24, inflict pecuniary penalties, as well upon the master of any public house wherein servants are permitted to game, as upon the servants themselves, who are found to be gaming there. But this is not the principal ground of modern complaint; it is the gaming in high life that demands the attention of the magistrate; a passion to which every valuable consideration is made a sacrifice, and which we seem to have inherited from our ancestors the ancient Ger-

(b) *LL. Edw. c. 37. Bracton, l. 2, tr. 2, c. 10, § 2.*

(c) *Sp. L. b. 7, cc. 2 and 4.*

(d) *3 Inst. 190.*

(e) *Logetting in the fields, slide thrift or shove goat, cloyish cayles, half-bowl and coyting.*

(15) These offenses are now punishable under statute 5 Geo. IV, c. 83, amended by 1 and 2 Vic., c. 88.

(16) Playing at cards, dice, etc., for recreation was not an offense at common law, but cheating at play by means of false dice, etc., was indictable. *Bac. Abr. Gaming, A, and cases cited.*

mans; whom Tacitus (*f*) describes to have been bewitched with a spirit of play to a most exorbitant degree. "They addict themselves," says he, "to dice (which is wonderful) when sober, and as a serious employment: with such a mad desire of winning or losing, that when stript of everything else, they will stake at last their liberty and their very selves. The loser goes into a voluntary slavery, and though younger and stronger than his antagonist, suffers himself to be bound and sold. And this perseverance in so bad a cause they call the point of honor: *\*ea est in re parva pervicacia, ipsi fidem vocant.*" [\*172] One would almost be tempted to think Tacitus was describing a modern Englishman. When men are thus intoxicated with so frantic a spirit, laws will be of little avail; because the same false sense of honor that prompts a man to sacrifice himself, will deter him from appealing to the magistrate. Yet it is proper that laws should be, and be known publicly, that gentlemen may consider what penalties they wilfully incur, and what a confidence they repose in sharpers; who, if successful in play, are certain to be paid with honour, or if unsuccessful, have it in their power to be still greater gainers by informing. For by statute 16 Car. II. c. 7, if any person by playing or betting shall lose more than 100*l.* at one time, he shall not be compellable to pay the same, and the winner shall forfeit treble the value, one moiety to the king, the other to the informer. The statute 9 Ann, c. 14, enacts, that all bonds and other securities, given for money won at play, or money lent at the time to play withal, shall be utterly void; that all mortgages and incumbrances of lands, made upon the same consideration, shall be and enure to the use of the heir of the mortgagor; that if any person at any time or sitting lose 10*l.* at play, he may sue the winner, and recover it back by action of debt at law; and in case the loser does not, any other person may sue the winner for treble the sum so lost; (17) and the plaintiff may by bill in equity examine the defendant himself upon oath; and that in any of these suits no privilege of parliament shall be allowed. The statute further enacts, that if any person by cheating at play shall win any money or valuable thing, or shall at any one time or sitting win more than 10*l.*, he may be indicted thereupon, and shall forfeit five times the value to any person who will sue for it; and (in case of cheating) shall be deemed infamous, and suffer such corporal punishment as in case of wilful perjury. By several statutes of the reign of King George II, (*g*) all private lotteries by tickets, cards or dice (and particularly the games of faro, basset, ace of hearts, hazard, passage, roly polly, and all other games with dice except backgammon) are prohibited under a penalty of 200*l.* for him that shall erect such lotteries, and 50*l.* a time for the players. Public \*lotteries, unless [\*173] by authority of parliament, and all manner of ingenious devices, under the denomination of sales or otherwise, which in the end are equivalent to lotteries, were before prohibited by a great variety of statutes (*h*) under heavy pecuniary penalties. But particular descriptions will ever be lame and deficient, unless all games of mere chance are at once prohibited: the inventions of sharpers being swifter than the punishment of the law, which only hunts them from one device to another. The statute 13 Geo. II, c. 19, to prevent the multiplicity of horse races, another fund of gaming, directs that no plates or matches under 50*l.* value shall be run, upon penalty of 200*l.* to be paid by the owner of each horse running, and 100*l.* by such as advertise the plate. By statute 18 Geo. II, c. 34, the statute 9 Ann. is farther enforced, and some deficiencies supplied; the forfeitures of that act may now be recovered in a court of equity; and moreover, if any man be convicted upon information or indict-

(*f*) *De Mor. Germ.* c. 24. (*g*) 12 Geo. II, c. 28. 13 Geo. II, c. 19. 18 Geo. II, c. 34.  
 (A) 10 and 11 Wm. III, c. 17. 9 Ann. c. 6, § 56. 10 Ann. c. 26, § 109. 8 Geo. I, c. 2, §§ 26, 37. 9 Geo. I, c. 19, §§ 4, 5. 6 Geo. II, c. 35, §§ 29, 30.

(17) The penalties for winning or losing to a certain amount are repealed by 8 and 9 Vic., c. 109, which makes new provisions. See also 14 and 15 Vic., c. 100; 16 and 17 Vic., c. 119; 17 and 18 Vic., c. 38; and 22 and 23 Vic., c. 17.

ment of winning or losing at play, or by betting at any one time 10*l.* or 20*l.*, within twenty-four hours, he shall be fined five times the sum for the benefit of the poor of the parish. Thus careful has the legislature been to prevent this destructive vice; which may show that our laws against gaming are not so deficient, as ourselves and our magistrates in putting those laws in execution. (18)

9. Lastly, there is another offence, constituted by a variety of acts of parliament, which are so numerous and so confused, and the crime itself of so questionable a nature, that I shall not detain the reader with many observations thereupon. And yet it is an offence which the sportsmen of England seem to think of the highest importance; and a matter, perhaps the only one, of general and national concern: associations having been formed all over the kingdom to prevent its destructive progress. I mean the offence of destroying such beasts and fowls as are ranked under the denomination of *game*; which, we may remember, was formerly observed (i) (upon the old principles of the [\*174] forest law), \*to be a trespass and offence in all persons alike who have not authority from the crown to kill game (which is royal property), by the grant of either a free warren, or at least a manor of their own. But the laws, called the game laws, have also inflicted additional punishments (chiefly pecuniary) on persons guilty of this general offence, unless they be people of such rank or fortune as is therein particularly specified. All persons, therefore, of what property or distinction soever, that kill game out of their own territories, or even upon their own estates, without the king's license, expressed by the grant of a franchise, are guilty of the first original offence, of encroaching on the royal prerogative. And those indigent persons who do so, without having such rank or fortune as is generally called a qualification, are guilty not only of the original offence, but of the aggravations also, created by the statutes for preserving the game: which aggravations are so severely punished, and those punishments so implacably inflicted, that the offence against the king is seldom thought of, provided the miserable delinquent can make his peace with the lord of the manor. This offence, thus aggravated, I have ranked under the present head, because the only rational footing upon which we can consider it as a crime, is that in low and indigent persons it promotes idleness, and takes them away from their proper employments and callings; which is an offence against the public police and economy of the commonwealth.

The statutes for preserving the game are many and various, and not a little obscure and intricate; it being remarked, (j) that in one statute only, 5 Ann. c. 14, there is false grammar in no fewer than six places, besides other mistakes: the occasion of which, or what denomination of persons were probably the penners of these statutes, I shall not at present inquire. It is in general sufficient to observe, that the *qualifications* for killing game, as they are usually called, or more properly the *exemptions* from the penalties inflicted by the [\*175] statute law, are, 1. The having a freehold estate of 100*l.* \*per annum: there being fifty times the property required to enable a man to kill a partridge, as to vote for a knight of the shire: 2. A leasehold for ninety-nine

(i) See book II, page 417, &c.

(j) Burn's Justice, Game, § 2.

(18) The enactment of 18 Geo. II, c. 19, referred to in the text, was repealed by 8 and 4 Vic., c. 5, and the penalties under statute 9 Anne were repealed by 8 and 9 Vic., c. 109, s. 15. Section 18 of the same statute made all wagers and wagering contracts null and void, and prohibited suit to recover the stakes. That wagers in general were legal at the common law, see *Good v. Elliot*, 8 T. R., 693; *Bland v. Collett*, 4 Campb., 37; *Marryat v. Broderick*, 2 M. & W., 869. But if the subject matter of the wager is such as to make it inconsistent with public policy, either party may demand his stakes, and recover from the stakeholder if he refuse to pay back, even though the wager is determined (*Cotton v. Thurland*, 5 T. R., 405; *Lacause v. White*, 7 T. R., 535), unless the stakeholder has actually paid it over to the winner before notice not to do so. *Howson v. Hancock*, 8 T. R., 575; *Perkins v. Eaton*, 3 N. H., 152; *Livingston v. Wootan*, 1 N. & McC., 178. In the United States wagers are generally made illegal by statute.

years of 150*l. per annum*: 3. Being the son and heir-apparent of an esquire (a very loose and vague description), or person of superior degree: 4. Being the owner or keeper of a forest, park, chase or warren. For unqualified persons transgressing these laws, by killing game, keeping engines for that purpose, or even having game in their custody, or for persons (however qualified) that kill game or have it in possession, at unseasonable times of the year, or unseasonable hours of the day or night, on Sundays or on Christmas day, there are various penalties assigned, corporal and pecuniary, by different statutes; (*k*) on any of which, but only on one at a time, the justices may convict in a summary way, or (in most of them) prosecutions may be carried on at the assizes. And, lastly, by statute 28 Geo. II, c. 12, no persons, however qualified to *kill*, may make merchandise of this valuable privilege, by *selling* or exposing to sale any game, on pain of like forfeiture as if he had no qualification. (19)

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## CHAPTER XIV.

### OF HOMICIDE.

IN the ten preceding chapters we have considered, first, such crimes and misdemeanors as are more immediately injurious to God, and his holy religion; secondly, such as violate or transgress the law of nations; thirdly, such as more especially affect the king, the father and representative of his people; fourthly, such as more directly infringe the rights of the public or commonwealth, taken in its collective capacity; and are now, lastly, to take into consideration those which in a more peculiar manner affect and injure *individuals* or private subjects.

Were these injuries indeed confined to individuals only, and did they affect none but their immediate objects, they would fall absolutely under the notion of private wrongs; for which a satisfaction would be due only to the party injured; the manner of obtaining which was the subject of our inquiries in the preceding book. But the wrongs, which we are now to treat of, are of a much more extensive consequence: 1. Because it is impossible they can be committed without a violation of the laws of nature; of the moral as well as political rules of right: 2. Because they include in them almost always a breach of the public peace: 3. Because by their example and evil tendency they threaten and endanger the subversion of all civil society. Upon these accounts it is, \*that, besides the private satisfaction due and given in [\*177] many cases to the individual, by action for the private wrong, the government also calls upon the offender to submit to public punishment for the public crime. And the prosecution of these offences is always at the suit and in the name of the king, in whom, by the texture of our constitution, the *jus gladii*, or executory power of the law, entirely resides. Thus, too, in the old Gothic constitution, there was a three-fold punishment inflicted on all delinquents; first, for the private wrong to the party injured; secondly, for the offence against the king by disobedience to the laws; and, thirdly, for the

(*k*) Burn's Justice, tit. Game.

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(19) The changes made in the game laws by which the property qualifications are dispensed with, and the buying and selling of game are legalized under certain restrictions, are elsewhere referred to. See statute 1 and 2 Wm. IV, c. 32, and 2 and 3 Vic., c. 85. And as to taking game by night, statute 9 Geo. IV, c. 69; 7 and 8 Vic., c. 29, and 24 and 25 Vic., c. 96, s. 17. In this connection, the offense of buying and selling offices may properly be mentioned. The statutes concerning it are 5 and 6 Edw. VI, c. 16, and 49 Geo. III, c. 106, which make it a misdemeanor.

crime against the public by their evil example. (a) Of which we may trace the groundwork, in what Tacitus tells us of his Germans; (b) that whenever offenders were fined, "*pars mulctas regi, vel civitati, pars ipsi, qui vindicatur vel propinquis ejus, exsolvitur.*"

These crimes and misdemeanors against private subjects are principally of three kinds; against their *persons*, their *habitations*, and their *property*.

Of crimes injurious to the *persons* of private subjects, the most principal and important is the offence of taking away that life which is the immediate gift of the great Creator; and of which therefore no man can be entitled to deprive himself or another, but in some manner either expressly commanded in, or evidently deducible from those laws which the Creator has given us; the divine laws, I mean, of either nature or revelation. The subject therefore of the present chapter, will be the offence of *homicide*, or destroying the life of man, in its several stages of guilt, arising from the particular circumstances of mitigation or aggravation which attend it.

Now homicide, or the killing of any human creature, is of three kinds; *justifiable*, *excusable*, and *felonious*. The first has no share of guilt at all; the [\*178] second very little; but the \*third is the highest crime against the law of nature that man is capable of committing.

I. Justifiable homicide is of divers kinds.

1. Such as is owing to some unavoidable *necessity*, without any will, intention, or desire, and without any inadvertence or negligence in the party killing, and therefore without any shadow of blame. As, for instance, by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who hath forfeited his life by the laws and verdict of his country. This is an act of necessity, and even of civil duty; and therefore not only justifiable, but commendable, where the law requires it. But the law must *require* it, otherwise it is not justifiable: therefore, wantonly to kill the greatest of malefactors, a felon or a traitor, attainted or outlawed, deliberately, uncompelled, and extra-judicially, is murder. (c) For, as Bracton (d) very justly observes, "*istud homicidium, si fit ex livore, vel delectatione effundendi humanum sanguinem, licet juste occidatur iste, tamen occisor peccat mortaliter, propter intentionem corruptam.*" And farther, if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly, the judge is guilty of murder. (e) And upon this account, Sir Matthew Hale himself, though he accepted the place of a judge of the common pleas under Cromwell's government (since it is necessary to decide the disputes of civil property in the worst of times), yet declined to sit on the crown side at the assizes, and try prisoners; having very strong objections to the legality of the usurper's commission; (f) a distinction perhaps rather too refined; since the punishment of crimes is at least as necessary to society, as maintaining the boundaries of property. Also, such judgment, when legal, must be executed by the proper officer, or his appointed deputy; for no one else is *required* by law to do it, which requisition it is that justifies the homicide. If [\*179] another \*person doth it of his own head, it is held to be murder: (g) even though it be the judge himself. (h) It must farther be executed *servato juris ordine*; it must pursue the sentence of the court. If an officer beheads one who is adjudged to be hanged, or *vice versa*, it is murder: (i) for he is merely ministerial, and therefore only justified when he acts under the authority and compulsion of the law: but if a sheriff changes one kind of death for another, he then acts by his own authority, which extends not to the commission of homicide; and besides, this license might occasion a very gross abuse of his power. The king, indeed, may remit part of a sentence; as in the case of treason, all but the beheading; but this is no change, no introduc-

(a) Sternhook, l. 1, c. 5.

(b) De mor. Germ. c. 12.

(c) 1 Hal. P. C. 497.

(d) fol. 120.

(e) 1 Hawk. P. C. 70. 1 Hal. P. C. 497.

(f) Burnet in his life.

(g) 1 Hal. P. C. 501. 1 Hawk. P. C. 70.

(h) Dalt. Just. c. 150.

(i) Finch, l. 51. 3 Inst. 52. 1 Hal. P. C. 501.

tion of a new punishment; and in the case of felony, where the judgment is *to be hanged*, the king (it hath been said) cannot legally order even a peer to be beheaded. (*k*) But this doctrine will be more fully considered in a subsequent chapter.

Again, in some cases homicide is justifiable, rather by the *permission*, than by the absolute *command*, of the law, either for the *advancement*, of public *justice*, which without such indemnification would never be carried on with proper vigour; or, in such instances where it is committed for the *prevention* of some atrocious *crime*, which cannot otherwise be avoided.

2. Homicides committed for the *advancement* of public *justice*, are; 1. Where an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults and resists him. (*l*) 2. If an officer, or any private person, attempts to take a man charged with felony, and is resisted; and, in the endeavour to take him, kills him. (*m*) This is similar to the old Gothic constitutions, which (Stiernhook informs us) (*n*) "*furem, si aliter capi non posset, occidere permittunt.*" 3. In case of a riot, or rebellious assembly, the officers endeavouring to disperse the mob are justifiable in killing them, both at common law, (*o*) and by the riot act, 1 Geo. I. c. 5. 4. Where the prisoners in a gaol, or going to a gaol, assault the gaoler or officer, and he in his defence kills any of them, it is justifiable for the sake of preventing an escape. (*p*) 5. If trespassers in forests, parks, chases, or warrens, will not surrender themselves to the keepers, they may be slain; by virtue of the statute 21 Edw. I. st. 2, *de malefactoribus in parcis*, and 3 and 4 W. and M. c. 10. (1) But in all these cases, there must be an apparent necessity on the officer's side, viz.: that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, the deer-stealers could not but escape, unless such homicide were committed: otherwise, without such absolute necessity, it is not justifiable. (2)

(*l*) 3 Inst. 53, 312.

(*k*) 3 Inst. 53, 312.

(*i*) 1 Hal. P. C. 494.

1 Hawk. P. C. 71.

(*m*) 1 Hal. P. C. 494.

(*n*) *de jure Goth.* l. 3. c. 5.

(*o*) 1 Hal. P. C. 495.

1 Hawk. P. C. 161.

(*p*) 1 Hal. P. C. 496.

(1) These statutes are since repealed.

(2) "In all cases, whether civil or criminal, when persons having authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, they may repel force with force, and need not give back; and if the party making resistance is unavoidably killed in the struggle, this homicide is justifiable." 1 Russell on Crimes, p. 546. "But, generally, when one refuses to submit to arrest after he has been touched by the officer, or endeavors to break away after the arrest is effected, he may be lawfully killed, provided this extreme measure is necessary. And, in cases of felony, the killing is justifiable before an actual arrest is made, if in no other way the escaping felon can be taken." 2 Bishop Cr. L., 4th ed., § 660. See also 1 Bish. Cr. Pro., § 155, *et seq.* "If a person having actually committed a felony, will not suffer himself to be arrested, but stands on his own defense, or fly so that he cannot possibly be apprehended alive by those who pursue him, whether private persons or public officers, with or without a warrant from a magistrate, he may be lawfully slain by them." 1 Hawk. P. C., c. 28, § 11. If a felon flies, and refusing to stop, is killed by his pursuers, the homicide is justifiable: *Fost.*, 271; but in cases of misdemeanor or breaches of the peace, if the criminal flies and will not stop, killing him is not justifiable. Still, in such cases, if he is caught and resists the officer and will not suffer arrest, the latter may kill him, if necessary. *East P. C.*, ch. 5, § 70. If a person resisting arrest is killed, the homicide is justifiable. *State v. Anderson*, 1 Hill (S. C.), 327; *Clements v. State*, 50 Ala., 117; *Reg. v. Dadson*, 1 Eng. L. & Eq., 566; 14 Jur., 1051. To justify the killing, a felony must have been committed, the person killed must have notice of the intention to arrest, and must have refused to submit. *State v. Roane*, 2 Dev., 28.

If prisoners attempt to break jail and escape, and, in preventing it, the jailer kill one, the homicide is justifiable: 1 Hawk. P. C., c. 28, § 3; but it must appear to the jailer that the escape can in no other way be prevented. *East P. C.*, ch. 5, § 91. Under the Texas statute, an officer is not justified in killing a convict escaped from the penitentiary, in trying to recapture him. *Wright v. State*, 44 Tex., 645. Query, whether, apart from such statute, the killing would not in such case be justifiable under the authority of *Hawkins and Foster* cited above, if all offenses punished by imprisonment in the state prison are felonies.

The killing of those engaged in rioting or breaches of the peace is justifiable, if they refuse to desist on demand; this even by private persons, if in no other way the riot can

6. If the champions in a trial by battel killed either of them the other, such homicide was justifiable, and was imputed to the just judgment of God, who was thereby presumed to have decided in favour of the truth. (q) (3)

In the next place, such homicide as is committed for the *prevention* of any forcible and atrocious *crime*, is justifiable by the law of nature; (r) and also by the law of England, as it stood so early as the time of Bracton, (s) and as it is since declared in statute 24 Hen. VIII, c. 5. (4) If any person attempts a robbery or murder of another, or attempts to break open a house in the *night-time* (which extends also to an attempt to burn it), (t) and shall be killed in such attempt, the slayer shall be acquitted and discharged. This reaches not to any crime unaccompanied with force, as picking of pockets; or to the breaking open of any house in the *day-time*, unless it carries with it an attempt of robbery also. So the Jewish law, which punished no theft with death, makes homicide only justifiable in case of *nocturnal* house-breaking; if a thief [\*181] be found breaking up, and he be "smitten that he \*die, there shall no blood be shed for him: but if the sun be risen upon him, there shall blood be shed for him; for he should make full restitution." (u) At Athens, if any theft was committed by night, it was lawful to kill the criminal, if taken in the fact: (w) and by the Roman law of the twelve tables, a thief might be slain by night with impunity: or even by day, if he armed himself with any dangerous weapon: (x) which amounts very nearly to the same as is permitted by our own constitutions.

The Roman law also justifies homicide, when committed in defence of the chastity either of one's self or relations: (y) and so also, according to Selden, (z) stood the law in the Jewish republic. The English law likewise justifies a woman killing one who attempts to ravish her: (a) and so, too, the husband or father may justify killing a man who attempts a rape upon his wife or daughter: but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other. (b) And I make no doubt but the forcibly attempting a crime of a still more detestable nature may be equally resisted by the death of the unnatural aggressor. For the one uniform principle that runs through our own, and all other laws, seems to be this: that where a crime, in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting. But we must not carry this doctrine to the same visionary length that Mr. Locke does: who holds, (c) "that all manner of force without right upon a man's person, puts him in a state of war with the aggressor; and, of consequence, that being in

(q) 1 Hawk. P. C. 71.

(r) Puff. L. of N. l. 2, c. 5.

(s) fol. 155.

(t) 1 Hal. P. C. 698.

(u) Exod. xxii. 2.

(w) Potter, Antiq. b. 1, c. 24.

(x) Cic. pro Milone. 2. ff. 2, 2, 4.

(y) "Divus Hadrianus rescripsit eum, qui stuprum sibi vel suis inferentem occidit, dimittendum." (ff. 48, 8, 1.)

(z) De legib. Hebraeor. l. 4, c. 8.

(a) Bac. Elem. 34. 1 Hawk. P. C. 71.

(b) 1 Hal. P. C. 695, 696.

(c) Ess. on Gov. p. 2, c. 5.

be suppressed. 1 Hawk. P. C., ch. 28, § 14; Pond v. People, 8 Mich., 150; People v. Cole, 4 Park. Cr. R., 85.

(8) See note, p. 846, *post*.

(4) The law justifies the taking of life when it is necessary to prevent the perpetration of a felony. Pond v. People, 8 Mich., 150; Oliver v. State, 17 Ala., 587; State v. Harris, 1 Jones (N. C.), 190. There must be a reasonable belief in the slayer's mind that the necessity exists. Niles v. State, 26 Ala., 81, State v. Rutherford, 1 Hawks, 457; 3 C., 9 Am. Dec., 658. The doctrine is thus stated in Coke: "If thieves come to a man's house to rob him or murder, and the owner or his servants kill any of the thieves in defense of himself or his house, it is not felony." Semayne's Case, 5 Co., 91. In Connecticut, it is said that "the class of crimes in prevention of which a man may, if necessary, exercise his natural right to repel force by force, to the taking of the life of the aggressor, are felonies which are committed by violence or surprise: such as murder, robbery, burglary, arson, breaking a house in the daytime with intent to rob, sodomy and rape." State v. Moore, 31 Conn., 479. So, where a trespasser went upon another's land with intent and with the means to commit a felony, if necessary to accomplish his end, the owner of the property was held justified in meeting force with force, even to the killing of the trespasser. People v. Payne, 8 Cal., 841. See Gray v. Combs, 7 J. J. Marsh., 478; S. C., 28 Am. Dec., 481.



such a state of war, he may lawfully kill him that puts him under this unnatural restraint." However just this conclusion may be in a state of uncivilized nature, yet the law of England, like that of every other \*well-regulated community, is too tender of the public peace, too careful of [\*182] the lives of the subjects, to adopt so contentious a system; nor will suffer with impunity any crime to be *prevented* by death, unless the same, if committed, would also be *punished* by death.

In these instances of *justifiable* homicide, it may be observed, that the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation rather than blame. But that is not quite the case in *excusable* homicide, the very name whereof imports some fault, some error, or omission; so trivial, however, that the law excuses it from the guilt of felony, though, in strictness, it judges it deserving of some little degree of punishment.

II. Excusable homicide is of two sorts; either *per infortunium*, by misadventure; or *ex defendo*, upon a principle of self preservation. We will first see wherein these two species of homicide are distinct, and then wherein they agree.

1. Homicide *per infortunium* or *misadventure* is where a man, doing a lawful act, without any intention of hurt, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off, and kills a stander-by; or where a person, qualified to keep a gun, is shooting at a mark, and undesignedly kills a man: (*d*) for the act is lawful, and the effect is merely accidental. So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only misadventure; for the act of correction is lawful: but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases (according to the circumstances) murder: (*e*) for the act of immoderate correction is unlawful. \*Thus, by an edict of the [\*183] emperor Constantine, (*f*) when the rigour of the Roman law with regard to slaves began to relax and soften, a master was allowed to chastise his slave with rods and imprisonment, and if death accidentally ensued, he was guilty of no crime: but if he struck him with a club or a stone, and thereby occasioned his death; or if, in any other, yet grosser manner, "*immoderate suo jure utatur, tunc reus homicidii sit.*"

But to proceed. A tilt or tournament, the martial diversion of our ancestors, was, however, an unlawful act: and so are boxing and sword-playing, the succeeding amusement of their posterity: and, therefore, if a knight in the former case, or a gladiator in the latter, be killed, such killing is felony or manslaughter. But if the king command or permit such diversion, it is said to be only misadventure; for then the act is lawful. (*g*) In the like manner, as by the laws both of Athens and Rome, he who killed another in the *pancratium*, or public games authorized or permitted by the state, was not held to be guilty of homicide. (*h*) Likewise, to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he had done nothing unlawful: but manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness, of inevitably dangerous consequence. (*i*) And in general, if death ensues in consequence of an idle, dangerous, and unlawful sport, as shooting or casting stones in a town, or the barbarous diversion of cock-throwing, in these and similar cases the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts. (*k*) (*5*).

(*d*) 1 Hawk. P. C. 73, 74.

(*e*) 1 Hal. P. C. 473, 474.

(*f*) Cod. l. 9, t. 14.

(*g*) 1 Hal. P. C. 473. 1 Hawk. P. C. 74.

(*h*) Plato, de LL. lib. 7. Ff. 9, 2, 7.

(*i*) 1 Hawk. P. C. 73.

(*k*) Ibid. 74. 1 Hal. P. C. 473. Fost. 261.

(5) When one does a lawful act, not intending to do bodily harm to any one, and uses

2. Homicide in *self-defence*, or *se defendendo*, upon a sudden affray, is also excusable, rather than justifiable, by the English law. This species of self-defence must be distinguished from that just now mentioned, as calculated to [\*184] hinder the perpetration of a capital crime; which is not only a matter of excuse, but of justification. But the self-defence which we are now speaking of is that whereby a man may protect himself from an assault, or the like, in the course of a sudden broil or quarrel, by killing him who assaults him. And this is what the law expresses by the word *chance-medley*, or (as some rather choose to write it) *chaud-medley*, the former of which in its etymology signifies a *casual* affray, the latter an affray in the *heat* of blood or passion; both of them of pretty much the same import: but the former is in common speech too often erroneously applied to any manner of homicide by misadventure; whereas it appears by the statute 24 Hen. VIII, c. 5, and our ancient books, (l) that it is properly applied to such killing as happens in self-defence upon a sudden rencounter. (m) This right of natural defence does not imply a right of attacking; for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot, therefore, legally exercise this right of preventing defence, but in sudden and violent cases when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible (or, at least, probable) means of escaping from his assailant.

It is frequently difficult to distinguish this species of homicide (upon *chance-medley* in self-defence) from that of manslaughter, in the proper legal sense of the word. (n) But the true criterion between them seems to be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer has not

(l) Staundf. P. C. 16.

(m) 3 Inst. 55, 57. Foxt. 275, 276.

(n) 3 Inst. 55.

proper caution to prevent danger, if death ensue he is excusable. East P. C., ch. 5, § 86. So, if one is engaged in harmless diversion, like shooting at butts, or at a bird, and the arrow glances and death ensues, or if one lay poison for rats so as not to be mistaken easily for human food, and another partake of it and die; or if one driving and using due care runs over another and kills him; all these are cases of excusable homicide. Hawk. P. C., ch. 29. So, if death is caused in innocent sports, like foot ball, wrestling, and the like. Foxt., 259; Hawk. P. C., ch. 29; Whart. Cr. L., § 1012. But fighting is not innocent sport. East P. C., ch. 5, § 42. See *Pennsylvania v. Levin, Add. (1<sup>a</sup>), 279*. And if, for the purposes of boat racing, excessive fires are built, and a boat takes fire in consequence, and lives are lost, the persons accountable for the excessive fires are guilty of manslaughter. *People v. The Sheriff*, 1 Park. Cr. R., 659.

If death is produced by willful neglect to prevent mischief which should be provided against, or by an omission through gross carelessness to do something which the safety of others requires, or by negligently doing something proper to be done if due care be used, the homicide is not excusable. Therefore, where an ox known to be dangerous is not secured, and he kills a man, the owner is guilty of manslaughter. East P. C., ch. 5, § 36. So, where an omnibus driver raced with a carriage, and thereby a collision occurred in which a passenger was killed. *R. v. Timmins*, 7 C. & P., 499. And see *R. v. Murray*, 5 Cox, 509. So where a hack driver, who seeing the danger to which a little child was exposed of being run over by him, drove on at a moderate rate and killed the child. *Lee v. State*, 1 Coldw., 62. So where one shot a loaded gun into the street in the dark and killed a man, though the killing was unintentional. *People v. Fuller*, 2 Park. Cr. R., 16. See *Sparks v. Commonwealth*, 3 Bush, 111; *State v. Vance*, 17 Iowa, 138. So where one shot at a man in his yard at night, after hailing him and receiving no answer, though his purpose was only to frighten. *State v. Roane*, 2 Dev., 58. So where one pointed a pistol at a girl intending merely to frighten her, and the pistol went off accidentally. "Human life is not to be sported with by the use of firearms, even though the person using them may have good reason to believe that the weapon used is not loaded, or that being loaded it will do no injury. When persons engage in such reckless sport, they should be held liable for the consequences of their acts." *State v. Hardie*, 47 Iowa, 647.

Homicide resulting from negligence in a perfectly lawful calling is manslaughter. *Chrystal v. Commonwealth*, 9 Bush, 669. As where an engineer in charge of hoisting

begun the fight, or having begun, endeavours to decline any farther struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence. (o) For which reason the law requires that the person who kills another, in his own defence, \*should have retreated as far as he conveniently or safely can, to avoid [\*185] the violence of the assault, before he turns upon his assailant; and that not factitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice in time of war between two independent nations, to flee from an enemy; yet between two fellow-subjects the law countenances no such point of honour; because the king and his courts are the *vindices injuriarum*, and will give to the party wronged all the satisfaction he deserves. (p) In this the civil law also agrees with ours, or perhaps goes rather farther: "*qui cum aliter tueri se non possunt, damni culpam dederint, innoxii sunt.*" (q) The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him: (r) for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm: and then in his defence he may kill his assailant instantly. And this is the doctrine of universal justice, (s) as well as of the municipal law.

And as the *manner* of the defence, so is also the *time* to be considered: for if the person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge, and not defence. Neither, under the colour of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder: for if two persons, A and B, agree to fight a duel, and A gives the first onset, and B retreats as far as he safely can, and then kills A, this is murder; because of the previous malice and concerted design. (t) But if A upon a sudden quarrel assaults B first, and upon B's

(o) *Fost.* 377.

(p) 1 Hal. P. C. 481, 483.

(q) *Ff.* 2, 2, 45.

(r) 1 Hal. P. C. 483.

(s) *Fuff.* 1, 2, c. 5, § 13.

(t) 1 Hal. P. C. 479.

apparatus leaves it in charge of an incompetent person, and workmen are killed. *R. v. Fargeter*, 3 Cox, 191. Or, where a railroad switchman fails to move a switch when it is his duty to do so, and loss of life ensues in consequence. *State v. O'Brien*, 32 N. J., 169. Or, where workmen cast rubbish into a street without warning, whereby a passer-by is killed. *Fost.*, 362. See further, *R. v. Waters*, 6 C. & P., 328. If one assume the character of a physician, and through ignorance administer to his patient a medicine which he intends and expects will cure, but which causes death, he is not guilty of manslaughter. *Commonwealth v. Thompson*, 6 Mass., 187; *State v. Shultz*, 55 Iowa, 628; S. C., 39 Am. Rep., 187; *Rice v. State*, 8 Mo., 561. If, however, the party prescribing have so much knowledge of the fatal tendency of the prescription that it may be reasonably presumed that he administered the medicine from an obstinate, willful rashness, and not with an honest intention and expectation of effecting a cure, he is guilty of manslaughter at the least, though bodily harm may not have been intended. *Rice v. State*, 8 Mo., 561; *Fairlee v. People*, 11 Ill., 1; *State v. Shultz*, 55 Iowa, 628; S. C., 39 Am. Rep., 187. In England, the rule seems to be that a person who holds himself out as a practitioner of medicine is guilty of manslaughter in case his patient dies through his gross ignorance and unskillfulness. *R. v. Spiller*, 5 C. & P., 338; *R. v. Long*, 4 C. & P., 398. And see *State v. Hardister*, 38 Ark., 605; S. C., 42 Am. Rep., 5.

Homicide by practical joke is manslaughter. As where a fire was kindled around a drunken man to frighten him, but he rolled into it and was killed. *Errington's Case*, 2 Lewin C. C., 217. See *Fenton's Case*, *Ibid.*, 179; *Martin's Case*, 3 C. & P., 211. And where the bolt of a partly loaded cart was pulled out and the cartman was thrown out and killed in consequence. *R. v. Sullivan*, 7 C. & P., 641.

Involuntary manslaughter must be charged as such. *Com. v. Gable*, 7 S. & R., 428; *Walters v. Commonwealth*, 44 Penn. St., 135; *Bruner v. State*, 58 Ind., 159. *Contra*: *Isham v. State*, 38 Ala., 213. If the killing was from negligence, it is not necessary to allege or prove a criminal intent. *State v. Smith*, 65 Me., 257; *State v. O'Brien*, 32 N. J., 169. That homicide in performance of an act unlawful, though not felonious, is not excusable, see *Reg. v. Packard*, 1 Car. & M., 236.

On the subject of homicide in self-defence and of the necessity of endeavor to avoid so serious a consequence, see note 1, book 3, page 3. Also, see *State v. Wells*, Cox, 424; S. C., 1 Am. Dec., 211; *Grainger v. State*, 5 Yerg., 459; S. C., 26 Am. Dec., 278.

returning the assault A really and *bona fide* flees; and, being driven to the wall, turns again upon B and kills him; this may be *se defendendo* according [\*186] to some of our writers; (u) \*though others (w) have thought this opinion too favourable: inasmuch as the necessity, to which he is at last reduced, originally arose from his own fault. Under this excuse of self-defence, the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself. (x)

There is one species of homicide *se defendendo*, where the party slain is equally innocent as he who occasions his death: and yet this homicide is also excusable from the great universal principle of self-preservation, which prompts every man to save his own life preferable to that of another, where one of them must inevitably perish. As, among others, in that case mentioned, by Lord Bacon, (y) where two persons, being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned. He who thus preserves his own life at the expense of another man's is excusable through unavoidable necessity, and the principle of self-defence: since their both remaining on the same weak plank is a mutual, though innocent, attempt upon, and an endangering of each other's life.

Let us next take a view of those circumstances wherein these two species of homicide, by misadventure and self-defence, agree; and those are in their blame and punishment. For the law sets so high a value upon the life of a man, that it always intends some misbehaviour in the person who takes it away, unless by the command or express permission of the law. In the case of misadventure, it presumes negligence, or at least a want of sufficient caution in him who was so unfortunate as to commit it; who therefore is not altogether faultless. (z) [\*187] And as to the necessity which excuses a man who \*kills another *se defendendo*, Lord Bacon (a) entitles it *necessitas culpabilis*, and thereby distinguishes it from the former necessity of killing a thief or a malefactor. For the law intends that the quarrel or assault arose from some unknown wrong, or some provocation, either in word or deed: and since in quarrels both parties may be, and usually are, in some fault; and it scarce can be tried who was originally in the wrong; the law will not hold the survivor entirely guiltless. But it is clear in the other case, that where I kill a thief that breaks into my house, the original default can never be upon my side. The law besides may have a farther view, to make the crime of homicide more odious, and to caution men how they venture to kill another upon their own private judgment; by ordaining, that he who slays his neighbour without an express warrant from the law so to do, shall in no case be absolutely free from guilt.

Nor is the law of England singular in this respect. Even the slaughter of enemies required a solemn purgation among the Jews; which implies that the death of a man, however it happens, will leave some stain behind it. And the Mosaical law (b) appointed certain cities of refuge for him "who killed his neighbour unawares: as when a man goeth into the wood with his neighbour to hew wood, and his hand fetcheth a stroke with the axe to cut down the tree, and the head slippeth from the helve, and lighteth upon his neighbour that he die, he shall flee unto one of those cities and live." But it seems he was not held wholly blameless, any more than in the English law; since the avenger of blood might slay him before he reached his asylum, or if he afterwards stirred out of it till the death of the high priest. In the imperial law likewise (c) casual homicide was excused, by the indulgence of the emperor signed with his own sign-manual, "*annotationes principis*:" otherwise the death of a

(u) 1 Hal. P. C. 482.

(w) 1 Hawk. P. C. 75.

(z) 1 Hal. P. C. 84.

(y) Elem. c. 5. See also 1 Hawk. P. C. 72.

(x) 1 Hawk. P. C. 72.

(a) Elem. c. 5.

(b) Numb. c. 35, and Deut. c. 19.

(c) Cod. 9, 14, 5.

man, however committed, was in some degree punishable. Among the Greeks (*d*) homicide by misfortune was expiated by voluntary \*banishment for a year. (*e*) In Saxony a fine is paid to the kindred of the slain; [\*188] which also, among the Western Goths, was little inferior to that of voluntary homicide: (*f*) and in France (*g*) no person is ever absolved in cases of this nature, without a largess to the poor, and the charge of certain masses for the soul of the party killed.

The penalty inflicted by our laws is said by Sir Edward Coke to have been anciently no less than death; (*h*) which, however, is with reason denied by later and more accurate writers. (*i*) It seems rather to have consisted in a forfeiture, some say of all the goods and chattels, others of only part of them, by way of fine or *weregild*: (*k*) which was probably disposed of, as in France, *in pios usus*, according to the humane superstition of the times, for the benefit of his soul who was thus suddenly sent to his account, with all his imperfections on his head. But that reason having long ceased, and the penalty, especially if a total forfeiture, growing more severe than was intended, in proportion as personal property has become more considerable, the delinquent has now, and has had as early as our records will reach, (*l*) a pardon and writ of restitution of his goods as a matter of course and right, only paying for suing out the same. (*m*) (*n*) And, indeed, to prevent this expense, in cases where the death has notoriously happened by misadventure or in self-defence, the judges will usually permit, if not direct, a general verdict of acquittal. (*n*)

III. Felonious homicide is an act of a very different nature from the former, being the killing of a human creature, of any age or sex, without justification or excuse. This may be done either by killing one's self, or another man.

\*Self-murder, the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they [\*189] had not the fortitude to endure, though the attempting it seems to be countenanced by the civil law, (*o*) yet was punished by the Athenian law with cutting off the hand, which committed the desperate deed. (*p*) And also the law of England wisely and religiously considers, that no man hath a power to destroy life, but by commission from God, the author of it: and as the suicide is guilty of a double offence: one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on one's self. And this admits of accessories before the fact, as well as other felonies; for if one persuades another to kill himself, and he does so, the adviser is guilty of murder. (*q*) A *felo de se* therefore is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death: as if attempting to kill another, he runs upon his antagonist's sword: or, shooting at another, the gun bursts and kills himself. (*r*) (?) The

(*d*) Plato *de Leg. lib. 9.*

(*e*) To this expiation by banishment the spirit of Patroclus in Homer may be thought to allude, when he reminds Achilles, in the twenty-third Iliad, that when a child he was obliged to flee his country for casually killing his playfellow; "*νηπιός οὐχ ἐβέλεα*."

(*f*) *Stiernh. de jure Goth. l. 3. c. 4.*

(*g*) 1 Hal. P. C. 425. 1 Hawk. P. C. 75. Post. 282, &c.

(*h*) 2 Hawk. P. C. 381.

(*i*) "*Si quis impatientia doloris, aut tadio vite, aut morbo, aut furoris, aut pudore, morti maluit, non animadvertatur in eum.*" *Jf.* 42, 16, 6.

(*j*) Pot. Antiq. b. 1, c. 26.

(*k*) Kellw. 136.

(*l*) 1 Hawk. P. C. 68. 1 Hal. P. C. 413.

(*m*) 2 Inst. 148, 315.

(*n*) *Ibid.* 288.

(*o*) All forfeiture and punishment is now removed in such cases.

(*p*) If A discharge a gun at B, with intent to kill, and the gun burst and kill A, he is a *felo de se*. So, if A strike B, and hastily falling upon him wound himself with a knife in B's hand, unless B purposely hold the knife so as to kill A. 1 Hawk. P. C., ch. 27, § 4, 5. He who kills another at his desire or command is, in judgment of law, as much a murderer as if he had done it merely of his own head, and the person killed is not looked upon as a

party must be of years of discretion, and in his senses, else it is no crime. But this excuse ought not to be strained to that length to which our coroners' juries are apt to carry it, viz.: that the very act of suicide is an evidence of insanity; as if every man, who acts contrary to reason, had no reason at all: for the same argument would prove every other criminal *non compos*, as well as the self-murderer. The law very rationally judges that every melancholy or hypochondriac fit does not deprive a man of the capacity of discerning right from wrong; which is necessary, as was observed in a former chapter, (s) to [\*190] form a legal excuse. And therefore if a real lunatic kills himself in a lucid interval, he is a *felo de se* as much as another man. (t)

But now the question follows, what punishment can human laws inflict on one who has withdrawn himself from their reach? They can only act upon what he has left behind him, his reputation and fortune: on the former, by an ignominious burial in the highway, with a stake driven through his body; (8) on the latter, by a forfeiture of all his goods and chattels to the king: hoping that his care for either his own reputation, or the welfare of his family, would be some motive to restrain him from so desperate and wicked an act. And it is observable, that this forfeiture has relation to the time of the act done in the felon's lifetime, which was the cause of his death. As if husband and wife be possessed jointly of a term of years in land, and the husband drowns himself; the land shall be forfeited to the king, and the wife shall not have it by survivorship. For by the act of casting himself into the water he forfeits the term which gives a title to the king, prior to the wife's title by survivorship, which could not accrue till the instant of her husband's death. (u) And though it must be owned that the letter of the law herein borders a little upon severity, yet it is some alleviation that the power of mitigation is left in the breast of the sovereign, who upon this, as on all other occasions, is reminded by the oath of his office to execute judgment in mercy. (9)

The other species of criminal homicide is that of killing another man. But in this there are also degrees of guilt, which divide the offence into *manslaughter* and *murder*. The difference between which may be partly collected from what has been incidentally mentioned in the preceding articles, and principally consists in this, that manslaughter, when voluntary, arises from the sudden heat of the passions, murder from the wickedness of the heart.

[\*191] \*1. Manslaughter is therefore thus defined, (v) the unlawful killing of another without malice either express or implied; which may be either voluntarily, upon a sudden heat; or involuntarily, but in the commission

(s) See page 24.

(t) 1 Hal. P. C. 412.

(u) Finch, L. 216.

(v) 1 Hal. P. C. 406.

*felo de se*, inasmuch as his assent was merely void, as being against the laws of God and man. But where persons agree to die together and one of them, at the persuasion of the other, buys poison and both drink, and the buyer alone survives, the other is a *felo de se* 1 Hawk., ch. 27, § 6. *Contra*; R. v. Alison, 8 C. & P., 418, where the survivor is held guilty of murder as principal. Where one was present and encouraged another to commit suicide, he is a principal in murder. R. v. Tyson, R. & R., 523. If one procures another to commit suicide, but is absent when the act is done, he is an accessory before the fact, and is not punishable, since at common law an accessory could not be tried unless the principal could be: a thing manifestly impossible here. R. v. Russell, 1 Moo., 356; R. v. Leddington, 9 C. & P., 79. But where a prisoner counselled another in an adjoining cell to kill himself, the former was held guilty. Com. v. Bowen, 13 Mass., 356. It is suggested that this must have been on the ground that he was present at the death. Com. v. Dennis, 105 Mass., 162. This case holds an attempt to commit suicide not an indictable offence.

(8) Interment in the highway, with a stake driven through the body, is done away with by statute 4 Geo. IV, c. 53. And see stat. 45 and 46 Vic., c. 19.

(9) The offender forfeits all chattels, real and personal, held in his own right, all chattels real possessed jointly with his wife or in her right, all bonds or personal choses in action belonging to him, a moiety of such chattels as may be severed to which he is jointly entitled with another, but nothing held as executor or administrator. 1 Hawk. P. C., ch. 27, § 7, which see for further discussion of the point.

The offence of self-murder is not punishable in the United States.

of some unlawful act. These were called in the Gothic constitutions "*homicidia vulgaria; quæ aut casu, aut etiam sponte committuntur, sed in subitaneo quodam iracundiæ calore et impetu.*" (v) And hence it follows, that in manslaughter there can be no accessories before the fact; because it must be done without premeditation.

As to the first, or *voluntary* branch: if upon a sudden quarrel two persons fight, and one of them kills the other, this is manslaughter: and so it is, if they upon such an occasion go out and fight in a field; for this is one continued act of passion: (x) and the law pays that regards to human frailty, as not to put a hasty and a deliberate act upon the same footing with regard to guilt. So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself; yet neither is it murder, for there is no previous malice; but it is manslaughter. (y) But in this and every other case of homicide upon provocation, if there be a sufficient cooling-time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder. (z) (10) So if a man takes another in the act of adultery with his wife, and kills him directly upon the spot: though this was allowed by the laws of Solon, (a) as likewise by the Roman civil law (if the adulterer was found in the husband's own house), (b) and also among the ancient Goths; (c) yet in England it is not absolutely ranked in the class of justifiable homicide, as in case of a forcible rape, \*but it is [\*192] manslaughter. (d) (11). It is however the lowest degree of it; and therefore in such a case the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation. (e) Manslaughter, therefore, on a sudden provocation differs from excusable homicide *se defendendo* in this: that in one case there is an apparent necessity, for self-preservation, to kill the aggressor; in the other, no necessity at all, being only a sudden act of revenge.

The second branch, or *involuntary* manslaughter, differs also from homicide excusable by misadventure in this; that misadventure always happens in consequence of a lawful act, but, this species of manslaughter in consequence of an unlawful one. As, if two persons play at sword and buckler, unless by the king's command, and one of them kills the other: this is manslaughter, because the original act was unlawful; but it is not murder, for the one had no intent to do the other any personal mischief. (f) So where a person does an act, lawful in itself, but in an unlawful manner, and without due caution and circumspection: as when a workman flings down a stone or piece of timber into the street, and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done: if it were in a country village, where few passengers are, and he calls out to all people to have a care, it is misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning; (g) and murder, if he knows of their passing, and gives no warning at all, for then it is malice against all mankind. (h)

(v) Stiernh. *de jure Goth.* l. 3, c. 4.

(s) Foet. 295.

(d) 1 Hal. F. C. 486.

(a) Plutarch, *in vita Solon.*

(e) Sir. T. Raym., 212.

(x) 1 Hawk. P. C. 62.

(b) Ff. 48, § 94.

(f) 3 Inst. 56.

(y) Kelyng. 125.

(c) Stiernh. *de jure Goth.* l. 3, c. 2.

(g) Kel. 40.

(h) 3 Inst. 57.

(10) The question what is sufficient cooling time under all the circumstances of the case is one of fact for the jury, in which the nature of the aggravation is an important consideration. See *Rex v. Lynch*, 5 C. & P., 324; *Rex v. Hayward*, 6 C. & P., 157; *State v. Norris*, 1 Hayw., 429; S. C., 1 Am. Dec., 564; *Maher v. People*, 10 Mich., 212. But see as to this, 2 Bish. Cr. L., 7th ed., § 718; Whart. Cr. L., § 983.

(11) See *State v. Samuel*, 3 Jones (N. C.), 74; *State v. John*, 8 Ired., 330; Whart. Cr. L., § 983. As to the distinction between manslaughter and murder, see, in general, *Pennsylvania v. Bell*, Addison, 156; S. C., 1 Am. Dec., 298; *State v. Ferguson*, 2 Hill, 619; S. C., 27 Am. Dec., 412.

And, in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, (i) according to the nature of the act which occasioned it. If it be in prosecution of a felonious [\*193] \*intent, or, in its consequences, naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter. (j)

Next, as to the *punishment* of this degree of homicide: the crime of manslaughter amounts to felony, but within the benefit of clergy; and the offender shall be burnt in the hand, and forfeit all his goods and chattels.

But there is one species of manslaughter which is punished as murder, the benefit of clergy being taken away from it by statute; namely, the offence of mortally *stabbing* another, though done upon sudden provocation. For by statute 1 Jac. 1, c. 8, when one thrusts or stabs another, not then having a weapon drawn, or who hath not then first stricken the party stabbing, so that he dies thereof within six months after, the offender shall not have the benefit of clergy, though he did it not of malice aforethought. This statute was made on account of the frequent quarrels and stabbings with short daggers, between the Scotch and the English at the accession of James the First, (k) and being therefore of a temporary nature, ought to have expired with the mischief which it meant to remedy. For in point of solid and substantial justice, it cannot be said that the mode of killing, whether by stabbing, strangling, or shooting, can either extenuate or enhance the guilt; unless where, as in case of poisoning, it carries with it an internal evidence of cool and deliberate malice. But the benignity of the law hath construed the statute so favourably in behalf of the subject, and so strictly when against him, that the offence of stabbing now stands almost upon the same footing as it did at the common law. (l) Thus, not to repeat the cases before mentioned, of stabbing an adulteress, &c., which are barely manslaughter as at common law, in the construction of this statute it hath been doubted whether, if the deceased had struck at all before the mortal blow given, this does not take it out of the statute, though in the preceding quarrel the stabber had given the [\*194] first blow; and \*it seems to be the better opinion that this is not within the statute. (m) Also it hath been resolved, that the killing a man by throwing a hammer or other blunt weapon is not within the statute; and whether a shot with a pistol be so or not, is doubted. (n) But if the party slain had a cudgel in his hand, or had thrown a pot or a bottle, or discharged a pistol at the party stabbing, this is a sufficient having a weapon drawn on his side within the words of the statute. (o) (12)

2. We are next to consider the crime of deliberate and wilful *murder*; a crime at which human nature starts, and which is, I believe, punished almost universally throughout the world with death. The words of the Mosaical law (over and above the general precept to Noah, (p) that "whoso sheddeth man's blood, by man shall his blood be shed"), are very emphatical in prohibiting the pardon of murderers. (q) "Moreover ye shall take no satisfaction for the life of a murderer, who is guilty of death, but he shall surely be put to death; for the land cannot be cleansed of the blood that is shed therein but by the blood of him that shed it." And therefore our law has provided one course of pro-

(i) Our statute law has severely animadverted on one species of criminal negligence, whereby the death of a man is occasioned. For by statute 10 Geo. II. c. 81, if any waterman between Gravesend and Windsor receives into his boat or barge a greater number of persons than the act allows, and any passenger shall then be drowned, such waterman is guilty (not of manslaughter, but) of felony, and shall be transported as a felon.

(j) Foist. 258.

(k) Hawk. P. C. 84.

(l) Lord Raym. 140.

(m) Foist. 299, 300.

(n) Foist. 301.

(o) 1 Hawk. P. C. 77.

(p) 1 Hal. P. C. 470.

(q) 1 Hawk. P. C. 77.

(r) Gen. ix. 6.

(s) Numb. xxxv, 31.

(12) The statute 1 James I, c. 8, is repealed. The crime of attempt to murder is punishable under 24 and 25 Vic., c. 100. Murder and manslaughter are punishable under the same statute.



secution (that by appeal, of which hereafter), wherein the king himself is excluded the power of pardoning murder; so that, were the king of England so inclined he could not imitate that Polish monarch mentioned by Puffendorf: (r) who thought proper to remit the penalties of murder to all the nobility, in an edict, with this arrogant preamble, "*nos, divini juris rigorem moderantes,*" &c. But let us now consider the definition of this great offence.

The name of *murder* (as a crime) was anciently applied only to the secret killing of another; (s) (which the word *moërda* signifies in the Teutonic language); (t) and it was defined, "*homicidium quod nullo vidente, nullo sciente, clam perpetratur*:" (u) for which the vill wherein it was committed or (if that were too poor) the whole hundred was liable to a heavy \*amercement; [\*195] which amercement itself was also denominated *murdrum*. (w). This was an ancient usage among the Goths in Sweden and Denmark; who supposed the neighbourhood, unless they produced the murderer, to have perpetrated, or at least connived at the murder; (x) and according to Bracton, (y) was introduced into this kingdom by King Canute, to prevent his countrymen the Danes from being privily murdered by the English; and was afterwards continued by William the Conqueror, for the like security to his own Normans. (z) And therefore if upon inquisition had, it appeared that the person found slain was an Englishman (the presentment whereof was denominated *englescherie*), (a) the country seems to have been excused from this burthen. But, this difference being totally abolished by statute 14 Edw. III, st. 1, c. 4, we must now (as is observed by Staunford) (b) define murder in quite another manner, without regarding whether the party slain was killed openly or secretly, or whether he was of English or foreign extraction.

Murder is therefore now thus defined, or rather described, by Sir Edward Coke: (c) "when a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied." The best way of examining the nature of this crime will be by considering the several branches of this definition.

First, it must be committed by a *person of sound memory and discretion*; for lunatics or infants, as was formerly observed, are incapable of committing any crime: unless in such cases where they show a consciousness of doing wrong, and of course a discretion, or discernment, between good and evil.

Next it happens when a person of such sound discretion *unlawfully killeth*. The unlawfulness arises from the killing without \*warrant or excuse; [\*196] and there must also be an actual killing to constitute murder; for a bare assault, with intent to kill, is only a great misdemeanor, though formerly it was held to be murder. (d) The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome. And if a person be indicted for one species of killing, as by *poisoning*, he cannot be convicted by evidence of a totally different species of death, as by *shooting* with a pistol, or *starving*. But where they only differ in circumstances, as if a *wound* be alleged to be given with a sword, and it proves to have arisen from a staff, an ax, or a hatchet, this difference is immaterial. (e) (13)

(r) L. of N. l. 8, c. 2.

(s) *Dial. de Scacc.* l. 1, c. 10.

(t) *Sternh. de jure Sueon.* l. 3, c. 3. The word *murdrum* in our old statutes also signified any kind of concealment or stifling. So in the statute of Exeter, 14 Edw. I. "*je riens ne celerai, ne souffrai estre cele ne murdre*;" which is thus translated in *Fleta*. l. 1, c. 18, § 4. "*Nullam veritatem celabo, nec celari permittam nec murdrari*." And the words "*pur murdre le droit*," in the articles of that statute, are rendered in *Fleta*, *ibid.* § 8. "*pro jure alicujus murdrando*."

(u) *Glanv.* l. 14, c. 3.

(w) *Bract.* l. 3, tr. 2, c. 15, § 7. *Stat. Marl.* c. 26. *Forst.* 281.

(x) *Sternh.* l. 3, c. 4.

(y) l. 3, tr. 2, c. 15.

(z) 1 *Hal. P. C.* 447.

(a) *Bract. ubi supra.*

(b) *F. C.* l. 1, c. 10.

(c) 3 *Inst.* 47.

(d) 1 *Hal. P. C.* 436.

(e) 3 *Inst.* 135. 2 *Hal. P. C.* 185.

(13) The common-law rule in setting forth the instrument of death is, that where the instrument laid and that proved are of the same nature and character, there is no variance, but where they are of an opposite nature and character, the contrary. *Whart. Cr. L.* § 1059. Thus, evidence of a dagger will support the averment of a knife, but evidence of a knife will not support the averment of a pistol. If the indictment allege a death by one kind of poison, proof of a death by another kind of poison will support the indictment. *Id.*

Of all species of deaths, the most detestable is that of poison; because it can of all others be the least prevented either by manhood or forethought. (f) And therefore by the statute 22 Hen. VIII, c. 9, it was made treason, and a more grievous and lingering kind of death was inflicted on it than the common law allowed, namely, boiling to death: but this act did not live long, being repealed by 1 Edw. VI, c. 12. There was also by the ancient common law, one species of killing held to be murder, which may be dubious at this day; as there hath not been an instance wherein it has been held to be murder for many ages past: (g) I mean by bearing false witness against another, with an express premeditated design to take away his life, so as the innocent person be condemned and executed. (h) The Gothic laws punished, in this case, both the judge, the witnesses, and the prosecutor: "*peculiari poena judicem puniunt; peculiari testes, quorum fides judicem seduxit; peculiari denique et maxima auctorem, ut homicidam.*" (i) And, among the Romans, the *lex Cornelia de sicariis*, punished the false witness with death, as being guilty of a species of assassination. (k) And there is no doubt but this is equally murder in *foro* [\*197] *consentia* as killing with a sword; though the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the peril of their own lives) has not yet punished it as such. If a man, however, does such an act of which the probable consequence may be, and eventually is death; such killing may be murder, although no stroke be struck by himself, and no killing may be primarily intended: as was the case of the unnatural son who exposed his sick father to the air, against his will, by reason whereof he died; (l) of the harlot who laid her child under leaves in an orchard, where a kite struck it and killed it; (m) and of the parish officers, who shifted a child from parish to parish, till it died from want of care and sustenance. (n) (14) So, too, if a man hath a beast that is used to do mischief; and he knowing it, *suffers* it to go abroad, and it kills a man; even this is manslaughter in the owner: but if he had purposely *turned it loose*, though barely to frighten people, and make what is called sport, it is with us (as in the Jewish law) as much murder as if he had incited a bear or dog to worry them. (o) If a physician or surgeon gives his patient a potion or plaster

(f) 3 Inst. 48.

(g) Foat. 132. In the case of Macdaniel and Berry, reported by sir Michael Foster, though the then attorney general declined to argue this point of law, I have good grounds to believe it was not from any apprehension of his that the point was not maintainable, but from other prudential reasons. Nothing therefore should be concluded from the waiving of that prosecution.

(h) Mirror, c. 1, § 9. Brit. c. 52. Bract. l. 3, c. 4.

(i) Stiernh. *de jure Goth.* l. 3, c. 8.

(k) *Ff.* 48. 8. 1.

(l) 1 Hawk. P. C. 78.

(m) 1 Hal. P. C. 432.

(n) Palm. 545.

(o) *Ibid.* 481.

But where an indictment charged that the injury was inflicted with a hatchet or knife, evidence was admitted to show that death was caused by a pistol. *People v. Colt*, 8 Hill, 432. Where the averment was that a razor or knife was the instrument employed to cause death, evidence was admitted to show that a blunt instrument was used. *State v. Fox*, 1 Dutch., 566. But a conviction is erroneous, when the indictment charged striking and killing by blows, but the fact appeared that the deceased was knocked down and, in falling, struck some substance which caused death. *R. v. Kelly*, 1 Moo. C. C., 113; *R. v. Thompson*, 1 id., 189. An averment that death was caused by a blow of a hammer is supported by evidence of a blow from any hard instrument held in the hand. *R. v. Mertin*, 5 C. and P., 128. See *State v. Smith*, 83 Me., 369; *Miller v. State*, 25 Wis., 384, and Archbold's Cr. Pleading, 10th ed., 406, 407 for a collection of English cases on the point.

(14) Where an apprentice died who, coming back from the bridewell sick and in a filthy condition, was not allowed by his master to sleep in bed, but was made to lie on bare boards, and did not receive proper medical attention, the master was held guilty of murder if the jury found malice. *R. v. Self*, 1 East P. C., 226. So, where an old woman died from neglect in the house of one who was under obligation to care for her. *Reg. v. Marriott*, 8 C. & P., 425. The withholding by a master of sufficient food from an apprentice may be murder. *R. v. Squires*, 1 Russ. Cr., 20. If a mother willfully neglects to nourish her infant child so that it dies, she is guilty of murder. *R. v. Edwards*, 8 C. & P., 611; *R. v. Hughes*, 7 Cox, 801; but not if the child is of such age that it is the duty of the father to furnish food. *R. v. Saunders*, 7 C. & P., 277. If a prisoner dies from unreasonably harsh treatment by his jailer, the latter is guilty of murder. *R. v. Huggins*, Stra., 882. And see *Nun v. State*, 11 Humph., 159; *Reg. v. Plummer*, 1 C. & K., 600; *Roscoe Cr. Ev.*, 724.

to cure him, which contrary to expectation, kills him, this is neither murder nor manslaughter, but misadventure; and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or ignorance: (p) (15) but it hath been holden, that if it be not a *regular* physician or surgeon, who administers the medicine, or performs the operation, it is manslaughter at the least. (q) Yet, Sir Matthew Hale very justly questions the law of this determination. (r) (16) In order also to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered; in the computation of which, the whole day upon which the hurt was done shall be reckoned the first. (s)

Farther; the person killed must be "*a reasonable creature in being, and under the king's peace*," at the time of the \*killing. Therefore to kill [\*198] an alien, a Jew, or an outlaw, who were all under the king's peace and [198] protection, is as much murder as to kill the most regular-born Englishman; except he be an alien enemy in time of war. (t). To kill a child in its mother's womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them. (u) But, as there is one case where it is difficult to prove the child's being born alive, namely, in the case of the murder of bastard children by the unnatural mother, it is enacted by statute 21 Jac. I, c. 27, that if any woman be delivered of a child which if born alive should by law be a bastard; and endeavours privately to conceal its death, by burying the child or the like; the mother so offending shall suffer death as in the case of murder, unless she can prove, by one witness at least, that the child was actually born dead. This law, which savours pretty strongly of severity in making the concealment of the death almost conclusive evidence of the child's being murdered by the mother, is nevertheless to be also met with in the criminal codes of many other nations of Europe: as the Danes, the Swedes, and the French. (v) But I apprehend it has of late years been usual with us in England, upon trials for this offence, to require some sort of presumptive evidence that the child was born alive, before the other constrained presumption (that the child whose death is concealed was therefore killed by its parent) is admitted to convict the prisoner. (17)

Lastly, the killing must be committed *with malice aforethought*, to make it the crime of murder. This is the grand criterion which now distinguishes murder from other killing: and this malice prepense, *malitia præcogitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general: the dictate of a wicked, depraved, and malignant heart; (w) *un disposition a faire un male chose*; (x) and it may be either *express* or *implied* in law. Express \*malice is when one, with a sedate deliberate mind and formed design, doth kill another: which formed design is [\*199]

(p) *Mirr. c. 4, § 18.* See book III page 123. (q) *Britt. c. 5, 4 Inst. 251.*  
 (r) 1 *Hal. P. C. 430.* (s) 1 *Hawk. P. C. 79.* (t) 3 *Inst. 50.* 1 *Hal. P. C. 433.*  
 (u) 3 *Inst. 50.* 1 *Hawk. P. C. 80,* but see, 1 *Hal. P. C. 433.* (v) See *Barrington on the statutes, 435.*  
 p. 463. (w) *Foster, 256.* (x) 2 *Roll. Rep. 461.*

(15) A physician is liable to a civil action for damages for want of reasonable care and skill. *Hallam v. Means*, 82 Ill., 379; *Gramm v. Boener*, 56 Ind., 407; *Hyatt v. Adams*, 16 Mich., 180; *Hathorn v. Richmond*, 48 Vt., 557; *Riper v. Menifee*, 12 B. Mon., 465; *Leighton v. Sargent*, 11 *Fost.*, 119; *Simonds v. Henry*, 39 Me., 155 (case of a dentist).

(16) Whether one is a regular physician or not, he is bound to use competent skill, or the death of the patient may render him guilty of manslaughter. *R. v. Spiller*, 5 C. & P., 333. If a surgeon, regular or not, uses his best skill he is not liable for death. *R. v. Williamson*, 3 C. & P., 635; *R. v. VanButchell*, 3 C. & P., 629; *R. v. Long*, 4 C. & P., 398; *Com. v. Thompson*, 6 Mass., 134; *Rice v. State*, 8 Mo., 561. Otherwise if the fatal treatment was adopted through obstinate rashness. *Com. v. Thompson*, *ubi supra*. But if one undertakes to act as surgeon, where competent assistance is attainable, he is responsible for the consequences, if death ensue. *R. v. Webb*, 1 *Moo. & Rob.*, 405.

(17) Statute 21 James I, c. 27, is repealed. The present law on the subject of this paragraph is 24 and 25 Vic., c. 100.

evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm (y). This takes in the case of deliberate duelling, where both parties meet avowedly with an intent to murder: thinking it their duty as gentlemen, and claiming it as their right, to wanton with their own lives and those of their fellow creatures; without any warrant or authority from any power either divine or human, but in direct contradiction to the laws both of God and man; and therefore the law has justly fixed the crime and punishment of murder on them, and on their seconds also. (z) (18) Yet it requires such a degree of passive valour to combat the dread of even undeserved contempt, arising from the false notions of honour too generally received in Europe, that the strongest prohibitions and penalties of the law will never be entirely effectual to eradicate this unhappy custom; till a method be found out of compelling the original aggressor to make some other satisfaction to the affronted party, which the world shall esteem equally reputable, as that which is now given at the hazard of the life and fortune, as well of the person insulted, as of him who hath given the insult. (19) Also, if even upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice: that is, by an express evil design, the genuine sense of *malitia*. As, when a park-keeper tied a boy that was stealing wood, to a horse's tail, and dragged him along the park; when a master corrected his servant with an iron bar; and a schoolmaster stamped on his scholar's belly; so that each of the sufferers died: these were justly held to be murders, because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter. (a) (20)

[\*200] Neither shall he be guilty of a less crime, who kills another \*in consequence of such a wilful act as shows him to be an enemy to all mankind in general; as going deliberately, and with an intent to do mischief, (b) upon a horse used to strike, or coolly discharging a gun among a multitude of people. (c) So, if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice. And, if two or more come together to do an unlawful act against the king's peace, of which the probable consequence might be bloodshed, as to beat a man, to commit a riot, or to rob a park: and one of them kills a man; it is murder in them all, because of the unlawful act, the *malitia præcogitata*, or evil intended beforehand. (d) (21)

Also, in many cases where no malice is expressed, the law will imply it, as,

(y) 1 Hal. P. C. 451.

(z) 1 Hawk. P. C. 82.

(a) 1 Hal. P. C. 454, 473, 474.

(b) Lord Raym. 143.

(c) 1 Hawk. P. C. 74.

(d) *Ibid.* 84.

(18) On the subject of challenges and duels, see note p. 150, *ante*.

(19) See the case of *Commonwealth v. Webster*, 5 Cush., 295, for the meaning of "malice aforethought." Also *State v. Martin*, 2 Ired., 101; *Whiteford v. Commonwealth*, 6 Rand., 721; *Dale v. State*, 10 Yerg., 551; *Shoemaker v. State*, 12 Ohio, 43; *U. S. v. Ross*, 1 Gallia., 624. The words "premeditated design," it has been held, mean in legal effect the same as "malice aforethought." *McDaniel v. State*, 8 S. and M., 401. Whether it is legally with malice aforethought when one is killed upon the sudden impulse of passion without previous design, compare *Commonwealth v. Webster*, 5 Cush., 295, and *People v. Austin*, 1 Park. C. R., 154, with *Clark v. State*, 8 Humph., 671, and *Bivens v. State*, 6 Eng. (Ark.), 455, and the cases referred to in each.

(20) See *Bishop. Cr. L.*, 7th ed., §§ 663, 683; *Whart. Cr. L.*, 7th ed., §§ 969-990.

(21) "If the act from which death ensues be *malum in se*, it will be murder or manslaughter according to the circumstances; if done in prosecution of a felonious intent, but the death ensued against or beside the intent of the party, it will be murder; but on the other hand, if the intent went no further than to commit a bare trespass, it will be manslaughter. \* \* \* \* If a number of persons conspire to do an unlawful act, and they inflict death as a means of effecting the design, it is murder in all. If the unlawful act was a trespass, the murder to affect all must be done in the prosecution of the design. If the unlawful act be a felony, it will be murder in all, although the death happened collaterally or beside the principal design." *Wharton Cr. L.* §§ 997, 998; and see generally §§ 997-1001.

where a man wilfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved. (e) And if a man kills another suddenly, without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act, upon a slight or no apparent cause. No affront, by words or gestures only, is a sufficient provocation, so as to excuse or extenuate such acts of violence as manifestly endanger the life of another. (f) But if the person so provoked had unfortunately killed the other, by beating him in such a manner as showed only an intent to chastise and not to kill him, the law so far considers the provocation of contumelious behaviour as to adjudge it only manslaughter, and not murder. (g) In like manner, if one kills an officer of justice, either civil or criminal, in the execution of his duty, or any of his assistants, endeavouring to conserve the peace, or any private person endeavouring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes, the law will imply malice, and the killer shall be guilty of murder. (h) And if one intends to do another felony, \*and undesignedly kills a man, this is also murder. (i) Thus [\*201] if one shoots at A and misses him, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder. (j) So also if one gives a woman with child a medicine to procure abortion and it operates so violently as to kill the woman, this is murder in the person who gave it. (k) It were endless to go through all the cases of homicide which have been adjudged, either expressly or impliedly, malicious: these, therefore, may suffice as a specimen; and we may take it for a general rule, that all homicide is malicious, and, of course, amounts to murder, unless where justified by the command or permission of the law; excused on the account of accident or self-preservation; or alleviated into manslaughter, by being either the involuntary consequence of some act, not strictly lawful, or if voluntary, occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury; the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to take away or mitigate the guilt. For all homicide is presumed to be malicious, until the contrary appeareth upon evidence. (l) (22)

The punishment of murder and that of manslaughter, was formerly one and the same; both having the benefit of clergy; so that none but unlearned persons, who least knew the guilt of it, were put to death for this enormous crime. (m) But now by several statutes, (n) the benefit of clergy is taken

(e) 1 Hal. P. C. 455.

(f) 1 Hal. P. C. 457.

(g) 1 Hal. P. C. 455.

(h) 1 Hal. P. C. 455.

(i) 1 Hal. P. C. 455.

(j) 1 Hal. P. C. 455.

(k) 1 Hal. P. C. 455.

(l) 1 Hal. P. C. 455.

(m) 1 Hal. P. C. 455.

(n) 1 Hal. P. C. 455.

(f) 1 Hawk. P. C. 82. 1 Hal. P. C. 455, 456.

(g) 1 Hal. P. C. 455.

(h) 1 Hal. P. C. 455.

(i) 1 Hal. P. C. 455.

(j) 1 Hal. P. C. 455.

(k) 1 Hal. P. C. 455.

(l) 1 Hal. P. C. 455.

(m) 1 Hal. P. C. 455.

(n) 1 Hal. P. C. 455.

(g) Foxt. 291.

(h) Foxt. 291.

(i) Foxt. 291.

(j) Foxt. 291.

(k) Foxt. 291.

(l) Foxt. 291.

(m) Foxt. 291.

(n) Foxt. 291.

(22) As the majority of homicides are not, *in fact*, malicious, but occur through misadventure, or under circumstances which would reduce the offence to manslaughter, a legal presumption of malice seems inconsistent with the general doctrines of the criminal law, as well as with humanity. On this subject the reader is referred to the Review of the Trial of Prof. Webster, by Hon. Joel Parker, North American Review, No. 72, p. 178.

That malice is not a legal presumption, from the fact of homicide, but an inference to be drawn by the jury from the surrounding circumstances, see Wharton Cr. L., 7th ed. § 712; Bish., 6th ed., § 673; Farris v. Com., 14 Bush, 362; State v. Swayze, 30 La. Ann. II, 1323; Dukes v. State, 14 Fla., 499; Maher v. People, 10 Mich., 212; Stokes v. People, 53 N. Y., 164; State v. McDonnell, 32 Vt., 491; Clem v. State, 31 Ind., 480; Eiland v. State, 52 Ala., 323. In Com. v. Hawkins, 3 Gray, 463, it was held that the jury must infer malice, when the surrounding circumstances are known, limiting the application of the doctrine laid down in Com. v. Webster, 5 Cush., 295, and Com. v. York, 9 Met., 93. See also U. S. v. Armstrong, 2 Curt. C. C., 446; Erwin v. State, 29 Ohio St., 186.

away from murderers through malice prepense, their abettors, procurers, and counsellors. In atrocious cases, it was frequently usual for the court to direct the murderer, after execution, to be hung upon a gibbet in chains near the place \*where the fact was committed: but this was no part of the legal [\*202] judgment; and the like is still sometimes practised in the case of notorious thieves. This being quite contrary to the express command of the Mosaical law, (o) seems to have been borrowed from the civil law: which, besides the terror of the example, gives also another reason for this practice, viz.: that it is a comfortable sight to the relations and friends of the deceased. (p) But now in England, it is enacted by statute 25 Geo. II, c. 37, that the judge, before whom any person is found guilty of wilful murder, shall pronounce sentence immediately after conviction, unless he sees cause to postpone it; and shall, in passing sentence, direct him to be executed on the next day but one (unless the same shall be Sunday, and then on the Monday following), and that his body be delivered to the surgeons to be dissected and anatomized: (q) and that the judge may direct his body to be afterwards hung in chains, but in nowise to be buried without dissection. And, during the short but awful interval between sentence and execution, the prisoner shall be kept alone, and sustained with only bread and water. But a power is allowed to the judge, upon good and sufficient cause, to respite the execution, and relax the other restraints of this act. (23)

By the Roman law, *parricide*, or the murder of one's parents or children, was punished in a much severer manner than any other kind of homicide. After being scourged, the delinquents were sewed up in a leathern sack, with a live dog, a cock, a viper, and an ape, and so cast into the sea. (r) Solon, it is true, in his laws, made none against parricide; apprehending it impossible that any one should be guilty of so unnatural a barbarity. (s) And the Persians, according to Herodotus, entertained the same notion, when they adjudged all persons who killed their reputed parents to be bastards. And, upon some such reason [\*203] as this, we must account for the \*omission of an exemplary punishment for this crime in our English laws; which treat it no otherwise than as simple murder, unless the child was also the servant of his parent. (t)

For, though the breach of natural relation is observed, yet the breach of civil or ecclesiastical connexions, when coupled with murder, denominates it a new offence, no less than a species of treason, called *parva proditio*, or *petit treason*: which however is nothing else but an aggravated degree of murder; (u) although, on account of the violation of private allegiance, it is stigmatized as an inferior species of treason. (v) And thus, in the ancient Gothic constitution, we find the breach both of natural and civil relations ranked in the same class with crimes against the state and the sovereign. (w)

Petit treason, (24) according to the statute 25 Edward III, c. 2, may happen three ways, by a servant killing his master, a wife her husband, or an ecclesiastical person (either secular or regular) his superior, to whom he owes faith and obedience. A servant who kills his master, whom he has left, upon a grudge conceived against him during his service, is guilty of petit treason: for the traitorous intention was hatched while the relation subsisted between them;

(o) "The body of a malefactor shall not remain all night upon the tree, but thou shalt in any wise bury him that day, that the land be not defiled." Deut. xxi. 23.

(p) "*Famosos latrones, in his locis, ubi grassati sunt, furas agendos placuit: ut, et conspectu deterreantur alii, et solatio sit cognatis interemptorum eodem loco pena reddita, in quo latrones homicidia fecissent.*" FF. 48, 19, 23, § 15.

(q) Post. 107.

(r) FF. 41, 9, 2.

(s) Cic. pro. S. Roscio, § 25.

(t) 1 Hal. P. C. 380.

(u) Foster, 107, 294, 326.

(v) See page 78.

(w) "*Omniū gravissima censetur vis facta ab incolis in patriam, subditis in regem, liberis in parentes, maritis in uxores, (et vice versa), servis in dominos, aut etiam ab homine in semet ipsum.* Sicut de jure Goth. l. 3, c. 3.

(23) The act 25 Geo. II, c. 37, is repealed, and by 6 and 7 Wm. IV, c. 30, sentence of death in cases of murder was made the same as in other capital cases.

(24) Petit treason is unknown to the law of the United States, and was abolished in England by statute 9 Geo. IV, c. 31, § 2.

and this is only an execution of that intention. (x) So, if a wife be divorced *a mensa et thoro*, still the *vinculum matrimonii* subsists, and if she kills such divorced husband, she is a traitress. (y) And a clergyman is understood to owe canonical obedience to the bishop who ordained him, to him in whose diocese he is beneficed, and also to the metropolitan of such suffragan or diocesan bishop: and therefore to kill any of these is petit treason. (z) As to the rest, whatever has been said, or remains to be observed hereafter, with respect to wilful murder, is also applicable to the crime of petit treason, which is no other than murder in its most odious degree: except that the trial shall be [\*204] as in cases of high treason, before the improvements therein made by the statutes of William III. (a) But a person indicted of petit treason may be acquitted thereof, and found guilty of manslaughter or murder: (b) and in such case it should seem that two witnesses are not necessary, as in case of petit treason they are. Which crime is also distinguished from murder in its punishment.

The punishment of petit treason, in a man, is to be drawn and hanged, and in a woman to be drawn and burnt; (c) the idea of which latter punishment seems to have been handed down to us by the laws of the ancient Druids, which condemned a woman to be burnt for murdering her husband; (d) and it is now the usual punishment for all sorts of treason committed by those of the female sex. (e) (25) Persons guilty of petit treason were first debarred the benefit of clergy, by statute 12 Hen. VII, c. 7, which has been since extended to their aiders, abettors and counsellors, by statutes 23 Hen. VIII, c. 1, and 4 and 5 P. and M. c. 4.

## CHAPTER XV.

### OF OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.

HAVING in the preceding chapter considered the principal crime, or public wrong, that can be committed against a private subject, namely, by destroying his life; I proceed now to inquire into such other crimes and misdemeanors, as more peculiarly affect the security of his person, while living.

Of these some are felonies, and in their nature capital; others are simple misdemeanors, and punishable with a lighter animadversion. Of the felonies, the first is that of *mayhem*.

I. *Mayhem*, *mayhemium*, was in part considered in the preceding book, (a) as a civil injury; but it is also looked upon in a criminal light by the law, being an atrocious breach of the king's peace, and an offence tending to deprive him of the aid and assistance of his subjects. For mayhem is properly defined to be, as we may remember, the violently depriving another of the use of such of his members as may render him the less able in fighting, either to defend himself, or to annoy his adversary. (b) And therefore the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts the loss of which in all animals abates their courage, are held to be mayhems. But the cutting off his ear, [\*206] or nose, or the like, are not held to be mayhems at common law; because they do not weaken but only disfigure him.

(x) 1 Hawk. P. C. 89. 1 Hal. P. C. 380. (y) 1 Hal. P. C. 381. (z) *Ibid.* (a) Foster, 337.  
 (b) Foster, 106. 1 Hal. P. C. 378. 2 Hal. P. C. 184.  
 (c) 1 Hal. P. C. 382. 3 Inst. 311. (d) *Cæsar de bell. Gall.* l. 6, c. 19. (e) see page 83.  
 (a) See book III, p. 131. (b) Britt. l. 1, c. 25. 1 Hawk. P. C. 111.

(25) It was abolished by 30 Geo. III, c. 48. The punishment is now death by hanging-  
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By the ancient law of England he that maimed any man, whereby he lost any part of his body, was sentenced to lose the like part; *membrum pro membro*; (c) which is still the law in Sweden. (d) But this went afterwards out of use: partly because the law of retaliation, as was formerly shown, (e) is at best an inadequate rule of punishment; and partly because upon a repetition of the offence the punishment could not be repeated. So that, by the common law, as it for a long time stood, mayhem was only punishable with fine and imprisonment; (f) unless perhaps the offence of mayhem by castration, which all our old writers held to be felony: "*et sequitur aliquando poena capitalis, aliquando perpetuum exilium, cum omnium bonorum ademptione.*" (g) And this, although the mayhem was committed upon the highest provocation. (h)

But subsequent statutes have put the crime and punishment of mayhem more out of doubt. For first, by statute 5 Henry IV, c. 5, to remedy a mischief that then prevailed of beating, wounding, or robbing a man, and then cutting out his *tongue*, or putting out his *eyes*, to prevent him from being an evidence against them, this offence is declared to be felony, if done of malice prepense; that is, as Sir Edward Coke (i) explains it, voluntarily, and of set purpose, though done upon a sudden occasion. Next, in order of time, is the statute of 37 Hen. VIII, c. 6, which directs, that if a man shall maliciously and unlawfully cut off the *ear* of any of the \*king's subjects, he shall not only [\*207] forfeit treble damages to the party grieved, to be recovered by action of trespass at common law, as a civil satisfaction; but also 10*l*. by way of fine to the king, which was his criminal amercement. The last statute, but by far the most severe and effectual of all, is that of 22 and 23 Car. II, c. 1, called the Coventry Act; being occasioned by an assault on Sir John Coventry in the street, and slitting his nose, in revenge (as was supposed) for some obnoxious words uttered by him in parliament. By this statute it is enacted, that if any person shall, of malice aforethought and by lying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any other person, *with intent to maim or to disfigure him*; such person, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy. (k)

Thus much for the felony of mayhem; to which may be added the offence of wilfully and maliciously shooting at any person in any dwelling-house or other place; an offence, of which the probable consequence may be either killing or [\*208] maiming him. This, though no such evil consequence \*ensues, is made felony without benefit of clergy by statute 9 Geo. I, c. 22, and thereupon one Arnold was convicted in 1723 for shooting at Lord Onslow; but, being half a madman, was never executed, but confined in prison, where he died about thirty years after. (l)

(c) 3 Inst. 118. — *Mes, si la pleynte soit faite de femme qu'avera tolle a home ses membres, en tel case perdra le feme la une meyn par jugement, come le membre dont ele avera trespasse.* (Brit. c. 25.)

(d) Stiernhook de jure Sueon. l. 3, t. 8.

(e) See page 12.

(f) 1 Hawk. P. C. 112.

(g) Brac. fol. 144.

(h) Sir Edward Coke (3 Inst. 62) has transcribed a record of Henry the Third's time (*Claus. 12 Hen. III. m. 9*), by which a gentleman of Somersetshire and his wife appear to have been apprehended and committed to prison, being indicted for dealing thus with John, the monk, who was caught in adultery with the wife.

(i) 3 Inst. 62.

(k) On this statute Mr. Coke, a gentleman of Suffolk, and one Woodburn, a laborer, were indicted in 1722: Coke for hiring and abetting Woodburn, and Woodburn for the actual fact of slitting the nose of Mr. Crispe, Coke's brother-in-law. The case was somewhat singular. The murder of Crispe was intended, and he was left for dead, being terribly hacked and disfigured with a hedge-bill; but he recovered. Now the bare intent to murder is no felony; but to disfigure with an intent to disfigure, is made so by the statute; on which they were therefore indicted. And Coke, who was a disgrace to the profession of the law, had the effrontery to rest his defence upon this point, that the assault was not committed with an intent to disfigure, but with an intent to murder; and therefore not within the statute. But the court held, that if a man attacks another to murder him with such an instrument as a hedge-bill, which cannot but

(l) All the previous statutes, so far as they relate to offenses against the person, were repealed by 7 Wm. IV, and 1 Vic., c. 85. For the most recent revision of the law on this subject, see statute 24 and 25 Vic., c. 100. Penal servitude for life is now the extreme penalty. As to the proper mode of charging mayhem, see *Chick v. State*, 7 Humph., 161; *State v. Briley*, 8 Port. (Ala.), 472.



II. The second offence, more immediately affecting the personal security of individuals, relates to the female part of his majesty's subjects; being that of their *forcible abduction and marriage*; which is vulgarly called *stealing an heiress*. For by statute 3 Hen. VII, c. 2, it is enacted, that if any person shall for lucre take any woman, being maid, widow, or wife, and having substance either in goods or lands, or being heir apparent to her ancestors, contrary to her will; and afterwards she be married to such misdoer, or by his consent to another, or defiled; such person, his procurers and abettors, and such as knowingly receive such woman, shall be deemed principal felons; and by statute 39 Eliz. c. 9, the benefit of clergy is taken away from all such felons, who shall be principals, procurers, or accessories *before the fact*. (2)

In the construction of this statute it hath been determined: 1. That the indictment must allege that the taking was for lucre, for such are the words of the statute. (1) 2. In order to show this, it must appear that the woman has substance, either real or personal, or is an heir apparent. (m) 3. It must appear that she was taken away against her will. 4. It must also appear that she was afterwards married, or defiled. And though possibly the marriage or defilement might be by her subsequent consent being won thereunto by flatteries after the taking, yet this is felony, if the first taking were against her will: (n) and so *vice versa*, if the woman be originally taken away with her own consent, yet if she afterwards refuse to continue with the offender, and be forced against her will, she may from that time as properly \*be said to be taken against her will, as if she never had given any consent at all; [\* 209] for till the force was put upon her she was in her own power. (o) It is held that a woman thus taken away and married may be sworn and give evidence against the offender, though he is her husband *de facto*; contrary to the general rule of law; because he is no husband *de jure*, in case the actual marriage was also against her will. (p) In cases, indeed, where the actual marriage is good, by the consent of the inveigled woman obtained after her forcible abduction, Sir Matthew Hale seems to question how far her evidence should be allowed: but other authorities (q) seem to agree, that it should even then be admitted; esteeming it absurd, that the offender should thus take advantage of his own wrong, and that the very act of marriage, which is a principal ingredient of his crime, should (by a forced construction of law) be made use of to stop the mouth of the most material witness against him.

