COMMENTARIES
ON
The Laws of England:
IN FOUR BOOKS;
WITH
AN ANALYSIS OF THE WORK.
________________________________________
BY
SIR WILLIAM BLACKSTONE, KNT:
ONE OF THE
JUSTICES OF THE COURT OF COMMON PLEAS.
________________________________________
IN TWO VOLUMES.
FROM THE
EIGHTEENTH LONDON EDITION.
WITH A LIFE OF THE AUTHOR, AND NOTES:
BY
CHRISTIAN, CHITTY, LEE, HOVENDEN, AND RYLAND:
AND ALSO
REFERENCES TO AMERICAN CASES,
BY
A MEMBER
OF THE NEW-YORK BAR.
________________________________________
VOL. II.—BOOK III. & IV.
________________________________________
NEW-YORK:
W. E. DEAN, PRINTER AND PUBLISHER.
B. & S. COLLINS; N. & J. WHITE; GOULD, BANKS, & CO.; HALSTED &
VOORHIS; AND A. TOWER, PHILADELPHIA.
1836.
Entered according to the Act of Congress in the year One Thousand Eight Hundred and Thirty-two, by W. E. Dean, in the Clerk's Office of the Southern District of New-York.
CONTENTS

THE ANALYSIS OF BOOK III

PRIVATE WRONGS.

For which the laws of England have provided redress

1. By the mere act of the parties. ................................................. Chapter I
2. By the mere operation of law. .............................................. II
3. By both together, or suit in courts; wherein
   1. Of courts, and therein of
      1. Their nature and incidents. ........................................ III
      2. Their several distinctions; viz.
         1. Of public or general jurisdiction; as, ........................ IV
            1. The courts of common law and equity. ........................ IV
            2. Ecclesiastical courts,
            3. Courts military,
            4. Courts maritime
         2. Of private or special jurisdiction ................................ VI
   2. Of the cognizance of wrongs, in the courts—
      1. Ecclesiastical,
      2. Military,
      3. Maritime .......................................................... VII
   4. Of common law; wherein
      1. Of the respective remedies, for injuries affecting
         1. The rights of private persons
            1. Absolute,
            2. Relative ....................................................... VIII
         2. The rights of property
            1. Personal,
               1. In possession; by
                  1. Dispossession, ........................... X
                  2. Damage, ...................................... XI
               2. In action; by breach of contracts ................ IX
            2. Real; by
               1. Ouster, or dispossession of
                  1. Freeholds .................................. X
                  2. Chattels real .................................. XI
               2. Trespass .............................................. XII
               3. Nusance ............................................ XIII
               4. Waste ............................................... XIV
               5. Subtraction ......................................... XV
               6. Disturbance ......................................... XVI
            3. The rights of the crown ..................................... XVII
   2. Of the pursuit of remedies,
      1. By action at common law; wherein of
         1. Original .................................................... XVIII
         2. Process .................................................. XIX
         3. Pleading .................................................. XX
         4. Demurrer and issue ........................................ XXI
         5. Trial; by
            1. Record,
            2. Inspection,
            3. Witnesses,
            4. Certificate,
            5. Wager of battel,
            6. Wager of law
            7. Jury .................................................... XXII
         6. Judgment .................................................. XXIII
         7. Appeal ................................................... XXIV
         8. Execution ................................................ XXV
      2. By proceedings in the courts of equity ......................... XXVII
## ANALYSIS.

### BOOK III.—OF PRIVATE WRONGS.

#### CHAPTER I.

<table>
<thead>
<tr>
<th>Of the Redress of Private Wrongs, by the mere act of the parties</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Wrongs are the privation of right; and are, I. Private. II. Public</td>
<td>2</td>
</tr>
<tr>
<td>2. Private wrongs, or civil injuries, are an infringement, or privation, of the civil rights of individuals, considered as individuals</td>
<td></td>
</tr>
<tr>
<td>3. The redress of civil injuries is one principal object of the laws of England</td>
<td></td>
</tr>
<tr>
<td>4. This redress is effected, I. By the mere act of the parties. II. By the mere operation of law. III. By both together, or suit in courts</td>
<td></td>
</tr>
<tr>
<td>5. Redress by the mere act of the parties, is that which arises, I. From the sole act of the party injured. II. From the joint act of all the parties</td>
<td></td>
</tr>
<tr>
<td>6. Of the first sort are, I. Defence of one's self, or relations. II. Sequestration of goods. III. Entry on lands and tenements. IV. Abatement of nuisances. V. Distress—for rent, for suit or service, for amercements, for damage, or for divers statutory penalties—made of such things only as are legally distreasable; and taken and disposed of according to the due course of law. VI. Seizing of heriots, &amp;c.</td>
<td></td>
</tr>
<tr>
<td>7. Of the second sort are, I. Accord. II. Arbitration</td>
<td>15, 16</td>
</tr>
</tbody>
</table>

#### CHAPTER II.

<table>
<thead>
<tr>
<th>Of Redress by the mere operation of Law</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Redress effected by the mere operation of law, is, I. In case of retainer; where a creditor is executor or administrator, and is thereupon allowed to retain his own debt. II. In the case of remitter; where one who has a good title to lands, &amp;c., comes into possession by a bad one, and is thereupon remitted to his antient good title, which protects his ill-acquired possession</td>
<td>18—21</td>
</tr>
</tbody>
</table>

#### CHAPTER III.

<table>
<thead>
<tr>
<th>Of Courts in General</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Redress that is effected by the act both of law and of the parties, is by suit or action in the courts of justice</td>
<td>22</td>
</tr>
<tr>
<td>2. Herein may be considered, I. The courts themselves. II. The cognizance of wrongs, or injuries, therein. And of courts, I. Their nature and incidents. II. Their several species</td>
<td>23</td>
</tr>
<tr>
<td>3. A court is a place wherein justice is judicially administered, by officers delegated by the crown: being a court either of record, or not of record</td>
<td>23—24</td>
</tr>
</tbody>
</table>

#### CHAPTER IV.

<table>
<thead>
<tr>
<th>Of the Public Courts of Common Law and Equity</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Courts of justice, with regard to their several species are, I. Of a public or general jurisdiction throughout the realm. II. Of a private or special jurisdiction</td>
<td>30</td>
</tr>
<tr>
<td>2. Public courts of justice are, I. The courts of common law and equity. II. The ecclesiastical courts. III. The military courts. IV. The maritime courts</td>
<td></td>
</tr>
<tr>
<td>3. The general and public courts of common law and equity are, I. The court of piepoudre. II. The court-baron. III. The hundred court. IV. The county court. V. The court of Common Pleas. VI. The court of King's Bench. VII. The court of Exchequer. VIII. The court of Chancery. (Which two last are courts of equity as well as law). IX. The courts of Exchequer-Chamber. X. The house of Peers. To which may be added, as auxiliaries, XI. The courts of Assise and Nisi Prius</td>
<td>32—60</td>
</tr>
</tbody>
</table>

#### CHAPTER V.

<table>
<thead>
<tr>
<th>Of Courts Ecclesiastical, Military, and Maritime</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Ecclesiastical courts, (which were separated from the temporal by William the Conqueror), or courts Christian, are, I. The court of the Archdeacon. II. The court of the Bishop's Consistory. III. The court of Archs. IV. The court of Peculiars. V. The Prerogative court. VI. The court of Delegates. VII. The court of Review</td>
<td>62—68</td>
</tr>
<tr>
<td>2. The only permanent military court is that of chivalry; the courts martial annually established by act of Parliament, being only temporary</td>
<td>67</td>
</tr>
<tr>
<td>3. Maritime courts are, I. The court of Admiralty and Vice-Admiralty. II. The court of Delegates. III. The lords of the Privy Council, and others authorized by the king's commission, for appeals in prize-causes</td>
<td>68</td>
</tr>
</tbody>
</table>

#### CHAPTER VI.

<table>
<thead>
<tr>
<th>Of Courts of a Special Jurisdiction</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Courts of a special or private jurisdiction are, I. The forest courts; in-</td>
<td>71—85</td>
</tr>
</tbody>
</table>
CHAPTER VII.

Of the Cognizance of Private Wrongs

1. All private wrongs or civil injuries are cognizable either in the courts ecclesiastical, military, maritime, or those of common law.