An inferior degree of the same kind of offence, but not attended with force, is punished by the statutes 4 and 5 P. and M. c. 8, which enacts, that if any person, above the age of fourteen, unlawfully shall convey or *take away any woman child unmarried* (which is held (r) to extend to bastards as well as to legitimate children), within the age of sixteen years, from the possession and against the will of the father, mother, guardians, or governors, he shall be imprisoned for two years, or fined at the discretion of the justices; and if he deflowers such maid or woman child, or without the consent of parents contracts matrimony with her, *he* shall be imprisoned five years, or fined at the discretion of the justices, and *she* shall forfeit all her lands to her next of kin, during the life of her said husband. So that as these stolen marriages, under the age of sixteen, were usually upon mercenary views, this act, besides punish-

endanger the disfiguring him; and in such attack happens not to kill, but only to disfigure him; he may be indicted on this statute; and it shall be left to the jury to determine whether it were not a design to murder by disfiguring, and consequently a malicious intent to disfigure as well as to murder. Accordingly the jury found them guilty of such previous intent to disfigure, in order to effect the principal intent to murder, and they were both condemned and executed. (State Trials, VI, 212.)

(1) 1 Hawk. P. C. 110.

(m) 1 Hawk. P. C. 110.

(r) Stra. 1162.

(n) 1 Hal. P. C. 660.

(p) 1 Hal. P. C. 661.

1 Hawk. P. C. 109.

(q) Cro. Car. 483.

(n) 1 Hal. P. C. 660.

3 Keb. 193. State Trials. V, 455.

(2) This offence is now punishable under statute 24 and 25 Vic., c. 100. The extreme penalty is fourteen years' penal servitude. The guilty party is made incapable, by the statute, of taking any estate or interest in the property of the woman married, but the property, on his conviction, is to be settled as the court of chancery may appoint.

ing the seducer, wisely removed the temptation. But this latter part of the act is now rendered \*almost useless, by provisions of a very different [\*210] kind, which make the marriage totally void, (s) in the statute 26 Geo. II, c. 33. (3)

III. A third offence, against the female part also of his majesty's subjects, but attended with greater aggravation than that of forcible marriage, is the crime of *rape, raptus mulierum*, or the carnal knowledge of a woman forcibly and against her will. This, by the Jewish law, (t) was punished with death, in case the damsel was betrothed to another man; and in case she was not betrothed, then a heavy fine of fifty shekels was to be paid to the damsel's father, and she was to be the wife of the ravisher all the days of his life; without that power of divorce, which was in general permitted by the Mosaic law.

The civil law (u) punishes the crime of ravishment with death and confiscation of goods: under which it includes both the offence of forcible abduction, or taking away a woman from her friends, of which we last spoke: and also the present offence of forcibly dishonouring them; either of which, without the other, is in that law sufficient to constitute a capital crime. Also the stealing away a woman from her parents or guardians, and debauching her, is equally penal by the emperor's edict, whether she consent or is forced: "*sive volentibus, sive nolentibus mulieribus, tale facinus fuerit perpetratum.*" And this, in order to take away from women every opportunity of offending in this way: whom the Roman law supposes never to go astray, without the seduction and arts of the other sex: and therefore, by restraining and making so highly penal the solicitations of the men, they meant to secure effectually the honour of the women. "*Si enim ipsi raptores metu, vel atrocitate pœnæ, ab hujusmodi facinore se temperaverint, nulli mulieri, sive volenti, sive nolenti, peccandi locus relinquetur; quia hoc ipsum velle mulierum, ab insidiis nequissimi hominis [\*211] qui meditatur rapinam, inducitur. \*Nisi etenim eam sollicitaverit, nisi, odiosis artibus circumvenerit, non faciet eam velle in tantum dedecus sese prodere.*" But our English law does not entertain quite such sublime ideas of the honour of either sex, as to lay the blame of a mutual fault upon one of the transgressors only: and therefore makes it a necessary ingredient in the crime of rape, that it must be against the woman's will.

Rape was punished by the Saxon laws, particularly those of King Athelstan, (w) with death: which was also agreeable to the old Gothic or Scandinavian constitution. (x) But this was afterwards thought too hard: and in its stead another severe but not capital punishment was inflicted by William the Conqueror; viz., castration and loss of eyes; (y) which continued until after Bracton wrote, in the reign of Henry the Third. But, in order to prevent malicious accusations, it was then the law (and, it seems, still continues to be so in appeals of rape), (z) that the woman should immediately after, *dum recens fuerit maleficium*, go to the next town, and there make discovery to some credible persons of the injury she has suffered; and afterwards should acquaint the high constable of the hundred, the coroners, and the sheriff with the outrage. (a) This seems to correspond in some degree with the laws of Scotland and Arragon, (q) which require that complaint must be made within twenty-four hours: though afterwards, by statute Westm. 1, c. 13, the time of limitation in England was extended to forty days. At present there is no time of limitation fixed: for as it is usually now punished by indictment at the suit of the king, the maxim of law takes place, that *nullum tempus occurrit regi*; but the jury will rarely give credit to a stale complaint. During the

(s) See book I, page 437, &c.

(w) Bracton, l. 3, c. 28.

(x) 1 Hal. P. C. 332.

(t) Dent. xxii, 25.

(u) Stiernh. de jure Sueon. l. 2, c. 2.

(a) Glan. l. 14, c. 6. Bract. l. 3, c. 23.

(v) Cod. 9, tit. 12.

(y) LL. Gul. Cong. c. 19.

(z) Barrington, 162.

(3) The act 4 and 5 P. and M., c. 8, is repealed, and the subject of this paragraph is covered by 24 and 25 Vic., c. 100. See Roscoe Cr. Ev., 6th ed., 244.

former period also it was held for law, (c) that the woman (by consent of the judge and her parents) might redeem the offender from the execution of his sentence, by accepting him for her husband; if he also was willing to agree to the exchange, but not otherwise.

\*In the 8 Edw. I, by the statute Westm. 1, c. 13, the punishment of rape was much mitigated; the offence itself of ravishing a damsel [\*212] within age (that is, *twelve* years old), either with her consent or without, or of any other woman against her will, being reduced to a trespass, if not prosecuted by appeal within forty days, and subjecting the offender only to two years' imprisonment, and a fine at the king's will. But this lenity being productive of the most terrible consequences, it was in ten years afterwards, 13 Edw. 1, found necessary to make the offence of forcible rape felony by statute Westm. 2, c. 34. And by statute 18 Eliz. c. 7, it is made felony without benefit of clergy; as is also the abominable wickedness of carnally knowing and abusing any woman child under the age of ten years: in which case the consent or non-consent is immaterial, as by reason of her tender years she is incapable of judgment and discretion. Sir Matthew Hale is indeed of opinion that such profligate actions committed on an infant under the age of *twelve* years, the age of female discretion by the common law, either with or without consent, amount to rape and felony: as well since as before the statute of Queen Elizabeth; (d) but that law has in general been held only to extend to infants under *ten*: though it should seem that damsels between *ten* and *twelve* are still under the protection of the statute Westm. 1, the law with respect to their seduction not having been altered by either of the subsequent statutes. (4)

A male infant, under the age of fourteen years, is presumed by law incapable to commit a rape, and therefore it seems cannot be found guilty of it. For though in other felonies *malitia supplet aetatem*, as has in some cases been shown; yet, as to this particular species of felony, the law supposes an imbecility of body as well as mind. (e) (5)

The civil law seems to suppose a prostitute or common harlot incapable of any injuries of this kind: (f) not allowing \*any punishment for violating the chastity of her who hath indeed no chastity at all, or at least [\*213] hath no regard to it. But the law of England does not judge so hardly of offenders, as to cut off all opportunity of retreat even from common strumpets, and to treat them as never capable of amendment. It therefore holds it to be felony to force even a concubine or harlot; because the woman may have forsaken that unlawful course of life: (g) for, as Bracton well observes, (h) "*licet meretrix fuerit antea, certe tunc temporis non fuit, cum reclamando nequitiae ejus consentire noluit.*" (6)

As to the material facts requisite to be given in evidence and proved upon an indictment of rape, they are of such a nature, that though necessary to be known and settled, for the conviction of the guilty and preservation of the innocent, and therefore to be found in such criminal treatises as discourse of these matters in detail, yet they are highly improper to be publicly discussed, except

(c) Glanv. l. 14, c. 6. Bract. l. 2, c. 28.

(d) 1 Hal. P. C. 651.

(e) *Ibid.*

(f) Cod. 9, 2, 22. ff. 47, 2, 22.

(g) 1 Hal. P. C. 620. 1 Hawk. P. C. 106.

(h) fol. 147.

(4) The punishment for rape, and also for carnal knowledge of a female child under ten years of age, was reduced to transportation for life, by statute 4 and 5 Vic., c. 56, and now to penal servitude or imprisonment. Statute 24 and 25 Vic., c. 100.

(5) But a boy under the age of puberty, or a woman, or a husband in respect to his own wife, may become guilty as principal in the second degree of this offense of rape. In *Commonwealth v. Green*, 2 Pick., 380, it was held that a boy under fourteen might be guilty of an assault with intent to commit rape. And see *Williams v. State*, 14 Ohio, 222. But the decisions generally are the other way. See 1 Bish. Cr. L., 7th ed., § 746.

(6) And whether she has forsaken it or not, she is entitled to the protection of the law. See *Wright v. State*, 4 Humph., 194; *Pleasant v. State*, 15 Ark., 624. But her character may have an important bearing on the credibility of her accusation.

only in a court of justice. I shall, therefore, merely add upon this head a few remarks from Sir Matthew Hale: with regard to the competency and credibility of witnesses; which may, *salvo pudore*, be considered.

And, first, the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance: if the witness be of good fame; if she presently discovered the offence, and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances which give greater probability to her evidence. But on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to be committed was where it was possible she might have been [214] heard, and she made no outcry; these and the \*like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned. (7).

Moreover, if the rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness, if she hath sense and understanding to know the nature and obligations of an oath; or even to be sensible of the wickedness of telling a deliberate lie. Nay, though she hath not, it is thought by Sir Matthew Hale (i) that she ought to be heard without oath, to give the court information; and others have held, that what the child told her mother, or other relations, may be given in evidence, since the nature of the case admits frequently of no better proof. But it is now settled [Brazier's case, before the twelve judges, P. 19 Geo. III], that no hearsay evidence can be given of the declaration of a child who hath not capacity to be sworn, nor can such child be examined in court without oath: and that there is no determinate age at which the oath of a child ought either to be admitted or rejected. Yet, where the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion. There may be therefore, in many cases of this nature, witnesses who are competent, that is, who may be admitted to be heard; and yet, after being heard, may prove not to be credible, or such as the jury is bound to believe. For one excellence of the trial by jury is, that the jury are triers of the credit of the witnesses, as well as of the truth of the fact.

[215] \* "It is true," says this learned judge, (j) "that rape is a most detestable crime, and therefore ought severely and impartially to be pun-

(i) 1 Hal. P. C. 684.

(j) 1 Hal. P. C. 685.

(7) The complaint made by the person alleged to have been ravished, immediately after the occurrence, cannot be put in as independent evidence, to show who were the persons who committed the offense, even though she be since deceased. *Reg. v. Megson*, 9 C. & P., 420; and see *People v. McGee*, 1 Denio, 19.

The general doctrine in the United States is, that the details of the complaint are not admissible in evidence to corroborate the complaining witness, although the fact of complaint is. But in Ohio, Connecticut and Tennessee a different doctrine seems to be held, and the details are admitted. For a discussion and full collection of cases on the point, see note to *Mallet v. People*, in 3 Amer. Crim. Rep. See, also, *Roscoe Cr. Ev.*, p. 26. There is no legal presumption against the truth of a charge from long silence on the part of the complainant. The delay is simply a matter for the jury to consider. *State v. Peter*, 8 Jones, 19.

It has been held that rape is not committed where the woman's consent is obtained by fraud, she at the time supposing the man to be her husband. *Rex v. Jackson*, Russ. & Ry., 487; *Reg. v. Saunders*, 8 C. & P., 265; *Reg. v. Williams*, *id.*, 286; *State v. Murphy*, 6 Ala., 765; *Wyatt v. State*, 2 Swan, 304. But this has been doubted. *People v. Metcalf*, 1 Wheel. C. C., 378 and note, 381; *State v. Shepard*, 7 Conn., 54. Carnal knowledge of the person of a woman, unaccompanied with any circumstance of force or fraud, is not rape, though the woman may have been at the time mentally incompetent to give consent. *Crosswell v. People*, 13 Mich., 427.

ished with death; but it must be remembered that it is an accusation easy to make, hard to be proved, but harder to be defended by the party accused, though innocent." He then relates two very extraordinary cases of malicious prosecution for this crime, that had happened within his own observation; and concludes thus: "I mention these instances, that we may be the more cautious upon trials of offences of this nature, wherein the court and jury may with so much ease be imposed upon, without great care and vigilance; the heinousness of the offence many times transporting the judge and jury with so much indignation that they are over-hastily carried to the conviction of the person accused thereof, by the confident testimony sometimes of false and malicious witnesses." (8)

IV. What has been here observed, especially with regard to the manner of proof, which ought to be more clear in proportion as the crime is the more detestable, may be applied to another offence, of a still deeper malignity; the infamous *crime against nature*, committed either with man or beast. A crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out: for, if false, it deserves a punishment inferior only to that of the crime itself.

I will not act so disagreeable a part, to my readers as well as myself, as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature. It will be more eligible to imitate in this respect the delicacy of our English law, which treats it, in its very indictments, as a crime not fit to be named: "*peccatum illud horribile, inter christianos non nominandum.*"

(k) A taciturnity observed likewise by the edict of Constantius and Constans: (l) "*ubi scelus est id, quod non prodest scire, jubemus insurgere leges, armari jura gladio ultore, ut exquisitis poenis subdantur infames qui sunt, vel qui futuri sunt rei.*" Which leads me to add a word concerning its punishment.

This the voice of nature and of reason, and the express law of God, (m) determined to be capital. Of which we have a signal instance long before the Jewish dispensation, by the destruction of two cities by fire from heaven; so that this is an universal, not merely a provincial precept. And our ancient law in some degree imitated this punishment, by commanding such miscreants to be burnt to death; (n) though Fleta (o) says they should be buried alive; either of which punishments was indifferently used for this crime among the ancient Goths. (p) But now the general punishment of all felonies is the same, namely, by hanging; and this offence (being in the times of popery only subject to ecclesiastical censures) was made felony without benefit of clergy by statute 25 Hen. VIII. c. 6, revived and confirmed by 5 Eliz. c. 17. And the rule of law herein is that if both are arrived at years of discretion, *agentes et consentientes pari poena plectantur.* (q) (9)

These are all the felonious offences more immediately against the personal security of the subject. The inferior offences or misdemeanors, that fall under this head, are *assaults, batteries, wounding, false imprisonment, and kidnapping.* (10)

(8) See in *Rot. Parl.* 50 Edw. III. n. 58, a complaint, that a Lombard did commit the sin, "that was not to be named." 15 Rep. 87.

(9) *Cod.* 9. 9. 81.

(10) *Levit.* xx, 15.

(n) *Britt.* c. 2.

(o) l. 1, c. 37.

(p) *Stiernh. de jure Goth.* l. 2, c. 2.

(q) 3 Inst. 59.

(9) By statute 88 and 89 Vic., c. 94, carnal abuse of a female child under the age of twelve years is punishable by penal servitude for life or not less than thirteen years, and if the female be over twelve, but under thirteen, the act is a misdemeanor, even though the female consents.

(10) As to this offense, see statute 24 and 25 Vic., c. 100, § 61, which makes it punishable by penal servitude for life, or for any term not less than ten years. And see 2 Blash. Cr. L., 7th ed., ch. 43; *Roa. Cr. Ev.*, 871; 1 *Russ. on Cr.*, 698.

(10) See, as to these offenses, statute 24 and 25 Vic., c. 100.

V. VI. VII. With regard to the nature of the three first of these offences in general, I have nothing further to add to what has already been observed in the preceding book of these Commentaries; (r) when we considered them as private wrongs, or civil injuries, for which a satisfaction or remedy is given [\*217] to the party aggrieved. But, taken in a public light as a "breach of the king's peace, an affront to his government, and a damage done to his subjects, they are also indictable and punishable with fines and imprisonment; or with other ignominious corporal penalties, where they are committed with any very atrocious design. (s) As in case of an assault with an intent to murder, or with an intent to commit either of the crimes last spoken of; for which intentional assaults, in the two last cases, indictments are much more usual than for the absolute perpetration of the facts themselves, on account of the difficulty of proof; or, when both parties are consenting to an unnatural attempt, it is usual not to charge any *assault*; but that one of them laid hands on the other with intent to commit, and that the other permitted the same with intent to suffer the commission of, the abominable crime before mentioned. And, in all these cases, besides heavy fine and imprisonment, it is usual to award judgment of the pillory. (11)

There is also one species of battery, more atrocious and penal than the rest, which is the beating of a clerk in orders, or clergyman; on account of the respect and reverence due to his sacred character, as the minister and ambassador of peace. Accordingly it is enacted by the statute called *articuli cleri*, 9 Edw. II, c. 3, that if any person lay violent hands upon a clerk, the amends for the peace broken shall be before the king: that is, by indictment in the king's courts; and the assailant may also be sued before the bishop, that excommunication or bodily penance may be imposed: which if the offender will redeem by money, to be given to the bishop, or the party aggrieved, it may be sued for before the bishop; whereas otherwise to sue in any spiritual court for civil damages for the battery, falls within the danger of *præmunire*. (t) But suits are and always were, allowable in the spiritual court, for money agreed to be given as a commutation for penance. (u) So that upon the whole it appears, that a person guilty of such brutal behavior to a clergyman is subject to three kinds of prosecution, all of which may be pursued for one and the same offence: an indictment, for the breach of the king's peace by such assault and battery; a civil action, for the special damage sustained by the party injured; and a suit in the ecclesiastical court, first, *pro correctione et salute animæ*, by enjoining penance, and then again for such sum of money [\*218] as shall be agreed on for *taking off* the penance enjoined; \*it being usual in those courts to exchange their spiritual censures for a round compensation in money; (v) perhaps because poverty is generally esteemed by the moralists the best medicine *pro salute animæ*. (12)

VIII. The two remaining crimes and offences, against the persons of his majesty's subjects, are infringements of their natural liberty: concerning the first of which, *false imprisonment*, its nature and incidents, I must content myself with referring the student to what was observed in the preceding book, (w) when we considered it as a mere civil injury. But besides the private satisfaction given to the individual by action, the law also demands public vengeance for the breach of the king's peace, for the loss which the state sustains by the confinement of one of its members, and for the infringement of the good order of society. We have seen before, (x) that the most atrocious degree of this offence, that of sending any subject of this realm a prisoner into

(r) See book III, page 120.

(s) 3 Inst. 493, 630.

(w) See book III, page 127.

(t) 1 Hawk. P. C. 65.

(u) *Arctic. Cler. Edw. II, c. 4.* F. N. B. 53.

(x) See page 116.

(v) 2 Roll. Rep. 384.

(11) This punishment is abolished.

(12) The punishment is now imprisonment not exceeding two years. Statute 24 and 25 Vic., c. 100, § 88.

parts beyond the seas, whereby he is deprived of the friendly assistance of the laws to redeem him from such his captivity, is punished with the pains of *proemunire*, and incapacity to hold any office, without any possibility of pardon. (y) And we may also add, that by statute 48 Eliz. c. 13, to carry any one by force out of the four northern counties, or imprison him within the same, in order to ransom him or make spoil of his person or goods, is felony without benefit of clergy, in the principals and all accessories before the fact. Inferior degrees of the same offence, of false imprisonment, are also punishable by indictment, (like assaults and batteries) and the delinquent may be fined and imprisoned. (z) And, indeed, (a) there can be no doubt but that all kinds of crimes of a public nature, all disturbances of the peace, all oppressions, and other misdemeanors whatsoever of a notoriously evil example, may be indicted at the suit of the king.

\*IX. The other remaining offence, that of *kidnapping*, being the forcible abduction or stealing away of a man, woman, or child, from their own country, and sending them into another, was capital by the Jewish law. "He that stealeth a man, and selleth him, or if he be found in his hand, he shall surely be put to death." (b) So likewise in the civil law, the offence of spiriting away and stealing men and children; which was called *plagium*, and the offenders *plagiarii*, was punished with death. (c) This is unquestionably a very heinous crime, as it robs the king of his subjects, banishes a man from his country, and may in its consequences be productive of the most cruel and disagreeable hardships; and therefore the common law of England has punished it with fine, imprisonment, and pillory. (d) And also the statute 11 and 12 Wm. III, c. 7, though principally intended against pirates, has a clause that extends to prevent the leaving of such persons abroad, as are thus kidnapped or spirited away; by enacting, that if any captain of a merchant vessel shall (during his being abroad) force any person on shore, or wilfully leave him behind, or refuse to bring home all such men as he carried out, if able and desirous to return, he shall suffer three months' imprisonment. (13) And thus much for offences that more immediately affect the *persons* of individuals.

## CHAPTER XVI.

### OF OFFENCES AGAINST THE HABITATIONS OF INDIVIDUALS.

THE only two offences that more immediately affect the *habitations* of individuals or private subjects, are those of *arson* and *burglary*.

1. Arson, *ab ardendo*, is the malicious and wilful burning the house or out-house of another man. This is an offence of very great malignity, and much more pernicious to the public than simple theft: because first, it is an offence against that right of habitation, which is acquired by the law of nature as well as by the laws of society; next, because of the terror and confusion that necessarily attend it; and, lastly, because in simple theft the thing stolen only changes its master but still remains *in esse* for the benefit of the public, whereas by burning the very substance is absolutely destroyed. It is also frequently

(y) Stat. 31 Car. II, c. 2. (z) West. Symbol. part 2, page 22. (a) 2 Hawk. P. C. 210. (b) Exod. xxi, 16. (c) 27. 48, 18, 1. (d) Raym. 474. 2 Show. 221. Skin. 46. Comb. 10.

(13) See statute 24 and 25 Vic., c. 100, for the punishment of abduction and kidnapping. Also, statute 17 and 18 Vic., c. 104, for the punishment of wilfully and wrongfully leaving persons abroad.

more destructive than murder itself, of which, too, it is often the cause: since murder, atrocious as it is, seldom extends beyond the felonious act designed; whereas fire too frequently involves in the common calamity persons unknown to the incendiary, and not intended to be hurt by him, and friends as well as enemies. For which reasons the civil law (*a*) punishes with death such as maliciously set fire to houses in towns, and contiguous to other; but is more merciful to such as only fire a cottage, or house, standing by itself. (1)

[\*221] \*Our English law also distinguishes with much accuracy upon this crime. And therefore we will inquire, first, what is such a house as may be the subject of this offence; next, wherein the offence itself consists, or what amounts to a burning of such house; and, lastly how the offence is punished.

1. Not only the bare dwelling-house, but all outhouses that are parcel thereof, though not contiguous thereto, or under the same roof, as barns and stables, may be the subject of arson. (*b*) And this by the common law; which also accounted it felony to burn a single barn in the field, if filled with hay or corn though not parcel of the dwelling-house. (*c*) The burning of a stack of corn was anciently likewise accounted arson. (*d*) And indeed all the niceties and distinctions which we meet with in our books, concerning what shall, or shall not, amount to arson, seem now to be taken away by a variety of statutes; which will be mentioned in the next chapter, and have made the punishment of wilful burning equally extensive as the mischief. The offence of arson (strictly so called) may be committed by willfully setting fire to one's own house, provided one's neighbour's house is thereby also burnt; but if no mischief is done but to one's own, it does not amount to felony, though the fire was kindled with intent to burn another's. (*e*) For by the common law no intention to commit a felony amounts to the same crime; though it does, in some cases, by particular statutes. However, such wilful firing one's own house, in a town, is a high misdemeanor, and punishable by fine, imprisonment, pillory, and perpetual sureties for the good behaviour. (*f*) And if a landlord or reversioner sets fire to his own house, of which another is in possession under a lease from

(*a*) *Jy. 48, 19, 28, § 12.*  
(*e*) *Cro. Car. 377. 1 Jon. 351.*

(*b*) *1 Hal. P. C. 567.*  
(*f*) *1 Hal. P. C. 568.*

(*c*) *3 Inst. 67.*  
*1 Hawk. P. C. 106.*

(*d*) *1 Hawk. P. C. 106.*

(1) The English statutes on this subject were revised and consolidated in 24 and 35 Vic., c. 97.

Section 1 makes it felony, punishable with penal servitude for life, or for any term not less than three years, or with imprisonment not more than two years, with or without whipping, if the offender be a male over sixteen years of age, to set fire, unlawfully and maliciously, to any church, chapel, meeting-house or other place of divine worship.

Section 2 imposes the like punishment for setting fire to a dwelling-house, any person being therein.

Section 3 imposes the like punishment for setting fire to any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, storehouse, granary, hovel, shed, or fold, or to any farm building, or to any building or erection used in farming land, or in carrying on any trade or manufacture, whether in possession of the offender or not, with intent to injure or defraud any person.

And by subsequent sections the unlawfully and maliciously setting fire to buildings belonging or appertaining to railways, ports, docks, harbors, or canals, or to public buildings, or "to any buildings other than such as are in this act before mentioned," or to any thing in, against or under a building, under such circumstances that, if the building were thereby set fire to, the offense would be felony, or to crops of hay, grass, corn, grain or pulse, or of any cultivated vegetable produce, standing or cut, or to any wood, coppice or plantation of trees, or to any heath, gorse, furze, fern, or to stacks of hay, grain, straw, coal, peat, wood, etc., or to coal mines, or to ships or vessels, is also made felony. Attempts to burn the like buildings or property are also provided for by the same act; and, by section 58, it is not essential to any of these offenses that they should be committed from the malice conceived against the owner of the property.



himself, or from those whose estate he hath, it shall be accounted arson; for during the lease the house is the property of the tenant. (g) (2)

\*2. As to what shall be said to be a *burning*, so as to amount to arson, a bare intent, or attempt to do it, by actually setting fire to a house, [\*222] unless it absolutely *burns*, does not fall within the description of *incendit et combussit*; which were words necessary, in the days of law-latin, to all indictments of this sort. But the burning and consuming of any part is sufficient; though the fire be afterwards extinguished. (h) Also, it must be a *malicious* burning: otherwise it is only a trespass: and, therefore, no negligence or mischance amounts to it. (3) For which reason, though an unqualified person, by shooting with a gun, happens to set fire to the thatch of a house, this Sir Matthew Hale determines not to be felony, contrary to the opinion of former writers. (i) But by statute 6 Ann. c. 31, any servant negligently setting fire to a house or outhouses shall forfeit 100*l.* or be sent to the house of correction for eighteen months; in the same manner as the Roman law directed, "*eos, qui negligenter ignes apud se habuerint, fustibus vel flagellis cædi.*" (k)

3. The *punishment* of arson was death by our ancient Saxon laws. (l) And in the reign of Edward the First this sentence was executed by a kind of *lex talionis*; for the incendiaries were burnt to death: (m) as they were also by the Gothic constitutions. (n) The statute 8 Hen. VI, c. 6, made the wilful burning of houses, under some special circumstances therein mentioned, amount to the crime of high treason. But it was again reduced to felony by the general acts of Edward VI, and Queen Mary; and now the punishment of all capital felonies is uniform, namely, by hanging. The offence of arson was denied the benefit of clergy by statute 23 Hen. VIII, c. 1, but that statute was repealed by 1 Edward VI, c. 12, and arson was afterwards held to be ousted of clergy, with respect to the principal offender, only by inference and deduction from the statute 4 and 5 P. and M. c. 4, \*which expressly denied [\*223] it to the accessories before the fact; (o) though now it is expressly [\*223] denied to the principal in all cases within the statute 9 Geo. I, c. 22. (4)

II. Burglary, or nocturnal housebreaking, *burgi latrocinium*, which by our ancient law was called *hamesecken*, as it is in Scotland to this day, has always been looked upon as a very heinous offence; not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion and

(g) *Fost.* 115. (h) 1 *Hawk. P. C.* 106.

(i) 1 *Hal. P. C.* 569. (k) *Ff.* 1, 15, 4.

(n) *Stiernh. de jure Goth.* l. 3, c. 6.

(l) *LL. Inas.* c. 7.

(m) *Britt.* c. 9.

(o) 11 *Rep.* 35. 2 *Hal. P. C.* 346, 347. *Fost.* 836.

(2) See 2 *Bish. Cr. L.*, 7th ed. § 18. It is usual to provide by statute that the burning one's own house, with intent to defraud, shall be felony. "House," it seems, imports a dwelling house. *Commonwealth v. Posey*, 4 *Call*, 109; 5 *C.*, 2 *Am. Dec.*, 560.

(3) To complete the offense, there must be an actual burning of some part of the building. *Com. v. VanSchaack*, 16 *Mass.*, 105; *People v. Butler*, 16 *Johns.*, 208; but to set fire to a building was a misdemeanor at common law. *R. v. Clayton*, 1 *C. & K.*, 128; *Com. v. Flynn*, 3 *Cush.*, 525. It is a sufficient burning if the fibre of the wood is destroyed. *People v. Haggerty*, 46 *Cal.*, 354. So, if a floor is charred to the depth of half an inch, as this presupposes a burning. *State v. Sandy*, 3 *Ired.*, 570. It is not necessary that the flame should be visible; as where a thatched roof was fired so that it smoked and was in part destroyed, but did not blaze. *R. v. Stallion*, 1 *Moo.*, 398. Enough if the burnt surface has been at a red heat. *R. v. Parker*, 9 *C. & P.*, 45; but not if only scorched. *R. v. Russell*, 1 *C. & M.*, 541.

If one fires his own house, standing so near other houses that the latter would probably be destroyed by the fire, and the latter are actually destroyed, the burning is deemed malicious. 2 *East P. C.*, 1031. "There is no occasion that any malice or ill-will should subsist against the person whose property is so destroyed. It is a malicious act in contemplation of law when a man willfully does that which is illegal, and which, in its necessary consequence must injure his neighbor." *Tindal C. J.*, 5 *C. & P.*, 263, note. So, where one set fire to a summer-house in such a way as to destroy a wood, held guilty of firing a wood. *R. v. Price*, 9 *C. & P.*, 728; and see *R. v. Cooper*, 5 *C. & P.*, 534, where a barn was burnt by a fire set originally to a straw stack. See further on intent, *Jesse v. State*, 28 *Miss.*, 100; and *Wharton Cr. Law*, 7th ed., § 1663.

(4) The punishment of arson is no longer capital in England.

disturbance of that right of habitation which every individual might acquire even in a state of nature; an invasion, which in such a state would be sure to be punished with death, unless the assailant were the stronger. But in civil society the laws also come in to the assistance of the weaker party; and, besides that they leave him this natural right of killing the aggressor, if he can (as was shown in a former chapter), (p) they also protect and avenge him, in case the might of the assailant is too powerful. And the law of England has so particular and tender a regard to the immunity of a man's house, that it styles it his castle, and will never suffer it to be violated with impunity; agreeing herein with the sentiments of ancient Rome, as expressed in the words of Tully; (g) "*quid enim sanctius, quid omni religione munitius, quam domus uniuscujusque civium?*" For this reason no outward doors can in general be broken open to execute any civil process; though, in criminal cases, the public safety supersedes the private. Hence also, in part, arises the animadversion of the law upon eaves-droppers, nuisancers and incendiaries: and to this principle it must be assigned, that a man may assemble people together lawfully (at least if they do not exceed eleven) without danger of raising a riot, rout, or unlawful assembly, in order to protect and defend his house; which he is not permitted to do in any other case. (r) (b)

[\*224] \*The definition of a burglar, as given us by Sir Edward Coke, (s) is "he that by night breaketh and entereth into a mansion-house, with intent to commit a felony." In this definition there are four things to be considered; the *time*, the *place*, the *manner*, and the *intent*.

1. The *time* must be by night, and not by day: for in the day time there is no burglary. We have seen, (t) in the case of justifiable homicide, how much more heinous all laws made an attack by night, rather than by day; allowing the party attacked by night to kill the assailant with impunity. As to what is reckoned night, and what day, for this purpose: anciently the day was accounted to begin only at sun-rising, and to end immediately upon sun-set; but the better opinion seems to be, that if there be daylight or *crepusculum* enough, begun or left to discern a man's face withal, it is no burglary. (u) But this does not extend to moonlight; for then many midnight burglars would go unpunished: and besides, the malignity of the offence does not so properly arise from its being done in the dark, as at the dead of night; when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner, and rendered his castle defenceless.

2. As to the *place*. It must be, according to Sir Edward Coke's definition, in a *mansion-house*: and, therefore, to account for the reason why breaking open a church is burglary, as it undoubtedly is, he quaintly observes that it is *domus mansionalis Dei*. (v) But it does not seem absolutely necessary that it should in all cases be a mansion-house; (b) for it may be also committed by

(p) See page 180.

(g) *pro domo*, 41.

(r) 1 Hal. P. C. 547.

(s) 3 Inst. 63.

(t) See pages 180, 181.

(u) 3 Inst. 63. 1 Hal. P. C. 350. 1 Hawk. P. C. 101.

(v) 3 Inst. 64.

(5) The English statute for the punishment of this offense is 24 and 25 Vic., c. 96. The penalty in the discretion of the court is penal servitude for life, or for any term not less than three years, or imprisonment for any term not exceeding two years, with or without hard labor, and with or without solitary confinement.

(6) As to what is a dwelling-house, and what is considered within the curtilage. see *Fisher v. State*, 43 Ala., 17; *State v. Ginns*, 1 N. and McC., 583; *State v. Langford*, 1 Dev., 253; *Armour v. State*, 3 Humph., 379; *People v. Parker*, 4 Johns., 424; *Commonwealth v. Estabrook*, 10 Pick., 293; *State v. Shaw*, 31 Me., 523; *Ratekin v. State*, 26 Ohio St., 420; *State v. Outlaw*, 72 N. C., 598; *Re Lammer*, 7 Biss., 269; *State v. Mordecai*, 68 N. C., 207; *State v. Potts*, 75 N. C., 129; *People v. Taylor*, 2 Mich., 250; *Pitcher v. People*, 16 Mich., 142; *Quinn v. People*, 71 N. Y., 576; S. C., 27 Am. Rep., 85. Where a building is leased to different persons in distinct apartments, each apartment is the dwelling house of the lessee. *Stedman v. Crane*, 11 Met., 295; *Mason v. People*, 26 N. Y., 200. And see *Dale v. State*, 27 Ala., 31; *Ullman v. State*, 1 Tex. App., 220; S. C., 28 Am. Rep., 405. But in charging a burglary in an inn, the room of a guest must be laid as the dwelling of the innkeeper. *Rodgers v. People*, 86 N. Y., 360; S. C., 40 Am. Rep., 548.

breaking the gates or walls of a town, in the night; (w) though that perhaps Sir Edward Coke would have called the mansion-house of the garrison or corporation. Spelman defines burglary to be "*nocturna diruptio alicujus habitaculi, vel ecclesie, etiam murorum portarumve burgi, ad feloniam perpetranda*." And therefore we may safely conclude, that the requisite of its being *domus mansionalis* is only in the burglary of a private house: which is the most frequent, and in which it is indispensably necessary to form its guilt, that it must be in a mansion or dwelling-house. For no distant barn, warehouse, or the like are under the same privileges, nor looked upon as a man's castle of defence: nor is a breaking open of houses wherein no man resides, and which, therefore, for the time being, are not mansion-houses, attended with the same circumstances of midnight terror. A house, however, wherein a man sometimes resides, and which the owner hath only left for a short season, *animo revertendi*, is the object of burglary, though no one be in it at the time of the fact committed. (x) And if the barn, stable, or warehouse, be parcel of the mansion-house, and within the same common fence, (y) though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenances, if within the curtilage or homestall. (z) A chamber in a college or an inn of court, where each inhabitant hath a distinct property, is to all other purposes as well as this, the mansion-house of the owner. (a) So also is a room or lodging, in any private house, the mansion for the time being of the lodger; if the owner doth not himself dwell in the house, or if he and the lodger enter by different outward doors. But if the owner himself lies in the house, and hath but one outward door at which he and his lodgers enter, such lodgers seem only to be inmates, and all their apartments to be parcel of the one dwelling house of the owner. (b) Thus, too, the house of a corporation, inhabited in separate apartments by the officers of the body corporate, is the mansion-house of the corporation, and not of the respective officers. (c) But if I hire a shop, parcel of another man's house, and work or trade in it, but never lie there, it is no dwelling house, nor can burglary be committed therein; for by the lease [\*226] it is severed from the rest of the house, and therefore is not the dwelling-house of him who occupies the other part: neither can I be said to dwell therein, when I never lie there. (d) Neither can burglary be committed in a tent or booth erected in a market or fair; though the owner may lodge therein; (e) for the law regards thus highly nothing but permanent edifices; a house or church, the wall or gate of a town; and though it may be the choice of the owner to lodge in so fragile a tenement, yet his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted wagon in the same circumstances.

3. As to the *manner* of committing burglary: there must be both a breaking and an entry to complete it. But they need not be both done at once; for if a hole be broken one night, and the same breakers enter the next night through the same they are burglars. (f) There must in general be an actual breaking: not a mere legal *clausum fregit* (by leaping over invisible ideal boundaries, which may constitute a civil trespass), but a substantial and forcible irruption. As at least by breaking, or taking out the glass of, or otherwise opening, a window; picking a lock, or opening it with a key; nay, by lifting up the latch of a door, or unloosing any other fastening which the owner has provided. But if a person leaves his doors or windows open, it is his own folly and negligence, and if a man enters therein, it is no burglary; yet, if he afterwards unlocks an inner or chamber door, it is so. (g) (7) But to come down

(w) Spelm. Gloss t. Burglary. 1 Hawk. P. C. 103.

(x) 1 Hal. P. C. 556. Foster, 77.

(y) K. v. Garland, P. 16 Geo. III, by all the judges.

(z) 1 Hal. P. C. 558. 1 Hawk. P. C. 104.

(a) 1 Hal. P. C. 556. (b) Kel. 84. 1 Hal. P. C. 556.

(c) Foster, 88, 89.

(d) 1 Hal. P. C. 558.

(e) 1 Hawk. P. C. 104.

(f) 1 Hal. P. C. 551.

(g) Ibid. 552, 553.

(7) Where a window sash was raised two inches and the prisoner pushed it up and entered the house, held no breaking. R. v. Smith, 1 Moo., 178. So, where sash was raised only

a chimney is held a burglarious entry; for that is as much closed as the nature of things will permit. (h) So also to knock at the door, and upon opening it to rush in, with a felonious intent: or under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance, in order to search for traitors, and then to bind the constable and rob the house; all these entries have been adjudged burglarious, though there was [\*227] \*no actual breaking; for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process. (i) And so, if a servant opens and enters his master's chamber-door with a felonious design; or if any other person lodging in the same house, or in a public inn opens and enters another's door, with such evil intent, it is burglary. Nay, if the servant conspires with a robber and lets him into the house by night, this is burglary in both; (k) for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease rather aggravates than extenuates the guilt. As for the entry, any the least degree of it, with any part of the body, or with an instrument held in the hand, is sufficient; as to step over the threshold, to put a hand or a hook in at the window to draw out goods, or a pistol to demand one's money, are all of them burglarious entries. (l) (8) The entry may be before the breaking as well as after: for by the statute 12 Ann. c. 7, if a person enters into the dwelling-house of another, without breaking in, either by day or by night, with intent to commit felony, or being in such a house, shall commit any felony; and shall in the night break out of the same, this is declared to be burglary: there having been before different opinions concerning it: Lord Bacon (m) holding the affirmative, and Sir Matthew Hale (n) the negative. But it is universally agreed, that there must be both a breaking, either in fact or by implication, and also an entry, in order to complete the burglary.

(h) 1 Hawk. P. C. 103. 1 Hal. P. C. 552. (i) 1 Hawk. P. C. 103.  
 (k) Stra. 881. 1 Hal. P. C. 553. 1 Hawk. P. C. 103. (l) 1 Hal. P. C. 555. 1 Hawk. P. C. 103. Post. 103.  
 (m) Elem. 65. (n) 1 Hal. P. C. 554.

one-fourth of an inch. *Com. v. Strupney*, 105 Mass., 588; 8 C., 7 Am. Rep., 556. But where an open window was covered by a twine netting nailed to the sash, and this was cut and thus an entrance effected, held sufficient breaking. *Com. v. Stephenson*, 8 Pick., 354. It is a breaking if the entrance is gained by lifting a heavy iron grating and pushing open a cellar window which swings on hinges and is wedged together. *R. v. Hall, R. & R.*, 355. So, if the cellar window is open and the grating over the area in front of it is lifted. *People v. Nolan*, 22 Mich., 229. It is enough if a window shut, but unbolted, be opened. *State v. Boon*, 13 Ired., 244; *Frank v. State*, 30 Miss., 705. So, pushing open a closed door which swings on hinges. *State v. Reid*, 20 Ia., 413; *Timmons v. State*, 84 Ohio St., 426; 8 C., 32 Am. Rep., 376. Unlatching a door which was latched, but not bolted, is a breaking at common law. *People v. Bush*, 3 Park. Cr. R., 552; *Curtis v. Hubbard*, 1 Hill, 336; 4 Id., 487. Breaking the glass in a door so as to get in without opening the door, is enough. *R. v. Smith, R. & R.*, 417. So, where glass had been cut through previously but stayed in place, and the prisoner simply pushed it out. *R. v. Bird*, 9 C. & P., 44. So, getting into a chimney in order to enter. *R. v. Price, R. & R.*, 450; *State v. Willis*, 7 Jones, 190. So, raising a trap door held down by its own weight. *R. v. Russell*, 1 Moo., 377. The breaking may be by fire, and this is not merged in the consumption of the building. *White v. State*, 49 Ala., 344. Where one, by fraud or trick upon the inmate, gets a door opened and immediately enters, it is a breaking. *State v. Johnson, Phill. (N. C.)*, 186; *Ducher v. State*, 18 Ohio, 308; *Johnston v. Com.*, 85 Pa. St., 54. If one finds an outer door open and opens an inner door, it is a breaking. *Rolland v. Com.*, 85 Pa. St., 66; 8 C., 27 Am. Rep., 636; not if, all doors being open, one breaks open a chest or box. *State v. Wilson, Cox*, 489; 8 C., 1 Am. Dec., 216. *Erskine, J.*, said in one case, that if a thief who is lawfully within even lifts the latch to get out of the house with the stolen property, that is a burglarious breaking out of the house. *R. v. Wheeldon*, 8 C. & P., 747. See *State v. Reid*, 20 Iowa, 413.

(8) Breaking outer shutters, and putting a hand inside is not an entry, if the window is down and the glass unbroken; but the least entry of a dwelling house by a hand or foot, or an instrument with which it is intended to commit a felony is enough. *State v. McCall*, 4 Ala., 648.

It is enough to introduce the hand between the window-glass and a shutter, if, to do it, the glass must be broken first. *R. v. Bailey, R. and R.*, 341. So if a finger merely is inside by

4. As to the *intent*; it is clear, that such breaking and entry must be with a felonious intent, otherwise it is only a trespass. And it is the same, whether such intention be actually carried into execution, or only demonstrated by some attempt or overt act, of which the jury is to judge. And therefore such a breach and entry of a house as has been before described, by night, with intent to commit a robbery, \*a murder, a rape, or any other felony, is [\*228] burglary; whether the thing be actually perpetrated or not. Nor does it make any difference whether the offence were felony at common law, or only created so by statute; since that statute which makes an offence felony, gives it incidentally all the properties of a felony at common law. (o) (9)

Thus much for the nature of burglary; which is a felony at common law, but within the benefit of clergy. The statutes, however, of 1 Edw. VI, c. 12, and 18 Eliz. c. 7, take away clergy from the principals, and that of 3, and 4 W. and M. c. 9, from all abettors and accessories before the fact. (p) And in like manner, the law of Athens, which punished no simple theft with death, made burglary a capital crime. (q)

(o) 1 Hawk. P. C. 105.

(p) Burglary in any house belonging to the plate glass company, with intent to steal the stock or utensils, is by statute 13 Geo. III, c. 38, declared to be single felony, and punished with transportation for seven years.

(q) Pott. Antiq. b. 1, c. 26.

pushing in a window-pane. *R. v. Davis*, R. and R., 499. Where a window had been raised, and a crowbar pushed under the inner shutters to pry them open, but the hands of the men had not been put inside, there was no entry. *R. v. Rust*, Moo., 183. So where one with a bit had bored through a door, because the instrument was not introduced for the purpose of taking property: 2 East P. C., 490. Compare *Walker v. State*, 68 Ala., 49; S. C., 35 Am. Rep., 1. An entry through a hole in a roof left unguarded, is not burglarious. *R. v. Spriggs*, 1 Moo. and Rob., 357.

(9) The English and American courts seem to differ upon the question, whether there can be any burglary when, though the intent is present, there is unknown to the thief an absence of anything to steal. Thus, when one was indicted for breaking the house of J. D. with intent to steal the goods of J. W., and it appeared that J. W. had no goods in the house, *held* that there could be no conviction. *R. v. Jenks*, 2 East P. C., 514. Where an indictment charged breaking and entering with intent to steal certain specified goods, and it appeared that no such goods were there, *held*, that though the breaking and entering was proved, there could be no conviction. While the intent to steal those goods might have existed, there could have been no attempt, because "an attempt must be to do, that which if successful would amount to the felony." *R. v. McPherson*, Dears. and B., 197. So where the charge was attempt to commit larceny by pocket picking, and there was nothing in the pocket, *held* for similar reason no conviction was possible. *R. v. Collins*, L. and C., 471. This question has not arisen in American courts, so far as known, in reference to burglary, but has been adjudicated in larceny cases, and a different conclusion has been reached from that arrived at in England. Thus where one was indicted for attempt to commit larceny by pocket picking, but the indictment did not set out the property, which the prisoner attempted to steal, and it did not appear that there was anything in the pocket, the court held that the offense was complete by the general attempt to steal, and the act done toward the commission of the offense by thrusting the hand into the pocket; that to attempt was simply "to make an effort to effect some object, to make a trial or experiment, to endeavour, to use exertion for some purpose." *Com. v. McDonald*, 5 Cush., 865. In a similar case in Connecticut, it was held that "the attempt is complete and punishable, when an act is done with intent to commit the crime, which is adapted to the perpetration of it, whether the purpose fail by reason of interruption, or because there was nothing in the pocket, or for other extrinsic cause." *State v. Wilson*, 30 Conn., 500, and see *Com. v. Rogers*, 5 S. and R., 461; *People v. Jones*, 46 Mich., 441. It would seem that breaking and entering with intent to steal that which it is physically impossible to steal, might be an offense within the reasoning of the American cases, notwithstanding the case of *R. v. McPherson*, *contra*.

## CHAPTER XVII.

## OF OFFENCES AGAINST PRIVATE PROPERTY.

THE next and last species of offences against private subjects, are such as more immediately affect their property. Of which there are two, which are attended with a breach of the peace; *larceny* and *malicious mischief*: and one, that is equally injurious to the rights of property, but attended with no act of violence, which is the crime of *forgery*. Of these three in their order.

1. Larceny, or *theft*, by contraction for larcociny, *larcocinium*, is distinguished by the law into two sorts: the one called *simple* larceny, or plain theft, unaccompanied with any other atrocious circumstances; and *mixed* or *compound* larceny, which also includes in it the aggravation of a taking from one's house or person.

And, first, of *simple* larceny; which, when it is the stealing of goods above the value of twelve-pence, is called *grand* larceny; when of goods to that value, or under, is *petit* larceny; offences which are considerably distinguished in their punishment, but not otherwise. I shall, therefore, first consider the nature of simple larceny in general; and then shall observe the different degrees of punishment inflicted on its two several branches.

Simple larceny, then, "is the felonious taking and carrying away of the personal goods of another." This \*offence certainly commenced then, [\*230] whenever it was, that the bounds of property, or laws of *meum* and *tuum*, were established. How far such an offence can exist in a state of nature, where all things are held to be common, is a question that may be solved with very little difficulty. The disturbance of any individual, in the occupation of what he has seized to his present use seems to be the only offence of this kind incident to such a state. But unquestionably, in social communities, when property is established, the necessity whereof we have formerly seen, (a) any violation of that property is subject to be punished by the laws of society: though how far that punishment should extend, is matter of considerable doubt. At present we will examine the nature of theft, or larceny, as laid down in the foregoing definition.

1. It must be a *taking*. (2) This implies the consent of the owner to be wanting. Therefore, no delivery of the goods from the owner to the offender,

(a) See book II, p. 8, &c.

(1) The punishment for this offence is now provided for by statute 24 and 25 Vic., c. 96. That statute abolishes the distinction between grand and petit larceny, and limits the punishment for the first offence of simple larceny to three years' penal servitude, or two years' imprisonment, with or without hard labor, and with or without solitary confinement.

(2) 1. If the owner, from any cause, voluntarily parts with the property in the goods taken, there is no larceny. To make it larceny, the taking must be against the owner's will. 2 East P. C., 665. Therefore, if the owner, through mistake or fraud or force, parts with the possession and title, i. e., with the property in goods taken, the taking is not larceny. *Welsh v. People*, 17 Ill., 839. So, where A paid C, servant to B, money which he owed B, on the erroneous supposition that C was empowered by B to take it, held no larceny from A, as he voluntarily parted with the property. *R. v. Hawtin*, 7 C. & P., 281. Where one obtained a half guinea on the pretense that silver would be sent in exchange, held no larceny, but a false pretense. *Coleman's Case*, 2 East P. C., 672. Where one, in paying a bill, could not make change, and a bystander took a coin to get it changed, and converted it, held no larceny, because the owner could not have expected the return of the specific coin, and therefore he had divested himself of his property in it when he surrendered possession of it. *R. v. Thomas*, 9 C. & P., 741. A hatter, by a trick, was induced to send a hat to a man who had no right to it, supposing he was sending it to the owner: held no larceny, as he voluntarily parted absolutely with the property. *R. v. Adams, R. & R.*, 225. One who could not read was induced by a fraudulent representation to give bills to a man for a certain pretended purpose, and took in return worthless metal pieces, supposing them to be valuable coin. Held no larceny, as he had parted with his property in

upon trust, can ground a larceny. As if A lends B a horse, and he rides away with him: or, if I send goods by a carrier, and he carries them away: these are no larcenies. (b) But if the carrier opens a bale or pack of goods, or

(b) 1 Hal. P. C. 504.

the bills, which were not to be returned. *Kelly v. People*, 13 N. Y. Sup. Ct., 509. See, also, *Kellogg v. State*, 26 Ohio St., 15.

2. If, with intent to steal them, one gets possession of goods by consent, the title remaining in the owner, he is guilty of larceny. "If the owner does not part with the title, expecting and intending that the same thing shall be returned to him, or that it shall be disposed of on his account, or in a particular way as directed or agreed upon for his benefit," then a bailee may feloniously convert the goods so as to make the conversion larceny, if at the time of the taking possession he had the felonious intent. *State v. Gorman*, 2 N. & McC., 90; S. C., 10 Am. Dec., 576; *Welsh v. People*, 17 Ill., 339. If one, by fraud or otherwise, is induced to part with the possession of goods merely, and the taker has a felonious intent when the goods are thus taken, it is larceny. *Lewer v. Com.*, 15 S. & R., 93; *Mancino v. People*, 19 N. Y. Sup. Ct., 127; *Elliott v. Com.*, 12 Bush, 176; *State v. Gorman*, 2 Nott & McC., 90. Where one hired a horse for a journey and sold it the same day, and the jury found the hiring was with felonious intent, held larceny. *Pear's Case*, 2 East P. C., 685. So, where a carriage was hired with like intent, and was not returned. *Major Semple's Case*, 2 East P. C., 691. A received some gold from B, on pretense of going up stairs to get some silver for it, which he was to bring B. A ran off with the gold. The jury found that B did not intend to part with the property in the gold till he got the silver, and that A took the gold with felonious intent; held larceny on the ground that B had parted with possession only. *State v. Watson*, 41 N.H., 533. A jeweler brought some goods to an inn for the defendant to select such as he wished to purchase. Just at that time the defendant received a letter purporting to be from a friend who agreed to furnish funds for the purchase at another place a little later. The jeweler was thus induced to leave his goods at the inn for the intervening time, and went away. The defendant then converted them. The jeweler swore he did not consider the goods sold till he got the cash, and the jury found that the defendant had a felonious intent, in regard to the transaction, from the beginning; held larceny. *R. v. Campbell*, 1 Moo., 179. See also *R. v. Brown, Dears.*, 616. If one fraudulently induces a servant to part with his master's goods, it may be larceny, since the servant's possession is the master's, and a mere servant has no authority to transfer the property in such goods. *Hite v. State*, 9 Yerg., 198; *R. v. Longstreeth*, 1 Moo., 187. In *Commonwealth v. Wilde*, 5 Gray, 83, the defendant wished to get a pair of trousers on his father's credit. The owner of the shop refused to let them go without a written order. The defendant left the shop, but soon returned, and, while a salesman, ignorant of what had passed, was busy with a customer, folded up the trousers, put them under his coat, and walked off, telling the salesman that he had made it all right with the owner. Held larceny, as there was no actual or intended transfer of the property. In *R. v. Robins, Dears.*, 418, one servant induced another to give him some wheat in charge of their employee on pretense of carting it to a specified place. He made off with it instead. Held, that the second servant did not part with the property in the wheat, but delivered it for a specified purpose, and that the falsehood made no difference, and the conversion was larceny.

3. If, without felonious intent, one gets possession of goods as a bailee; and subsequently converts them with felonious intent, there is, in general, no larceny.

Where a watchmaker received a watch to repair, and afterwards converted it, held no larceny, if this felonious intent was not formed when the watch was received. *R. v. Thistle*, 3 C. and K., 843. The defendant, a tailor, received goods to be made up. He finished them, and was then induced to sell them instead of returning them to his bailor. Nothing showed an intent to convert them when he took them. Held no larceny. *Abrams v. People*, 18 N. Y. Sup. Ct., 491. So where one borrowed a horse for a special purpose, and next day took the horse away, and sold it, held no larceny, if the intent to convert was formed after the taking. *R. v. Banks, R. and R.*, 441. So when after borrowing horses to go to a certain place, the borrower drove on instead of returning. *State v. Stone*, 68 Mo., 101. See *Wright v. Lindsay*, 20 Ala., 428. Although, while the relation of bailor and bailee exists, the latter is entitled to possession, so that he does not commit the trespass necessary in larceny in taking the goods entrusted to him, yet, if the relation is ended, his taking such goods with felonious intent may be larceny. Thus, if a bailee takes goods to their destination and then converts them, he may be guilty of larceny, for the delivery has taken effect, and the point of bailment is determined. 2 East. P. C., 696. Where several separate articles of a parcel make but one bailment, a tortious act, in reference to some of the articles, determines the bailment, and a subsequent fraudulent conversion of the remainder is larceny. *R. v. Poyser*, 5 Cox, 241. A miller had some barilla given him to grind, which he returned adulterated. Held that his act in separating a part, from the rest of the barilla, for his own use, while the general property remained in the owner, determined the contract,

pierces a vessel of wine, and takes away part thereof, or if he carries it to the place appointed, and afterwards takes away the whole, these are larcenies; (c) for here the *animus furandi* is manifest; since in the first case he had other-

(c) 3 Inst. 107.

and his taking was larceny, on the principle that if goods, originally delivered on a special contract, which is determined by fraudulent act of the party, or by the completion of the contract, are, subsequent to such determination, taken with felonious intent, it is larceny. *Com. v. James*, 1 Pick., 375. If a bailee tortiously breaks a package entrusted to him, and takes goods from it *animo furandi*, this breaking terminates the bailment, and he may be guilty of larceny. *R. v. Madox*, R. and R., 92. A bailee of wheat in bags emptied all the wheat out of several of the bags. Held that taking all the wheat out of each bag was as much breaking bulk as taking part out of each, and he was convicted. *R. v. Brazier*, R. and R., 337. See as establishing the rule that it is enough to take one of several articles bailed without breaking any package. *Nichols v. People*, 17 N. Y., 114; *Com. v. Brown*, 4 Mass., 580.

4. If without felonious intent one gets possession of goods as a mere custodian, or under a bare charge, and subsequently converts them with felonious intent, he is guilty of larceny.

The distinction is between custody and possession. A servant who receives from his master goods or money to use for a specific purpose, has the custody of them, but the possession remains in the master. So where a servant, sent by a member of a firm with money to another member of the same firm, converted the money, it was larceny. *Com. v. Berry*, 99 Mass., 428. See *Com. v. Davis*, 104 Mass., 548. If a servant who has charge of his master's horses steals them, it is larceny. *People v. Wood*, 2 Park. Cr. R., 22; *People v. Belden*, 37 Cal., 51. So, if a clerk in charge of a store takes from the stock of goods. *Marcus v. State*, 26 Ind., 101; *Walker v. Com.*, 8 Leigh, 743. In these cases the felonious intention may be formed after the goods have come under the charge of the custodian, and the conversion will then be larceny. *R. v. Jones*, C. and M., 611; *R. v. Beaman*, C. and M., 595; *R. v. Goode*, C. and M., 582.

A servant was given goods by his master to take with the master's team to a specified place. He was to sell the goods and bring back the proceeds. He converted the team. Held larceny even if felonious intent was formed after starting, as he had but a bare charge, the possession remaining in the master. *State v. Schingen*, 20 Wis., 74. So where a servant has been given a check to be delivered at a specified place, and he has converted it, it is larceny. *R. v. Paradise*, 2 East P. C., 565; *R. v. Heath*, 2 Moo., 83. And see *R. v. Chipchase*, 2 East P. C., 567. In *Bass's Case*, 2 East P. C., 566, a servant was held guilty of larceny who sold goods given him to carry to a customer, as the master still had possession of them. So it was larceny where a servant put certain bags belonging to his employer with new ones which the employer was to buy, thus hoping to cheat the employer, since the servant had but the custody of the old bags. *R. v. Manning*, Dears., 21. The defendant stood near the paying place in a crowded railway station. A lady gave him some money to buy a ticket. He offered to buy it, but ran away. It was larceny, as he had but the custody of the money. *R. v. Thompson*, Leigh and C., 225. The holder of a note handed it to the maker to indorse a payment on it. The latter refused to give it back. Held that the maker had but the custody of the note, not the possession in law, and that the felonious intent, even if formed after the taking, was enough to make the taking larceny. *People v. Call*, 1 Denio, 120. A was induced by a pretended deposit of funds as security to draw a check in favor of B. A went with B to get the check cashed, and directed how it should be done, but the cash was paid B. The jury found that A did not intend to part with the property in the check till he was paid the funds deposited. B ran off with the money, and the supposed deposit did not exist. Held larceny, as B had but the custody of the cash and A the possession. *R. v. Johnson*, 5 Cox, 372; S. C., 2 Den. C. C., 810; 14 E. L. and Eq., 570. A sent his watch to London to be regulated. B induced the watchmaker to send it to A in care of the postmaster at C. B then, by personating A, got the watch from the postmaster. Held that by sending the watch to the postmaster, the watchmaker was divested of his special property in it; that the postmaster held it under a bare charge to deliver to the true owner, to that extent as servant of A, and that the crime was larceny. *R. v. Kay*, 7 Cox, 289. That a servant's consent does not pass property, see *Longstreth's Case* and *Hite v. State* cited *supra*. In *R. v. Watts*, 2 Eng. L. and Eq., 558, a clerk in an insurance company, who was also a shareholder in the company, was employed by the directors to keep returned checks, among other duties. He stole such a check. Held that when the check came to him it was in possession of the directors, having reached its ultimate destination; that as shareholder he had no property in the check, and that having custody merely, he was guilty of larceny. In a case where a servant was sent to haul a certain amount of coal to his master's house, the coal was loaded into the master's wagon, and then converted by the servant. Held that as the wagon was in the possession of the master and in the charge of the servant, the coal was likewise in the master's possession, and the conversion was larceny. *R. v. Reed*, Dears., 257. A broker who



wise no inducement to open the goods, and in the second the trust was determined, the delivery having taken its effect. But bare non-delivery shall not of course be intended to arise from a felonious design; since that may happen from a variety of other accidents. Neither by the common law was it larceny in any servant to run away with the goods committed to him to keep, but only a breach of civil trust. But by statute 33 Hen. VI, c. 1, the servants of persons deceased; accused of embezzling their masters' goods, may by writ out of chancery (issued by \*the advice of the chief justices and chief [\*231] baron, or any two of them), and proclamation made thereupon, be summoned to appear personally in the court of king's bench, to answer their masters' executors in any civil suit for such goods; and shall, on default of appearance, be attainted of felony. And by statute 21 Hen. VIII, c. 7, if any servant embezzles his masters' goods to the value of forty shillings, it is made

had no funds in the bank was given by a bank a certified check with which to buy silver. He used the check for his own purposes. Held that he had the mere custody of the check, and the taking was larceny. *People v. Abbott*, 58 Cal., 284. But where one received a check to buy exchequer bills with, cashed it, and ran off with part of the proceeds; held no larceny, as the giving of the check was not induced by fraud, and the prosecutor never had possession of the money at the bankers. *R. v. Walsh, R. and R.*, 215. Where money was paid to a bank clerk who, without putting it in a drawer, where it should have gone, kept it, held no larceny, as master never had possession of it except through the clerk; otherwise had he put in the drawer before taking it. *Bazely's Case*, 2 East P. C., 571. A servant entrusted with a check to be cashed for the payment of a bill, cashed it and ran off. Held no larceny, as the master had no possession of the money. *Com. v. King*, 9 Cush., 284. So where a servant given a bill to change, ran away with the change. Held embezzlement. *R. v. Sullens*, 1 Moo., 129.

*Lost goods.* The old doctrine seems to be that there could be no larceny of lost goods, because the element of trespass necessary to make the crime was lacking. 1 Hawk. P. C., ch. 33, §§ 2, 3; *Porter v. State*, Mart. & Yerg., 226; *People v. Anderson*, 14 Johns., 294, S. C., 7 Am. Dec., 462. The present doctrine is thus stated: "The finder of lost goods may lawfully take them into his possession, and if he does so without any felonious intent at that time, a subsequent conversion to his own use, by whatever intent that conversion is accompanied, will not constitute larceny. But if, at the time of first taking them into his possession, he has a felonious intent to appropriate them to his own use, and to deprive the owner of them, and then knows or has the reasonable means of knowing or ascertaining by marks on the goods or otherwise, who the owner is, he may be found guilty of larceny." *Commonwealth v. Titus*, 116 Mass., 42. Substantially the same is held in *Wolffington v. State*, 58 Ind., 843; *State v. Conway*, 18 Mo., 821; *Tanner v. Commonwealth*, 14 Gratt., 635; *Ransom v. State*, 22 Conn., 153; *Tyler v. People*, Breese, 227; S. C., 12 Am. Dec., 176; *State v. Dean*, 49 Iowa, 78. And see *People v. Cogdell*, 1 Hill, 94. In *Griggs v. State*, 58 Ala., 425, it was held by a divided court that the subsequent conversion of lost goods, taken innocently, may make the finder guilty of larceny. The modern English doctrine, as laid down in *R. v. Thurborn*, 2 C. & K., 831, is: "If a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. But if he has taken them with like intent, though lost or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny." See also *R. v. Dixon*, Dears. 580; *Preston's Case*, 2 Den. O. C., 853; *Christopher's Case*, Bell, 271; S. C., 8 Cox, 91. If goods have been abandoned by the owner, not lost merely, the finder commits no larceny in taking them. *R. v. Reed*, C. & M., 306; *McGoon v. Ankeny*, 11 Ill., 558. There is a distinction between taking lost goods and those put in a particular place by the owner and forgotten. Thus, in paying a barber, a man laid his purse on a table in the shop and went off without it. Soon after, he came back for it and failed to find it. It appeared that the barber took it; held larceny, as being not lost, but in the owner's constructive possession. *Lawrence v. State*, 1 Humph., 236. In *R. v. West*, Dears. 402, a person left his purse at a market stall and afterwards came to look for it. Meanwhile, the stall-keeper had taken it. Held larceny, and the court said that there was a clear distinction between property lost and mislaid, put down, left by mistake, under circumstances enabling the owner to know where he left it. See *People v. McGarren*, 17 Wend., 460. In a Connecticut case a lady using a washtub lost in it a ring, soon noticed her loss and looked in the tub, but could not find it. Meantime her servant, who had used the tub, had taken it. Held larceny, as, under the circumstances, there was no loss except for the defendant's act. *State v. Cummings*, 33 Conn., 260. A man dropped a note in a shop, and coming back failed to find it. The jury found that, when the shopman picked up the note, he did not know, and had not reasonable means of knowing, the

felony; except in apprentices, and servants under eighteen years old. (3) But if he had not the possession, but only the care and oversight of the goods, as the butler of the plate, the shepherd of the sheep, and the like, the embezzling of them is felony at common law. (d) So, if a guest robs his inn or tavern of a piece of plate, it is larceny: for he hath not the possession delivered to him, but merely the use, (e) and so it is declared to be by statute 3 and 4 W. and M. c. 2, if a lodger runs away with the goods from his ready furnished lodgings. Under some circumstances, also, a man may be guilty of felony in taking his own goods: as if he steals them from a pawnbroker, or any one to whom he hath delivered and entrusted them, with intent to charge such bailee with the value; or if he robs his own messenger on the road, with an intent to charge the hundred with the loss, according to the statute of Winchester. (f)

2. There must not only be a taking, but a *carrying away*; (4) *cepit et aspor-*

(d) 1 Hal. P. C. 508.

(e) 1 Hawk. P. C. 90.

(f) Foxt. 122, 124.

owner of it, but afterwards acquired knowledge and converted it; that when he picked it up he believed the owner could be found, but intended then to convert the note; held larceny, as not a lost note. *R. v. Moore, L. & C.*, 1.

*Stealing one's own goods.* A man may be guilty of larceny in stealing his own goods from his bailee, who has a right to possession or interest in possession, and who is injured by losing possession. *R. v. Wilkinson, R. & R.*, 470; *People v. Thompson*, 84 Cal., 671; *Palmer v. People*, 10 Wend., 165; and see *State v. DeWitt*, 32 Mo., 571. A member of a society stole some of the society's property from the society's bailee; held larceny in the part owner, since the bailee was answerable. *R. v. Bramley, R. & R.*, 478; *R. v. Burgess, L. & C.*, 299. So, if one part owner steals from another, the latter being responsible for the safety of the goods. *R. v. Webster, L. & C.*, 77. In *R. v. Cain*, 2 Moo., 204, a trustee of a society was held guilty of larceny of society funds from the society treasurer. In *Kirksey v. Fike*, 29 Ala., 206, held that a joint owner or tenant in common cannot be guilty of larceny of the property jointly owned, unless he take it from a bailee who is thereby made answerable.

(3) This subject is also covered by statute 24 and 25 Vic., c. 96, which imposes the punishment of penal servitude for not more than fourteen and not less than three years, or imprisonment not more than two years.

(4) A very slight removal of an article from its place has been held to constitute carrying away. A parcel lying in a wagon was carried from one end of the wagon to the other, but was not taken from it; held a sufficient carrying away. *R. v. Cozlett*, 2 East P. C., 556. But where a package in a wagon was set on end and the wrapper cut open without removing any of the contents, it was held no asportation. *R. v. Cherry*, 2 East P. C., 557. Turning on its side a barrel which was standing on end was held not enough, in *State v. Jones*, 65 N. C., 395. Where a purse tied to keys was drawn from a pocket, but the keys remained in the pocket, there was no asportation. *R. v. Wilkinson*, 2 East P. C., 556. So, where goods in a shop were tied to the counter and a thief carried them as far as the cord would permit. *Anon.* 2 East P. C., 556. A thief snatched an earring from a lady's ear, but it fell in her hair. As it was for an instant in his possession, held a sufficient carrying away. *R. v. Lapier*, 2 East P. C., 557. A bag in a stage boot was lifted off the bottom of the boot, but it was not drawn entirely out of it; held sufficient. *R. v. Walsh*, 1 Moo., 14. So, where a pocket-book in an inside coat pocket was drawn completely out of the pocket, but so little that, on the prisoner's dropping it, it fell back into the pocket. *R. v. Thompson*, 1 Moo., 78. See *Com. v. Luckis*, 99 Mass., 431. A watch was snatched from the owner's pocket and the chain was drawn clear through the button hole, but the key at end of the chain then caught on a button and the thief was seized; held sufficient asportation, as in the thief's control for an instant. *R. v. Simpson*, Dears. 421. A person called on defendant to pay a note, the latter asked to see it; on its being handed him, he concealed or destroyed it; held sufficient. *State v. Fenn*, 41 Conn., 590; *People v. Call*, 1 Denio, 120. A person stole keys from another's pocket, opened a safe, took a money drawer completely out and was handling the money when caught; held sufficient carrying away of the money. *State v. Green*, 81 N. C., 560. A man put in a pipe connecting the gas-main and the delivery pipe in his house, cutting off the flow through the gas meter; held that by necessary physical action there was such severance of the gas in the main as to constitute asportation. *R. v. White*, Dears. 208. *Com. v. Shaw*, 4 Allen, 308. To constitute larceny of an animal, it must be removed while alive: *R. v. Williams*, 1 Moo., 107; but a very slight change of position is enough. *State v. Carr*, 13 Vt., 571. See *State v. Alexander*, 74 N. C., 232, and *State v. Wisdom*, 8 Port (Ala.), 511. An indictment charging larceny of a turkey and pea hen in Massachusetts is not supported by evidence of taking them alive in Connecticut and bringing them dead into

*tavit* was the old law-latin. A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation, or carrying away. As, if a man be leading another's horse out of a close, and be apprehended in the fact; or if a guest, stealing goods out of an inn, has removed them from his chamber down stairs: these have been adjudged sufficient carryings away to constitute a larceny. (g) Or, if a thief, intending to steal plate, takes it out of a chest in which it was, and lays it down upon the floor, but is surprised before he can make his escape with it; this is larceny. (h)

3. \*This taking, and carrying away, must also be *felonious*; that is, [\*232] done *animo furandi*: or, as the civil law expresses it, *lucri causa*. (i) (5) This requisite, besides excusing those who labour under incapacities of mind

(g) 3 Inst. 108, 109.

(A) 1 Hawk. P. C. 93.

(i) 1 Inst. 4, 1, 1.

Massachusetts. It should have been alleged that they were dead. Com. v. Beaman, 8 Gray, 497.

"He who steals my goods in the county of B and carries them to the county of C, may be indicted or appealed in county of C as well as that of B, because, the possession still continuing in me, every moment's continuance of the trespass is as much a wrong to it, and may come under the word *cepi* as much as the first taking." 1 Hawk. P. C., c. 33, § 9; 2 East P. C., 771; People v. Burke, 11 Wend., 129; State v. Somerville, 21 Me., 14; Com. v. Dewitt, 10 Mass., 154; People v. Mellon, 40 Cal., 648; R. v. Parkin, 1 Moo., 45; State v. Smith, 66 Mo., 61. But this doctrine applies only in cases of simple larceny; not if the original offense is compound. Smith v. State, 55 Ala., 59.

If several articles are stolen in such a way as to make but one transaction, there is but one taking and can be but one prosecution. Thus, a mine lessee had taken coal for several years from the mines of adjoining proprietors, but had raised it all through one shaft. This was held, by Erie J., one continuous taking, though the work was done at different levels and in different cuttings. R. v. Bleasdale, 2 C. & K., 765. Where a mill owner, by a pipe connecting with the main and cutting out the gas meter, had for several years gotten gas without paying for it, held one continuous taking, not merely a taking from time to time, as the gas was turned on inside the mill, since the connecting pipe had always had gas in it. R. v. Firth, 11 Cox C. C., 234. Where a man stole two pigs at the same time, and was undergoing punishment for stealing one, held he could not be tried for stealing the other. R. v. Brettell, C. & M., 609. Where half an hour intervened between taking articles of different sorts, held two offences. R. v. Birdseye, 4 C. & P., 886. So, where one stole a horse and harness and wagon all at once, held but one offense. Fisher v. Com., 1 Bush, 211; State v. Cameron, 40 Vt., 555. See, also, State v. Williams, 10 Humph., 101. Where one steals goods belonging to different persons at same time and place, it is but one offense. Lorton v. State, 7 Mo., 55; State v. Morphin, 37 Mo., 878; State v. Nelson, 29 Me., 329. *Contra*, State v. Thurston, 2 McMullen, 383.

That where goods are stolen in one state and carried into another, this may be treated as a larceny in the latter state as well as the former, has been held in many cases. See Commonwealth v. Andrews, 2 Mass., 14; S. C., 3 Am. Dec., 17; Commonwealth v. White, 123 Mass., 430; State v. Ellis, 3 Conn., 185; S. C., 8 Am. Dec., 175; State v. Cummings, 33 Conn., 260; State v. Seay, 3 Stew., 123; S. C., 20 Am. Dec., 66; Hamilton v. State, 11 Ohio, 435; People v. Williams, 24 Mich., 156; State v. Main, 16 Wis., 898; Powell v. State, 53 Wls., 217; State v. Bennett, 14 Iowa, 479; State v. Bartlett, 11 Vt., 650; Myers v. People, 26 Ill., 173; State v. Johnson, 2 Oreg., 115; State v. Underwood, 49 Me., 181; Watson v. State, 36 Miss., 593; Ferrill v. Commonwealth, 1 Duv., 153; Worthington v. State, 58 Md., 408; Regina v. Hennessy, 85 Up. Can. R., 603. But there are cases to the contrary which are referred to in these, and in Massachusetts and Ohio it is held that if the original conversion took place in a foreign country, the doctrine of continuous larceny would not be applied. Commonwealth v. Uprichard, 3 Gray, 434; Stanley v. State, 24 Ohio St., 166; S. C., 15 Am. Rep., 604. As to offenses committed in another state through innocent agents, see People v. Adams, 3 Denio, 190; S. C., 45 Am. Dec., 468.

(5) In R. v. VanMayen, R. & R., 118, the master of a foreign ship captured by the English, took from the ship some of the cargo entrusted to his care. Held no larceny, unless he intended to appropriate the goods. Where, from similarity of name, one took from the postoffice a letter intended for another and appropriated an enclosed draft, held no larceny without proof of a felonious intent at the time of getting it. R. v. Mucklow, R. & R., 160; see R. v. Leigh, 2 East P. C., 694. A tanner took hides from one part of the tannery where he was employed to another, with intent, not to take them away, but to get paid for them as if they were his own work. Held no larceny, since the intent must be to deprive the owner of his property permanently. R. v. Holloway, 2 C. & K., 742. See R. v. Webb, 1 Moo., 481; R. v. Hall, 2 C. & K., 947; State v. Self, 1 Bay, 242; R. v. Poole, Dears. &

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or will (of whom we spoke sufficiently at the entrance of this book) (*k*) indemnifies also mere trespassers, and other petty offenders. As if a servant takes his master's horse without his knowledge, and brings him home again; if a neighbour takes another's plough that is left in the field, and uses it upon his own land, and then returns it: if under colour of arrear of rent where none is due, I distrain another's cattle, or seize them; all these are misdemeanors and trespasses, but no felonies. (*l*) The ordinary discovery of a felonious intent is where the party doth it clandestinely; or, being charged with the fact denies it. But this is by no means the only criterion of criminality: for, in cases that may amount to larceny, the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent, or *animus furandi*: wherefore they must be left to the due and attentive consideration of the court and jury.

4. This felonious taking and carrying away must be of the *personal goods of another*: for, if they are things *real*, or savour of the realty, larceny at the common law cannot be committed of them. Lands, tenements, and hereditaments (either corporeal or incorporeal) cannot in their nature be taken and carried away. And of things, likewise, that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house, no larceny could be committed by the rules of the common law: but the severance of them was, and in many things is still, merely a trespass which depended on the subtlety in the legal notions of our ancestors. These things were parcel of the real estate; and, therefore, while they continued so, could not by any possibility, be the subject of theft, being absolutely fixed and immovable. (*m*) And if they were [*\*233*] \*severed by violence, so as to be changed into movables; and, at the same time, by one and the same continued act, carried off by the person

(*k*) See page 20.

(*l*) 1 Hal. P. C. 509.

(*m*) See book II, p. 18.

B., 345; and see U. S. v. Durkee, 1 McAllister, 196. The same principle applies where one takes a horse to ride without intention to deprive the owner of his property in it. R. v. Phillips, 2 East P. C., 662; Umphrey v. State, 68 Ind., 223; State v. York, 5 Harr. (Del.), 498. While generally the taking must be with intent to retain property permanently, yet it seems that an intent to use temporarily, if such use would destroy the thing taken, or to use an unreasonable time, is not entirely inconsistent with the commission of the felony, but should be left to the jury. State v. South, 28 N. J., 28.

Having once taken property with felonious intent, no subsequent return obliterates the offense. R. v. Peat, 2 East P. C., 557; State v. Scott, 64 N. C., 586; R. v. Wright, 9 C. & P., 754. The jury should consider the fact of the party's offering full value for the property taken. This does not preclude a felonious intent, but is pregnant evidence in the negative. 2 East P. C., 662.

The doctrine that the taking must be for the sake of gain, that intention to injure another without converting the property to one's own use is not enough, is laid down in State v. Hawkins, 8 Port., 461; McDaniel v. State, 8 Sm. & M., 401; R. v. Holloway, 5 C. & P., 524, by Vaughan, B.; R. v. Godfrey, 8 C. & P., 563, by Lord Abinger. On the other hand, it is said that there need not be any pecuniary advantage to the one who takes the property, but it is enough if he thus gratifies some wish. R. v. Garrett, 6 Cox, 260; People v. Juarez, 28 Cal., 889; Keely v. State, 14 Ind., 86; L. Hamilton v. State, 35 Miss., 214. The obligor in a bond got it from the obligee on pretense of looking at it and threw it into the fire. It was a benefit to him thus to destroy the evidence of his debt; held larceny. Dignowitty v. State, 17 Tex., 521. To aid in preventing the conviction of another for the larceny of a horse, a man took the horse from the owner's stable and drove it into an old coal-pit. It was held larceny, on the ground that, without any gain to the taker, it was enough if he intended wholly to deprive the owner of his property. R. v. Cabbage, R. & R., 292. A servant broke into his master's granary and took beans with intent to give them to his master's horses. Held larceny, but some of the judges thought that not only was the master injured, but, as the servant's work was lessened, the act was *lucri causa*. In R. v. Privett, 2 C. & K., 114, on a similar state of facts, it was held larceny without reference to any gain. In R. v. Jones, 2 C. & K., 236, a servant, knowing that a letter in reference to her character was sent to a former employer, got it at the postoffice and burnt it. Held larceny. So, where a postal clerk, to prevent detection and punishment for a mistake, threw some letters into a water-closet; held larceny, as the taking was for a purpose of his own, and with intent to deprive the owners wholly of the letters. R. v. Wynn, 2 C. & K., 859.

who severed them: they never could be said to be taken *from the proprietor*, in this their newly acquired state of mobility (which is essential to the nature of larceny), being never, as such, in the actual or constructive possession of any one, but of him who committed the trespass. He could not, in strictness be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods. But if the thief severs them at *one* time, whereby the trespass is completed, and they are converted into personal chattels, in the constructive possession of him on whose soil they are left or laid; and come again at *another* time, when they are so turned into personalty, and take them away; it is larceny: and so it is, if the owner, or any one else, has severed them. (n) And now, by the statute 4 Geo. II, c. 32, to steal, or rip, cut, or break, with intent to steal any lead, or iron bar, rail, gate, or palisado, fixed to a dwelling-house or out-house, or in any court or garden thereunto belonging, or to any other building, is made felony, liable to transportation for seven years; and to steal, damage, or destroy underwood or hedges, and the like, to rob orchards or gardens of fruit, growing therein, to steal or otherwise destroy any turnips, potatoes, cabbages, parsnips, peas, or carrots, or the roots of madder, when growing, are (o) punishable, criminally, by whipping, small fines, imprisonment, and satisfaction to the party wronged, according to the nature of the offence. Moreover, the stealing by night of any trees, or of any roots, shrubs, or plants, to the value of 5s., is, by statute 6 Geo. III, c. 36, made felony in the principals, aiders and abettors, and in the purchasers thereof, knowing the same to be stolen: and by statutes 6 Geo. III, c. 48, and 13 Geo. III, c. 33, the stealing of any timber trees therein specified, (p) and of any root, \*shrub or plant, by day [\*234] or night, is liable to pecuniary penalties for the two first offences, and for the third is constituted a felony, liable to transportation for seven years. Stealing ore out of mines is also no larceny, upon the same principle of adherence to the freehold, with an exception only as to mines of black lead, the stealing of ore out of which, or entering the same with intent to steal, is felony, punishable with imprisonment and whipping, or transportation not exceeding seven years; and to escape from such imprisonment, or return from such transportation, is felony, without benefit of clergy, by statute 25 Geo. II, c. 10. Upon nearly the same principle the stealing of writings relating to a real estate is no felony; but a trespass: (q) because they concern the land, or (according to our technical language) *savour* of the *reality*, and are considered as part of it by the law: so that they descend to the heir, together with the land which they concern. (r) (6)

Bonds, bills, and notes, which concern mere *choses in action*, were also, at the common law, held not to be such goods whereof larceny might be committed; being of no intrinsic value: (s) and not importing any property in *possession* of the person from whom they are taken. But by the statute 2 Geo. II, c. 25, they are now put upon the same footing, with respect to larcenies, as the money they were meant to secure. By statute 15 Geo. II, c. 13, officers or servants of the bank of England, secreting or embezzling any note, bill, warrant, bond, deed, security, money, or effects intrusted with them or with the company, are guilty of felony without benefit of clergy. The same is enacted by statute 24 Geo. II, c. 11, with respect to officers and servants of the South-Sea company. And by statute 7 Geo. III, c. 50, if any officer or servant of the post office shall secrete, embezzle, or destroy any letter or packet, con-

(n) 8 Inst. 109. 1 Hal. P. C. 510.

(o) Stat. 48 Eliz. c. 7. 15 Car. II, c. 2. 31 Geo. II, c. 33. 6 Geo. III, c. 48. 9 Geo. III, c. 41. 13 Geo. III, c. 33.

(p) Oak, beech, chestnut, walnut, ash, elm, cedar, fir, ash, lime, sycamore, birch, poplar, alder, larch, maple, and hornbeam.

(q) 1 Hal. P. C. 510. Stra. 1187.

(r) See book II, p. 423.

(s) 8 Rep. 33.

(6) The subject of this paragraph is now covered by statute 24 and 25 Vic., c. 96, which provides for the criminal punishment of the various wrongs here enumerated.

taining any bank note or other valuable paper particularly specified in the act, [ \*235] or shall steal the same out of any letter or \*pacquet, he shall be guilty of felony without benefit of clergy. Or, if he shall destroy any letter or packet with which he has received money for the postage, or shall advance the rate of postage on any letter or packet sent by the post, and shall secrete the money received by such advancement, he shall be guilty of single felony. Larceny also could not, at common law, be committed of treasure-trove or wreck, till seized by the king or him who hath the franchise, for till such seizure no one hath a determinate property therein. But by statute 26 Geo. II, c. 19, plundering or stealing from any ship in distress (whether wreck or no wreck) is felony, without benefit of clergy: in like manner as, by the civil law, (z) this inhumanity is punished in the same degree as the most atrocious theft. (7)

Larceny also cannot be committed of animals in which there is no property either absolute or qualified: as of beasts that are *feræ naturæ* and unreclaimed, such as deer, hares, and conies in a forest, chase, or warren; fish in an open river or pond: or wild fowls at their natural liberty. (u) But if they are reclaimed or confined, and may serve for food, it is otherwise, even at common law: for of deer so inclosed in a park that they may be taken at pleasure, fish in a trunk, and pheasants or partridges in a mew, larceny may be committed. (v) (8) And now, by statute 9 Geo. I, c. 22, to hunt, wound, kill, or steal any deer; to rob a warren; or to steal fish from a river or pond (being in these cases armed and disguised); also to hunt, wound, kill, or steal any deer, in the king's forests or chases inclosed, or in any other inclosed place where deer have been usually kept; or by gift or promise of reward to procure any person to join them in such unlawful act; all these are felonies without benefit of clergy. And the statute 16 Geo. III, c. 30, enacts that every unauthorized person, his aiders and abettors, who shall course, hunt, shoot at, or otherwise attempt to kill, wound, or destroy any red or fallow deer, in *any* forest, chase, purlieu, or ancient walk, [ \*236] or in any *inclosed* park, paddock, wood, or other ground, \*where deer are usually kept, shall forfeit the sum of 20*l.*, or for every deer actually killed, wounded, destroyed, taken in any toil or snare, or carried away, the sum of 30*l.*, or double those sums in case the offender be a keeper: and upon a second offence (whether of the same or a different species), shall be guilty of felony, and transportable for seven years. Which latter punishment is likewise inflicted on all persons armed with offensive weapons, who shall come into such places with an intent to commit any of the said offences, and shall there unlawfully beat or wound any of the keepers in the execution of their offices, or shall attempt to rescue any person from their custody. Also, by statute 5 Geo. III, c. 14, the penalty of transportation for seven years is inflicted on persons stealing or taking fish in any water within a park, paddock, garden, orchard, or yard: and on the receivers, aiders, and abettors: and the like punishment, or whipping, fine, or imprisonment, is provided for the taking or killing of conies (w) by night in open warrens: and a forfeiture of five pounds to the owner of the fishery, is made payable by persons taking or destroying (or attempting so to do) any fish in any river or other water within any inclosed ground, being private property. Stealing hawks, in disobedience to the rules prescribed by the statute 37 Edw. III, c. 19, is also felony. (x) It is also said, (y) that, if swans be lawfully marked, it is felony to steal them, though at large in a public river; and that it is likewise felony to steal them, though unmarked, if in any private river or pond; otherwise it is only a tree-

(f) Cod. 6, 2, 18.