2. Injuries cognizable in the ecclesiastical courts are, I. Pecuniary. II. Matrimonial. III. Testamentary

3. Pecuniary injuries, here cognizable, are, I. Subtraction of tithes. For which the remedy is by suit to compel their payment, or an equivalent; and also their double value. II. Non-payment of ecclesiastical dues. Remedy: by suit for payment. III. Spoilation. Remedy: by suit for restitution. IV. Dilapidations. Remedy: By suit for damages. V. Non-repair of the church, &c.; and non-payment of church-rates. Remedy: by suit to compel them


5. Testamentary injuries are, I. Disputing the validity of wills. Remedy: By suit to establish them. II. Obstructing of administrations. Remedy: by suit for the granting them. III. Subtraction of legacies. Remedy: by suit for the payment

6. The course of proceedings herein is much conformed to the civil and canon law; but their only compulsory process is that of excommunication which is enforced by the temporal writ of significavit or de excommunicato capiendo

7. Civil injuries, cognizable in the court military, or court of chivalry, are, I. Injuries in point of honour. Remedy: by suit for honourable amends. II. Encroachments in coat-armour, &c.

CHAPTER VIII.

Of Wrongs, and their Remedies, respecting the Rights of Persons

1. In treating of the cognizance of injuries by the courts of common law, may be considered, I. The injuries themselves, and their respective remedies. II. The pursuit of those remedies in the several courts

2. Injuries between subject and subject, cognizable by the courts of common law, are in general remedied by putting the party injured into possession of that right whereof he is unjustly deprived

3. This is effected, I. By delivery of the thing detained to the rightful owner. II. Where that remedy is either impossible or inadequate, by giving the party injured a satisfaction in damages

4. The instruments by which these remedies may be obtained, are suits or actions; which are defined to be the legal demand of one's right: and these are, I. Personal. II. Real. III. Mixed

5. Injuries (whereof some are with, others without, force) are, I. Injuries to the rights of persons. II. Injuries to the rights of property. And the former are, I. Injuries to the absolute. II. Injuries to the relative, rights of persons

6. The absolute rights of individuals are, I. Personal security. II. Personal liberty. III. Private property. (See Book I. Ch. I.) To which the injuries must be correspondent

7. Injuries to personal security are, I. Against a man's life. II. Against his limbs. III. Against his body. IV. Against his health. V. Against his reputation.—The first must be referred to the next book

8. Injuries to the limbs and body are, I. Threats. II. Assault. III. Battery. IV. Wounding. V. Mayhem. Remedy: by action of trespass vi et armis, for damages
9. Injuries to health, by any unwholesome practices, are remedied by a special action of trespass on the case, for damages.


11. The sole injury to personal liberty is false imprisonment. Remedies: I. By writ of, 1st, mainprize; 2dly, 

12. For injuries to private property, see the next chapter.


15. The only injury to a parent or guardian, is the abduction of their children, or wards. Remedy: by action of trespass, de filiis, vel custodiiis, rapitis vel abductis; to recover possession of them, and damages.

16. Injuries to a master are, I. Retaining his servants. Remedy: by action on the case, for damages. II. Beating them. Remedy: by action on the case, per quod servitium amissi; for damages.

CHAPTER IX.

OF INJURIES TO PERSONAL PROPERTY

1. Injuries to the rights of property, are either to those of personal, or real, property.

2. Personal property is either in possession, or in action.

3. Injuries to personal property in possession are, I. By dispossession. II. By damage, while the owner remains in possession.

4. Dispossession may be effected, I. By an unlawful taking. II. By an unlawful detaining.

5. For the unlawful taking of goods and chattels personal, the remedy is, I. Actual restitution; which (in case of a wrongfull distress) is obtained by action of replevin. II. Satisfaction in damages; 1st, in case of rescous, by action of rescous, pound-breach, or on the case; 2dly, in case of other unlawful takings, by action of trespass, or trover.

6. For the unlawful detaining of goods lawfully taken, the remedy is also, I. Actual restitution; by action of replevin, or detinue. II. Satisfaction in damages; by action on the case, for trover and conversion.

7. For damage to personal property, while in the owner's possession, the remedy is in damages, by action of trespass vi et armis, in case the act be immediately injurious, or by action of trespass on the case, to redress consequential damage.

8. Injuries to personal property, in action, arise by breach of contracts, I. Express. II. Implied.


10. Implied contracts are such as arise, I. From the nature and constitution of government. II. From reason and the construction of law.

11. Breaches of contracts implied in the nature of government, are by the non-payment of money which the laws have directed to be paid. Remedy: by action of debt; (which, in such cases, is frequently a popular, frequently a qui tam action) to compel the specific payment; or sometimes by action on the case, for damages.