(w) See stat. 22 and 23 Car. II. c. 25.

(u) 1 Hal. P. C. 511. Foet. 206.

(x) 3 Inst. 93.

(v) 1 Hawk. P. C. 24. 1 Hal. P. C. 511.

(y) Dalt. Just. c. 154.

(7) The subject of this paragraph is also covered by statute 24 and 25 Vic., c. 96.

(8) See Reg. v. Cheafor, 2 Den. C. C., 361. The statutes mentioned in this paragraph are now repealed.

pass. But of all valuable domestic animals, as horses and other beasts of draught, and of all animals *domitas naturæ*, which serve for food, as neat or other cattle, swine, poultry, and the like, and of their fruit or produce, taken from them while living, as milk or wool, (2) larceny may be committed; and also of the flesh of such as are either *domitas* or *feræ naturæ*, when killed. (a) As to those animals which do not serve for food, and which, therefore, the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein, and maintain a civil action for the loss of them, (b) yet they are not of such estimation as that the crime of stealing them amounts to larceny. (c) But by statute 10 Geo. III, c. 18, very high pecuniary penalties, or a long imprisonment, and whipping in their stead, may be inflicted by two justices of the peace (with a very extraordinary mode of appeal to the quarter sessions), on such as steal, or knowingly harbour, a stolen dog, or have in their custody the skin of a dog that has been stolen. (d) (9)

Notwithstanding however that no larceny can be committed, unless there be some property in the thing taken, and an owner; yet, if the owner be unknown, provided there be a property, it is larceny to steal it; and an indictment will lie, for the goods of a person unknown. (e) In like manner as among the Romans, the *lex Hostilia de furtis* provided that a prosecution for theft might be carried on without the intervention of the owner. (f) This is the case of stealing a shroud out of a grave; which is the property of those, whoever they were, that buried the deceased: but stealing the corpse itself, which has no owner, (though a matter of great indecency) is no felony, unless some of the grave-clothes be stolen with it. (g) (10) Very different from the law of the Franks, which seems to have respected both as equal offences: when it directed that a person who had dug a corpse out of the ground in order to strip it, should be banished from society, and no one suffered to relieve his wants, till the relations of the deceased consented to his re-admission. (h)

Having thus considered the general nature of simple larceny, I come next to treat of its *punishment*. Theft, by the Jewish law, was only punished with a pecuniary fine, and satisfaction to the party injured. (i) And in the civil law, till some very late constitutions, we never find the punishment capital. The laws of Draco at Athens punished it with death: but his laws were said to be written in blood; and Solon afterwards changed the penalty to a pecuniary mulct. And so the Attic laws in general continued; (j) except that once, in a time of dearth, it was made capital to break into a garden and steal figs: but this law and the informers against the offence, grew so odious, that from them all malicious informers were styled sycophants; a name which we have much perverted from its original meaning. From these examples, as well as the reason of the thing, many learned and scrupulous men have questioned the propriety, if not lawfulness of inflicting capital punishment for sim-

(a) Dal. 21. Crompt. 36. 1 Hawk. P. C. 93. 1 Hal. P. C. 511. The King v. Martin, by all the judges. P. 17 Geo. III.

(b) 1 Hal. P. C. 511. (c) See book II, p. 393. (d) 1 Hal. P. C. 512.

(e) See the remarks in page 4. The statute hath now continued eighteen sessions of parliament unrepealed.

(f) 1 Hal. P. C. 512. (g) Gravin. l. 8, § 106. (h) See book II, page 429.

(i) Montesq. Sp. L. b. 30. ch. 19. (j) Exod. c. xxii.

(k) Petit. LL. Attic. l. 7, tit. 5.

(9) Dog stealing, under statute 24 and 25 Vic., c. 96, may be visited with the maximum punishment of six months' imprisonment, or a forfeiture of twenty pounds over and above the value of the dog.

(10) Violation of the sepulture is made highly penal by statutes in the United States. It was an indictable offense at the common law, even where the body was taken up for the purpose of dissection. See 2 East P. C., 652; Roscoe Cr. Ev., 392; R. v. Lynn, 2 T. R., 783; R. v. Sharpe, Dears. & B., 160; Com. v. Loring, 8 Pick., 370; Tate v. State, 6 Blackf., 111. As to proprietary rights in bodies and burial rights, see Pierce v. Proprietors, 10 R. I., 227; Wynkoop v. Wynkoop, 42 Penn. St., 293; Meagher v. Driscoll, 99 Mass., 281; Guthrie v. Weaver, 1 Mo. Ap. R., 186.

ple theft. (*k*) And certainly the natural punishment for injuries to property seems to be the loss of the offender's own property; which ought to be universally the case, were all men's fortunes equal. But as those who have no property themselves are generally the most ready to attack the property of others, it has been found necessary instead of a pecuniary to substitute a corporal punishment; yet how far this corporal punishment ought to extend, is what has occasioned the doubt. Sir Thomas More, (*l*) and the marquis Beccaria, (*m*) at the distance of more than two centuries from each other, have very sensibly proposed that kind of corporal punishment which approaches the nearest to a pecuniary satisfaction; viz., a temporary imprisonment, with an obligation to labour, first for the party robbed, and afterwards for the public, in works of the most slavish kind: in \*order to oblige the offender to [\*237] repair, by his industry and diligence, the depredations he has committed upon private property and public order. But notwithstanding all the remonstrances of speculative politicians and moralists, the punishment of theft still continues, throughout the greatest part of Europe, to be capital; and Puffendorf, (*n*) together with Sir Matthew Hale, (*o*) are of opinion that this must always be referred to the prudence of the legislature; who are to judge, say they, when crimes are become so enormous as to require such sanguinary restrictions. (*p*) Yet both these writers agree, that such punishment should be cautiously inflicted, and never without the utmost necessity.

Our ancient Saxon laws nominally punished theft with death, if above the value of twelvecence; but the criminal was permitted to redeem his life by a pecuniary ransom; as, among their ancestors the Germans, by a stated number of cattle. (*q*) But in the ninth year of Henry the First, this power of redemption was taken away, and all persons guilty of larceny above the value of twelvecence were directed to be hanged; which law continues in force to this day. (*r*) For though the inferior species of theft, or petit larceny, is only punished by imprisonment or whipping at common law, (*s*) which by statute 4 Geo. I. c. 11, may be extended to transportation for seven years, as is also expressly directed in the case of the plate-glass company, (*t*) yet the punishment of grand larceny, or the stealing above the value of twelvecence (which sum was the standard in the time of King Athelstan, eight hundred years ago), is at common law regularly death. Which, considering the great intermediate alteration (*u*) in the price or denomination of \*money, is undoubtedly a [\*238] very rigorous constitution; and made Sir Henry Spelman (above a century since, when money was at twice its present rate), complain, that while every thing else was risen in its nominal value, and become dearer, the life of man had continually grown cheaper. (*v*) It is true, that the mercy of juries will often make them strain a point, and bring in larceny to be under the value of twelvecence, when it is really of much greater value: but this, though evidently justifiable and proper, when it only reduces the present nominal value of money to the ancient standard, (*w*) is otherwise a kind of pious perjury, and does not at all excuse our common law in this respect from the imputation of severity, but rather strongly confesses the charge. It is likewise true, that by the merciful extensions of the benefit of clergy by our modern statute law,

(*k*) *Est enim ad vindicanda furtiva nimis atrox, nec tamen ad refrananda sufficiens; quippe neque furtum simplex tam ingens facinus est, ut capite debeat plecti: neque ulla poena est tanta ut ab latrocinio cohibeat eos, qui nullam aliam artem quarendi victus habent.* (*Mori Utopia*, edit. Glasg. 1750, pag. 31.)—Denique, cum lex Mosaitica, quamquam inclemens et aspera tamen pecunia furtum, haud morte, mulctavit: ne putemus Deum, in nova lege clementia qua pater imperat filius majorem indulgentiam nobis invicem adveniendi licentiam. Hæc sunt cur non licere putem; quam vero sit absurdum, atque etiam perniciosum reipublicæ, furem atque homicidam ex æquo puniri nemo est (opinor) qui nesciat. (*Ibid.* 38.)

(*l*) *Utop.* page 42.

(*m*) *Ch.* 22.

(*n*) *L. of N. b.* 2, c. 3.

(*o*) 1 *Hal. P. C.* 12.

(*p*) See page 9.

(*q*) *Tac. de mor. Germ.* c. 12.

(*r*) 1 *Hal. P. C.* 12, 3 *Inst.* 53.

(*s*) 3 *Inst.* 218.

(*t*) *Stat.* 13 *Geo.* III. c. 88.

(*u*) In the reign of King Henry I. the stated value, at the exchequer, of a pasture-fed ox, was one shilling (*Dial. de Scacc.* l. 1, § 7), which, if we should even suppose to mean the *solidus legalis* mentioned by Lyndwode (*Prov.* l. 2, c. 12. See book II, page 509), or the 72d part of a pound of gold, is only equal to 12s. 4d. of the present standard.

(*v*) *Gloss.* 350.

(*w*) 2 *Inst.* 120.



a person who commits a simple larceny to the value of thirteen pence, or thirteen hundred pounds, though guilty of a capital offence, shall be excused the pains of death: but this is only for the first offence. And in many cases of simple larceny the benefit of clergy is taken away by statute; as for horse-stealing in the principals, and accessories both *before* and *after* the fact; (a) theft by great and notorious thieves in Northumberland and Cumberland; (y) taking woollen cloth from off the tenters, (z) or linens, fustians, calicoes, or cotton goods from the place of manufacture; (a) (which extends, in the last case, to aiders, assisters, procurers, buyers, and receivers;) feloniously driving away, or otherwise stealing one or more sheep or other cattle specified in the \*acts, or killing them with intent to steal the whole or any part of the carcass, (b) or aiding or assisting therein; thefts on navigable rivers [\*239] above the value of forty shillings, (c) or being present, aiding and assisting thereat: plundering vessels in distress, or that have suffered shipwreck; (d) stealing letters sent by the post, (e) (11) and also stealing deer, fish, hares, and conies under the peculiar circumstances mentioned in the Waltham black act. (f) Which additional severity is owing to the great malice and mischief of the theft in some of these instances; and, in others, to the difficulties men would otherwise lie under to preserve those goods, which are so easily carried off. Upon which last principle the Roman law punished more severely than other thieves the *abigeti*, or stealers of cattle; (g) and the *balnearii*, or such as stole the clothes of persons who were washing in the public baths; (h) both which constitutions seem to be borrowed from the laws of Athens. (i) And so, too, the ancient Goths punished with unrelenting severity thefts of cattle, or corn that was reaped and left in the field: such kind of property (which no human industry can sufficiently guard) being esteemed under the peculiar custody of heaven. (j) And thus much for the offence of simple larceny.

Mixed or *compound* larceny is such as has all the properties of the former, but is accompanied with either one or both of the aggravations of a taking from one's *house* or *person*. First, therefore, of larceny from the *house*, and then of larceny from the *person*.

1. Larceny from the *house*, though it seems (from the considerations mentioned in the preceding chapter) (k) to have a higher degree of guilt than simple larceny, yet it is not at all \*distinguished from the other at com- [\*240] mon law; (l) unless where it is accompanied with the circumstance of breaking the house by night; and then we have seen that it falls under another description, viz., that of burglary. But now by several acts of parliament (the history of which is very ingeniously deduced by a learned modern writer, (m) who hath shown them to have gradually arisen from our improvements in trade and opulence), the benefit of clergy is taken from larcenies committed in a house in almost every instance; except that larceny of the stock or utensils of the plate-glass company from any of their houses, &c., is made only a single felony, and liable to transportation for seven years. (n) The multiplicity

(a) Stat. 1 Edw. VI. c. 12. 2 and 3 Edw. VI. c. 23. 31 Eliz. c. 12. (y) Stat. 18 Car. II. c. 3.  
 (z) Stat. 22 Car. II. c. 5. But, as it sometimes is difficult to prove the identity of the goods so stolen, the *onus probandi* with respect to innocence is now by statute 15 Geo. II. c. 27, thrown on the persons in whose custody such goods are found; the failure whereof is, for the first time, a misdemeanor punishable by the forfeiture of the treble value: for the second, by imprisonment, also; and the third time it becomes a felony, punished with transportation for seven years.  
 (a) Stat. 18 Geo. II. c. 27. Note, in the three last cases an option is given to the judge to transport the offender: for *life* in the first case, for *seven years* in the second, and for *fourteen years* in the third; in the first and third cases *instead of sentence of death*, in the second *after sentence* is given.  
 (b) Stat. 14 Geo. II. c. 6. 15 Geo. II. c. 34. See book I. page 88. (c) Stat. 24 Geo. II. c. 45.  
 (d) St. 13 Ann. st. 2. c. 18. 26 Geo. II. c. 19. (e) Stat. 7 Geo. III. c. 50. (f) Stat. 9 Geo. I. c. 28.  
 (g) 77. t. 14. (h) *Ibid.* t. 17. (i) Pott. Antiq. b. 1, c. 26.  
 (j) *Stiernh. de jure Goth.* l. 3, c. 5.  
 (k) See page 232. (l) 1 Hawk. P. C. 98. (m) Barr. 375, &c. (n) Stat. 18 Geo. III. c. 35.

(11) Offences relating to the postoffice were provided for by statute 7 Wm. IV. and 1 Vic., c. 36. As to the other offences mentioned in this paragraph, see statute 24 and 25 Vic., c. 96.

In the United States the postal service being exclusively in the control of the national gov-

of the general acts is apt to create some confusion; but upon comparing them diligently we may collect, that the benefit of clergy is denied upon the following domestic aggravations of larceny; viz.: First, in larcenies *above the value of twelvepence*, committed, 1. In a church or chapel, with or without violence, or breaking the same; (o) 2. In a booth or tent, in a market or fair in the day-time or in the night, by violence or breaking the same; the owner or some of his family being therein: (p) 3. By robbing a dwelling-house in the day-time (which *robbing* implies a breaking), any person being therein: (q) 4. In a dwelling-house by day or by night, without breaking the same, any person being therein put in fear; (r) which amounts in law to a robbery; and in both these last cases the accessory before the fact is also excluded from his clergy. Secondly, in larcenies *to the value of five shillings*, committed, 1. By breaking any dwelling-house or any outhouse, shop, or warehouse thereunto belonging in the day-time, although no person be therein; (s) which also now extends to aiders, abettors, and accessories before the fact: (t) 2. By privately stealing [\*241] goods, \*wares, or merchandise in any shop, warehouse, (u) coachhouse, or stable, by day or by night; though the same be not broken open, and though no person be therein: (v) which likewise extends to such as assist, hire, or command the offence to be committed. Lastly, in larcenies *to the value of forty shillings* in a dwelling-house, or its outhouses, although the same be not broken, and whether any person be therein or no; unless committed against their masters by apprentices under the age of fifteen. (w) This also extends to those who aid or assist in the commission of any such offence. (12)

2. Larceny from the *person* is either by *privately* stealing; or by open and violent assault, which is usually called *robbery*.

The offence of *privately* stealing from a man's *person*, as by picking his pocket or the like, privily without his knowledge, was debarred of the benefit of clergy, so early as by the statute 8 Eliz. c. 4. But then it must be such a larceny as stands in need of the benefit of clergy, viz., of above the value of twelvepence; else the offender shall not have judgment of death. For the statute creates no new offence; but only prevents the prisoner from praying the benefit of clergy, and leaves him to the regular judgment of the ancient law. (x) This severity (for a most severe law it certainly is) seems to be owing to the ease with which such offences are committed, the difficulty of guarding against them, and the boldness with which they were practiced (even in the queen's court and presence) at the time when this statute was made: besides that this is an infringement of property, in the manual occupation or [\*242] corporal possession of the \*owner, which was an offence even in a state of nature. And therefore the *saccularii*, or cut-purses, were more severely punished than common thieves by the Roman and Athenian laws. (y) (13)

(o) Stat. 23 Hen. VIII. c. 1. 1 Edw. VI. c. 12. 1 Hal. P. C. 518.

(p) Stat. 8 and 6 Edw. VI. c. 9. 1 Hal. P. C. 523.

(q) Stat. 8 and 4 W. and M. c. 9.

(r) *Ibid.*

(s) Stat. 39 Eliz. c. 15.

(t) Stat. 8 and 4 W. and M. c. 9.

(u) See Foster, 78. Barr. 379.

(v) Stat. 10 and 11 Wm. III. c. 23.

(w) Stat. 12 Ann. st. 1, c. 7.

(x) 1 Hawk. P. C. 98. The like observation will certainly hold in the cases of horse-stealing (1 Hal. P. C. 531), thefts in Northumberland and Cumberland, and stealing woolen cloths from the tenters; and possibly in such other cases where it is provided by any statute that simple larceny under certain circumstances shall be felony without benefit of clergy.

(y) *Ff.* 47, 11, 7. *Pott. Antiq. l.* 1, c. 26.

ernment, offenses which obstruct or interfere with its due performance are defined and punished by acts of congress. See Rev. St. U. S. 1878, § 5463, *et seq.* Larceny from the mails is made a felony.

(12) See, as to this offense, statute 24 and 25 Vic., c. 96. In the United States a distinction is commonly made by statute between larceny in a dwelling-house and simple larceny, and the former is more severely punished.

(13) This subject is also covered by statute 24 and 25 Vic., c. 96. If a robbery is committed, being armed, or by more than one person, and with personal violence, the punishment may be penal servitude for life; in other cases it is limited to penal servitude for not more than fourteen nor less than three years, or to imprisonment not more than two years.

Open and violent larceny from the *person*, or *robbery*, the *rapina* of the civilians, is the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear. (2) 1. There must be a taking, otherwise it is no robbery. A mere attempt to rob was indeed held to be felony, so late as Henry the Fourth's time: (a) but afterwards it was taken to be only a misdemeanor, and punishable with fine and imprisonment; till the statute 7 Geo. II, c. 21, which makes it a felony (transportable for seven years) unlawfully and maliciously to assault another with any offensive weapon or instrument; or by menaces, or by other forcible or violent manner, to demand any money or goods; with a felonious intent to rob. If the thief, having once taken a purse, returns it, still it is a robbery; and so it is whether the taking be strictly from the person of another, or in his presence only; as, where a robber by menaces and violence puts a man in fear, and drives away his sheep or his cattle before his face. (b) But if the taking be not either directly from his person, or in his presence, it is no robbery. (c) 2. It is immaterial of what value the thing taken is: a penny as well as a pound, thus forcibly extorted, makes a robbery. (d) 3. Lastly, the taking must be by force, or a previous putting in fear; which makes the violation of the person more atrocious than privately stealing. For, according to the maxim of the civil law (e) "*qui vi rapuit, fur improbius esse videtur.*" This previous violence, or putting in fear, is the criterion that distinguishes robbery from other larcenies. For if one \*privately steals sixpence from the person of another, and afterwards keeps it by putting him in fear, this is no robbery, for the fear is subsequent: (f) neither is it capital, as privately stealing, being under the value of twelvepence. Not that it is indeed necessary, though usual, to lay in the indictment that the robbery was committed by *putting in fear*; it is sufficient, if laid to be done by *violence*. (g) And when it is laid to be done by putting in fear, this does not imply any great degree of terror or fright in the party robbed: it is enough that so much force, or threatening by word or gesture, be used, as might create an apprehension of danger, or induce a man to part with his property without or against his consent. (h) Thus, if a man be knocked down without previous warning, and stripped of his property while senseless, though strictly he cannot be said to be *put in fear*, yet this is undoubtedly a robbery. Or, if a person with a sword drawn begs an alms, and I give it him through mistrust and apprehension of violence, this is a felonious robbery. (i) So if, under a pretence of sale, a man forcibly extorts money from another, neither shall this subterfuge avail him. But it is doubted, (j) whether the forcing a higler, or other chapman, to sell his wares, and giving him the full value of them, amounts to so heinous a crime as robbery. (14)

(a) 1 Hawk. P. C. 95.

(a) 1 Hal. P. C. 583.

(b) 1 Hal. P. C. 583.

(c) 1 Comyns. 478. Stra. 1015.

(d) 1 Hawk. P. C. 97.

(e) *Ff.* 47, 2, 4, § 16.

(f) 1 Hal. P. C. 584.

(g) Trin. 3 Ann. by all the judges.

(h) *Fost.* 128.

(i) 1 Hawk. P. C. 96.

(j) *Ibid.* 97.

(14) As to the taking and intent, see notes 4 and 5, *supra*.

The thing taken need not be actually severed from the person. It is enough if it be in the presence and under the control of the person from whom it is taken. *Clary v. State*, 38 Ark., 561; *Kit v. State*, 11 Humph., 167; *U. S. v. Jones*, 3 Wash. C. C., 209. Where a man went armed to a house and, by threats of death, compelled the owner's wife to take money from a desk in the owner's presence, and then snatched it from her hand, held robbery. *Turner v. State*, 1 Ohio St., 423. The owner of certain goods, traveling with a man in charge of some of these goods, was knocked senseless by the man, who then ran away with the goods. Held that the man's possession of the goods was that of the owner, and the offense was robbery. *James v. State*, 53 Ala., 380. But it is no robbery if one carrying goods drops them to go to the assistance of the owner who is assaulted, and a thief picks them up and runs off with them. *R. v. Fallows*, 5 C. & P., 508.

It is unnecessary to prove both violence and intimidation. If a man is knocked senseless and plundered, it is robbery, though there may be no putting in fear; and where fear is the essential ingredient, the law *in odium spoliatoris* will presume violence where there appears just ground for it. *State v. Burke*, 73 N. C., 83; *McDaniel v. State*, 8 Sm. & M., 401. If

This species of larceny is debarred of the benefit of clergy by statute 23 Hen. VIII, c. 1, and other subsequent statutes, not indeed in general, but only when committed in a dwelling-house, or in or near the king's highway. A robbery, therefore, in a distant field or foot-path, was not punished with death; (k) but was open to the benefit of clergy, till the statute 3 and 4 W. and M. c. 9, which takes away clergy from both principals and accessories before the fact, in robbery, wheresoever committed.

II. *Malicious mischief*, or damage, is the next species of injury to private property, which the law considers as a public crime. This is such as is done, not *animo furandi*, or with an intent of gaining by another's loss; which is some though a weak excuse: but either out of a spirit of wanton cruelty, or black and diabolical revenge. In which it bears a near relation to the crime of arson; for as that affects the habitation, so this does the other property of individuals. And therefore any damage arising from this mischievous disposition, though only a trespass at common law, is now by a multitude of statutes made penal in the highest degree. Of these I shall extract the contents in order of time.

\*And, first, by statute 22 Hen. VIII, c. 11, perversely and maliciously to cut down or destroy the powdike, in the fens of Norfolk and Ely, is felony. And in like manner it is, by many special statutes enacted upon the occasions, made felony to destroy the several sea-banks, river-banks, public navigations, and bridges, erected by virtue of those acts of parliament. (15) By statute 43 Eliz. c. 13 (for preventing rapine on the northern borders), to

(k) 1 Hal. P. C. 535.

there is any struggle for the possession of the goods taken, this is violence enough. If the "fact be attended with circumstances of terror, such threatening word or gesture as in common experience is likely to create an apprehension of danger and induce a man to part with his property for the safety of his person, it is robbery." It is not necessary to prove actual fear, as the law will presume it in such a case. If the terror continue, the delivery of the property need not be contemporaneous with the assault. *Long v. State*, 13 Ga., 293. See *Taplin's Case*, *Simon's Case*, *Spencer's Case*, 2 East P. C., 712; *State v. Howerton*, 58 Md., 581. Where a man, as he stepped on a street car, was pushed against the door by a large man standing on the platform, and then another man threw his arm round his neck, pushing back his head and at the same time rifling his pocket, there was force enough to make it a robbery. *Mahoney v. People*, 10 N. Y. S. C., 202. For like case, see *Com. v. Snelling*, 4 Binn., 379. A thief snatched a man's watch from his fob. The watch was fastened to a chain going round the neck, and the chain only broke after three jerks. As the thief used actual force in overcoming the resistance of the chain, held robbery. *R. v. Mason, R. & R.*, 419. So where a silk watch-guard was broken, and at the same time the thief said that he meant to take the watch. *State v. McCune*, 5 R. I., 60. Where a watch-chain was snatched away, held that if there was violence enough to carry out the intent, it was robbery. *State v. Broderick*, 59 Mo., 318. But where the prisoner, while walking in a friendly way, drew money from his friend's pocket, using only force enough to draw it from the pocket, the court held, that "the mere snatching of anything from the hand or person of any one without any struggle or resistance by the owner, or any force or violence on the part of the thief, will not constitute robbery." *McCloskey v. People*, 5 Park. Cr. R., 299. See *Baker's Case*, 2 East P. C., 702; *Steward's Case*, *ibid.*, where a wig and hat were taken from the owner's head; *Horner's Case*, 2 East P. C., 703, where an umbrella was snatched from the hand; *R. v. Wall*, 2 C. & K., 214, where a watch, loosely held in the hands, was taken. In *Shinn v. State*, 64 Ind., 13, money was snatched from the owner, but the only violence used was in preventing his retaking it; held no robbery. See *Bonsall v. State*, 35 Ind., 460.

That extorting money or other thing of value, by means of a charge of sodomy, may be robbery, see *People v. McDaniels*, 1 Park. Cr. R., 198. But this is an exceptional case, and it is held not robbery to extort money by means of the charge of any other offense, as for instance, forgery. *Long v. State*, 13 Geo., 293; *Britt v. State*, 7 Humph., 45. Obtaining money from a woman under a threat to accuse her husband of an indecent assault, was held not to be robbery, in *Rex v. Edwards*, 5 C. & P., 518; 1 Moo. & R., 257.

(15) See, as to this offense, statute 24 and 25 Vic., c. 97. The same statute provides generally for other offenses mentioned in this paragraph.

As to malicious mischief in the United States, at the common law, see *State v. Robinson*, 3 Dev. & Bat. 130, and the valuable note thereto in 32 Am. Dec., 662,

burn any barn or stack of corn or grain; or to imprison or carry away any subject, in order to ransom him, or to make prey or spoil of his person or goods upon deadly feud or otherwise, in the four northern counties of Northumberland, Westmoreland, Cumberland, and Durham, or being accessory before the fact to such carrying away or imprisonment; or to give or take any money or contribution, there called *blackmail*, to secure such goods from rapine; is felony without benefit of clergy. By statute 22 and 23 Car. II, c. 7, maliciously, unlawfully, and willingly, in the night time, to burn, or cause to be burnt or destroyed, any ricks or stacks of corn, hay, or grain, barns, houses, buildings, or kilns; or to kill any horses, sheep, or other cattle, is felony; but the offender may make his election to be transported for seven years; and to maim or hurt such \*horses, sheep, or other cattle, is a trespass for which treble damages shall be recovered. By statute 4 and 5 W. and M. c. 23, to burn [\*245] on any waste, between Candlemas and Midsummer, any grig, ling, heath, furze, goss, or fern, is punishable with whipping and confinement in the house of correction. By statute 1 Ann. st. 2, c. 9, captains and mariners belonging to ships, and destroying the same, to the prejudice of the owners (and by 4 Geo. I, c. 12, to the prejudice of insurers also), are guilty of felony without benefit of clergy. And by statute 12 Ann. st. 2, c. 18, making any hole in a ship in distress, or stealing her pumps, or aiding or abetting such offences, or wilfully doing any thing tending to the immediate loss of such ship, is felony without benefit of clergy. By statute 1 Geo. I, c. 48, maliciously to set on fire any underwood, wood, or coppice, is made single felony. By statute 6 Geo. I, c. 23, the wilful and malicious tearing, cutting, spoiling, burning, or defacing of the garments or clothes of any persons passing in the streets or highways, with intent so to do, is felony. This was occasioned by the insolence of certain weavers and others, who, upon the introduction of some Indian fashions prejudicial to their own manufactures, made it their practice to deface them; either by open outrage, or by privily cutting, or casting *aqua fortis* in the streets upon such as wore them. By statute 9 Geo. I, c. 22, commonly called the Waltham black act, occasioned by the devastations committed near Waltham in Hampshire, by persons in disguise or with their faces blacked (who seem to have resembled the Roberdsmen, or followers of Robert Hood, that in the reign of Richard the First committed great outrages on the borders of England and Scotland); (l) by this black act, I say, which has in part been mentioned under the several heads of riots, menaces, mayhem, and larceny, (m) it is farther enacted, that to set fire to any house, barn, or outhouse (which is extended by statute 9 Geo. III, c. 29, to the \*malicious and wilful burning or setting [\*246] fire to all kinds of mills, or to any hovel, cock, mow, or stack of corn, straw, hay, or wood; or unlawfully and maliciously to break down the head of any fish pond, whereby the fish shall be lost or destroyed; or in like manner to kill, maim, or wound any cattle; or cut down or destroy any trees planted in an avenue, or growing in a garden, orchard, or plantation, for ornament, shelter, or profit; all these malicious acts, or procuring by gift or promise of reward any person to join them therein, are felonies without benefit of clergy; and the hundred shall be chargeable for the damages, unless the offender be convicted. In like manner by the Roman law to cut down trees, and especially vines, was punished in the same degree as robbery. (n) By statutes 6 Geo. II, c. 37, and 10 Geo. II, c. 32, it is also made felony, without the benefit of clergy, maliciously to cut down any river or sea-bank, whereby lands may be overflowed or damaged; or to cut any hop-binds growing in a plantation of hops, or wilfully and maliciously to set on fire, or cause to be set on fire, any mine, pit, or delph of coal. By statute 11 Geo. II, c. 22, to use any violence in order to deter any person from buying corn or grain; to seize any carriage or horse carrying grain or meal to or from any market or sea port; or to use any outrage with such intent; or to scatter, take away, spoil, or damage such

(l) 3 Inst. 197.

(m) See pages 144, 208, 235, 240.

(n) FF. 47, 7, 2.

grain or meal; is punished for the first offence with imprisonment and public whipping: and the second offence, or destroying any granary where corn is kept for exportation, or taking away or spoiling any grain or meal in such granary, or in any ship, boat, or vessel intended for exportation, is felony, subject to transportation for seven years. By statute 28 Geo. II, c. 19, to set fire to any goss, furze, or fern, growing in any forest or chase, is subject to a fine of five pounds. By statutes 6 Geo. III, cc. 36, and 48, and 13 Geo. III, c. 33, [\*247] wilfully to spoil or destroy any timber or other trees, roots, \*shrubs, or plants, is for the two first offences liable to pecuniary penalties; and for the third, if in the day time, and even for the first, if at night, the offender shall be guilty of felony, and liable to transportation for seven years. By statute 9 Geo. III, c. 29, wilfully and maliciously to burn or destroy any engine or other machines, therein specified, belonging to any mine; or any fences for inclosures pursuant to any act of parliament, is made single felony, and punishable with transportation for seven years, in the offender, his advisers, and procurers. And by statute 13 Geo. III, c. 38, the like punishment is inflicted on such as break into any house, &c., belonging to the plate-glass company, with intent to steal, cut or destroy, any of their stock or utensils, or wilfully and maliciously cut or destroy the same. And these are the principal punishments of malicious mischief.

III. Forgery, (16) or the *crimen falsi*, is an offence, which was punished by the civil law with deportation or banishment, and sometimes with death. (c) It

(c) Inst. 4, 18, 7.

(16) Anciently, at common law, forgery could only be committed by making falsely or uttering a matter of record, as an authentic matter of public nature, or deed, or will—some sealed instrument. 1 Hawk. P. C., ch. 70, §§ 8-10; Com. v. Searle, 2 Binn., 332. The statutes of the different states of the American Union have added largely to the number of instruments which are the subject of forgery. The term as at present used is comprehensively defined as "the false making or materially altering, with intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability." 2 Bish. Cr. L., 7th ed., § 572.

*The false making.* The making and uttering need not be by writing; as where, by engraving, an Austrian bank-note was forged. *People v. Rhoner*, 4 Park. Cr. R., 166. The forgery may be by printing: *Com. v. Ray*, 3 Gray, 441; by a stamp: *Wheeler v. Lynde*, 1 Allen, 402; even by a photograph: *R. v. Rinaldi, L. & C.*, 830, where it was held forgery to take a "positive" evanescent impression of a bank-note, though the culprit was caught before he had taken a lasting "negative."

It is not necessary that the whole instrument be forged. A false signature written on a genuine instrument may be a forgery. *Powell v. Com.*, 11 Gratt., 822; citing *R. v. Wicks*, R. and R., 149, and *R. v. Winterbottom*, 1 Den., 41. To make a material alteration on a true instrument with fraudulent intent is a forgery. *R. v. Dawson*, 1 Stra., 19; *Teagin's Case*, 2 East P. C., 979. Where words were inserted in a lease to express a contemporary oral agreement, held, no forgery. *Pauli v. Com.*, 89 Pa. St., 432. An agent was authorized to sell and fill up blanks in insurance tickets. By filling and falsely antedating such a ticket the agent defrauded the company. This filling the blank falsely was held a material alteration, and the man was convicted. *People v. Graham*, 6 Park. C. R., 135; citing *R. v. Wilson*, 2 C. and K., 527. Where a clerk was given a blank check with authority to fill it for a certain amount, and he wrote in a larger sum. See further as to forgery by fraudulent filling of blanks. *R. v. Hart*, 7 C. and P., 652; *R. v. Vanduzer*, 1 Cox C. C., 186; *Wilson v. Park Commissioners*, 70 Ill., 46; *Van Duzer v. Howe*, 21 N. Y., 531. Where a bond was altered after execution, and one of the signers was by false representations induced to assent on the express understanding that the representations were true; held, that there was no forgery, as the assent, however fraudulently gained, removed the false character of the instrument. *State v. Flanders*, 38 N. H., 324. A deed made by the parties purporting to make it was altered by them as to a material date with fraudulent intent. This was held forgery, *Kelly, C. B.*, saying: "Every instrument which fraudulently purports to be what it is not is a forgery, whether the falseness of the instrument consists in the fact that it is made in a false name, or that the pretended date, when that is a material portion of the deed," is false. *R. v. Ritson, L. R. and C. C.*, 199; *State v. Kattleman*, 35 Mo., 105. On the same paper with a promissory note, and below it, was an agreement referring to it and qualifying it. This was cut off. The act was a forgery, because the alteration was material, and changed a non-negotiable note into a negotiable one, thus changing the maker's liability. *State v. Stratton*, 27 Ia., 420. So it was held a material altera-

may with us be defined, at common law, to be, "the fraudulent making or alteration of a writing to the prejudice of another man's right;" for which

tion where a note was payable at either of two places, and a paper was pasted over the name of one place, and on the paper a different name written, thus substituting the name of a solvent for that of an insolvent firm. *Treble's Case*, R. and R., 164. If one from a course of dealing supposes he has authority to sign another's name, it is no forgery; otherwise if one signs thus, thinking he can take up the paper when due. *R. v. Beard*, 8 C. and P., 143. The defendant brought a bill to a banker's as from T. The bill was not indorsed, but the defendant said he would indorse it. The banker then wrote "per procura-tion T." beneath which the defendant signed his own name. Held, that this false assumption of authority was not forgery, as there was no false making. *R. v. White*, 2 C. and K., 404. Where two persons have the same name, and one signs this name with intention that the instrument shall be thought that of the other person, it is forgery. *Meade v. Young*, 4 T. R., 28; *Barfield v. State*, 29 Ga., 127. So if one uses his own name with fraudulent intent to represent a fictitious firm. *R. v. Rogers*, 8 C. and P., 629. So where the defendant induced his servant to sign a blank bill, and then filled it up, intending to charge another person of the same name as the servant. *R. v. Blenkinsop*, 2 C. and K., 581; see *R. v. Epps*, 4 F. and F., 81. Where one intends to utter a note as being the note of some one not the signer, but of the same name, and induces an innocent person, who does not intend to bind himself, to sign it, it is forgery. "It matters not by whom the signature is attached, if it be not attached as his own. If the note is prepared for the purpose of being fraudulently used as the note of another person, it is falsely made." The fraudulent intent necessary need not be "in the mind of the one who holds the pen in writing the signature. If that is done at the dictation or request of another, and for his purposes and use, and his designs are fraudulent so as to make it a forgery if he had written it himself, then the instrument is a forged one." *Com. v. Foster*, 114 Mass., 811. A fraudulent error in keeping books by a confidential clerk was held forgery. *Biles v. Com.*, 32 Pa. St., 529. But in *State v. Young*, 46 N. H., 266, it is held, that a man cannot be guilty of forgery by making a false entry in his own books, in his own possession, and before any settlement under which another has acquired rights, because the writing must be false, not genuine, without regard to the truth of what it contains—"a writing which is the counterfeit of something which has been or is a genuine instrument, or one which purports to be a genuine instrument, which it is not." The rule is said to be that "the writing or instrument which may be the subject of forgery must generally be or purport to be the act of another, or it must be at the time the property of another, or it must be some writing or instrument under which others have acquired" some rights, or liabilities sought to be effected, without their consent, by alteration. In *R. v. Closs*, *Dears. and B.*, 460, a man sold as an original a copy of a painting with a copy of the artist's name on it. Held, that this was not forgery; that the name copied was no more than an arbitrary mark of identification, and was not properly a writing. So in *Smith's Case*, *Dears. and B.*, 566, where B had sold a powder in packages with peculiar labels, and S copied the labels almost exactly and put them on packages of spurious powder; held no forgery. But a fraudulent alteration of a book settlement was held forgery in *Barnum v. State*, 15 Ohio, 717; *S. C.*, 45 Am. Dec., 601.

There may be forgery of public instruments when no private individual is injured; as of civil process. *R. v. Collier*, 5 C. and P., 160; or of a returned writ by the officer issuing it. *Com. v. Mycall*, 2 Mass., 136; or of a letter to a jailer authorizing the discharge of a prisoner. *R. v. Harris*, 6 C. and P., 129; or, under a statute, of a court record. *Brown v. People*, 86 Ill., 239. The forged instrument need not have been acted on: the false making with intent to defraud is the gist of the offense. *Commonwealth v. Ladd*, 15 Mass., 526; *United States v. Shellmire*, *Bald.*, 370; *State v. Pierce*, 8 Iowa, 231. The crime consists essentially in trying "to give an appearance of truth to mere deceit and falsity, and either to impose that upon the world as the solemn act of another which he is no way privy to, or at least make a man's act appear to have been done at a time when it was not done, and by force of such falsity to give it an operation which in truth and justice it ought not to have." 1 *Hawk. P. C.*, ch. 78, § 2.

2. *The apparent validity of the forged instrument.* The forged instrument should in all essential points have upon the face of it the similitude of a true one, so that it is not radically defective and illegal in the very frame of it. 2 *East P. C.*, 952. The forgery of a void instrument is not indictable; otherwise, if by a possibility the State or some person might be defrauded. *Henderson v. State*, 14 Tex., 503. Where three witnesses were required to a will and a false will had but two, held so plainly invalid as to be no forgery. *Wall's Case*, 2 *East P. C.*, 953. So where a bill of exchange required a witness and the imitation had none. *Moffat's Case*, 2 *East P. C.*, 954. See for the same principle, *State v. Jones*, 1 Bay, 207; *State v. Gutridge*, 1 Bay, 285. The fraudulent adding of the name of a subscribing witness to an instrument not requiring one, is not forgery. *State v. Gherkin*, 7 *Ired.*, 206. In an indictment for forging a promissory note, the false instrument set forth contained no promise to pay money to bearer or order. Held, that this was no for-

the offender may suffer fine, imprisonment, and pillory. And also by a variety of statutes, a more severe punishment is inflicted on the offender in many par-

gery, since the instrument, if genuine, would not be a good promissory note in legal effect. *R. v. Burke*, R. and R., 496. Where a statute required that certain orders should be sealed and directed to a treasurer; held, no forgery to make a false order without seal and directed to a constable. *R. v. Rushworth*, R. and R., 317. So where an order was drawn without a payee. *R. v. Richardson*, R. and R., 193. But where a forged bill was uttered without the drawee's indorsement, it was held that the instrument was so far a bill as to be the subject of forgery. *R. v. Wicks*, R. & R., 149. So, an order differing only in some minute particulars from the statutory form, held not so far void that the false making might not be forgery. *R. v. Lyon*, R. & R., 255. The principle upon which these distinctions rest is laid down thus: An instrument void in law upon its face is not the subject of forgery, because the genuine and counterfeit would be equally useless, imposing no duty, conferring no right. *State v. Smith*, 8 Yerg., 150. "An instrument should be so far perfect in form and substance as to be valid if genuine. It is not the falsity of the writing alone, but also its supposed fraudulent effect, which makes a forgery criminal. If the forged instrument is so obviously defective in its form as this is, the law will not presume that it can accomplish the fraud which is perhaps intended. The rule seems to be well settled that a writing, void in itself and which cannot be made good by averment, if it were genuine, is not the subject of forgery." *People v. Harrison*, 8 Barb., 560; *Abbott v. Rose*, 62 Me., 194. In order to be forgery, the instrument must be of such character that, if genuine, it would be evidence of the fact it recites. The instrument must be such that, when forged, it does or may tend to prejudice the rights of another. *State v. Anderson*, 80 La. An., 557; *Barnum v. State*, 15 Ohio, 717. In an indictment for forgery of a note, the instrument set out was an agreement without any consideration, to be paid in labor, and there was no averment of any extrinsic fact to make the contract operative. As the instrument, on its face, was without legal effect, and it was not shown operative by averment, it was held no forgery, although an ignorant man might be imposed upon by the instrument. *People v. Shall*, 9 Cow., 778. While one cannot be convicted of forgery if the instrument is apparently void, one may be when the invalidity is shown by proof of some extrinsic fact, because here there is a probability that some one may be defrauded. *People v. Galloway*, 17 Wend., 540; citing *Sterling's Case*, 1 Leach, 99, where the defendant was convicted of forging a will while the testator was alive; because, though in fact the will could not be genuine, the instrument purported on its face to be good for the purpose intended. In *State v. Pierce*, 8 Iowa, 231, it is said: "If the writing is invalid on its face, it cannot be the subject of forgery, for the obvious reason that it has no tendency to effect a fraud. Where, however, the invalidity is to be made out by the proof of some extrinsic fact, the instrument, if good on its face, may be legally capable of effecting a fraud, and the party making the same may be punished." See also *Brown v. People*, 86 Ill., 239; *State v. Shelters*, 51 Vt., 102.

There may be a forgery of a bill of exchange, though not stamped according to law, notwithstanding this defect appears on the face of the instrument, since the stamp acts are revenue laws and not meant to vary the law of crimes. *Hawkeswood's Case*, 3 East P. O., 955; *Morton's Case*, *ibid.*; *Teague's Case*, *id.*, 979; *R. v. Pike*, 2 Moo., 70; *Cross v. People*, 47 Ill., 152; *People v. Frank*, 28 Cal., 507; *Horton v. State*, 32 Tex., 79..

8. *Intent*. The intent to defraud is the essence of the crime. It is not necessary that one should be actually defrauded. If the jury can infer from the circumstances of the case an intent to utter the instrument, that fact will be enough to imply an intent to defraud. *Henderson v. State*, 14 Tex., 503. There must be an intent to defraud some person or corporation, but the intent may be gathered from knowingly forging the instrument. *U. S. v. Shellmire*, 1 Bald. C. C., 870; *Brown v. Com.*, 2 Leigh, 769. If the jury can fairly infer an intent to utter the forged note, the act of forgery will be sufficient to imply an intent to defraud. But if there could not possibly be any fraud effected by the false making, there could be no fraud intended, and hence no forgery. *State v. Redstrake*, 39 N. J., 365. Although one may intend to take up a bill when due, if he utters it knowing it to be forged and believing that he could raise money on it, there is a sufficient fraudulent intent to constitute forgery, and this, too, though the forger has actually paid the bill before conviction. *R. v. Geach*, 9 C. & P., 499. A man issued in payment of a debt a bill which he knew was fictitious. There was reason to suppose that he meant to take it up at maturity, but he did not communicate this to the creditor, who thought the bill genuine. Held, forgery. *R. v. Hill*, 2 Moo., 80. To constitute an intent to defraud, it is not necessary to intend to defraud a particular person, if the consequence of his act would necessarily defraud some person, but there must be a possibility of some one being defrauded. *R. v. Marcus*, 2 C. & K., 356. A man had altered a genuine medical diploma so as to make it appear that the document had been issued to him. On the discovery of the fraud he was indicted for forgery. The jury found that he altered the instrument with intent to induce the belief that it was genuine, but without intent to deceive any particular person. Held, no forgery, because it was necessary that, at the time of the alteration, there should have been an intent to defraud



ticular cases, which are so multiplied of late as almost to become general. I shall mention the principal instances. (17)

By statute 5 Eliz. c. 14, to forge or make, or knowingly to publish or give in evidence, any forged deed, court-roll or will, with intent to affect the right of real property, either freehold or copyhold, is punished by a forfeiture to the party grieved of double costs and damages; by standing in the pillory, and having both the ears cut off, and the nostrils slit and seared; by forfeiture to the crown of the profits of the offender's lands, and by perpetual imprisonment. For any forgery relating to a term of years, or annuity, bond, obligation, acquittance, release, or discharge of any debt or demand of [\*248] any personal chattels, the same forfeiture is given to the party grieved; and on the offender is inflicted the pillory, loss of one of his ears, and a year's imprisonment; the second offence in both cases being felony without benefit of clergy.

Besides this general act, a multitude of others, since the revolution when paper credit was first established, have inflicted capital punishment on the forging, altering, or uttering as true, when forged, of any bank bills or notes, or other securities; (p) (18) of bills of credit issued from the exchequer; (q) of South Sea bonds, &c.; (r) of lottery tickets or orders; (s) of army or navy debentures; (t) of East India bonds; (u) of writings under the seal of the London or royal exchange assurance; (v) of the hand of the receiver of the pre-fines; (x) or of the accountant-general and certain other officers of the court of chancery; (y) of a letter of attorney or other power to receive or transfer stock or annuities; and on the personating a proprietor thereof, to

(p) Stat. 6 and 9 Wm. III. c. 20, § 26. 11 Geo. I. c. 9. 12 Geo. I. c. 22. 15 Geo. II. c. 12. 18 Geo. III. c. 79.

(q) See the several acts for issuing them.

(r) Stat. 9 Ann. c. 21. 6 Geo. I. c. 4 and 11. 12 Geo. I. c. 22.

(s) See the several acts for the lotteries. (t) Stat. 5 Geo. I. c. 14. 9 Geo. I. c. 5.

(u) Stat. 12 Geo. I. c. 22.

(v) Stat. 6 Geo. I. c. 12.

(w) Stat. 22 Geo. II. c. 14.

(y) Stat. 12 Geo. I. c. 22.

some particular person. *R. v. Hodgson, Dears. & B.*, 8. The intent in uttering a forged instrument may be inferred from the uttering of other like instruments. *State v. Williams*, 2 Rich., 418; 5 C. 45 Am. Dec., 741.

(17) The 24 and 25 Vic., c. 98, consolidates the various statutes on this subject, and goes with great particularity into an enumeration of the cases which shall be punishable under it. The punishment in some cases may be penal servitude for life.

Besides the punishment to which the forger is subject, he becomes, at common law, infamous, and incapable of giving evidence. Co. Litt., 6 b.; 1 Greenl. Ev., § 373. But to have this effect, there must be both a conviction and a judgment. *Rex v. Castell*, 8 East, 77; *Rex v. Teal*, 11 id., 809; *People v. Whipple*, 9 Cow., 707. The disability will be removed by a reversal of judgment, or by pardon: *People v. Pease*, 3 Johns. Cas., 338; and it is not competent to attach to the pardon a condition that the disability shall still remain.

*Ibid.*

Statutes, in some cases, have changed this common law rule, either by making the convicted party a competent witness after he has endured the punishment, or by making the infamy of a person an objection, to his credibility only.

(18) Declaring that a paper is good is an uttering. *U. S. v. Mitchell*, 1 Bald. C. C., 366. "To utter and publish is to declare or assent, directly or indirectly, by words or actions, that a note is good. Offering it in payment would be an uttering or publishing." *Commonwealth v. Searle*, 2 Binn., 332. It is an offense to utter a note the forgery of which is an offense at common law. *R. v. Sharman, Dears.*, 285; overruling *R. v. Boulton*, 2 C. & K., 604, where it was held no offense to utter an instrument unless the fraud succeeded. Uttering to an accomplice is not enough to make an offense. *R. v. Heywood*, 2 C. & K., 352. There may be an uttering through the hands of an innocent agent. *Com. v. Hill*, 11 Mass., 186. Simply handing a bill with a forged indorsement to a clerk for payment is a sufficient uttering. *R. v. Arscott*, 6 C. & P., 408. A man gave a forged bill to a banker and asked him to take it as security for a debt, and the banker said that it would depend on his inquiries. Held, this conditional uttering was enough. *R. v. Cook*, 8 C. & P., 582. A debtor exhibited to a creditor a forged receipt for the debt, claiming credit for it, but kept it in his own hands. Held, a sufficient uttering, for, unlike a promissory note, it need not be tendered to be taken. *R. v. Radford*, 1 C. & K., 707; but the mere exhibition of a false note with fraudulent intent, is not an uttering. *R. v. Shukard, R. & R.*, 200. Handing another a counterfeit note as a specimen of engraving, not to put it in circulation, is not an uttering. *R. v. Harris*, 7 C. & P., 428; neither is it to give knowingly a counterfeit in charity. *R. v. Page*, 8 C. & P., 123.

receive or transfer such annuities, stock or dividends; (2) also on the personating, or procuring to be personated, any seaman or other person, entitled to wages or other naval emoluments, or any of his personal representatives; and the taking or procuring to be taken, any false oath in order to obtain a probate, or letters of administration in order to receive such payments; and the forging or procuring to be forged and likewise the uttering, or publishing, as [\*249] true, of any counterfeited seaman's \*will or power: (a) to which may be added, though not strictly reducible to this head, the counterfeiting of Mediterranean passes, under the hands of the lords of the admiralty, to protect one from the piratical states of Barbary; (b) the forging or imitating of any stamps to defraud the public revenue (c) and the forging of any marriage register or license; (d) all which are by distinct acts of parliament made felonies without benefit of clergy. By statute 13 Geo. III, cc. 52 and 59, forging or counterfeiting any stamp or mark to denote the standard of gold and silver plate, and certain other offences of the like tendency, are punished with transportation for fourteen years. By statute 12 Geo. III, c. 48, certain frauds on the stamp duties, therein described, principally by using the same stamps more than once, are made single felony, and liable to transportation for seven years. And the same punishment is inflicted by statute 13 Geo. III, c. 38, on such as counterfeit the common seal of the corporation for manufacturing plate glass (thereby erected) or knowingly demand money of the company by virtue of any writing under such counterfeit seal.

There are also certain other general laws with regard to forgery of which the first is 2 Geo. II, c. 25, whereby the first offence in forging or procuring to be forged, acting or assisting therein, or uttering or publishing as true any forged deed, will, bond, writing obligatory, bill of exchange, promissory note, indorsement, or assignment thereof, or any acquittance or receipt for money or goods, with intention to defraud any person (or corporation), (e) is made felony without benefit of clergy. And by statute 7 Geo. II, c. 22, and 18 Geo. III, c. 18, it is equally penal to forge or cause to be forged, or utter as true, a counterfeit acceptance of a bill of exchange, or the number or principal [\*250] sum of any accountable receipt for any note, bill, or any \*other security for money; or any warrant or order for the payment of money, or delivery of goods. So that I believe, through the number of these general and special provisions, there is now hardly a case possible to be conceived wherein forgery, that tends to defraud, whether in the name of a real or fictitious person, (f) is not made a capital crime. (19)

These are the principal infringements of the rights of property: which were the last species of offences against individuals or private subjects which the method of distribution has led us to consider. We have before examined the nature of all offences against the public, or commonwealth; against the king or supreme magistrate, the father and protector of that community; against

- (a) Stat. 8 Geo. I, c. 23. 9 Geo. I, c. 12. 31 Geo. II, c. 22, § 77.  
 (a) Stat. 31 Geo. II, c. 10. 9 Geo. III, c. 30. (b) Stat. 4 Geo. II, c. 12.  
 (c) See the several stamp acts. (d) Stat. 26 Geo. II, c. 33.  
 (e) Stat. 31 Geo. II, c. 22, § 73. (f) Foote, 114, &c.

(19) If one indorses a note or bill in an assumed name, with intent to defraud, it is forgery. *R. v. Marshall*, R. & R., 75. So, even if by the use of the fictitious name no credit is added. *R. v. Whitley*, R. & R., 90; *R. v. Francis*, R. & R., 209. So, a false making in an assumed name. *Thompson v. State*, 49 Ala., 16. S accepted a bill which was afterwards dishonored. When the drawer next saw him he was called B. On the evidence the court held that it did not sufficiently appear that the prisoner had not gone by the name of S before the time of accepting the bill, or that he had assumed the name for the purpose of fraud. *R. v. Boutien*, R. & R., 260. By false representations and using an assumed name, the defendant had defrauded another. Held, that when his real name appeared he must show that he had used this assumed name for other purposes, and before the fraud, and that when proved to have assumed a name for fraudulent purposes, the drawing the instrument in that name was a forgery. *R. v. Peacock*, R. & R., 278. See *R. v. Marshall*, R. & R., 75; *State v. Givens*, 5 Ala., 747.

the universal law of all civilized nations, together with some of the more atrocious offences, of publicly pernicious consequence, against God and his holy religion. And the several heads comprehend the whole circle of crimes and misdemeanors, with the punishment annexed to each, that are cognizable by the laws of England.

## CHAPTER XVIII.

### OF THE MEANS OF PREVENTING OFFENCES.

WE are now arrived at the fifth general branch, or head, under which I proposed to consider the subject of this book of our Commentaries; viz., the means of *preventing* the commission of crimes and misdemeanors. And really it is an honour, and almost a singular one, to our English laws, that they furnish a title of this sort; since *preventive* justice is, upon every principle of reason, of humanity, and of sound policy, preferable in all respects to *punishing* justice; (a) the execution of which, though necessary, and in its consequences a species of mercy to the commonwealth, is always attended with many harsh and disagreeable circumstances.

This preventive justice consists in obliging those persons whom there is a probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behaviour. This requisition of sureties has been several times mentioned before, as part of the penalty inflicted upon such as have been guilty of certain gross misdemeanors; but there, also, it must be understood rather as a caution against the repetition of the offence, than any immediate pain or punishment. And indeed, if we consider all human \*punishments in a [\*252] large and extended view, we shall find them all rather calculated to prevent future crimes, than to expiate the past; since, as was observed in a former chapter, (b) all punishments inflicted by temporal laws may be classed under three heads; such as tend to the amendment of the offender himself, or to deprive him of any power to do future mischief, or to deter others by his example; all of which conduce to one and the same end, of preventing future crimes, whether that can be effected by amendment, disability, or example. But the caution that we speak of at present is such as is intended merely for prevention, without any crime actually committed by the party, but arising only from a probable suspicion that some crime is intended or likely to happen; and consequently it is not meant as any degree of punishment, unless, perhaps, for a man's imprudence in giving just ground of apprehension.

By the Saxon constitution these sureties were always at hand, by means of King Alfred's wise institution of decennaries or frankpledges; wherein as has more than once been observed, (c) the whole neighbourhood or tithing of free-men were mutually pledges for each other's good behaviour. But this great and general security being now fallen into disuse and neglected, there hath succeeded to it the method of making suspected persons find particular and special securities for their future conduct: of which we find mention in the laws of King Edward the Confessor; (d) *tradat fidejussores de pace et legalitate tuenda*." Let us, therefore, consider, first, what this security is; next, who may take or demand it; and, lastly, how it may be discharged.

I. This security consists in being bound, with one or more securities, in a recognizance or obligation to the king, entered on record, and taken in some court or by some judicial officer; whereby the parties acknowledge themselves

(a) Beccar. ch. 41.

(b) See page 11.

(c) See book I, page 114.

(d) Cap. 18.

to be indebted to the crown in the sum required (for instance, 100*l.*), with condition to be void and of none effect if the \*party shall appear in court [ \*253 ] on such a day, and in the mean time shall keep the peace; (1) either generally towards the king and all his liege people; or, particularly, also, with regard to the person who craves the security. Or, if it be for the good behaviour, then on condition that he shall demean and behave himself well (or be of good behaviour), either generally or specially, for the time therein limited, as for one or more years, or for life. This recognizance, if taken by a justice of the peace, must be certified to the next sessions, in pursuance of the statute 3 Hen. VII, c. 1, and if the condition of such recognizance be broken, by any breach of the peace in the one case, or any misbehaviour in the other, the recognizance becomes forfeited or absolute; and being *estreated* or extracted (taken out from among the other records) and sent up to the exchequer, the party and his sureties, having now become the king's absolute debtors, are sued for the several sums in which they are respectively bound.

2. Any justices of the peace, by virtue of their commission, or those who are *ex officio* conservators of the peace, as was mentioned in a former volume, (e) may demand such security according to their own discretion; or it may be granted at the request of any subject, upon due cause shown, provided such demandant be under the king's protection; for which reason it has been formerly doubted, whether Jews, pagans, or persons convicted of a *præmunire* were entitled thereto. (f) Or, if the justice is averse to act, it may be granted by a mandatory writ, called a *supplicavit*, issuing out of the court of king's bench or chancery; which will compel the justice to act, as a ministerial and not as a judicial officer: and he must make a return to such writ, specifying his compliance, under his hand and seal. (g) But this writ is seldom used: for, when application is made to the superior courts, they usually take the recognizances there, under the directions of the statute 21 Jac. I. c. 8. And, indeed, a peer or peeress cannot be bound over in any other place than the [ \*254 ] courts of \*king's bench or chancery: though a justice of the peace has a power to require sureties of any other person, being *compos mentis* and under the degree of nobility, whether he be a fellow-justice or other magistrate, or whether he be merely a private man. (h) Wives may demand it against their husbands; or husbands, if necessary, against their wives. (i) But feme covert, and infants under age, ought to find security by their friends only, and not to be bound themselves: for they are incapable of engaging themselves to answer any debt; which, as we observed, is the nature of these recognizances or acknowledgments. (2)

3. A recognizance may be discharged, either by the demise of the king, to whom the recognizance is made; or by the death of the principal party bound thereby, if not before forfeited; or by order of the court to which such recognizance is certified by the justices (as the quarter sessions, assizes, or king's bench), if they see sufficient cause; or in case he at whose request it was granted, if granted upon a private account, will release it, or does not make his appearance to pray that it may be continued. (k)

Thus far what has been said is applicable to both species of recognizances, for the *peace*, and for the *good behaviour*: *de pace, et legalitate, tuenda*, as ex-

(e) See book I, page 350.

(f) 1 Hawk. P. C. 120.

(g) 2 Stra. 1307.

(h) F. N. B. 80. 2 P. Wms. 202.

(i) 1 Hawk. P. C. 120.

(k) 1 Hawk. P. C. 127.

(1) There must be a limit to the time of imprisonment in default of finding sureties. *Prickett v. Gratrex*, 8 Q. B., 1020. But one may be bound over for a longer time than till the next sessions. *Willes v. Bridger*, 2 B. & Ald., 278, where the imprisonment was for two years. See *R. v. Bowes*, 1 T. R., 696. See next note.

(2) In default of giving security, the party is committed to prison, but is not to be detained on the warrant of a single magistrate for more than twelve calendar months. *Statute 16 and 17 Vic., c. 80, § 2.*

pressed in the laws of King Edward. But as these two species of securities are in some respects different, especially as to the cause of granting, or the means of forfeiting them, I shall now consider them separately: and, first, shall show for what cause such a recognizance, with sureties for the *peace*, is grantable; and then, how it may be forfeited.

1. Any justices of the peace, may, *ex officio*, bind all those to keep the peace, who in his presence make any affray: or threaten to kill or beat another; or contend together with hot and angry words; or go about with unusual weapons \*or attendance, to the terror of the people; and all such as he [\*255] knows to be common barretors; and such as are brought before him by the constable for a breach of peace in his presence; and all such persons, as, having been before bound to the peace, have broken it and forfeited their recognizances. (l) Also, wherever any private man hath just cause to fear that another will burn his house, or do him a corporal injury, by killing, imprisoning, or beating him; or that he will procure others so to do; he may demand surety of the peace against such person: and every justice of the peace is bound to grant it, if he who demands it will make oath that he is actually under fear of death or bodily harm; and will show that he has just cause to be so, by reason of the other's menaces, attempts, or having lain in wait for him; and will also further swear, that he does not require such surety out of malice, or for mere vexation. (m) This is called *swearing the peace* against another: and, if the party does not find such sureties, as the justice in his discretion shall require, he may immediately be committed till he does. (n)

2. Such recognizance for keeping the peace, when given, may be forfeited by any actual violence, or even an assault, or menace, to the person of him who demanded it, if it be a special recognizance; or if the recognizance be general, by any unlawful action whatsoever, that either is or tends to a breach of the peace; or more particularly, by any one of the many species of offences which were mentioned as crimes against the public peace in the eleventh chapter of this book; or by any private violence committed against any of his majesty's subjects. But a bare trespass upon the lands or goods of another, which is a ground for a civil action, unless accompanied with a wilful breach of the peace, is no forfeiture of the recognizance. (o) Neither are mere reproachful words, as calling a man a knave or liar, any breach of the peace, so as to forfeit one's recognizance, (being \*looked upon to be merely the effect of unmean- [\*256] ing heat and passion), unless they amount to a challenge to fight. (p)

The other species of recognizance, with sureties, is for the *good abearance* or *good behaviour*. This includes security for the peace, and somewhat more; we will therefore examine it in the same manner as the other.

1. First, then, the justices are empowered by the statute 34 Edw. III, c. 1, to bind over to the good behaviour towards the king and his people, all of them *that be not of good fame*, wherever they be found; to the intent that the people be not troubled or endamaged, nor the peace diminished, nor merchants and others, passing by the highways of the realm, be disturbed nor put in the peril which may happen by such offenders. Under the general words of this expression *that be not of good fame*, it is holden that a man may be bound to his good behaviour for causes of scandal, *contra bonos mores*, as well as *contra pacem*: as, for haunting bawdy-houses with women of bad fame; or for keeping such women in his own house; or for words tending to scandalize the government, or in abuse of the officers of justice, especially in the execution of their office. Thus, also, a justice may bind over all night-walkers; eaves-droppers; such as keep suspicious company, or are reported to be pilferers or robbers; such as sleep in the day, and wake in the night; common drunkards; whoremasters; the putative fathers of bastards; cheats; idle vagabonds; and other persons whose misbehaviour may reasonably bring them within the general words of the statute, as persons not of good fame: an expression, it

(l) 1 Hawk, P. C. 126.

(m) 1 Hawk, P. C. 127.

(n) *Ibid.* 128.(o) *Ibid.* 131.(p) *Ibid.* 130.

must be owned, of so great a latitude, as leaves much to be determined by the discretion of the magistrate himself. But if he commits a man for want of sureties, he must express the cause thereof with convenient certainty; and take care that such cause be a good one. (g) (3)

[\*257] \*2. A recognizance for the good behaviour may be forfeited by all the same means as one for the security of the peace may be: and also by some others. As, by going armed, with unusual attendance, to the terror of the people; by speaking words tending to sedition; or by committing any of those acts of misbehaviour which the recognizance was intended to prevent. But not by barely giving fresh cause of suspicion of that which perhaps may never actually happen: (r) for, though it is just to compel suspected persons to give security to the public against misbehaviour that is apprehended; yet it would be hard, upon such suspicion, without proof of any actual crime, to punish them by a forfeiture of their recognizance.

## CHAPTER XIX.

### OF COURTS OF A CRIMINAL JURISDICTION.

THE sixth, and last, object of our inquiries will be the method of *inflicting* those *punishments* which the law has annexed to particular offences; and which I have constantly subjoined to the description of the crime itself. In the discussion of which, I shall pursue much the same general method that I followed in the preceding book, with regard to the redress of civil injuries; by, first, pointing out the several *courts* of criminal jurisdiction, wherein offenders may be prosecuted to punishment; and by, secondly, deducing down in their natural order, and explaining, the several *proceedings* therein.

First, then, in reckoning up the several *courts* of criminal jurisdiction, I shall, as in the former case, begin with an account of such as are of a *public* and *general* jurisdiction throughout the whole realm; and afterwards, proceed to such as are only of a *private* and *special* jurisdiction, and confined to some particular parts of the kingdom.

I. In our inquiries into the criminal courts of *public* and *general* jurisdiction, I must, in one respect, pursue a different order from that in which I considered the civil tribunals. For there, as the several courts had a gradual subordination to each other, the superior correcting and reforming the errors of the inferior, I thought it best to begin with the lowest, and so ascend gradually to the courts of appeal or those of \*the most extensive powers. [\*259] But as it is contrary to the genius and spirit of the law of England to suffer any man to be tried twice for the same offence in a criminal way, especially if acquitted upon the first trial; therefore these criminal courts may be said to be all independent of each other; at least, so far as that the sentence of the lowest of them can never be controlled or reversed by the highest jurisdiction in the kingdom, unless for error in matter of law, apparent upon the face of the record; though sometimes causes may be removed from one to the other before trial. And therefore as in these courts of criminal cognizance, there is not the same chain and dependence as in the others, I shall rank them according to their dignity, and begin with the highest of all, viz.:

(g) 1 Hawk. P. C. 133.

(r) 1 Hawk. P. C. 133.

(3) The subject of this chapter will be found covered by statutes in the several states of the American Union, and treated of in the treatises published for the guide of magistrates in criminal cases, and also in some of the works on criminal law.

1. The high court of *parliament*; which is the supreme court in the kingdom, not only for the making, but also for the execution, of laws: by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment. (1) As for acts of parliament to attain particular persons of treason or felony, or to inflict pains and penalties, beyond or contrary to the common law, to serve a special purpose, I speak not of them; being to all intents and purposes new laws, made *pro re nata*, and by no means an execution of such as are already in being. But an impeachment before the lords by the commons of Great Britain, in parliament, is a prosecution of the already known and established law, and has been frequently put in practice; being a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom. (a) A commoner cannot, however, be impeached before the lords for any capital offence, but only for high misdemeanors: (b) a peer may be impeached for any \*crime. (2) And they usually (in case of an impeachment of a peer [260] for treason) address the crown to appoint a lord high steward for the greater dignity and regularity of their proceedings; which high steward was formerly elected by the peers themselves, though he was generally commissioned by the king; (c) but it hath of late years been strenuously maintained (d) that the appointment of an high steward in such cases is not indispensably necessary, but that the house may proceed without one. The articles of impeachment are a kind of bills of indictment, found by the house of commons, and afterwards tried by the lords; who are, in cases of misdemeanors, considered not only as their own peers, but as the peers of the whole nation. This is a custom derived to us from the constitution of the ancient Germans: who, in their great councils, sometimes tried capital accusations relating to the public: "*licet apud consilium accusare quoque, et discrimen capitis intendere.*" (e) And it has a peculiar propriety in the English constitution; which has much improved upon the ancient model imported hither from the continent. For, though in general the union of the legislative and judicial powers ought to be more carefully avoided, (f) yet it may happen that a subject, intrusted with the administration of public affairs, may infringe the rights of the people, and be guilty of such crimes as the ordinary magistrate either \*dares [261] not or cannot punish. Of these the representatives of the people, or house of commons, cannot properly *judge*; because their constituents are the

(a) 1 Hal. P. C. 150.

(b) When in 4 Edw. III. the king demanded the earls, barons, and peers to give judgment against Simon de Beresford, who had been a notorious accomplice in the treasons of Roger, Earl of Mortimer, they came before the king in parliament, and said all with one voice that the said Simon was not their peer; and, therefore, they were not bound to judge him as a peer of the land. And when afterwards, in the same parliament, they were prevailed upon, in respect to the notoriety and heinousness of his crimes, to receive the charge, and give judgment against him, the following protest and proviso was entered in the parliament-roll: "And it is assented and accorded by our lord the king, and all the great men, in full parliament, that albeit the peers, as judges of the parliament, have taken upon them in the presence of our lord the king, to make and render the said judgment, yet the peers who now are, or shall be in time to come, be not bound or charged to render judgment upon others than peers; nor that the peers of the land have power to do this, but thereof ought ever to be discharged and acquitted; and that the aforesaid judgment now rendered be not drawn to example or consequence in time to come, whereby the said peers may be charged hereafter, to judge others than their peers, contrary to the laws of the land, if the like case happen, which God forbid." (Rot. Parl. 4 Ed. III. n. 2 and 6. 2 Bred. Hist. 190. Selden, Judic. in Parl. c. 1.)

(c) 1 Hal. P. C. 350.

(d) Lords' Journ. 12 May, 1679. Com. Journ. 15 May, 1679. Fort. 142, &c.

(e) Tacit. *de mor. Germ.* 12.

(f) See book I. page 269.

(1) In the United States, as well as in the several states of the Union, the senate tries impeachments, while the lower house prefers the charges. The whole law of impeachment was very fully considered on the trial of President Johnson, to the report of which the reader is referred. See also 6 Am. Law Reg., N. S., 257 and 641.

The constitution of the United States forbids the passage of bills of attainder, by either the national or state governments. Const. U. S., art. 1, §§ 9 and 10. This precludes special acts imposing punishments on particular persons or classes of persons by legislative authority. For a full discussion of these provisions, see *Cummings v. Missouri*, 4 Wall., 277; *Ex parte Garland*, 4 Wall., 383; *Drehman v. Stifle*, 8 Wall., 595.

(2) On charges of misdemeanor, however, peers are tried, like commoners, by jury. *R. v. Lord Faux*, 1 Bulstr., 197.

parties injured, and can therefore only *impeach*. But before what court shall this impeachment be tried? Not before the ordinary tribunals, which would naturally be swayed by the authority of so powerful an accuser. Reason, therefore, will suggest that this branch of the legislature, which represents the people, must bring its charge before the other branch, which consists of the nobility, who have neither the same interests nor the same passions as popular assemblies. (g) This is a vast superiority, which the constitution of this island enjoys, over those of the Grecian or Roman republics; where the people were, at the same time, both judges and accusers. It is proper that the nobility should judge, to insure justice to the accused; as it is proper that the people should accuse, to insure justice to the commonwealth. And, therefore, among other extraordinary circumstances attending the authority of this court, there is one of a very singular nature, which was insisted on by the house of commons in the case of the earl of Danby, in the reign of Charles II; (h) and it is now enacted by statute 12 and 13 Wm. III, c. 2, that no pardon under the great seal shall be pleadable to an impeachment by the commons of Great Britain in parliament. (i)

2. The court of the *lord high steward* of Great Britain (k) is a court instituted for the trial of peers, indicted for treason or felony, or for misprision of either. (l) The office of this great magistrate is very ancient: and was formerly hereditary, or at least held for life, or *dum bene se gesserit*: but now it is usually and hath been for many centuries past, (m) granted *pro hac vice* only; and it hath been the constant practice (and therefore seems now to have become necessary, to grant \*it to a lord of parliament, else he is incapable [\*262] to try such delinquent peer. (n) When such an indictment is therefore found by a grand jury of freeholders in the king's bench, or at the assizes before the justices of *oyer and terminer*, it is to be removed by a writ of *certiorari* into the court of the lord high steward, which only has power to determine it. A peer may plead a pardon before the court of king's bench, and the judges have power to allow it; in order to prevent the trouble of appointing an high steward, merely for the purpose of receiving such plea. But he may not plead, in that inferior court, any other plea; as *guilty or not guilty*, of the indictment; but only in this court: because, in consequence of such plea, it is possible that judgment of death might be awarded against him. The king, therefore, in case a peer be indicted for treason, felony or misprision, creates a lord high steward *pro hac vice* by commission under the great seal; which recites the indictment so found, and gives his grace power to receive and try it *secundum legem et consuetudinem Angliæ*. Then, when the indictment is regularly removed by writ of *certiorari*, commanding the inferior court to certify it up to him, the lord high steward directs a precept to a serjeant at arms, to summon the lords to attend and try the indicted peer. This precept was formerly issued to summon only eighteen or twenty, selected from the body of peers; then the number came to be indefinite; and the custom was for the lord high steward to summon as many as he thought proper (but of late years not less than twenty-three.) (o) and that those lords only should sit upon the trial: which threw a monstrous weight of power into the hands of the crown, and this its great officer, of selecting only such peers as the then predominate party should most approve of. And accordingly, when the Earl of Clarendon fell in [\*263] disgrace with Charles II, \*there was a design formed to prorogue the parliament, in order to try him by a select number of peers; it being doubted whether the whole house could be induced to fall in with the views of the court. (p) But now by statute 7 Wm. III, c. 3, upon all trials of peers for

(g) Montesq. Sp. L. xi, 6.

(h) Com. Journ. 5 May, 1679.

(i) 1 Bulstr. 198.

(m) Pryn. on 4 Inst. 46.

(k) 4 Inst. 53. 2 Hawk. P. C. 5, 431. 2 Jon. 34.

(l) Quand un seigneur de parlement serra arreign de treason ou felony, le roy par ses lettres patentes fera un grand et sage seigneur d'estre le grand senechal d'Angleterre: qui doit faire un precept par faire venir xx seigneurs, ou avuis, &c. (Yearb. 13 Hen. VIII, 11.) See Standf. P. C. 153. 3 Inst. 2. 4 Inst. 50. 2 Hawk. P. C. 5. Barr. 234.

(o) Kelynge, 55.

(p) Carte's Life of Ormonde, Vol. II.



treason or misprision, all the peers who have a right to sit and vote in parliament shall be summoned, at least twenty days before such trial, to appear and vote therein; and every lord appearing shall vote in the trial of such peer, first taking the oaths of allegiance and supremacy, and subscribing the declaration against popery. (3)

During the session of parliament the trial of an indicted peer is not properly in the court of the lord high steward, but before the court last mentioned, of our lord the *king in parliament*. (q) It is true, a lord high steward is always appointed in that case, to regulate and add weight to the proceedings: but he is rather in the nature of a speaker *pro tempore*, or chairman of the court, than the judge of it; for the collective body of the peers are therein the judges both of law and fact, and the high steward has a vote with the rest, in right of his peerage. But in the court of the lord high steward, which is held in the recess of parliament, he is the sole judge of matters of law, as the lords triors are in the matters of fact; and as they may not interfere with him in regulating the proceedings of the court, so he has no right to intermix with them in giving any vote upon the trial. (r) Therefore, upon the conviction and attainder of a peer for murder in full parliament, it hath been holden by the judges, (s) that in case the day appointed in the judgment for execution should lapse before execution done, a new time of execution may be appointed by either the high court of parliament during its sitting, though no high steward be existing; or, in the recess of parliament, by the court of king's bench, the record being removed into that court.

\*It has been a point of some controversy, whether the bishops have now a right to sit in the court of the lord high steward, to try indictments of treason and misprision. Some incline to imagine them included under the general words of the statute of King William, "all peers who have a right to sit and vote in parliament;" but the expression had been much clearer if it had been, "all lords," and not "all peers;" for though bishops, on account of the baronies annexed to their bishopricks, are clearly lords of parliament, yet, their blood not being ennobled, they are not universally allowed to be peers with the temporal nobility: and perhaps this word might be inserted purposely with a view to exclude them. However, there is no instance of their sitting on trials for capital offences, even upon impeachments or indictments in full parliament, much less in the court we are now treating of; for indeed they usually withdraw voluntarily, but enter a protest declaring their right to stay. It is observable that, in the eleventh chapter of the constitutions of Clarendon, made in parliament 11 Hen. II, they are expressly excused, rather than excluded, from sitting and voting in trials, when they come to concern life or limb: "*episcopi, sicut ceteri barones, debent interesse judiciis cum baronibus, quosque perveniatur ad diminutionem membrorum, vel ad mortem*," and Becket's quarrel with the king hereupon was not on account of the exception (which was agreeable to the canon law), but of the general rule that compelled the bishops to attend at all. And the determination of the house of lords in the earl of Danby's case, (t) which hath ever since been adhered to, is consonant to these constitutions; "that the lords spiritual have a right to stay and sit in court in capital cases, till the court proceeds to the vote of guilty, or not guilty." It must be noted that this resolution extends only to trials *in full parliament*: for to the court of the lord high steward (in which no vote can be given, but merely that of guilty, or not guilty), no bishop, as such, ever was or could be summoned; and though the statute of King William \*regulates the proceedings in that court, as well as in the court of parliament, yet it never intended

(q) *Fost.* 141.(r) *State Trials*, vol. iv. 214, 222, 233.(s) *Fost.* 132.(t) *Lords' Journ.* 15 May, 1679.

(3) In the United States all the members of the house which is to try the impeachment are summoned. The right of challenge was somewhat discussed on the trial of President Johnson, but was not conceded.

to new-model or alter its constitution: and consequently does not give the lords spiritual any right in cases of blood which they had not before. (u) And what makes their exclusion more reasonable is, that they have no right to be tried themselves in the court of the lord high steward, (w) and therefore surely ought not to be judges there. For the privilege of being thus tried depends upon nobility of blood, rather than a seat in the house: as appears from the trials of popish lords, or lords under age, and (since the union) of the Scots' nobility, though not in the number of the sixteen; and from the trials of females, such as the queen consort or dowager, and of all peeresses by birth; and peeresses by marriage, also, unless they have, when dowagers, disparaged themselves by taking a commoner to their second husband. (4)

3. The court of *king's bench*, (x) concerning the nature of which we partly inquired in the preceding book, (y) was (we may remember) divided into a *crown* side and a *plea* side. And on the crown side, or crown office, it takes cognizance of all criminal causes, from high treason down to the most trivial misdemeanor or breach of the peace. Into this court also indictments from all inferior courts may be removed by writ of *certiorari*, and tried either at bar, or at *nisi prius*, by a jury of the county out of which the indictment is brought. The judges of this court are the supreme coroners of the kingdom. And the court itself is the principal court of criminal jurisdiction (though the two former are of greater dignity) known to the laws of England. For which reason by the coming of the court of king's bench into any county (as it was removed to Oxford on account of the sickness in 1665), all former commissions of *oyer* and *terminer*, and general gaol delivery, are at once absorbed and determined *ipso facto* (5) \*in the same manner as by the old Gothic and Saxon constitutions, "*jura vetusto obtinuit, quiescunt omnia inferiora judicia, dicente jus rege.*" (z)

Into this court of king's bench hath reverted all that was good and salutary of the jurisdiction of the court of *star-chamber*, *camera stellata*; (a) which was a court of very ancient original, (b) but new-modeled by statutes 3 Hen. VII, c. 1, and 21 Hen. VIII, c. 20, consisting of divers lords, spiritual and temporal, being privy counsellors, together with two judges of the courts of common law, without the intervention of any jury. Their jurisdiction extended [\*267] legally over riots, perjury, misbehaviour of sheriffs, and other \*notorious misdemeanors, contrary to the laws of the land. Yet, this was afterwards (as Lord Clarendon informs us) (c) stretched "to the asserting of

(u) *Fort. 348.* (w) *Bro. Abr. 2 Trial. 142.*

(z) 4 *Inst. 70.* 2 *Hal. P. C. 2.* 2 *Hawk. P. C. 6.*

(y) See book 3, page 41.

(x) *Stiernhook, l. 1, c. 2.*

(a) This is said (Lamb. *Arch. 154*) to have been so called, either from the Saxon word *stear* or *stern*;—or from its punishing the *crimen stellionatus*, or cozenage;—or because the room wherein it sat, the old council-chamber of the palace of Westminster (Lamb. *148*), which is now converted into the lottery office, and forms the eastern side of New Palace-yard, was full of windows; or (to which Sir Edward Coke, 4 *Inst. 66*, accedes) because haply the roof thereof was at the first garnished with glided stars. As all these are merely conjectures (for no stars are now in the roof, nor are any said to have remained there so late as the reign of Queen Elizabeth), it may be allowable to propose another conjectural etymology, as plausible perhaps as any of them. It is well known that before the banishment of the Jews under Edward I, their contracts and obligations were denominated in our ancient records *starrs* or *stars*, from a corruption of the Hebrew word *shetar*, a covenant. Tovey's *Angl. judaic.* 32. Selden, tit. of Hon. ii, 34. *Uxor. ebraic.* l. 14. These *starrs*, by an ordinance of Richard the First, preserved by Hoveden, were commanded to be enrolled and deposited in chests under three keys in certain places; one, and the most considerable, of which was in the king's exchequer at Westminster; and no *starr* was allowed to be valid unless it were found in some of the said repositories. (*Memorand. in Soacc. P. 6 Edw. I.* prefixed to Maynard's year-book of Edw. II, fol. 8, Madox. *hist. exch. c. vii, §§ 4, 5, 6.*) The room at the exchequer, where the chests containing these *starrs* were kept, was probably called the *starr-chamber*; and when the Jews were expelled the kingdom, was applied to the use of the king's council, sitting in their judicial capacity. To confirm this, the first time the *starr-chamber* is mentioned in any record, it is said to have been situated near the receipt of the exchequer at Westminster; the king's council, his chancellor, treasurer, justices, and other sages, were assembled *en la chambre des esteilles pres la recepte la Westminster.* *Clau. 41. Edw. III, m. 13.* For in process of time, when the meaning of the Jewish *starrs* was forgotten, the word *starr-chamber* was naturally rendered in law-French, *la chambre des esteilles* and in law-Latin *camera stellata*; which continued to be the style in Latin till the dissolution of that court. (b) Lamb. *Arch. 156.* (c) *Hist. of Reb., books 1 and 3.*

(4) By 4 and 5 Vic., c. 22, "Every lord of parliament or peer of this realm, having place or voice in parliament, against whom any indictment for felony may be found, shall plead to such indictment, and shall, upon conviction, be liable to the same punishment as any other of her majesty's subjects are or may be liable upon conviction for such felony."

(5) This is now otherwise by statute.

all proclamations and orders of state: to the vindicating of illegal commissions, and grants of monopolies; holding for honourable that which pleased, and for just that which profited, and becoming both a court of law to determine civil rights, and a court of revenue to enrich the treasury; the council table by proclamations enjoining to the people that which was not enjoined by the laws, and prohibiting that which was not prohibited; and the star-chamber, which consisted of the same persons in different rooms, censuring the breach and disobedience to those proclamations by very great fines, imprisonments, and corporal severities: so that any disrespect to any acts of state, or to the persons of statesmen, was in no time more penal, and the foundations of right never more in danger to be destroyed." For which reasons it was finally abolished by statute 16 Car. I, c. 10, to the general joy of the whole nation.

(a) (6)

4. The court of *chivalry* (e) of which we also formerly spoke (f) as a military court, or court of honour, when held before the earl marshal only, is also a criminal court when held before the lord high constable of England jointly with the earl marshal. And then it has jurisdiction over pleas of life and member, arising in matters of arms and deeds of war, as well out of the realm as within it. But the criminal, as well as civil part of its authority, [268] is fallen into entire disuse: there having been no permanent high constable of England (but only *pro hac vice* at coronations and the like), since the attainder and execution of Stafford, duke of Buckingham, in the thirteenth year of Henry VIII; the authority and charge, both in war and peace, being deemed too ample for a subject: so ample that when the chief justice Fineux was asked by king Henry the Eighth, how far they extended, he declined answering, and said the decision of that question belonged to the law of arms, and not to the law of England. (g)

5. The high court of *admiralty*, (h) held before the lord high admiral of England, or his deputy, styled the judge of the admiralty, is not only a court of civil but also of criminal jurisdiction. This court hath cognizance of all crimes and offences committed either upon the sea, or on the coasts, out of the body or extent of any English county; and by statute 15 Ric. II, c. 3, of death and mayhem happening in great ships being and hovering in the main stream of great rivers, below the bridges of the same rivers, which are then a sort of ports or havens; such as are the ports of London and Gloucester, though they lie at a great distance from the sea. But, as this court proceeded without jury, in a method much conformed to the civil law, the exercise of a criminal jurisdiction there was contrary to the genius of the law of England: inasmuch as a man might be there deprived of his life by the opinion of a single judge, without the judgment of his peers. And besides, as innocent persons might thus fall a sacrifice to the caprice of a single man, so very gross offenders

(d) The just odium into which this tribunal had fallen before its dissolution, has been the occasion that few memorials have reached us of its nature, jurisdiction and practice; except such as, on account of their enormous oppression, are recorded in the histories of the times. There are, however, to be met with some reports of its proceedings in Dyer, Croke, Coke, and other reporters of that age, and some in manuscript, of which the author hath two; one from 40 Eliz. to 13 Jac. I, the other for the first three years of King Charles; and there is in the British Museum (Harl. MSS. vol. I. No. 1228) a very full, methodical, and accurate account of the constitution and course of this court, compiled by William Hudson of Gray's Inn, an eminent practitioner therein, and a short account of the same, with copies of all its process, may also be found in 13 Ryms. Feod. 192, &c.

(e) 4 Inst. 123. 2 Hawk. P. C. 9.

(h) 4 Inst. 134, 147.

(f) See book III, page 68.

(g) Duck. *de authorit. jur. civ.*

(6) In this place should be mentioned the court of criminal appeal, established by 11 and 12 Vic., c. 78.