12. Breaches of contracts implied in reason and construction at law, are by the non-performance of legal presumptive assumptis; for which the remedy is in damages; by an action on the case, on the implied assumptis, I. Of a quantum meruit. II. Of a quantum valetat. III. Of money expended for another. IV. Of receiving money to another's use. V. Of an insinual comptassent, on an account stated; (the remedy on an account unstated being by action of account). VI. Of performing one's duty, in any employment, with integrity, diligence, and skill. In some of which cases an action of deceit (or on the case of deceit) will lie.

CHAPTER X.

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

1. Injuries affecting real property are, I. Ouster. II. Trespass. III. Nuisance. IV. Waste. V. Subtraction. VI. Disturbance.

2. Ouster is the motion of possession; and is, I. From freeholds. II. From chattels real.
<table>
<thead>
<tr>
<th>Page</th>
<th>3. Ouster from freeholds is effected by,</th>
</tr>
</thead>
<tbody>
<tr>
<td>167</td>
<td>I. Abatement. II. Intrusion. III. Disseisin. IV. Discontinuance. V. Deforcement.</td>
</tr>
<tr>
<td>167</td>
<td>4. Abatement is the entry of a stranger, after the death of the ancestor, before the heir.</td>
</tr>
<tr>
<td>167</td>
<td>5. Intrusion is the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion.</td>
</tr>
<tr>
<td>169</td>
<td>6. Disseisin is a wrongful putting out of him that is seised of the freehold.</td>
</tr>
<tr>
<td>171</td>
<td>7. Discontinuance is where tenant in tail, or the husband of tenant in fee, makes a larger estate than the land allowed.</td>
</tr>
<tr>
<td>172</td>
<td>8. Deforcement is any other detainer of the freehold from him who hath the property, but who never had the possession.</td>
</tr>
<tr>
<td>174</td>
<td>9. The universal remedy for all these is restitution or delivery of possession, and, sometimes, damages for the detention. This is effected, I. By mere entry. II. By action possessory. III. By writ of right.</td>
</tr>
<tr>
<td>175-179</td>
<td>10. Mere entry on lands, by him who hath the apparent right of possession, will (if peaceable) devest the mere possession of a wrong-doer. But forcible entries are remedied by immediate restitution, to be given by a justice of the peace.</td>
</tr>
<tr>
<td>179</td>
<td>11. Where the wrong-doer hath not only mere possession, but also an apparent right of possession; this may be devested by him who hath the actual right of possession, by means of the possessory actions of writ of entry, or assise.</td>
</tr>
<tr>
<td>179</td>
<td>12. A writ of entry is a real action, which disposes the title of the tenant, by shewing the unlawful means under which he gained or continues possession. And it may be brought, either against the wrong-doer himself; or in the degrees, called the per, the per and cui, and the post.</td>
</tr>
<tr>
<td>180</td>
<td>13. An assise is a real action, which proves the title of the demandant, by shewing his own, or his ancestor's possession. And it may be brought either to remedy abatements; viz. the assise of mort d'ancestor, &amp;c.; or to remedy recent disseisins; viz. the assise of recent disseisin.</td>
</tr>
<tr>
<td>184-190</td>
<td>14. Where the wrong-doer hath gained the actual right of possession, he who hath the right of property can only be remedied by a writ of right, or some writ of a similar nature. As, I. Where such right of possession is gained by the discontinuance of tenant in tail. Remedy, for the right of property by writ of demand. II. Where gained by recovery in a possessory action, bad against tenants of particular estates by their own default. Remedy: by writ of quod ei deforcent. III. Where gained by recovery in a possessory action, had upon the merits. IV. Where</td>
</tr>
</tbody>
</table>

---

**Page 190-197**

### CHAPTER XI.

**OF DISPOSSESSION, OR OUSTER, OF CHATTLES REAL.**

1. Ouster from chattels real is, I. From estates by statute and elegit. II. From an estate for years.

2. Ouster, from estates by statute or elegit, is effected by a kind of disseisin. Remedy: restitution, and damages; by assise of novel disseisin.

3. Ouster from an estate for years, is effected by a like disseisin or ejectment. Remedy: restitution and damages; I. By writ of ejectio firma. II. By writ of quare ejectit infra terminum.

4. A writ of ejectio firma, or action of trespass in ejectment, lieth where lands, &c., are let for a term of years, and the lessee is ousted or ejected from his term; in which case he shall recover possession of his term, and damages.