It consists of the judges of the superior courts of common law, any five of whom, including one of the chief justices, or the chief baron, shall constitute a quorum. On a conviction before a court of oyer and terminer, gaol delivery or quarter sessions, the judges before whom the cause was tried, may reserve the questions of law for the consideration of this court. The court, after argument, may make such order in the premises as justice may require, and may either pronounce the proper judgment themselves, or remit the record for that purpose.

might, and did frequently, escape punishment: for the rule of the civil law is, how reasonably I shall not at present inquire, that no judgment of death can be given against offenders, without proof by two witnesses, or a confession of the fact by themselves. This was always a great offence to the English nation: and therefore in the eighth year of Henry VI it was endeavoured to apply [\*269] <sup>a</sup> a remedy in parliament: which then miscarried for want of the royal assent. However, by the statute 28 Hen. VIII, c. 15, it was enacted, that these offences should be tried by commissioners of *oyer and terminer*, under the king's great seal; namely, the admiral or his deputy, and three or four more (among whom two common law judges are usually appointed); the indictment being first found by a grand jury of twelve men, and afterwards tried by a petty jury: and that the course of proceedings should be according to the law of the land. This is now the only method of trying marine felonies in the court of admiralty; the judge of the admiralty still presiding therein, as the lord mayor is the president of the session of *oyer and terminer* in London. (7)

These five courts may be held in any part of the kingdom, and their jurisdiction extends over crimes that arise throughout the whole of it, from one end to the other. What follow are also of a general nature, and universally diffused over the nation, but yet are of a local jurisdiction, and confined to particular districts. Of which species are,

6, 7. The courts of *oyer and terminer* and the *general gaol delivery*, (i) which are held before the king's commissioners, among whom are usually two judges of the courts at Westminster, twice in every year in every county of the kingdom; except the four northern ones, where they are held only once, and London and Middlesex, wherein they are held eight times. These were slightly mentioned in the preceding book. (k) We then observed that, at what is usually called the assizes, the judges sit by virtue of five several authorities: two of which, the commission of *assize* and its attendant jurisdiction of *nisi prius*, being principally of a civil nature, were then explained at large; to which I shall only add, that these justices have, by virtue of several statutes, a criminal jurisdiction, also, in certain special cases. (l) The third, which is [\*270] the <sup>\*</sup>commission of the *peace*, was also treated of in a former volume, (m) when we inquired into the nature and office of a justice of the peace. I shall only add, that all the justices of the peace of any county,

(i) 4 Inst. 163, 163. 2 Hal. P. C. 23, 23. 2 Hawk. P. C. 14, 22.

(k) See book III, p. 62.

(l) 2 Hal. P. C. 32. 2 Hawk. P. C. 23.

(m) See book I, p. 251.

(7) By 4 and 5 Wm. IV, c. 36, and 7 Wm. IV and 1 Vic., c. 77, the central criminal court was created, with a district composed of London and Middlesex, and parts of Kent and Surrey. It is composed of the lord mayor of London, the lord chancellor, the common law judges, the judges of the courts of bankruptcy and admiralty, the dean of the arches, the aldermen of London, the recorder and common sergeant of London, the judges of the sheriff's court of London, and the ex-chancellors and ex-judges of the superior courts. Any two or more may hold the court, (and, in practice, it is generally presided over by two judges of the superior courts and the law officers of the city of London. It has jurisdiction of offenses committed within the district, and also of all offenses committed on the high seas and other places within the jurisdiction of the admiralty.

By 7 and 8 Vic., c. 2, after reciting that the issuing of a special commission in the manner prescribed by 28 Hen. VIII, c. 15, was found inconvenient, it is enacted that her majesty's justices of assize, or others, her majesty's commissioners, by whom any court shall be holden under any of her majesty's commissions of *oyer and terminer*, or general gaol delivery, shall have the powers which by any act are given to any commissioners named in any commission of *oyer and terminer*, for the trying of offenses committed within the jurisdiction of the admiralty, and to deliver the gaol, etc., of any person therein for any offense alleged to have been committed on the high seas and other places within the jurisdiction of the admiralty. See, also, 18 and 19 Vic., c. 91, § 21. And several subsequent statutes declare that offenses committed within the jurisdiction of the admiralty shall be deemed offenses of the same nature and liable to the same punishments, as if committed upon land within England or Ireland, and may be tried in any county or place in which the offender may be apprehended or in custody.

wherein the assizes are held, are bound by law to attend them, or else are liable to a fine; in order to return recognizances, &c., and to assist the judges in such matters as lie within their knowledge and jurisdiction, and in which some of them have probably been concerned, by way of previous examination. But the fourth authority is the commission of *oyer and terminer* (n) to hear and determine all treasons, felonies and misdemeanors. This is directed to the judges and several others, or any two of them; but the judges or serjeants at law only are of the *quorum*, so that the rest cannot act without the presence of one of them. The words of the commission are, "to inquire, hear and determine;" so that, by virtue of this commission, they can only proceed upon an indictment found at the same assizes; for they must first inquire by means of the grand jury or inquest, before they are empowered to hear and determine by the help of the petit jury. Therefore, they have, besides, fifthly, a commission of general *gaol delivery*; (o) which empowers them to try and deliver every prisoner, who shall be in the gaol when the judges arrive at the circuit town, whenever or before whomsoever indicted, or for whatever crime committed. It was anciently the course to issue special writs of gaol delivery for each particular prisoner, which are called the writs *de bono et malo*: (p) but these being found inconvenient and oppressive, a general commission for all the prisoners has long been established in their stead. So that, one way or other, the gaols are in general cleared, and all offenders tried, punished, or delivered, twice in every year; a constitution of singular use and excellence. (8) Sometimes, also, upon urgent occasions; the king issues a special or extraordinary commission of *oyer and terminer*, and *gaol delivery*, confined to those offences which stand in need of immediate inquiry and punishment: upon which the course of proceeding is much the same, as upon general and ordinary commissions. Formerly it was held, in pursuance of the statutes 8 [271] Ric. II, c. 2, and 33 Hen. VIII, c. 4, that no judge or other lawyer could act in the commission of *oyer and terminer*, or in that of *gaol delivery*, within his own county where he was born or inhabited; in like manner as they are prohibited from being judges of assize and determining civil causes. But that local partiality, which the jealousy of our ancestors was careful to prevent, being judged less likely to operate in the trial of crimes and misdemeanors, than in matters of property and disputes between party and party, it was thought proper by the statute 12 Geo. II, c. 27, to allow any man to be a justice of *oyer and terminer*, and general *gaol delivery*, within any county of England.

8. The court of general *quarter sessions* of the peace (q) is a court that must be held in every county once in every quarter of a year; which, by statute 2 Hen. V, c. 4, is appointed to be in the first week after Michaelmas-day; the first week after the epiphany; the first week after the close of Easter; and in the week after the translation of St. Thomas the Martyr, or the seventh of July. It is held before two or more justices of the peace, one of whom must be of the *quorum*. (9) The jurisdiction of this court, by statute 34 Edw. III, c. 1, extends to the trying and determining all felonies and trespasses whatsoever: though they seldom, if ever, try any greater offence than small felonies within the benefit of clergy; their commission providing, that if any case of difficulty arises, they shall not proceed to judgment, but in the presence of one of the justices of the court of king's bench or common pleas, or one of the judges of assize. And therefore, murders, and other capital felonies, are usually remitted for a more solemn trial to the assizes. (10) They cannot also try

(n) See Appendix, § 1.

(o) See Appendix, § 1.

(p) 3 Inst. 42.

(q) 4 Inst. 170. 2 Hal. P. C. 42. 2 Hawk. P. C. 82.

(8) For a full discussion of this point, see 2 Hawk. P. C., ch. 6.

(9) The commission so runs, but it is made immaterial by statute. The terms of the court are also now altered by statute.

(10) Since the statute 5 and 6 Vic., c. 88, this court cannot try any person for treason or

any new created offence, without express power given them by the statute which creates it. (r) But there are many offences and particular matters, which by particular statutes belong properly to this jurisdiction, and ought [\*272] to be prosecuted in this court; as, the \*smaller misdemeanors against the public or commonwealth, not amounting to felony; and, especially, offences relating to the game, highways, ale-houses, bastard children, the settlement and provision for the poor, vagrants, servants' wages, apprentices, and popish recusants. (s) Some of these are proceeded upon by indictment; and others in a summary way by motion and order thereupon; which order may, for the most part, unless guarded against by particular statutes, be removed into the court of king's bench, by a writ of *certiorari facias*, and be there either quashed or confirmed. The records or rolls of the sessions are committed to the custody of a special officer, denominated the *custos rotulorum*, who is always a justice of the *quorum*; and among them of the *quorum* (saith Lambard) (t) a man for the most part especially picked out, either for wisdom, countenance, or credit. The nomination of the *custos rotulorum* (who is the principal *civil* officer in the county, as the lord lieutenant is the chief in *military* command) is by the king's sign manual: and to him the nomination of the clerk of the peace belongs; which office he is expressly forbidden to sell for money. (u)

In most corporation towns there are quarter sessions kept before justices of their own, within their respective limits: which have exactly the same authority as the general quarter sessions of the county, except in a very few instances: one of the most considerable of which is the matter of appeals from orders of removal of the poor, which, though they be from the orders of corporation justices, must be to the sessions of the county, by statutes 8 and 9 Wm. III, c. 30. In both corporations and counties at large, there is sometimes kept a special or petty session, by a few justices, for dispatching smaller business in the neighbourhood, between the times of the general sessions; as, for licensing ale-houses, passing the accounts of the parish officers, and the like.

\*9. The *sheriff's tourn*, (v) or rotation, is a court of record, held [\*273] twice every year, within a month after Easter and Michaelmas, before the sheriff, in different parts of the county; being, indeed, only the turn of the sheriff to keep a court-leet in each respective hundred: (w) this, therefore, is the great court-leet of the county, as the county court is the court-baron: for out of this, for the ease of the sheriff, was it taken.

10. The *court-leet*, or *view of frankpledge*, (x) which is a court of record, held once in the year, and not oftener, (y) within a particular hundred, lordship, or manor, before the steward of the leet: being the king's court, granted by charter to the lords of those hundreds or manors. Its original intent was to view the frankpledges, that is, the freeman within the liberty; who (we may remember), (z) according to the institution of the great Alfred, were all mutually pledges for the good behaviour of each other. Besides this, the preservation of the peace, and the chastisement of divers minute offences against the public good, are the objects both of the court-leet and the sheriff's tourn; which have exactly the same jurisdiction, one being only a larger species of the other; extending over more territory, but not over more causes. All freeholders within the precinct are obliged to attend them, and all persons commorant therein; which commorancy consists in usually lying there: a regulation, which owes its original to the laws of king Canute. (a) But persons under twelve and

(r) 4 Mod. 379. Salk. 406. Lord Raym. 1144.

(s) See Lambard *Eirenarcha*, and Burns' *Justice*.

(t) B. 4, c. 3.

(u) Stat. 37 Hen. VIII, c. 1. 1 W. and M. st. 1, c. 21.

(v) 4 Inst. 259. 2 Hal. P. C. 69. 2 Hawk. P. C. 55.

(w) Mirr. c. 1, §§ 13, 16.

(x) 4 Inst. 261. 2 Hawk. P. C. 72.

(y) Mirr. c. 1, § 10.

(z) See book III, p. 113.

(a) Part 2, c. 19.

murder, or for any felony which, when committed by a person not previously convicted of felony, is punishable by transportation for life; and its jurisdiction is still further restricted by subsequent statutes.

above sixty years old, peers, clergymen, women, and the king's tenants in ancient demesne, are excused from attendance there: all others being bound to appear upon the jury, if required, and make their due presentments. It was also, anciently, the custom to summon all the king's subjects, as they respectively grew to years of discretion and strength, to \*come to the court-leet, and there take the oath of allegiance to the king. The other [\*274] general business of the leet and tourn, was to present by jury all crimes whatsoever that happened within their jurisdiction: and not only to present, but also to punish, all trivial misdemeanors, as all trivial debts were recoverable in the court baron, and county court: justice, in these minuter matters of both kinds, being brought home to the doors of every man by our ancient constitution. Thus in the Gothic constitution, the *hæreda*, which answered to our court-leet, "*de omnibus quidem cognoscit, non tamen de omnibus judicat.*" (b) The objects of their jurisdiction are therefore unavoidably very numerous: being such as, in some degree, either less or more, affect the public weal, or good governance of the district in which they arise; from common nuisances and other material offences against the king's peace and public trade, down to eaves-dropping, waifs, and irregularities in public commons. But both the tourn and the leet have been for a long time in a declining way; a circumstance, owing in part to the discharge granted by the statute of Marlbridge, 52 Hen. III, c. 10, to all prelates, peers, and clergymen, from their attendance upon these courts; which occasioned them to grow into disrepute. And, hence, it is that their business hath, for the most part, gradually devolved upon the quarter sessions; which it is particularly directed to do in some cases by 1 Edw. IV, c. 2.

11. The court of the *coroners* (c) is also a court of record, to inquire when any one dies in prison, or comes to a violent or sudden death, by what manner he came to his end. And this he is only entitled to do *super visum corporis*. Of the coroner and his office we treated at large in a former volume, (d) among the public officers and ministers of the kingdom: and therefore, shall not here repeat our inquiries; only mentioning his court by way of regularity, among the criminal courts of the nation.

\*12. The court of the *clerk of the market* (e) is incident to every fair and market in the kingdom, to punish misdemeanors therein; as a court [\*275] *pie poudre* is, to determine all disputes relating to private or civil property. The object of this jurisdiction (f) is principally the cognizance of weights and measures, to try whether they be according to the true standard thereof, or no, which standard was anciently committed to the custody of the bishop, who appointed some clerk under him to inspect the abuse of them more narrowly; and hence this officer, though now usually a layman, is called the *clerk of the market*. (g) If they be not according to the standard, then, besides the punishment of the party by fine, the weights and measures themselves ought to be burnt. This is the most inferior court of criminal jurisdiction in the kingdom: though the objects of its coercion were esteemed among the Romans of such importance to the public that they were committed to the care of some of their most dignified magistrates, the *curule ædiles*.

II. There are a few other criminal courts of greater dignity than many of these, but of a more confined and partial jurisdiction; extending only to some particular places, which the royal favour, confirmed by act of parliament, has distinguished by the privilege of having peculiar courts of their own for the punishment of crimes and misdemeanors arising within the bounds of their cognizance. These, not being universally dispersed, or of general use as the former, but confined to one spot, as well as to a determinate species of causes, may be denominated private or special courts of criminal jurisdiction.

(b) *Stiernhook de jure Goth.* l. 1. c. 2.

(c) 4 Inst. 271. 2 Hal. P. C. 53. 4 Hawk. P. C. 42.

(d) See book I. page 246.

(e) 4 Inst. 272.

(f) See st. 17 Car. II, c. 19. 23 Car. II, c. 8. 26 Car. II, c. 12.

(g) Bacon of English Gov. b. x. c. 2.

I speak not here of ecclesiastical courts; which punish spiritual sins, rather than temporal crimes, by penance, contrition and excommunication, *pro salute animæ*; or, which is looked upon as equivalent to all the rest, by a sum of [\*276] money to the officers of the court by way of commutation of penance. Of these we discoursed sufficiently in the preceding book. (h) I am now speaking of such courts as proceed according to the course of the common law; which is a stranger to such unaccountable barterings of public justice.

1. And, first, the court of the *lord steward, treasurer, or comptroller* of the king's household, (i) was instituted by statute 3 Hen. VII, c. 14, to inquire of felony by any of the king's sworn servants, in the cheque roll of the household, under the degree of a lord, in confederating, compassing, conspiring, and imagining the death or destruction of the king, or any lord or other of his majesty's privy council, or the lord steward, treasurer, or comptroller of the king's house. The inquiry, and trial thereupon, must be by a jury according to the course of the common law, consisting of twelve sad men (that is, sober and discreet persons) of the king's household. (11)

2. The court of the *lord steward* of the king's household, or (in his absence) of the treasurer, comptroller, and steward of the *marshalsea*, (k) was erected by statute 33 Hen. VIII, c. 12, with jurisdiction to inquire of, hear, and determine, all treasons, misprisions of treason, murders, manslaughters, bloodshed, and other malicious strikings; whereby blood shall be shed in, or within the limits (that is, within two hundred feet from the gate) of any of the palaces and houses of the king, or any other house where the royal person shall abide. The proceedings are also by jury, both a grand and a petit one, as at common law, taken out of the officers and sworn servants of the king's household. The form and solemnity of the process, particularly with regard to the execution of the sentence for cutting off the hand, which is part of the punishment for shedding blood in the king's court, are very minutely set forth in the said statute 33 Hen. VIII, and the several officers of the servants of the household [\*277] in and about such execution are \*described; from the *serjeant of the wood-yard*, who furnishes the chopping-block, to the *serjeant-farrier*, who brings hot irons to sear the stump. (12)

3. As in the preceding book (l) we mentioned the courts of the two universities, or their chancellor's courts, for the redress of civil injuries; it will not be improper now to add a short word concerning the jurisdiction of their criminal courts, which is equally large and extensive. The chancellor's court of Oxford (with which university the author hath been chiefly conversant, though probably that of Cambridge hath also a similar jurisdiction) hath authority to determine all causes of property, wherein a privileged person is one of the parties, except only causes of freehold; and also all criminal offences or misdemeanors under the degree of treason, felony, or mayhem. The prohibition of meddling with freehold still continues: but the trial of treason, felony, and mayhem, by a particular charter, is committed to the university-jurisdiction in another court, namely, the court of the *lord high steward* of the university.

For by the charter of 7th June, 2 Hen. IV, (confirmed, among the rest, by the statute 13 Eliz. c. 29), cognizance is granted to the university of Oxford of all indictments of treasons, insurrections, felony and mayhem, which shall be found in any of the king's courts against a scholar or privileged person; and they are to be tried before the high steward of the university, or his deputy, who is to be nominated by the chancellor of the university for the time being. But when his office is called forth into action, such high steward must

(A) See book III, p. 61. (i) 4 Inst. 133. (k) 4 Inst. 133. 3 Hal. P. C. 7. (l) See book III, page 82.

(11) The statute 3 Hen. VII, c. 14, was repealed by the 6 Geo. IV, c. 81.

(12) That part of statute 33 Hen. VIII, c. 12, relating to this subject, was repealed by 9 Geo. IV, c. 81, and this court is therefore become obsolete.



be approved by the lord high chancellor of England; and a special commission under the great seal is given to him, and others, to try the indictment then depending, according to the law of the land and the privileges of the said university. When, therefore, an indictment is found "at the assizes or elsewhere, against any scholar of the university, or other privileged person, the vice-chancellor may claim the cognizance of it; and when claimed (in due time and manner) it ought to be allowed him by the judges of assize: and then it comes to be tried in the high steward's court. But the indictment must first be found by a grand jury, and then the cognizance claimed: for I take it that the high steward cannot proceed originally *ad inquirendum*; but only, after inquest in the common-law courts *ad audiendum et determinandum*. Much in the same manner, as when a peer is to be tried in the court of the lord high steward of Great Britain, the indictment must first be found at the assizes, or in the court of king's bench, and then (in consequence of a writ of *certiorari*) transmitted to be finally heard and determined before his grace the lord high steward and the peers.

When the cognizance is so allowed, if the offence be *inter minora crimina* or a misdemeanor only, it is tried in the chancellor's court by the ordinary judge. But if it be for treason, felony, or mayhem, it is then, and then only, to be determined before the high steward, under the king's special commission to try the same. The process of the trial is this. The high steward issues one precept to the sheriff of the county, who thereupon returns a panel of eighteen freeholders; and another precept to the bedels of the university, who thereupon return a panel of eighteen matriculated laymen, "*laicos privilegio universitatis gaudentes*:" and by a jury formed *de medietate*, half of freeholders and half of matriculated persons, is the indictment to be tried; and that in the guildhall of the city of Oxford. And if execution be necessary to be awarded, in consequence of finding the party guilty, the sheriff of the county must execute the university-process; to which he is annually bound by an oath.

"I have been the more minute in describing these proceedings, as there has happily been no occasion to reduce them into practice for more than a century past; nor will it perhaps be thought advisable to revive them: though it is not a right that merely rests *in scriptis* or theory, but has formerly often been carried into execution. There are many instances, one in the reign of Queen Elizabeth, two in that of James the First, and two in that of Charles the First, where indictments for murder have been challenged by the vice-chancellor at the assizes, and afterwards tried before the high steward by jury. The commissions under the great seal, the sheriff's and bedel's panels, and all the other proceedings on the trial of the several indictments, are still extant in the archives of that university.

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## CHAPTER XX.

### OF SUMMARY CONVICTIONS.

We are next, according to the plan I have laid down, to take into consideration the proceedings in the courts of criminal jurisdiction, in order to the punishment of offences. These are plain, easy, and regular; the law not admitting any fictions, as in civil causes, to take place where the life, the liberty, and the safety of the subject are more immediately brought into jeopardy. And these proceedings are divisible into two kinds, *summary* and *regular*: of the former of which I briefly speak, before we enter upon the latter, which will require a more thorough and particular examination.

By a *summary* proceeding (1) I mean principally such as is directed by several acts of parliament (for the common law is a stranger to it, unless in the case of contempts) for the conviction of offenders, and the inflicting of certain penalties created by those acts of parliament. In these there is no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only, as the statute has appointed for his judge. An institution designed professedly for the greater ease of the subject, by doing him speedy justice, and by not harrassing the freeholders with frequent and [\*281] troublesome attendances to try every minute \*offence. But it has of late been so far extended, as, if a check be not timely given, to threaten the disuse of our admirable and truly English trial by jury, unless only in capital cases. For,

I. Of this summary nature are all trials of offences and frauds contrary to the laws of the *excise*, and other branches of the *revenue*: which are to be inquired into and determined by the commissioners of the respective departments, or by justices of the peace in the country; officers, who are all of them appointed and removable at the discretion of the crown. And though such convictions are absolutely necessary for the due collection of the public money, and are a species of mercy to the delinquents, who would be ruined by the expense and delay of frequent prosecutions by action or indictment; and though such has usually been the *conduct* of the commissioners, as seldom, if ever, to afford just grounds to complain of oppression, yet when we again (a) consider the various and almost innumerable branches of this revenue; which may be in their turns the subjects of fraud, or, at least, complaints of fraud, and, of course, the objects of this summary and arbitrary jurisdiction; we shall find that the power of these officers of the crown over the property of the people is increased to a very formidable height.

II. Another branch of summary proceedings is that before *justices of the peace*, in order to inflict divers petty pecuniary mulcts, and corporal penalties denounced by act of parliament for many disorderly offences; such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others, for which I must refer the student to the justice-books formerly cited, (b) and

(a) See book I, page 319, &c.

(b) Lambard and Burn.

(1) There were two reasons for holding inferior courts to great strictness in exercising authority to convict of petty offenses in a summary way: 1. That jury trial, which is supposed to be favorable to accused parties was not allowed, and 2. No appeal was given, and therefore the conviction was final. It was perfectly reasonable, therefore, as Pratt, J., says in *R. v. Marriott*, Stra., 67, to keep the magistrate up strictly to the law. "No comparison," says Lord Kenyon, "can be made between summary proceedings on a conviction before magistrates, and actions in the courts of common law. \* \* It is necessary for courts of justice to hold a strict hand over summary proceedings before magistrates, and I never will agree to relax any of the rules by which they have been bound. Their jurisdiction is of a limited nature, and they must show that the party was brought within it." *Rex v. Stone*, 1 East, 639, 649, 650. See also *Rex v. Corden*, Burr., 2279. In *People v. Phillips*, 1 Park. Cr. R., 95, it is said that a record must be made up in every case as a prerequisite to the execution of the conviction; the reasons of which are: 1. For protection of the accused, that he may not again be convicted of the same offense; 2. for protection of the magistrate: a proper record being conclusive evidence in his favor in cases within his jurisdiction; 3. in the absence of appeal the only mode by which the accused can obtain a review of the sentence is by *habeas corpus* or *certiorari*, founded on the record. To the same purport is *Bennac v. People*, 4 Barb., 164. And the record must recite the facts; not legal conclusions merely, or it will be void. Therefore, a complaint and conviction of defendant for that, on the Lord's day, commonly called Sunday, "he performed certain worldly employment or business, the same not being a work of necessity or charity, by driving certain horses to which was attached a carriage in which certain persons, not travelers, but residents of the aforesaid county, were carried over the streets of the city of Pittsburgh," were held bad, because they did not show the purpose for which the carriage was driven. "No citizen," says Lowrie, Ch. J., "could have any sort of protection against the ignorance or wickedness of inferior magistrates, if these were authorized to convict citizens of offenses, and yet allowed so to record their proceedings that the very act done cannot be ascertained, and thus their judgment cannot be tested by their judicial superiors." Com-

which used to be formerly punished by the verdict of a jury in the court-leet. This change in the administration of justice hath, however, had some mischievous effects; as, 1. The almost entire disuse and contempt of the court-leet, and sheriff's tourn, the king's ancient courts of common law, formerly much revered and respected. \*2. The burthensome increase of the business of a justice of the peace, which discourages so many gentlemen of rank and character from acting in the commission; from an apprehension that the duty of their office would take up too much of that time, which they are unwilling to spare from the necessary concerns of their families, the improvement of their understandings, and their engagements in other services of the public. Though if *all* gentlemen of fortune had it both in their power and inclinations to act in this capacity, the business of a justice of the peace would be more divided, and fall the less heavy upon individuals: which would remove what, in the present scarcity of magistrates, is really an objection so formidable that the country is greatly obliged to any gentleman of figure who will undertake to perform that duty, which, in consequence of his rank in life, he owes more peculiarly to his country. However, this backwardness to act as magistrates, arising greatly from this increase of summary jurisdiction, is productive of, 3. A third mischief: which is, that this trust, when slighted by gentlemen, falls, of course, into the hands of those who are not so; but the mere tools of office. And then the extensive power of a justice of the peace, which, even in the hands of men of honour, is highly formidable, will be prostituted to mean and scandalous purposes, to the low ends of selfish ambition, avarice, or personal resentment. And from these ill consequences we may collect the prudent foresight of our ancient lawgivers, who suffered neither the property nor the punishment of the subject to be determined by the opinion of any one or two men; and we may also observe the necessity of not deviating any farther from our ancient constitution, by ordaining new penalties to be inflicted upon summary convictions. (2)

The process of these summary convictions, it must be owned, is extremely speedy. Though the courts of common law have thrown in one check upon them, by making it necessary to *summon* the party accused before he is \*condemned. This is now held to be an indispensable requisite: (c) [ \*283] though the justices long struggled the point; forgetting that rule of [ \*283] natural reason expressed by Seneca.

(c) Salk. 181. 2 Lord Raym. 14

monwealth v. Nesbit, 34 Penn. St., 396, 408. See Commonwealth v. Burkhart, 28 Penn. St., 521.

It is probable that in cases in which jury trial is allowed, and especially if an appeal is given, a less strict rule will be applied. See 1 Bish. Cr. Pro., §§ 722-725. Even in those cases, however, it is necessary that it appear on the face of the proceedings that the magistrate had jurisdiction of the case under the statute; this being a general rule, applicable to all inferior tribunals. See *People v. Koeber*, 7 Hill, 39; *State v. LaBore*, 26 Vt., 765; *Clark v. Holmes*, 1 Doug. (Mich.), 390; *Cooper v. Sunderland*, 3 Iowa, 114; *Tift v. Griffin*, 5 Ga., 185; *Jennings v. Stafford*, 1 Ired., 404; *State v. Metzger*, 26 Mo., 65; *Perrine v. Farr*, 23 N. J., 356; *Sullivan v. Blackwell*, 28 Miss., 787. And even if the record apparently show jurisdiction, it is competent to disprove it by other evidence. *Fawcett v. Foulis*, 1 Man. & Ry., 102; *Sheldon v. Wright*, 5 N. Y., 497; *Sears v. Terry*, 26 Conn., 273; *Cooper v. Sunderland*, 3 Iowa, 114; *Brown v. Foster*, 6 R. I., 564; *Clark v. Holmes*, 1 Doug. (Mich.), 390. Though if the jurisdiction depend upon matter of fact to be found by the magistrate, his finding is conclusive. *Brittain v. Kinnaird*, 1 B. & B., 432. See *Mather v. Hodd*, 3 Johns., 44; *Mackaboy v. Commonwealth*, 3 Virg. Cases, 270; *Ex parte Kellogg*, 6 Vt., 509; *Facey v. Fuller*, 13 Mich., 527; *Ricketts v. Spraker*, 77 Ind., 371; *Freeman on Judgments*, § 523, and cases cited.

(2) In *Bennett v. Ward*, 3 Caines, 259, where a statute was under consideration which seemed in one part to provide for a summary proceeding, and in another for a proceeding in the ordinary way, Chief Justice Kent remarked that, "where a statute admits of two constructions, it is advisable to give it that which is consonant to the ordinary mode of proceeding." This is a very proper and just rule.

*"Qui statuit aliquid, parte inaudita altera,  
Æquum licet statuerit, haud æquus fuit."*

A rule, to which all municipal laws, that are founded on the principles of justice, have strictly conformed: the Roman law requiring a citation at the least; and our common law never suffering any fact (either civil or criminal) to be tried, till it has previously compelled an appearance by the party concerned. After this summons, the magistrate, in summary proceedings, may go on to examine one or more witnesses, as the statute may require, upon oath; and then make his conviction of the offender, in writing: upon which he usually issues his warrant, either to apprehend the offender, in case corporal punishment is to be inflicted on him: or else to levy the penalty incurred, by distress and sale of his goods. This is, in general, the method of summary proceedings before a justice or justices of the peace; but for particulars we must have recourse to the several statutes, which create the offence, or inflict the punishment: and which usually chalk out the method by which offenders are to be convicted. Otherwise they fall of course under the general rule, and can only be convicted by indictment or information at the common law.

III. To this head, of summary proceedings, may also be properly referred the method, immemorially used by the superior courts of justice, of punishing contempts by *attachment*, and the subsequent proceedings thereon. (3)

The contempts, that are thus punished, are either *direct*, which openly insult or resist the powers of the courts, or the person of the judges who preside there;

(3) The power to punish for contempt seems to have originated in the fact that the king, in contemplation of law, is supposed to be always present in his courts. Only courts of record, however, are, properly speaking, the king's courts, and therefore it has been said that they alone, at common law, have authority to fine and imprison for contempt. *Queen v. Lefroy*, L. R. 8 Q. B., 134; *In re Kerrigan*, 33 N. J., 344; *Rhinehart v. Lance*, 43 N. J., 311; S. C., 39 Am. Rep., 592; *Noyes v. Byrbee*, 45 Conn., 383. The power is therefore denied to justices of the peace. See above cases. Also, *Albright v. Lapp*, 26 Penn. St., 99. But in some states it is held that these magistrates have it. *In re Cooper*, 33 Vt., 253; and in some it is held that the power is a necessary incident in establishing a tribunal as a court. *Brown v. People*, 19 Ill., 613; *Middlebrook v. State*, 43 Conn., 257; *U. S. v. New Bedford Bridge Co.*, 1 Wood. & M., 401; *Republica v. Oswald*, 1 Dall., 319; S. C., 1 Am. Dec., 246; *State v. Morrill*, 16 Ark., 384; *Ex parte Adams*, 25 Miss., 883; *Ex parte Robinson*, 19 Wall., 505; *Hughes v. People*, 5 Col., 436; see *Robb v. McDonald*, 29 Iowa, 330; S. C., 4 Am. Rep., 211; though perhaps the power of justices of the peace is to be restricted to contempts which are direct, as distinguished from those which are consequential or constructive. *State v. Applegate*, 8 McCord, 110; *Lining v. Bentham*, 2 Bay, 1; *State v. Johnson*, 3 Bay, 385; *Queen v. Lefroy*, L. R. 8 Q. B., 134. It has been held that the power of legislative bodies to punish for contempts of their authority is inherent. *Anderson v. Dunn*, 6 Wheat., 204; *Burnham v. Morrissey*, 14 Gray, 226; *In re Falvey*, 7 Wis., 630. For the limits to this authority, see *Kilbourn v. Thompson*, 108 U. S., 163.

At common law, adjudications of contempt by courts of competent jurisdiction are not subject to review by any higher tribunal. *Yates v. Lansing*, 9 Johns., 395; *Williamson's Case*, 26 Penn. St., 9; *Watson v. Williams*, 36 Miss., 331; *Ex parte Smith*, 53 Cal., 204; *Tyler v. Hammersley*, 44 Conn., 393; *Hayes v. Fischer*, 103 U. S., 121. But the question of jurisdiction is always open. *Queen v. Lefroy*, L. R. 8 Q. B., 134. And in some states power to review proceedings in contempt is given by statute. See *Whitlaw v. State*, 36 Ind., 196; *Dunham v. State*, 6 Iowa, 245; *People v. Simonson*, 9 Mich., 492. Whether a general power to pardon will embrace cases of convictions for contempt, see *Re Muller*, 7 Blatch., 23; 3 Op. Atty. Gen., 622; 4 *Ibid.*, 317; *State v. Sauvinet*, 24 La. An., 119.

The most common classification of contempts is into direct and constructive. The contempt is direct when committed in the presence of, or so near to, the court as to interrupt its proceedings. Constructive contempts are not committed in the presence of the court, but tend, by their operation, to interrupt, obstruct, or prevent the due administration of justice. *Whittem v. The State*, 36 Ind., 196; *Stuart v. The People*, 34 Ill., 395; *State v. Orleans Civil Judges*, 32 La. An., 1256. Direct contempts are usually punished upon the view and personal knowledge of the judge without taking evidence, or making a rule to show cause. If the offender leave the court-room before he can be punished, the judge may, without first issuing process for his arrest, sentence him. *Middlebrook v. The State*, 43 Conn., 257; *State v. Orleans Civil Judges*, 32 La. An., 1256.

In constructive contempts the court will, upon affidavit specifically making the charge, make a rule to show cause, or issue an attachment, and the party accused will have a right to be heard in his defense by himself or counsel. If he denies that he committed the acts

or else are *consequential* which (without such gross insolence or direct opposition) \*plainly tend to create an universal disregard of their authority. [\*284] The principal instances, of either sort, that have been usually (*d*) punishable by attachment, are chiefly of the following kinds. 1. Those committed by inferior judges and magistrates; by acting unjustly, oppressively or irregularly, in administering those portions of justice which are intrusted to their distribution: or by disobeying the king's writs issuing out of the superior courts, by proceeding in a cause after it is put a stop to or removed by writ of prohibition, *certiorari*, error, *supersedeas*, and the like. For, as the king's superior courts, and especially the court of king's bench, have a general superintendence over all inferior jurisdictions, any corrupt or iniquitous practices of subordinate judges are contempts of that superintending authority, whose duty it is to keep them within the bounds of justice. 2. Those committed by sheriffs, bailiffs, gaolers, and other officers of the court, by abusing the process of the law, or deceiving the parties, by any acts of oppression, extortion, collusive behaviour, or culpable neglect of duty. 3. Those committed by attorneys and solicitors, who are also officers of the respective courts: by gross instances of fraud and corruption, injustice to their clients, or other dishonest practice. For the malpractice of the officers reflects some dishonour on their employers: and, if frequent or unpunished, creates among the people a disgust against the courts themselves. 4. Those committed by jurymen, in collateral matters

(*d*) 2 Hawk. P. C. 142, &c.

complained of, or insists that they do not constitute a contempt, the court will hear the evidence, and upon that determine. *Whittem v. The State*, 36 Ind., 196; *Ex parte Ireland*, 38 Tex., 844.

The following may be given as illustrations of direct contempts: Striking an attorney while he is addressing the court. *Middlebrook v. State*, 43 Conn., 257. Calling another a liar in the presence of the court. *U. S. v. Emerson*, 4 Cranch, C. C., 188. Addressing insulting language to the judge while he is proceeding to take his seat on the bench. *Commonwealth v. Dandridge*, 2 Va. Cas., 408. Charging the judge with prejudice in a paper filed. *Harrison v. State*, 35 Ark., 458.

It is a constructive contempt of court to publish an article concerning pending proceedings calculated and intended to influence the result, or to bring the court in its dealings with it into public discredit or disgrace. *Bronson's Case*, 12 Johns., 460; *Respublica v. Oswald*, 1 Dall., 819; S. C., 1 Am. Dec., 246; *State v. Matthews*, 37 N. H., 450; *In re Sturoc*, 48 N. H., 428; *People v. Wilson*, 64 Ill., 195. Compare *State v. Anderson*, 40 Iowa, 207; *Storey v. People*, 79 Ill., 45.

It is a constructive contempt of court to serve with summons a witness who has come from another state to testify, but who has not since had time to return. *Re Healey*, 53 Vt., 694; S. C., 38 Am. Rep., 718.

Where no private interests are involved, a party guilty of contempt will sometimes be discharged without punishment on his sworn disavowal that he intended to commit a contempt; but this is not of course. See *People v. Freer*, 1 Caines, 485; *People v. Wilson*, 64 Ill., 195; *Watson v. Savings Bank*, 5 S. C., 159; *Hughes v. People*, 5 Col., 436.

Attachments as for contempt may issue to compel the performance of duty by municipal bodies, but in such case the proceedings must be against the individual members. *Bass v. Shakopee*, 27 Minn., 250. They may also issue against inferior courts or judges for refusing, without cause, to sign a bill of exceptions. *People v. Judges of Westchester*, 2 Johns. Cas., 118; for refusing to obey a writ of *mandamus*: *People v. Pearson*, 4 Ill., 270; or any other lawful mandate of the superior court. *Gorham v. Luckett*, 6 B. Monr., 688.

Also against attorneys for refusing to pay over to clients moneys received in the professional character. *Ex parte Staats*, 4 Cow., 76; *Ex parte Biggs*, 64 N. C., 202; *Smith v. McLendon*, 59 Ga., 528; or for addressing insulting language to the judge, orally or in papers filed. *Hill v. Crandall*, 52 Ill., 70; *In re Cooper*, 33 Vt., 258; *In re Woolley*, 11 Bush, 95; *Harrison v. State*, 35 Ark., 458; for entering appearance in a case and confessing judgment without authority. *Denton v. Noyes*, 6 Johns., 298, and the like.

Also against sheriffs for neglecting to pay over moneys collected: *Bagley v. Yeates*, 3 McLean, 465; *Matter of Stephens*, 1 Ga., 584; for negligently suffering an escape, *Craig v. Maltbie*, 1 Ga., 544; for levying on property in the custody of the law: *Matter of Hopper*, 5 Paige, 489. See *People v. Pierson*, 4 Ill., 270.

Also against a clerk for refusing to comply with a *mandamus*: *People v. Salomon*, 54 Ill., 39; or to furnish copies of papers wanted for a trial. *Delaney v. Regulators*, 1 Yates, 408.

Also against a witness for refusing to answer any proper question. *U. S. v. Canton*, 1 Cranch C. C., 150; *Burnham v. Morrissey*, 14 Gray, 226; *Hirsh v. State*, 8 Bax., 89; *Hol-*

relating to the discharge of their office; such as making default, when summoned; refusing to be sworn, or to give any verdict; eating or drinking without the leave of the court, and especially at the cost of either party; and other misbehaviours or irregularities of a similar kind: but not in the mere exercise of their judicial capacities, as by giving a false or erroneous verdict. 5. Those committed by witnesses: by making default when summoned, refusing to be sworn or examined, or prevaricating in their evidence when sworn. 6. Those committed by parties to any suit, or proceeding before the court: as by disobedience to any \*rule or order, made in the progress of a cause; by non-payment of costs awarded by the court upon a motion; or, by non-observance of awards duly made by arbitrators or umpires, after having entered into a rule for submitting to such determination. (e) Indeed the attachment for most of this species of contempts, and especially for non-payment of costs and non-performance of awards, is to be looked upon rather as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court. And, therefore, it hath been held that such contempts, and the process thereon, being properly the civil remedy of individuals for a private injury, are not released or affected by a general act of pardon. And upon a similar principle, obedience to any rule of court may also, by statute 10 Geo. III, c. 50, be enforced against any person having privilege of parliament by the process of distress infinite. 7. Those committed by any other persons under the degree of a peer: and even by peers themselves, when enormous and accompanied with violence, such as forcible *rescous* and the like; (f) or when they import a disobedience to the king's great prerogative writs of prohibition, *habeas corpus*, (g) and the rest. Some of these contempts may arise in the face of the court; as by rude and contumelious behaviour; by obstinacy, perverseness, or prevarication: by breach of the peace, or any wilful disturbance whatever: others in the absence of the party; as by disobeying or treating with disrespect the king's writ, or the rules or process of the court; by perverting such writ or process to the purposes of private malice, extortion, or injustice; by speaking or writing contemptuously of the court or judges, acting in their judi-

(e) See book III, page 17.

(f) Styl. 277. 2 Hawk. P. C. 152. Cro. Jac. 412. Salk. 886.

(g) 1 Burr. 632. Lord's Jour. 7 Feb. 8 June 1757.

man v. Austin, 84 Tex., 668; *Ex parte* Renshaw, 6 Mo. App., 474. See Maxwell v. River-  
11 Nev., 218; or for remaining in the court-room after being excluded by order of the  
court. People v. Boscovitch, 20 Cal., 486.

Also against jurymen for separating from their fellows and mingling with the community  
at large, or holding communications with others than their fellows or the officer in charge.  
R. M. Charl., 48.

Parties may be punished as for contempt for violating an injunction; Doubleday v. Sher-  
man, 8 Blatch., 45; *Ex parte* Hamilton, 51 Ala., 66; Baker v. Cordon, 86 N. C., 116; S. C.,  
41 Am. Rep., 448; Winslow v. Nayson, 113 Mass., 411; for refusing to pay alimony in a  
divorce suit: Petrie v. People, 40 Ill., 334; O'Callaghan v. O'Callaghan, 69 Ill., 552; or to  
obey any proper order of the court: Blair v. Nelson, 8 Bax., 1; McClure v. Gulick, 17 N. J.,  
340; Baker v. Baker, 23 Hun, 356; for preventing by open force the service of process upon  
themselves: Conover v. Wood, 5 Abb. Pr., 84; for keeping a witness who has been duly  
summoned from attending court: Commonwealth v. Feely, 2 Va. Cas., 1; for addressing  
an insulting letter to the judge in regard to his judicial conduct: *In re* Pryor, 18 Kan., 72;  
S. C., 26 Am. Rep., 747, and note; for bringing a fictitious case in order to get the opinion  
of the court on matters presented by it. Smith v. Brown, 3 Tex., 360. And in the case of  
an administrator, for failing to obey an order of distribution. Haines v. People, 97 Ill., 161.

The foregoing are only illustrative cases. Where the contempt consists in the failure of  
any officer or party to comply with an order of the court, the guilty party may be impris-  
oned until he complies or gives satisfactory excuse for failure to do so. But when impris-  
onment is inflicted as a punishment, the order therefor must fix a limit or it is void. People  
v. Pirfenbrink, 96 Ill., 68.

The case ought to be plain before any court should assume to punish a contempt of its  
authority. Batchelder v. Moore, 42 Cal., 412. Court commissioners have no such power.  
Haight v. Lucia, 36 Wis., 355. And municipal bodies neither have it, nor can it be con-  
ferred upon them. Whitcomb's Case, 120 Mass., 118.

cal capacity; by printing false accounts (or even true ones without proper permission) of causes then depending in judgment; and by any thing, in short, that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people.

\*The process of attachment, for these and the like contempts, must necessarily be as ancient as the laws themselves. For laws without a [\*286] competent authority to secure their administration from disobedience and contempt would be vain and nugatory. A power, therefore, in the supreme courts of justice to suppress such contempts, by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal. Accordingly, we find it actually exercised as early as the annals of our law extend. And though a very learned author (*h*) seems inclinable to derive this process from the statute of Westm. 2, 13 Edw. I, c. 39 (which ordains, that in case the process of the king's court be resisted by the power of any great man, the sheriff shall chastise the resisters by imprisonment, "*a qua non deliberenter sine speciali precepto domini regis.*" and if the sheriff himself be resisted, he shall certify to the courts the names of the principal offenders, their aiders, consentors, commanders, and favourers, and by a special writ judicial they shall be attached by their bodies to appear before the court, and if they be convicted thereof they shall be punished at the king's pleasure, without any interfering by any other person whatsoever), yet he afterwards more justly concludes, that it is part of the *law of the land*, and, as such, is confirmed by the statute of *magna carta*.

If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, (*i*) without any farther proof or examination. But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon *affidavit* see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him; (*j*) or, in very flagrant instances of contempt, the attachment issues in the first instance; (*k*) as it also \*does, if no sufficient [\*287] cause be shown to discharge; and thereupon the court confirms, and makes absolute, the original rule. This process of attachment is merely intended to bring the party into court: and, when there, he must either stand committed, or put in bail, in order to answer upon oath to such *interrogatories* as shall be administered to him, for the better information of the court with respect to the circumstances of the contempt. These interrogatories are in the nature of a charge or accusation, and must by the course of the court be exhibited within the first four days: (*l*) and, if any of the interrogatories is improper, the defendant may refuse to answer it, and move the court to have it struck out. (*m*) If the party can clear himself upon oath, he is discharged; but, if perjured, may be prosecuted for the perjury. (*n*) If he confesses the contempt, the court will proceed to correct him by fine, or imprisonment, or both, and sometimes by a corporal or infamous punishment. (*o*) If the contempt be of such a nature that, when the fact is once acknowledged, the court can receive no farther information by interrogatories than it is already possessed of (as in the case of a *rescous*), (*p*) the defendant may be admitted to make such simple acknowledgment, and receive his judgment without answering to any interrogatories: but if he wilfully and obstinately refuses to answer, or answers in an evasive manner, he is then clearly guilty of a high and repeated contempt, to be punished at the discretion of the court.

It cannot have escaped the attention of the reader, that this method of mak-

(A) Gilb. Hist. C. P. ch. 3. (i) Staund. P. C. 73, b. (j) Styl. 377. (k) Salk. 84. Stra. 125, 554. (l) 6 Mod. 73. (m) Stra. 444. (n) 6 Mod. 73. (o) Cro. Car. 146. (p) The King v. Elkins, M. 8 Geo. III, B. R., 4 Burr. 2129.

ing the defendant answer upon oath to a criminal charge, is not agreeable to the genius of the common law in any other instance; (q) and seems indeed to have been derived to the courts of king's bench and common pleas through the medium of the courts of equity. For the whole process of the courts of equity, in the several stages of a cause, and finally to enforce their decrees, was till the \*introduction of sequestrations, in the nature of a process of [288] contempt; acting only *in personam* and not *in rem*. And there, after the party in contempt has answered the interrogatories, such his answer may be contradicted and disproved by *affidavits* of the adverse party: whereas, in the courts of law, the admission of the party to purge himself by oath is more favourable to his liberty, though perhaps not less dangerous to his conscience; for, if he clears himself by his answers, the complaint is totally dismissed. And, with regard to this singular mode of trial, thus admitted in this one particular instance, I shall only for the present observe, that as the process by attachment in general appears to be extremely ancient, (r) and has in more modern times been recognized, approved, and confirmed by several express acts of parliament, (s) so the method of examining the delinquent himself upon oath with regard to the contempt alleged, is at least of as high antiquity, (t) and by long and immemorial usage is now become the law of the land.

## CHAPTER XXI.

### OF ARRESTS.

WE are now to consider the regular and ordinary method of proceeding in the courts of criminal jurisdiction; which may be distributed under twelve general heads, following each other in a progressive order, viz.: 1. Arrest; 2. Commitment, and bail; 3. Prosecution; 4. Process; 5. Arraignment, and its incidents; 6. Plea, and issues; 7. Trial, and conviction; 8. Clergy; 9. Judgment, and its consequences; 10. Reversal of judgment; 11. Reprieve, or pardon; 12. Execution; all of which will be discussed in the subsequent part of this book.

First, then, of an *arrest*; which is the apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime. To this arrest all persons whatsoever are, without distinction, equally liable in all criminal cases: but no man is to be arrested, unless charged with such a crime as will at least justify holding him to bail when taken. And, in general, an arrest may be made four ways: 1. By warrant; 2. By an officer without warrant; 3. By a private person also without warrant; 4. By an hue and cry.

\*1. A warrant may be granted in extraordinary cases by the privy [290] council, or secretaries of state: (a) (1) but ordinarily by justices of the peace. This they may do in any cases where they have a jurisdiction over the offence, in order to compel the person accused to appear before them: (b) for it would be absurd to give them power to examine an offender, unless they

(q) See book III, pp. 100, 101.

(r) Yearb. 20 Hen. VI. c. 37. 23 Edw. IV. c. 29.

(s) Stat. 43 Eliz. c. 4, § 2. 13 Car. II. st. 2, c. 2, § 4. 9 and 10 Wm. III. c. 15. 13 Ann. st. 2, c. 14, § 5.

(t) M. 5 Edw. IV. rot. 75, cited in *Rast. Ent.* 268, pl. 5.

(a) 1 Lord Raym. 65.

(b) 2 Hawk. P. C. 64.

(1) Power is now, by several recent statutes, expressly conferred upon private individuals to make arrest of persons found committing offenses. The caution to abstain from so doing where no apparent necessity exists is nevertheless worthy of being observed.

To ascertain what officers may issue warrants in the American states, the statutes of the several states must be consulted.



had also a power to compel him to attend, and submit to such examination. And this extends undoubtedly to all treasons, felonies, and breaches of the peace; and also to all such offences as they have power to punish by statute. Sir Edward Coke indeed (c) hath laid it down that a justice of the peace cannot issue a warrant to apprehend a felon upon bare suspicion; no, not even till an indictment be actually found: and the contrary practice is by others (d) held to be grounded rather upon connivance than the express rule of law; though now by long custom established. A doctrine which would in most cases give a loose to felons to escape without punishment; and therefore Sir Matthew Hale hath combatted it with invincible authority and strength of reason: maintaining, 1. That a justice of the peace hath power to issue a warrant to apprehend a person *accused* of felony, though not yet indicted; (e) and, 2. That he may also issue a warrant to apprehend a person *suspected* of felony, though the original suspicion be not in himself, but in the party that prays his warrant; because he is a competent judge of the probability offered to him of such suspicion. But in both cases it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there is a felony or other crime actually committed, without which no warrant should be granted; as also to *prove* the cause and probability of suspecting the party against whom the warrant is prayed. (f) This warrant ought to be under the hand and seal of the justice, should set forth the time and place of making, and the cause for which it is made, and should be directed to the \*constable or other [291] peace officer (or, it may be, to any private person by name), (g) requiring him to bring the party either generally before *any* justice of the peace for the county, or only before the justice who granted it; the warrant in the latter case being called a *special* warrant. (h) A *general* warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty; (i) for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion. And a warrant to apprehend all persons, guilty of a crime therein specified, is no legal warrant: for the point upon which its authority rests, is a fact to be decided on a subsequent trial; namely, whether the person apprehended thereupon be really guilty or not. (2) It is therefore in fact *no* warrant at all; for it will not justify the officer who acts under it: (k) whereas, a warrant properly penned (even though the magistrate who issues it should exceed his jurisdiction); will, by statute 24 Geo. II, c. 44, at all events indemnify the officer who executes the same ministerially. And when a warrant is received by the officer he is bound to execute it, so far as the jurisdiction of the magistrate and himself extends. A warrant from the chief or other justice of the court of king's bench extends all over the kingdom: and is *teste'd*, or *dated*, *England*; not *Oxfordshire*, *Berks*, or other particular county. But a warrant of a justice of the peace in one county, as Yorkshire, must be backed, that is, signed by a justice of the \*peace in another, as Middlesex, before it [292] can be executed there. Formerly, regularly speaking, there ought to have been a fresh warrant in every fresh county: but the practice of backing

(c) 4 Inst. 176.

(d) 2 Hawk. P. C. 84.

(e) 2 Hal. P. C. 108.

(f) *Ibid.* 110.

(g) Salk. 176.

(h) 2 Hawk. P. C. 86.

(i) 1 Hal. P. C. 580. 2 Hawk. P. C. 82.

(k) A practice had obtained in the secretaries' office ever since the restoration, grounded on some clauses in the acts for regulating the press, of issuing *general* warrants to take up (without naming any person in particular) the authors, printers, or publishers of such obscene or seditious libels as were particularly specified in the warrant. When those acts expired in 1694, the same practice was inadvertently continued in every reign, and under every administration, except the four last years of Queen Anne, down to the year 1763; when such a warrant being issued to apprehend the authors, printers, and publishers, of a certain seditious libel, its validity was disputed; and the warrant was adjudged by the whole court of king's bench to be void, in the case of *Money v. Leach*. Trin. 5 Geo. III, B. R. After which the issuing of such general warrants was declared illegal by a vote of the House of Commons. (Com. Journ. 22 Apr. 1766.)

(2) Warrants to arrest idle, loose, or disorderly persons are an exception to this rule, and by several statutes, peace officers are expressly authorized to apprehend them without any warrant at all.

warrants had long prevailed without law, and was at last authorized by statutes 23 Geo. II, c. 26, and 24 Geo. II, c. 55. And now, by statute 13 Geo. III, c. 31, any warrant for apprehending an English offender, who may have escaped into Scotland, and *vice versa*, may be indorsed and executed, by the local magistrates, and the offender conveyed back to that part of the united kingdom, in which such offence was committed. (3)

2. Arrests by officers without warrant may be executed, 1. By a justice of the peace; who may himself apprehend or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence. (1) 2. The sheriff; and 3. The coroner, may apprehend any felon within the county without warrant. 4. The constable, of whose office we formerly spoke, (m) hath great original and inherent authority with regard to arrests. He may, without warrant, arrest any one for a breach of the peace, committed in his view, and carry him before a justice of the peace. And in case of felony actually committed, or a dangerous wounding, whereby felony is like to ensue, he may upon probable suspicion arrest the felon; (4) and for that purpose is

(1) 2 Hal. P. C. 88.

(m) See book I, page 355.

(3) Statute 29 Car. 2, c. 7, § 6, provides that no person upon the Lord's day shall serve any writ, process or warrant, except in cases of treason, felony or breach of the peace. Under this, an arrest may be made on Sunday for an indictable offense. It is not necessary for the officer to inquire whether the breach of the peace is actual or constructive. *Rawlins v. Ellis*, 16 M. & W., 172. So, for violating a city ordinance against keeping open a drinking shop on Sunday. *Main v. McCarty*, 15 Ill., 441. The arrest may be made by night as well as by day. 1 East P. C., ch. 5, § 88; *State v. Smith*, 1 N. H., 346.

By statute, provision is made for arresting and sending back for trial supposed offenders who may have fled to the United Kingdom from any of the British colonies, and also for the extradition of supposed offenders who may be demanded by foreign governments under extradition treaties. In the United States the power to extradite fugitives from the justice of foreign countries is one belonging to the national government, and is exercised under treaties made for the purpose. *Holmes v. Jennison*, 14 Pet., 540; *Ex parte Holmes*, 12 Vt., 681; *People v. Curtis*, 50 N. Y., 321. The constitution of the United States provides that, "A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." Art. 4, § 2. Under this provision, the offense must actually have been committed within the state making the demand, and the accused must have fled therefrom. *Ex parte Smith*, 8 McLean, 121; *Hartman v. Aventure*, 63 Ind., 344; *Wilcox v. Nolze*, 34 Ohio St., 520; *Jones v. Leonard*, 50 Iowa, 106; S. C., 32 Am. Rep., 116. The accused may be arrested to await the demand, and the states provide by law for such arrest. The demand is made on a *prima facie* showing of guilt, which is either by the indictment of the supposed offender, or by affidavit of facts. *State v. Swope*, 72 Mo., 399; *Ex parte Sheldon*, 34 Ohio St., 319; *Harn v. State*, 4 Tex. Ap. R., 645. It is made on the governor of the state to which the offender has fled, who will issue his warrant of extradition, if the cause shown is satisfactory. But he may revoke this at any time before its execution, if he is satisfied it ought not to have been issued. *Work v. Corrington*, 34 Ohio St., 64; S. C., 33 Am. Rep., 345. The courts have no power to compel the governor to perform his duty in the extradition of offenders. *Kentucky v. Dennison*, 24 How., 66; *Matter of Manchester*, 5 Cal., 287.

(4) As to arrests without process in general, see *Ruloff v. People*, 45 N. Y., 213; *Reuck v. McGregor*, 32 N. J., 70; *State v. Holmes*, 48 N. H., 877; *Somerville v. Richards*, 37 Mich., 299; *Newton v. Locklin*, 77 Ill., 103; *Corbett v. Sullivan*, 54 Vt., 619; *State v. Freeman*, 86 N. C., 688. The general rule is that a peace officer who has reasonable ground to suspect that a felony has been committed, may at the common law detain the suspected party until inquiry can be made. *Beckwith v. Philby*, 6 B. & C., 685; *Davis v. Russell*, 5 Bing., 354; *Rohan v. Sawin*, 5 Cush., 281. And even though no felony proves to have been committed, the officer will be justified in making an arrest upon suspicion, if he acts in good faith upon apparently reliable information. *Burnes v. Erben*, 40 N. Y., 463. So, an officer may arrest without warrant for a breach of peace committed in his presence. 3 Hawk. P. C., ch. 13, § 8. And perhaps for some high misdemeanors. *Smith v. Donnelly*, 66 Ill., 464. But not for misdemeanors in general. *Com. v. Carey*, 13 Cush., 246; *Quinn v. Heisel*, 40 Mich., 576; *Way's Case*, 41 Mich., 299. Any private party present at the commission of a felony may arrest the felon without warrant. *Keenan v. State*, 8 Wis., 182. And a private party may lawfully recapture a prisoner who has broken jail, though the breaking was only a misdemeanor. *State v. Holmes*, 48 N. H., 877. And may stop a breach of the peace, though he cannot arrest for it. *Phillips v. Trull*, 11 Johns., 496. A

authorized (as upon a justice's warrant) to break open doors, and even to kill the felon if he cannot otherwise be taken; and, if he or his assistants be killed in attempting such arrests, it is murder in all concerned. (n) 5. Watchmen, either those appointed by the statute of Winchester, 13 Edw. I, c. 4, to keep watch and ward in all towns from sun-setting to sun-rising, or such as are mere assistants to the constable, may *virtute officii* arrest all offenders, and particularly night-walkers, and commit them to custody till the morning. (o)

3. Any private person (and *a fortiori* a peace officer) that is present when any felony is committed, is bound by the law to \*arrest the felon, on [\*293] pain of fine and imprisonment, if he escapes through the negligence of the standers-by. (p) And they may justify breaking open the doors upon following such felon; and if *they kill him*, provided he cannot be otherwise taken, it is justifiable: though if *they are killed* in endeavouring to make such arrest, it is murder. (q) Upon probable suspicion also a private person may arrest the felon, or other person so suspected. (r) But he cannot justify breaking open doors to do it; and if either party kill the other in the attempt, it is man slaughter, and no more. (s) It is no more, because there is no malicious design to kill: but it amounts to so much, because it would be of most pernicious consequence, if, under pretence of suspecting felony, any private person might break open a house, or kill another; and also because such arrest upon suspicion is barely *permitted* by the law, and not *enjoined*, as in the case of those who are present when a felony is committed.

4. There is yet another species of arrest, wherein both officers and private men are concerned, and that is upon an *hue and cry* raised upon a felony committed. An hue (from *huor*, to shout, and cry), *hutesium et clamor*, is the old common-law process of pursuing, with horn and with voice, all felons, and such as have dangerously wounded another. (t) It is also mentioned by statute Westm. 1, 3 Edw. I, c. 9, and 4 Edw. I, stat. 2 *de officio coronatoris*. But the principal statute, relative to this matter, is that of Winchester, 13 Edw. I, cc. 1 and 4, which directs that from thenceforth every county shall be so well kept, that immediately upon robberies and felonies committed, fresh suit shall be made from town to town, and from county to county; and that hue and cry shall be raised upon the felons, and they that keep the town shall follow with hue and cry with all the town, and the towns near; and so hue and cry shall be made from town to town, until they be taken and delivered to the sheriff. And that such hue and cry may more effectually be made, the \*hundred is [\*294] bound by the same statute, chapter 3, to answer for all robberies there committed, unless they take the felon; which is the foundation of an action against the hundred, (u) in case of any loss by robbery. By statute 27 Eliz.,

(n) 3 Hal. P. C. 80, 81.

(o) *Ibid.* 98.

(p) 3 Hawk. P. C. 74.

(q) 3 Hal. P. C. 77.

(r) Stat. 30 Geo. II, c. 24.

(s) 3 Hal. P. C. 82, 83.

(t) Bracton, l. 2, tr. 2, c. 1, § 1. *Mirr.* c. 2, § 6.

(u) See book III, page 161.

person detected in an attempt to commit felony may be arrested without warrant. *R. v. Hunt*, 1 Moo., 98; but not one merely suspected of the commission of a misdemeanor. *Fox v. Gaunt*, 3 B. & Ad., 798. The apprehension by a private party upon suspicion is only for the purpose of taking the suspected person before a magistrate. *Long v. State*, 12 Ga., 298. If a felony has in fact been committed by the person arrested, the arrest may be justified by any person without a warrant, whether there is time to obtain one or not. If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed, and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrest without a warrant, such arrest is illegal, although an officer would be justified if he acted upon reliable information. *Holley v. Mix*, 3 Wend., 350; *Brockway v. Crawford*, 3 Jones, N. C., 433; *Com. v. Carey*, 12 Cush., 246; *Wakely v. Hart*, 6 Binn., 316; *Com. v. Deacon*, 8 S. & R., 49; *Burns v. Erbin*, 40 N. Y., 468; and see *Doughty v. State*, 33 Tex., 1. Upon suspicion of felony merely, a private party cannot break open a house, or kill the suspected party; and in making the arrest he must give notice of his purpose to arrest for felony. *Brooks v. Com.*, 61 Penn. St., 352. The purpose to arrest must be made known, and the individual attempting to make the arrest has no right to kill the suspected party if the latter is charged with an inferior felony and does not resist, but flies. *State v. Bryant*, 65 N. C., 827.

c. 13, no hue and cry is sufficient, unless made with both horsemen and footmen. And by statute 8 Geo. II, c. 16, the constable or like officer, refusing or neglecting to make hue and cry, forfeits 5*l.*: and the vill or district is still in strictness liable to be amerced, according to the law of Alfred, if any felony be committed therein, and the felon escapes. (5) An institution which hath long prevailed in many of the eastern countries, and hath in part been introduced even into the Mogul empire, about the beginning of the last century: which is said to have effectually delivered that vast territory from the plague of robbers, by making in some places the villages, in others the officers of justice, responsible for all the robberies committed within their respective districts. (w) Hue and cry (x) may be raised either by precept of a justice of the peace, or by a peace officer, or by any private man that knows of a felony. The party raising it must acquaint the constable of the vill with all the circumstances which he knows of the felony, and the person of the felon; and thereupon the constable is to search his own town, and raise all the neighbouring vills, and make pursuit with horse and foot; and in the prosecution of such hue and cry the constable and his attendants have the same powers, protection and indemnification, as if acting under a warrant of a justice of the peace. But if a man wantonly or maliciously raises an hue and cry, without cause, he shall be severely punished as a disturber of the public peace. (y)

In order to encourage farther the apprehending of certain felons, rewards and immunities are bestowed on such as bring them to justice, by divers acts of parliament. The statute 4 and 5 W. and M. c. 8, enacts, that such as apprehend a highwayman, and prosecute him to conviction, shall receive a reward [\*295] of 40*l.* from the public; to be paid to them (or if \*killed in the endeavour to take him, their executors) by the sheriff of the county; besides the horse, furniture, arms, money, and other goods taken upon the person of of such robber, with a reservation of the right of any person from whom the same may have been stolen: to which the statute 8 Geo. II, c. 16, superadds 10*l.* to be paid by the hundred indemnified by such taking. By statutes 6 and 7 Wm. III, c. 17, and 15 Geo. II, c. 28, persons apprehending and convicting any offender against those statutes, respecting the coinage, shall (in case the offence be treason or felony) receive a reward of forty pounds; or ten pounds, if it only amount to counterfeiting the copper coin. By statute 10 and 11 Wm. III, c. 23, any person apprehending and prosecuting to conviction a felon guilty of burglary, house-breaking, horse-stealing, or private larceny to the value of 5*s.* from any shop, warehouse, coach-house, or stable, shall be excused from all parish offices. And by statute 5 Ann. c. 31, any person so apprehending and prosecuting a burglar, or felonious house-breaker (or, if killed in the attempt, his executors), shall be entitled to a reward of 40*l.* (z) By statute 6 Geo. I, c. 23, persons discovering, apprehending, and prosecuting to conviction, any person taking reward for helping others to their stolen goods, shall be entitled to forty pounds. By statute 14 Geo. II, c. 6, explained by 15 Geo. II, c. 34, any person apprehending and prosecuting to conviction such as steal, or kill with an intent to steal, any sheep, or other cattle specified in the latter of the said acts, shall for every such conviction receive a reward of ten pounds. Lastly, by statute 16 Geo. II, c. 15, and 8 Geo. III, c. 15, persons discovering, apprehending, and convicting felons and others being found at large during the term for which they are ordered to be transported, shall receive a reward of twenty pounds. (6)

(w) Mod. Un. Hist. vi, 383, vii, 156.

(x) 2 Hal. P. C. 100-104.

(y) 1 Hawk. P. C. 75.

(z) The statutes 4 and 5 W. and M. c. 8, 6 and 7 Wm. III, c. 17, and 5 Ann. c. 31 (together with 3 Geo. I, c. 15, § 4, which directs the method of reimbursing the sheriffs), are extended to the county palatine of Durham, by stat. 14 Geo. III, c. 46.

(5) All these acts are now repealed.

(6) These statutes are repealed and new provisions substituted.

## CHAPTER XXII. OF COMMITMENT AND BAIL.

WHEN a delinquent is arrested by any of the means mentioned in the preceding chapter, he ought regularly to be carried before a justice of the peace: (1) and how he is there to be treated, I shall next show, under the second head, of *commitment* and *bail*.

The justice before whom such prisoner is brought is bound immediately to *examine* the circumstances of the crime alleged: and to this end by statute 2 and 3 P. and M. c. 10, he is to take in writing the examination of such prisoner, and the information of those who bring him: which, Mr. Lambard observes, (a) was the first warrant given for the examination of a felon in the English law. For, at the common law, *nemo tenebatur prodere seipsum*: and his fault was not to be wrung out of himself, but rather to be discovered by other means and other men. (2) If upon this inquiry it manifestly appears

(a) *Elmarch*, b. 2, c. 7. See page 287.

(1) A private party who makes an arrest may deliver the prisoner to an officer or take him before a justice. 1 Chitty Cr. L., 20. In general, a prisoner should be taken before a magistrate for examination as soon as circumstances will allow. *State v. Freeman*, 86 N. C., 688. Where a man was arrested on suspicion of felony, a delay of three days in taking him up for examination was held unreasonable. *Wright v. Court*, 4 B. & C., 596. A prisoner may be detained a reasonable time while the officer tries to find a justice before whom to bring him. *Arnold v. Steeves*, 10 Wend., 514. So, where one is arrested on probable ground of suspicion, he may lawfully be detained a reasonable time while a warrant is taken out for him. *Wheeler v. Nesbitt*, 24 How., 544.

(2) The statute 2 and 3 P. and M., c. 10, is repealed. By statute 11 and 12 Vic., c. 42, § 17, when a person appears or is brought before a justice or justices, charged with an indictable offense, the justice or one of the justices shall "read or cause to be read to the accused the depositions taken against him, and shall say to him these words or words of the like effect: 'Having heard the evidence, do you wish to say any thing in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you on your trial;' and whatever the prisoner shall then say in answer thereto shall be taken down in writing and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards, upon the trial of said accused person, the same may, if necessary, be given in evidence against him without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same; provided always, that the said justice or justices, before such accused person shall make any statement, shall state to him and give him clearly to understand that he has nothing to hope from any promise of favor and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him on the trial, notwithstanding such promise or threat; provided, nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person." Some further provisions are made by statute 30 and 31 Vic., c. 35.

The statement of one defendant is not evidence against another arrested on the same charge. *Reg. v. Swinnerton*, 1 C. & M., 598. It must not be taken on oath, or it will be inadmissible. *Rex v. Smith*, 1 Stark. N. P., 242; *R. v. Rivers*, 7 C. & P., 177; *R. v. Pikeley*, 9 id., 124.

In the United States provisions are made by statute for the arrest and examination of offenders before justices of the peace and other local magistrates, and for their being held for trial in the proper court. These provisions are different, but have a general similarity. The accused, after the proofs against him are taken, is permitted to make a statement without oath, which he makes or not at his option, and it is quite customary to caution him that what he says may be used in evidence against him. After the statement is received, the magistrate, if he decides to hold the accused to trial, makes an order accordingly, and if the case is bailable, fixes the amount of bail. But the accused, without the taking of

that either no such crime was committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him. Otherwise he must either be committed to prison, or give bail: that is put in securities for his appearance, to answer the charge against him. (3) This commitment, therefore, being only for safe custody, wherever bail will answer the same intention, it ought to be taken; as in most of the inferior crimes: but in felonies, and other offences of a \*capital nature, [\*297] no bail can be a security equivalent to the actual custody of the person. For what is there that a man may not be induced to forfeit, to save his own life? and what satisfaction or indemnity is it to the public, to seize the effects of them who have bailed a murderer, if the murderer himself be suffered to escape with impunity? Upon a principle similar to which the Athenian magistrates, when they took a solemn oath never to keep a citizen in bonds that could give three sureties of the same quality with himself, did it with an exception to such as had embezzled the public money, or been guilty of treasonable practices. (b) What the nature of bail is hath been shown in the preceding book, (c) viz., a delivery or bailment, of a person to his sureties, upon their giving (together with himself) sufficient security for his appearance: he being supposed to continue in their friendly custody, instead of going to gaol. In civil cases we have seen that every defendant is bailable; but in criminal matters it is otherwise. Let us therefore inquire in what cases the party accused ought, or ought not, to be admitted to bail.

And, first, to refuse or delay to bail any person bailable is an offence against the liberty of the subject, in any magistrate by the common law, (d) as well as by the statute Westm. 1, 3 Edw. 1, c. 15, and the *habeas corpus* act, 31 Car. II, c. 2. And, lest the intention of the law should be frustrated by the justices requiring bail to a greater amount than the nature of the case demands, it is expressly declared by statute I W. and M., st. 2, c. 2, that excessive bail ought not to be required; though what bail should be called excessive must be left to the courts, on considering the circumstances of the case, to determine. And, on the other hand, if the magistrate takes insufficient bail he is liable to be fined, if the criminal doth not appear. (e) (4) Bail may be taken either in court, or in some particular cases by the sheriff, coroner, or other magistrate, (5) but most usually by the justices of the peace. Regularly, [\*298] in all offences either against the common \*law or act of parliament, that are below felony, the offender ought to be admitted to bail, unless

(b) Pott, Antiq. b. 1, c. 18.

(c) See book III, page 260.

(d) 2 Hawk. P. C. 90.

(e) *Ibid.* 98.

proofs against him, is allowed to waive examination; and he will then be held for trial as if a case had been proved.

On the examination, the prisoner, if held in irons, should be released from them, though if he waives examination without having them removed, the fact of his being in irons at the time will be no ground for a plea in abatement to the subsequent indictment. *State v. Lewis*, 19 Kan., 260; S. C., 27 Am. Rep., 113.

(3) The magistrate, in cases of alleged felony, may cause the material witnesses who have appeared for the prosecution to enter into recognizance to appear at the trial, and if sufficient sureties are not given, may commit the witness. 2 Hawk. P. C., ch. 16, § 2; 1 Bish. Cr. Proc., § 84. In some of the United States this power of requiring the witness to recognize is not restricted to cases of felony. The liability of witnesses to be thus detained is sometimes a great hardship, and probably in some cases where persons become cognizant of crimes when they happen to be at a distance from their homes, and from the means of giving bail, the danger of their being detained in prison leads to a concealment of the facts within their knowledge.

(4) To bail one charged with an offense not bailable is, in the absence of statute, a negligent escape. 2 Hawk. P. C., ch. 15, § 7; *R. v. Clarke*, Stra., 1216. But where a magistrate has admitted one to bail, he has no right to order his re-arrest upon the supposition that the bail is insufficient. *Ingram v. State*, 27 Ala., 17.

(5) The court of king's bench, or any judge thereof, in vacation, may at their discretion admit persons to bail in all cases whatsoever: but none can claim this benefit *de jure*. 3 Hale, 129. As to when this court will bail, see 1 Chit. C. L., 2d ed., 98.

it be prohibited by some special act of parliament. (f) In order, therefore, more precisely to ascertain what offences are bailable,

Let us next see, who may *not* be admitted to bail, or what offences are *not* bailable. And here I shall not consider any one of those cases in which bail is ousted by statute, from prisoners *convicted* of particular offences: for then such imprisonment without bail is part of their sentence and punishment. But, where the imprisonment is only for safe custody *before* the conviction, and not for punishment *afterwards*, in such cases bail is ousted or taken away, wherever the offence is of a very enormous nature; for then the public is entitled to demand nothing less than the highest security that can be given, viz., the body of the accused; in order to insure that justice shall be done upon him if guilty. Such persons, therefore, as the author of the Mirror observes, (g) have no other sureties but the four walls of the prison. By the ancient common law, before (h) and since (i) the conquest, all felonies were bailable, till murder was excepted by statute: so that persons might be admitted to bail before conviction almost in every case. But the statute Westm. I, 3 Edw. 1, c. 15, takes away the power of bailing in treason, and in divers instances of felony. The statutes 23 Hen. VI, c. 9, and 1 and 2 P. and M. c. 13, give farther regulations in this matter; (k) and upon the whole we may collect, (l) that no justice of the peace can bail, 1. Upon an accusation of treason: (7) nor, 2. Of murder: nor, 3. In case of manslaughter, if the prisoner be clearly the slayer, and not barely suspected to be so; or if any indictment be found against him: nor, 4. Such as, being committed for felony, have broken prison; because it not only carries a presumption of guilt, but is also superadding one felony to another: 5. Persons outlawed: 6. Such as have abjured the realm: 7. \*Approvers, of whom we shall speak in a subsequent chapter, and persons by them accused: 8. Persons taken with the mainour, or in the fact of felony: 9. Persons charged with arson: 10. Excommunicated persons taken by writ *de excommunicato capiendo*: all of which are clearly not admissible to bail by the justices. Others are of a dubious nature; as, 11. Thieves openly defamed and known: 12. Persons charged with other felonies, or manifest and enormous offences, not being of good fame: and, 13. Accessories to felony, that labour under the same want of reputation. These seem to be in the discretion of the justices, whether bailable or not. The last class are such as *must* be bailed upon offering sufficient surety; as, 14. Persons of good fame, charged with a bare suspicion of manslaughter, or other inferior homicide: 15. Such persons, being charged with petit larceny, or any felony not before specified: or, 16. With being accessory to any felony. Lastly, it is agreed that the court (l) of king's bench (or any judge (m) thereof in time

(f) 2 Hal. P. C. 127.

(g) C. 2, § 24.

(h) 2 Inst. 189.

(i) *In omnibus placitis de felonis solet accusatus per plegios dimitti, praterquam in placito de homicidio, ubi ad terrorem aliter statutum est.* (Glanv. l. 14, c. 1.)

(k) 2 Inst. 186. 2 Hal. P. C. 129.

(l) 2 Inst. 189. Latch. 127. Vaugh. 127. Comb. 111, 228. 1 Comyn's Dig. 495.

(m) Skin. 633. Salk. 105. Stra. 911. 1 Comyn's Dig. 497.

(6) These statutes are since repealed, and much more liberal authority is conferred upon justices to admit to bail.

In the United States it is provided by the national and state constitutions that unreasonable bail shall not be required. But what is reasonable is necessarily left to the discretion of the officer who is empowered to fix it. Bail is usually denied in offenses punishable capitally, where, in the opinion of the magistrate, the proof of guilt is evident or the presumption great; but, nevertheless, there is power to let to bail even in capital cases. *United States v. Hamilton*, 8 Dall., 17; *United States v. Jones*, 3 Wash. C. C., 209; *Commonwealth v. Semmes*, 11 Leigh, 665; *Commonwealth v. Archer*, 6 Gratt., 705; *State v. Summons*, 19 Ohio, 139; *People v. Smith*, 1 Cal., 9; *Barronet's Case*, 1 El. and Bl. 1.

As to the duty of the justices in taking bail to look into the nature of the charge and the evidence to sustain it, see the case last cited. The duty is essentially judicial. *Linford v. Fitzroy*, 13 Q. B., 240; *Reg. v. Badger*, 4 id., 468.

(7) On a charge of treason, bail cannot be taken, except by order of a secretary of state, or by the court of queen's bench, or, in vacation, by one of the judges thereof. 11 and 12 Vic., c. 12.

of vacation) may bail for any crime whatsoever, be it treason (n), murder (o), or any other offence, according to the circumstances of the case. And herein the wisdom of the law is very manifest. To allow bail to be taken commonly for such enormous crimes would greatly tend to elude the public justice: and yet there are cases, though they rarely happen, in which it would be hard and unjust to confine a man in prison, though accused even of the greatest offence. The law has therefore provided one court, and only one, which has a discretionary power of bailing in any case: except only, even to this high jurisdiction, and of course to all inferior ones, such persons as are committed by either [300] house of parliament, so long as the \*session lasts; or such as are committed for contempts by any of the king's superior courts of justice. (p)

Upon the whole, if the offence be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the *mittimus* of the justice, or warrant under his hand and seal, containing the cause of his commitment: there to abide till delivered by due course of law. (q) But this imprisonment, as has been said, is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, nor subjected to other hardships than such as are absolutely requisite for the purpose of confinement only; though what are so requisite must too often be left to the discretion of the gaolers; who are frequently a merciless race of men, and, by being conversant in scenes of misery, steeled against any tender sensation. Yet the law (as formerly held) would not justify them in fettering a prisoner, unless where he was unruly, or had attempted to escape; (r) this being the humane language of our ancient lawgivers: (s) "*custodes pœnam sibi commissorum non augeant, nec eos torqueant; sed omni savitia remota, pietateque adhibita, judicia debite exequantur.*"

## CHAPTER XXIII.

### OF THE SEVERAL MODES OF PROSECUTION.

THE next step towards the punishment of offenders is their prosecution, or the manner of their formal accusation. (1) And this is either upon a previous finding of the fact by an inquest or grand jury; or without such previous finding. The former way is either by *presentment* or *indictment*.

I. A presentment, *generally* taken, is a very comprehensive term; including not only presentments, properly so called, but also inquisitions of office and indictments by a grand jury. A presentment, *properly* speaking, is the notice

(n) In the reign of Queen Elizabeth it was the unanimous opinion of the judges, that no court could bail upon a commitment for a charge of high treason, by any of the queen's privy council. 1 Anders. 288.

(o) In omnibus placitis de felonis solet accusatus per plegios dimitti, præterquam in placito de homicidio. (Glan. l. 14, c. 1.) Sciendum tamen quod, in hoc placito non solet accusatus per plegios dimitti, nisi ex regis potestatis beneficio. (Ibid. c. 8.)

(p) Staundf. P. C. 73, b.

(q) 2 Hal. P. C. 122.

(r) 2 Inst. 281. 3 Inst. 34.

(s) Flet. l. 1, c. 26.

(1) It is a requirement of constitutional law that a person accused of crime shall be entitled to a speedy trial, and this has been 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. U. S. v. Fox, 3 Montana, 512. By the *Habeas Corpus Act*, 31 Car. II., c. 2, § 7, a person committed for treason or felony must be indicted at the next term or sessions, and if not indicted and tried in the second term or sessions, he shall be discharged from confinement, unless the delay arises from the impossibility of reaching witnesses for the prosecution. Similar provisions are found in the statutes of the American States, and there are general statutes limiting the time within which prosecutions for criminal offenses shall be instituted.



taken by a grand jury of any offence from their own knowledge or observation, (a) without any bill of indictment laid before them at the suit of the king: as the presentment of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment, (b) before the party presented can be put to answer it. An inquisition of office is the act of a jury summoned by the proper officer to inquire of matters relating to the crown, upon evidence laid before them. Some of these are in themselves convictions, and cannot afterwards be traversed or denied; and therefore the inquest or jury, ought to hear all that can be alleged on both sides. Of this nature are all inquisitions of *felo de se*; of flight in persons accused of felony; of deodanda, and the like; and presentments of petty offences in the sheriff's tourn or court-leet, whereupon the presiding officer may set a fine. (2) Other inquisitions may be afterwards traversed and examined: as particularly the coroner's \*inquisition of the death of a man, when it finds any one guilty of [\*302] homicide; (3) for in such cases the offender so presented must be arraigned upon this inquisition, and may dispute the truth of it; which brings it to a kind of indictment, the most usual and effectual means of prosecution, and into which we will therefore inquire a little more minutely.

II. An indictment (c) is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury. To this end the sheriff of every county is bound to return to every session of the peace, and every commission of *oyer and terminer*, and of general gaol delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute all those things which, on the part of our lord the king, shall then and there be commanded them. (d) They ought to be freeholders, (4) but to what amount is uncertain: (e) which seems to be *casus omissus*, and as proper to be supplied by the legislature as the qualifications of the petit jury, which were formerly equally vague and uncertain, but are now settled by several acts of parliament. However, they are usually gentlemen of the best figure in the county. As many as appear upon this panel are sworn upon the grand jury, to the amount of twelve at the least, and not more than twenty-three; that twelve may be a majority. Which number, as well as the constitution itself, we find exactly described, so early as the laws of king Ethelred. (f) "*Exeant seniores duodecim thani, et prefectus cum eis, et jurent super sanctuarium quod eis in manus datur, quod nolint ullum innocentem accusare, nec aliquem noxium celare.*" In the time

(a) Lamb. Eirenarch. l. 4, c. 5.

(b) 2 Inst. 739.

(c) See Appendix, § 1.

(d) 2 Hal. P. C. 154.

(e) *Ibid.* 155.

(f) Wilk. LL. Angl. Sax. 117.

(2) Mr. Justice Coleridge points out an inaccuracy here. He shows that inquisitions of *felo de se* may be traversed by the executors or administrators of the deceased. *Toomes v. Etherington*, 1 Saund. R., 363, n. 1, ed. 1824; that inquisition is not taken of the flight of persons accused of felony distinct from the felony; that the finding as to deodanda is not so conclusive but that the court may interfere to diminish the value: *Post*, 266; and that, as to presentments of petty offenses in the tourn or leet, Lord Mansfield has said that it cannot be true that they are not traversable anywhere: *Cowp.*, 459; and the law seems to be that, before the fine is estreated and paid, though not afterwards, the presentment may be removed by *certiorari* into the court of king's bench, and traversed there. *Rex v. Heaton*, 2 T. R., 184.

(3) That the finding of a coroner's jury is in itself an indictment upon which a trial may be had without the intervention of a grand jury, see *R. v. Ingham*, 9 Cox, 508. The old doctrine was that one might be put on trial for crime without indictment when a verdict had in a civil action involved finding one guilty of crime. As if in trespass the jury found the defendant stole the goods. 2 Hawk. P. C., c. 25, § 6; Com. Dig. Indictment, C. Or in slander for calling one a thief, and the jury found a justification made out. *Bac. Abr.* Indictment, B. 5. But no such proceeding is known to modern English law.

Capital or other infamous crimes against the United States are only to be tried on indictment. Const. U. S., Amendment 5. In a majority of the states there are similar constitutional provisions, but in some the grand jury is abolished, and an information filed by a public prosecutor is substituted for an indictment.

(4) It is not essential that they be freeholders. *Russ. and R.*, 177.

of King Richard the First (according to Hoveden) the process of electing the grand jury ordained by that prince, was as follows: four knights were to be taken from the county at large, who chose two more out of every hundred; which two associated to themselves ten other principal freemen, and those twelve were to answer concerning all particulars relating to their own district.

[\*303] This number was probably \*found too large and inconvenient; but the traces of this institution still remain in that some of the jury must be summoned out of every hundred. This grand jury are previously instructed in the articles of their inquiry, by a charge from the judge who presides upon the bench. They then withdraw, to sit and receive indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor; and they are only to hear evidence on behalf of the prosecution: for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire, upon their oaths, whether there be sufficient cause to call upon the party to answer it. A grand jury, however, ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not to rest satisfied merely with remote probabilities: a doctrine that might be applied to very oppressive purposes. (g)

The grand jury are sworn to inquire, only for the body of the county, *pro corpore comitatus*; and therefore they cannot regularly inquire of a fact done out of that county for which they are sworn, unless particularly enabled by an act of parliament. And to so high a nicety was this matter anciently carried, that where a man was wounded in one county, and died in another, the offender was at common law indictable in neither, because no complete act of felony was done in any one of them; but by statute 2 and 3 Edw. VI, c. 24, he is now indictable in the county where the party died. And, by statute 2 Geo. II, c. 21, if the stroke or poisoning be in England, and the death upon the sea, or out of England: or, *vice versa*; the offenders and their accessories may be indicted in the county where either the death, poisoning, or stroke shall happen. And so in some other cases; as particularly, where treason is committed out of the realm, it may be inquired of in any county within the realm, as the king shall direct, in pursuance of statutes 26 Hen. VIII, c. 13, 33 Hen. VIII, c. 23, 35 Hen. VIII, c. 2, and 5 and 6 Edw. VI, c. 11. And counterfeiters, washers, or

[\*304] minishers \*of the current coin, together with all manner of felons and their accessories, may by statute 26 Hen. VIII, c. 6 (confirmed and explained by 34 and 35 Hen. VIII, c. 26, §§ 85, 86), be indicted and tried for those offences, if committed in any part (h) of Wales, before the justices of gaol-delivery and of the peace in the next adjoining county of England, where the king's writ runneth: that is, at present in the county of Hereford or Salop; and not, as it should seem, in the county of Chester or Monmouth: the one being a county-palatine where the king's writ did not run, and the other a part of Wales, in 26 Hen. VIII. (i) Murders, also, whether committed in England or foreign parts, (k) may by virtue of the statute 33 Hen. VIII, c. 23, be inquired of and tried by the king's special commission in any shire or place in the kingdom. By statute 10 and 11 Wm. III, c. 25, all robberies and other capital crimes, committed in Newfoundland, may be inquired of and tried in any county in England. Offences against the black-act, 9 Geo. I, c. 22, may be inquired of and tried in any county in England, at the option of the prosecutor. (l) So felonies in destroying turnpikes, or works upon navigable rivers, erected by authority of parliament, may by statutes 8 Geo. II, c. 20, and 13 Geo. III, c. 84, be inquired of and tried in any adjacent county. By statute 26 Geo. II, c. 19, plundering or stealing from any vessel in distress or wrecked, or breaking any ship contrary to 12 Ann. st. 2, c. 18 (m) may be pro-

(g) State Trials, iv, 183.

(h) Stra. 553. 3 Mod. 134.

(i) See Hardr. 68.

(k) Ely's Case, at the Old Bailey, Dec. 1720. Roache's Case, Dec. 1770.

(l) So held by all the judges, H. 11 George III, in the case of Richard Mortis, on a case referred from the Old Bailey.

(m) See page 244.

secuted either in the county where the fact is committed, or in any county next adjoining; and, if committed in Wales, then in the next adjoining English county: by which is understood to be meant such English county as by the statute 26 Hen. VIII, above mentioned, had before a concurrent jurisdiction with the great sessions of felonies committed in Wales. (n) Felonies committed out of the realm, in burning or destroying the king's ships, \*magazines, or stores, may by statute 12 Geo. III, c. 24, be inquired of and tried in any county of England, or in the place where the offence [\*305] is committed. By statute 13 Geo. III, c. 63, misdemeanors committed in India may be tried upon information or indictment in the court of king's bench in England; and a mode is marked out for examining witnesses by commission, and transmitting their depositions to the court. But, in general, all offences must be inquired into, as well as tried, in the county where the fact is committed. Yet, if larceny be committed in one county, and the goods carried into another, the offender may be indicted in either; for the offence is complete in both. (o) Or he may be indicted in England for larceny in Scotland, and carrying the goods with him into England, or *vice versa*; or for receiving in one part of the united kingdom goods that have been stolen in another. (p) But for robbery, burglary, and the like, he can only be indicted where the fact was actually committed; for though the carrying away and keeping of the goods is a continuation of the original taking, and is therefore larceny in the second county, yet it is not a robbery or burglary in that jurisdiction. And if a person be indicted in one county for larceny of goods originally taken in another, and be thereof convicted, or stands mute, he shall not be admitted to his clergy: provided the original taking be attended with such circumstances as would have ousted him of his clergy by virtue of any statute made previous to the year 1891. (q) (5)

When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to endorse on the back of the bill, "*ignoramus*," or, we know nothing of it: intimating, that though the facts might possibly be true, that truth did not appear to them: but now, they assert in English more absolutely, "not a true bill;" or (which is the better way) "not found;" and then the party is discharged without farther answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then \*endorse upon it, "a true bill;" [\*306] anciently "*billa vera*." The indictment is then said to be found, and the party stands indicted. But to find a bill there must at least twelve of the jury agree: for so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offence, unless by the unanimous voice of twenty-four of his equals and neighbours: that is, by twelve at least of the grand jury, in the first place, assenting to the accusation: and afterwards, by the whole petit jury, of twelve more, finding him guilty, upon his trial. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree. (r) And the indictment, when so found, is publicly delivered into court.

(n) At Shrewsbury summer assizes, 1774, Parry and Roberts were convicted of plundering a vessel which was wrecked on the coast of Anglesey. It was moved in arrest of judgment, that Chester, and not Salop, was the next adjoining English county. But all the judges (in Mich. 15 Geo. III) held the prosecution to be regular.

(o) 1 Hal. P. c. 507.

(p) Stat. 13 Geo. III, c. 81.

(q) Stat. 26 Hen. VIII, c. 3. 3 W. and M. c. 2.

(r) 2 Hal. P. C. 161.

(5) Formerly it was necessary to state the venue in the body of the indictment, but it is not so now. See statute 14 and 15 Vic., c. 100, § 23. And as the court by the same statute has power to allow an amendment in the statement of the venue, an objection on this score does not often become available, unless the indictment on its face, or the evidence given on the trial, shows that the court had no jurisdiction. And if the record on its face shows the court to have no jurisdiction, a conviction cannot be sustained without amendment, notwithstanding the court had jurisdiction in fact. Reg. v. Mitchell, 3 Q. B., 686.

Indictments must have a precise and sufficient certainty. (6) By statute 1 Hen. V, c. 5, all indictments must set forth the christian name, surname, and addition of the state, and degree, mystery, town, or place, and county of the offender: and all this to identify his *person*. The *time*, and *place*, are also to be ascertained by naming the day and township, in which the fact was committed; though a mistake in these points is in general not held to be material, provided the *time* be laid previous to the finding of the indictment, and the *place* to be within the jurisdiction of the court; unless where the place is laid, not merely as a *venue*, but as a part of the description of the fact. (e) But sometimes the *time* may be very material, where there is any limitation in point of time assigned for the prosecution of offenders: as by the statute 7 Wm. III, c. 3, which enacts, that no prosecution shall be had for any of the treasons or misprisions therein mentioned (except an assassination designed or attempted on the person of the king), unless the bill of indictment be found within three years after the offence committed: (f) and in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given. The offence itself must also be set forth with clearness and certainty; and in some crimes particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the [\*307] offence, that no other words, however synonymous they may seem, are capable of doing it. Thus, in treason, the facts must be laid to be

(a) 2 Hawk. P. C. 435.

(e) Post. 349.

(6) "The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, inform the court of the facts alleged, so that it may decide whether they are sufficient to support a conviction, if one should be had. For this, facts are to be stated; not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity, of time, place, and circumstances." U. S. v. Cruikshank, 92 U. S., 542, 558; Jarrard's Case, L. and C., 301; Merwin v. People, 26 Mich., 298. By the sixth amendment to the constitution of the United States an accused party is entitled to be informed of the nature and cause of the accusation against him. The indictment must therefore set forth the offense with clearness and all necessary certainty to apprise the accused of the crime he is charged with. U. S. v. Mills, 7 Pet., 138. The alleged crime must be set forth with reasonable precision, directness, and fullness. Com. v. Phillips, 16 Pick., 211. Every ingredient of the offense must be clearly alleged. U. S. v. Cook, 17 Wall., 168. The requisites of an indictment are thus described by Justice Brett in a carefully considered opinion: "An indictment must contain an allegation of every fact necessary to constitute the criminal charge preferred by it. As, in order to make acts criminal, they must always be done with a criminal mind, the existence of that criminality of mind must always be alleged. If, in order to support the charge, it is necessary to show that certain acts have been committed, it is necessary to allege that those acts were in fact committed. If it is necessary to show that those acts, when they were committed, were done with a particular intent, it is necessary to aver that intention. If it is necessary, in order to support the charge, that the existence of a certain fact should be negatived, the negative must be alleged." R. v. Aspinall, 2 Q. B. D., 56; and see Bradlaugh v. The Queen, 3 Q. B. D., 607. As to the last point, see Com. v. Hart, 11 Cush., 180, where it is held that if in the enacting clause of a statute there is an exception, the party pleading an offense against the statute must show that his adversary is not within the exception; but, if the exception is in a subsequent clause or statute, it is to be shown in defense. "The ultimate design of all these objects" (that is, those sought to be accomplished by strictness in setting forth the charge), "is fairness to the prisoner; and consequently any indictment which has failed to set forth the offense with such certainty as to accomplish any of these purposes as far as the nature and circumstances of the case would permit, has generally been held bad upon general demurrer, or motion in arrest of judgment, or on writ of error. It is, however, true that in some cases and to some extent the omission to state facts not essential constituents of the offense in the abstract, but which are required to be stated, if known, may be excused by an allegation, on the face of the indictment, showing why they could not be stated. Thus, *first*, the grand jury may not have been able to ascertain the names of third persons whose names ought regularly to be stated; or, *second*, the means used to take life in case of murder; or, *third*, if in forgery, the forged instrument be lost, or in the hands of, or concealed by, the defendant; in the first case, the names; in the second, the means used to produce death; and, in the third, the exact words

done, "treasonably and against his allegiance;" anciently, "*proditorie et contra ligeantiae suae debitum*," else the indictment is void. In indictments for murder, it is necessary to say that the party indicted "murdered," not "killed," or "slew," the other; which till the late statute was expressed in Latin by the word "*murdravit*." (u) In all indictments for felonies, the adverb "feloniously," "*felonice*," must be used; and for burglaries also "*burglariter*," or in English, "burglariously;" and all these to ascertain the intent. In rapes, the word "*rapuit*," or "ravished," is necessary, and must not be expressed by any periphrasis; in order to render the crime certain. So in larcenies also, the words "*felonice cepit et asportavit*," "feloniously took and carried away," are necessary to every indictment; for these only can express the very offence. Also in indictments for murder, the length and depth of the wound should in general be expressed, in order that it may appear to the court to have been of a mortal nature; but if it goes through the body, then its dimensions are immaterial, for that is apparently sufficient to have been the cause of the death. Also, where a limb, or the like, is absolutely cut off, there such description is impossible. (v) Lastly, in indictments the *value* of the thing, which is the subject or instrument of the offence, must sometimes be expressed. In indictments for larcenies this is necessary, that it may appear whether it be grand or petit larceny; and whether entitled or not to the benefit of clergy; in homicides

(u) See book III, page 331.

(v) 5 Rep. 122.

of the forged instrument, may be stated to the jurors aforesaid unknown (though in the case of the forged instrument, its loss or destruction, or its possession or concealment by the prisoner must be stated and its substance given). And upon the same principle, the omission of a specific statement of many other facts not absolutely essential to the existence of the offence, may doubtless be excused in the same way." Merwin v. People, 26 Mich., 298.

The certainty required in an indictment is said by Justice Buller to be "what, upon a fair and reasonable construction, may be called certain, without recurring to possible facts which do not appear." R. v. Lyme Regis, 1 Doug., 159. "The court will construe the words according to their ordinary and usual acceptation, and technical terms according to their technical meaning. An indictment is not vitiated by ungrammatical language or clerical errors, if the real meaning is sufficiently expressed. An indictment is not objectionable as ambiguous or obscure if it be clear enough according to reasonable intendment or construction, though not worded with absolute precision. 'And if there is no necessary ambiguity in the construction of an indictment,' said Chief Justice Tindal, 'we are not bound to create one by reading an indictment in the only way which will make it unintelligible.'" Heard's Cr. Pl., 105-6. See further on the requisites of an indictment, Archbold Cr. Pr. and Pl.; Bish. Cr. Proc., §§ 819-718; Heard Cr. Pl., 41-261, in which most of the cases cited above are discussed.

Some important changes have been made in the law relative to indictments by recent statutes. By statute 14 and 15 Vic., c. 100, § 24, no indictment is to be held insufficient for omitting to state the time at which the offence was committed when time is not of the essence of the offence, nor by stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the pending of the indictment, or on an impossible day, or on a day that never happened. By section 9, a person on trial for an offence, if it shall appear that he did not complete it, may be convicted of an attempt to commit the same. By 24 and 25 Vic., c. 96, § 85, a person on trial for robbery may be acquitted on the main charge and convicted of an assault with intent to rob. By section 72 there may be a conviction for larceny on an indictment for embezzlement. By section 88, a person indicted for false pretences may be convicted of larceny. By 9 Geo. IV, c. 81, § 14, a woman indicted for the murder of her infant child may be convicted of endeavoring to conceal its birth. And by 24 and 25 Vic., c. 94, an accessory before the fact to any felony may be indicted in all respects as if he were the principal felon. And by statutes 24 and 25 Vic., c. 100, in an indictment for felonious homicide it is not necessary to set forth the manner in which, or the means by which, the death was caused. Indictments in other cases have been very much simplified. In the United States, indictments for murder, not stating the manner of the killing, have been sustained under statutes which provided that the manner need not be alleged. Cathcart v. Commonwealth, 87 Penn. St., 108; Campbell v. Commonwealth, 84 Penn. St., 187; State v. Shay, 30 La. Ann., 114; People v. King, 27 Cal., 507; Sneed v. People, 88 Mich., 248; Newcomb v. State, 87 Miss., 383; State v. Morrissey, 70 Me., 401; Williams v. State, 85 Ohio St., 175. Valuable discussions on the particularity required in indictments will be found in those cases.

of all sorts it is necessary; as the weapon with which it is committed is forfeited to the king as a deodand. (7)

The remaining methods of prosecution are without any previous finding by a jury, to fix the authoritative stamp of verisimilitude upon the accusation. One of these by the common law, was when a thief was taken *with the mainour*, that is, with the thing stolen upon him *in manu*. For he might, when so detected *flagrante delicto*, be brought into court, arraigned, and tried, without [\*308] indictment: as by the \*Danish law he might be taken and hanged upon the spot, without accusation or trial. (w) But this proceeding was taken away by several statutes in the reign of Edward the Third: (x) though in Scotland a similar process remains to this day. (y) So that the only species of proceeding at the suit of the king, without a previous indictment or presentment by a grand jury, now seems to be that of *information*.

III. Informations are of two sorts: first, those which are partly at the suit of the king, and partly at that of a subject; and secondly, such as are only in the name of the king. The former are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the king, and another to the use of the informer; and are a sort of *qui tam* actions (the nature of which was explained in a former book,) (z) only carried on by a criminal instead of a civil process: upon which I shall therefore only observe, that by the statute 31 Eliz. c. 5, no prosecution upon any penal statute, the suit and benefit whereof are limited in part to the king and in part to the prosecutor, can be brought by any common informer after one year is expired since the commission of the offence; nor on behalf of the crown after the lapse of two years longer; nor, where the forfeiture is originally given only to the king, can such prosecution be had after the expiration of two years from the commission of the offence. (8)

The informations that are exhibited in the name of the king alone, are also of two kinds: first, those which are truly and properly his own suits, and filed *ex officio* by his own immediate officer, the attorney-general; secondly, those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person or common informer; and they are filed by the king's coroner and attorney in the court of king's bench, usually called the master of the crown-office, who is for this purpose the standing officer of the public. The objects of the king's own prosecutions, filed *ex officio* by his own attorney-general, are properly such \*enormous misdemeanors as peculiarly tend [\*309] to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offences so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal: which power, thus necessary, not only to the ease and safety, but even to the very existence of the executive magistrate, was originally reserved in the great plan of the English constitution, wherein provision is wisely made for the due preservation of all its parts. The objects of the other species of informations filed by the master of the crown-office upon the complaint or relation of a private subject, are any gross and notorious misdemeanors, riots, batteries, libels, and

(w) *Stiernh. de jure Sueon.* l. 2, c. 5.  
(x) See book III, page 162.

(y) 2 Hal. P. C. 149.

(z) Lord Kaime, l. 231.

(7) Very broad powers to amend indictments are conferred upon the courts by 14 and 15 Vic., c. 100. As to amendment of the record after judgment, see *Gregory v. Reg.*, 15 Q. B. 957; *Bowers v. Nixon*, 12 *id.*, 548. As to amendment of indictments in the United States, see *State v. Manning*, 14 Tex., 402; *State v. Corson*, 59 Me., 137; *Lasure v. State*, 19 Ohio St., 43; *Commonwealth v. Hall*, 97 Mass., 570.

(8) The time, unless otherwise expressly provided by statute relating to the particular case, is limited in the case of offenses punishable on summary conviction, to six calendar months. 11 and 12 Vic., c. 43, § 36.

other immoralities of an atrocious kind, (a) not peculiarly tending to disturb the government (for those are left to the care of the attorney-general), but which, on, account of their magnitude or pernicious example, deserve the most public animadversion. (9) And when an information is filed, either thus, or by the attorney-general *ex officio*, it must be tried by a petit jury of the county where the offence arises: after which, if the defendant be found guilty, the court must be resorted to for his punishment.

There can be no doubt but that this mode of prosecution by information, (or suggestion,) filed on record by the king's attorney-general, or by his coroner or master of the crown-office in the court of king's bench, is as ancient as the common law itself. (b) For as the king was bound to prosecute, or at least to lend the sanction of his name to a prosecutor, whenever the grand jury informed him upon their oaths that there was a sufficient ground for instituting a criminal-suit: so when these his immediate officers were otherwise sufficiently assured that a man had committed a gross misdemeanor, either personally against the king or his government, or against the public peace and good order, they were at liberty, without waiting for any farther intelligence, to convey that information to the court of king's bench by a \*suggestion on record, and to carry on the prosecution in his majesty's name. But these in- [\*310] formations (of every kind) are confined by the constitutional law to mere misdemeanors only: for, wherever any capital offence is charged, the same law requires that the accusation be warranted by the oath of twelve men; before the party shall be put to answer it. And, as to those offences in which informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, and were carried on in a legal and regular course in his majesty's court of king's bench, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment. But when the statute 3 Hen. VII, c. 1, had extended the jurisdiction of the court of star-chamber, the members of which were the sole judges of the law, the fact, and the penalty; and when the statute 11 Hen. VII, c. 3, had permitted informations to be brought by any informer upon any penal statute, not extending to life or member, at the assizes or before the justices of the peace, who were to hear and determine the same according to their own discretion; then it was that the legal and orderly jurisdiction of the court of king's bench fell into disuse and oblivion, and Empson and Dudley (the wicked instruments of King Henry VII), by hunting out obsolete penalties, and this tyrannical mode of prosecution, with other oppressive devices (c) con-

(a) 2 Hawk. P. C. 360.

(b) 1 Show. 118.

(c) 1 And. 157.

(9) By the fifth amendment, U. S. Const., "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land and naval forces, or in the militia, when in actual service in time of war or public danger." This provision has no application to prosecutions for state offenses. Fox v. Ohio, 5 How., 34; Livingston v. Moore, 7 Pet., 469. An infamous offense is one involving moral turpitude in the offender, or infamy in the punishment, or both. Cooley, Principles of Const. Law, 291. That misdemeanors against the United States may be prosecuted by information, see U. S. v. Waller, 1 Sawyer, 701; U. S. v. Block, 4 Sawyer, 211; U. S. v. Shepard, 1 Abb. U. S., 431. As to prosecutions for state offenses by information, see Commonwealth v. Barrett, 9 Leigh, 665; State v. Dover, 9 N. H., 468; Washburn v. People, 10 Mich., 372. An early case lays down the rule that "all public misdemeanors which may be prosecuted by indictment may also be prosecuted by information in behalf of the commonwealth, unless the prosecution be restrained by statute to indictment." Commonwealth v. Waterborough, 5 Mass., 257. Where it is the practice to proceed by information, it is the rule that the substantial parts of the information shall be drawn as exactly and nicely as the corresponding parts of an indictment for the same offense. Enders v. People, 20 Mich., 233; People v. Olmstead, 30 Mich., 481; Chapman v. People, 39 Mich., 357; Rowan v. State, 30 Wis., 129; State v. Cockburn, 88 Conn., 400; Vogle v. State, 31 Ind., 64; People v. Higgins, 15 Ill., 110; State v. Williams, 3 Tex., 255.

tinually harassed the subject, and shamefully enriched the crown. The latter of these acts was soon indeed repealed by statute 1 Hen. VIII, c. 6, but the court of star-chamber continued in high vigor, and daily increasing its authority, for more than a century longer till finally abolished by statute 16 Car. I, c. 10.

Upon this dissolution the old common law (*d*) authority of the court of king's bench, as the *custos morum* of the nation being found necessary to reside somewhere for the peace and good government of the kingdom, was again [\*311] revived in \*practice. (*e*) And it is observable, that in the same act of parliament which abolished the court of star-chamber, a conviction by information is expressly reckoned up, as one of the legal modes of conviction of such persons as should offend a third time against the provisions of that statute. (*f*) It is true Sir Matthew Hale, who presided in this court soon after the time of such revival, is said (*g*) to have been no friend to this method of prosecution: and, if so, the reason of such his dislike was probably the ill use which the master of the crown-office then made of his authority, by permitting the subject to be harassed with vexatious informations, whenever applied to by any malicious or revengeful prosecutor: rather than his doubt of their legality, or propriety upon urgent occasions. (*h*) For the power of filing informations, without any control, then resided in the breast of the master: and, being filed in the name of the king, they subjected the prosecutor to no costs, though on trial they proved to be groundless. This oppressive use of them, in the times preceding the revolution, occasioned a struggle, soon after the accession of King William, (*i*) to procure a declaration of their illegality by the judgment of the court of king's bench. But Sir John Holt who then presided there, and all the judges, were clearly of opinion, that this proceeding was grounded on the common law, and could not be then impeached. And, in a few years afterwards, a more temperate remedy was applied in parliament, by statute 4 and 5 W. and M. c. 18, which enacts, that the clerk of the crown shall not file any information without express direction from the court of king's bench: and that every prosecutor, permitted to promote such information, shall give security by a recognizance of twenty pounds (which now seems to be too small a sum) to prosecute the same with effect: and to pay costs to the defendant in case he be acquitted thereon, unless the judge, who tries the information, shall certify there was reasonable cause for filing it; and, at all events, to pay [\*312] costs, unless \*the information shall be tried within a year after issue joined. But there is a proviso in this act, that it shall not extend to any other informations than those which are exhibited by the master of the crown-office: and consequently, informations at the king's own suit, filed by his attorney-general, are no way restrained thereby.

There is one species of informations, still farther regulated by statute 9 Ann. c. 20, viz., those in the nature of a writ of *quo warranto*; which was shown, in the preceding book, (*k*) to be a remedy given to the crown against such as had usurped or intruded into any office or franchise. The modern information tends to the same purpose as the ancient writ, being generally made use of to try the civil rights of such franchises; though it is commenced in the same manner as other informations are by leave of the court, or at the will of the attorney-general: being properly a criminal prosecution, in order to fine the defendant for his usurpation, as well as to oust him from his office; yet usually considered at present as merely a civil proceeding. (10)

(*d*) 5 Mod. 464.

(*e*) Styl. Rep. 317, 345. Styl. Pract. Reg. tit. Information, p. 187, (edit. 1657). 2 Sid. 71. 1 Sid. 128.

(*f*) Stat. 16 Car. I. c. 10. § 6.

(*g*) 5 Mod. 460.

(*h*) 1 Saund. 301. 1 Sid. 174.

(*i*) M. 1 W. and M. 5 Mod. 469. Comb. 141. Far. 361. 1 Show. 106.

(*k*) See book III, page 363.

(10) See *Rex v. Francis*, 3 T. R., 484, in which it was held that a new trial might be granted in these cases.



These are all the methods of prosecution at the suit of the king. There yet remains another, which is merely at the suit of the subject, and is called an *appeal*.

IV. An appeal, in the sense wherein it is here used, does not signify any complaint to a superior court of an injustice done by an inferior one, which is the general use of the word; but it here means an original suit, at the time of its first commencement. (l) An appeal, therefore, when spoken of as a criminal prosecution, denotes an accusation by a private subject against another, for some heinous crime; demanding punishment on account of the particular injury suffered, rather than for the offence against the public. As this method of prosecution is still in force, I cannot omit to mention it: but as it is very little in use, on account of the \*great nicety required in conducting it, [313] I shall treat of it very briefly; referring the student for more particulars to other more voluminous compilations. (m)

This private process, for the punishment of public crimes, had probably its original in those times when a private pecuniary satisfaction, called a *weregild*, was constantly paid to the party injured, or his relations, to expiate enormous offences. This was a custom derived to us, in common with other northern nations, (n) from our ancestors, the ancient Germans; among whom, according to Tacitus, (o) "*luitur homicidium certo armentorum ac pecorum numero; recipitur satisfactionem universa domus.*" (p) In the same manner by the Irish Brehon law, in case of murder, the brehon or judge was used to compound between the murderer and the friends of the deceased who prosecuted him, by causing the malefactor to give unto them, or to the child or wife of him that was slain, a recompense which they called an *eriacb*. (q) And thus we find in our Saxon laws (particularly those of King Athelstan) (r) the several weregilds for homicide established in progressive order from the death of the ceorl or peasant, up to that of the king himself. (s) And in the laws of King Henry I, (t) we have an account of what other offences were then redeemable by weregild, and what were not so. (u) As therefore during the continuance of this custom, a process was certainly given, for recovering the weregild by the party to whom it was due; it seems that, when \*these offences by degrees grew no [314] longer redeemable, the private process was still continued, in order to insure the infliction of punishment upon the offender, though the party injured was allowed no pecuniary compensation for the offence.

But, though appeals were thus in the nature of prosecutions for some atrocious injury committed more immediately against an individual, yet it also was anciently permitted, that any subject might appeal another subject of high treason, either in the courts of common law, (w) or in parliament, or (for treasons committed beyond the seas) in the court of the high constable and marshal. The cognizance of appeals in the latter still continues in force; and so late as 1631 there was a trial by battel awarded in the court of chivalry, on such an appeal of treason: (x) but that in the first was *virtually* abolished (y) by the statutes 5 Edw. III, c. 9, and 25 Edw. III, c. 24, and in the second *expressly* by statute 1 Hen. IV, c. 14, so that the only appeals now in force for things done within the realm, are appeals of felony and mayhem.

(l) It is from the French, "*appeller*," the verb active, which signifies to call upon, summon, or challenge one; and not the verb neuter which signifies the same as the ordinary sense of "*appeal*" in English.

(m) 3 Hawk. P. C. ch. 23. (n) Sclernh. *de jure Saxon*. l. 3, c. 4. (o) *de M. G. c. 21*. (p) And in another place, (c. 15), *Delictis, pro modo pœna: equorum pecorumque numero convolvitur mulctantur. Pars mulctæ regi vel civitati; pars ipsi qui vindicatur, vel propinquis ejus exsolvitur.*"

(q) Spencer's State of Ireland, p. 1513, edit. Hughes. (r) *Judic. Civil. Lund. Wilk. 71*.

(s) The weregild of a ceorl was 200 thrymsas, that of the king 30,000; each thrymsa being equal to about a shilling of our present money. The weregild of a subject was paid entirely to the relations of the party slain; but that of the king was divided; one-half being paid to the public, the other half to the royal family.

(t) c. 12. (u) In Turkey this principle is still carried so far, that even murder is never prosecuted by the officers of the government, as with us. It is the business of the next relations, and them only, to revenge the slaughter of their kinsmen; and if they rather choose (as they generally do, to compound the matter for money, nothing more is said about it. (Lady M. W. Montague, lett. 43.)

(w) Brit. c. 22. (x) By Donald lord Ree against David Ramsey. (Rushw. vol. 2, part 2, p. 112.) (y) 1 Hal. P. C. 268.

An appeal of *felony* may be brought for crimes committed either against the parties themselves or their relations. The crimes against the parties themselves are *larceny*, *rape*, and *arson*. And for these, as well as for mayhem, the persons robbed, ravished, maimed, or whose houses are burnt, may institute this private process. The only crime against one's relation, for which an appeal can be brought, is that of *killing* him, by either murder or manslaughter. But this cannot be brought by every relation: but only by the wife for the death of her husband, or by the heir male for the death of his ancestor; which heirship was also confined, by an ordinance of King Henry the First, to the four nearest degrees of blood. (a) It is given to the wife on account of the loss of her husband; therefore, if she marries again, before or pending her appeal, it is lost and gone; or, if she marries after judgment, she shall not demand execution. The heir, as was said, must also be heir male, and such a one as was [315] the \*next heir by the course of the common law, at the time of the killing of the ancestor. But this rule hath three exceptions: 1. If the person killed leaves an innocent wife, she only, and not the heir, shall have the appeal: 2. If there be no wife, and the heir be accused of the murder, the person who, next to him, would have been heir male, shall bring the appeal: 3. If the wife kills her husband, the heir may appeal her of the death. And, by the statute of Gloucester, 6 Edw. I, c. 9, all appeals of death must be sued within a year and a day after the completion of the felony by the death of the party: which seems to be only declaratory of the old common law; for in the Gothic constitutions we find the same "*præscriptio annalis, quæ currit adversus actorem, si de homicida ei non constet intra annum a cæde facta, nec quæquam interea arguat et accuset.*" (a)

These appeals may be brought previous to an indictment: and if the appellee be acquitted thereon, he cannot be afterwards indicted for the same offence. In like manner as by the old Gothic constitution, if any offender gained a verdict in his favour, when prosecuted by the party injured, he was also understood to be acquitted of any crown prosecution for the same offence: (b) but, on the contrary, if he made his peace with the king, still he might be prosecuted at the suit of the party. And so, with us, if a man be acquitted on an indictment of murder, or found guilty, and pardoned by the king, still he ought not (in strictness) to go at large, but be imprisoned or let to bail till the year and day be past, by virtue of the statute 3 Hen. VII, c. 1, in order to be forthcoming to answer any appeal for the same felony, not having as yet been punished for it, though, if he hath been found guilty of manslaughter on an indictment, and hath had the benefit of clergy, and suffered the judgment of the law, he cannot afterwards be appealed; for it is a maxim in law that, "*nemo bis punitur pro eodem delicto.*" Before this statute was made, it was not usual to indict a man for homicide within the time limited for appeals; which produced very great inconvenience, of which more hereafter. (c)

[316] \*If the appellee be acquitted, the appellor (by virtue of the statute of Westm. 2, 13 Edw. I, c. 12) shall suffer one year's imprisonment, and pay a fine to the king, besides restitution of damages to the party for the imprisonment and infamy which he has sustained; and if the appellor be incapable to make restitution, his abettors shall do it for him, and also be liable to imprisonment. This provision, as was foreseen by the author of Fleta, (d) proved a great discouragement to appeals; so that thenceforward they ceased to be in common use.

If the appellee be found guilty he shall suffer the same judgment as if he had been convicted by indictment: but with this remarkable difference; that on an indictment, which is at the suit of the king, the king may pardon and remit the execution; on an appeal, which is at the suit of a private subject, to make an atonement for the private wrong, the king can no more pardon it

(a) Mirr. c. 2, § 7.  
(c) See page 335.

(a) Stiernh. de jure Goth. l. 2, c. 4.  
(d) L. 1, c. 34, § 48.

(b) Stiernh. de jure Goth. l. 1, c. 2.

than he can remit the damages recovered in an action of battery. (e) In like manner, as, while the weregild continued to be paid as a fine for homicide, it could not be remitted by the king's authority. (f) And the ancient usage was, so late as Henry the Fourth's time, that all the relations of the slain should drag the appellee to the place of execution; (g) a custom founded upon that savage spirit of family resentment, which prevailed universally through Europe, after the irruption of the northern nations, and is peculiarly attended to in their several codes of law; and which prevails even now among the wild and untutored inhabitants of America; as if the finger of nature had pointed it out to mankind, in their rude and uncultivated state. (h) However, the punishment of the offender may be remitted and discharged by the concurrence of all parties interested; and, as the king, by his pardon, may frustrate an indictment, so the appellant by his release may \*discharge an appeal; (i) "*nam quilibet potest renunciare juri pro se introducto.*" (11) [\*317]

These are the several modes of prosecution, instituted by the laws of England for the punishment of offences; of which that by indictment is the most general. I shall therefore confine my subsequent observations principally to this method of prosecution; remarking by the way the most material variations that may arise, from the method of proceeding, by either information or appeal.

(e) 2 Hawk. P. C. 392.  
(g) M. 11 Hen. IV, 12.

(f) LL. Edm. § 2.  
3 Inst. 181.

(h) Robertson, Chas. V, l. 45.

1 Hal. P. C. 2.

(11) These appeals had become nearly obsolete, but the *right* still existing was claimed, and in part exercised, in the year 1818, by William Ashford, eldest brother and heir at law of Mary Ashford, who brought a writ of appeal against Abraham Thornton, for the murder of his sister. Thornton had been tried at the Warwick summer assizes, 1817, for the murder, and acquitted, though under circumstances of strong suspicion. The appellee, when called upon to plead, pleaded "not guilty, and that he was ready to defend himself by his body;" and, taking his glove off, he threw it upon the floor of the court. A counterplea was afterwards delivered in by the appellant, to which there was a replication. A general demurrer followed, and joinder thereon. See a full detail of the proceedings in that singular case, in the report of it, under the name of Ashford v. Thornton, 1 B. & A., 405. It was held, in that case, that where, in an appeal of death, the appellee wages his battle, the counterplea, to oust him of this mode of trial, must disclose such violent and strong presumptions of guilt, as to leave no possible doubt in the minds of the court; and, therefore, that a counterplea, which only stated strong circumstances of suspicion, was insufficient. It was also held, that the appellee may reply fresh matter, tending to show his innocence, as an alibi, and his former acquittal of the same offense on an indictment. But it was doubted whether, where the counterplea is *per se* insufficient, or where the replication is a good answer to it, the court should give judgment that the appellee be allowed his wager of battle, or that he go without day. Therefore, the appellant praying no further judgment, the court, by consent of both parties, ordered that judgment should be stayed in the appeal, and that the appellee should be discharged. This case, the first of the kind that had occurred for more than half a century: see Bigby v. Kennedy, 5 Burr., 2643; 2 W. Bl., 713; Rex v. Taylor, 5 Burr, 2793; Smith v. Taylor, *id.*; the last cases upon the subject, where the mode of proceeding is detailed at large, led to the total abolition of appeals of murder, as well as of treason, felony, or other offenses, together with wagers of battle, by the passing of the statute 59 Geo. III, c. 46.

## CHAPTER XXIV. OF PROCESS UPON AN INDICTMENT.

WE are next, in the fourth place, to inquire into the manner of *issuing process*, after indictment found, to bring in the accused to answer it. We have hitherto supposed the offender to be in custody before the finding of the indictment; in which case he is immediately (or as soon as convenience permits) to be arraigned thereon. But if he hath fled, or secretes himself, in capital cases: or hath not, in smaller misdemeanors, been bound over to appear at the assizes or sessions, still an indictment may be preferred against him in his absence; since, were he present, he could not be heard before the grand jury against it. And, if it be found, then process must issue to bring him into court; for the indictment cannot be tried, unless he personally appears, according to the rules of equity in all cases, and the express provision of statute 28 Edw. III, c. 3, in capital ones, that no man shall be put to death, without being brought to answer by due process of law.

The proper process on an indictment for any petit misdemeanor, or on a penal statute, is a writ of *venire facias*, which is in the nature of a summons to cause the party to appear. And if, by the return to such *venire*, it appears that the party hath lands in the county, whereby he may be distrained, then a *distress infinite* shall be issued, from time to time, till he appears. But if the sheriff returns that he hath no lands in his bailiwick, (then upon his non-appearance) a writ of *capias* shall issue, which commands the sheriff to [\*319] take his body, and have him at the next assizes; and if he cannot be taken upon the first *capias*, a second and third shall issue, called an *alias*, and a *pluries capias*. But, on indictments for treason or felony, a *capias* is the first process: and, for treason or homicide, only one shall be allowed to issue, (a) or two in the case of other felonies, by statute 25 Edw. III, st. 5, c. 14, though the usage is to issue only one in any felony; the provisions of this statute being in most cases found impracticable. (b) And so, in the case of misdemeanors, it is now the usual practice for any judge of the court of king's bench, upon certificate of an indictment found, to award a writ of *capias* immediately, in order to bring in the defendant. (1) But if he absconds, and it is thought proper to pursue him to an outlawry, then a greater exactness is necessary. For, in such case, after the several writs have issued in a regular number, according to the nature of the respective crimes, without any effect, the offender shall be put in the *exigent* in order to his outlawry; that is, he shall be exacted, proclaimed, or required to surrender, at five county courts; and if he be returned *quinto exactus*, and does not appear at the fifth exaction or requisition, then he is adjudged to be *outlawed*, or put out of the protection of the law; so that he is incapable of taking the benefit of it in any respect, either by bringing actions or otherwise.

The punishment for outlawries upon indictments for misdemeanors is the same as for outlawries upon civil actions (of which, and the previous process by writs of *capias*, *exigi facias*, and *proclamation*, we spoke in the preceding book); (c) viz., forfeiture of goods and chattels. But an outlawry in treason or felony amounts to a conviction and attainder of the offence charged in the indictment, as much as if the offender had been found guilty by his country.

(a) See Appendix, § 1.

(b) 3 Hal. P. C. 193.

(c) See book III, pp. 263, 264.

(1) This is altered by statute 11 and 12 Vic., c. 43, which provides for the issue by justices of a *capias* in such cases, upon certificate presented to them of indictment found. In the United States a *capias* is the first writ issued to bring the offender before the magistrate.

(*d*) His life is, however, still under the protection of the law, as hath formerly been \*observed: (*e*) so that though anciently an outlawed felon was said to have *caput lupinum*, and might be knocked on the head [*\*320*] like a wolf, by any one that should meet him; (*f*) because, having renounced all law, he was to be dealt with as in a state of nature, when every one that should find him might slay him; yet, now, to avoid such inhumanity, it is holden that no man is entitled to kill him wantonly or wilfully: but in so doing is guilty of murder, (*g*) unless it happens in the endeavour to apprehend him. (*h*) For any person may arrest an outlaw on a criminal prosecution, either of his own head, or by writ or warrant of *capias ullagatum*, in order to bring him to execution. But such outlawry may be frequently reversed by writ of error; the proceedings therein being (as it is fit they should be) exceedingly nice and circumstantial; and, if any single minute point be omitted or misconducted, the whole outlawry is illegal, and may be reversed: upon which reversal the party accused is admitted to plead to, and defend himself against the indictment.

Thus much for process to bring in the offender after indictment found; during which stage of the prosecution it is that writs of *certiorari facias* are usually had, though they may be had at any time before trial, to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction into the court of king's bench; (2) which is the sovereign ordinary court of justice in causes criminal. And this is frequently done for one of these four purposes; either, 1. To consider and determine the validity of appeals or indictments and the proceedings thereon; and to quash or confirm them as there is cause: or, 2. Where it is surmised that a partial or insufficient trial will probably be had in the court below, the indictment is removed in order to have the prisoner or defendant tried at the bar of the court of king's bench, or before the justices of *nisi prius*: or, 3. It is so removed in order to plead the king's pardon there: or, 4. To issue process of outlawry against the offender, in those \*counties or places where the process of [*\*321*] the inferior judges will not reach him. (*i*) Such writ of *certiorari*, when issued and delivered to the inferior court for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior court, and makes all subsequent proceedings therein entirely erroneous and illegal; unless the court of king's bench remands the record to the court below, to be there tried and determined. A *certiorari* may be granted at the instance of either the prosecutor or the defendant: the former as a matter of right, the latter as a matter of discretion; and therefore it is seldom granted to remove indictments from the justices of gaol-delivery, or after issue joined or confession of the fact in any of the courts below. (*k*)

At this stage of prosecution, also, it is that indictments found by the grand

(*d*) 2 Hal. P. C. 205.

(*e*) See page 178.

(*f*) Mirr. c. 4. Co. Litt. 128.

(*g*) 1 Hal. P. C. 497.

(*h*) Bracton, fol. 125.

(*i*) 2 Hal. P. C. 210.

(*k*) 2 Hawk. P. C. 287. 2 Burr. 749.

(2) Now, by statute 5 and 6 Wm. IV, c. 83, § 1, no *certiorari* issues from the queen's bench, except at the instance of the attorney general, unless on leave obtained from the court, or a judge at chambers. And by statute 16 and 17 Vic., c. 80, § 4, no indictment, except indictments against bodies corporate not authorized to appear by attorney in the courts in which the same are found, can be removed into the queen's bench or the central criminal court, by *certiorari*, at the instance of the prosecutor or defendant (other than the attorney general acting on behalf of the crown), unless it be made to appear to the court that a fair and impartial trial cannot be had in the court below, or that some question of law of more than usual difficulty and importance is likely to arise upon the trial, or that a view of the premises in respect whereof any indictment is preferred, or a special jury, may be required for the satisfactory trial of the same.

In some of the American states a *certiorari* lies to some inferior court to remove a pending cause before trial. In some cases this is a statutory privilege. See *Kendrick v. State*, Cooke (Tenn.), 474; *State v. Studer*, 8 Ired., 487; *Nicholls v. State*, 5 N. J., 539; *State v. Jones*, 11 N. J., 289; *State v. Canal Co.*, 18 N. J., 193; *People v. Runkel*, 6 Johns., 234; *People v. Ruloff*, 8 Park. Cr. R., 401.

jury against a peer must, in consequence of a writ of *certiorari*, be certified and transmitted into the court of parliament, or into that of the lord high steward of Great Britain; and that, in places of exclusive jurisdiction, as the two universities, indictments must be delivered (upon challenge and claim of cognizance) to the courts therein established by charter, and confirmed by act of parliament, to be there respectively tried and determined.

## CHAPTER XXV.

## OF ARRAIGNMENT AND ITS INCIDENTS.

WHEN the offender either appears voluntarily to an indictment, or was before in custody, or is brought in upon criminal process to answer it in the proper court, he is immediately to be *arraigned* thereon; which is the fifth stage of criminal prosecution.

To arraign is nothing else but to call the prisoner to the bar of the court to answer the matter charged upon him in the indictment. (a) The prisoner is to be called to the bar by his name; and it is laid down in our ancient books (b) that, though under an indictment of the highest nature, he must be brought to the bar without irons, or any manner of shackles or bonds: unless there be evident danger of an escape, and then he may be secured with irons. But yet in Lamer's case, A. D. 1722, a difference was taken between the time of arraignment and the time of trial; and accordingly the prisoner stood at the bar in chains during the time of his arraignment. (c)

[\*323] \*When he is brought to the bar, he is called upon by name to hold up his hand: which, though it may seem a trifling circumstance, yet is of this importance, that, by the holding up of his hand, *constat de persona*, and he owns himself to be of that name by which he is called. (d) However, it is not an indispensable ceremony; for, being calculated merely for the purpose of identifying the person, any other acknowledgment will answer the purpose as well; therefore, if the prisoner obstinately and contemptuously refuses to hold up his hand, but confesses he is the person named, it is fully sufficient. (e)

Then the indictment is to be read to him distinctly in the English tongue (which was law, even while all other proceedings were in Latin), that he may fully understand his charge. After which it is to be demanded of him whether he be guilty of the crime whereof he stands indicted, or not guilty. By the old common law the accessory could not be arraigned till the principal was attainted, unless he chose it; for he might waive the benefit of the law: and therefore, principal and accessory might, and may still, be arraigned, and plead, and also be tried together. But otherwise, if the principal had never been indicted at all, had stood mute, had challenged above thirty-five jurors peremptorily, had claimed the benefit of clergy, had obtained a pardon, or had died before attainder, the accessory in any of these cases could not be arraigned: for *non constitit* whether any felony was committed or no, till the principal was attainted; and it might so happen that the accessory should be convicted one day, and the principal acquitted the next, which would be absurd. However, this absurdity could only happen where it was possible that a trial of the principal might be had subsequent to that of the accessory; and therefore the law still continues that the accessory shall not be tried so long as the principal re-

(a) 2 Hal. P. C. 216.

(b) Bract. l. 3, de coron. c. 18, § 3. Mirr. c. 5, sect. 1, § 84. Flet. l. 1, c. 31, § 1. Brit. c. 5. Staundf. P. C. 2. Inst. 34. Kel. 10. 2 Hal. P. C. 219. 2 Hawk. P. C. 308.

(c) State Trials, VI, 230.

(d) 2 Hal. P. C. 219.

(e) Raym. 408.

mains liable to be tried hereafter. (1) But by statute, \*1 Ann. c. 9, if [324] the principal be once convicted, and before attainder (that is, before he receives judgment of death or outlawry), he is delivered by pardon, the benefit of clergy, or otherwise; or if the principal stands mute, or challenges peremptorily above the legal number of jurors, so as never to be convicted at all; in any of these cases, in which no subsequent trial can be had of the principal, the accessory may be proceeded against as if the principal felon had been attainted; for there is no danger of future contradiction. And upon the trial of the accessory, as well after as before the conviction of the principal, it seems to be the better opinion, and founded on the true spirit of justice, (f) that the accessory is at liberty (if he can) to controvert the guilt of his supposed principal, and to prove him innocent of the charge, as well in point of fact as in point of law.

When a criminal is arraigned, he either *stands mute*, or *confesses* the fact; which circumstances we may call *incidents* to the arraignment: or else he *pleads* to the indictment, which is to be considered as the next stage of proceedings. But, first, let us observe these incidents to the arraignment, of standing mute, or confession.

I. Regularly, a prisoner is said to stand mute, when, being arraigned for treason or felony, he either, 1. Makes no answer at all; or, 2. Answers foreign to the purpose, or with such matter as is not allowable; and will not answer otherwise: or, 3. Upon having pleaded not guilty, refuses to put himself upon the country. (g) If he says nothing, the court ought *ex officio* to empanel a jury to inquire whether he stands obstinately mute, or whether he be dumb *ex visitatione Dei*. If the latter appears to be the case, the judges of the court (who are to be of counsel for the prisoner, and to see that he hath law and justice) shall proceed to the trial, and examine all points as if he had pleaded not guilty. (h) (2) But whether judgment of death can be given against such a \*prisoner who hath never pleaded, and can say nothing in arrest of [325] judgment, is a point yet undetermined. (i)

If he be found to be obstinately mute (which a prisoner hath been held to be that hath cut out his own tongue), (k) then if it be on an indictment of high treason, it hath long been clearly settled, that standing mute is an equivalent to a conviction, and he shall receive the same judgment and execution. (l) And as in this the highest crime, so also in the lowest species of felony, viz: in petit larceny, and in all misdemeanors, standing mute hath always been equivalent to conviction. But upon appeals and indictments for other felonies,

(f) Foster, 365, &c.  
(k) 3 Inst. 178.

(g) 2 Hal. P. C. 516.  
(i) 1 Hawk. P. C. 329. 2 Hal. P. C. 517.

(A) 2 Hawk. P. C. 337.

(C) 2 Hal. P. C. 517.

(1) Now, by 24 and 25 Vic., c. 94, § 1, an accessory before the fact to any felony may be indicted, tried, convicted and punished in all respects as if he were the principal felon. By section 2, whosoever shall counsel, procure or command any other person to commit any felony shall be guilty of felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as an accessory before the fact to the same felony, if convicted as an accessory, may be punished. And by 24 and 25 Vic., c. 99, § 8, the like provision is made for the case of accessories after the fact.

(2) By 7 and 8 George IV, c. 28, § 2, it is provided that if the prisoner stands mute of malice, or does not answer directly to the charge, this may be entered as a plea of not guilty. R. v. Bernard, 1 F. & F., 240. It is proper for a jury to determine whether or not the silence is malicious. R. v. Israel, 2 Cox Cr. C., 263. Where a deaf and dumb person was silent at her arraignment, it was left to a jury to say whether the silence was from malice or by visitation of God. They found that it was the latter. They were then sworn to determine whether the prisoner was able to plead, and they found that she was; then to determine whether she was sane enough to warrant a trial, and they found she was not. The prisoner was then by order of the court detained during her majesty's pleasure, under the provisions of 39 and 40 Geo. III, c. 64, § 2, as to the detention of persons found insane by a jury upon arraignment.

or *petit treason*, the prisoner was not, by the ancient law, looked upon as convicted, so as to receive judgment for the felony; but should, for his obstinacy, have received the terrible sentence of *penance*, or *peine* (which, as will appear presently, was probably nothing more than a corrupted abbreviation of *prisonne forte et dure*).

Before this was pronounced the prisoner had not only *trina admonitio*, but also a respite of a few hours, and the sentence was distinctly read to him, that he might know his danger; (m) and, after all, if he continued obstinate, and his offence was clergyable, he had the benefit of his clergy allowed him, even though he was too stubborn to pray it. (n) Thus tender was the law of inflicting this dreadful punishment; but if no other means could prevail, and the prisoner (when charged with a capital felony) continued stubbornly mute, the judgment was then given against him without any distinction of sex or degree. A judgment, which was purposely ordained to be exquisitely severe, that by that very means it might rarely be put in execution. (8)

The rack, or question, to extort a confession from criminals, is a practice of [ \*326 ] a different nature; *this* having been only \*used to compel a man to put himself upon his trial; *that* being a species of trial in itself. And the trial by rack is utterly unknown to the law of England; though once when the dukes of Exeter and Suffolk, and other ministers of Henry VI, had laid a design to introduce the civil law into this kingdom as the rule of government, for a beginning thereof they erected a rack for torture; which was called in derision the duke of Exeter's daughter, and still remains in the tower of London; (o) where it was occasionally used as an engine of state, not of law, more than once in the reign of Queen Elizabeth. (p) But, when upon the assassination of Villiers, duke of Buckingham, by Felton, it was proposed in the privy council to put the assassin to the rack, in order to discover his accomplices; the judges, being consulted, declared unanimously, to their own honour and the honour of the English law, that no such proceeding was allowable by the laws of England. (q) It seems astonishing that this usage of administering the torture should be said to arise from a tenderness to the lives of men; and yet this is the reason given for its introduction in the civil law, and its subsequent adoption by the French and other foreign nations, (r) *viz.* because the laws cannot endure that any man should die upon the evidence of a false or even a single witness; and, therefore, contrived this method that innocence should manifest itself by a stout denial, or guilt by a plain confession. Thus rating a man's virtue by the hardness of his constitution, and his guilt by the sensibility of his nerves! But there needs only to state accurately, (s) in order most effectually to expose this inhuman species of mercy, the uncertainty of which, as a test and criterion of truth, was long ago very elegantly pointed [ \*327 ] out by Tully; though he lived in a state wherein it was \*usual to torture slaves in order to furnish evidence; "*tamen*," says he, "*illa tormenta gubernat dolor, moderatur natura cujusque tum animi tum corporis, regit*

(m) 2 Hal. P. C. 530.

(n) *Ibid.* 531. 2 Hawk. P. C. 332.

(o) 3 Inst. 35.

(p) Barr. 22, 434.

(q) Rushw. Coll. i. 638.

(r) Cod. i. 9, t. 41, l. 8, & t. 47, l. 16.

Fortesq. de LL. Ang. c. 22.

(s) The marquis Beccaria (ch. 16), in an exquisite piece of railery, has proposed this problem, with a gravity and precision that are truly mathematical: "The force of the muscles and the sensibility of the nerves of an innocent person being given, it is required to find the degree of pain necessary to make him confess himself guilty of a given crime."

(8) Many cases are on record in which this punishment was inflicted. See Case of Juliana Quicke, Cro. Car., 118; Case of John Fussell, whose tortures are said to have been shortened by compassionate bystanders casting stones upon him. Barrington's Statutes, 85, note. In Kelynge's Rep., p. 27, it is said to have been the constant practice at Newgate, in the time of Charles II, to tie the two thumbs together with whiplard in order that the pain might compel the party to plead.

The only American case on record in which this punishment was inflicted was that of Giles Corey. 8 Bancroft's U. S., 98; 2 Hildreth's U. S., 160; 2 Upham's History of Salem Witchcraft, 334-343.



*quassitor, flectit, libido, corrumpit spes, infirmat metus, ut in tot rerum angustiis nihil veritati loci relinquatur.*" (t)

The English judgment of penance for standing (u) mute was as follows: that the prisoner be remanded to the prison from whence he came; and put into a low, dark chamber; and there be laid on his back, on the bare floor, naked, unless where decency forbids: that there be placed upon his body as great a weight of iron as he could bear, and more; that he have no sustenance, save only, on the first day, three morsels of the worst bread; and on the second day, three draughts of standing water, that should be nearest to the prison door; and in this situation this should be alternately his daily diet *till he died*, or (as anciently the judgment ran) *till he answered*. (v)

It hath been doubted whether this punishment subsisted at the common law, (w) or was introduced in consequence of the statute Westm. 1, 3 Edw. I, c. 12, (x) which seems to be the better opinion. For not a word of it is mentioned in Glanvil or Bracton, or in any ancient author, case, or record (that hath yet been produced), previous to the reign of Edward I; but there are instances on record in the reign of Henry III, (y) where persons accused of felony, and standing mute were tried in a particular manner by two successive juries, and convicted; and it is asserted by the judges in 8 Hen. IV, that, by the common law before the statute, standing mute on an appeal amounted to a conviction of the felony. (z) This statute of Edward I directs such persons \* "as [\*328] will not put themselves upon inquests of felonies before the judges at the suit of the king, to be put into hard and strong prison (*soient mys en la prison fort et dure*) as those which refuse to be at the common law of the land." And immediately after this statute, the form of the judgment appears in Fleta and Britton to have been only a very strait confinement in prison, with hardly any degree of sustenance; but no weight is directed to be laid upon the body, so as to hasten the death of the miserable sufferer: and indeed any surcharge of punishment on persons adjudged to penance, so as to shorten their lives, is reckoned by Horne in the *Mirror* (a) as a species of criminal homicide. It also clearly appears, by a record of 31 Edw. III, (b) that the prisoner might then possibly subsist for forty days under this lingering punishment. I should, therefore, imagine that the practice of loading him with weights, or, as it was usually called, *pressing him to death*, was gradually introduced between 31 Edw. III, and 8 Hen. IV, at which last period it first appears upon our books; (c) being intended as a species of mercy to the delinquent, by delivering him the sooner from his torment: and hence I presume it also was, that the duration of the penance was then first (d) altered; and instead of continuing *till he answered*, it was directed to continue *till he died*, which must very soon happen under an enormous pressure.

The uncertainty of its original, the doubts that were conceived of its legality, and the repugnance of its theory (for it was rarely carried into practice) to the humanity of the laws of England, all concurred to require a legislative abolition of this cruel process, and a restitution of the ancient common law: whereby the standing mute in felony, as well as in treason and in trespass, amounted to a confession of the charge. Or, if the corruption of the blood and the consequent escheat in felony had been removed, the judgment of *peine forte et dure* might perhaps have still innocently remained, \*as a monument of the [\*329] savage rapacity with which the lordly tyrants of feudal antiquity hunted after escheats and forfeitures; since no one would ever have been tempted to undergo such a horrid alternative. For the law was, that by standing mute, and suffering this heavy penance, the judgment, and of course the

(f) *Pro Sulla*, 28.

(u) 2 Hal. P. C. 519. 2 Hawk. P. C. 329.

(v) Britton, c. 4. & 29. Flet. l. 1, § 34, § 35.

(w) 2 Inst. 179. 2 Hal. P. C. 322.

2 Hawk. P. C. 330.

(x) Staundt. P. C. 149. Barr. 82.

(y) Emlyn on 2 Hal. P. C. 323.

(z) *Al common ley, avant le statute de West. 1, c. 12, si ascus uet estre appeal, et uet estre mute, ill sera convict de felony.* (M. 2 Hen. IV. 2.)

(a) Ch. 1, § 9.

(b) 6 Rym. 13.

(c) Yearb. 8 Hen. IV, 1.

(d) *Et fait dit, que le contraire avoit estre fait devant ces heures.* (*Ibid.* 2.)

corruption of the blood and escheat of the *lands*, were saved in felony and petit treason, though not the forfeiture of the *goods*: and, therefore, this lingering punishment was probably introduced, in order to extort a plea: without which it was held that no judgment of death could be given, and so the lord lost his escheat. But in high treason, as standing mute is equivalent to a conviction, the same judgment, the same corruption of blood, and the same forfeitures always attended it, as in other cases of conviction. (e) And very lately, to the honour of our laws, it hath been enacted by statute 12 Geo. III. c. 20, that every person who, being arraigned for felony or piracy, shall stand mute or not answer directly to the offence, shall be convicted of the same, and the same judgment and execution (with all their consequences in every respect) shall be thereupon awarded, as if the person had been convicted by verdict or confession of the crime. (4) And thus much for the demeanor of a prisoner upon his arraignment, by standing mute; which now, in all cases, amounts to a constructive confession.

II. The other incident to arraignments, exclusive of the plea, is the prisoner's actual *confession* of the indictment. Upon a simple and plain confession, the court hath nothing to do but to award judgment: but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it, and plead to the indictment. (f)

But there is another species of confession, which we read much of in our ancient books, of a far more complicated kind, which is called *approvement*. [\*330] And that is when a \*person indicted of treason or felony, and arraigned for the same, doth confess the fact before plea pleaded: and appeals or accuses others, his accomplices, of the same crime, in order to obtain his pardon. In this case he is called an *approver* or prover, *probator*, and the party appealed or accused is called the *appellee*. Such approvement can only be in capital offences; and it is, as it were, equivalent to an indictment, since the appellee is equally called upon to answer it; and if he hath no reasonable and legal exceptions to make to the person of the approver, which indeed are very numerous, he must put himself upon his trial, either by battel, or by the country; and if vanquished or found guilty, must suffer the judgment of the law, and the approver shall have his pardon *ex debito justitiæ*. On the other hand, if the appellee be conqueror, or acquitted by the jury, the approver shall receive judgment to be hanged, upon his own confession of the indictment; for the condition of his pardon has failed, viz., the convicting of some other person, and therefore his conviction remains absolute.

But it is purely in the discretion of the court to permit the approver thus to appeal or not: and, in fact, this course of admitting approvements hath been long disused: for the truth was, as Sir Matthew Hale observes, that more mischief hath arisen to good men by these kind of approvements, upon false and malicious accusations of desperate villains, than benefit to the public by the discovery and conviction of real offenders. And therefore, in the times when such appeals were more frequently admitted, great strictness and nicety were held therein: (g) though, since their discontinuance, the doctrine of approvements is become a matter of more curiosity than use. I shall only observe, that all the good, whatever it be, that can be expected from this method of approvement, is fully provided for in the cases of coining, robbery, burglary, house-breaking, horse-stealing, and larceny to the value of five shillings from shops, warehouses, stables, and coach-houses, by statutes 4 and 5 W. and M. c.

(e) 2 Hawk. P. C. 351.

(f) 2 Hal. P. C. 285.

(g) 2 Hal. P. C. ch. 22. 2 Hawk. P. C. ch. 24.

(4) The practice now, since the statute 7 and 8 Geo. IV. c. 28, is for the court to enter a plea of not guilty for the accused party. See notes, pp. 324 and 325, *supra*.

When the prisoner is arraigned, he should be released from shackles if any are upon him. *People v. Harrington*, 42 Cal., 165; S. C., 10 Am. Rep., 396; *State v. Kring*, 64 Mo., 591.

8, \*6 and 7 Wm. III, c. 17, 10 and 11 Wm. III, c. 23, and 5 and 6 Ann. c. 13, which enact, that if any such offender, being out of prison, shall discover two or more persons, who have committed the like offences, so as they may be convicted thereof; he shall in case of burglary or house-breaking receive a reward of 40*l.*, and in general be entitled to a pardon of all capital offences, excepting only murder and treason; and of them also in the case of coining. (h) And if any such person, having feloniously stolen any lead, iron, or other metal, shall discover and convict two offenders of having illegally bought or received the same, he shall by virtue of statute 29 Geo. II, c. 30, be pardoned for all such felonies committed before such discovery. (5) It hath also been usual for the justices of the peace, by whom any persons charged with felony are committed to gaol, to admit some one of their accomplices to become a witness (or, as it is generally termed, king's evidence) against his fellows; upon an implied confidence, which the judges of gaol-delivery have usually countenanced and adopted that if such accomplice makes a full and complete discovery of that and of all other felonies to which he is examined by the magistrate, and afterwards gives his evidence without prevarication or fraud, he shall not himself be prosecuted for that or any other previous offence of the same degree. (i) (6)

(h) The pardon for discovering offences against the coinage act of 15 Geo. II, c. 28, extends only to all such offences.

(i) The King v. Rudd; Mich. 16 Geo. III, on a case reserved from the old Bailey, Oct. 1776.

(5) The statutes here mentioned are since repealed.

(6) If the accomplice admitted as a witness by the justice makes full and true disclosure, he ought not to be prosecuted. But he cannot plead this in bar of an indictment, for it is merely an equitable claim to the mercy of the crown from the magistrate's promise of indemnity upon certain conditions which have been performed. *R. v. Rudd*, Cowp., 831. In the United States, it would seem that, if the prisoner makes full disclosure, immunity is substantially pledged him; the government is under implied, if not express, obligation not to prosecute. *U. S. v. Lee*, 4 McLean, 108; *Com. v. Knapp*, 10 Pick., 447; *Foster v. People*, 18 Mich., 266. If the accomplice, after such understanding with the state and admission of his guilt, refuses to testify, or testifies falsely, he forfeits his immunity and may be prosecuted and convicted on his own confession. *Com. v. Knapp*, *ubi supra*.

The importance to be attached to uncorroborated evidence of an accomplice is a matter for the jury to determine. They may legally convict upon it, but in general would not be inclined to give it much credit. *R. v. Hastings*, 7 C. & P., 152. So Lord Mansfield, in *R. v. Rudd*, Cowp., 831, says, as to the evidence of accomplices: "Though clearly competent, their single testimony is seldom alone sufficient for a jury to convict upon." Lord Ellenborough laid it down that, "No one can seriously doubt that a conviction is legal, though it proceed upon the evidence of an accomplice, only judges, in their discretion, will advise a jury not to believe an accomplice, unless he is confirmed, or only so much as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts to which he deposes." *R. v. Jones*, 2 Camp., 132. The court should not instruct the jury as to what weight is to be given to an accomplice's testimony. The matter lies peculiarly within the province of the jury. *Hamilton v. People*, 29 Mich., 178; *George v. State*, 39 Miss., 570. It is not error for a court to refuse to advise a jury that they ought not to convict on such evidence. It is a question for the jury, who may legally convict on the evidence. *People v. Jenness*, 5 Mich., 305. The jury may convict upon such evidence if they are satisfied by it, but it is a general practice to consider it alone insufficient to convict upon. *People v. Reeder*, 1 Wheel. Cr. C., 148. The statements of an accomplice are always to be received with caution, and the court should always so advise, but if the testimony carries conviction to the jury, they should give it the same effect as that of any other witness. It will authorize a conviction in any case. *People v. Costello*, 1 Denio, 83; *Allen v. State*, 10 Ohio St., 287. If an accomplice testifies, he must make full disclosure. He cannot stop short and claim the privilege of refusing to criminate himself. *Foster v. People*, 18 Mich., 266; *Com. v. Price*, 10 Gray, 472; *State v. Condry*, 5 Jones, 418. But this disclosure need not be made as to criminality in other cases than the one on trial. *Pitcher v. People*, 16 Mich., 142. In order to make an accomplice a competent witness in behalf of the prosecution, he must not be put on trial at the same time with the other prisoners. It makes no difference whether he has been convicted or not, or whether he is joined in the same indictment with others or not, if only he is not tried with them. *People v. Wright*, 38 Mich., 744; *Allen v. State*, 10 Ohio St., 287; *George v. State*, 39 Miss., 570; *State v. Brien*, 32 N. J., 414.

## CHAPTER XXVI. OF PLEA AND ISSUE.

WE are now to consider the plea of a prisoner, or defensive matter alleged by him on his arraignment, if he does not confess or stand mute. This is either, 1. A plea to the jurisdiction; 2. A demurrer; 3. A plea in abatement; 4. A special plea in bar; or, 5. The general issue.

Formerly, there was another plea, now abrogated, that of *sanctuary*; which is however necessary to be lightly touched upon, as it may give some light to many parts of our ancient law: it being introduced and continued during the superstitious veneration that was paid to consecrated ground in the times of popery. First, then, it is to be observed, that if a person accused of any crime (except treason, wherein the crown, and sacrilege, wherein the church, was too nearly concerned), had fled to any church, or church yard, and within forty days after went in sackcloth and confessed himself guilty before the coroner, and declared all the particular circumstances of the offence; and thereupon took the oath in that case provided, viz., that he abjured the realm, and would depart from thence forthwith at the port that should be assigned him, and would never return without leave from the king; he by this means saved his life, if he [\*333] observed the conditions of the oath, by going with a cross in \*his hand, and, with all convenient speed, to the port assigned, and embarking. For if, during this forty days' privilege of sanctuary, or in his road to the seaside, he was apprehended and arraigned in any court, for this felony, he might plead the privilege of sanctuary, and had a right to be remanded, if taken out against his will. (a) But by this abjuration his blood was attainted, and he forfeited all his goods and chattels. (b) The immunity of these privileged places was very much abridged by the statutes 27 Hen. VIII, c. 19, and 32 Hen. VIII, c. 12. And now, by the statute, 21 Jac. I, c. 28, all privilege of sanctuary, and abjuration consequent thereupon, is utterly taken away and abolished.

Formerly also the benefit of clergy used to be pleaded before trial or conviction, and was called a *declinatory* plea; which was the name also given to that of sanctuary. (c) But, as the prisoner upon a trial has a chance to be acquitted, and totally discharged; and, if convicted of a clergyable felony, is entitled equally to his clergy after as before conviction: this course is extremely disadvantageous; and therefore the benefit of clergy is now very rarely pleaded; but, if found requisite, is prayed by the convict before judgment is passed upon him. (1)

I proceed, therefore, to the five species of pleas before mentioned.

I. A plea to the *jurisdiction*, is where an indictment is taken before a court that hath no cognizance of the offence; as if a man be indicted for a rape at the sheriff's tourn, or for treason at the quarter sessions: in these, or similar cases, he may except to the jurisdiction of the court, without answering at all to the crime alleged. (d) (2)

II. A demurrer to the indictment. This is incident to criminal cases, as well [\*334] as civil, when the fact as alleged is \*allowed to be true, but the prisoner joins issue upon some point of law in the indictment, by which he in-

(a) *Mirr.* c. 1, § 12. 2 *Hawk.* P. C. 335.  
(d) *Ibid.* 255.

(b) 2 *Hawk.* P. C. 52.

(c) 2 *Hal.* P. C. 268.

(1) It is now abolished.

(2) A plea to the jurisdiction is never important where the want of jurisdiction appears on the face of the proceedings, as the defect may then be taken advantage of either by demurrer or by motion in arrest of judgment. And if the objection is one which must appear from the evidence of the prosecution, it may be taken without special plea whenever it appears.

sists that the fact, as stated, is no felony, treason, or whatever the crime is alleged to be. Thus, for instance, if a man be indicted for *feloniously* stealing a greyhound; which is an animal in which no valuable property can be had, and therefore it is not felony, but only a civil trespass, to steal it: in this case the party indicted may demur to the indictment; denying it to be felony, though he confesses the act of taking it. Some have held, (e) that if, on demurrer, the point of law be adjudged *against* the prisoner, he shall have judgment and execution, as if convicted by verdict. But this is denied by others, (f) who hold, that in such case he shall be directed and received to plead the general issue, not guilty, after a demurrer determined against him. (g) Which appears the more reasonable, because it is clear that if the prisoner freely discovers the fact in court, and refers it to the opinion of the court, whether it be felony or no; and upon the fact thus shown it appears to be felony; the court will not record the confession; but admit him afterwards to plead not guilty. (g) And this seems to be a case of the same nature, being for the most part a mistake in point of law, and in the conduct of his pleading; and though a man by mispleading may in some cases lose his property, yet the law will not suffer him by such niceties to lose his life. However, upon this doubt, demurrers to indictments are seldom used: since the same advantages may be taken upon a plea of not guilty; or afterwards in arrest of judgment, when the verdict has established the fact.

III. A plea in *abatement* is principally for a *misnomer*, a wrong name, or a false addition to the prisoner. As, if *James Allen, gentleman*, is indicted by the name of *John Allen, esquire*, he may plead that he has the name of James, and not of John; and that he is a gentleman, and not an esquire. And if either fact is found by a jury, then the \*indictment shall be abated, as [\*335] writs or declarations may be in civil actions; of which we spoke at large in the preceding book. (h) (4) But, in the end, there is little advantage accruing to the prisoner by means of these dilatory pleas; because, if the exception be allowed, a new bill of indictment may be framed, according to what the prisoner in his plea avers to be his true name and addition. For it is a rule, upon all pleas in abatement, that he who takes advantage of a flaw must at the same time show how it may be amended. Let us therefore next consider a more substantial kind of plea, viz.:

IV. Special pleas in *bar*; which go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged. These are of four kinds: a former acquittal, a

(e) 2 Hal. P. C. 267.

(f) 2 Hawk. P. C. 324.

(g) 2 Hal. P. C. 265.

(h) See book III, page 302.

(3) The present English doctrine as to this point in case of felony is thus stated: A judgment on a general demurrer, which contains a confession of the subject matter, is final, and the privilege to plead over is one not given in such case. This privilege is only given upon the overruling of a demurrer in abatement: one, that is, with which a plea of not guilty might consistently be pleaded. *R. v. Faderman*, 4 Cox C. C., 359. Previous to that decision it was the practice for the court in its discretion to allow pleading over *in favorem vite*. *R. v. Smith*, 4 Cox C. C., 42. It has been held that in case of misdemeanor, a judgment even on demurrer in abatement is final. *R. v. Gibson*, 8 East, 107; but see *R. v. Birmingham, &c., Ry. Co.*, 8 Q. B., 223, where the defendant was allowed to plead over. In the United States it has been held generally that judgment on demurrer in case of misdemeanor was final. *Com. v. Gloucester*, 110 Mass., 491; *State v. Merrill*, 87 Me., 829; *State v. Dresser*, 54 Me., 569; *People v. Taylor*, 3 Denio, 91. If demurrer is overruled, it may be withdrawn by leave of the court, and then the defendant may plead over. *Evans v. Commonwealth*, 3 Met., 453; *Bennett v. State*, 2 Yerg., 472; *Commonwealth v. Foggy*, 6 Leigh, 688. That leave to answer over is discretionary in such case, see *State v. Wilkins*, 17 Vt., 151; *Lewis v. State*, 11 Mo., 366; *Thomas v. State*, 6 Mo., 457. In case of felony the practice is unsettled, but generally pleading over is allowed. 1 Bish. Cr. Proc., § 784, thus following the doctrine in *R. v. Smith*, cited above, and in 2 Hale P. C., 88.

(4) Defects of this description are now amendable. Statute 14 and 15 Vic., c. 100, § 1. If objection was taken in any form, they would therefore be amended, and if not taken, they would be cured by verdict.

former conviction, a former attainder, or a pardon. There are many other pleas, which may be pleaded in bar of an appeal; (i) but these are applicable to both appeals and indictments.

1. First, the plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, (j) he may plead such acquittal in bar of any subsequent accusation for the same crime. (5) Therefore an acquittal on an appeal is a good bar to an indictment on the same offence. And so also was an acquittal on an indictment a good bar to an appeal, by the common law: (k) and therefore, in favour of appeals, a general practice was introduced, not to try any person on an indictment of homicide, till after the year and day, within which appeals may be brought, were past; by which time it often happened that the witnesses died, or the whole was forgotten. To remedy which [\*336] inconvenience, the statute 3 Hen. VII, c. 1, enacts, that \*indictments shall be proceeded on, immediately, at the king's suit, for the death of a man, without waiting for bringing an appeal; and that the plea of *autrefois acquit* on an indictment, shall be no bar to the prosecuting of any appeal.

2. Secondly, the plea of *autrefois convict*, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be (being suspended by the benefit of clergy or other causes), is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime. (l) Hereupon it has been held, that a conviction of manslaughter, on an appeal or an indictment, is a bar even in another appeal, and much more in an indictment of murder; for the fact prosecuted is the same in both, though the offences differ in colouring and in degree. It is to be observed, that the pleas of *autrefois acquit* and *autrefois convict*, or a former acquittal, and former conviction, must be upon a prosecution for the same identical act and crime. But the case is otherwise in,

3. Thirdly, the plea of *autrefois attaind*, or a former attainder; which is a good plea in bar, whether it be for the same or any other felony. For wherever

(i) 2 Hawk. P. C. ch. 23.

(j) 3 Mod. 194.

(k) 2 Hawk. P. C. 373.

(l) 2 Hawk. P. C. 377.

(5) A former conviction or acquittal must be specially pleaded; it is not enough to offer evidence of it under the general issue. *State v. Barnes*, 82 Ma., 530; *Com. v. Chesley*, 107 Mass., 223. The plea must show that the prisoner was acquitted upon an indictment sufficient to induce punishment if he had been convicted, and charging the same offense as the one to which he pleads. *R. v. Taylor*, 3 B. & C., 503. If such plea is overruled, the defendant may plead over in case of felony, not in misdemeanor. 2b. In misdemeanor the defendant's rights are concluded by such a plea, even though thus he is not tried upon the offense charged in the indictment. *R. v. Bird*, 2 Eng. L. & Eq., 428; and note 530. \*That is not the American doctrine. *Foster v. Com.*, 8 W. & S., 77; *Com. v. Goddard*, 13 Mass., 455. In Massachusetts the defendant may plead over if his plea in bar is overruled, whether he is charged with felony or misdemeanor. *Com. v. Golding*, 14 Gray, 49.

That an acquittal on an indictment which was sufficient to warrant a conviction will be a bar to future prosecution of the same offense, see *Rex v. Emden*, 9 East, 437; *Heikes v. Commonwealth*, 26 Penn. St., 518; *People v. Cook*, 10 Mich., 164. A person is not to be twice put in jeopardy on the same charge; and he is in jeopardy when he is put upon trial before a court of competent jurisdiction, upon an indictment or information which is so far valid as to be sufficient to sustain a conviction, and the jury has been charged with his deliverance. *Commonwealth v. Cook*, 6 S. & R., 577; *Wright v. State*, 5 Ind., 290; *State v. Norvell*, 2 Yerg., 24; *State v. Ned*, 7 Port., 187; *State v. Ephraim*, 2 Dev. & Bat., 163; *Price v. State*, 10 Ohio, 423. After the jury are impaneled and sworn, any discharge of them without verdict and without the defendant's consent, except for reasons of necessity, will be equivalent to an acquittal. *People v. Barrett*, 2 Caines, 804; *Commonwealth v. Tuck*, 20 Pick., 365. And see *Cooley's Const. Lim.*, 327; *Whart. Cr. L.*, § 541, *et seq.* But the court must have had jurisdiction. *State v. Odell*, 4 Blackf., 156; *State v. Payne*, 4 Mo., 376; *State v. Hodgkins*, 43 N. H., 474.

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a man is attainted of felony, by judgment of death either upon a verdict or confession, by outlawry, or heretofore by abjuration; and whether upon an appeal or an indictment; he may plead such attainder in bar to any subsequent indictment or appeal, for the same or for any other felony. (m) And this because, generally, such proceeding on a second prosecution cannot be to any purpose: for the prisoner is dead in law by the first attainder, his blood is already corrupted, and he hath forfeited all that he had: so that it is absurd and superfluous to endeavour to attain him a second time. But to this general rule, however, as to all others, there are some exceptions; wherein, *cessante ratione, cessat et ipsa lex*. As, 1. Where the former attainder is reversed for error, for then it \*is the same as if it had never been. And the same reason [\*337] holds, where the attainder is reversed by parliament, or the judgment vacated by the king's pardon, with regard to felonies committed afterwards. 2. Where the attainder was upon indictment, such attainder is no bar to an appeal: for the prior sentence is pardonable by the king; and if that might be pleaded in bar of the appeal, the king might in the end defeat the suit of the subject, by suffering the prior sentence to stop the prosecution of a second, and then, when the time of appealing is elapsed, granting the delinquent a pardon. 3. An attainder in felony is no bar to an indictment of treason: because not only the judgment and manner of death are different, but the forfeiture is more extensive, and the land goes to different persons. 4. Where a person attainted of one felony is afterwards indicted as principal in another, to which there are also accessories, prosecuted at the same time; in this case it is held, that the plea of *autrefois attaint* is no bar, but he shall be compelled to take his trial, for the sake of public justice; because the accessories to such second felony cannot be convicted till after the conviction of the principal. (n) And from these instances we may collect that a plea of *autrefois attaint* is never good, but when a second trial would be quite superfluous. (o) (6)

4. Lastly, a *pardon* may be pleaded in bar; as at once destroying the end and purpose of the indictment, by remitting that punishment which the prosecution is calculated to inflict. There is one advantage that attends pleading a pardon in bar, or in arrest of judgment, *before* sentence is past; which gives it by much the preference to pleading it *after* sentence or attainder. This is, that by stopping the judgment it stops the attainder, and prevents the corruption of the blood; which, when once corrupted by attainder, cannot afterwards be restored, otherwise than by act of parliament. But as the title of pardons is applicable to other stages of prosecution; and they have their respective force and efficacy, as well after as before conviction, outlawry, or \*attainder; I shall therefore reserve the more minute consideration of [\*338] them till I have gone through every other title except only that of execution.

Before I conclude this head of special pleas in bar, it will be necessary once more to observe, that though in civil actions when a man has his election what plea in bar to make, he is concluded by that plea, and cannot resort to another if that be determined against him; (as if, on an action of debt, the defendant pleads a general release, and no such release can be proved, he cannot afterwards plead the general issue, *nil debet*, as he might at first: for he has made his election what plea to abide by, and it was his own folly to choose a rotten defence;) though, I say, this strictness is observed in civil actions, *quia interest reipublicæ ut sit finis litium*: yet in criminal prosecutions *in favorem vitæ*, as well upon appeal as indictment, when a prisoner's plea in bar is found against him upon issue tried by a jury, or adjudged against him in point of law by the court; still he shall not be concluded or convicted thereon, but shall have

(m) 2 Hawk. P. C. 875.

(n) Poph. 107.

(o) Staund. P. C. 107.

(6) Stat. 7 and 8 Geo. IV., c. 28, § 4, provides "that no plea setting forth any attainder shall be pleaded in bar of any indictment, unless the attainder be for the same offense as that charged in the indictment."

judgment of *respondeat ouster*, and may plead over to the felony the general issue, not guilty. (p) For the law allows many pleas, by which a prisoner may escape death; but only one plea, in consequence whereof it can be inflicted: viz., on the general issue, after an impartial examination and decision of the fact, by the unanimous verdict of a jury. It remains, therefore, that I consider

V. The general issue, or plea of *not guilty*, (q) upon which plea alone the prisoner can receive his final judgment of death. In case of an indictment of felony or treason, there can be no special justification put in by way of plea. As, on an indictment for murder, a man cannot plead that it was in his own defence against a robber on the highway, or a burglar; but he must plead the general issue, not guilty, and give this special matter in evidence. For (besides that these pleas do in effect amount to the general issue; since, if true, the prisoner is most clearly not guilty) as the facts in treason are \*laid to [\*339] be done *proditoris et contra ligeantibus suis debitum*, and, in felony, that the killing was done *felonice*; these charges of a traitorous or felonious intent, are the points and very gist of the indictment, and must be answered directly, by the general negative, not guilty; and the jury upon the evidence will take notice of any defensive matter, and give their verdict accordingly, as effectually as if it were, or could be, specially pleaded. So that this is, upon all accounts, the most advantageous plea for the prisoner. (r)

When the prisoner hath thus pleaded not guilty, *non culpabilis*, or *nient culpable*; which was formerly used to be abbreviated upon the minutes, thus, "*non* (or *nient*) *cul.*," the clerk of the assizes, or clerk of the arraigns, on behalf of the crown replies, that the prisoner is guilty, and that he is ready to prove him so. This is done by two monosyllables in the same spirit of abbreviation, "*cul. prit.*," which signifies, first, that the prisoner is guilty *cul.*, *culpable*, (or *culpabilis*), and then that the king is ready to prove him so; *prit.*, *præsto sum*, or *paratus verificare*. This is therefore a replication on behalf of the king *viva voce* at the bar; which was formerly the course in all pleadings, as well in civil as in criminal causes. And that was done in the concisest manner: for when the pleader intended to demur, he expressed his demurrer in a single word, "*judgment*," signifying that he demanded judgment, whether the writ, declaration, plea, &c., either in form or matter, were sufficiently good in law: and if he meant to rest on the truth of the facts pleaded, he expressed that also in a single syllable, "*prit.*," signifying that he was ready to prove his assertions: as may be observed from the year-books and other ancient repositories of law. (s) By this replication the king and the prisoner are therefore at issue; for we may remember in our strictures upon pleadings, in the preceding book, (t) it was observed, that when the parties come to a fact, which is affirmed on one side and denied on the other, then they are said to be at issue in point \*of fact: which is evidently the case here, in the plea of [\*340] *non cul.* by the prisoner; and the replication of *cul.* by the clerk. And we may also remember, that the usual conclusion of all affirmative pleadings, as this of *cul.* or *guilty* is, was by an averment in these words, "and this he is ready to verify; *et hoc paratus est verificare*," which same thing is here expressed by the single word "*prit.*"

How our courts came to express a matter of this importance in so odd and obscure a manner, "*rem tantam tam negligenter*," can hardly be pronounced with certainty. It may perhaps, however, be accounted for by supposing, that these were at first short notes, to help the memory of the clerk, and remind him what he was to reply; or else it was the short method of taking down in court, upon the minutes, the replication and averment, "*cul. prit.*," which

(p) 2 Hal. P. C. 239.

(q) See Appendix, § 1.

(r) See book III, page 512.

(s) 2 Hal. P. C. 252.

(t) North's Life of Lord Guilford, 82.



afterwards the ignorance of succeeding clerks adopted for the very words to be by them spoken. (u)

But however it may have arisen, the joining of issue (which though now usually entered on the record, (w) is no otherwise joined (x) in any part of the proceedings) seems to be clearly the meaning of this obscure expression: (y) which has puzzled our most ingenious etymologists, and is commonly understood as if the clerk of the arraigns, immediately on plea pleaded, had fixed an opprobrious name on the prisoner, by asking him, "*Culpit*, how wilt thou be tried?" For, immediately upon issue joined, it is inquired of the prisoner, by what trial he will make his innocence appear. This form has at present reference to appeals and approvements only wherein the appellee has his choice, either to try the \*accusation by battel or by jury. But upon indictments, since the abolition of ordeal, there can be no other trial but by jury, *per pais*, or by the country; and therefore, if the prisoner refuses to put himself upon the inquest in the usual form, that is, to answer that he will be tried by God and his country, (z) if a commoner; and, if a peer, by God and his peers; (a) the indictment, if in treason, is taken *pro confesso*; and the prisoner, in cases of felony, is adjudged to stand mute, and if he perseveres in his obstinacy, shall now (b) be convicted of the felony. (7)

When the prisoner has thus put himself upon his trial, the clerk answers in the humane language of the law, which always hopes that the party's innocence rather than his guilt may appear, "God send thee a good deliverance." And then they proceed, as soon as conveniently may be, to the trial; the manner of which will be considered at large in the next chapter.

## CHAPTER XXVII.

### OF TRIAL AND CONVICTION.

THE several methods of trial and conviction of offenders established by the laws of England, were formerly more numerous than at present, through the superstition of our Saxon ancestors: who like other northern nations, were extremely addicted to divination: a character which Tacitus observes of the ancient Germans. (a) They therefore invented a considerable number of methods of purgation or trial, to preserve innocence from the danger of false witnesses, and in consequence of a notion that God would always interpose miraculously to vindicate the guiltless.

I. The most ancient (b) species of trial was that by *ordeal*: which was peculiarly distinguished by the appellation of *judicium Dei*; and sometimes *vulgaris purgatio*, to distinguish it from the canonical purgation, which was by the oath of the party. This was of two sorts, (c) either *fire-ordeal*, or *water-ordeal*;

(a) Of this ignorance we may see daily instances in the abuse of two legal terms of ancient French; one, the prologue to all proclamations, "*oyez*," or hear ye, which is generally pronounced most unmeaningly, "O yes;" the other a more pardonable mistake, viz. when the jury are all sworn, the officer bids the crier number them, for which the word in law-French is "*countes*;" but we now hear it pronounced in very good English, "count these."

(w) See Appendix, § 1.

(x) 2 Hawk. P. C. 393.

(y) 2 Hal. P. C. 258.

(z) A learned author, who is very seldom mistaken in his conjectures, has observed that the proper answer is, "*by God or the country*," that is, either by *ordeal* or by jury; because the question supposes an option in the prisoner. And certainly it gives some countenance to this observation, that the trial by *ordeal* used formerly to be called *judicium Dei*. But it should seem, that when the question gives the prisoner an option, his answer must be positive, and not in the disjunctive, which returns the option back to the prosecutor.

(a) Keylinge, 57. State Trials, *passim*.

(b) Stat. 12 Geo. III. c. 20.

(c) *De Mor. Germ.* 10.

(b) LL. Inq. c. 77. Wilk. 37.

(c) Murr. c. 2, § 22.

(7) When a prisoner pleads "not guilty" he puts himself upon the country, and the ceremony of asking him how he will be tried is discontinued. And if he stands mute the court will enter the plea of not guilty for him. 7 and 8 Geo. IV., c. 28, § 2.

the former being confined to persons of higher rank, the latter to the common people. (d) Both these might be performed by deputy: but the principal was to answer for the success of the trial; the deputy only venturing some corporal [\*343] pain for hire, or perhaps for friendship. (e) Fire-ordeal was performed either by taking up in the hand, unhurt, a piece of red-hot iron of one, two, or three pounds weight; or else by walking barefoot and blindfold over nine red-hot ploughshares, laid lengthwise at equal distances: and if the party escaped being hurt, he was adjudged innocent; but if it happened otherwise, as without collusion it usually did, he was then condemned as guilty. However, by this latter method Queen Emma, the mother of Edward the Confessor, is mentioned to have cleared her character, when suspected of familiarity with Alwyn, bishop of Winchester. (f)

Water-ordeal was performed, either by plunging the bare arm up to the elbow in boiling water, and escaping unhurt therefrom: or by casting the person suspected into a river or pond of cold water; and if he floated therein without any action of swimming, it was deemed an evidence of his guilt; but, if he sunk, he was acquitted. It is easy to trace out the traditional relics of this water-ordeal, in the ignorant barbarity still practiced in many countries to discover witches by casting them into a pool of water, and drowning them, to prove their innocence. And in the eastern empire the fire-ordeal was used to the same purpose by the emperor Theodore Lascaris: who, attributing his sickness to magic, caused all those whom he suspected to handle the hot iron: thus joining (as has been well remarked) (g) to the most dubious crime in the world the most dubious proof of innocence.

And, indeed, this purgation by ordeal seems to have been very ancient and very universal in the times of superstitious barbarity. It was known to the [\*344] ancient Greeks: for, in the \*Antigone of Sophocles, (h) a person suspected by Creon of a misdemeanor, declares himself ready "to handle hot iron, and to walk over fire," in order to manifest his innocence; which, the scholiast tells us, was then a very usual purgation. And Grotius (i) gives us many instances of water-ordeal in Bythynia, Sardinia, and other places. There is also a very peculiar species of water-ordeal, said to prevail among the Indians on the coast of Malabar; where a person accused of any enormous crime is obliged to swim over a large river abounding with crocodiles, and, if he escapes unhurt, he is reputed innocent. As, in Siam, besides the usual methods of fire and water-ordeal, both parties are sometimes exposed to the fury of a tiger let loose for that purpose; and if the beast spares either, that person is accounted innocent; if neither, both are held to be guilty; but if he spares both, the trial is incomplete, and they proceed to a more certain criterion. (k)

One cannot but be astonished at the folly and impiety of pronouncing a man guilty, unless he was cleared by a miracle; and of expecting that all the powers of nature should be suspended by an immediate interposition of Providence to save the innocent, whenever it was presumptuously required. And yet, in England, so late as King John's time, we find grants to the bishops and clergy to use the *judicium ferri, aquæ, et ignis*. (l) And, both in England and Sweden, the clergy presided at this trial, and it was only performed in the churches or in other consecrated ground: for which Stiernhook (m) gives the reason: "*non defuit illis operæ et laboris pretium; semper enim ab ejusmodi judicio aliquid lucri sacerdotibus obveniebat.*" But, to give it its due praise, we find the canon law very early declaring against trial by ordeal, or *vulgaris purgatio*, as being the fabric of the devil, "*cum sit contra præceptum Domini, non tentabis*

(d) Tenetur se purgare is qui accusatur, per Dei judicium; scilicet per calidum ferrum, vel per aquam, pro diversitate conditionis hominum; per ferrum calidum, si fuerit homo liber; per aquam si fuerit rusticus (Glanv. l. 14, c. 1.)

(e) This is still expressed in that common form of speech, "of going through fire and water to serve another."

(f) Tho. Rudborne Hist. maj. Winton. l. 4, c. 1.

(g) Sp. L. b. 12, c. 5.

(h) v. 270.

(i) On Numb. v. 17.

(k) Mod. Univ. Hist. vii, 206.

(l) Spelm. Gloss. 435.

(m) De jure Sueonum, l. 1, c. 8.

*Dominum Deum tuum.*" (n) Upon this authority, though the canons [\*345] \*themselves were of no validity in England, it was thought proper (as [\*345] had been done in Denmark above a century before) (o) to disuse and abolish this trial entirely in our courts of justice, by an act of parliament in 3 Hen. III, according to Sir Edward Coke, (p) or rather, by an order of the king in council. (q)

II. Another species of purgation, somewhat similar to the former, but probably sprung from a presumptuous abuse of revelation in the ages of dark superstition, was the *corsned*, or morsel of execration: being a piece of cheese or bread, of about an ounce in weight, which was consecrated with a form of exorcism; desiring of the Almighty that it might cause convulsions and paleness, and find no passage if the man was really guilty; but might turn to health and nourishment, if he was innocent: (r) as the water of jealousy among the Jews (s) was, by God's special appointment, to cause the belly to swell, and the thigh to rot, if the woman was guilty of adultery. This corsned was then given to the suspected person, who at the same time also received the holy sacrament: (t) if, indeed, the corsned was not, as some have suspected, the sacramental bread itself; till the subsequent invention of transubstantiation preserved it from profane uses with a more profound respect than formerly. Our historians assure us, that Godwin, earl of Kent, in the reign of King Edward the Confessor, abjuring the death of the king's brother, at last appealed to his corsned, "*per buccellam deglutiendam abjuravit*," (u) which stuck in his throat, and killed him. This custom has long since been gradually abolished, though the remembrance of it still subsists in certain phrases of abjuration retained among the common people. (v)

\*However, we cannot but remark, that though in European countries this custom most probably arose from an abuse of revealed religion, yet [\*346] credulity and superstition will, in all ages and in all climates, produce the same or similar effects. And, therefore, we shall not be surprised to find that, in the kingdom of Pegu, there still exists a trial by the corsned, very similar to that of our ancestors, only substituting raw rice instead of bread. (x) And, in the kingdom of Monomotapa, they have a method of deciding lawsuits equally whimsical and uncertain. The witness for the plaintiff chews the bark of a tree endued with an emetic quality; which, being sufficiently masticated, is then infused in water, which is given the defendant to drink. If his stomach rejects it, he is condemned: if it stays with him, he is absolved, unless the plaintiff will drink some of the same water; and, if it stays with him also, the suit is left undetermined. (y)

These two antiquated methods of trial were principally in use among our Saxon ancestors. The next, which still remains in force, though very rarely in use, owes its introduction among us to the princes of the Norman line. And that is,

III. The trial by *battel*, (1) duel, or single combat; which was another species of presumptuous appeals to Providence, under an expectation that Heaven would unquestionably give the victory to the innocent or injured party. The nature of this trial, in cases of civil injury, upon issue joined in a writ of right, was fully discussed in the preceding book: (z) to which I have only to add, that the trial by *battel* may be demanded at the election of the appellee, in either an

(n) *Decret. part 2, caus. 2, qu. 5, dist. 7. Decretal. lib. 3, tit. 80, c. 9, and Gloss. ibid.*

(o) *Mod. Un. Hist. xxxii, 106.* (p) 9 Rep. 33.

(q) 1 Rym. Foed. 236. *Spelm. Gloss. 326. 2 Fryn Rec. Append. 30. Seld. Eadm. fol. 48.*

(r) *Spelm. Gl. 439.*

(s) *Numb. ch. v.*

(t) *LL. Canut c. 6.*

(u) *Ingulph.*

(v) *As, "I will take the sacrament upon it;" "May this morsel be my last;" and the like.*

(x) *Mod. Univ. Hist. vii, 129.*

(y) *Ibid. xv, 464.*

(z) See book III, p. 337.

(1) Now abolished by statute 59 Geo. III., c. 46. See the proceedings in the case of Lord Rea and Mr. Ramsey, 11 St. Tr. 124, and the case of Ashford v. Thornton, 1 B. & Ald., 405. See also 3 St. Tr., 483, note, and Mr. H. C. Lea's recent work entitled "Superstition and Force."

appeal or an approvement; and that it is carried on with equal solemnity as that on a writ of right: but with this difference, that there each party might hire a champion, but here they must fight in their proper persons. And therefore, [\*347] if the \*appellant or approver be a woman, a priest, an infant, or of the age of sixty, or lame, or blind, he or she may counterplead and refuse the wager of battel; and compel the appellee to put himself upon the country. Also peers of the realm, bringing an appeal, shall not be challenged to wage battel, on account of the dignity of their persons; nor the citizens of London, by special charter, because fighting seems foreign to their education and employment. So, likewise, if the crime be notorious; as, if the thief be taken with a *mainour*, or the murderer in the room with a bloody knife, the appellant may refuse the tender of battel, from the appellee; (a) for it is unreasonable that an innocent man should stake his life against one who is already half-convicted.

The form and manner of waging battel upon appeals are much the same as upon a writ of right; only the oaths of the two combatants are vastly more striking and solemn. (b) The appellee, when appealed of felony, pleads *not guilty*, and throws down his glove, and declares he will defend the same by his body: the appellant takes up the glove, and replies that he is ready to make good the appeal, body for body. And thereupon the appellee, taking the book in his right hand, and in his left the right hand of his antagonist, swears to this effect: "*Hoc audi, homo quem per manum teneo*," &c. "Hear this, O man, whom I hold by the hand, who callest thyself John by the name of baptism, that I, who call myself Thomas by the name of baptism, did not feloniously murder thy father, William by name, nor am any way guilty of the said felony. So help me God, and the saints; and this I will defend against thee by my body, as this court shall award." To which the appellant replies, holding the bible and his antagonist's hand in the same manner as the other: "Hear this, O man, whom I hold by the hand, who callest thyself Thomas by the name of baptism, that thou art perjured; and therefore perjured, because that [\*348] thou feloniously didst murder my \*father, William by name. So help me, God, and the saints: and this I will prove against thee by my body, as this court shall award." (c) The battel is then to be fought with the same weapons, viz., batons, the same solemnity, and the same oath against amulets and sorcery, that are used in the civil combat: and if the appellee be so far vanquished that he cannot or will not fight any longer, he shall be adjudged to be hanged immediately; and then, as well as if he be killed in battel, providence is deemed to have determined in favour of the truth, and his blood shall be attainted. But if he kills the appellant, or can maintain the fight from sunrise till the stars appear in the evening, he shall be acquitted. So also if the appellant becomes recreant, and pronounces the horrible word of *craven*, he shall lose his *liberam legem*, and become infamous; and the appellee shall recover his damages, and also be forever quit, not only of the appeal, but of all indictments likewise for the same offence.

IV. The fourth method of trial used in criminal cases is that by the peers of Great Britain, in the court of parliament, or the court of the lord high steward, when a peer is capitally *indicted*: for in case of an *appeal*, a peer shall be tried by jury. (d) (2) Of this enough has been said in a former chapter; (e) to which I shall now only add, that, in the method and regulation of its pro-

(a) 2 Hawk. P. C. 427.

(b) Fleet. J. 1, c. 34. 2 Hawk. P. C. 426.

(c) There is a striking resemblance between this process and that of the court of Areopagus at Athens for murder; wherein the prosecutor and prisoner were both sworn in the most solemn manner; the prosecutor, that he was related to the deceased (for none but near relations were permitted to prosecute in that court) and that the prisoner was the cause of his death; the prisoner that he was innocent of the charge against him. (Pott. Antiq. b. 1, c. 12.)

(d) 9 Rep. 30. 2 Inst. 49.

(e) See page 259.

(2) The nobility are tried by jury like commoners, except in cases of treason and felony and misprison thereof.

ceedings, it differs little from the trial *per patriam*, or by jury; except that no special verdict can be given in the trial of a peer; (*f*) because the lords of parliament, or the lord high steward (if the trial be \*had in his court), are judges sufficiently competent of the law that may arise from the fact: and except, also, that the peers need not all agree in their verdict; but the greater number, consisting of twelve at the least, will conclude, and bind the minority. (*g*)

V. The trial by jury, or the country, *per patriam*, is also that trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter: (*h*) "*nullus liber homo capiatur, vel imprisonetur, aut exulet, aut aliquo alio modo destruatur, nisi per legale iudicium parium suorum, vel per legem terræ.*"

The antiquity and excellence of this trial, for the settling of civil property, has before been explained at large. (*i*) And it will hold much stronger in criminal cases; since in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of *oyer and terminer* occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have, with excellent forecast, contrived that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow-subjects, the grand jury; and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, \*should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion. So that the liberties of England cannot but subsist so long as this *palladium* remains sacred and inviolate; not only from all open attacks (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however *convenient* these may appear at first (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.

What was said of juries in general, and the trial thereby, in *civil* cases, will greatly shorten our present remarks, with regard to the trial of *criminal* suits: indictments, informations and appeals: which trial I shall consider in the same method that I did the former; by following the order and course of the proceedings themselves, as the most clear and perspicuous way of treating it.

When, therefore, a prisoner on his arraignment has pleaded *not guilty*, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicinato*: that is, freeholders, without just exception, and of the

(*f*) Hatt. 116.

(*g*) See book III, page 370.

(*h*) Kelynge, 56. Stat. 7 Wm. III, c. 2, § 11. Foster, 247.

(*i*) 9 Hen. III, c. 20.

*visne* or neighbourhood; which is interpreted to be of the county where the fact is committed. (j) If the proceedings are before the court of king's bench, there is time allowed, between the arraignment and the trial, for a jury to be [ \*351 ] \*impaneled by a writ of *venire facias* to the sheriff, as in civil causes: and the trial in case of misdemeanor is had at *nisi prius*, unless it be of such consequence as to merit a trial at bar; which is always invariably had when the prisoner is tried for any capital offence. But, before commissioners of *oyer* and *terminer* and gaol-delivery, the sheriff, by virtue of a general precept directed to him beforehand, returns to the court a panel of forty-eight jurors, to try all felons that may be called upon their trial at that session; and therefore it is there usual to try all felons immediately, or soon after their arraignment. But it is not customary, nor agreeable to the general course of proceedings (unless by consent of parties or where the defendant is actually in gaol), to try persons indicted of smaller misdemeanors at the same court in which they have pleaded *not guilty*, or *traversed* the indictment. But they usually give security to the court, to appear at the next assizes or session, and then and there to try the traverse, giving notice to the prosecutor of the same.

In cases of high treason, whereby corruption of blood may ensue (except treason in counterfeiting the king's coin or seals), or misprision of such treason, it is enacted by statute 7 Wm. III, c. 3, first, that no person shall be tried for any such treason, except an attempt to assassinate the king, unless the indictment be found within three years after the offence committed: next, that the prisoner shall have a copy of the indictment (which includes the caption), (k) but not the names of the witnesses, five days at least before the trial; that is, upon the true construction of the act, before his arraignment; (l) for then is his time to take any exceptions thereto, by way of plea or demurrer; thirdly, that he shall also have a copy of the panel of jurors two days before his trial; and, lastly, that he shall have the same compulsive process to bring in his witnesses for him as was usual to compel their appearance *against* him. And by statute 7 Ann. c. 21 (which did not take place till after the decease of the late pretender), all persons indicted for high treason or misprision [ \*352 ] \*thereof, shall have not only a copy of the indictment, but a list of all the witnesses to be produced, and of the jurors impaneled, with their professions and places of abode, delivered to him ten days before the trial, and in the presence of two witnesses; the better to prepare him to make his challenges and defence. But this last act, so far as it affected indictments for the inferior species of high treason, respecting the coin and the royal seals, is repealed by the statute 6 Geo. III, c. 53, else it had been impossible to have tried those offences in the same circuit in which they are indicted: for ten clear days, between the finding and the trial of the indictment, will exceed the time usually allotted for any session of *oyer* and *terminer*. (m) And no person indicted for felony, is, or (as the law stands) ever can be, entitled to such copies before the time of his trial. (n) (3)

When the trial is called on, the jurors are to be sworn, as they appear, to the number of twelve, unless they are challenged by the party.

Challenges may here be made, either on the part of the king, or on that of the prisoner; and either to the whole array, or to the separate polls, for the very same reasons that they may be made in civil causes. (o) For it is here at least as

(j) 2 Hal. P. C. 364. 2 Hawk. P. C. 408.

(k) Fost. 229. Appendix. l.

(l) *Ibid.* 230.

(m) Fost. 250.

(n) 2 Hawk. P. C. 410.

(o) See book III, p. 359.

(3) Although in England the prisoner is not entitled as of right to a copy of the indictment in case of felony, yet the prosecution may give it, and their doing so on request would be expected. If not given, the court would direct the indictment to be read over slowly, in order that it might be taken down. *Rex v. Parry*, 7 C. & P., 836. In misdemeanors, the defendant is entitled to a copy. *Morrison v. Kelly*, 1 W. Black., 385. In the United States, the right is generally secured by statute or constitution in all cases.

necessary, as there, that the sheriff or returning officer be totally indifferent; that where an alien is indicted, the jury should be *de medietate*, or half foreigners, if so many are found in the place; (which does not indeed hold in treasons, (p) aliens being very improper judges of the breach of allegiance; nor yet in the case of Egyptians (4) under the statute 22 Hen. VIII, c. 10), that on every panel there should be a competent number of hundredors; (5) and that the particular jurors should be *omni exceptione majores*; not liable to objection either *propter honoris respectum*, *propter defectum*, *propter affectum*, or *propter delictum*.

\*Challenges upon any of the foregoing accounts are styled challenges *for cause*; which may be without stint in both criminal and civil trials. [\*353] But in criminal cases, or at least in capital ones, there is, *in favorem vite*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a *peremptory* challenge: a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous. (6) This is grounded on two reasons. 1. As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

The privilege of peremptory challenges, though granted to the prisoner, is denied to the king by the statute 33 Edw. I, st. 4, which enacts, that the king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court. However, it is held that the king need not assign his cause of challenge, till all the panel is gone through, and unless there cannot be a full jury without the person so challenged. And then, and not sooner, the king's counsel must show the cause: otherwise the juror shall be sworn. (q) (7)

The peremptory challenges of the prisoner must, however, have some reasonable boundary; otherwise he might never \*be tried. This reasonable boundary is settled by the common law to be the number of thirty-five; [\*354] that is, one under the number of three full juries. For the law judges that five-and-thirty are fully sufficient to allow the most timorous man to challenge through mere caprice; and that he who peremptorily challenges a greater number, or three full juries, has no intention to be tried at all. And, therefore, it

(p) 2 Hawk. P. C. 430. 2 Hal. P. C. 571.

(q) 2 Hawk. P. C. 413. 2 Hal. P. C. 571.

(4) This class of persons are now dealt with summarily, as rogues and vagabonds.

(5) This ground of challenge is now taken away by statute.

(6) No challenges are allowed on the trial of collateral issues. *R. v. Radcliff*, 1 W. Bl., 3. The challenges must be made, before the jury is sworn to try the cause. *R. v. Frost*, 9 C. and P., 129. The jury must be full, before the challenges are made. *R. v. Lacey*, 3 Cox, 517. In the American states statutes regulate to a large extent the matter of challenges, and a practice has grown up to consider and determine challenges to favor as the jurors are severally called.

(7) In the United States challenges to the favor are generally tried by two jurors already impaneled, if there are such, and if not, then by two indifferent bystanders appointed and sworn by the court for that purpose, or by the court itself. The American decisions regarding challenges are collected in 1 Waterman's Arch. Cr. L., 545, *et seq.* The subject of challenges to the polls was quite fully considered in *People v. Bodine*, 1 Denio, 281. There is a good deal of diversity of opinion as to what previously received impressions of the party called as a juror, as to the guilt of the accused, should exclude him from sitting. Compare *Freeman v. People*, 4 Denio, 9; *People v. Mather*, 4 Wend., 239; *Baxter v. People*, 8 Ill., 366, with *Moran's Case*, 9 Leigh, 651; *State v. Ellington*, 7 Ired., 61; *Moses v. State*, 10 Humph., 456; *Holt v. People*, 13 Mich., 224.

dealt with one who peremptorily challenges above thirty-five, and will not retract his challenge, as with one who stands mute or refuses his trial; by sentencing him to the *peine forte et dure* in felony, and by attainting him in treason. (r) And so the law stands at this day with regard to treason of any kind.

But by statute 22 Hen. VIII, c. 14 (which, with regard to felonies, stands unrepealed by statute 1 and 2 P. and M. c. 10), by this statute, I say, no person arraigned for felony can be admitted to make any more than *twenty* peremptory challenges. But how if a prisoner will peremptorily challenge twenty-one? what shall be done? The old opinion was, that judgment of *peine forte et dure* should be given, as where he challenged thirty-six at the common law: (s) but the better opinion seems to be, (t) that such challenge shall only be disregarded and overruled. Because, first, the common law does not inflict the judgment of penance for challenging twenty-one, neither doth the statute inflict it; and so heavy a judgment (or that of conviction, which succeeds it) shall not be imposed by implication. Secondly, the words of the statute are, "that he be not *admitted* to challenge more than twenty;" the evident construction of which is, that any further challenge be disallowed or prevented: and therefore, being null from the beginning, and never in fact a challenge, it can subject the prisoner to no punishment; but the juror shall be regularly sworn. (8)

If, by reason of challenges or the default of the jurors, a sufficient number [355] cannot be had of the original panel, a *tales* \*may be awarded as in civil causes, (u) till the number of twelve is sworn, "well and truly to try, and true deliverance make, between our sovereign lord the king, and the prisoner whom they have in charge; and a true verdict to give according to the evidence."

When the jury is sworn, if it be a cause of any consequence, the indictment is usually opened, and the evidence marshaled, examined, and enforced by the counsel for the crown or prosecution. But it is a settled rule at common law, that no counsel shall be allowed a prisoner upon his trial, upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated. (w) (9) A rule, which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular) (x) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass? Nor, indeed, is it, strictly speaking, a part of our ancient law: for the Mirror (y) having observed the necessity of counsel in civil suits, "who know how to forward and defend the cause, by the rules of law and customs of the realm," immediately afterwards subjoins: "and more necessary are they for defence upon indictments

(r) 2 Hal. P. C. 268. (s) 2 Hawk. P. C. 414. (t) 3 Inst. 227. 2 Hal. P. C. 270.

(u) See book III, page 364. But in mere commissions of gaol delivery, no *tales* can be awarded: though the court may *ore tenus* order a new panel to be returned *instantly*. (4 Inst. 168. 4 St. Tr. 728. *Cooke's Case*.)

(w) 2 Hawk. P. C. 400.

(x) Sir Edward Coke (3 Inst. 137) gives another additional reason for this refusal, "because the evidence to convict a prisoner should be so manifest, as it could not be contradicted." Which Lord Nottingham (when high steward) declared (3 St. Tr. 726) was the only good reason that could be given for it.

(y) c. 3. § 1.

(8) By statute 7 and 8 Geo. IV, c. 28, s. 8, peremptory challenges beyond the number allowed by law are entirely void.

(9) A full defence by counsel is now allowed in all cases. See statute 6 and 7 Wm. IV, c. 114. In the United States the right to counsel is a constitutional right, and if the accused party is unable to employ counsel, the court will designate some member of the bar for that purpose, and he is not at liberty to decline the appointment. See *Vine v. Hamilton County*, 19 Ill., 18. See also, *Cooley's Const. Lim.*, 384.



and appeals of felony, than upon other venial causes." (s) And the judges themselves are so sensible of this defect, that they never scruple to allow a prisoner counsel to instruct him what questions to ask, or even to \*ask [\*356] questions for him, with respect to matters of fact: for as to matters of law, arising on the trial, they are *entitled* to the assistance of counsel. But, lest this indulgence should be intercepted by superior influence, in the case of state criminals, the legislature has directed by statute 7 Wm. III, c. 3, that persons *indicted* for such high treason, as works a corruption of the blood, or misprision thereof (except treason in counterfeiting the king's coin or seals), may make their full defence by counsel, not exceeding two, to be named by the prisoner and assigned by the court or judge: and the same indulgence, by statute 20 Geo. II, c. 30, is extended to parliamentary *impeachments* for high treason, which were excepted in the former act.

The doctrine of evidence upon pleas of the crown is, in most respects, the same as that upon civil actions. There are, however, a few leading points, wherein, by several statutes, and resolutions, a difference is made between civil and criminal evidence.

First, in all cases of high treason, petit treason, and misprision of treason, by statutes 1 Edw. VI, c. 12, and 5 and 6 Edw. VI, c. 11, *two* lawful witnesses are required to convict a prisoner; unless he shall willingly and without violence *confess* the same. By statute 1 and 2 P. and M. c. 10, a farther exception is made as to treasons in counterfeiting the king's seals or signatures, and treasons concerning coin current within this realm: and more particularly by chapter 11, the offences of importing counterfeit foreign money current in this kingdom, and impairing, counterfeiting, or forging any current coin. The statutes 8 and 9 Wm. III, c. 25, and 15 and \*16 Geo. II, c. 28, in their subsequent [\*357] extensions of this species of treason, do also provide, that the offenders may be indicted, arraigned, tried, convicted, and attainted, by the like evidence and in such manner and form as may be had and used against offenders for counterfeiting the king's money. But by statute 7 Wm. III, c. 3, in prosecutions for those treasons to which that extends, the same rule (of requiring *two* witnesses) is again enforced; with this addition, that the *confession* of the prisoner, which shall countervail the necessity of such proof, must be in *open court*. In the construction of which act it hath been holden, (a) that a confession of the prisoner, taken out of court, before a magistrate or person having competent authority to take it, and proved by two witnesses, is sufficient to convict him of treason. But hasty, unguarded confessions, made to persons having no such authority, ought not to be admitted as evidence under this statute. And, indeed, even in cases of felony at the common law, they are the weakest, and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence. (10) By the same statute 7 Wm. III, it is declared,

(s) Father Parsons, the Jesuit, and after him Bishop Ely (of English liberty II. 66), have imagined that the benefit of counsel to plead for them was first denied to prisoners by law of Hen. I, meaning (I presume) chapters 47 and 48 of the code which is usually attributed to that prince. "*De causis criminalibus vel capitalibus nemo quærat consilium: quin implacitatus statim perneget, sine omni petitione consiliis. — In aliis omnibus potest et debet uti consilio.*" — But this *consilium*, I conceive, signifies only an *importance*, and the *petitio consilii* is *craving leave to impart*; (see book III, page 399), which is not allowable in any criminal prosecution. This will be manifest by comparing this law with a contemporary passage in the *grand coutumier* of Normandy (ch. 65), which speaks of *importance*s in personal actions. "*Après ce, est tend le querelle a respondre; et aura congé de soy conseiller, s'il le demande; et quand il sera consellé il peut nyer le fait dont il est accusé.*" Or, as it stands in the Latin text (edit. 1539), "*Querelatus autem postea tenetur respondere; et habebit licentiam consulendi, si requiratur; habito autem consilio, de hoc factum negare quo accusatus est.*"

(a) *Post. 240-244.*

(10) The confession is not sufficient evidence of the *corpus delicti*, but is only allowed for the purpose of connecting the defendant with the offense when that has been established by other evidence. *People v. Hennessey*, 15 Wend., 147; *Stringfellow v. State*, 26 Miss., 157; *State v. Guild*, 10 N. J., 168; *People v. Lambert*, 5 Mich., 349.

The confession, to be admissible in any case, ought to appear to have been made volun-

that both witnesses must be to the same overt act of treason, or one to one overt act, and the other to another overt act, of the same species of treason, (b) and not of distinct heads or kinds: and no evidence shall be admitted to prove any overt act not expressly laid in the indictment. And, therefore, in Sir John Fenwick's case in King William's time, where there was but one witness, an act of parliament (c) was made on purpose to attain him of treason, and he was executed. (d) But in almost every other accusation one positive witness is sufficient. Baron Montesquieu lays it down for a rule, (e) that those laws which condemn a man to death in any case on the deposition of a single witness, are fatal to liberty; and he adds this reason, that the witness who affirms, and the accused who denies, make an equal balance; (f) there is a necessity, [\*358] therefore, to call in a third man to incline the scale. But this seems to be carrying matters too far: for there are some crimes, in which the very privacy of their nature excludes the possibility of having more than one witness, must these, therefore, escape unpunished? Neither, indeed, is the bare denial of the person accused equivalent to the positive oath of a disinterested witness. In cases of indictment for perjury, this doctrine is better founded; and there our law adopts it: for one witness is not allowed to convict a man indicted for perjury; because then there is only one oath against another. (g) In cases of treason, also, there is the accused's oath of allegiance, to counterpoise the information of a single witness; and that may perhaps be one reason why the law requires a double testimony to convict him: though the principal reason, undoubtedly, is to secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages.

Secondly, though from the reversal of Colonel Sidney's attainder by act of parliament in 1689, (h) it may be collected, (i) that the mere similitude of handwriting in two papers shown to a jury, without other concurrent testimony, is no evidence that both were written by the same person; yet undoubtedly the testimony of witnesses, well acquainted with the party's hand, that they believe the paper to have been written by him is evidence to be left to a jury. (j)

Thirdly, by the statute 21 Jac. I. c. 27, a mother of a bastard child, concealing its death, must prove by one witness that the child was born dead; otherwise such concealment shall be evidence of her having murdered it. (k) (11)

Fourthly, all presumptive evidence of felony should be admitted cautiously; for the law holds that it is better that ten guilty persons escape, than that one innocent suffer. \*And Sir Matthew Hale in particular (l) lays down [\*359] two rules most prudent and necessary to be observed: 1. Never to convict a man for stealing the goods of a person unknown, merely because he will give no account of how he came by them, unless an actual felony be proved of such goods; and 2. Never to convict any person of murder or manslaughter, till at least the body be found dead; on account of two instances he mentions, where persons were executed for the murder of others, who were then alive, but missing. (12)

(b) See St. Tr. II. 144. Foster, 385. (c) Stat. 8 Wm. III. c. 4. (d) St. Tr. V. 40. (e) Sp. L. b. 12, c. 2.

(f) Beccar. c. 18.

(g) 10 Mod. 194.

(h) St. Tr. VIII. 472.

(i) 2 Hawk. P. C. 431.

(j) Lord Preston's Case, A. D., 1690. St. Tr. IV. 453. Francis's Case, A. D., 1716. St. Tr. VI. 60. Layton's Case, A. D., 1722. *Ibid.* 279. Henzey's Case, A. D., 1758. Burr. 644.

(k) See page 198.

(l) 2 Hal. P. C. 290.

tarly, and without motives of hope or fear being employed for the purpose of inducing it. Rex v. Enoch, 5 C. and P., 539; Earle v. Picken, *id.*, 542, note; Morehead v. State, 9 Humph., 635; State v. Bostick, 4 Harr., 563; 1 Greenl. Ev. § 214, and note; 1 Phil. Ev. by Cowen, Hill and Edwards, 514, and cases cited.

(11) This statute is since repealed.

(12) A noted instance of conviction in America for the murder of a person who afterwards returned alive, obtained principally upon the confessions of the accused parties, has had a tendency towards still greater caution. See the case referred to in 1 Greenl. Ev. § 214, n., and given more at large by Mr. Gallison, in 10 N. A. Review, 418.

Lastly, it was an ancient and commonly received practice (*m*) (derived from the civil law, and which, also, to this day obtains in the kingdom of France), (*n*) that, as counsel was not allowed to any prisoner accused of a capital crime, so neither should he be suffered to exculpate himself by the testimony of any witnesses. And, therefore, it deserves to be remembered to the honour of Mary I, (whose early sentiments, till her marriage with Philip of Spain, seem to have been humane and generous), (*o*) that when she appointed Sir Richard Morgan chief justice of the common pleas, she enjoined him, "that notwithstanding the old error, which did not admit any witness to speak, or any other matter to be heard, in favour of the adversary, her majesty being party; her highness's pleasure was, that whatsoever should be brought in favour of the subject should be admitted to be heard: and moreover, that the justices should not persuade themselves to sit in judgment otherwise for her highness than for her subject." (*p*) Afterwards, in one particular instance (when embezzling the queen's military stores was made felony by statute 34 Eliz. c. 4), it was provided, that any person impeached for such felony, "should be received and admitted to make any lawful proof that he could, by lawful witness or otherwise, for his discharge and defence:" and in general the courts grew so heartily ashamed of a doctrine so unreasonable and oppressive, that a practice was \*gra- [\*360] dually introduced of examining witnesses for the prisoner, but not upon oath; (*q*) the consequence of which still was, that the jury gave less credit to the prisoner's evidence than to that produced by the crown. Sir Edward Coke (*r*) protests very strongly against this tyrannical practice; declaring that he never read in any act of parliament, book-case, or record, that in criminal cases the party accused should not have witnesses sworn for him; and, therefore, there was not so much as *scintilla juris* against it. (*s*) And the house of commons were so sensible of this absurdity, that, in the bill for abolishing hostilities between England and Scotland, (*t*) when felonies committed by Englishmen in Scotland were ordered to be tried in one of the three northern counties they insisted on a clause, and carried it (*u*) against the efforts of both the crown and the house of lords, against the practice of the courts in England, and the express law of Scotland, (*v*) "that in all such trials for the better discovery of the truth, and the better information of the consciences of the jury and justices, there shall be allowed to the party arraigned the benefit of such credible witnesses, to be examined upon oath, as can be produced for his clearing and justification." At length by the statute 7 Wm. III, c. 3, the same measure of justice was established throughout all the realm, in cases of treason within the act: and it was afterwards declared by statute 1 Ann. st. 2, c. 9, that in all cases of treason and felony all witnesses for the prisoner should be examined upon oath, in like manner as the witnesses against him.

When the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged (unless in cases of evident necessity) (*x*) till they have given in their verdict; (13) but are to consider of it; and deliver it in, with the same forms as upon civil causes; only they cannot, in a criminal case which touches life or member, give a *privy* verdict. (*y*) But

(m) St. Tr. I. *passim*.

(n) Domat. publ. law, b. 2, f. 1. Montesq. Sp. L. b. 29, c. 11.

(o) See page 17.

(p) Hollingsh. 1112. St. Tr. I. 72.

(q) 2 Bulst. 147. Cro. Car. 292.

(r) 3 Inst. 79.

(s) See also 2 Hal. P. C. 283, and his summary, 364.

(t) Stat. 4 Jac. I. c. 1.

(u) Coun. Journ. 4, 5, 12, 13, 15, 22, 30 Jun. 1607.

(v) Com. Journ. 4 Jun. 1607.

(x) Co. Litt. 227. 3 Inst. 110. Fost. 27. Gould's Case. Hil. 1764.

(y) 2 Hal. P. C. 300. 2 Hawk. P. C. 432.

(13) The discharge of the jury from any overruling necessity does not entitle the defendant to his discharge: *U. S. v. Perez*, 9 Wheat., 579; *State v. Ephraim*, 2 Dev. and Bat., 162; *Commonwealth v. Fells*, 9 Leigh, 613; *People v. Goodwin*, 18 Johns., 205. The sickness or death of the judge, or of a juror, or inability of the jury to agree upon a verdict, or the term of the court coming to an end before the conclusion of the trial, would be such a necessity. See *Miller v. State*, 8 Ind., 325; *Mahala v. State*, 10 Yerg., 535; *State v. Battle*, 7 Ala., 259; *State v. Wiseman*, 68 N. C., 203; *Hoffman v. State*, 20 Md., 425; *Price v. State*, 36 Miss., 531; *Moseley v. State*, 33 Tex., 671; *Lester v. State*, 33 Geo., 329.

the judges may adjourn while the jury are withdrawn to confer, and return to receive the verdict in open court. (2) And such public or open verdict may be [\*361] 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, manslaughter, or no crime at all. This is where they *doubt* the matter of 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 finding a general verdict, if they think proper so to hazard a breach of their oaths: and if their verdict be notoriously wrong, they may be punished, and the verdict set aside by attain at the suit of the king; but not at the suit of the prisoner. (a) (14) But the practice heretofore in use of fining, imprisoning, or otherwise punishing jurors, merely at the discretion of the court, for finding their verdict contrary to the direction of the judge, was arbitrary, unconstitutional, and illegal: and is treated as such by Sir Thomas Smith, two hundred years ago; who accounted "such doings to be very violent, tyrannical, and contrary to the liberty and custom of the realm of England." (b) For, as Sir Matthew Hale well observes, (c) it would be a most unhappy case for the judge himself, if the prisoner's fate depended upon his directions; unhappy, also, for the prisoner; for if the judge's opinion must rule the verdict, the trial by jury would be useless. Yet, in many instances, (d) where contrary to evidence the jury have found the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted by the court of king's bench: for in such case, as hath been said, it cannot be set right by attain. But there hath yet been no instance of granting a new trial where the prisoner was *acquitted* upon the first. (e) (15)

If the jury, therefore, find the prisoner not guilty, he is then forever quit and discharged of the accusation, (f) except he be appealed of felony within the time limited by law. And upon such his acquittal, or discharge for want [\*362] of any fee to the gaoler. (g) But if the jury find him guilty, (h) he is then to be *convicted* of the crime whereof he stands indicted. Which conviction may accrue two ways: either by his confessing the offence and pleading guilty; or by his being found so by the verdict of his country.

When the offender is thus convicted, there are two collateral circumstances that immediately arise. 1. On a conviction (or even upon an acquittal where there was a reasonable ground to prosecute, and in fact a *bona fide* prosecution) for any grand or petit larceny, or other felony, the reasonable expenses of prosecution, and also, if the prosecutor be poor, a compensation for his trouble and loss of time, are by statutes 25 Geo. II, c. 36, and 18 Geo. III, c. 19, to be allowed him out of the county stock, if he petitions the judge for that purpose: and by statute 27 Geo. II, c. 3, explained by the same statute, 18 Geo. III, c. 19, all persons appearing upon recognizance or *subpoena* to give evidence, whether any indictment be preferred or no, and as well without conviction as with

(a) 3 St. Tr. 731. 4 St. Tr. 331, 455, 435.

(b) 2 Hal. P. C. 310.

(c) Smith's Commonw. I, 2, c. 1.

(d) 2 Hal. P. C. 312.

(e) 1 Lev. 2. T. Jones, 163. St. Tr. X, 416.

(f) 2 Hawk. P. C. 442.

(g) The civil law in such case only discharges him from the same accuser, but not from the same accusation. Ff. 48, 2, 7, § 2.

(h) Stat. 14, Geo. III, c. 20.

(i) In the Roman republic, when the prisoner was convicted of any capital offence by his judges, the form of pronouncing that conviction was something peculiarly delicate; not that he was guilty, but that he had not been enough upon his guard: "*parum cavisse videtur.*" (Festus, 335.)

(14) This is no longer the law. Attaints are abolished, and the jury must be left perfectly free to give such judgment as their conscience dictates, and be protected in so doing. See Penn's Case, 6 Howell's St. Tr., 951; Vaughan, 195.

(15) If the prisoner is convicted on one count of an indictment and acquitted on another, and then obtains a new trial, he is only tried afterwards on the count on which he was before convicted. State v. Cooper, 18 N. J., 360; Commonwealth v. Roby, 12 Pick., 504; Price v. State, 19 Ohio, 423; State v. Benham, 7 Conn., 414; People v. McGowan, 17 Wend., 336.

it, are entitled to be paid their charges, with a farther allowance (if poor) for their trouble and loss of time. 2. On a conviction of larceny, in particular, the prosecutor shall have restitution of his goods, by virtue of the statute 21 Hen. VIII, c. 11. (16) For, by the common law, there was no restitution of goods upon an indictment, because it is at the suit of the king only; and therefore the party was enforced to bring an appeal of robbery, in order to have his goods again. (i) But, it being considered that the party prosecuting the offender by indictment, deserves to the full as much encouragement as he who prosecutes by appeal, this statute was made, which enacts, that if any person be convicted of larceny, by the evidence of the party robbed, he shall have full restitution of his money, goods and chattels; or the value of them out of the offender's goods, if he has any, by a writ to be granted by the justices. And the construction of this act having been in a great measure conformable to the law of appeals, it has therefore in practice superseded the use of appeals of larceny. For instance: as formerly upon appeals, (j) so now upon indictments of larceny, this writ of restitution \*shall reach the goods so stolen, notwithstanding the property (k) of them is endeavoured to be altered by sale in market overt. (l) And though this may seem somewhat hard upon the buyer, yet the rule of law is that "*spoliatus debet, ante omnia, restitui*," especially when he has used all the diligence in his power to convict the felon. And, since the case is reduced to this hard necessity, that either the owner or the buyer must suffer; the law prefers the right of the owner, who has done a meritorious act by pursuing a felon to condign punishment, to the right of the buyer, whose merit is only negative, that he has been guilty of no unfair transaction. And it is now usual for the court, upon the conviction of a felon, to order, without any writ, immediate restitution of such goods as are brought into court, to be made to the several prosecutors. Or else, secondly, without such writ of restitution, the party may peaceably retake his goods, wherever he happens to find them, (m) unless a new property be fairly acquired therein. Or, lastly, if the felon be convicted and pardoned, or be allowed his clergy, the party robbed may bring his action of trover against him for his goods; and recover a satisfaction in damages. But such action lies not before prosecution; for so felonies would be made up and healed: (n) and also recaption is unlawful, if it be done with intention to smother or compound the larceny; it then becoming the heinous offence of theft-bote, as was mentioned in a former chapter. (o)

It is not uncommon, when a person is convicted of a misdemeanor, which principally and more immediately affects some individual, as a battery, imprisonment or the like, for the court to permit the defendant to *speak with the prosecutor*, before any judgment is pronounced; and if the prosecutor declares himself satisfied, to inflict but a trivial punishment. This is done to re-imburse the prosecutor his expenses, and make him some private amends, without the trouble and circuity of a civil action. But it surely is a dangerous practice; \*and though it may be intrusted to the prudence and discretion of the judges in the superior courts of record, it ought never to be allowed in local or inferior jurisdictions, such as the quarter sessions; where prosecutions for assaults are by these means too frequently commenced rather for private lucre than for the great ends of public justice. Above all, it should never be suffered where the testimony of the prosecutor himself is necessary to convict the defendant: for, by these means, the rules of evidence are entirely subverted; the prosecutor becomes in effect a plaintiff, and yet is suffered to bear witness for himself. Nay, even a voluntary forgiveness by the party injured

(1) 3 Inst. 242.

(j) Bracton, de Coron. c. 32.

(k) See book II, 450.

(l) 1 Hal. P. C. 542.

(m) See book III, page 4.

(n) 1 Hal. P. C. 542.

(o) See page 132.

(16) These statutes are since repealed, and new provisions made. The present law on the restoration of property stolen, embezzled, etc., or received with guilty knowledge, is 24 and 25 Vic., c. 96, s. 100.

ought not, in true policy, to intercept the stroke of justice. "This," says an elegant writer, (*p*) who pleads with equal strength for the *certainly* as for the *lenity* of punishment, "may be an act of good nature and humanity, but it is contrary to the good of the public. For, although a private citizen may dispense with satisfaction for his private injury, he cannot remove the necessity of public example. The right of punishing belongs not to any one individual in particular, but to the society in general, or the sovereign who represents that society: and a man may renounce his own portion of this right, but he cannot give up that of others."

## CHAPTER XXVIII

### OF THE BENEFIT OF CLERGY.

**AFTER** trial and conviction, the judgment of the court regularly follows, unless suspended or arrested by some intervening circumstance; of which the principal is the *benefit of clergy*; (1) a title of no small curiosity as well as use; and concerning which I shall therefore inquire: 1. Into its original, and the various mutations which this privilege of clergy has sustained. 2. To what persons it is to be allowed at this day. 3. In what cases. 4. The consequences of allowing it.

I. Clergy, the *privilegium clericale*, or in common speech, *the benefit of clergy*, had its original from the pious regard paid by Christian princes to the church in its infant state; and the ill use which the popish ecclesiastics soon made of that pious regard. The exemptions which they granted to the church, were principally of two kinds: 1. Exemption of *places* consecrated to religious duties, from criminal arrests, which was the foundation of sanctuaries; 2. Exemption of the *persons* of clergymen from criminal process before the secular judge in a few particular cases, which was the true original and meaning of the *privilegium clericale*.

But the clergy, increasing in wealth, power, honour, number, and interest, began soon to set up for themselves: and that which they obtained by the favour of the civil government, they now claimed as their inherent right: and [\*366] as a \*right of the highest nature, indefeasible, and *jure divino*. (*a*) By their canons, therefore, and constitutions, they endeavoured at, and where they met with easy princes obtained, a vast extension of these exemptions: as well in regard to the crimes themselves, of which the list became quite universal; (*b*) as in regard to the persons exempted, among whom were at length comprehended not only every little subordinate officer belonging to the church or clergy, but even many that were totally laymen.

In England, however, although the usurpations of the pope were very many and grievous, till Henry the Eighth entirely exterminated his supremacy, yet a total exemption of the clergy from secular jurisdiction could never be thoroughly effected, though often endeavoured by the clergy: (*c*) and therefore, though the ancient *privilegium clericale* was in some capital cases, yet it was not *universally* allowed. And in those particular cases, the use was for the bishop or ordinary to demand his clerks to be remitted out of the king's courts, as soon as they were indicted: concerning the allowance of which demand there was for many years a great uncertainty; (*d*) till at length it was finally settled in

(*p*) Becc. ch. 48.

(*a*) The principal argument upon which they founded this exemption was that text of Scripture: Touch not mine anointed, and do my prophets no harm." (Kellw. 181.

(*b*) See book III, page 62.

(*c*) Kellw. 180.

(*d*) 2 Hal. P. C. 377.

(1) Benefit of clergy is now abolished, and the law of this chapter is obsolete.

the reign of Henry the Sixth, that the prisoner should first be arraigned; and might either *then* claim his benefit of clergy, by way of declinatory plea; or, *after conviction*, by way of arresting judgment. This latter way is most usually practiced, as it is more to the satisfaction of the court to have the crime previously ascertained by confession or the verdict of a jury: and also it is more advantageous to the prisoner himself, who may possibly be acquitted, and so need not the benefit of his clergy at all.

Originally the law was held, that no man should be admitted to the privilege of clergy, but such as had the *\*habitu et tonsuram clericalem*. (e) But in process of time a much wider and more comprehensive criterion was established: every one that could read (a mark of great learning in those days of ignorance and her sister superstition) being accounted a clerk or *clericus* and allowed the benefit of clerkship, though neither initiated in holy orders, nor trimmed with the clerical tonsure. But when learning, by means of the invention of printing, and other concurrent causes, began to be more generally disseminated than formerly; and reading was no longer a competent proof of clerkship, or being in holy orders; it was found that as many laymen as divines were admitted to the *privilegium clericale*: and, therefore, by statute 4 Hen. VII, c. 13, a distinction was once more drawn between mere lay scholars, and clerks that were really in orders. And, though it was thought reasonable still to mitigate the severity of the law with regard to the former, yet they were not put upon the same footing with actual clergy; being subjected to a slight degree of punishment, and not allowed to claim the clerical privilege more than once. Accordingly, the statute directs that no person once admitted to the benefit of clergy shall be admitted thereto a second time, unless he produces his orders: and in order to distinguish their persons, all laymen who are allowed this privilege shall be burnt with a hot iron in the brawn of the left thumb. This distinction between learned laymen, and real clerks in orders, was abolished for a time by the statutes 28 Hen. VIII. c. 1, and 32 Hen. VIII, c. 8, but it is held (e) to have been virtually restored by statute 1 Edw. VI, c. 12, which statute also enacts that lords of parliament and peers of the realm, having place and voice in parliament, may have the benefit of their peerage, equivalent to that of clergy, for the first offence (although they cannot read, and without being burnt in the hand), for all offences then clergyable to commoners, and also for the crimes of house-breaking, highway robbery, horse-stealing, and robbing of churches. (2)

\*After this burning, the laity, and before it the real clergy, were discharged from the sentence of the law in the king's court, and delivered over to the ordinary, to be dealt with according to the ecclesiastical canons. Whereupon the ordinary, not satisfied with the proofs adduced in the profane secular court, set himself formally to work to make a purgation of the offender by a new canonical trial; although he had been previously convicted by his country, or perhaps by his own confession. (f) This trial was held before the bishop in person, or his deputy; and by a jury of twelve clerks: and there, first, the party himself was required to make oath of his own innocence; next, there was to be the oath of twelve compurgators, who swore they believed he spoke the truth; then, witnesses were to be examined upon oath, but on behalf of the prisoner only: and, lastly, the jury were to bring in their verdict upon oath, which usually acquitted the prisoner; otherwise, if a clerk, he was degraded, or put to penance. (g) A learned judge, in the beginning of the last century, (h) remarks with much indignation the vast complication of perjury and subornation of perjury, in this solemn farce of a mock trial; the wit-

(e) 2 Hal. P. C. 372. M. Paris, A. D., 1230. See book I. p. 24.

(e) Hob. 294. 2 Hal. P. C. 375. (f) Staundford, P. C. 138, b.

(g) 3 P. Wms. 447. Hob. 290.

(h) Hob. 291.

(2) A person convicted of a clergyable felony was entitled to discharge without being burned in the hand. *Duchess of Kingston's Case*, 20 How. St. Tr. 355.

nesses, the compurgators, and the jury, being all of them partakers in the guilt: the delinquent party also, though convicted before on the clearest evidence, and conscious of his own offence, yet was permitted and almost compelled to swear himself not guilty: nor was the good bishop himself, under whose countenance this scene of wickedness was daily transacted, by any means exempt from a share of it. And yet by this purgation the party was restored to his credit, his liberty, his lands, and his capacity of purchasing afresh, and was entirely made a new and an innocent man.

This scandalous prostitution of oaths and the forms of justice, in the almost constant acquittal of felonious clerks by purgation, was the occasion, that upon [\*369] very heinous and \*notorious circumstances of guilt, the temporal courts would not trust the ordinary with the trial of the offender, but delivered over to him the convicted clerk, *absque purgatione facienda*: in which situation the clerk convict could not make purgation; but was to continue in prison during life, and was incapable of acquiring any personal property, or receiving the profits of his lands, unless the king should please to pardon him. Both these courses were in some degree exceptionable; the latter being perhaps too rigid, as the former was productive of the most abandoned perjury. As, therefore, these mock trials took their rise from factious and popish tenets, tending to exempt one part of the nation from the general municipal law; it became high time, when the reformation was thoroughly established, to abolish so vain and impious a ceremony.

Accordingly, the statute of 18 Eliz. c. 7, enacts that, for the avoiding of such perjuries and abuses, after the offender has been allowed his clergy, he shall not be delivered to the ordinary, as formerly; but, upon such allowance and burning in the hand, he shall forthwith be enlarged and delivered out of prison; with proviso that the judge may, if he thinks fit, continue the offender in gaol for any time not exceeding a year. And thus the law continued, for above a century, unaltered, except only that the statute of 21 Jac. I, c. 6, allowed, that women convicted of simple larcenies under the value of ten shillings should (not properly have the benefit of clergy, for they were not called upon to read; but) be burned in the hand, and whipped, (3) stocked, or imprisoned for any time not exceeding a year. And a similar indulgence, by the statutes 3 and 4 W. and M. c. 9, and 4 and 5 W. and M. c. 24, was extended to women, guilty of any clergyable felony whatsoever; who were allowed once to claim the benefit of the *statute*, in like manner as men might claim the benefit of *clergy*, and to be discharged upon being burnt in the hand, and imprisoned for any time not exceeding a year. The punishment of burning in the *hand*, being found ineffectual, was also changed by statute 10 and 11 Wm. III, c. 23, into burning in the most visible part of the left *cheek*, nearest the nose; but such an indelible stigma being found by experience to render offenders desperate, this provision was repealed, about seven years afterwards, by statute 5 Ann., c. 6, and till that period, all women, all peers of parliament and peeresses, and [\*370] all male commoners who could read, were discharged \*in all clergyable felonies; the males absolutely, if clerks in orders: and other commoners, both male and female, upon branding; and peers and peeresses without branding, for the first offence: yet all liable (excepting peers and peeresses), if the judge saw occasion, to imprisonment not exceeding a year. And those men who could not read, if under the degree of peerage, were hanged.

Afterwards, indeed, it was considered, that education and learning were no extenuations of guilt, but quite the reverse: and that, if the punishment of

(8) Whipping of women in England was abolished in England by Stat. 1 Geo. IV, c. 57. Whipping as a punishment is allowed in a few only of the American states. It is not "cruel" or "unusual" punishment in a constitutional sense. *Commonwealth v. Wyatt*, 6 Rand., 694.



death for simple felony was too severe for those who had been liberally instructed, it was, *a fortiori*, too severe for the ignorant also. And thereupon, by the same statute, 5 Ann. c. 6, it was enacted that the benefit of clergy should be granted to all those who were entitled to ask it, without requiring them to read, by way of conditional merit. And, experience having shown that so very universal a lenity was frequently inconvenient, and an encouragement to commit the lower degrees of felony; and that, though capital punishments were too rigorous for these inferior offences, yet no punishment at all (or next to none), was as much too gentle; it was further enacted by the same statute, that when any person is convicted of any theft, or larceny, and burnt in the hand for the same, according to the ancient law, he shall also, at the discretion of the judge, be committed to the house of correction or public workhouse, to be there kept to hard labour, for any time not less than six months, and not exceeding two years; with a power of inflicting a double confinement in case of the party's escape from the first. And it was also enacted, by the statutes 4 Geo. I, c. 11, and 6 Geo. I, c. 23, that when any persons shall be convicted of any larceny, either grand or petit, or any felonious stealing or taking of money, or goods and chattels, either from the person or the house of any other, or in any other manner, and who by the law shall be entitled to the benefit of clergy, and liable only to the penalties of burning in the hand, or whipping, the court in their discretion, instead of such burning in the hand, or whipping, may direct such offenders to be transported to America (or, by statute 19 Geo. III, c. 74, to any other parts beyond the seas) for seven years: and if they \*return or are seen at large in this kingdom within that time, [\*371] it shall be felony, without benefit of clergy. And by the subsequent statutes, 16 Geo. II, c. 15, and 8 Geo. III, c. 15, many wise provisions are made for the more speedy and effectual execution of the laws relating to transportation, and the conviction of such as transgress them. But now, by the statute 19 Geo. III, c. 74, all offenders liable to transportation may, in lieu thereof, at the discretion of the judges, be employed, if males, except in the case of petty larceny, in hard labour for the benefit of some public navigation; or, whether males or females, may, in all cases, be confined to hard labour in certain penitentiary houses, to be erected by virtue of the said act, for the several terms therein specified, but in no case exceeding seven years; with a power of subsequent mitigation, and even of reward, in case of their good behaviour. But if they escape, and are retaken, for the first time an addition of three years is made to the term of their confinement; and a second escape is felony, without benefit of clergy.

In forming the plan of these penitentiary houses, the principal objects have been, by sobriety, cleanliness and medical assistance, by a regular series of labour, by solitary confinement during the intervals of work, and by due religious instruction, to preserve and amend the health of the unhappy offenders, to inure them to habits of industry, to guard them from pernicious company, to accustom them to serious reflection, and to teach them both the principles and practice of every Christian and moral duty. And if the whole of this plan be properly executed, and its defects be timely supplied, there is reason to hope that such a reformation may be effected in the lower classes of mankind, and such a gradual scale of punishment be affixed to all gradations of guilt, as may in time supersede the necessity of capital punishment, except for very atrocious crimes.

It is also enacted by the same statute, 19 Geo. III, c. 74, that instead of burning in the hand (which was sometimes too slight, and sometimes too disgraceful a punishment), the court, in all clergyable felonies, may impose a pecuniary fine; or (except in the case of manslaughter) may order the offender to be once or oftener, but not more than thrice, either publicly or privately whipped; such private whipping (to prevent collusion or abuse) to be inflicted in the presence of two witnesses, and in case of female offenders in the presence of

females only. Which fine or whipping shall have the same consequences as burning in the hand; and the offender, so fined or whipped, shall be equally liable to a subsequent detainer or imprisonment.

In this state does the benefit of clergy at present stand; very considerably different from its original institution; the wisdom of the English legislature having, in the course of a long and laborious process, extracted by a noble alchemy rich medicines out of poisonous ingredients; and converted, by gradual mutations, what was at first an unreasonable exemption of particular popish ecclesiastics, into a merciful mitigation of the general law, with respect to capital punishment.

From the whole of this detail we may collect, that however in times of ignorance and superstition that monster in true policy may for a while subsist, of a body of men, residing in the bowels of a state, and yet independent of its laws; yet, when learning and rational religion have a little enlightened men's minds, society can no longer endure an absurdity so gross, as must destroy its very fundamentals. For, by the original contract of government, the price of protection by the united force of individuals is that of obedience to the united will of the community. This united will is declared in the laws of the land: and that united force is exerted in their due and universal execution.

II. I am next to inquire, to what *persons* the benefit of clergy is to be allowed at this day: and this must be chiefly collected from what has been observed [\*372] in the preceding \*article. For, upon the whole, we may pronounce that all clerks in orders are, without any branding, and of course without any transportation, fine, or whipping, (for those are only substituted in lieu of the other) to be admitted to this privilege, and immediately discharged; and this as often as they offend. (i) Again, all lords of parliament and peers of the realm, having place and voice in parliament, by the statute 1 Edw. VI. c. 12, (which is likewise held to extend to peeresses) (k) shall be discharged in all clergyable and other felonies provided for by the act, without any burning in the hand, or imprisonment, or other punishment substituted in its stead, in the same manner as real clerks convict: but this is only for the first offence. Lastly, all the commons of the realm, not in orders, whether male or female, shall, for the first offence, be discharged of the capital punishment of felonies, within the benefit of clergy, upon being burnt in the hand, whipped, or fined, or suffering a discretionary imprisonment in the common gaol, the house of correction, one of the penitentiary houses, or in the places of labour, for the benefit of some navigation; or, in case of larceny, upon being transported for seven years, if the court shall think proper. It hath been said, that Jews, and other infidels and heretics, were not capable of the benefit of clergy, till after the statute 5 Ann. c. 6, as being under a legal incapacity for orders. (l) But I much question whether this was ever ruled for law, since the re-introduction of the Jews into England, in the time of Oliver Cromwell. For, if that were the case, the Jews are still in the same predicament, which every day's experience will contradict: the statute of Queen Anne having certainly made no alteration in this respect; it only dispensing with the necessity of reading in those persons, who, in case they could read, were before the act entitled to the benefit of their clergy.

III. The third point to be considered is, for what *crimes* the *privilegium clericale*, or benefit of clergy, is to be allowed. And, it is to be observed, that neither in high treason, nor in petit larceny, nor in any mere misdemeanors, it was indulged at the common law; and therefore we may lay it down for a rule, that it was allowable only in petit treason and capital felonies: which, for the [\*373] most part, became legally entitled to this \*indulgence by the statute *de clero*, 25 Edw. III, st. 3, c. 4, which provides that clerks convict for treasons or felonies, touching other persons than the king himself or his royal

(g) 2 Hal. P. C. 375.

(h) *Duchess of Kingston's Case* in Parliament, 23 Apr., 1776.

(i) 2 Hal. P. C. 373. 2 Hawk. P. C. 323. Post. 306.

majesty, shall have the privilege of holy church. But yet it was not allowable in all felonies whatsoever: for in some it was denied even by the common law, viz., *insidiatio viarum*, or lying in wait for one on the highway; *depopulatio agrorum*, or destroying and ravaging a country; (m) and *combustio domorum*, or arson, that is, the burning of houses: (n) all which are a kind of hostile acts, and in some degree border upon treason. And, farther, all these identical crimes, together with petit treason, and very many other acts of felony, are ousted of clergy by particular acts of parliament; which have in general been mentioned under the particular offences to which they belong, and therefore need not be here recapitulated. Upon all which statutes for excluding clergy I shall only observe, that they are nothing else but the restoring of the law to the same rigour of capital punishment in the first offence that it exerted before the *privilegium clericale* was at all indulged; and which it still exerts upon a second offence in almost all kinds of felonies, unless committed by clerks actually in orders. But so tender is the law of inflicting capital punishment in the first instance for any inferior felony, that, notwithstanding by the marine law, as declared in statute 28 Hen. VIII. c. 15, the benefit of clergy is not allowed in any case whatsoever; yet, when offences are committed within the admiralty-jurisdiction, which would be clergyable if committed by land, the constant course is to acquit and discharge the prisoner. (o) (4) And, to conclude this head of inquiry, we may observe the following rules: 1. That in all felonies, whether new created or by common law, clergy is now allowable, unless taken away by express words of an act of parliament. (p) 2. That, where clergy is taken away from the principal, it is not of course taken away from the accessory, unless he be also particularly included in the words of the statute. (q) 3. That when the benefit of clergy is taken away from the offence (as in case of murder, buggery, robbery, rape, and burglary), a principal in the second degree being present, aiding and abetting the crime, is as well \*excluded from [\*374] his clergy as he that is principal in the first degree: but 4. That, where it is only taken away from the *person committing* the offence (as in the case of stabbing, or committing larceny in a dwelling-house, or privately from the person), his aiders and abettors are not excluded; through the tenderness of the law which hath determined that such statutes shall be taken literally. (r)

IV. Lastly, we are to inquire what the consequences are to the party, of allowing him this benefit of clergy. I speak not of the branding, fine, whipping, imprisonment, or transportation; which are rather concomitant conditions, than consequences of receiving this indulgence. The consequences are such as affect his present interest, and future credit and capacity: as having been once a felon, but now purged from that guilt by the privilege of clergy; which operates as a kind of statute pardon.

And we may observe, 1. That by this conviction he forfeits all his goods to the king: which being once vested in the crown, shall not afterwards be restored to the offender. (s) 2. That, after conviction, and till he receives the judgment of the law, by branding, or some of its substitutes, or else is pardoned by the king, he is to all intents and purposes a felon, and subject to all the disabilities and other incidents of a felon. (t) 3. That after burning, or its substitute, or pardon, he is discharged forever of that, and all other felonies before committed, within the benefit of clergy; but not of felonies from which such benefit is excluded: and this by statutes 8 Eliz. c. 4 and 18 Eliz. c. 7. 4. That, by the burning, or its substitute, or the pardon of it, he is restored to all

(m) 2 Hal. P. C. 333.

(n) 2 Hal. P. C. 346.

(o) Moor. 754. Fost. 263.

(p) 2 Hal. P. C. 330.

(q.) 2 Hawk. P. C. 342.

(r) 1 Hal. P. C. 529. Fost. 354, 357.

(s) 2 Hal. P. C. 333.

(t) 3 P. Wms. 437.

(4) By subsequent statutes, offenses committed on the high seas are to be considered and treated in the same manner as if committed on shore.

capacities and credits, and the possession of his lands, as if he had never been convicted. (u) 5. That what is said with regard to the advantages of commoners and laymen, subsequent to the burning in the hand, is equally applicable to all peers and clergymen, although never branded at all, or subjected to other punishment in its stead. For they have the same privileges, without any burning, or any substitute for it, which others are entitled to after it. (v)

## CHAPTER XXIX.

### OF JUDGMENT AND ITS CONSEQUENCES.

WE are now to consider the next stage of criminal prosecution, after trial and conviction are past, in such crimes and misdemeanors as are either too high or too low to be included within the benefit of clergy: which is that of *judgment*. For when, upon a capital charge, the jury have brought in their verdict guilty, in the presence of the prisoner, he is either immediately, or at a convenient time soon after, asked by the court if he has anything to offer why judgment should not be awarded against him. And in case the defendant be found guilty of a misdemeanor (the trial of which may, and does usually, happen in his absence, after he has once appeared), a *capias* is awarded and issued, to bring him in to receive his judgment; and, if he absconds, he may be prosecuted even to outlawry. But whenever he appears in person, upon either a capital or inferior conviction, he may, at this period, as well as at his arraignment, offer any exceptions to the indictment, in *arrest* or stay of judgment: as, for want of sufficient certainty in setting forth either the person, the time, the place, or the offence. And, if the objections be valid, the whole proceedings shall be set aside; but the party may be indicted again. (a) (1) And we may take notice, 1. That none of the statutes of *jeofails*, (b) for amendment of errors, extend to indictments or proceedings in [ \*376 ] criminal cases; \*and therefore a defective indictment is not aided by a verdict, as defective pleadings in civil cases are. 2. That, in favour of life, great strictness has at all times been observed, in every point of an indictment. Sir Matthew Hale indeed complains, "that this strictness is grown to be a blemish and inconvenience in the law, and the administration thereof: for that more offenders escape by the over-easy ear given to exceptions in indictments, than by their own innocence." (c) And yet no man was more tender of life than this truly excellent judge. (2)

A pardon, also, as has been before said, may be pleaded in arrest of judgment, and it has the same advantage when pleaded here as when pleaded upon arraignment, viz., the saving the attainer, and, of course, the corruption of blood; which nothing can restore but parliament, when a pardon is not pleaded till after sentence. And certainly, upon all accounts, when a man hath obtained a pardon, he is in the right to plead it as soon as possible.

Praying the benefit of clergy may also be ranked among the motions in arrest of judgment: of which we spoke largely in the preceding chapter.

If all these resources fail, the court must pronounce that judgment which the law hath annexed to the crime, and which hath been constantly mentioned,

(u) 2 Hal. P. C. 329. 5 Rep. 110.

(v) 4 Rep. 45.

(w) 2 Hal. P. C. 329, 330.

(x) 2 Hal. P. C. 128.

(1) See *Casborus v. People*, 18 Johns., 351; *Commonwealth v. Goddard*, 18 Mass., 455.

(2) But now, formal defects apparent on the face of the indictment can only be taken advantage of by demurrer or motion to quash, and not afterwards. Statute 14 and 15 Vic. c. 100, § 25.

together with the crime itself, in some or other of the former chapters. Of these, some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead; though in very atrocious crimes other circumstances of terror, pain or disgrace, are superadded; as, in treasons \*of all kinds, being drawn or dragged to the place of execution; in high treason affecting the king's person or government, emboweling alive, beheading, and quartering; and in murder, a public dissection. And, in case of any treason committed by a female, the judgment is to be burned alive. But the humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such parts of these judgments as savour of torture or cruelty: a sledge or hurdle being usually allowed to such traitors as are condemned to be drawn; and there being very few instances (and those accidental or by negligence) of any person's being embowelled or burned, till previously deprived of sensation by strangling. Some punishments consist in exile or banishment, by abjuration of the realm, or transportation: others in loss of liberty, by perpetual or temporary imprisonment. Some extend to confiscation, by forfeiture of lands, or movables, or both, or of the profits of lands for life: others induce a disability, of holding offices or employments, being heirs, executors, and the like. Some, though rarely, occasion a mutilation or dismembering, by cutting off the hand or ears; others fix a lasting stigma on the offender, by slitting the nostrils, or branding in the hand or cheek. Some are merely pecuniary, by stated or discretionary fines: and lastly, there are others that consist principally in their ignominy, though most of them are mixed with some degree of corporal pain; and these are inflicted chiefly for such crimes as either arise from indigence, or render even opulence disgraceful. Such as whipping, hard labour in the house of correction, or otherwise, the pillory, the stocks, and the ducking-stool.

Disgusting as this catalogue may seem, it will afford pleasure to an English reader, and do honour to the English law, to compare it with that shocking apparatus of death and torment, to be met with in the criminal codes of almost every other nation in Europe. And it is, moreover, one of the glories of our English law, that the species, though not always the quantity or degree, of punishment is *ascertained* for every offence; and that it is not left in the breast of any \*judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained, for every subject alike, without respect of persons. For, if judgments were to be the private opinions of the judge, men would then be slaves to their magistrates; and would live in society without knowing exactly the conditions and obligations which it lays them under. And besides, as this prevents oppression on the one hand, so on the other it stifles all hopes of impunity or mitigation; with which an offender might flatter himself, if his punishment depended on the humour or discretion of the court. Whereas, where an established penalty is annexed to crimes, the criminal may read their certain consequence in that law; which ought to be the unvaried rule, as it is the inflexible judge, of his actions.

The discretionary fines and discretionary length of imprisonment, which our courts are enabled to impose, may seem an exception to this rule. But the general nature of the punishment, viz., by fine or imprisonment, is, in these cases, fixed and determinate: though the duration and quantity of each must frequently vary, from the aggravations or otherwise of the offence, the quality and condition of the parties, and from innumerable other circumstances. The *quantum*, in particular, of pecuniary fines, neither can, nor ought to be ascertained by an invariable law. The value of money itself changes from a thousand causes, and, at all events, what is ruin to one man's fortune, may be matter of indifference to another's. Thus the law of the twelve tables at Rome fined every person that struck another five-and-twenty *denarii*: this in the more opulent days of the empire, grew to be a punishment of so little consideration, that Aulus Gellius tells a story of one Lucius Neratius, who made

at his diversion to give a blow to whomsoever he pleased, and then tender them the legal forfeiture. Our statute law has not, therefore, often ascertained the quantity of fines, nor the common law ever; it directing such an offence to be punished by fine in general, without specifying the certain sum; [379] which is fully sufficient, when we consider that \*however unlimited the power of the court may seem, it is far from being wholly arbitrary; but its discretion is regulated by law. For the bill of rights (d) has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted (which had a retrospect to some unprecedented proceedings in the court of king's bench, in the reign of King James the Second): and the same statute farther declares, that all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void. Now the bill of rights was only declaratory of the old constitutional law: and accordingly we find it expressly holden, long before, (e) that all such previous grants are void; since thereby many times undue means, and more violent prosecution, would be used for private lucre, than the quiet and just proceeding of law would permit.

The reasonableness of fines in criminal cases has also been usually regulated by the determination of *magna carta*, c. 14, concerning amercements for misbehaviour by the suitors in matters of civil right. "*Liber homo non amercietur pro parvo delicto, nisi secundum modum ipsius delicti; et pro magno delicto, secundum magnitudinem delicti; salvo contenemento suo; et mercator eodem modo, salva mercandisa sua; et villanus eodem modo amercietur, salvo wainagio suo.*" (3) A rule that obtained even in Henry the Second's time (f) and means only that no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear; saving to the landholder his contenement, or land; to the trader his merchandize; and to the countryman his wainage, or team and instruments of husbandry. In order to ascertain which, the great charter also directs that the amercement, which is always inflicted in general terms ("*sit in misericordia*"), shall be set, *ponatur*, or reduced to a certainty, by the oath of good and lawful men of the neighborhood. Which method of liquidating the amercement to a precise sum, was usually performed in the superior courts by the assessment or *affeerment* of the coroner, a sworn officer chosen by the neighborhood, under the equity of the statute Westm. 1, c. 18; and then the judges estricted them into the exchequer. (g) But in the court-leet and court-baron it is still performed by [380] \**affeerors*, or suitors sworn to *affeere*, that is, tax and moderate the general amercement according to the particular circumstances of the offence and the offender. (h) Amercements imposed by the superior courts on their own officers and ministers were *affeered* by the judges themselves; but when a peculiar mulct was inflicted by them on a stranger (not being party to any suit), it was then denominated a *fine*; (i) and the ancient practice was, when any such fine was imposed, to inquire by a jury "*quantum inde regi dare valeat per annum, salva sustentatione sua, et uxoris, et liberorum suorum.*" (j) And since the disuse of such inquest, it is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelihood; but to inflict corporal punishment, or a limited imprisonment, instead of such fine as might amount to imprisonment for life. And this is the reason why fines in the king's court are frequently denominated ransoms, because the pen-

(d) Stat. 1 W. and M. st. 2, c. 2.

(e) 2 Inst. 48.

(f) Glanv. l. 9 cc. 8 and 11.

(g) F. N. B. 76.

(h) The *affeeror's* oath is conceived in the very terms of *magna carta*. Fitzh. Survey, ch. 11.

(i) 6 Rep. 40.

(j) Gilb. Exch. c. 5.

(3) Cruel and unusual punishments are forbidden in the United States by constitutional provisions. See *Barker v. People*, 8 Cow., 686; *State v. Danforth*, 3 Conn., 112; *Commonwealth v. Wyatt*, 6 Rand., 694; *Huber v. Reiley*, 53 Penn. St., 112; *Garcia v. Territory*, 1 New Mex., 415.

alty must otherwise fall upon a man's person, unless it be redeemed or ransomed by a pecuniary fine; (k) according to an ancient maxim, *qui non habet in crumena luat in corpore*. Yet, where any statute speaks both of fine and ransom, it is holden that the ransom shall be treble to the fine at least. (l) (4)

When sentence of death, the most terrible and highest judgment in the laws of England, is pronounced, the immediate inseparable consequence from the common law is *attainder*. For when it is now clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him, puts him out of its protection, and takes no farther care of him than barely to see him executed. (5) He is then called attain, *attinctus*, stained or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court: neither is he capable of performing the functions of another man: for, by an anticipation of his punishment, he is already dead in law. (m) This is after judgment; for there is great difference between a man convicted and *attainted*: though they are frequently through inaccuracy confounded together. After conviction \*only a man is liable to none of these disabilities; for there is still in contemplation of law a possibility of his innocence. [\*381] Something may be offered in arrest of judgment; the indictment may be erroneous, which will render his guilt uncertain, and thereupon the present conviction may be quashed: he may obtain a pardon, or be allowed the benefit of clergy: both which suppose some latent sparks of merit, which plead in extenuation of his fault. But when judgment is once pronounced, both law and fact conspire to prove him completely guilty; and there is not the remotest possibility left of anything to be said in his favour. Upon judgment, therefore, of death, and not before, the attainder of a criminal commences: or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And, therefore, either upon judgment of outlawry, or of death, for treason or felony, a man shall be said to be *attainted*.

The consequences of attainder are forfeiture and corruption of blood.

I. Forfeiture is two-fold; of real and personal estates. First, as to real estates: by attainder in high treason (n) a man forfeits to the king all his lands and tenements of inheritance, whether fee-simple or fee-tail, and all his rights of entry on lands or tenements, which he had at the time of the offence committed, or at any time afterwards, to be forever vested in the crown; and also the profits of all lands and tenements, which he had in his own right for life or years, so long as such interest shall subsist. This forfeiture relates backwards to the time of the treason committed; so as to avoid all intermediate sales and incumbrances, (o) but not those before the fact: and therefore a wife's jointure is not forfeitable for the treason of her husband; because settled upon her previous to the treason committed. But her dower \*is [\*382] forfeited by the express provision of statute 5 and 6 Edw. VI, c. 11. And yet the husband shall be tenant by the curtesy of the wife's lands, if the wife be attainted of treason: (p) for that is not prohibited by the statute. But, though after attainder the forfeiture relates back to the time of the trea-

(k) *Mirr. c. 5, § 2. Lamb. Eirenarch, 575.*

(l) *Dyer, 232.*

(m) 3 *Inst. 313.*

(n) *Co. Litt. 322; 3 Inst. 19; 1 Hal. P. C. 240; 2 Hawk. P. C. 443.*

(o) 3 *Inst. 311.*

(p) 1 *Hal. P. C. 359.*

(4) In any case the judgment must be the same which the law allows, and not other or different; for if it is it will be erroneous, and the prisoner may have it reversed, even though it be not so severe as should have been inflicted. *R. v. Bourne*, 7 A. & E. 58; *Hartung v. People*, 26 N. Y., 167; *Elliott v. People*, 13 Mich., 365. But if the punishment consist of two severable things, as fine and imprisonment, the prisoner cannot be heard to complain that only one is imposed. See *Kane v. People*, 8 Wend., 203.

(5) This statement is not well guarded. Even an attainted felon cannot be killed with impunity by any one without warrant of law.

son committed, yet it does not take effect unless an attainder be had, of which it is one of the fruits; and therefore if a traitor dies before judgment pronounced, or is killed in open rebellion, or is hanged by martial law, it works no forfeiture of his lands; for he never was attainted of treason. (g) But if the chief justice of the king's bench (the supreme coroner of all England) in person, upon the view of the body of one killed in open rebellion, records it and returns the record into his own court, both lands and goods shall be forfeited. (r)

The natural justice of forfeiture or confiscation of property, for treason, (d) is founded on this consideration: that he who hath thus violated the fundamental principles of government, and broken his part of the original contract between king and people, hath abandoned his connections with society; and hath no longer any right to those advantages, which before belonged to him purely as a member of the community; among which *social* advantages, the right of transferring or transmitting property to others is one of the chief. Such forfeitures, moreover, whereby his posterity must suffer as well as himself, will help to restrain a man, not only by the sense of his duty, and dread of personal punishment, but also by his passions and natural affections; and will interest every dependent and relation he has to keep him from offending: according to that beautiful sentiment of Cicero, (t) "*nec vero me fugit quam sit acerbum, parentum scelera filiorum poenis lui: sed hoc præclare legibus comparatum est, ut caritas liberorum amiciores parentes reipublicæ redderet.*" And therefore Aulus Cascellius, a Roman lawyer in the time of the triumvirate used to boast [\*383] that he had two reasons for \*despising the power of the tyrants; his old age and his want of children: for children are pledges to the prince of the father's obedience. (u) Yet many nations have thought, that this posthumous punishment savours of hardship to the innocent; especially for crimes that do not strike at the very root and foundation of society, as treason against the government expressly does. And therefore, though confiscations were very frequent in the times of the earlier emperors, yet Arcadius and Honorius in every other instance but that of treason thought it more just, "*ibi esse poenam, ubi et noxa est;*" and ordered that "*peccata suos teneant auctores, nec ulterius progrediatur metus, quam reperiatur delictum.*" (v) and Justinian also made a law to restrain the punishment of relations, (w) which directs the forfeiture to go, except in the case of *crimen majestatis*, to the next of kin to the delinquent. On the other hand, the Macedonian laws extended even the capital punishment of treason, not only to the children, but to all the relations of the delinquent: (x) and of course their estates must be also forfeited, as no man was left to inherit them. And in Germany, by the famous golden bulle (y) (copied almost *verbatim* from Justinian's code), (z) the lives of the sons of such as conspire to kill an elector are spared, as it is expressed, by the emperor's *particular bounty*. But they are deprived of all their effects and rights of succession, and are rendered incapable of any honour, ecclesiastical or civil: "to the end that, being always poor and necessitous, they may forever be accompanied by the infamy of their father; may languish in continual indigence; and may find (says this merciless edict) their punishment in living, and their relief in dying."

With us, in England, forfeiture of lands and tenements to the crown for treason is by no means derived from the feudal policy (as has been already observed), (a) but was antecedent to the establishment of that system in this island; [\*384] and; \*being transmitted from our Saxon ancestors, (b) and forming a part of the ancient Scandinavian constitution. (c) But in certain treasons relating to the coin (which, as we formerly observed, seem rather a species of the *crimen falsi*, than the *crimen læsæ majestatis*), it is provided by some

(g) Co. Litt. 12. (r) 4 Rep. 57. (s) See book I, page 399.  
 (t) ad Brutum ep. 12. (u) Gravina. 1 § 62. (v) Cod. 9, 47, 22. (w) Nov. 134, c. 12.  
 (x) Qu. Curt. l. 6. (y) cap. 24. (z) l. 9, t. 8, l. 5. (a) See book II, page 361.  
 (b) LL. Aelfr. c. 4. Canut. c. 54. (c) Stiernh. de jure Golt. l. 2, c. 6, and l. 3, c. 2.



of the modern statutes (*d*) which constitute the offence, that it shall work no forfeiture of lands save only for the life of the offender; and by all, that it shall not deprive the wife of her dower. (*e*) And, in order to abolish such hereditary punishment entirely, it was enacted by statute 7 Ann. c. 21, that, after the decease of the late pretender, no attainder for treason should extend to the disinheriting of any heir, nor to the prejudice of any person other than the traitor himself. By which, the law of forfeitures for high treason would by this time have been at an end, had not a subsequent statute intervened to give them a longer duration. The history of this matter is somewhat singular, and worthy observation. At the time of the union, the crime of treason in Scotland was, by the Scots' law, in many respects different from that of treason in England; and particularly in its consequences of forfeitures of entailed estates, which was more peculiarly English; yet it seemed necessary, that a crime so nearly affecting government should, both in its essence and consequences, be put upon the same footing in both parts of the united kingdoms. In new-modeling these laws, the Scotch nation and the English house of commons struggled hard, partly to maintain, and partly to acquire, a total immunity from forfeiture and corruption of blood, which the house of lords as firmly resisted. At length a compromise was agreed to, which is established by this statute, viz., that the same crimes, and no other, should be treason in Scotland that are so in England; and that the English forfeitures and corruption of blood should take place in Scotland till the death of the then pretender; and then cease throughout the whole of Great Britain: (*f*) the lords artfully proposing this temporary clause, in \*hopes (it is said) (*g*) that the prudence of succeeding [\*385] parliaments would make it perpetual. (*h*) This has partly been done by the statute 17 Geo. II, c. 39 (made in the year preceding the late rebellion), the operation of these indemnifying clauses being thereby still farther suspended till the death of the sons of the pretender. (*i*) (6)

In petit treason and felony, the offender also forfeits all his chattel interests absolutely, and the profits of all estates of freehold during life; and after his death, all his lands and tenements in fee simple (but not those in tail) to the crown, for a very short period of time: for the king shall have them for a year and a day, and may commit therein what waste he pleases; which is called the king's year, day, and waste. (*j*) Formerly the king had only a liberty of committing waste on the lands of felons, by pulling down their houses, extirpating their gardens, ploughing their meadows, and cutting down their woods. And a punishment of a similar spirit appears to have obtained in the oriental countries, from the decrees of Nebuchadnezzar and Cyrus in the books of Daniel (*k*) and Ezra; (*l*) which, besides the pain of death inflicted on the delinquents there specified, ordain, "that their houses shall be made a dunghill." But this tending greatly to the prejudice of the public, it was agreed, in the reign of Henry the First, in this kingdom, that the king should have the profits of the land for one year and a day, in lieu of the destruction he was otherwise at liberty to commit: (*m*) and therefore *magna carta* (*n*) provides, that the king shall only hold such lands for a year and a day, and then restore them to the lord of the fee; without any mention made of waste. But the statute 17 Edw. II, *de prerogativa regis* seems to suppose, that the king shall have his year, day and waste; and not the \*year and day *instead of* waste. Which Sir Edward Coke (and the author of the Mirror, before him) very justly [\*386]

(*d*) Stat. 5 Eliz. c. 11. 18 Eliz. c. 1. (*e*) *Ibid.* 8 and 9 Wm. III, c. 26. 15 and 16 Geo. II, c. 22.  
 (*f*) Burnet's Hist. A. D. 1709. (*g*) Considerations on the law of forfeiture, 6. (*h*) See Post. 390.  
 (*i*) The justice and expediency of this provision were defended at the time with much learning and strength of argument in the *Considerations on the law of forfeiture*, first published A. D. 1744. (See Book I, page 244.)  
 (*j*) 2 Inst. 37. (*k*) ch. III, 28. (*l*) ch. vi, 11. (*m*) Mirr. c. 4, § 16. *Flet.* I, 1, c. 22.  
 (*n*) 9 Hen. III, c. 22.

(6) The modification of the law of forfeiture by later statutes is referred to elsewhere. See Book 2, pp. 267, 409, 420.

look upon as an encroachment, though a very ancient one, of the royal prerogative. (o) This year, day, and waste, are now usually compounded for; but otherwise they regularly belong to the crown; and after their expiration, the land would naturally have descended to the heir (as in gavelkind tenure it still does), did not its feudal quality intercept such descent, and give it by way of escheat to the lord. These forfeitures for felony do also arise only upon attainder; and therefore a *felo de se* forfeits no lands of inheritance or freehold, for he never is attainted as a felon. (p) They likewise relate back to the time of the offence committed, as well as forfeitures for treason; so as to avoid all intermediate charges and conveyances. This may be hard upon such as have unwarily engaged with the offender: but the cruelty and reproach must lie on the part, not of the law, but of the criminal; who has thus knowingly and dishonestly involved others in his own calamities.

These are all the forfeitures of real estates created by the common law, as consequential upon attainders by judgment of death or outlawry. I here omit the particular forfeitures created by the statutes of *præmunire* and others: because I look upon them rather as a *part* of the judgment and penalty, inflicted by the respective statutes, than as *consequences* of such judgment; as in treason and felony they are. But I shall just mention, as a part of the forfeiture of real estates, the forfeiture of the profits of lands during life, which extends to two other instances, besides those already spoken of; misprision of treason, (q) and striking in Westminster-hall, or drawing a weapon upon a judge there sitting in the king's courts of justice. (r)

The forfeiture of goods and chattels accrues in every one of the higher kinds [\*387] of offence: in high treason or misprision \*thereof, petit treason, felonies of all sorts, whether clergyable or not, self-murder or felony *de se*, petit larceny, standing mute, and the above-mentioned offences of striking, &c., in Westminster-hall. For *flight* also, on an accusation of treason, felony, or even petit larceny, whether the party be found guilty or acquitted, if the jury find the flight, the party shall forfeit his goods and chattels: for the very flight is an offence, carrying with it a strong presumption of guilt, and is at least an endeavor to allude and stifle the course of justice prescribed by the law. But the jury very seldom find the flight: (s) forfeiture being looked upon, since the vast increase of personal property of late years, as too large a penalty for an offence, to which a man is prompted by the natural love of liberty. (7)

There is a remarkable difference or two between the forfeiture of lands and of goods and chattels. 1. Lands are forfeited upon *attainder*, and not before: goods and chattels are forfeited by *conviction*. Because, in many of the cases where goods are forfeited, there never is any attainder, which happens only where judgment of death or outlawry is given: therefore in those cases the forfeiture must be upon conviction or not at all; and, being necessarily upon conviction in those, it is so ordered in all other cases, for the law loves uniformity. 2. In outlawries for treason or felony, lands are forfeited only by the judgment: but the goods and chattels are forfeited by a man's being first put in the *exigent*, without staying till he is *quinto exactus*, or finally outlawed; for the secreting himself so long from justice is construed a flight in law. (t) 3. The forfeiture of lands has relation to the time of the fact committed, so as to avoid all subsequent sales and incumbrances; but the forfeiture of goods and chattels has no relation backwards; so that those only which a man has at the time of conviction shall be forfeited. Therefore a traitor or felon may *bona fide* sell any of his chattels real or personal, for the sustenance of himself and

(o) *Mirr.* c. 5, § 2.    (p) *3 Inst.* 55.

(q) *Ibid.* 218.

(r) *Ibid.* 141.

(s) *Staundf. P. C.* 183, b.

(t) *3 Inst.* 223.

(7) By Stat. 7 and 8 Geo. IV, c. 28, the jury is no longer to be charged to inquire concerning the lands, tenements, or goods of the accused, nor whether he fled for the offence of which he is accused.

family between the fact and conviction; (u) for personal property is of \*so fluctuating a nature, that it passes through many hands in a short time; and no buyer could be safe, if he were liable to return the goods [\*388] which he had fairly bought, provided any of the prior vendors had committed a treason or felony. Yet, if they be collusively and not *bona fide* parted with merely to defraud the crown, the law, (and particularly the statute 13 Eliz., c. 5) will reach them; for they are all the while truly and substantially the goods of the offender: and as he, if acquitted, might recover them himself, as not parted with for a good consideration; so in case he happens to be convicted, the law will recover them for the king.

II. Another immediate consequence of attainder is the *corruption of blood*, both upwards and downwards, (8), so that an attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the king's superior right of forfeiture: and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor. (v)

This is one of those notions which our laws have adopted from the feudal constitutions, at the time of the Norman conquest; as appears from its being unknown in those tenures which are indisputably Saxon, or gavelkind: wherein, though by treason, according to the ancient Saxon laws, the land is forfeited to the king, yet no corruption of blood, no impediment of descents, ensues; and, on judgment of mere felony, no escheat accrues to the lord. And therefore as every other oppressive mark of feudal tenure is now happily worn away in these kingdoms, it is to be hoped, that this *corruption of blood*, with all its connected consequences, not only of present escheat, but of future incapacities of inheritance even to the twentieth generation, may in process of time be abolished by act of parliament: as it stands upon a very different footing from the forfeiture of lands for high \*treason, affecting the king's person or government. And, indeed, the legislature has, from time to time, appeared very inclinable to give way to so equitable a provision; by enacting, that, in certain treasons respecting the papal supremacy (w) and the public coin (x) and in many of the new-made felonies, created since the reign of Henry the Eighth by act of parliament, corruption of blood shall be saved. But as in some of the acts for creating felonies (and those not of the most atrocious kind) this saving was neglected, or forgotten, to be made, it seems to be highly reasonable and expedient to antiquate the whole of this doctrine by one undistinguishing law: especially as by the aforementioned statute of 7 Ann. c. 21 (the operation of which is postponed by statute 17 Geo. II, c. 39), after the death of the sons of the late pretender, no attainder for treason will extend to the disinheriting any heir, nor the prejudice of any person, other than the offender himself; which virtually abolishes all corruption of blood for treason, though (unless the legislature should interpose) it will still continue for many sorts of felony.

(u) 2 Hawk P. C. 454.

(v) See book II, page 361.

(w) Stat. 5 Eliz. c. 1.

(x) Stat. 5 Eliz. c. 11. 18 Eliz. c. 1. 8 and 9 W. III, c. 24. 15 and 16 Geo. II, c. 28.

(8) By Stat. 3 and 4 Wm. IV, c. 106, attainders no longer obstruct the descent of estates. The constitution of the United States provides that "No attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted." Art. 3, § 3. The whole law respecting attainders and forfeitures for treason and felony is now practically obsolete in the United States.

## CHAPTER XXX.

### OF REVERSAL OF JUDGMENT.

WE are next to consider how judgments, with their several connected consequences of attainder, forfeiture, and corruption of blood, may be set aside. There are two ways of doing this; either by falsifying or reversing the judgment, or else by reprieve or pardon.

A judgment may be falsified, reversed or avoided, in the first place, *without a writ of error*, for matters foreign to or *dehors* the record, that is, not apparent upon the face of it; so that they cannot be assigned for error in the superior court, which can only judge from what appears in the record itself: and therefore if the whole record be not certified, or not truly certified, by the inferior court, the party injured thereby (in both civil and criminal cases) may allege a *diminution* of the record, and cause it to be rectified. Thus, if any judgment whatever be given by persons who had no good commission to proceed against the person condemned, it is void, and may be falsified by showing the special matter without writ of error. As, where a commission issues to A and B, and twelve others, or any two of them, of which A or B shall be one, to take and try indictments; and any of the other twelve proceed without the [\*391] interposition or presence \*of either A or B: in this case all proceedings, trials, convictions and judgments, are void for want of a proper authority in the commissioners, and may be falsified upon bare inspection without the trouble of a writ of error; (a) (1) it being a high misdemeanor in the judges so proceeding, and little (if any thing) short of murder in them all, in case the person so attainted be executed and suffer death. So, likewise, if a man purchases land of another; and afterwards the vendor is, either by outlawry or his own confession, convicted and attainted of treason or felony previous to the sale or alienation; whereby such land becomes liable to forfeiture or escheat; now upon any trial the purchaser is at liberty, without bringing any writ of error, to falsify not only the time of the felony or treason supposed, but the very point of the felony or treason itself; and is not concluded by the confession or the outlawry of the vendor; though the vendor himself is concluded, and not suffered now to deny the fact, which he has by confession or flight acknowledged. But if such attainder of the vendor was by verdict, on the oath of his peers, the alienee cannot be received to falsify or contradict the *fact* of the crime committed; though he is at liberty to prove a mistake in *time*, or that the offence was committed after the alienation, and not before. (b)

Secondly, a judgment may be reversed *by writ of error*: which lies from all inferior criminal jurisdictions to the court of king's bench, and from the king's bench to the house of peers; and may be brought for notorious mistakes in the judgment or other parts of the record: as, where a man is found guilty of perjury and receives the judgment of felony, or for other less palpable errors; such as any irregularity, omission, or want of form in the process of outlawry, or proclamations; the want of a proper *addition* to the defendant's name, according to the statute of additions; for not properly naming the sheriff or other officer of the court, or not duly describing where his county court was

(a) 2 Hawk. P. C. 430.

(b) 3 Inst. 231. 1 Hal. P. C. 351.

(1) That is, if the court had no jurisdiction of the case, its proceedings may be treated as void whenever they come in question. Even the prosecution may treat them as void, and put the accused party on trial again for the same offense. *Commonwealth v. Goddard*, 13 Mass., 455; *People v. Tyler*, 7 Mich., 161.

held; for laying an offence committed in the time of the late king, to be done \*against the peace of the present; and for many other similar causes, [ \*392] which (though allowed out of tenderness to life and liberty) are not much to the credit or advancement of the national justice. These writs of error, to reverse judgments in case of misdemeanors, are not to be allowed of course, but on sufficient probable cause shown to the attorney-general; and then they are understood to be grantable of common right, and *ex debito justitiæ*. (2) But writs of error to reverse attainders in capital cases are only allowed *ex gratia*: and not without express warrant under the king's sign manual, or at least by the consent of the attorney-general. (c) These, therefore, can rarely be brought by the party himself, especially where he is attainted for an offence against the state: but they may be brought by his heir, or executor, after his death, in more favourable times; which may be some consolation to his family. But the easier and more effectual way is,

Lastly, to reverse the attainder by act of parliament. This may be and hath been frequently done, upon motives of compassion, or perhaps from the zeal of the times, after a sudden revolution in the government, without examining too closely into the truth or validity of the errors assigned. And sometimes, though the crime be universally acknowledged and confessed, yet the merits of the criminal's family shall after his death obtain a restitution in blood, honours, and estate, or some or one of them, by act of parliament; which, (so far as it extends) has all the effect of reversing the attainder without casting any reflections upon the justice of the preceding sentence.

The effect of falsifying, or reversing an outlawry, is that the party shall be in the same plight as if he had appeared upon the *capias*; and, if it be before plea pleaded, he shall be put to plead to the indictment; if after conviction, he shall receive the sentence of the law; for all the other proceedings, except only the process of outlawry for his non-appearance, \*remain good and effectual as before. But when judgment, pronounced upon conviction, [ \*398] is falsified or reversed, all former proceedings are absolutely set aside, and the party stands as if he had never been at all accused; restored in his credit, his capacity, his blood, and his estates: with regard to which last, though they be granted away by the crown, yet the owner may enter upon the grantee with as little ceremony as he might enter upon a disseisor. (d) But he still remains liable to another prosecution for the same offence; for the first being erroneous, he never was in jeopardy thereby. (3)

(c) 1 Vern. 170, 175.

(d) 2 Hawk P. C. 462.

(2) See *Mansell v. Reg.* 8 E. and B., 54: *Ex parte Newton*, 4 *id.*, 869. The right to sue out such writs is in the United States government by statutes, and in some states is given to the prosecution as well as the accused.

(3) In England a new trial is not granted in case of felony. *R. v. Murphy*, L. R., 3 P. O., 585; *Reg. v. Bertrand*, 10 Cox, 618, overruling *R. v. Scaife*, 2 Den. C. O., 281; S. O., 17 Q. B., 283. If the conviction appears improper, the practice is to recommend a pardon. *R. v. Frost*, 2 Moo., 140, 171 and note. In misdemeanors new trials are allowed. *R. v. Tremearne*, 5 B. and C., 254.

In the United States new trials may be granted, whether the offense charged be treason, felony, or misdemeanor. *U. S. v. Conner*, 8 McLean, 578; *Grayson v. Com.*, 6 Gratt., 712; *Com. v. Roby*, 12 Pick., 496; *State v. Prescott*, 7 N. H., 287; *State v. Slack*, 6 Ala., 676. An acquittal, even though against the weight of evidence, is final. In the absence of statutory permission no new trial is granted the prosecution. *R. v. Praed, Burr.*, 2257; *State v. Brown*, 16 Conn., 54; *People v. Webb*, 38 Cal., 467.

## CHAPTER XXXI. OF REPRIEVE AND PARDON.

THE only other remaining ways of avoiding the execution of the judgment are by a reprieve, or a pardon; whereof the former is temporary only, the latter permanent.

I. A reprieve, from *reprendre*, to take back, is the withdrawing of a sentence for an interval of time; whereby the execution is suspended. This may be, first, *ex arbitrio judicis*; either before or after judgment; as where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offence be within clergy; or sometimes if it be a small felony, or any favourable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their session be finished, and their commission expired: but this rather by common usage, than of strict right. (a)

Reprieves may also be *ex necessitate legis*: as, where a woman is capitally convicted, and pleads her pregnancy; though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a [\*395] mercy \*dictated by the law of nature, *in favorem prolis*; and therefore no part of the bloody proceedings, in the reign of Queen Mary, hath been more justly detested than the cruelty that was exercised in the island of Guernsey, of burning a woman big with child: and when, through the violence of the flames, the infant sprang forth at the stake, and was preserved by the bystanders, after some deliberation of the priests who assisted at the sacrifice, they cast it again into the fire as a young heretic. (b) A barbarity which they never learned from the laws of ancient Rome; which direct, (c) with the same humanity as our own, "*quod prægnantis mulieris damnatæ pœna differatur, quoad pariat*," which doctrine has also prevailed in England as early as the first memorials of our law will reach. (d) In case this plea be made in stay of execution, the judge must direct a jury of twelve matrons or discreet women to inquire the fact: and if they bring in their verdict *quick with child* (for, barely *with child*, unless it be alive in the womb, is not sufficient), execution shall be stayed generally till the next session; and so from session to session, till either she is delivered, or proves by the course of nature not to have been with child at all. But if she once hath had the benefit of this reprieve, and been delivered, and afterwards becomes pregnant again, she shall not be entitled to the benefit of a farther respite for that cause. (e) For she may now be executed before the child is quick in the womb; and shall not, by her own incontinence, evade the sentence of justice.

Another cause of regular reprieve is, if the offender becomes *non compos* between the judgment and the award of execution: (f) for regularly, as was formerly (g) observed, though a man be *compos* when he commits a capital crime, yet if he becomes *non compos* after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive [\*396] judgment; if after judgment, he \*shall not be ordered for execution: for "*furius solo furore punitur*," and the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings. It is therefore an invariable rule, when any time intervenes between the attainder and the award of execution, to demand of the prisoner what he hath to allege why execution should not be awarded against

(a) 3 Hal. P. C. 412.

(e) 1 Hal. P. C. 389.

(b) Fox, Acts and Mon.

(f) *Ibid.* 370.(c) *Ff.* 48, 19, 2.

(g) See page 24.

(d) *Flet.* 1.1, c. 23.

him: and if he appears to be insane, the judge in his discretion may and ought to reprieve him. Or, the party may *plead* in bar of execution; which plea may be either pregnancy, the king's pardon, an act of grace, or diversity of person, viz., that he is not the same as was attainted, and the like. In this last case a jury shall be impaneled to try this collateral issue, namely, the identity of his person; and not whether guilty or innocent; for that has been decided before. And in these collateral issues the trial should be *instante*, (*h*) and no time allowed the prisoner to make his defence or produce his witnesses, unless he will make oath that he is not the person attainted: (*i*) neither shall any peremptory challenges of the jury be allowed the prisoner; (*j*) though formerly such challenges were held to be allowable, whenever a man's life was in question. (*k*)

II. If neither pregnancy, insanity, non-identity, nor other plea, will avail to avoid the judgment, and stay the execution consequent thereupon, the last and surest resort is in the king's most gracious *pardon*; the granting of which is the most amiable prerogative of the crown. Law (says an able writer) cannot be framed on principles of compassion to guilt; yet justice, by the constitution of England, is bound to be administered in mercy; this is promised by the king in his coronation oath, and it is that act of his government which is the most personal; and most entirely his own. (*l*) The king himself condemns no man; that rugged task he leaves to his courts of justice: the great operation of his sceptre is *mercy*. His power of pardoning was said by our Saxon ancestors (*m*) to be derived *a lege sua dignitatis*: and it is declared in [\*397] parliament, by statute 27 Hen. VIII, c. 24, that no other person hath power to pardon or remit any treason or felonies whatsoever: but that the king hath the whole and sole power thereof, united and knit to the imperial crown of this realm. (*n*)

This is indeed one of the great advantages of monarchy in general, above any other form of government; that there is a magistrate who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment. Pardons (according to some theorists) (*o*) should be excluded in a perfect legislation, where punishments are mild but certain: for that the clemency of the prince seems a tacit disapprobation of the laws. But the exclusion of pardons must necessarily introduce a very dangerous power in the judge or jury, that of construing the criminal law by the spirit instead of the letter; (*p*) or else it must be holden, what no man will seriously avow, that the situation and circumstances of the offender (though they alter not the essence of the crime) ought to make no distinction in the punishment. In democracies however, this power of pardon can never subsist; for there nothing higher is acknowledged than the magistrate who administers the laws: and it would be impolitic for the power of judging and pardoning to centre in one and the same person. (1) This, as the president Montesquieu observes) (*q*) would oblige him very often to contradict himself, to make and to unmake his decisions: it would tend to confound all ideas of right among the mass of the people; as they would find it difficult to tell whether a prisoner was discharged by his innocence, or obtained a pardon through favour. In \*Holland, therefore, if there be no stadtholder, [\*398] there is no power of pardoning lodged in any other member of the

(h) 1 Sid. 72. See Appendix, § 3.

(i) Fost. 48.

(j) 1 Lev. 61.

(k) Fost. 42, 46.

(l) Staundf. P. C. 168. Co. Litt. 187. Hal. Sum. 259.

(m) Law of Forfeitt. 90.

(n) LL. Edw. Conf. c. 18.

(o) And this power belongs only to a king *de facto*, and not to a king *de jure* during the time of usurpation. (Bro. Abr. *t. charter de pardon*, 22.)

(p) Beccar. ch. 20.

(q) *Ibid.* ch. 4.

(1) Sp. L. b. 6, c. 5.

(1) In the United States the power to reprieve and pardon is vested in the president, and in the several states it is given to the executive of the state, with some restrictions in some of them.

state. But in monarchies the king acts in a superior sphere; and though he regulates the whole government as the first mover, yet he does not appear in any of the disagreeable or invidious parts of it. Whenever the nation see him personally engaged, it is only in works of legislature, magnificence, or compassion. To him, therefore, the people look up as the fountain of nothing but bounty and grace; and these repeated acts of goodness, coming immediately from his own hand, endear the sovereign to his subjects, and contribute more than any thing to root in their hearts that filial affection and personal loyalty which are the sure establishment of a prince.

Under this head of pardons, let us briefly consider, 1. The *object* of pardon: 2. The *manner* of pardoning: 3. The method of *allowing* a pardon. 4. The *effect* of such pardon when allowed.

1. And, first, the king may pardon all offences merely against the crown, or the public; excepting, 1. That, to preserve the liberty of the subject, the committing any man to prison out of the realm is, by the *habeas corpus* act, 31 Car. II, c. 2, made a *præmunire*, unpardonable even by the king. Nor, 2. Can the king pardon, where private justice is principally concerned in the prosecution of offenders; "*non potest rex gratiam facere cum injuria et damno aliorum.*" (r) Therefore in appeals of all kinds (which are the suit, not of the king, but of the party injured) the prosecutor may release, but the king cannot pardon. (s) Neither can he pardon a common nuisance, while it remains unredressed, or so as to prevent an abatement of it, though afterwards he may remit the fine: because though the prosecution is vested in the king to avoid multiplicity of suits, yet (during its continuance) this offence savours more of the nature of a [399] private \*injury to each individual in the neighborhood, than of a *public* wrong. (t) Neither, lastly, can the king pardon an offence against a popular or penal statute, after information brought; for thereby the informer hath acquired a private property in his part of the penalty. (u)

There is also a restriction of a peculiar nature, that affects the prerogative of pardoning in case of parliamentary impeachments; viz., that the king's pardon cannot be *pleaded* to any such impeachment so as to impede the inquiry, and stop the prosecution of great and notorious offenders. Therefore when, in the reign of Charles the Second, the earl of Danby was impeached by the house of commons of high treason, and other misdemeanors, and pleaded the king's pardon in bar of the same, the commons alleged, (v) "that there was no precedent that ever any pardon was granted to any person impeached by the commons of high treason, or other high crimes, *depending the impeachment*;" and thereupon resolved, (w) "that the pardon so pleaded was illegal and void, and ought not to be allowed *in bar* of the impeachment of the commons of England;" for which resolution they assigned (x) this reason to the house of lords, "that the setting up a pardon to be a *bar* of an impeachment defeats the whole use and effect of impeachments: for should this point be admitted, or stand doubted, it would totally discourage the exhibiting any for the future; whereby the chief institution for the preservation of the government would be destroyed." Soon after the revolution the commons renewed the same claim, and voted, (y) "that a pardon is not *pleadable in bar* of an impeachment." And, at length, it was enacted by the act of settlement, 12 and 13 Wm. III, c. 2, "that no pardon under the great seal of England shall be *pleadable* to an impeachment by the commons in parliament." But, after the impeachment has [400] been solemnly heard and determined, it is not understood that the \*king's royal grace is farther restrained or abridged: for, after the impeachment and attainder of the six rebel lords in 1715, three of them were from time

(r) 3 Inst. 236.

(s) *Ibid.* 237.

(t) 3 Hawk. P. C. 301.

(u) 3 Inst. 236.

(v) Com. Journ. 26 Apr. 1679.

(w) *Ibid.* 5 May, 1679.(x) *Ibid.* 30 May, 1679.(y) *Ibid.* 6 June, 1689.



to time reprieved by the crown, and at length received the benefit of the king's most gracious pardon. (2)

2. As to the *manner* of pardoning. 1. First, it must be under the great *seal*. A warrant under the privy seal, or sign manual, though it may be a sufficient authority to admit the party to bail, in order to plead the king's pardon, when obtained, in proper form, yet is not of itself a complete, irrevocable pardon. (z) 2. Next, it is a general rule that, wherever it may be reasonably presumed the king is deceived, the pardon is void. (a) Therefore any suppression of truth, or suggestion of falsehood, in a charter of pardon, will vitiate the whole; for the king was misinformed. (b) 3. General words have also a very imperfect effect in pardons. A pardon of all felonies will not pardon a conviction or attainder of felony (for it is presumed the king knew not of those proceedings), but the conviction or attainder must be particularly mentioned; (c) and a pardon of felony will not include piracy; (d) for that is no felony punishable at the common law. 4. It is also enacted by statute 13 Ric. II, st. 2, c. 1, that no pardon for treason, murder, or rape shall be allowed unless the offence be particularly specified therein; and particularly in murder it shall be expressed, whether it was committed by lying in wait, assault, or malice prepense. Upon which Sir Edward Coke observes (e) that it was not the intention of the parliament, that the king should ever pardon murder under these aggravations; and therefore they prudently laid the pardon under these restrictions, because they did not conceive it possible that the king would ever excuse an offence by name, which was attended with such high aggravations. And it is remarkable enough, that there is no precedent of a pardon in the register for any other homicide than that \*which happens *as defendendo* or *per infortunium*: to which two [401] species the king's pardon was expressly confined by the statutes 2 Edw. III, c. 2, and 14 Edw. III, c. 15, which declare that no pardon of homicide shall be granted, but only where the king may do it *by the oath of his crown*; that is to say, where a man slayeth another in his own defence, or by misfortune. But the statute of Richard the Second, before mentioned, enlarges by implication the royal power; provided the king is not deceived in the intended object of his mercy. And, therefore, pardons of murder were always granted with a *non obstante* of the statute of King Richard, till the time of the revolution; when the doctrine of *non obstantes* ceasing, it was doubted whether murder could be pardoned generally; but it was determined by the court of king's bench, (f) that the king may pardon on an indictment of murder, as well as a subject may discharge an appeal. Under these and a few other restrictions, it is a general rule, that a pardon shall be taken most beneficially *for* the subject, and most strongly against the king.

A pardon may also be *conditional*; that is, the king may extend his mercy upon what terms he pleases; and may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend; and this by the common law. (g) Which prerogative is daily exerted in the pardon of felons, on condition of being confined to hard labour for a stated time, or of transportation to some foreign country for life, or for a term of years; such transportation or banishment (h) being allowable and warranted by the *habeas corpus* act, 31 Car. II, c. 2, § 14, and both the impris-

(a) 5 St. Tr. 165, 172.

(a) 2 Hawk. P. C. 333.

(b) 2 Inst. 232.

(c) 2 Hawk. P. C. 333.

(d) 1 Hawk. P. C. 99.

(e) 2 Inst. 236.

(f) Salk. 499.

(g) 2 Hawk. P. C. 394.

(h) Transportation is said (Bar. 352) to have been first inflicted as a punishment by statute 29 Eliz. c. 4.

(3) See Queen v. Boyes, 1 Best and S., 811. As the Lords do not pass judgment in cases of impeachment, until the commons demand it, the commons may indirectly pardon a convicted offender by failing to demand judgment.

In the United States the president can grant no pardon in case of impeachment. Const. of U. S., art. 2, § 2. There is a similar exception to the power to pardon which is conferred upon the governors of the states.

onment and transportation rendered more easy and effectual by statutes 8 Geo. III, c. 15, and 19 Geo. III, c. 74. (3)

3. With regard to the manner of *allowing* pardons: we may observe that a [402] pardon by act of parliament is more \*beneficial than by the king's charter, for a man is not bound to plead it, but the court must *ex officio* take notice of it; (i) neither can he lose the benefit of it by his own *laches* or negligence, as he may of the king's charter of pardon. (k) The king's charter of pardon must be specially pleaded, and that at a proper time: for if a man is indicted, and has a pardon in his pocket, and afterwards puts himself upon his trial by pleading the general issue, he has waived the benefit of such pardon. (l) But, if a man avails himself thereof, as soon as by course of law he may, a pardon may either be pleaded upon arraignment, or in arrest of judgment or in the present stage of proceedings, in bar of execution. Anciently, by statute 10 Edw. III, c. 2, no pardon of felony could be allowed, unless the party found sureties for the good behaviour before the sheriff and coroners of the county. (m) But that statute is repealed by the statute 5 and 6 W. and M. c. 13, which, instead thereof, gives the judges of the court a discretionary power to bind the criminal, pleading such pardon, to his good behaviour, with two sureties, for any term not exceeding seven years.

4. Lastly, the *effect* of such pardon by the king, is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not so much to restore his former, as to give him a new credit and capacity. But nothing can restore or purify the blood when once corrupted, if the pardon be not allowed till after attainder, but the high and transcendent power of parliament. Yet, if a person attainted receives the king's pardon, and afterwards hath a son, that son may be heir to his father, because the father being made a new man, might transmit new inheritable blood; though, had he been born before the pardon, he could never have inherited at all. (n)

## CHAPTER XXXII.

### OF EXECUTION.

THERE now remains nothing to speak of but *execution*; the completion of human punishment. And this in all cases, as well capital as otherwise, must be performed by the legal officer, the sheriff or his deputy; whose warrant for so doing was anciently by precept under the hand and seal of the judge, as it is still practised in the court of the lord high steward, upon the execution of a peer: (a) though in the court of the peers in parliament, it is done by writ from the king. (b) Afterwards it was established, (c) that in case of life, the judge may command execution to be done without any writ. And now the usage is, for the judge to sign the calendar, or list of all the prisoners' names, with their separate judgments in the margin, which is left with the sheriff. As for a capital felony, it is written opposite to the prisoner's name, "let him be hanged by the neck;" formerly in the days of Latin an abbreviation, (d) "*sus. per col.*," for "*suspendatur per collum.*" And this is the only warrant that the sheriff has for so material an act as taking away the life of another.

(i) *Fost.* 43.

(k) 2 *Hawk. P. C.* 397.

(l) 2 *Hawk. P. C.* 396.

(m) *Salk.* 499.

(n) See book II, page 264.

(a) 3 *Hal. P. C.* 409.

(b) See Appendix, § 5.

(c) *Finch, L.* 473.

(d) *Staundf. P. C.* 132.

(3) These statutes are since repealed and new provisions made.

(e) It may certainly afford matter of speculation, that in civil causes there should be such a variety of writs of execution to recover a trifling debt, issued in the king's name, and under the seal of the court, without which the sheriff \*cannot legally stir one step; and yet that the execution of a man, the most important and terrible task of any, should depend upon a mar- [404] ginal note.

The sheriff, upon receipt of his warrant, is to do execution within a convenient time; which in the country is also left at large. In London, indeed, a more solemn and becoming exactness is used, both as to the warrant of execution and the time of executing thereof: for the recorder, after reporting to the king in person the case of the several prisoners, and receiving his royal pleasure, that the law must take its course, issues his warrant to the sheriffs; directing them to do execution on the day and at the place assigned. (f) (1) And, in the court of king's bench, if the prisoner be tried at the bar, or brought there by *habeas corpus*, a rule is made for his execution; either specifying the time and place, (g) or leaving it to the discretion of the sheriff. (h) And, throughout the kingdom, by statute 25 Geo. II. c. 37, it is enacted that, in case of murder, the judge shall in his sentence direct execution to be performed on the next day but one after sentence passed. (i) (2) But otherwise the time and place of execution are by law no part of the judgment. (k) It has been well observed, (l) that it is of great importance, that the punishment should follow the crime as early as possible; that the prospect of gratification or advantage, which tempts the man to commit the crime, should instantly awake the attendant idea of punishment. Delay of execution serves only to separate these ideas; and then the execution itself affects the minds of the spectators rather as a terrible sight, than as the necessary consequence of transgression.

The sheriff cannot alter the manner of the execution by substituting one death for another, without being guilty of felony himself, as has been formerly said. (m) It is held also \*by Sir Edward Coke (n) and Sir Matthew [405] Hale, (o) that even the king cannot change the punishment of the law, by altering the hanging or burning into beheading; though, when beheading is part of the sentence, the king may remit the rest. And notwithstanding some examples to the contrary, Sir Edward Coke stoutly maintains that "*judicandum est legibus, non exemplis*." But others have thought, (p) and more justly, that this prerogative, being founded in mercy, and immemorially exercised by the crown, is part of the common law. For, hitherto, in every instance, all these exchanges have been for more merciful kinds of death; and how far this may also fall within the king's power of granting conditional pardons, viz., by remitting a severe kind of death, on condition that the criminal submits to a milder, is a matter that may bear consideration. It is observable that when Lord Stafford was executed for the popish plot in the reign of King Charles the Second, the then sheriffs of London, having received the king's writ for beheading him, petitioned the house of lords for a command or order from their lordships how the said judgment should be executed; for, he being prosecuted by impeachment, they entertained a notion, which is said to have been countenanced by Lord Russell, that the king could not pardon any part of the sentence. (q) The lords resolved (r) that the scruples of the sheriffs were unnecessary, and declared that the king's writ ought to be obeyed. Disappointed of raising a flame in that assembly, they immediately signified (s) to the house of commons by one of the members that they were not satisfied as to the power of the said writ. The house took two days to consider of

(e) 5 Mod. 22. (f) See Appendix, § 4. (g) St. Trials, VI. 332. Post. 43.  
 (h) See Appendix, § 3. (i) See page 302. (k) So held by the twelve judges, Mich. 10 Geo. III.  
 (l) Boecar. ch. 19. (m) See page 179. (n) 3 Inst. 53. (o) 2 Hal. P. C. 412.  
 (p) Post. 270. F. N. B. 244, h. 19 Rym. Foed. 224. (q) 2 Hume Hist. of G. B. 238.  
 (r) Lords' Journ. 21 Dec. 1680. (s) Com. Journ. 21 Dec. 1680.

(1) This is now changed by stat. 1 Vic. c. 77.  
 (2) This is no longer the law. Stat. 6 and 7 Wm. IV. c. 30.  
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it; and then (t) sullenly resolved that the house was *content* that the sheriff do execute Lord Stafford, by severing his head from his body. It is further related, that when, afterwards, the same Lord Russell was condemned for high treason upon indictment, the king, while he remitted the ignominious part of [\*408] the sentence, observed, "that his lordship would now find he was possessed of that prerogative which in the case of Lord Stafford, he had denied him." (u) One can hardly determine, at this distance from those turbulent times, which most to disapprove of, the indecent and sanguinary zeal of the subject, or the cool and cruel sarcasm of the sovereign.

To conclude: it is clear that if, upon judgment to be hanged by the neck till he is dead, the criminal be not thoroughly killed, but revives, the sheriff must hang him again. (v) For the former hanging was no execution of the sentence; and if a false tenderness were to be indulged in such cases a multitude of collusions might ensue. Nay even while abjurations were in force, (x) such a criminal, so reviving, was not allowed to take sanctuary and abjure the realm; but his fleeing to sanctuary was held an escape in the officer. (y) (8)

And, having thus arrived at the *last* stage of criminal proceedings, or execution, the end and completion of human *punishment*, which was the sixth and last head to be considered under the division of *public wrongs*, the fourth and last object of the laws of England; it may now seem high time to put a period to these Commentaries, which the author is very sensible, have already swelled to too great a length. But he cannot dismiss the student, for whose use alone these rudiments were originally compiled, without endeavouring to recall to his memory some principal outlines of the legal constitution of this country; by a short historical review of the most considerable revolutions that have happened in the laws of England from the earliest to the present times. And this task he will attempt to discharge, however imperfectly, in the next or concluding chapter.

## CHAPTER XXXIII.

### OF THE RISE, PROGRESS, AND GRADUAL IMPROVEMENTS OF THE LAWS OF ENGLAND.

**BEFORE** we enter on the subject of this chapter, in which I propose, by way of supplement to the whole, to attempt an historical review of the most remarkable changes and alterations that have happened in the laws of England, I must, first of all, remind the student that the rise and progress of many principal points and doctrines have been already pointed out in the course of these Commentaries, under their respective divisions; these having, therefore, been particularly discussed already, it cannot be expected that I should re-examine them with any degree of minuteness; which would be a most tedious undertaking. What I therefore at present propose is, only to mark out some outlines of an English juridical history, by taking a chronological view of the state of our laws, and their successive mutations at different periods of time.

The several periods, under which I shall consider the state of our legal polity, are the following six: 1. From the earliest times to the Norman conquest: 2. From the Norman conquest to the reign of King Edward the First:

(t) *Ibid.* 23 Dec. 1680.

(u) 2 Hume, 290.

(v) 2 Hal. P. C. 412. 2 Hawk. P. C. 463.

(x) See page 322.

(y) Fitz. Abr. t. corone. 83. Finch. L. 467.

(8) Executions in England are now private and within the walls of the prison. Statute 31 and 32 Vic. c. 24. And burning, as before stated, is abolished. See *supra*, 376, note.

3. From thence to the reformation: 4. From the reformation to the \*restoration of King Charles the Second: 5. From thence to the revolution [\*408] in 1688: 6. From the revolution to the present time.

I. And, first, with regard to the ancient Britons, the *aborigines* of our island, we have so little handed down to us concerning them with any tolerable certainty, that our inquiries here must needs be very fruitless and defective. However, from Cæsar's account of the tenets and discipline of the ancient Druids in Gaul, in whom centered all the learning of these western parts, and who were, as he tells us, sent over to Britain (that is, to the island of Mona or Anglesey) to be instructed; we may collect a few points which bear a great affinity and resemblance to some of the modern doctrines of our English law. Particularly the very notion itself of an oral, unwritten law, delivered down from age to age, by custom and tradition merely, seems derived from the practice of the Druids, who never committed any of their instructions to writing: possibly for want of letters; since it is remarkable that in all the antiquities, unquestionably British, which the industry of the moderns has discovered, there is not in any of them the least trace of any character or letter to be found. The partible quality, also, of lands by the custom of gavel-kind, which still obtains in many parts of England, and did universally over Wales till the reign of Henry VIII, is undoubtedly of British original. So, likewise, is the ancient division of the goods of an intestate between his widow and children, or next of kin; which has since been revived by the statute of distributions. And we may also remember an instance of a slighter nature, mentioned in the present volume, where the same custom has continued from Cæsar's time to the present; that of burning a woman guilty of the crime of petit treason by killing her husband. (1)

The great variety of nations that successively broke in upon and destroyed both the British inhabitants and \*constitution, the Romans, the Picts, [\*409] and after them the various clans of Saxons and Danes, must necessarily have caused great confusion and uncertainty in the laws and antiquities of the kingdom; as they were very soon incorporated and blended together, and, therefore, we may suppose, mutually communicated to each other their respective usages, (a) in regard to the rights of property and the punishment of crimes. So that it is morally impossible to trace out with any degree of accuracy, when the several mutations of the common law were made, or what was the respective original of those several customs we at present use, by any chemical resolution of them to their first and component principles. We can seldom pronounce that *this* custom was derived from the Britons; *that* was left behind by the Romans; *this* was a necessary precaution against the Picts; *that* was introduced by the Saxons; discontinued by the Danes, but afterwards restored by the Normans.

Wherever this can be done, it is a matter of great curiosity, and some use: but this can very rarely be the case; not only from the reason above mentioned, but also from many others. First, from the nature of traditional laws in general; which, being accommodated to the exigencies of the times, suffer by degrees insensible variations in practice: (b) so that, though upon comparison we plainly discern the alteration of the law from what it was five hundred years ago, yet it is impossible to define the precise period in which that alteration accrued, any more than we can discern the changes of the bed of a river, which varies its shores by continual decreases and alluvions. Secondly, this becomes impracticable from the antiquity of the kingdom and its government: which alone, though it had been disturbed by no foreign invasions, would make it impossible to search out the original of its laws; unless we had as authentic monuments thereof as the Jews had by the hand of Moses. (c)

(a) Hal. Hist. C. L. 68.

(b) *Ibid.* 57.

(c) *Ibid.*, 58.

(1) Both petit treason, and burning as a mode of execution, are now abolished.

{ \*410] Thirdly, \*this uncertainty of the true origin of particular customs must also in part have arisen from the means whereby christianity was propagated among our Saxon ancestors in this island; by learned foreigners brought over from Rome and other countries, who undoubtedly carried with them many of their own national customs; and probably prevailed upon the state to abrogate such usages as were inconsistent with our holy religion, and to introduce many others that were more conformable thereto. And this perhaps may have partly been the cause that we find not only some rules of the Mosaic, but also of the imperial and pontifical laws, blended and adopted into our own system.

A farther reason may also be given for the great variety, and of course the uncertain original, of our ancient established customs; even after the Saxon government was firmly established in this island: viz., the subdivision of the kingdom into an heptarchy, consisting of seven independent kingdoms, peopled and governed by different clans and colonies. This must necessarily create an infinite diversity of laws: even though all those colonies, of Jutes, Angles, Anglo-Saxons, and the like, originally sprung from the same mother-country, the great northern hive; which poured forth its warlike progeny, and swarmed all over Europe, in the sixth and seventh centuries. This multiplicity of laws will necessarily be the case in some degree, where any kingdom is cantoned out into provincial establishments; and not under one common dispensation of laws, though under the same sovereign power. Much more will it happen where seven unconnected states are to form their own constitution and superstructure of government, though they all begin to build upon the same or similar foundations.

When, therefore, the West Saxons had swallowed up all the rest, and King Alfred succeeded to the monarchy of England, whereof his grandfather Egbert was the founder, his mighty genius prompted him to undertake a most great { \*411] and necessary work, which he is said to have executed in as \*masterly a manner: no less than to new-model the constitution; to rebuild it on a plan that should endure for ages; and, out of its old, discordant materials, which were heaped upon each other in a vast and rude irregularity, to form one uniform and well connected whole. This he effected, by reducing the whole kingdom under one regular and gradual subordination of government, wherein each man was answerable to his immediate superior for his own conduct and that of his nearest neighbours: for to him we owe that master-piece of judicial polity, the subdivision of England into tithings and hundreds, if not into counties; all under the influence and administration of one supreme magistrate, the king; in whom, as in a general reservoir, all the executive authority of the law was lodged, and from whom justice was dispersed to every part of the nation by distinct, yet communicating, ducts and channels; which wise institution has been preserved for near a thousand years unchanged, from Alfred's to the present time. He also, like another Theodosius, collected the various customs that he found dispersed in the kingdom, and reduced and digested them into one uniform system or code of laws, in his *Dom-bec*, or *liber judicialis*. This he compiled for the use of the court-baron, hundred and county court, the court-leet and sheriff's tourn; tribunals, which he established, for the trial of all causes, civil and criminal, in the very districts wherein the complaint arose: all of them subject, however, to be inspected, controlled and kept within the bounds of the universal or common law, by the king's own courts; which were then itinerant, being kept in the king's palace, and removing with his household in those royal progresses which he continually made from one end of the kingdom to the other.

The Danish invasion and conquest, which introduced new foreign customs, was a severe blow to this noble fabric: but a plan so excellently concerted could never be long thrown aside. So that, upon the expulsion of these intruders, the English returned to their ancient law; retaining, however, some few of the

customs of their late visitants; which went \*under the name of *Dane-Lage*: as the code compiled by Alfred was called the *West-Saxon-Lage*; [\*412] and the local constitutions of the ancient kingdom of Mercia, which obtained in the counties nearest to Wales, and probably abounded with many British customs, were called the *Mercen-Lage*. And these three laws were, about the beginning of the eleventh century, in use in different counties of the realm: the provincial polity of counties, and their subdivisions, having never been altered or discontinued through all the shocks and mutations of government, from the time of its first institution; though the laws and customs therein used, have (as we shall see) often suffered considerable changes.

For King Edgar (who, besides his military merit, as founder of the English navy, was also a most excellent civil governor), observing the ill effects of three distinct bodies of laws prevailing at once in separate parts of his dominions, projected and begun what his grandson, King Edward the Confessor, afterwards completed, viz., one uniform digest or body of laws, to be observed throughout the whole kingdom; being probably no more than a revival of King Alfred's code, with some improvements suggested by necessity and experience; particularly the incorporating some of the British, or rather Mercian, customs, and also such of the Danish as were reasonable and approved, into the *West-Saxon-Lage*, which was still the groundwork of the whole. And this appears to be the best supported and most plausible conjecture (for certainty is not to be expected) of the rise and original of that admirable system of maxims and unwritten customs which is now known by the name of the *common law*, as extending its authority universally over all the realm; and which is doubtless of Saxon parentage.

Among the most remarkable of the Saxon laws we may reckon. 1. The constitution of parliaments, or rather, general assemblies of the principal and wisest men in the nation: the *wittena gemote*, or *commune consilium*, of the ancient Germans, which was not yet reduced to the forms and \*distinctions of [\*413] our modern parliament; without whose concurrence, however, no new law could be made, or old one altered. 2. The election of their magistrates by the people; originally even that of their kings, till dear-bought experience evinced the convenience and necessity of establishing an hereditary succession to the crown. But that of all subordinate magistrates, their military officers or heretochs, their sheriffs, their conservators of the peace, their coroners, their port-reeves, (since changed into mayors and bailiffs), and even their tything-men and borsholders at the leet, continued, some till the Norman conquest, others for two centuries after, and some remain to this day. 3. The descent of the crown, when once a royal family was established, upon nearly the same hereditary principles upon which it has ever since continued; only that, perhaps, in case of minority, the next of kin of full age would ascend the throne, as king, and not as protector: though after his death, the crown immediately reverted back to the heir. 4. The great paucity of capital punishments for the first offence; even the most notorious offenders being allowed to commute it for a fine or *weregild*, or, in default of payment, perpetual bondage; to which our benefit of clergy has now in some measure succeeded. 5. The prevalence of certain customs, as heriots and military services in proportion to every man's land, which much resembled the feudal constitution: but yet were exempt from all its rigorous hardships: and which may be well enough accounted for, by supposing them to be brought from the continent by the first Saxon invaders, in the primitive moderation and simplicity of the feudal law, before it got into the hands of the Norman jurists, who extracted the most slavish doctrines and oppressive consequences out of what was originally intended as a law of liberty. 6. That their estates were liable to forfeiture for treason, but that the doctrine of escheats and corruption of blood for felony, or any other cause, was utterly unknown amongst them. 7. The descent of their lands to all the males equally, without any right of primogeniture; a custom which obtained among the

Britons, was agreeable to the Roman law, and continued among the Saxons till the Norman conquest: \*though really inconvenient, and more especially [ \*414] destructive to ancient families; which are, in monarchies, necessary to be supported, in order to form and keep up a nobility, or intermediate state between the prince and the common people. 8. The courts of justice consisted principally of the county courts, and, in cases of weight or nicety, the king's court, held before himself in person, at the time of his parliaments; which were usually holden in different places, according as he kept the three great festivals of Christmas, Easter, and Whitsuntide. An institution which was adopted by King Alonzo VII, of Castile, about a century after the conquest: who, at the same three great feasts, was wont to assemble his nobility and prelates in his court; who there heard and decided all controversies, and then, having received his instructions, departed home. (d) These county courts, however, differed from the modern ones, in that the ecclesiastical and civil jurisdiction were blended together, the bishop and the ealdorman, or sheriff, sitting in the same county court; and also that the decisions and proceedings therein were much more simple and unembarrassed; an advantage which will always attend the infancy of any laws, but wear off as they gradually advance to antiquity. 9. Trials among a people who had a very strong tincture of superstition, were permitted to be by *ordeal*, by the *corsned*, or morsel of exorcration, or by *wager of law* with compurgators, if the party chose it; but frequently they were also by *jury*: for, whether or no their juries consisted precisely of twelve men, or were bound to a strict unanimity; yet the general constitution of this admirable criterion of truth, and most important guardian both of public and private liberty, we owe to our Saxon ancestors. Thus stood the general frame of our polity at the time of the Norman invasion; when the second period of our legal history commences.

II. This remarkable event wrought as great an alteration in our laws as it did in our ancient line of kings: and though the alteration of the former was effected rather by the \*consent of the people than any right of con- [ \*415] quest, yet that consent seems to have been partly extorted by fear, and partly given without any apprehension of the consequences which afterwards ensued.

1. Among the first of these alterations we may reckon the separation of the ecclesiastical courts from the civil; effected in order to ingratiate the new king with the popish clergy, who for some time before had been endeavouring all over Europe to exempt themselves from the secular power; and whose demands the conqueror, like a politic prince, thought it prudent to comply with, by reason that their reputed sanctity had a great influence over the minds of the people; and because all the little learning of the times was engrossed into their hands, which made them necessary men, and by all means to be gained over to his interests. And this was the more easily effected, because the disposal of all the episcopal sees being then in the breast of the king, he had taken care to fill them with Italian and Norman prelates.

2. Another violent alteration of the English constitution consisted in the depopulation of whole counties, for the purposes of the king's royal diversion; and subjecting both them and all the ancient forests of the kingdom to the unreasonable severities of forest-laws imported from the continent, whereby the slaughter of a beast was made almost as penal as the death of a man. In the Saxon times, though no man was allowed to kill or chase the king's deer, yet he might start any game, pursue, and kill it, upon his own estate. But the rigour of these new constitutions vested the sole property of all the game in England in the king alone; (2) and no man was entitled to disturb any fowl

(d) Mod. Un. Hist. xx. 114.

(2) This is controverted by Mr. Christian, in the note to p. 419, of book 2, of his edition of this work.



of the air, or any beast of the field, of such kinds as were specially reserved for the royal amusement of the sovereign, without express license from the king by a grant of a chase or free warren: and these franchises were granted as much with a view to preserve the breed of animals as to indulge the subject. From a similar principle to which, though the forest-laws are now mitigated, and by degrees \*grown entirely obsolete, yet from this root has [\*416] sprung a bastard slip, known by the name of the game-law, now arrived to and wantoning in its highest vigour: both founded upon the same unreasonable notions of permanent property in wild creatures; and both productive of the same tyranny to the commons; but with this difference, that the forest-laws established only one mighty hunter throughout the land; the game-laws have raised a little Nimrod in every manor. And in one respect the ancient law was much less unreasonable than the modern: for the king's grantee of a chase or free-warren might kill game in every part of his franchise; but now, though a freeholder of less than 100*l.* a year is forbidden to kill a partridge upon his own estate, yet nobody else (not even the lord of the manor, unless he hath a grant of free-warren) can do it without committing a trespass, and subjecting himself to an action.

3. A third alteration in the English laws was by narrowing the remedial influence of the county courts, the great seats of Saxon justice, and extending the *original* jurisdiction of the king's justiciars to all kinds of causes, arising in all parts of the kingdom. To this end the *aula regis*, with all its multifarious authority, was erected; and a capital justiciary appointed, with powers so large and boundless, that he became at length a tyrant to the people, and formidable to the crown itself. The constitution of this court, and the judges themselves who presided there, were fetched from the duchy of Normandy: and the consequence naturally was, the ordaining that all proceedings in the king's courts should be carried on in the Norman, instead of the English language. A provision the more necessary, because none of his Norman justiciars understood English; but as evident a badge of slavery as ever was imposed upon a conquered people. This lasted till King Edward the Third obtained a double victory, over the armies of France in their own country, and their language in our courts here at home. But there was one mischief too deeply rooted thereby, and which this caution of \*King Edward came too late [\*417] to eradicate. Instead of the plain and easy method of determining suits in the county courts, the chicanes and subtleties of Norman jurisprudence had taken possession of the king's courts, to which every cause of consequence was drawn. Indeed that age, and those immediately succeeding it, were the æra of refinement and subtilty. There is an active principle in the human soul, that will ever be exerting its faculties to its utmost stretch, in whatever employment, by the accidents of time and place, the general plan of education, or the customs and manners of the age and country, it may happen to find itself engaged. The northern conquerors of Europe were then emerging from the grossest ignorance in point of literature; and those who had leisure to cultivate its progress, were such only as were cloistered in monasteries, the rest being all soldiers or peasants. And, unfortunately, the first rudiments of science which they imbibed were those of Aristotle's philosophy, conveyed through the medium of his Arabian commentators; which were brought from the east by the Saracens into Palestine and Spain, and translated into barbarous Latin. So that, though the materials upon which they were naturally employed, in the infancy of a rising state, were those of the noblest kind; the establishment of religion, and the regulations of civil polity; yet having only such tools to work with, their execution was trifling and flimsy. Both the divinity and the law of those times were therefore frittered into logical distinctions, and drawn out into metaphysical subtleties, with a skill most amazingly artificial: but which serves no other purpose than to show the vast powers of the human intellect, however vainly or preposterously employed.

Hence law in particular, which (being intended for universal reception) ought to be a plain rule of action, became a science of the greatest intricacy; especially when blended with the new refinements engrafted upon feudal property: which refinements were from time to time gradually introduced by the Norman practitioners, with a view to supersede (as they did in great measure) the more homely, but more intelligible, maxims of distributive justice among the [418] Saxons. And, to say the truth, these \*scholastic reformers have transmitted their dialect and finesses to posterity, so interwoven in the body of our legal polity that they cannot now be taken out without a manifest injury to the substance. Statute after statute has in later times been made, to pare off these troublesome excrescences, and restore the common law to its pristine simplicity and vigour; and the endeavour has greatly succeeded: but still the scars are deep and visible; and the liberality of our modern courts of justice is frequently obliged to have recourse to unaccountable fictions and circuities, in order to recover that equitable and substantial justice, which for a long time was totally buried under the narrow rules and fanciful niceties of metaphysical and Norman jurisprudence.

4. A fourth innovation was the introduction of the trial by combat, for the decision of all civil and criminal questions of fact in the last resort. This was the immemorial practice of all the northern nations; but first reduced to regular and stated forms among the Burgundi, about the close of the fifth century, and from them it passed to other nations, particularly the Franks and the Normans: which last had the honour to establish it here, though clearly an unchristian, as well as most uncertain, method of trial. But it was a sufficient recommendation of it to the conqueror and his warlike countrymen, that it was the usage of their native duchy of Normandy.

5. But the last and most important alteration, both in our civil and military polity, was the engrafting on all landed estates, a few only excepted, the fiction of feudal tenure; which drew after it a numerous and oppressive train of servile fruits and appendages; aids, reliefs, primer seisins, wardships, marriages, escheats, and fines for alienation; the genuine consequences of the maxim then adopted, that all the lands in England were derived from, and holden, mediately or immediately, of the crown.

The nation at this period seems to have groaned under as absolute a slavery [419] as was in the power of a warlike, an \*ambitious, and a politic prince to create. The consciences of men were enslaved by sour ecclesiastics, devoted to a foreign power, and unconnected with the civil state under which they lived: who now imported from Rome for the first time the whole *farrago* of superstitious novelties, which had been engendered by the blindness and corruption of the times, between the first mission of Augustin, the monk, and the Norman conquest; such as transubstantiation, purgatory, communion in one kind, and the worship of saints and images; not forgetting the universal supremacy and dogmatical infallibility of the holy see. The laws, too, as well as the prayers, were administered in an unknown tongue. The ancient trial by jury gave way to the impious decision by battel. The forest-laws totally restrained all rural pleasures and manly recreations. And in cities and towns the case was no better; all company being obliged to disperse, the fire and candle to be extinguished, by eight at night, at the sound of the melancholy *curfew*. The ultimate property of all lands, and a considerable share of the present profits, were vested in the king, or by him granted out to his Norman favourites; who, by a gradual progression of slavery, were absolute vassals to the crown, and as absolute tyrants to the commons. Unheard of forfeitures, talliages, aids, and fines were arbitrarily extracted from the pillaged landlords in pursuance of the new system of tenure. And, to crown all, as a consequence of the tenure by knight-service, the king had always ready at his command an army of sixty thousand knights or *milites*; who were bound, upon pain of confiscating their estates, to attend him in time of invasion, or to quell

any domestic insurrection. Trade, or foreign merchandise, such as it then was, was carried on by the Jews and Lombards, and the very name of an English fleet, which King Edward had rendered so formidable, was utterly unknown to Europe: the nation consisting wholly of the clergy, who were also the lawyers; the barons, or great lords of the land; the knights, or soldiery, who were the subordinate landholders; and the burghers, or inferior tradesmen, who, from their insignificance, happily retained, in their socage and burgage tenure, some \* points of their ancient freedom. All the rest were [420] villeins or bondmen.

From so complete and well-concerted a scheme of servility, it has been the work of generations for our ancestors to redeem themselves and their posterity into that state of liberty which we now enjoy; and which, therefore, is not to be looked upon as consisting of mere encroachments on the crown, and infringements on the prerogative, as some slavish and narrow-minded writers in the last century endeavored to maintain; but as, in general, a gradual restoration of that ancient constitution, whereof our Saxon forefathers had been unjustly deprived, partly by the policy, and partly by the force, of the Norman. How that restoration has, in a long series of years, been step by step effected, I now proceed to inquire.

William Rufus proceeded on his father's plan, and in some points extended it; particularly with regard to the forest-laws. But his brother and successor, Henry the First, found it expedient, when first he came to the crown, to ingratiate himself with the people; by restoring (as our monkish historians tell us) the laws of King Edward the Confessor. The ground whereof is this: that by charter he gave up the great grievances of marriage, ward, and relief, the beneficial pecuniary *fruits* of his feudal tenures; but reserved the tenures themselves for the same military purposes that his father introduced them. He, also, abolished the *curfew*: (e) for, though it is mentioned in our laws a full century afterwards, (f) yet it is rather spoken of as a known *time* of night (so denominated from that abrogated usage), than as a still subsisting custom. There is extant a code of laws in his name, consisting partly of those of the Confessor, but with great additions and alterations of his own; and chiefly calculated for the regulation of the county courts. It contains some directions as to crimes and their punishments (that of theft being made capital in his reign), and a few things relating to estates, \* particularly as to the [421] descent of lands: which being by the Saxon laws equally to all the sons, by the feudal or Norman, to the eldest only, King Henry here moderated the difference; directing the eldest son to have only the principal estate, "*primum patris feudum*," the rest of his estates, if he had any others, being equally divided among them all. On the other hand, he gave up to the clergy the free election of bishops and mitred abbots; reserving, however, these ensigns of patronage, *conge d'eslire*, custody of the temporalties when vacant, and homage upon their restitution. He lastly united again for a time the civil and ecclesiastical courts, which union was soon dissolved by his Norman clergy: and, upon that final dissolution, the cognizance of testamentary causes seems to have been first given to the ecclesiastical court. The rest remained as in his father's time; from whence we may easily perceive how far short this was of a thorough restitution of King Edward's or the Saxon laws.

The usurper Stephen, as the manner of usurpers is, promised much at his accession, especially with regard to redressing the grievances of the forest-laws, but performed no great matter either in that or in any other point. It is from his reign, however, that we are to date the introduction of the Roman civil and canon laws into this realm: and at the same time was imported the doctrine of appeals to the court of Rome, as a branch of the canon law.

By the time of King Henry the Second, if not earlier, the charter of Henry the First seems to have been forgotten: for we find the claim of marriage,

(e) Spelm. Cod. LI. Wm. I. 288. Hen. I. 269.

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(f) Stat. Civ. Lond. 13 Edw. I.

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ward, and relief, then flourishing in full vigour. The right of primogeniture seems also to have tacitly revived, being found more convenient for the public than the parcelling of estates into a multitude of minute subdivisions. However, in this prince's reign much was done to methodize the laws, and reduce them into a regular order; as appears from that excellent treatise of Glanvil; which, though some of it be now antiquated and altered, yet, when compared [\*422] with the code of Henry the First, \*carries a manifest superiority. (g) Throughout his reign, also, was continued the important struggle, which we have had occasion so often to mention, between the laws of England and Rome: the former supported by the strength of the temporal nobility, when endeavoured to be supplanted in favour of the latter by the popish clergy. Which dispute was kept on foot till the reign of Edward the First: when the laws of England, under the new discipline introduced by that skilful commander, obtained a complete and permanent victory. In the present reign of Henry the Second, there are four things which peculiarly merit the attention of a legal antiquarian: 1. The constitutions of the parliament at Clarendon, A. D., 1164, whereby the king checked the power of the pope and his clergy, and greatly narrowed the total exemption they claimed from the secular jurisdiction: though his farther progress was unhappily stopped by the fatal event of the disputes between him and Archbishop Becket. 2. The institution of the office of justices in eyre, *in itinere*; the king having divided the kingdom into six circuits (a little different from the present), and commissioned these new created judges to administer justice, and try writs of assize in the several counties. These remedies are said to have been then first invented; before which all causes were usually terminated in the county courts, according to the Saxon custom; or before the king's justiciaries in the *aula regis*, in pursuance of the Norman regulations. The latter of which tribunals, travelling about with the king's person, occasioned intolerable expense and delay to the suitors; and the former, however proper for little debts or minute actions, where even injustice is better than procrastination, were now become liable to too much ignorance of the law, and too much partiality as to facts, to determine matters of considerable moment. 3. The introduction and establishment of the grand assize, or trial by a special kind of jury in a writ of right, at the option of the tenant or defendant, instead of the barbarous and Norman trial by battle. 4. To this time must also be referred the introduction of escuage, or pecuniary \*commutation for personal military [\*423] service; which in process of time was the parent of the ancient subsidies granted to the crown by parliament, and the land tax of later times.

Richard the First, a brave and magnanimous prince, was a sportsman as well as a soldier; and, therefore, enforced the forest laws with some rigour; which occasioned many discontents among his people: though (according to Matthew Paris) he repealed the penalties of castration, loss of eyes, and cutting off the hands and feet, before inflicted on such as transgressed in hunting; probably finding that their severity prevented prosecutions. He also, when abroad, composed a body of naval laws at the Isle of Oleron, which are still extant, and of high authority; for in his time we began again to discover, that (as an island) we were naturally a maritime power. But with regard to civil proceedings, we find nothing very remarkable in this reign, except a few regulations regarding the Jews, and the justices in eyre: the king's thoughts being chiefly taken up by the knight errantry of a croisade against the Saracens in the holy land.

In King John's time, and that of his son, Henry the Third, the rigours of the feudal tenures and the forest laws were so warmly kept up, that they occasioned many insurrections of the barons or principal feudatories: which at last had this effect, that first King John, and afterwards his son, consented to the two famous charters of English liberties, *magna carta* and *carta de foresta*. Of these the latter was well calculated to redress many grievances and encroachments of the

(g) Hal. Hist. C. L. 122.

crown, in the exertion of forest-law: and the former confirmed many liberties of the church, and redressed many grievances incident to feudal tenures, of no small moment at the time; though now, unless considered attentively and with this retrospect, they seem but of trifling concern. But, besides these feudal provisions, care was also taken therein to protect the subject against other oppressions, then frequently arising from unreasonable amercements, from illegal distresses, or other process for debts or services due to the crown, and \*from the tyrannical abuse of the prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony in the same manner as it still remains: prohibited for the future the grants of exclusive fisheries; and the erection of new bridges so as to oppress the neighbourhood. With respect to private rights; it established the testamentary power of the subject over part of his personal estate, the rest being distributed among his wife and children; it laid down the law of dower, as it hath continued ever since; and prohibited the appeals of women, unless for the death of their husbands. In matters of public police and national concern: it enjoined an uniformity of weights and measures; gave new encouragements to commerce, by the protection of merchant strangers; and forbade the alienation of lands in mortmain. With regard to the administration of justice: besides prohibiting all denials or delays of it, it fixed the court of common pleas at Westminster, that the suitors might no longer be harassed with following the king's person in all its progresses; and at the same time brought the trial of issues home to the very doors of the freeholders by directing assizes to be taken in the proper counties, and establishing annual circuits; it also corrected some abuses then incident to the trials by wager of law and of battle; directed the regular awarding of inquest for life or member; prohibited the king's inferior ministers from holding pleas of the crown, or trying any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the exchequer; and regulated the time and place of holding the inferior tribunals of justice, the county court, sheriff's tourn, and court-leet. It confirmed and established the liberties of the city of London, and all other cities, boroughs, towns, and ports of the kingdom. And, lastly (which alone would have merited the title that it bears, of the *great charter*), it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers, or the law of the land. (3)

\*However, by means of these struggles, the pope in the reign of King John, gained a still greater ascendant here, than he ever had before enjoyed; which continued through the long reign of his son, Henry the Third: in the beginning of whose time the old Saxon trial by ordeal was also totally abolished. And we may by this time perceive in Bracton's treatise, a still farther improvement in the method and regularity of the common law, especially in the point of pleadings. (4) Nor must it be forgotten that the first traces which remain of the separation of the greater barons from the less, in the constitution of parliaments, are found in the great charter of King John; though omitted in that of Henry III, and that, towards the end of the latter of these reigns, we find the first record of any writ for summoning knights, citizens and burgesses to parliament. And here we conclude the second period of our English legal history.

(4) Hal. Hist. C. L. 156.

(3) The 39th chapter of the charter of John was: "Ne corpus liberi hominis capiatur nec imprisonetur nec disseisiatur nec utlagetur nec exuletur, nec aliquo modo destruat, nec rex eat vel mittat super eum vi, nisi per iudicium parium suorum vel per legem terræ." By the charter of Henry III, the provision was slightly altered: "Nullus liber homo capiatur vel imprisonetur aut disseisiatur de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittimus, nisi per legale iudicium parium suorum vel per legem terræ." See Cooley's Const. Lim, 351, n.

III. The third commences with the reign of Edward the First, who hath justly been styled our English Justinian. For in his time the law did receive so sudden a perfection, that Sir Matthew Hale does not scruple to affirm, (i) that more was done in the first thirteen years of his reign to settle and establish the distributive justice of the kingdom, than in all the ages since that time put together.

It would be endless to enumerate all the particulars of these regulations; but the principal may be reduced under the following general heads. 1. He established, confirmed, and settled the great charter and charter of forests. 2. He gave a mortal wound to the encroachments of the pope and his clergy, by limiting and establishing the bounds of ecclesiastical jurisdiction: and by obliging the ordinary, to whom all the goods of intestates at that time belonged, to discharge the debts of the deceased. 3. He defined the limits of the several temporal courts of the highest jurisdiction, those of the king's bench, common [\*426] pleas, and exchequer; so as \*they might not interfere with each other's proper business: to do which they must now have recourse to a fiction, very necessary and beneficial in the present enlarged state of property. 4. He settled the boundaries of the inferior courts in counties, hundreds, and manors: confining them to causes of no great amount, according to their primitive institution: though of considerably greater, than by the alteration of the value of money they are now permitted to determine. 5. He secured the property of the subject, by abolishing all arbitrary taxes and talliages, levied without the consent of the national council. 6. He guarded the common justice of the kingdom from abuses, by giving up the royal prerogative of sending mandates to interfere in private causes. 7. He settled the form, solemnities and effect of fines levied in the court of common pleas: though the thing itself was of Saxon original. 8. He first established a repository for the public records of the kingdom; few of which are ancients than the reign of his father, and those were by him collected. 9. He improved upon the laws of King Alfred, by that great and orderly method of watch and ward, for preserving the public peace and preventing robberies, established by the statute of Winchester. 10. He settled and reformed many abuses incident to tenures, and removed some restraints on the alienation of landed property, by the statute of *quia emptores*. 11. He instituted a speedier way for the recovery of debts, by granting execution, not only upon goods and chattels, but also upon lands, by writ of *elegit*; which was of signal benefit to a trading people: and upon the same commercial ideas, he also allowed the charging of lands in a statute merchant, to pay debts contracted in trade, contrary to all feudal principles. 12. He effectually provided for the recovery of advowsons, as temporal rights; in which, before, the law was extremely deficient. 13. He also effectually closed the great gulf, in which all the landed property of the kingdom was in danger of being swallowed, by his reiterated statutes of mortmain; most admirably adapted to meet the frauds that had then been devised, though afterwards contrived to be evaded by the invention of uses. \*14. He established a new [\*427] limitation of property by the creation of estates-tail; concerning the good policy of which, modern times have, however, entertained a very different opinion. 15. He reduced all Wales to the subjection, not only of the crown, but in great measure of the laws of England (which was thoroughly completed in the reign of Henry the Eighth); and seems to have entertained a design of doing the like by Scotland, so as to have formed an entire and complete union of the island of Great Britain.

I might continue this catalogue much farther—but upon the whole we may observe, that the very scheme and model of the administration of common justice between party and party, was entirely settled by this king; (k) and has continued nearly the same, in all succeeding ages, to this day, abating some few alterations, which the humor or necessity of subsequent times hath occa-

(i) Hal. Hist. C. L. 158.

(k) Hal. Hist. C. L. 162.

sioned. The forms of writs, by which actions are commenced, were perfected in his reign, and established as models for posterity. The pleadings consequent upon the writs, were then short, nervous and perspicuous; not intricate, verbose and formal. The legal treatises, written in his time, as Britton, Fleta, Hengham, and the rest, are, for the most part, law at this day; or at least, *were* so, till the alteration of tenures took place. And, to conclude, it is from this period, from the exact *observation of magna carta*, rather than from its *making* or *renewal*, in the days of his grandfather and father, that the liberty of Englishmen began again to rear its head: though the weight of the military tenures hung heavy upon it for many ages after.

I cannot give a better proof of the excellence of his constitutions than that from his time to that of Henry the Eighth, there happened very few, and those not very considerable, alterations in the legal *forms* of proceedings. As to matter of *substance*: the old Gothic powers of electing the principal subordinate magistrates, the sheriffs, and \*conservators of the peace, were taken [\*428] from the people in the reigns of Edward II and Edward III; and justices of the peace were established instead of the latter. In the reign, also, of Edward the Third, the parliament is supposed most probably to have assumed its present form by a separation of the commons from the lords. The statute for defining and ascertaining treasons was one of the first productions of this new-modelled assembly; and the translation of the law proceedings from French into Latin another. Much also was done, under the auspices of this magnanimous prince, for establishing our domestic manufactures; by prohibiting the exportation of English wool, and the importation or wear of foreign cloth or furs; and by encouraging cloth-workers from other countries to settle here. Nor was the legislature inattentive to many other branches of commerce, or indeed, to commerce in general: for, in particular, it enlarged the credit of the merchant, by introducing the statute staple; whereby he might the more readily pledge his lands for the security of his mercantile debts. And, as personal property now grew by the extension of trade to be much more considerable than formerly, care was taken, in case of intestacies, to appoint administrators, particularly nominated by the law, to distribute that personal property among the creditors and kindred of the deceased, which before had been usually applied, by the officers of the ordinary, to uses then denominated pious. The statutes also of *præmunire*, for effectually depressing the civil power of the pope, were the work of this and the subsequent reign. And the establishment of a laborious parochial clergy, by the endowment of vicarages out of the overgrown possessions of the monasteries, added lustre to the close of the fourteenth century; though the seeds of the general reformation, which were thereby first sown in the kingdom, were almost overwhelmed by the spirit of persecution, introduced into the laws of the land by the influence of the regular clergy.

From this time to that of Henry the Seventh, the civil wars and disputed titles to the crown gave no leisure for farther \*juridical improvement; [\*429] "*nam silent leges inter arma.*" And yet it is to these very disputes that we owe the happy loss of all the dominions of the crown on the continent of France; which turned the minds of our subsequent princes entirely to domestic concerns. To these, likewise, we owe the method of barring entails by the fiction of *common recoveries*; invented originally by the clergy to evade the statutes of mortmain, but introduced under Edward the Fourth for the purpose of unfettering estates, and making them more liable to forfeiture: while, on the other hand, the owners endeavoured to protect them by the universal establishment of *uses*, another of the clerical inventions.

In the reign of Henry the Seventh, his ministers (not to say the king himself) were more industrious in hunting out prosecutions upon old and forgotten penal laws, in order to extort money from the subject, than in framing any new and beneficial regulations. For the distinguishing character of this reign

was that of amassing treasure in the king's coffers, by every means that could be devised: and almost every alteration in the laws, however salutary or otherwise in their future consequences, had this and this only for their great and immediate object. To this end the court of star-chamber was new modelled, and armed with powers the most dangerous and unconstitutional, over the persons and properties of the subject. Informations were allowed to be received, in lieu of indictments, at the assizes and sessions of the peace, in order to multiply fines and pecuniary penalties. The statute of fines for landed property was craftily and covertly contrived, to facilitate the destruction of entails, and make the owners of real estates more capable to forfeit as well as to alien. The benefit of clergy (which so often intervened to stop attainders and save the inheritance) was now allowed only once to lay offenders, who only could have inheritances to lose. A writ of *capias* was permitted in all actions on the case, and the defendant might in consequence be outlawed; because upon such outlawry his goods became the property of the crown. In short, there [430] is hardly a statute in this reign \*introduative of a new law, or modifying the old, but what either directly or obliquely tended to the emolument of the exchequer.

IV. This brings us to the fourth period of our legal history, viz: the reformation of religion under Henry the Eighth, and his children; which opens an entire new scene in ecclesiastical matters; the usurped power of the pope being now forever routed and destroyed, all his connections with this island cut off, the crown restored to its supremacy over spiritual men and causes, and the patronage of bishoprics being once more indisputably vested in the king. And, had the spiritual courts been at this time reunited to the civil, we should have seen the old Saxon constitution with regard to the *ecclesiastical* polity completely restored.

With regard also to our *civil* polity, the statute of wills, and the statute of uses (both passed in the reign of this prince), made a great alteration as to property; the former by allowing the *devise* of real estates by will, which before was in general forbidden; the latter, by endeavouring to destroy the intricate nicety of *uses*, though the narrowness and pedantry of the courts of common law prevented this statute from having its full beneficial effect. And thence the courts of equity assumed a jurisdiction, dictated by common justice and common sense; which, however arbitrarily exercised or productive of jealousies in its infancy, has at length been matured into a most elegant system of rational jurisprudence; the principles of which (notwithstanding they may differ in forms) are now equally adopted by the courts of both law and equity. From the statute of uses, and another statute of the same antiquity (which protected estates for years from being destroyed by the reversioner), a remarkable alteration took place in the mode of conveyancing: the ancient assurance of feoffment and livery upon the land being now very seldom practised, since the more easy and more private invention of transferring property, by secret conveyances to uses, and long terms of years being now continually [431] created in mortgages and \*family settlements, which may be moulded to a thousand useful purposes by the ingenuity of an able artist.

The farther attacks in this reign upon the immunity of estates-tail, which reduced them to a little more than the conditional fees at the common law, before the passing of the statute *de donis*; the establishment of recognizances in the nature of a statute-staple, for facilitating the raising of money upon landed security; and the introduction of the bankrupt laws, as well for the punishment of the fraudulent, as the relief of the unfortunate trader; all these were capital alterations of our legal polity, and highly convenient to that character, which the English began now to re-assume, of a great commercial people. The incorporation of Wales with England, and the more uniform administration of justice, by destroying some counties palatine, and abridging the unreasonable privileges of such as remained, added dignity and strength to the



monarchy; and, together with the numerous improvements before observed upon, and the redress of many grievances and oppressions which had been introduced by his father, will ever make the administration of Henry VIII a very distinguished æra in the annals of judicial history.

It must be however remarked, that (particularly in his latter years) the royal prerogative was then strained to a very tyrannical and oppressive height; and, what was the worst circumstance, its encroachments were established by law, under the sanction of those pusillanimous parliaments, one of which, to its eternal disgrace, passed a statute, whereby it was enacted that the king's proclamations should have the force of acts of parliament; and others concurred in the creation of that amazing heap of wild and new-fangled treasons, which were slightly touched upon in a former chapter. (1) Happily for the nation, this arbitrary reign was succeeded by the minority of an amiable prince; during the short sunshine of which, great part of these extravagant laws were repealed. And to do justice to the shorter reign of Queen Mary, \*many salutary [\*432] and popular laws in civil matters were made under her administration; perhaps the better to reconcile the people to the bloody measures which she was induced to pursue, for the re-establishment of religious slavery: the well-concerted schemes for effecting which, were (through the providence of God) defeated by the seasonable accession of Queen Elizabeth.

The religious liberties of the nation being, by that happy event, established (we trust) on an eternal basis, (though obliged in their infancy to be guarded, against papists and other non-conformists, by laws of too sanguinary a nature); the forest-laws having fallen into disuse; and the administration of civil rights in the courts of justice being carried on in a regular course, according to the wise institutions of King Edward the First, without any material innovations: all the principal grievances introduced by the Norman conquest seem to have been gradually shaken off, and our Saxon constitution restored, with considerable improvements: except only in the continuation of the military tenures, and a few other points, which still armed the crown with a very oppressive and dangerous prerogative. It is also to be remarked that the spirit of enriching the clergy and endowing religious houses had (through the former abuse of it) gone over to such a contrary extreme, and the princes of the house of Tudor and their favourites had fallen with such avidity upon the spoils of the church, that a decent and honourable maintenance was wanting to many of the bishops and clergy. This produced the *restraining* statutes, to prevent the alienation of lands and tithes belonging to the church and universities. The number of indigent persons being also greatly increased, by withdrawing the alms of the monasteries, a plan was formed in the reign of Queen Elizabeth, more humane and beneficial than even the feeding and clothing of millions; by affording them the means (with proper industry) to feed and to clothe themselves. And, the farther any subsequent plans for maintaining the poor have departed from this institution, the more impracticable and even pernicious their visionary attempts have proved.

\*However, considering the reign of Queen Elizabeth in a great and political view, we have no reason to regret many subsequent alterations [\*433] in the English constitution. For, though in general she was a wise and excellent princess, and loved her people: though in her time trade flourished, riches increased, the laws were duly administered, the nation was respected abroad, and the people happy at home: yet the increase of the power of the star-chamber, and the erection of the high commission court in matters ecclesiastical, were the work of her reign. She also kept her parliament at a very awful distance: and in many particulars she, at times, would carry the prerogative as high as her most arbitrary predecessors. It is true, she very seldom exerted this prerogative, so as to oppress individuals; but still she had it to exert; and therefore the felicity of her reign depended more on her want of opportunity

(1) See page 88.

and inclination, than want of power, to play the tyrant. This is a high encomium on her merit; but at the same time it is sufficient to show, that these were not those golden days of genuine liberty that we formerly were taught to believe: for surely the true liberty of the subject consists not so much in the gracious behaviour, as in the limited power, of the sovereign.

The great revolutions that had happened, in manners and in property, had paved the way, by imperceptible yet sure degrees, for as great a revolution in government: yet, while that revolution was effecting, the crown became more arbitrary than ever, by the progress of those very means which afterwards reduced its power. It is obvious to every observer that, till the close of the Lancastrian civil wars, the property and the power of the nation were chiefly divided between the king, the nobility, and the clergy. The commons were generally in a state of great ignorance; their personal wealth, before the extension of trade, was comparatively small; and the nature of their landed property was such as kept them in continual dependence upon their feudal lord, being usually some powerful baron, some opulent abbey, \*or [\*434] sometimes the king himself. Though a notion of general liberty had strongly pervaded and animated the whole constitution, yet the particular liberty, the natural equality, and personal independence of individuals, were little regarded or thought of; nay, even to assert them was treated as the height of sedition and rebellion. Our ancestors heard, with detestation and horror, those sentiments rudely delivered, and pushed to most absurd extremes, by the violence of a Cade and a Tyler; which have since been applauded, with a zeal almost rising to idolatry, when softened and recommended by the eloquence, the moderation, and the arguments of a Sidney, a Locke, and a Milton.

But when learning, by the invention of printing and the progress of religious reformation, began to be universally disseminated; when trade and navigation were suddenly carried to an amazing extent, by the use of the compass and the consequent discovery of the Indies; the minds of men, thus enlightened by science, and enlarged by observation and travel, began to entertain a more just opinion of the dignity and rights of mankind. An inundation of wealth flowed in upon the merchants, and middling rank; while the two great estates of the kingdom, which formerly had balanced the prerogative, the nobility and clergy, were greatly impoverished and weakened. The popish clergy, detected in their frauds and abuses, exposed to the resentment of the populace, and stripped of their land and revenues, stood trembling for their very existence. The nobles, enervated by the refinements of luxury (which knowledge, foreign travel and the progress of the politer arts, are too apt to introduce with themselves), and fired with disdain at being rivaled in magnificence by the opulent citizens, fell into enormous expenses; to gratify which they were permitted, by the policy of the times, to dissipate their overgrown estates, and alienate their ancient patrimonies. This gradually reduced their power and their influence within a very moderate bound; while the king, by the spoil of the monasteries, and the great increase of the customs, grew rich, independent and haughty; and the \*commons were not yet sensible of [\*435] the strength they had acquired, nor urged to examine its extent by new burthens or oppressive taxations, during the sudden opulence of the exchequer. Intent upon acquiring new riches, and happy in being freed from the insolence and tyranny of the orders more immediately above them, they never dreamed of opposing the prerogative to which they had been so little accustomed; much less of taking the lead in opposition, to which by their weight and their property they were now entitled. The latter years of Henry the Eighth were therefore the times of the greatest despotism that have been known in this island since the death of William the Norman: the prerogative as it then stood by common law (and much more when extended by act of parliament), being too large to be endured in a land of liberty.

Queen Elizabeth, and the intermediate princes of the Tudor line, had almost

the same legal powers, and sometimes exerted them as roughly, as their father, King Henry the Eighth. But the critical situation of that princess with regard to her legitimacy, her religion, her enmity with Spain, and her jealousy of the Queen of Scots, occasioned greater caution in her conduct. She, probably, or her able advisers, had penetration enough to discern how the power of the kingdom had gradually shifted its channel, and wisdom enough not to provoke the commons to discover and feel their strength. She therefore threw a veil over the odious part of the prerogative; which was never wantonly thrown aside, but only to answer some important purpose: and, though the royal treasury no longer overflowed with the wealth of the clergy, which had been all granted out, and had contributed to enrich the people, she asked for supplies with such moderation, and managed them with so much economy, that the commons were happy in obliging her. Such, in short, were her circumstances, her necessities, her wisdom, and her good disposition, that never did a prince so long and so entirely, for the space of half a century together, reign in the affections of the people.

\*On the accession of King James I, no new degree of royal power [436] was added to or exercised by him; but such a sceptre was too weighty to be wielded by such a hand. The unreasonable and imprudent exertion of what was then deemed to be prerogative, upon trivial and unworthy occasions, and the claim of a more absolute power inherent in the kingly office than had ever been carried into practice, soon awakened the sleeping lion. The people heard with astonishment doctrines preached from the throne and the pulpit subversive of liberty and property, and all the natural rights of humanity. They examined into the divinity of this claim, and found it weakly and fallaciously supported: and common reason assured them, that if it were of human origin, no constitution could establish it without power of revocation, no precedent could sanctify, no length of time could confirm it. The leaders felt the pulse of the nation, and found they had ability as well as inclination to resist it: and accordingly resisted and opposed it, whenever the pusillanimous temper of the reigning monarch had courage to put it to the trial; and they gained some little victories in the cases of concealments, monopolies and the dispensing power. In the mean time, very little was done for the improvement of private justice, except the abolition of sanctuaries, and the extension of the bankrupt laws, the limitation of suits and actions, and the regulating of informations upon penal statutes. For I cannot class the laws against witchcraft and conjuration under the head of improvements; nor did the dispute between Lord Ellesmere and Sir Edward Coke, concerning the powers of the court of chancery, tend much to the advancement of justice.

Indeed, when Charles the First succeeded to the crown of his father, and attempted to revive some enormities, which had been dormant in the reign of King James, the loans and benevolences extorted from the subject, the arbitrary imprisonments for refusal, the exertion of martial law in time of peace, and other domestic grievances, clouded the morning of that misguided prince's reign; which, though the noon of it began a little to brighten, [437] at last went down in blood, and left the whole kingdom in darkness. It must be acknowledged that, by the petition of right, enacted to abolish these encroachments, the English constitution received great alteration and improvement. But there still remained the latent power of the forest-laws, which the crown most unseasonably revived. The legal jurisdiction of the star-chamber and high commission courts was extremely great; though their usurped authority was still greater. And if we add to these the disuse of parliaments, the ill-timed zeal and despotic proceedings of the ecclesiastical governors in matters of mere indifference, together with the arbitrary levies of tonnage and poundage, ship-money and other projects, we may see grounds most amply sufficient for seeking redress in a legal, constitutional way. This redress, when sought, was also constitutionally given: for all these oppressions were actually

abolished by the king in parliament, before the rebellion broke out, by the several statutes for triennial parliaments, for abolishing the star-chamber and high commission courts, for ascertaining the extent of forests and forest-laws, for renouncing ship-money and other exactions, and for giving up the prerogative of knighting the king's tenants *in capite* in consequence of their feudal tenures; though it must be acknowledged that these concessions were not made with so good a grace as to conciliate the confidence of the people. Unfortunately, either by his own mismanagement, or by the arts of his enemies, the king had lost the reputation of sincerity; which is the greatest unhappiness that can befall a prince. Though he formerly had strained his prerogative, not only beyond what the genius of the present times would bear, but also beyond the examples of former ages, he had now consented to reduce it to a lower ebb than was consistent with monarchical government. A conduct so opposite to his temper and principles, joined with some rash actions and unguarded expressions, made the people suspect that his condescension was merely temporary. Flushed, therefore, with the success they had gained, fired with [\*438] resentment for past oppressions, \*and dreading the consequences if the king should regain his power, the popular leaders (who in all ages have called themselves the *people*) began to grow insolent and ungovernable; their insolence soon rendered them desperate: and despair at length forced them to join with a set of military hypocrites and enthusiasts, who overturned the church and monarchy, and proceeded with deliberate solemnity to the trial and murder of their sovereign.

I pass by the crude and abortive schemes for amending the laws in the times of confusion which followed; the most promising and sensible whereof (such as the establishment of new trials, the abolition of feudal tenures, the act of navigation, and some others) were adopted in the

V. Fifth, period, which I am next to mention, viz., after the restoration of King Charles II. Immediately upon which the principal remaining grievance, the doctrine and consequences of military tenures, were taken away and abolished except in the instance of corruption of inheritable blood, upon attainder of treason and felony. And though the monarch, in whose person the regal government was restored, and with it our ancient constitution, deserves no commendation from posterity, yet in his reign (wicked, sanguinary and turbulent as it was), the concurrence of happy circumstances was such that from thence we may date not only the re-establishment of our church and monarchy, but also the complete restitution of English liberty, for the first time since its total abolition at the conquest. For therein not only these slavish tenures, the badge of foreign dominion, with all their oppressive appendages, were removed from incumbering the estates of the subject: but also an additional security of his person from imprisonment was obtained by that great bulwark of our constitution, the *habeas corpus act*. These two statutes, with regard to our property and persons form a second *magna carta*, as beneficial and effectual as that of Running-Mead. That only pruned the luxuriances of the feudal system; but the statute of Charles the Second extirpated all its \*slaveries; except [\*439] perhaps in copyhold tenure; and there also they are now in great measure enervated by gradual custom, and the interposition of our courts of justice. *Magna carta* only, in general terms, declared, that no man should be imprisoned contrary to law: the *habeas corpus* act points him out effectual means, as well to release himself, though committed even by the king in council, as to punish all those who shall thus unconstitutionally misuse him.

To these I may add the abolition of the prerogatives of purveyance and preemption; the statute for holding triennial parliaments; the test and corporation acts, which secure both our civil and religious liberties; the abolition of the writ *de hæretico comburendo*; the statute of frauds and perjuries, a great and necessary security to private property; the statute for distribution of intestates' estates, and that of amendments and *jeofails*, which cut off those

superfluous niceties which so long had disgraced our courts: together with many other wholesome acts that were passed in this reign, for the benefit of navigation and the improvement of foreign commerce: and the whole, when we likewise consider the freedom from taxes and armies which the subject then enjoyed, will be sufficient to demonstrate this truth, "that the constitution of England had arrived to its full vigour, and the true balance between liberty and prerogative was happily established by *law*, in the reign of King Charles the Second."

It is far from my intention to palliate or defend many very iniquitous proceedings, *contrary to all law*, in that reign, through the artifice of wicked politicians, both in and out of employment. What seems incontestible is this; that *by the law (m)* as it then stood (notwithstanding some invidious, nay, dangerous, branches of the prerogative have since been lopped \*off, and the [\*440] rest more clearly defined), the people had as large a portion of real liberty as is consistent with a state of society; and sufficient power, residing in their own hands, to assert and preserve that liberty, if invaded by the royal prerogative. For which I need but appeal to the memorable catastrophe of the next reign. For when King Charles's deluded brother attempted to enslave the nation, he found it was beyond his power: the people both could, and did, resist him; and, in consequence of such resistance, obliged him to quit his enterprise and his throne together. Which introduces us to the last period of our legal history, viz.:

VI. From the revolution in 1688 to the present time. In this period many laws have passed; as the bill of rights, the toleration-act, the act of settlement with its conditions, the act for uniting England with Scotland, and some others: which have asserted our liberties in more clear and emphatical terms; have regulated the succession of the crown by parliament, as the exigencies of religious and civil freedom required; have confirmed and exemplified the doctrine of resistance, when the executive magistrate endeavours to subvert the constitution; have maintained the superiority of the laws above the king, by pronouncing his dispensing power to be illegal; have indulged tender consciences with every religious liberty, consistent with the safety of the state; have established triennial, since turned into septennial, elections of members to serve in parliament; have excluded certain officers from the house of commons; have restrained the king's pardon from obstructing parliamentary impeachments; have imparted to all the lords an equal right of trying their fellow-peers; have regulated trials for high treason; have afforded our posterity a hope that corruption of blood may one day be abolished and forgotten; have (by the desire of his present majesty) set bounds to the civil list, and placed the administration of that revenue in hands that are accountable to parliament; and have (by the like desire) made the judges completely independent of the king, his ministers, and his successors. Yet, though these provisions have, in appearance and \*nominally, reduced the strength of the executive power to [\*441] a much lower ebb than in the preceding period; if on the other hand we throw into the opposite scale (what perhaps the immoderate reduction of the ancient prerogative may have rendered in some degree necessary) the vast acquisition of force, arising from the riot-act, and the annual expedience of a standing army; and the vast acquisition of personal attachment, arising from the magnitude of the national debt, and the manner of levying those yearly millions that are appropriated to pay the interest; we shall find that the crown has gradually and imperceptibly, gained almost as much in influence as it has apparently lost in prerogative.

The chief alterations of moment (for the time would fail me to descend to *minutiæ*.) in the administration of private justice during this period, are the

(m) The point of time at which I would choose to fix this *theoretical* perfection of our public law, is in the year 1679, after the *habeas corpus* act was passed, and that for licensing the press had expired; though the years which immediately followed it were times of great *practical* oppression.

solemn recognition of the law of nations with respect to the rights of ambassadors: the cutting off, by the statute for the amendment of the law, a vast number of excrescences, that in process of time had sprung out of the practical part of it; the protection of corporate rights by the improvements in writs of *mandamus*, and informations in nature of *quo warranto*: the regulations of trials by jury, and the admitting witnesses for prisoners upon oath: the farther restraints upon alienation of lands in mortmain: the annihilation of the terrible judgment of *peine fort et dure*: the extension of the benefit of clergy by abolishing the pedantic criterion of reading: the counterbalance to this mercy, by the vast increase of capital punishment: the new and effectual methods for the speedy recovery of rents: the improvements which have been made in ejectments for the trying of titles: the introduction and establishment of paper-credit by indorsements upon bills and notes, which have shown the legal possibility and convenience (which our ancestors so long doubted) of assigning a *chose in action*; the translation of all legal proceedings into the English language; the erection of courts of conscience for recovering small debts, and (which is much the better plan) the reformation of county courts: the great system of marine jurisprudence, of which the foundations have been [\*442] laid, by clearly \*developing the principles on which policies of insurance are founded, and by happily applying those principles to particular cases: and, lastly, the liberality of sentiment, which (though late) has now taken possession of our courts of common law, and induced them to adopt (where facts can be clearly ascertained) the same principles of redress as have prevailed in our courts of equity, from the time that Lord Nottingham presided there; and this, not only where specially empowered by particular statutes (as in the case of bonds, mortgages and set-offs), but by extending the remedial influence of the equitable writ of trespass on the case according to its primitive institution by King Edward the First, to almost every instance of injustice not remedied by any other process. And these, I think, are all the material alterations that have happened with respect to private justice in the course of the present century.

Thus, therefore, for the amusement and instruction of the student, I have endeavoured to delineate some rude outlines of a plan for the history of our laws and liberties; from their first rise and gradual progress, among our British and Saxon ancestors, till their total eclipse at the Norman conquest, from which they have gradually emerged, and risen to the perfection they now enjoy, at different periods of time. We have seen in the course of our inquiries, in this and the former books, that the fundamental maxims and rules of the law, which regard the rights of persons, and the rights of things, the private injuries that may be offered to both, and the crimes which affect the public, have been and are every day improving, and are now fraught with the accumulated wisdom of ages: that the forms of administering justice came to perfection under Edward the First; and have not been much varied, nor always for the better, since: that our religious liberties were fully established at the reformation; but that the recovery of our civil and political liberties was a work of longer time; they not being thoroughly and completely regained till after the restoration of King Charles, nor fully and explicitly acknowledged and defined till the æra of the happy revolution. Of a constitution so wisely contrived, [\*443] so strongly raised, and so highly finished, it is hard to speak with that praise which is justly and severely its due:—the thorough and attentive contemplation of it will furnish its best panegyric. It hath been the endeavour of these Commentaries, however the execution may have succeeded, to examine its solid foundations, to mark out its extensive plan, to explain the use and distribution of its parts, and, from the harmonious concurrence of those several parts, to demonstrate the elegant proportion of the whole. We have taken occasion to admire at every turn the noble monuments of ancient simplicity, and the more curious refinements of modern art. Nor have its faults

been concealed from view, for faults it has; lest we should be tempted to think it of more than human structure; defects, chiefly arising from the decays of time, or the rage of unskilful improvements in later ages. To sustain, to repair, to beautify this noble pile, is a charge intrusted principally to the nobility, and such gentlemen of the kingdom as are delegated by their country to parliament. The protection of **THE LIBERTY OF BRITAIN** is a duty which they owe to themselves, who enjoy it; to their ancestors, who transmitted it down; and to their posterity, who will claim at their hands this, the best birthright, and noblest inheritance of mankind.

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## EDITOR'S REVIEW.

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THE just exultation with which our commentator reviewed the gradual improvement in the laws of England, which had continued to his own time, may well be felt by the English statesman of the present day, when the legislation of the succeeding period is presented to his view. During no equal period in English history were the changes in the English constitution so great and manifest, nor the modifications in English law so radical or so beneficent. Indeed, the England of to-day is, in many particulars, so different from the England of Blackstone's time, and its system of law is pervaded by a spirit so much milder and more just, that, upon many points, our author seems to be writing of some far-off and barbarous realm, rather than of the England which we know, and the justice, humanity, and equity of whose laws we admire, and are, for the most part, content to copy.

In notes to the preceding pages, we have endeavored to point out the changes in the law which have been introduced by statute, and the student will be enabled, as he progresses, to compare the past with the present, and to form some estimate of how the English system of laws which now prevails differs from that which was in force when our English ancestors colonized this country, bringing with them the common law to plant and acclimate upon our shores. But it may be desirable that, at the conclusion of our task, we refer briefly to some of the most striking and important of the changes which have been made, as we may thus, by bringing them together into one general summary, the better appreciate the general effect of all, than could possibly be done by the contemplation of each as a separate and distinct event.

The union of Ireland with England, and the abolition of the Irish parliament, was an act which promised at once strength to the empire and beneficence to Ireland, by incorporating it more intimately as a constituent part of the realm, and advancing its people from the condition of those of a conquered province, controlled and governed mainly in the interest of the conquerors, to that of freemen, entitled to a like voice with their fellows in the making of the laws, and to the like redress for all injuries. If the result of the union has not thus far answered the expectations of its advocates, it is, in part, because the difficulties were too deeply seated to be reached, except by long and patient probing and experiment; and we may reasonably hope that the more recent efforts in that direction—the abolition of the Irish church establishment, and the pending reform in the land laws—will do much to relieve the distress of that unhappy country, and to place it, in point of prosperity and contentment, on a level with other parts of the empire.

The most important statutes in the interests of our common humanity were those which made the foreign slave trade piracy, and which finally uprooted,

utterly the condition of servitude in all the territories subject to the crown of Great Britain. In immediate prosperity to the countries directly concerned, this act also, has failed to answer expectation, but the general benefit to the world at large has been incalculable, and the effects are constantly spreading wider and farther, until the present generation may well hope to witness the utter extinction of human slavery among the nations professing the Christian religion, or entitled, by their civilization and intelligence, to claim the benefits and come under the obligations of the laws of nations.

The representation of the people in the house of commons was greatly changed by the reform act of 1832, and many boroughs which had ceased to be populous and invited corruption, were entirely disfranchised. Further changes were made by the reform acts of 1867, which increased very largely the number of electors, and established such liberality of qualification as to bring the elective franchise within the reach of all but the hopelessly poor and dependent. Since then, by the introduction of the secret ballot, the independence of electors has been secured so far as, in the nature of things, this was possible. Concurrent with the changes in public sentiment which have made these reforms possible, has gone on another change, perceptible only at considerable intervals of time, by which the house of lords has been shorn of a considerable portion of its former power and importance, and the authority of the government has been steadily concentrating in the house of commons. Hitherto this change has been beneficial; but how far it can continue without necessitating other and more radical changes, the future alone can tell. In alluding to the reforms in parliament we must not forget to mention the improvement in the laws for the punishment of bribery in elections, and the reference of contested elections to a judicial tribunal, by means of which party favoritism in their determination is rendered impossible, and the actual will of the electors is reasonably certain to prevail.

The advance in *religious liberty* has been so remarkable, that it seems impossible in the brief space we can allot to the subject here, fitly to characterize or indicate it. A century ago the law not only supported and encouraged the state church, but, from motives of state policy, it threatened severe penalties against the teachers of another prominent body of Christians, and it imposed burdens and disabilities upon all who were not connected with the establishment. Jews and Catholics, in particular, were made to feel the weight of governmental displeasure, but all classes of dissenters were, in various ways, discriminated against; and, so far as the laws could effectually do so, conformity with the established church was sought to be enforced. It cannot yet be said that religious equality is the law of England, nor can it be, so long as burdens are imposed upon the people for the support of a favored church; but religious toleration is now universal, and all classes may take part in the making of the laws which are to govern them. The corporation and test acts, which excluded Catholics and dissenters from petty offices, and even from some other employments, were at length swept away by an act passed in 1828, though with a proviso which excluded Jews from some of its benefits, and precluded their taking seats in parliament as representatives of the people for thirty years longer. The last obstacle was then removed by a statute, which

allowed the obnoxious words "on the faith of a Christian," to be omitted from the declaration made by a member on taking his seat. The marriage laws have been wholly reformed, so as to enable all parties to have this most important rite celebrated according to such form as will satisfy their own consciences; the scruples of Quakers and others, however singular or absurd they may seem to most people, are respected by law; and there is a steady and very rapid advance to that entire equality of sects, and perfect freedom of religious opinion and expression which now prevails in America. Catholic emancipation, after long resistance on the part of the crown and of a majority of the national church, was finally effected, under the leadership of Sir ROBERT PEEL, in 1829, and the penal legislation since aimed at that denomination, in order to defeat the supposed encroachments of the court of Rome, has been allowed to remain a dead letter, and will probably be repealed at any time when any considerable portion of the people shall express a desire to that end. And a crowning act of justice to the Catholics has been done in the abrogation of the state church in Ireland, where it was the church of a small fraction of the people only, so that its support was a grievous oppression.

The last half of the reign of George III was characterized by exceedingly stringent measures to repress freedom of opinion and of expression, which, indeed, at one time threatened the most alarming disorders, and were well calculated to excite intense anxiety. The excesses of the French Revolution, and the spirit of independent inquiry which that great event made so active in England, alarmed the conservative government of the day, and led to coercive measures which tended to produce the very dangers which the government sought to preclude. The prosecutions for treason for engaging in organized, and sometimes, it must be confessed, in imprudent and threatening opposition to the existing authorities, were treated by British juries with an independence, a prudence and a wisdom which was something new in state prosecutions, and the liberties of the people found protection in the courts of law at a time when the parliament was lending itself to despotic measures. The parliament, however, is entitled to the credit of passing the libel act, under which juries were at liberty to pass upon the intent of publications prosecuted as libelous, and which, perhaps, has done more than anything else to make the press as free in fact as it was before in theory. Indeed, we may safely say, now, that the restraint upon the licentiousness of the press in its discussion of public affairs and of the conduct of public men, consists rather in a regard to a just and enlightened public opinion than in any penalties which the law threatens or would be likely to impose. And while the press of Great Britain is now much more free and much less subject to restraining laws than that of many other countries, it is gratifying to know that its freedom has not been productive of license, but that a gradual improvement in its tone and character is perceptible, and self-imposed restraints are generally found sufficient to prevent serious abuse.

The ameliorations in the criminal law have been so numerous and so great, that it would be impossible to enumerate them all in the compass of a note. Among the principal are, allowing a full defense by counsel in all cases; the entire abolition of trials by battle, appeals of murder and felony, and the ab-

surd privilege of benefit of clergy, and the reduction of the list of capital offenses to the two—treason and murder—regarded as the most heinous; the discontinuance of the pillory, the burning and whipping of females, the hanging in chains, the horrible accompaniments of capital executions for treason and the punishment of families of offenders by corruption of blood. And at length, by the statutes 24 and 25 Victoria, the body of the criminal law has been revised and methodized, and its punishments moderated and better proportioned. And, by extradition treaties with other nations, provision is made whereby one country no longer becomes an asylum for the desperate criminals of others.

Imprisonment for debt has at last been abolished in Great Britain. A clear idea of the barbarity of treating an unfortunate debtor as a criminal seems to have dawned slowly upon the minds of legislators in any country; but when once the public attention was fixed upon it, the inhuman laws which permitted it were not long suffered to disgrace the statute books. Only in cases of fraud or other wrong in contracting the debt, or in obstructing the creditor in obtaining satisfaction, can the body of the debtor be now seized, and even then he is relieved from imprisonment on making surrender of his property to be applied to the just demands against him. And while thus the good of the unfortunate debtor has been had in view, the interest of the creditor, also, has been consulted in various statutory changes which have improved his remedies. One of the principal of these—the subjecting of real estate to the payment of debts—is alluded to further on; but the creation of courts for small demands, in which justice could be had speedily and inexpensively, has also had an effect highly beneficial upon all the branches of small trade and commerce in which the middle and poorer classes of the people are most particularly interested, while it has aided the poor in giving confidence to credit, and protecting them against ruinous costs in cases of misfortune. The law of bankruptcy has also been wholly remodeled, and its barbarous penalties mitigated; many restraints upon trade and upon the freedom of artificers to employ their services in their discretion have been abolished, and the penalties for usury have been entirely done away with, without being followed by the evils which so many were ready to predict.

The same spirit of philanthropy which has secured the improvement of the criminal code, has also effected great reforms in prison management, and the law now endeavors to prevent parties who are accused of crime being punished as criminals before condemnation, or subjected to needless and inhuman barbarities afterwards. The care of insane persons is also better provided for, and asylums in which they are confined are not now, as formerly, mere prisons in which to restrain their excesses, but are retreats where, unless improper persons shall chance to obtain the management, the most, careful, patient and humane efforts are made for their cure, so long as cure is believed possible, and for their comfort afterwards.

No invention of either ancient or modern times has so sensibly affected the laws as the application of steam as a motive power, and especially for the conveyance of freight and passengers. Railroads have introduced many new questions in the law of eminent domain, of principal and agent, of bailments,

and of negotiable securities, which have been solved by the application of old principles of the common law, but under such new circumstances as to make them really innovations, and sometimes of a very remarkable character. To particularize all these cases would fill many pages of this work; and even a complete enumeration would give but a faint impression of the manner in which business and society have been affected by them, unless we go beyond the law books, and, at the centres of traffic and exchange, consider how large a proportion of all business transactions is connected with steam transportation, and governed by the principles of law which have been laid down and established with special reference to these improved modes of conveyance. Railroad securities now constitute a very large share of the commercial paper of the world, and the law of negotiable paper has been modified and changed so as to embrace them: and they have become for many purposes a substitute for money in the markets of the world, not surpassed in value or convenience by any other securities, except, possibly, the public debt of a few of the leading nations.

Perhaps in no particular has the change in the law of property been so palpable and so beneficial as in its relations to real estate. This species of property has at last been made liable generally to the payment of the debts of its owner, and the absurd exemption which formerly prevailed has been done away. Estates tail are also brought under more reasonable rules; restraints upon alienation have been limited within narrow bounds; the forms of conveyance have been simplified; fines and recoveries have given way to a simple deed, acknowledged by the party and expressing the real purpose of the conveyance; real actions have been abolished, and the proceedings to try claims to real property have been reduced to the action of ejectment, which, at the same time has been divested of all its cumbrous forms and needless fictions. Limitation laws have also been passed, under which claims to real property must be pursued within a reasonable period; and the law of descent has been considerably improved.

The establishment of penny postage has increased the correspondence of the kingdom to enormous proportions, and has doubtless tended, in a considerable degree, to the spread of intelligence among the people, and to a more general desire that the means of education may be brought within the reach of all, which bids fair, at a period not now remote, to result in a general system of free schools supported by public taxation. Postage to the colonies and to foreign countries is also established at very low rates, and the facilities which are afforded for still more rapid communication by means of the electric telegraph, though comparatively expensive, are made available, by means of a cheap public press, for diffusing among all classes of the people the speedy intelligence of important affairs as they transpire in every quarter of the globe.

When our commentator wrote, the general disposition among the statesmen of England was, to assert and maintain the unlimited power of the British parliament to control and govern the British colonies at its discretion, and to bind them by its enactments as well in respect to local concerns as to those of a more general nature. The attempt to enforce this view by military power lost to the empire the finest portion of her colonies, and the disaffected country

has since, by the establishment of free institutions, by the enactment of just laws, and by the cultivation of the arts of peace, attracted to itself a large immigration of industrious, enterprising, and liberty-loving people, and attained a population, a wealth of resources and a financial standing that gives it rank among the first nations of the globe in point of influence, power and importance. The lesson of this loss has not been thrown away upon the British nation, and a more liberal and just spirit now controls the relations between the mother country and its colonies. The right of the colonies to regulate their internal affairs is conceded and protected. At the same time it is perceived that those colonies are but embryo states, whose maturity and independence must at some time be recognized, and the government, instead of seeking to perpetuate their condition of pupilage and dependence, favors and encourages their increase in strength, population and resources, and prepares the way for making the separation, should it take place, result in the mutual benefit of both, and in permanent amity between them. The cruel and exacting government of India by the East India Company, has been abolished, and though the subject people of that country are not likely soon to be in condition to share the blessings of self-government, the rule of the crown is much more mild and just than that which it superseded, and the change is a long stride in the direction of substantial progress.

Much has been done in the interest of humanity by the laws which regulate the working of children in mines, factories, etc., and which give for the benefit of the surviving family an action against the party whose negligence or default has caused the death of another. Much also has been done for public morals, and for the equal and just administration of the law in the interest of the people, by the abolition of profitable sinecures, and by modification of official emoluments, to make them correspond in some degree with the services performed and the responsibilities assumed. And, while to those who live under a simpler form of government, and in a society less decidedly aristocratic in organization, habits and sentiment, the emoluments of many English offices must still appear enormous, yet the change in the direction of economy has been as great, perhaps, as could reasonably have been expected, and the phrase that "all abuses are freeholds," once justly applied to the English official system, may now be dismissed as obsolete.

Of the petty annoyances to which British subjects were liable, and which, in the aggregate, amounted to serious evils, two of the chief were abolished by the statutes so modifying the game laws as to do away with the previous qualifications, and those for abolishing tithes and substituting a rent charge instead. These will be found particularly alluded to, and the extent of the changes indicated in the preceding pages. The abolition of tithes has undoubtedly done something to strengthen and support the national church, or, at least, to render it less odious to those not in communion with it, and the statutory provisions against pluralities have also removed another source of serious complaint, and all together have resulted to the substantial benefit of the cause of religion and public morals.

The poor laws of Great Britain have been wholly revised since the time of our author; and we wish we could say, with entire confidence, that they have

been greatly improved. No doubt the changes are for the better; but with so large a pauper population as that country unfortunately possesses, the inherent difficulties are great, and we must still look to the future for any such reforms as can benefit their condition to any considerable degree. Upon these, and similar subjects, changes must generally be in the nature of experiment, and it is difficult to determine, many times, until after considerable experience, whether they do or do not constitute substantial improvements.

Upon one particular subject we are glad to have it in our power to say that the English system and English opinions have undergone no change. We refer to the deep settled conviction, that standing armies are inconsistent with liberty; which has prevented the people from being burdened with the support of large military forces, which could only constitute a means of oppression to the people at home, and of menace to other nations. While some of the neighboring nations have been steadily and rapidly enlarging their standing armies, until they constitute a very large proportion of their able-bodied men, and the life and energy of their people are exhausted by their withdrawal from the avocations of industry, and being made a charge upon the public, instead of contributing to the public wealth, Great Britain, secure in her insular position, and trusting to the patriotism of her people to protect her against unexpected assaults, has contented herself with garrisons for her forts and other fortified places, and relied upon the training of voluntary organizations to fit them for the wars which may be inevitable, but which the policy, not less than the best sentiment of her Christian people, now inclines her to avoid. In this policy she is followed by the great republic of the western hemisphere, which, in the most important and threatening crisis of its national existence, has demonstrated that, with a free people, standing armies are worse than useless, and that the best dependence of any government is in civil and political liberty, and in just laws, justly administered.

Among the minor changes deserving of note are the abolition of the counties palatine, and the bringing of Wales more directly within the jurisdiction of the English courts. Among those of greater importance are the simplification and expediting of proceedings in chancery; the abolition of the office of master in chancery, and the introduction of jury trial in the courts of equity; the taking away, from the ecclesiastical courts, the jurisdiction over probate and matrimonial causes, and conferring it upon courts specially created for its exercise; the simplification of pleadings and proceedings in courts of law; the transfer to a more suitable tribunal of most of the appellate jurisdiction of the house of lords; the remodelling of the judicial committee of the privy council, so as greatly to enlarge its powers and give to its constitution and proceedings more of judicial character and importance; the establishment of a court of criminal appeal, and the almost total abolition of the legal objections to the competency of witnesses. All the new improvements in these and similar matters are noted in the preceding pages, and so given as to enable the reader to compare the existing system with that which it has displaced.

Many of the most useful and beneficial changes in English law could not, with any propriety, be given in notes to the foregoing Commentaries, because they relate to subjects not treated in them, and but distantly, if at all, re-

ferred to. Among these are the establishment of a board for the administration of charitable trusts; the statutes establishing or providing for local regulations of police for ensuring cleanliness and good order, and thereby promoting the health and happiness of the people, and those, also, which encourage local libraries and schools, and other means of voluntary instruction of the people. Mention should also be made of the provision for a general system of public secular instruction, aided by the public treasury, and brought within the reach of rich and poor alike. The condition of women has also been improved—indeed, we might justly say, the condition of society—by the more distinct recognition of their right to property, and by lessening the power of control which the common law allowed to the husband over the wife and over her possessions. And we must not omit to mention, in this place, that the system of local self-government, which has always characterized England, has been greatly improved and amplified by the modern municipal corporation acts; and the tendency of late in Great Britain—unlike that in some other countries—has been towards a strengthening of the local authorities, and an increase of their powers and jurisdiction.

In closing this review of the recent modifications in English law, it may be justly remarked that the changes have not been made in haste and unadvisedly, or often under the influence of passion or excitement, but that they have been introduced with caution, discussed freely, fully and calmly, and only adopted after reasonable deliberation, and after all objections had been considered and weighed. Indeed, the eminent conservatism of the English character has often tended to continue for long periods what have been known and admitted to be abuses in their system. But if this has been a just ground for reproach, we must at the same time admit that the general result has been that, when amendments have finally been made in the law, they have been beneficial, safe, prudent and permanent, and that English legislation has been characterized by more stability than that of some other countries.

The changes in American law have not been so great or so striking as those in the law of England, because, in many particulars, America began at a point which Great Britain has only now reached. In the adoption of the constitution of the United States, the great idea of religious freedom and equality was assumed as fundamental; no state had a church establishment; there were no tithes to abolish, or religious oppression to be relieved from; and the few traces of discriminations against particular classes of persons, based on religious beliefs or professions, have been allowed to disappear by common consent. The oppressive features of the feudal system, which clung so long to the law of real estate in England, were never transplanted into America; the right of primogeniture in descents was generally discarded; the forms of conveyance were always simple, and real estate was, from the first, made assets for the payment of debts. And many of the most repulsive features in the common law of England were never engrafted in the law of America, which, from the very beginning, gave more full effect to the presumption of innocence on behalf of persons accused of crime, and avoided the severe punishments in the case of small offenses, which were deemed necessary in England at the middle of the last century.



The United States exerted its authority to forbid the importation of slaves into the country at the very earliest period permitted by its constitution, and followed this prohibition, in a few years, by making the slave trade piracy. Within the states, however, the government of the nation had no control of the domestic institutions, and the relation of slavery was allowed to exist in some of them until overthrown in the course of a great civil war. It is now entirely at an end throughout the whole country; but some of the evils, necessarily resulting from so great and sudden a change in society, are still upon the country, and it will require time, patience, and wise statesmanship to wholly eradicate them.

The right of married women to the real and personal estate of every name and description possessed by them at the time of their marriage, or in any manner acquired afterwards, and to make contracts in relation thereto, and to sell or otherwise dispose of the same, has gradually come to be recognized in most of the states; and the evils anticipated from this great departure from the common law principle, that the civil existence of the wife is swallowed up in that of the husband, have been looked for in vain. At the same time, the law has come to pay more regard to the rights of the family in the property acquired by its head, generally through the joint exertions of all; and while facilitating and simplifying the processes for the collection of debts, it has in most states made liberal exemptions for the benefit of the family, and, in case of the homestead, and sometimes of other property also, has forbidden the husband to incumber or dispose of it, except with the wife's assent.

Marriage is generally recognized as a relation by contract, into which parties can enter by such ceremony as they please, or without any ceremony whatever; and the regulations by statute are only such as are deemed essential to prevent irregular and discreditable relations, and to insure a proper record of so important a transaction.

Imprisonment for debt is abolished throughout the country, and ample provision is made everywhere for the support of the helpless poor. Asylums for the insane and for other unfortunate classes are established by state laws, and supported by state taxation; and, it is believed, they are made generally to subserve faithfully the purposes of their creation. The large number of immigrants landing every year upon our shores, renders regulations for their comfort and to protect them against fraud and dishonesty important; and provision of the most liberal character has been made for these purposes. The vast public domain is thrown open to actual settlers for the choice of homesteads, which, to a reasonable amount, are donated to them by the government; and if they desire to add to these possessions from the adjacent territory, the price of other public lands is fixed at a rate to make them accessible to any person who, having the ability to labor, joins thereto a disposition to industry, frugality and economy.

Suffrage in the United States has always been nearly universal; generally only the dependent classes being excluded from participation; and in the states in which a small property qualification was at first established, it has afterward been abolished; and provision has been made by law for the naturalization of the aliens who come to cast their lot in the new world, through

a proceeding both simple and inexpensive. Indeed, in some of the new states, even this formality has once been dispensed with, for, in framing their constitutions, they have allowed every *bona fide* resident to participate, and given to all an equal voice in the government.

One of the most noticeable changes in the law of America has been in the direction of imposing restraints upon the legislative power in the enactment of laws. The American people, from the first, have shown great solicitude, lest fundamental individual rights should be trampled upon, and they have made each of their constitutions a *magna carta*, by means of which barriers are erected against the encroachments of government. The promise extorted from King John, that no freeman should be taken, or imprisoned, or diseised, or outlawed, or banished, or any way destroyed, except by the judgment of his peers, or the law of the land, is repeated in substance in them all; and, lest this comprehensive declaration should prove insufficient, there is a careful enumeration of rights which are guarded from the encroachments of power, and of securities for the protection of liberty, where government is exercising its acknowledged authority. Religious liberty shall not be invaded; freedom of speech shall be inviolate; soldiers shall not be quartered upon citizens in time of peace, unreasonable searches and seizures shall not be allowed; the press shall be free; and a jury shall pass upon the criminality of any of its alleged excesses. Taxes shall only be levied in accordance with law, and when voted by the people's representatives; the military shall be subordinate to the civil authority; the privilege of the writ of *habeas corpus* shall be inviolate; no accused party shall be compelled to give evidence against himself, and none shall be twice put in jeopardy of life or limb for the same offense. But the disposition of late is to go far beyond this specification of individual rights, to inhibit class legislation, as well as the omnibus system of making laws, and to restrain within reasonable bounds the private legislation of which all our law-making bodies are apt to be so prolific. Forms of proceeding are also prescribed in some cases, the purpose of which is to insure care and deliberation in the enactment of laws, and to prevent the legislature being taken by surprise by designing and unscrupulous men. And a strong inclination has been developed to forbid private and special acts in all cases where public and general laws can reasonably accomplish the end designed.

The proceedings in courts of justice have been greatly simplified within a few years. In this direction, however, there was not the same room for improvement as in England. Many of the states had no distinct equity system, and those which had established one had, at the same time, established regulations to render its remedies speedy and reasonably inexpensive. At this time equitable and legal remedies are generally administered by the same courts, and under forms which are very simple, and with such ample power in the court to amend the pleadings and proceedings for the advancement of justice, that it is not easy for the forms of law to be employed for the furtherance of unjust and oppressive schemes. In some states statutes have been passed, the purpose of which was to sweep away at a single blow all legal subtleties and technicalities in the forms of pleadings and proceedings; and where changes so radical have been avoided, the old forms have been greatly simplified, and

the lawyer may now safely give more attention to the merits of his cause, and less to the forms provided by law, by means of which his client's rights are to be protected or his wrongs redressed.

Many of the modern changes in the English law enumerated in this note have been simultaneously made in America, and with the like good results. Among them may be mentioned the remedy given to the family of any deceased person whose death has been caused by the wrongful act, neglect or default of another, and the doing away with objections to the competency of witnesses based upon their interest in or connection with the cause. The latter innovation has been followed in some states by statutes permitting accused parties in criminal cases to give their own account of the transaction to the jury; and the result has been generally satisfactory. America preceded England in abolishing imprisonment for debt, and she has also exhibited a greater readiness to modify the law of nations for the protection of the rights and interests of neutrals in time of war. But as, in this respect, the interest of each is identical, and the voice of religion and humanity pleads earnestly for such changes as will limit and circumscribe the calamities of war so as to make them affect the least possible number of persons, we may confidently expect the efforts in this direction to be hereafter made by these two nations conjointly, and with a reasonable degree of success.

Great as have been the changes in the law here chronicled, we may still look forward, with reasonable confidence, to others of the like gratifying character, to be introduced by the Anglo-Saxon nations, upon the basis of the common law of England, by the like gradual but sure and safe steps, and as speedily as the public sentiment may be prepared to receive and perpetuate them.

# LOCAL GOVERNMENT IN GREAT BRITAIN.

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As the local institutions of Great Britain have very largely been remodeled in our day, it seems desirable to give some brief account of them, as they exist at the present time. England was always celebrated for the freedom of its local government, and though this was probably more complete during the Saxon period than at any time afterwards, it is made very apparent by the account which is given of the local magistracy in the preceding pages, that the power to regulate their local affairs through the agency of local officers, has been left at all times in the hands of municipal corporations and districts. The following summary will give the means of comparison between the old system and the new, and will serve to show that while some reforms have been introduced, changes have also been made, which have become necessary in consequence of the great increase in population, and the wonderful growth of modern towns.

The primary division of the realm for local purposes is into parishes. The parish is called by Prof. Stubbs, the ancient township in its ecclesiastical form. When the parish is spoken of the civil parish is commonly intended, and this is defined by Stat. 29 and 30 Vic. c. 113, as "a place for which a separate poor rate is or can be made, or for which a separate overseer is or can be appointed." The civil parish is therefore the Poor Law parish, though there are also by custom some highway parishes, which are not identical with the others. There are about 15,000 civil parishes in England and Wales. The corporate organization consists of the vestry and overseers. The vestry "is the ratepayers of the parish in vestry assembled," the minister of the parish presiding, if present. By custom, there are special vestries in some parishes, consisting of a select number of ratepayers, and by statute parishes having more than 800 ratepayers may have select vestries. The powers of the vestry are small, and are limited in the main to managing the parish property and charities. The overseers are nominally overseers of the poor. They are appointed by the justices, but the churchwardens are also *ex officio* overseers, when the civil is an ecclesiastical parish as well. They make and levy the poor rate, and they also prepare the jury list, and the lists of voters for parliamentary and municipal elections.

Of ecclesiastical parishes there are 13,000 in England and Wales. Since compulsory church rates were abolished, ecclesiastical parishes have been of little importance in local government. Their affairs are controlled by the vestry, which is composed of the minister, churchwardens, and parishioners. The minister has custody of the church, and makes records of baptisms, marriages, and burials. The freehold of the church-yard is also in him, but he can no longer as formerly control the burials in it; the act of 1880 authorizing

burials there without the intervention of the minister, and with or without religious services, as the friends may direct. The churchwardens are two in number, and are chosen annually by the minister and parishioners. Their duties have become nominal, and so have those of the parish clerk, who once was an important officer.

A more important division for poor-law purposes is the union. This commonly consists of several poor-law parishes, though in some cases a single parish constitutes a union. The whole number of unions is between six and seven hundred. The governing board is a board of guardians, of which the justices within the union are *ex officio* members, and others are chosen annually by the ratepayers and landowners. The number to be chosen is determined by the local government board. The chief function of the guardians is the administration of the poor relief fund, and the appointment of local officers connected therewith. In rural districts they are also the sanitary authority, and in some cases the highway authority also.

The boundaries of unions and of parishes may intersect those of counties and of boroughs, and in many cases do so.

Of counties there are forty in England, and twelve in Wales. The officers are the lord-lieutenant, who is appointed by the crown, and is commonly *custos rotulorum*, or keeper of the records, and as such the chief magistrate of the county. Next to him is the sheriff, also appointed by the crown. As presiding officer of the county court, his functions were once of high importance, but that court has now little more than a nominal existence. The chief duties of the sheriff now are to summon juries, to act as executive officer of the courts, and to enforce their judgments. He appoints an under sheriff, for whose acts he is responsible. The custody of prisons was taken from the sheriff in 1877, and transferred to the central government. Each county has its coroner, and some counties have several. For the most part they are elective by the freeholders, but by custom in some districts they are appointed by the lord of the manor, or some other authority. The chief duty of the coroner is to hold inquests over the bodies of persons who have been killed, or have died in prison, or suddenly from unknown causes. In this he calls a jury to his assistance. Justices for the county are appointed by the crown on the recommendation of the lord-lieutenant, and the number is indefinite. They have police powers for the county, and appoint the chief constable. The chief constable appoints the subordinate police force. The justices have the duty of maintaining county bridges and pauper lunatic asylums, and they appoint inspectors of weights and measures, and an analyst of food and drugs. County expenses are paid by an assessment upon the parishes, called a county rate. The treasury refunds to the county one-half the cost of the police force.

The subdivision of the realm into sanitary districts is now exceedingly important. Of these there are two classes, the urban and the rural. The rural are identical in territory with the poor-law unions, except as the urban may be carved out of them, and the guardians are the rural sanitary board. The sanitary authority in the urban districts is the town council, or some other local board. The sanitary organization begins with the public health act, 1848, which created a general board of health, whose members were to be

appointed by the crown, and who had power to create local boards of health. The name indicates the duties. The duty of general supervision was transferred to the local government board in 1871. The local boards are corporations, with power to make by-laws, and besides the ordinary functions of sanitary bodies, they are given authority to construct sewers and gas works when necessary, and the urban boards may open, construct and repair streets. In the seaports there are local sanitary authorities constituted by the local government board.

The division of England into school districts dates from the passage of Mr. Forster's elementary education act of 1870. Prior to that act voluntary schools received occasional aid from public moneys, but the duty of educating the people was now assumed as a public duty. The prominent features of the act as since amended are these: It is declared to be the duty of every one standing *in loco parentis* to a child to see that he receives efficient elementary instruction in reading, writing and arithmetic. In every school district adequate public school accommodations must be supplied for this purpose, and if there is neglect by the local authorities, the education department of the government must see that the duty is performed. In general every borough or city constitutes a school district, and so does every parish and part of a parish not within a borough or city. The whole of the metropolis is one district. The local authority in a district is either a school board or a school attendance committee. A school board is created by the education department on the application of the local authorities, and the department prescribes the number of members. The term of office is three years. They are chosen by the ratepayers, and each voter has as many votes as there are persons to be chosen, and may distribute them as he pleases, and give two or more to one candidate, if such is his choice. The school board appoints the teachers, and has certain powers to compel attendance of children upon the schools. A child who refuses may be sent to an industrial school. Certain fees are paid for attendance by such of the parents and guardians as are able, and to the extent that the fees fail to meet the expenditure, the deficiency is made up by a rate levied as a part of the borough rate, or, outside of the boroughs, as a part of the poor-rate. On an average the rates exceed the aggregate of fees as three to one. Where there is no school board, a school attendance committee is appointed by the borough council, or some other local authority.

The highways in the main are kept in repair by the parishes. For this purpose, however, the parish may not be the same as the poor-law parish, as a particular hamlet, which is a part of a poor-law parish, may by custom be a separate parish for highway purposes. The quarter sessions have authority to combine two or more parishes into one or more highway districts. In rural districts the highway authority is either a parish surveyor, a parish board, a district board, or the guardians. In urban districts the sanitary authority is also the highway authority. Formerly there were many turnpikes in the hands of trustees, who kept them in repair, and collected tolls for their use. Nearly all of these have now become free highways, and the cost of keeping the main roads in repair is shared by the county and the parish or district.

**LONDON: THE METROPOLIS.** London in government is an enigma to people of other countries, as no doubt it is also to some extent to the people of the United Kingdom, except so far as from their youth they may have been made familiar with its peculiarities. In any reference to the government, it is always essential to distinguish between the city proper, the ancient corporation known as the city of London, and which embraces, but little more than a mile square of territory, and the vast metropolis, which has grown up about the city, and which in common parlance, and in the commercial and political intercourse of the world, takes the name of London, though never in law a part of it. The city was an important town during the period of Roman supremacy, but the extent of its powers as a corporation it would be impossible now to determine. In subsequent periods, we know the city, first, as an association of tradesmen and industrial societies united for mutual protection, and exercising important powers for that purpose under claim of right, and with general public acquiescence. These powers were such as properly pertain to corporations; and whatever may have been their origin, they in time became rightful by prescription. The societies or guilds were severally composed of persons of one industrial calling, and their purpose in organizing was to ensure proficiency in the members, and to protect themselves and the public against frauds and impositions. They were also to some extent charitable societies, and accumulated funds as such. The authority of the guilds was not strictly confined to the territorial limits of the town, but by custom was extended outside, in some cases for several miles; and they were permitted to seize and destroy fraudulent or defective goods, and to fine and imprison persons guilty of violating their regulations. No one was suffered to pursue an industrial calling, until he had been made free of the proper guild, and this he became entitled to by serving an apprenticeship and paying certain fees. The guilds gradually became wealthy and powerful, and their customs were so far modified that it was no longer essential to membership, that one should serve an apprenticeship, or follow any particular calling; but membership might be obtained by purchase, and it would also pass from father to son by descent. Distinguished lawyers and statesmen became members; an illustration of which we have in the case of Lord Chancellor Hatherley, who was a member of the guild of fishmongers. The following will give some idea of the government of these guilds. Each guild has a court of assistants, composed of a master warden, wardens and assistants, who are chosen from and by the liverymen. Neither the voters nor those whom they select for these offices are required to be residents of the city, but they are required to possess a property qualification within it. The guilds expend their accumulated funds at discretion, and they own expensive halls and are accustomed to give costly entertainments. By custom their members constitute the citizens of London, and the government of the city is therefore in their hands. The first charter of the city was granted by William the Conqueror, but it was a very simple instrument, and constituted little more than a recognition of an existing corporation. (a) From that time the corporate bounds have never been extended, except by the small addition of the ward of Bridge Without in the reign of Edward IV. The govern-

(a) See Stubbs, *Const. Hist.*, ch. XI.

ing body of the corporation is the Common Council. This is composed of 26 aldermen, chosen in as many wards, and 240 common councilmen. The aldermen are not only local legislators, but they are also judicial officers with limited powers. They are not required to reside within the city, and in 1876, there were aldermen residing in all parts of the United Kingdom from Stoke-upon-Trent to Brighton, and not one of the aldermen had a city address, though the majority lived within the metropolis. The chief executive officer of the city is the mayor, who is chosen in common hall from the aldermen. He has the title of Lord Mayor, and is allowed within the city to assume regal pomp and ceremony.

The city is only the nucleus of the vast metropolis of 4,000,000 people, which embraces parts of four counties, and includes the city of Westminster, and the parliamentary boroughs of Southwark, Finsbury, Marylebone and Tower Hamlets. The local government is consequently varied and without unity. The whole area is about 125 square miles. The common authority for the whole is a board of public works, chosen by the vestrymen. Besides this there are numerous local boards in separate districts for lighting and paving purposes, and there are also, as elsewhere, guardians, governors, and trustees of the poor. There is also a metropolitan police district, but this is much larger than the metropolis itself, being made to embrace so much of the surrounding territory as seems necessary to a complete and efficient system. The city proper is not included within this district, but has its own police.

**Boroughs.** Up to 1835, the boroughs of England and Wales were without uniformity in history, organization and powers, and many of them were close corporations, with authority defined only by prescription. The local abuses were very great, and the corruptions notorious. These were remedied by the Municipal Corporations Act of that year, the purpose of which was to bring them all under one general system, with the control in the hands of the citizens in general. To that end the franchise was made uniform, and was based upon ratepaying residence within the borough or within seven miles of it. The government is now strictly representative, and any burgess is eligible to all offices. The governing body is the borough council, composed of the mayor, aldermen and councillors. The councillors are chosen by the burgesses by ballot, for a term of three years, and they choose the aldermen for a term of six years. They also choose the mayor. The mayor has judicial as well as executive powers, and there are also other local judges appointed by the Crown. The police force is under the control of a watch committee of the council. The franchise for local and for parliamentary purposes is not the same, and in local elections women are voters, if possessing the ratepaying qualification. The boroughs have authority to contract debts for ordinary local purposes, on obtaining the consent of the local government board mentioned below, or, in a few cases, of some other central authority; but for any other purposes, it would be necessary first to secure special legislation. It is also essential to have the assent of an absolute majority of the common council, and also of the ratepayers. It is customary, before the local government board or the legislature grants permission for contracting debts, to have special inquiry made into its necessity.



All boroughs which are or have been the see of a bishop are called cities; (b) but their organization is the same with that of other boroughs.

**LOCAL GOVERNMENT BOARD.** Since 1871, the central authority, which has had general supervision and control in matters of local government, has been the board with the above title. This board consists of a salaried president appointed by the crown, and the following *ex officio* members: The Lord President of the Council, the several Secretaries of State, the Lord Privy Seal, and the Chancellor of the Exchequer. The powers of this board are in part advisory, and in part compulsory, and vary with the subjects. One of the most important duties is to keep the local authorities from contracting unnecessary or burdensome debts, and when consent to indebtedness is given, it is only in connection with provisions for payment by annual instalments, or for setting apart an adequate sinking fund. This board also audits the accounts of the local boards, and may disallow such as are unauthorized or illegal, and charge the sums over to those who improperly incurred them. In poor law and sanitary matters the control of the board is very complete, and the supervision of the Rivers Pollution Acts, the Adulteration Acts, and the Vaccination Acts are specially committed to its superintendence.

(b) 1 Bl. Com., 114.

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## THE BRITISH COLONIAL SYSTEM.

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In a note to the first book of these Commentaries (p. 109), the Colonial System of Great Britain is spoken of as the grandest in extent and power the world has ever known. A more detailed account of the system, and of the countries and places embraced within it, than was given in the place referred to, will justify the statement there made, and at the same time will give us particulars of British Colonial government in all its varieties.

In respect to government the British colonies and possessions are classified officially in three classes, as follows: *First*; Those properly denominated crown colonies, in which the crown has entire control of legislation, and the administration of whose affairs is carried on by officers under the control of the home government. In this class are: In Europe, Gibraltar, Heligoland, Malta, Cyprus. In America: Falkland Islands, Guiana, Honduras, Jamaica, and Turks Island. In Africa: Ascension, Gambia, Gold Coast, Sierra Leone, Lagos, St. Helena. In Asia: India, Aden and Perim, Hong Kong, Labuan, Straits Settlements. In Australasia: Fiji Islands, Rotumah. For each of these there is an executive officer, appointed by the crown, and removable at pleasure, and whose title of office is Governor, except as follows: For India it is Governor-General; for Honduras it is Lieutenant-Governor; for Jamaica it is Captain-General, and for Gambia, Gold Coast and Lagos it is Administrator. The population of each of these was as follows at the dates given: Cyprus (1871) 150,000; Gibraltar (1871) 14,764; Heligoland (1871) 1,913; Malta (1871) 149,084; Falkland Islands (1871) 803; Guiana (1871) 193,491; Honduras (1870) 24,710; Jamaica and Turks Island (1871) 510,354; Ascension (1871) 27; Gambia (1871) 14,790; Gold Coast (1871) 408,070; Sierra Leone (1881) 60,546; Lagos (1871) 62,021; St. Helena (1871) 6,241; India (1881) 252,541,210; Aden (1871) 22,507; Perim (1871) 211; Hong Kong (1876) 139,144; Labuan (1871) 4,898; Straits Settlements (1871) 308,097; Fiji Islands (1881) 124,999; Rotumah (1881) 2,500. *Second*; Those which have legislative bodies chosen by their own people, with a veto on legislation in the representative of the crown, and a general control of public officers in the home government. These are: In America: Bahamas, Bermudas, Leeward Islands, Windward Islands. In Africa: Natal. In Asia: Ceylon. In Australasia: Western Australia. Each of these has an executive appointed and removable by the crown, and whose title of office is governor. The population of these at the dates named was as follows: Bahamas (1871) 39,162; Bermudas (1871) 12,121; Leeward Islands (1871) 120,491; Windward Islands (1871) 284,078; Natal (1877) 325,512; Ceylon (1876) 2,459,542; Western Australia (1881) 31,000. *Third*; Those which not only have legislatures of their own election, but whose governors, though appointed and removable by the crown, must reflect in their

government and administration the sentiments of the legislature as expressed by its votes. These are: In America: Dominion of Canada, Newfoundland. In Africa: Cape of Good Hope and dependencies. In Australasia: New South Wales and Norfolk Island, New Zealand, Queensland, South Australia, Tasmania, Victoria. The population of these severally in the year 1881 was as follows: Canada, 4,324,310; Newfoundland, 161,374; Cape of Good Hope and dependencies, 1,420,162; New South Wales and Norfolk Island 751,468; New Zealand, 544,032; Queensland, 213,525; Tasmania, 115,705; Victoria, 862,346. This class is supposed to embrace all the colonies that are fitted, by the numbers and character of their population, and by other circumstances, to be entrusted with the sole responsibility of making their own laws and guiding their own destiny.

Responsible parliamentary government for these colonies began in Canada, and may be said to have originated with the Earl of Durham, who, as governor-general in the year 1831, in a report made to the home government, recommended as a remedy for the widespread and long-continued discontent in the extensive provinces of Lower and Upper Canada, that representative institutions, which should be "an image and transcript of the British constitution," should be allowed to the people. In accordance with this recommendation, Mr. Poulette Thomson, the successor to the Earl of Durham, was directed to introduce a government which should be responsible to the representatives of the people, and the principal officers of which, constituting the governor's advisers, should possess the confidence of the legislature, and be subject to removal from office whenever any sufficient motives of public policy should suggest the expediency. Accordingly, this official, on his arrival in Canada, made public announcement that henceforth its government should be conducted in accordance with the wishes of the people as expressed by their representatives. The understanding which was had of this announcement, and which has ever since been acted upon, is tersely expressed in three resolutions adopted by the Legislative Assembly of Canada, in the year 1841, and which are as follows:

"1. That the head of the executive government of the province, being, within the limits of his government, the representative of the sovereign, is responsible to the imperial authority alone; but that nevertheless the management of our local affairs can only be conducted by him, by and with the assistance, counsel and information of subordinate officers in the province.

"2. That in order to preserve between the different branches of the provincial parliament that harmony which is essential to the peace, welfare, and good government of the province, the chief advisers of the representative of the sovereign, constituting a provincial administration under him, ought to be men possessed of the confidence of the representatives of the people; thus affording a guarantee that the well understood wishes and interests of the people, which our gracious sovereign has declared shall be the rule of the provincial government, will, on all occasions, be faithfully represented and advocated.

"3. That the people of this province have, moreover, a right to expect from such provincial administration the exertion of their best endeavors that the

imperial authority, within its constitutional limits, shall be exercised in the manner most consistent with their well understood wishes and interests."

It will be seen that this gave to the province of Canada a government which, as respects local affairs, was not to differ in its general features from that which existed within Great Britain itself. Its success in giving content to the people was immediate, and Lord Elgin, who went out as governor-general of Canada in 1847, and who was most influential in settling it upon secure foundations, was constrained to say, that, with his constitutional and changing cabinet, he was allowed by the free consent of the people to exercise greater authority than was permitted to the same office in colonies where responsible government did not exist. The like institutions were introduced into the colonies named at the dates following: Nova Scotia and New Brunswick, 1848; Tasmania and Victoria, 1855; New South Wales, South Australia and New Zealand, 1856; Queensland, 1860; Cape of Good Hope, 1872. When in 1867 Upper and Lower Canada and New Brunswick were united into one government by the name of The Dominion of Canada, the imperial act of union declared that the constitution of the new dominion should be similar in principle to that of the United Kingdom. Upper Canada was at this time given the name of Ontario, and Lower Canada that of Quebec, and authority was given to the Queen in council to admit into the Union any of the other British-American provinces whose legislature might express a desire to that effect. Under this authority Manitoba was admitted in 1870, British Columbia in 1871, and Prince Edward's Island in 1873. Each of the provinces has a legislature of its own, and a lieutenant-governor appointed by the governor-general, and subject to removal by him, but not within five years from his appointment except for cause assigned. Government in the several provinces, as in the Dominion itself, is responsible to the representatives of the people.

In the colonies, as in the united kingdom, the executive is a constituent part of the legislature, and the governor may withhold assent to any bill which may be passed, and take the opinion of the home government thereon. The home government may also, even against the opinion of the governor, disallow any colonial act, but it will only do so where the reasons seem imperative, or where the act is regarded as *ultra vires*. In judicial matters an appeal lies from the colonial courts to the queen in council. It seems to have been doubted, after the creation of the Supreme Court of Canada, with power to hear and finally adjudicate upon appeals from the highest courts of the several provinces, whether appeals to the privy council would any longer lie, but it was decided that parties at their option might appeal to either tribunal.

In respect to the self-governing colonies and provinces, as much as to all others, the imperial government reserves to itself the power of legislation on all subjects of general imperial policy, and retains control of international intercourse, and of all questions of war or peace with other nations. The customs establishments, however, of all the colonies, are under the control and management of the several colonial governments, and the colonial legislatures are permitted to establish their own customs regulations and rates of duty. Canada has taken advantage of this authority to establish a protective tariff,

in direct antagonism to the principles of free trade, which for a long time have prevailed with the home government.

Among the subjects for which the imperial parliament still legislates for all the colonies and dependencies are those of copyrights and patents, and the establishment of admiralty courts. Theoretically it has power to legislate to any extent; but how far this would be consistent with the constitutional rights of British subjects, or with true imperial policy must depend very much upon the condition of the colony or dependency legislated for, and the fitness of the people under the circumstances in which they are placed, to take their destinies into their own hands. The general policy of the imperial government has now for a long time been to foster and encourage independent self-government, to the fullest extent consistent with local safety and the general interests of the empire. In one noted instance, experience demonstrated to the entire satisfaction, not only of the home government, but of the colony itself, that the time for self-government had not yet arrived. Jamaica, which had been allowed a government responsible to the local representatives, abandoned it voluntarily in 1866, and with its own consent was remanded to the condition of a crown colony. It has now a legislative council, composed in part of official, and in part of non-official members, and the governor's council is responsible only to himself. The advice of this council the governor follows only so far as he finds it satisfactory to his own judgment.

The imperial authority over all the colonies is administered through the agency of a member of the administration, who is designated secretary of state for the colonies. In all the crown colonies, however, the governor is nearly absolute. As has been said by one of them, "he not only reigns, but governs in the strictest sense. All subordinate officers act in accordance with his directions. He is responsible for their short-comings if he fails to correct them. They are liable to suspension at his will. The legislature is so constructed as to enable him to secure, should he deem it necessary, the passage of any enactment he may frame. He is in the colony the ultimate referee on almost every conceivable subject of administration or legislation. \* \* \* In all crown colonies there exist—and it is the reason for the maintenance of so peculiar a form of constitution—two or more different races, to neither of which can safely be entrusted the charge of governing the other, and the existence of which is the cause of the establishment of what is in fact a species of despotism, modified by a power of appeal to the imperial government at home, and by the action of public opinion and common sense upon the mere legal rights of the post." This was said with special reference to the Fiji Islands, but was intended to be applicable to all whose condition is described in it.

The case of India is in some respects different from that of any of the other British possessions, it being by far the most populous of all, and only a small percentage of the inhabitants being of British birth or origin, while an uncertain proportion of the remainder are ill-affected to the British rule. The necessity for a strong and somewhat autocratic government is, under such circumstances, apparent, and this has been provided by imperial legislation. The history of British dominion over that extensive country is familiar. It began

with the charter granted by William III, in 1698, to a company of merchants, for trading with that country. This company became great and powerful, and acquired for its purposes the control of territory for which it became necessary to establish civil and criminal courts, and these were provided for by letters patent of the king. The government was in a board of directors, having its office in London. In the latter part of the 18th century, the company carried on extensive wars with the native princes, and won great victories over them, which resulted in the acquisition of immense territories. In 1783 parliament deemed it necessary to interfere to prevent abuses, and passed what is known as the regulating act. This act recites that "the several powers and authorities granted by charters to the United Company of Merchants of England trading to the East Indies, have been found by experience not to have sufficient force and efficacy to prevent various abuses which have prevailed in the government and administration of the affairs of the said united company, as well at home as in India, to the manifest injury of the public credit, and of the commercial interests of the said company." It then proceeds to empower his majesty to erect and establish a supreme court of judicature for the company's dominions, to consist of a chief justice and three other judges, being barristers of England, or Ireland, of not less than five years' standing. This was an important step in parliamentary control, and it was followed in 1833 with one still more important, which formally converted the trading corporation into a purely political body, with authority, under the parliament, to govern the British dominions in India. A governor-general was provided for, and the governor-general in council was to have general legislative authority, with power, however, in the court of directors of the company, to disallow any law or regulation that might be made.

The legislative power conferred was further restricted, as follows: "The said governor-general in council shall not have the power of making any laws or regulations which shall in any way repeal, vary, suspend or affect any of the provisions of this act, or any of the acts for punishing mutiny and desertion of officers and soldiers, whether in the service of his majesty or of said company, or any provisions of any act hereafter to be passed in any wise affecting the said company, or the said territories or the inhabitants thereof, or any laws and regulations which shall in any way affect any prerogative of the crown, or the authority of parliament, or the constitution or rights of the said company, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the crown of the United Kingdom, or the sovereignty or dominion of the said crown over any part of the said territories."

A still more important step was taken in 1858, when the direct government of India was finally transferred from the company to the crown. At the same time a "council of India" was created, consisting of fifteen persons, of whom seven were to be elected by the court of directors of the company, and eight to be appointed by the crown. The president of the council was to be a secretary of state, who was to be charged with the administrative functions previously vested in the board of directors. The members of the council were to hold office during good behaviour, but this was so changed in 1869 as to

limit their term of office to ten years, and all vacancies in the council were to be filled by the crown. Several acts in modification of the act of 1858 have since been passed without introducing any very radical changes.

In 1876 the title of Empress of India was conferred upon the Queen by act of parliament.

As the proportion of colonists in India is very small as compared with the native population, it would obviously be unsafe to confer upon the people the powers of self-government, and it is not likely that any attempt going very far in that direction will be made for a long time to come. Local officials of the native races are allowed to exercise authority over their own people, and it is now proposed to give to native magistrates jurisdiction in small cases even where Europeans are parties.

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# LOCAL GOVERNMENT IN THE UNITED STATES.

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To present completely local government as it exists in the United States would require a volume. Every one of the thirty-eight states has a code of its own with some peculiar features, and the changes which from time to time have been made in some states, are numerous and important, and would require presentation, if the existing system were to be fully explained. It would be possible to group the states into classes, composed of those whose systems are similar, but the classification could not be exact and might mislead. What we shall say, therefore, will be aimed at an explanation of certain general features, which are to be met with in all the states, and of some of the most important peculiarities.

It is to be said in the first place, that the sovereign authority within every state is in the state itself, and that all inferior public authorities are of state creation. The general rule is, that the state may create inferior public agencies at discretion, and may alter and abolish them at will. *Barnes v. District of Columbia*, 91 U. S. Rep., 540; *Laramie Co. v. Albany Co.*, 92 U. S. Rep., 307; *St. Louis v. Allen*, 13 Mo., 400; *People v. Draper*, 15 N. Y., 532; *Philadelphia v. Fox*, 64 Penn. St., 169; *Martin v. Dix*, 52 Miss., 53; *Goff v. Frederick*, 44 Md., 67. It is believed, however, that every one of the American constitutions has been adopted with either an express or an implied understanding, that local self-government in some form was to be continued, and that it would not be competent for any state legislature wholly to abolish local institutions and substitute no others in their stead. *People v. Hurlbut*, 24 Mich., 44; *People v. Lynch*, 51 Cal., 15.

There are two ways in which the people of a state may provide for their local institutions: 1. by their constitution; 2. by laws enacted by their representatives in the state legislature. Generally it will be found that the two are combined; the constitution marking out the general features of local government, and leaving all else to the legislature. This is the desirable method, as it ensures steadiness and uniformity, by making the main features subject to change only by the deliberate action of the people themselves, at the same time that it leaves minor matters, in respect to which there might be frequent occasion for modification and change, entirely at the control of the legislative power. There has however of late been a growing tendency in all constitutional revisions to particularize more and more, and this is quite as observable in respect to matters of local government as to any others. But as the most important provisions have been in the nature of restrictions to prevent abuse of local powers, probably no harm will result from any of them.

The feature common to the local government of all the states is that of county government. The counties are created at the will of the legislature,



by setting apart certain territory, the inhabitants of which are authorized to choose certain officers, and exercise certain powers of a public nature. The authority thus conferred is corporate authority, and the county is *quasi* a corporation, and may sue and be sued as such, though it is sometimes provided that suits by or against it shall be in the name of its corporate board, or of some designated corporate officer. The county officers commonly are a sheriff, a treasurer, a county clerk, one or more coroners, and a public prosecutor or state's attorney. In some states, there are also a recorder of deeds, a surveyor and a superintendent of schools. The titles of these officers perhaps sufficiently indicate their duties. Besides these the county has a governing board of some sort, with jurisdiction in respect to accounts against it, and to its taxation and all financial matters. There is great diversity in the composition of this board, and in the methods of its selection. In some states, it is a board of commissioners or supervisors selected directly or indirectly by the people of the county at large, in some it is a board of supervisors composed of the supervisors chosen in the respective towns or districts, in some it is a county court, made up in part or wholly of magistrates chosen in towns or districts, and in Louisiana it is a police jury, composed of members chosen by the people at large. The diversity in the powers of these boards is also very great. In some states they have large powers of local legislation in respect to highways, bridges, ferries, navigable waters, fences, the running at large of cattle, and the destruction of noxious weeds, and final authority in respect to claims against their respective counties. They also review the local assessments, determine the tax levy, and have general supervision of all county affairs, buildings, and offices. They thus constitute the most important agency in state legislation under the legislature itself, and, in respect to many of their powers, are altogether independent, so long as they do not exceed them. In other states the powers of the county board are much less important. It should be stated that in Louisiana the districts of territory having county government are designated parishes.

In a very large proportion of the states, but not in all, the counties are subdivided into districts, which are designated either as towns or townships. In the New England states the people of these towns constitute a democracy, which annually in town meeting chooses selectmen to manage its affairs, makes by-laws and gives general direction in respect to town business. In New York and the Western states generally, the democratic feature is not so prominent, but the town meeting is very important, and possesses considerable powers. Wherever township government exists, there is a town board composed of officers chosen by the people, and constituting the financial board. In the Western states the following officers are generally provided for: a supervisor, a clerk, a treasurer, several justices of the peace, an overseer of the poor, one or more commissioners of highways, one or more constables, and one or more school inspectors. Where the supervisor is not made assessor, an officer by that name is chosen; perhaps more than one. In some states there is a township superintendent of schools. This statement sufficiently indicates the importance of the town government.

In Virginia the subdivisions of the county for local purposes are called ma-

gisterial districts, each of which chooses three justices, a supervisor, a constable, and an overseer of the poor for a term of two years. These districts do not differ essentially from townships, elsewhere, except in name.

Where township government exists, the townships are generally subdivided into school districts and road districts. Each of these districts is a little municipality with corporate powers for school or road purposes, and with authority to choose its own officers and to control its own affairs, subject to the general laws of the state. Where township government does not exist, the counties may be divided into similar road districts, and into school districts also if a public school system has been established for the state.

Besides the municipal corporations already mentioned, and which are created by the legislature without any grant of special charter, there are others created for densely populated districts, which are designated cities, boroughs or villages. Until recently these have been created by special charter, and the powers conferred have had some regard to the size and importance of the town. Almost universally, they have exceeded the powers which it is customary to confer upon townships, and they are given authority to abate nuisances, establish market rules, and regulate public conveyances and places, and over many other subjects with which a rural population has no occasion to concern itself. The largest and most important of these towns have generally been chartered under the designation of city; the smaller under that of borough, or town perhaps, but more commonly under that of village. In this, however, it cannot be said that there has been any uniformity of action; for while there are some very large villages, there are some very small chartered cities. The difference between city and village, is nevertheless not wholly in name, for a village, where carved out of a township, will generally be left subject to town government, except as the village charter shall provide, and will thus constitute a corporation within a corporation: *Campbell v. Fair Haven*, 54 Vt., 336; *Jones v. Kolb*, 56 Wis., 263; when a city thus carved out, would be set off from the township altogether, and made wholly independent. Recently a strong disinclination to the granting of special municipal charters has grown up, and in several state constitutions, it is now provided that municipal bodies shall only be created by general law.

The highest type of local self government in the United States, is to be found in the city. As cities have been created at different periods, and by so great a number of states, it could not be expected that the plan of incorporation would be uniform, or that the diversity should not be, as indeed we find it, very great. Still there are some leading features present in city government everywhere. The American cities have severally a body of electors composed of all the adult male citizens, by whom the executive officer, usually called the mayor, and the local legislature, usually called the common council, are chosen. The common council is sometimes, but not always, composed of two houses, and for the purposes of their election, the city is subdivided into wards. If the city is not also a county by itself, the wards, or the city at large, will be given representation in the county board, by whatever name it may be called. The common council is generally given large powers of local government,

though sometimes the powers of one house are restricted to financial questions. The inferior municipal officers will be chosen, as the charter may provide, either by popular vote, or by the common council, or by the mayor with the concurrence of the common council or one of its branches. Cities have no inherent taxing powers, but they are given large powers of taxation for city purposes, and also the power to contract debts for like purposes. In these powers have been found to lurk the chief evils of city government: they are not only abused corruptly, but also, from over-confidence in future city growth and prosperity, they have led in some cases to enormous city debts and to practical bankruptcy. Protection against such calamities can only be made secure by the legislature imposing exact restrictions of the powers granted. This is now commonly done.

The cities are made responsible for the preservation of order within their limits, and are given very extensive police powers for that purpose. The preservation of public order is really, however, a state duty, and when authority over it is conferred upon a municipality, the municipality is made a state agency in respect to that duty, and may be compelled by the state to perform it, and to levy all necessary taxes, and provide all necessary officers for the purpose. If there is a state system of public instruction, the city is also given some part in that, and may be required to perform it. But, in respect to matters which concern its own people exclusively, such as providing parks, water or gas works, city buildings, etc., the city is entitled to be governed by the judgment of its own people and its own authorities, except that, as already said, the state may impose restrictions to prevent abuse of power. It is a general rule that cities, and indeed all municipal corporations, are entitled to the same protection in their property, that private citizens can claim, and even the state cannot deprive them of it. *Terrett v. Taylor*, 9 Cranch, 43; *Mills v. Charleton*, 29 Wis., 400; *People v. Common Council*, 51 Ill., 58; *Park Commissioners v. Common Council*, 28 Mich., 228. But where the property was acquired for public purposes, the state undoubtedly has a certain undefined right to direct as to its control and disposition, and if a municipal corporation is dissolved, the state as trustee will dispose of its property, keeping in view in doing so the purposes, for which, and the people for whose benefit, it was acquired.

Congress has no authority to create municipal corporations within the states, but it may create them in the District of Columbia and in the territories. But in the territories it is customary to leave this authority with the local legislature.

In none of the American states is there a body corresponding to the Local Government Board in Great Britain, and in none, perhaps, is the supervision of the municipalities as complete as would be desirable. Indeed, the general rule is that if a city, county, town or village, performs such state duties as may be imposed by law upon it, the state does not concern itself further, but leaves local evils to be remedied by the people themselves. If a municipal corporation exceeds its powers, its acts are void; if its officers exceed theirs, they may be held to personal accountability in the courts. Threatened abuses, such as a misapplication of funds, may be restrained by injunction on

the application of any person whose pecuniary interests would be injuriously affected thereby.

The general doctrine of the courts is that grants of municipal powers are to be strictly construed. *Nashville v. Ray*, 19 Wall., 468; *Bennett v. Birmingham*, 31 Penn. St., 15; *Johnston v. Louisville*, 11 Bush, 527; *Burritt v. New Haven*, 42 Conn., 174; *Jeffries v. Lawrence*, 42 Iowa, 498; *Clark v. School District*, 3 R. I., 199; *Williams v. Davidson*, 43 Tex., 1; *Vance v. Little Rock*, 30 Ark., 485; *Pullen v. Raleigh*, 68 N. C., 451.

570.

# THE TERRITORIES OF THE UNITED STATES.

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In the common acceptation of those terms the United States has no colonies and no foreign possessions.

It was provided by the constitution of the United States that "new states may be admitted by the Congress into this Union, but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress." Art. 4, § 3, cl. 1. Also that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States or of any particular state." Art. 4, § 3, cl. 2. Also that "the Congress shall have power" "to exercise exclusive legislation in all cases whatsoever over such district, not exceeding ten miles square, as may by cession of particular states, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased, by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." Art. 1, § 8, cl. 17.

It is always to be borne in mind, in considering the constitution of the United States, that it was made for sovereign states. Nevertheless its purpose was to create a sovereignty, which in respect to some of the highest powers of government, should be supreme over all the states, and which should be the sole representative of all the states in the family of nations. And no doubt any such sovereignty would possess all the incidental powers belonging to any sovereignty, of providing for the exercise of its constitutional functions, and of perpetuating its existence. *Martin v. Hunter*, 1 Wheat., 304; *United States v. Bevans*, 3 Wheat., 336; *McCulloch v. Maryland*, 4 Wheat., 316; *Osborn v. United States*, 9 Wheat., 738; *United States v. Coombs*, 12 Pet., 72; *Ableman v. Booth*, 21 How., 506.

But the United States as a nation was possessed at the time the constitution was formed of certain territory which had been ceded to it by the states. Within the limits of the cessions there were many private estates, which had been acquired by grant from the crown, or from the colonies then owning the territory, but the title to the land not thus granted passed by the cessions to the United States, which thus became proprietor of the soil, so far as it had not previously become private property, and ruler of the territory and of its people. Previous to the adoption of the constitution a government had been provided for the territory northwest of the Ohio, and as that government has to a considerable extent been a model since, it may be useful to give some

statement of the provisions of the ordinance establishing it. This was the ordinance of July 13, 1787.

The ordinance provided for a governor of the territory, to be appointed by Congress for the term of three years; a secretary, to be in like manner appointed for the term of four years, and three judges, to hold office during good behavior. The judges were not only to exercise judicial authority, but they were to be the legislature for the territory until it should have five thousand inhabitants, when the people were to elect representatives to sit in a general assembly. Meantime the governor was to appoint magistrates and other civil officers. The general assembly was to consist of the representatives, constituting one house, and a council of five members chosen by the Congress from ten names nominated to it by the representatives. All laws required the assent of both houses and of the governor. The fifth article of the ordinance provided that there should be formed within said territory not less than three nor more than five states; and after indicating boundaries for three states, it declares that, "whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original states in all respects whatever, and shall be at liberty to form a permanent constitution and state government.

After the federal government was organized under the constitution, the appointing power for the territory was transferred from the Congress to the president, but in other respects the ordinance remained in force. New territories were formed within its limits, however, as the needs of the people seemed to require separate governments, and in time, when the requisite population was obtained, the five states contemplated as possible by the ordinance, were formed and admitted into the Union in the following order: Ohio, Indiana, Illinois, Michigan and Wisconsin.

Here we observe a normal condition of things contemplated by the constitution when it speaks of the admission of new states into the Union. It contemplated that settlements would be formed on the unoccupied lands belonging to the United States; that the people would for a time be governed by the "rules and regulations" established for them by Congress, but that eventually, when the population was sufficient to warrant it, states suitable in size should be admitted to the Union on an equal footing with the original states. What should be sufficient population to justify admission has never been definitely agreed, but it has generally been thought it should be equal to the number required to entitle the existing states to a representative in Congress according to the ratio of representation as it stands at the time.

Congress has not always—nor generally of late—in organizing a territory, made the judges a legislative authority, but it has provided for a legislature chosen exclusively by the people. Whatever may be the local legislature, it possesses general legislative power, to be exercised, however, in conformity to the constitution of the United States, and to the organic law. *Miners' Bank v. Iowa*, 12 How., 1; *Vincennes University v. Indiana* 14 How., 268; *Cross v. Harrison*, 16 How., 164. But Congress may, in its discretion, disallow any territorial legislation, and legislate directly for the territory itself, so far as

it shall deem necessary or expedient: *American Ins. Co., v. Canter*, 1 Pet., 511; *Clinton v. Englebrecht*, 13 Wall., 434; *Reynolds v. United States*, 98 U. S. Rep., 145.

Before any state can be admitted to the union, there must be a state ready to admit; and this implies that there shall be a state with a constitution and laws, so that when admitted, it can proceed at once in the performance of sovereign functions. The regular method of obtaining admission is for Congress to pass an "enabling act," as it is called, which empowers the people of the territory who possess such qualifications as voters as the act prescribes, to elect representatives to a convention, for forming a constitution, and to vote upon the adoption of such instrument as the convention shall frame. If this authority shall be acted upon, and a constitution adopted and submitted to Congress, that body, if satisfied with the constitution, will pass another act admitting the state to the union under it. In some cases the people of territories have proceeded irregularly to form a state constitution, without the previous authority of Congress, and Congress has deemed it wise to overlook the irregularity, and pass an act of admission. There is no question of its power to do so.

But though it was probably expected that new states would generally be formed from territory belonging to the United States, there was nothing in the constitution to preclude the United States from acquiring new territory from foreign nations, and this has been done to a very large extent. The general understanding has always been, that all such territory shall have suitable territorial governments established for its people, and that eventually states of suitable size and population shall be formed from it. And many new states have already been admitted from the territory thus acquired. In no case, with the possible exception of Alaska, has it been supposed that the territory would remain permanently in a territorial or dependent condition. Such may possibly be the fate of the country just named. It is certain that it has no suitable population at the present time to be entrusted with legislative authority, and that the probability of a self-governing state being formed within its limits, is very remote and uncertain.

For the formation of a new state within the limits of an existing state, we have a precedent in the case of West Virginia. See *Virginia v. West Virginia*, 11 Wall., 39; *Kanawha Coal Co. v. Kanawha Coal, etc. Co.*, 7 Blatch., 391. The precedent comes from troublous times, and possesses some features which are never likely to present themselves again; but it nevertheless serves to show the operation of the constitutional provision.

In several cases—notably those of Missouri, Michigan and Nebraska—Congress has admitted states to the union subject to a condition to be thereafter accepted by the states. That conditions may thus be imposed will probably not be questioned; but as all new states must come into the union "on an equal footing with the original states," any condition that would preclude this must be inoperative.

The constitution under which any state can be received, must be republican in form. Const. of U. S., Art. 4, § 4.

The territory which the constitution contemplated should be obtained for the seat of government, was afterwards acquired by cessions from Maryland

and Virginia, and was named the District of Columbia. Over this district, with the exception of a portion, subsequently retroceded to Virginia, Congress exercises all the powers of sovereignty. See *Loughborough v. Blake*, 5 Wheat., 317, 322; *Cohens v. Virginia*, 6 Wheat., 264, 424. For a time the district was given a territorial government, but the experiment was not satisfactory, and it was abolished. The executive and administrative authority of the district is now vested in two commissioners appointed by the president.

As the power of exclusive legislation carries with it exclusive jurisdiction (*United States v. Cornell*, 2 Mass., 60), the states cannot take cognizance of acts done in places acquired by the United States, with the consent of the states, for forts, magazines, arsenals, dockyards and other needful buildings, and the inhabitants of those places cease to be inhabitants of the states, and can no longer exercise any civil or political rights under state laws. *Commonwealth v. Clary*, 8 Mass., 72; *Sinks v. Reese*, 19 Ohio St., 306. But it is competent for the United States to acquire lands for its purposes under the eminent domain, without the consent of the states: *Kohl v. United States*, 91 U. S. Rep., 367; and whenever it acquires or holds territory within the limits of a state without its consent, state jurisdiction is not excluded. *People v. Godfrey*, 17 Johns., 225. It is common for the states, when ceding jurisdiction of small parcels of territory for national purposes, to reserve authority for the service of state process within them.



# APPENDIX.

## SECT. 1. RECORD OF AN INDICTMENT AND CONVICTION OF MURDER, AT THE ASSIZES.

Warwickshire, } **BE IT REMEMBERED**, that at the general session of the lord the king of *oyer and terminer* holden at Warwick, in and for the said county of Warwick, on Friday, the twelfth day of March, in the second year of the reign of the lord George the Third, now king of Great Britain, before Sir Michael Foster, knight, one of the justices of the said lord the king assigned to hold pleas before the king himself, Sir Edward Clive, knight, one of the justices of the said lord the king, of his court of common bench, and others their fellows, justices of the said lord the king, assigned by letters patent of the said lord the king, under his great seal of Great Britain, made to them the aforesaid justices and others, and any two or more of them, (whereof one of them the said Sir Michael Foster and Sir Edward Clive, the said lord the king would have to be one) to inquire (by the oath of good and lawful men of the county aforesaid, by whom the truth of the matter might be the better known, and by other ways, methods, and means, whereby they could or might the better know, as well within liberties as without) more fully the truth of the treasons, misprisions of treasons, insurrections, rebellions, counterfeittings, clippings, washings, false coinings, and other falsities of the moneys of Great Britain, and of other kingdoms or dominions whatsoever; and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful uttering of words, unlawful assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligencies, concealments, maintenances, oppressions, champerties, deceits, and all other misdeeds, offences, and injuries whatsoever, and also the accessories of the same, within the county aforesaid, as well within liberties as without, by whomsoever and howsoever done, had, perpetrated, and committed, and by whom, to whom, when, how and in what manner; and of all other articles and circumstances in the said letters patent of the said lord the king specified; the premises, and every or any of them howsoever concerning; and for this time to hear and determine the said treasons and other the premises, according to the law and custom of the realm of England; and also keepers of the peace, and justices of the said lord the king assigned to hear and determine diverse felonies, trespasses, and other misdemeanors committed within the county aforesaid, by the oath of Sir James Thompson, baronet, Charles Iloper, Henry Dawes, Peter Wilson, Samuel Rogers, John Dawson, James Phillips, John Mayo, Richard Savage, William Bell, James Morris, Lawrence Hall, and Charles Carter, esquires, good and lawful men of the county aforesaid, then and there impanelled, sworn, and charged to inquire for the said lord the king and for the body of the said county, it is presented; *That* Peter Hunt, late of the parish of Lighthorne in the said county, gentleman, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the 5th day of March, in the said second year of the reign of the said lord the king, at the parish of Lighthorne aforesaid, with force and arms, in and upon one Samuel Collins, in the peace of God and of the said lord the king, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Peter Hunt, with a certain drawn sword, made of iron and steel, of the value of five shillings, which he the said Peter Hunt in his right hand then and there had and held, him the said Samuel Collins, in and upon the left side of the belly of him the said Samuel Collins, then and there feloniously, wilfully, and of his malice aforethought, did strike, thrust, stab, and penetrate; giving unto the said Samuel Collins, then and there, with the sword drawn as aforesaid, in and upon the left side of the belly of him, the said Samuel Collins, one mortal wound of the breadth of one inch, and the depth of nine inches; of which said mortal wound he the said Samuel Collins, at the parish of Lighthorne aforesaid, in the said county of Warwick, from the said fifth day of March in the year aforesaid, until the seventh day of the same month in the same year, did languish, and languishing did live; on which said

Session of *oyer and terminer*.

Commission of

*oyer and terminer*.

and of the peace.

Grand jury.

Indictment.

**Capias.** seventh day of March, in the year aforesaid, the said Samuel Collins, at the parish of Lighthorne aforesaid, in the county aforesaid of the said mortal wound did die; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said Peter Hunt, him the said Samuel Collins, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace of the said lord the now king, his crown, and dignity.

**Session of gaol delivery.** Whereupon the sheriff of the county aforesaid is commanded, that he omit not for any liberty in his bailiwick, but that he take the said Peter Hunt, if he may be found in his bailiwick, and him safely keep, to answer to the felony and murder whereof he stands indicted. Which said indictment the said justices of the lord the king above named, afterwards, to wit, at the delivery of the gaol of the said lord the king, holden at Warwick, in and for the county aforesaid, on Friday, the sixth day of August, in the said second year of the reign of the said lord the king, before the right honorable William lord Mansfield, chief justice of the said lord the king, assigned to hold pleas before the king himself, Sir Sidney Stafford Smythe, knight, one of the barons of the exchequer of the said lord the king, and others their fellows, justices of the said lord the king, assigned to deliver his said gaol of the county aforesaid of the prisoners therein being, by their proper hands to deliver here in court of record in form of the law to be determined.

**Arraignment.** And afterwards, to wit, at the same delivery of the gaol of the said lord the king of his county aforesaid, on the said Friday, the sixth day of August, in the said second year of the reign of the said lord the king, before the said justices of the lord the king last above-named, and others their fellows aforesaid, here cometh the said Peter Hunt, under the custody of William Browne, esquire, sheriff of the county aforesaid, (in whose custody in the gaol of the county aforesaid, for the cause aforesaid, he had been before committed,) being brought to the bar here in his proper person by the said sheriff, to whom he is here also committed: And forthwith being demanded concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, he saith that he is not guilty thereof; and thereof for good and evil, he puts himself upon the country: And John Blencowe, esquire, clerk of the assizes for the county aforesaid, who prosecutes for the said lord the king in this behalf doth the like: Therefore, let a jury thereupon here immediately come before the said justices of the lord the king last above mentioned, and others their fellows aforesaid, of free and lawful men of the neighbourhood of the said parish of Lighthorne, in the county of Warwick aforesaid, by whom the truth of the matter may be the better known, and who are not of kin to the said Peter Hunt, to recognize upon their oath, whether the said Peter Hunt be guilty of the felony and murder in the indictment aforesaid above specified, or not guilty: because as well the said John Blencowe, who prosecutes for the said lord the king in this behalf, as the said Peter Hunt, have put themselves upon the said jury. And the jurors of the said jury, by the said sheriff for this purpose impanelled and returned, to wit, David Williams, John Smith, Thomas Horne, Charles Nokes, Richard May, Walter Duke, Matthew Lion, James White, William Bates, Oliver Green, Bartholomew Nash, and Henry Long, being called, come; who, being elected, tried and sworn, to speak the truth of and concerning the premises, upon their oath say, that the said Peter Hunt is guilty of the felony and murder aforesaid, on him above charged in the form aforesaid, as by the indictment aforesaid is above supposed against him; and that the said Peter Hunt, at the time of committing the said felony and murder, or at any time since to this time, had not nor hath any goods or chattels, lands, or tenements, in the said county of Warwick, or elsewhere, to the knowledge of the said jurors. (1) And upon this it is forthwith demanded of the said Peter Hunt, if he hath or knoweth any thing to say, wherefore the said justices here ought not upon the premises and verdict aforesaid to proceed to justice and execution against him: who nothing farther saith, unless as he before hath said. Whereupon all and singular the premises being seen, and by the said justices here fully understood, it is considered by the court here, that the said Peter Hunt be taken to the gaol of the said lord the king of the said county of Warwick from whence he came, and from thence to the place of execution on Monday now next ensuing, being the ninth day of this instant August, and there be hanged by the neck, until he be dead; and that afterwards his body be dissected and anatomized.

**Verdict: guilty of murder.**

**Judgment of death**

**or J dissection.**

(1) This averment is now rendered unnecessary. See 7 and 8 Geo. IV, c. 22; ante, p. 357, n. (7)

## SECT. 2. CONVICTION OF MANSLAUGHTER.

upon their oath say, that the said Peter Hunt is not guilty of the murder aforesaid, above charged upon him; but that the said Peter Hunt is guilty of the felonious slaying of the aforesaid Samuel Collins; and that he had not nor hath any goods or chattels, lands, or tenements, at the time of the felony and manslaughter aforesaid, or ever afterwards to this time, to the knowledge of the said jurors. (2) And immediately it is demanded of the said Peter Hunt, if he hath or knoweth any thing to say, wherefore the said justices here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him: who saith that he is a clerk, and prayeth the benefit of clergy to be allowed him in this behalf. *Whereupon*, all and singular the premises being seen, and by the said justices here fully understood, *it is considered* by the court here, that the said Peter Hunt be burned in his left hand, and delivered. And immediately he is burned in his left hand, and is delivered, according to the form of the statute. (8)

Verdict: not guilty of murder; guilty of manslaughter.

Clergy prayed. Judgment to be burned in the hand, and delivered.

## SEC. 3. ENTRY OF A TRIAL INSTANTER IN THE COURT OF KING'S BENCH, UPON A COLLATERAL ISSUE AND RULE OF COURT FOR EXECUTION THEREON.

*Michaelmas Term, in the Sixth Year of the Reign of King George the Third.*

Kent; The King } THE PRISONER at the bar being brought into this court  
against } in custody of the sheriff of the county of Sussex by  
Thomas Rogers. } virtue of his majesty's writ of *habeas corpus*, it is ordered  
that the said writ and the return thereto be filed. And it appearing by a  
certain record of attainer, which hath been removed into this court by his  
majesty's writ of *certiorari*, that the prisoner at the bar stands attainted, by  
the name of Thomas Rogers, of felony for a robbery on the highway, and the  
said prisoner at the bar having heard the record of the said attainer now read  
to him, is now asked by the court here what he hath to say for himself, why  
the court here should not proceed to award execution against him upon the  
said attainer. He for plea saith, that he is not the same Thomas Rogers in  
the said record of attainer named, and against whom judgment was pro-  
nounced: and this he is ready to verify and prove, &c. To which said plea  
the honorable Charles Yorke, esquire, attorney-general of our present sovereign  
lord and king, who for our said lord the king in this behalf prosecuteth, being  
now present here in court, and having heard what the said prisoner at the bar  
hath now alleged, for our said lord the king by way of reply saith, that the  
said prisoner now here at the bar is the same Thomas Rogers in the said re-  
cord of attainer named, and against whom judgment was pronounced as afore-  
said; and this he prayeth may be inquired into by the country; and the said pris-  
oner at the bar doth the like: *Therefore* let a jury in this behalf immediately  
come here into court, by whom the truth of the matter will be the better  
known, and who have no affinity to the said prisoner, to try upon their oath,  
whether the said prisoner at the bar be the same Thomas Rogers in the said  
record of attainer named, and against whom judgment was so pronounced as  
aforesaid or not: because, as well the said Charles Yorke, esquire, attorney-  
general of our said lord the king, who for our said lord the king in this behalf  
prosecutes, as the said prisoner at the bar, have put themselves in this behalf  
upon the said jury. And immediately thereupon the said jury come here into  
court; and being elected, tried and sworn to speak the truth touching and con-  
cerning the premises aforesaid, and having heard the said record read to them,  
do say, upon their oath, that the said prisoner at the bar is the same Thomas  
Rogers in the said record of attainer named, and against whom judgment  
was so pronounced as aforesaid, in manner and form as the said attorney-  
general hath by his said replication to the said plea of the said prisoner now  
here at the bar alleged. *And hereupon* the said attorney-general, on behalf  
of our said lord the king, now prayeth that the court here would proceed to  
award execution against him, the said Thomas Rogers, upon the said attainer.  
*Whereupon*, all and singular the premises being now seen and fully understood  
by the court here, *it is ordered* by the court here, that execution be done upon  
the said prisoner at the bar for the said felony, in pursuance of the said judg-  
ment, according to due form of law. And it is lastly ordered, that he, the said  
Thomas Rogers, the prisoner at the bar, be now committed to the custody of

*Habeas corpus.*

Record of at-  
tainer read,

for felony and  
robbery.

Prisoner asked  
what he can  
say in bar of  
execution.

Plea: not the  
same person.

Replication,

averring that  
he is.

Issue joined.  
Ventre award-  
ed instanter.

Jury sworn.

Verdict: that  
he is the same.

Award of  
execution.

(2) See preceding note.

(3) Benefit of clergy and burning in the hand being now abolished: see 6 Geo. IV, c. 26; and 6 Geo. IV, c. 23, ante, p. 374, n. (8) this form will require alteration accordingly.

the sheriff of the county of Kent (now also present here in court) for the purpose aforesaid; and that the said sheriff of Kent do execution upon the said defendant, the prisoner at the bar, for the said felony, in pursuance of the said judgment, according to due form of law.

On the motion of Mr. Attorney-General.

By the Court.

**SEC. 4. WARRANT OF EXECUTION ON JUDGMENT OF DEATH, AT THE GENERAL GAOL DELIVERY IN LONDON AND MIDDLESEX.**

London } To the sheriffs of the city of London; and to the sheriff of the  
and } county of Middlesex: and to the keeper of his majesty's gaol  
Middlesex. } of Newgate.

*Whereas*, at the session of gaol delivery of Newgate, for the city of London and county of Middlesex, holden at Justice Hall, in the Old Bailey, on the nineteenth day of October last Patrick Mahony, Roger Jones, Charles King and Mary Smith received sentence of death for the respective offences in their several indictments mentioned: *Now it is hereby ordered*, that execution of the said sentence be made and done upon them, the said Patrick Mahony and Roger Jones, on Wednesday, the ninth day of this instant month of November, at the usual place of execution. And it is his majesty's command that execution of the said sentence upon them, the said Charles King and Mary Smith, be respited until his majesty's pleasure touching them be farther known.

GIVEN under my hand and seal, this fourth day of November, one thousand seven hundred and sixty-eight.

JAMES EYRE, Recorder.

[L. s.]

**SECT. 5. WRIT OF EXECUTION UPON A JUDGMENT OF MURDER, BEFORE THE KING IN PARLIAMENT.**

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriffs of London, and sheriff of Middlesex, greeting. *Whereas* Lawrence Earl Ferrers, Viscount Tamworth, hath been indicted of felony and murder, by him done and committed, which said indictment hath been certified before us in our present parliament; and the said Lawrence Earl Ferrers, Viscount Tamworth, hath been thereupon arraigned, and upon such arraignment hath pleaded not guilty; and the said Lawrence Earl Ferrers, Viscount Tamworth, hath before us in our said parliament been tried, and in due form of law convicted thereof; and whereas, judgment hath been given in our said parliament that the said Lawrence Earl Ferrers, Viscount Tamworth, shall be hanged by the neck till he is dead, and that his body be dissected and anatomized, the execution of which judgment yet remaineth to be done: We require, and by these presents strictly command you, that, upon Monday, the fifth day of May instant, between the hours of nine in the morning and one in the afternoon of the same day, him, the said Lawrence Earl Ferrers, Viscount Tamworth, without the gate of our tower of London (to you then and there to be delivered, as by another writ to the lieutenant of our tower of London or his deputy directed, we have commanded) into your custody you then and receive: and him, in your custody so being, you forthwith convey to the accustomed place of execution at Tyburn: and that you do cause execution to be done upon the said Lawrence Earl Ferrers, Viscount Tamworth, in your custody so being, in all things according to the said judgment. And this you are by no means to omit, at your peril. *Witness* ourself at Westminster, the second day of May, in the thirty-third year of our reign.

YORKE and YORK.

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