5. This is now the usual method of trying titles to land, instead of an action real: viz. by, I. The claimant's making an actual (or supposed) lease upon the land to the plaintiff. II. The plaintiff's actual (or supposed) entry thereupon. III. His actual (or supposed) ouster and ejectment by the defendant. For which injury this action is brought, either against the tenant, or (more usually) against some casual or fictitious ejector; in whose stead the tenant may be admitted defendant, on condition that the lease, entry, and ouster be confessed, and that nothing else be disputed but the merits of the title claimed by the lessor of the plaintiff.

6. A writ of quare ejectit infra terminum is an action of a similar nature; only not brought against the wrong-doer or ejector himself, but such as are in possession under his title.

---

**Page 207**

### CHAPTER XII.

**OF TRESPASS.**

1. Trespass is an entry upon, and damage done to, another's lands, by one's own, or one's cattle; without any lawful authority, or cause of justification, which is called a breach of his close. Remedy: damages; by action of trespass quare clausum fregit: besides that of distress damage feasant. But, unless the title to the land came chiefly in question, or the trespass was wilful or malicious, the plaintiff (if the damages be under forty shillings) shall recover no more costs than damages.

---

**Page 210**

### CHAPTER XIII.

**OF NUSANCE.**

1. Nusance, or annoyance, is any thing
that worketh damage, or inconvenience: and it is either a public and common nuisance, of which in the next book; or, a private nuisance, which is any thing done to the hurt or annoyance of, I. The corporeal, II. The incorporeal, hereditaments of another

2. The remedies for a private nuisance (besides that of abatement) are, I. Damages; by action on the case (which also lies for special prejudice by a public nuisance.) II. Removal thereof, and damages; by assise of nuisance. III. Like removal, and damages; by writ of quod permittis possession

CHAPTER XIV.

Of Waste 223 to 229
1. Waste is a spoil and destruction in lands and tenements, to the injury of him who hath, I. An immediate interest (as, by right of common) in the lands. II. The remainder or reversion of the inheritance

2. The remedies, for a commoner, are, restitution, and damages; by assise of common: or, damages only; by action on the case

3. The remedy for him in remainder, or reversion, is, I. Preventive: by writ of enterpement at law, or injunction out of Chancery; to stay waste. II. Corrective: by action of waste; to recover the place wasted, and damages 223-229

CHAPTER XV.

Of Subtraction 230 to 235
1. Subtraction is when one who owes services to another, withdraws or neglects to perform them. This may be, I. Of rents, and other services, due by tenure. II. Of those due by custom

2. For subtraction of rents and services due by tenure, the remedy is, I. By distress; to compel the payment, or performance. II. By action of debt. III. By assise. IV. By writ of consuetudinibus et servitutis—to compel the payment. V. By writ of cessavit; and VI. By writ of right sur disclaimer—to recover the land itself

3. To remedy the oppression of the lord, the law hath also given, I. The writ of ne injuste vexes: II. The writ of mesne

4. For subtraction of services, due by custom, the remedy is, I. By writ of secta ad molendinum, furnum, torrare, &c.; to compel the performance, and recover damages. II. By action on the case; for damages only

CHAPTER XVI.

Of Disturbance 236 to 252
1. Disturbance is the hindering or disquieting the owners of an incorporeal hereditament, in their regular and lawful enjoyment of it

2. Disturbances are, I. Of franchises. II. Of commons. III. Of ways. IV. Of tenure. V. Of patronage

3. Disturbance, of franchises, is remedied by a special action on the case; for damages

4. Disturbance of common, is, I. Intercommoning without right. Remedy: damages; by an action on the case, or of trespass: besides distress damage feasant; to compel satisfaction. II. Surcharging the common. Remedies: distress damage feasant; to compel satisfaction: action on the case; for damages: or, writ of admeasurement of pasture; to apportion the common; and writ de seunda supereratione; for the supernumerary cattle, and damages. III. Enclosure, or obstruction. Remedies: restitution of the common, and damages; by assise of novel disseisin, and by writ of quod permittis; or, damages only; by action on the case 237-240

5. Disturbance of ways, is the obstruction, I. Of a way in gross, by the owner of the land. II. Of a way appendant, by a stranger. Remedy, for both: damages; by action on the case

6. Disturbance of tenure, by driving away tenants, is remedied by a special action on the case; for damages

7. Disturbance of patronage, is the hindrance of a patron to present his clerk to a benefice; whereof usurpation within six months is now become a species

8. Disturbers may be, I. The pseudopatron, by his wrongful presentation. II. His clerk, by demanding institution. III. The ordinary, by refusing the clerk of the true patron

9. The remedies are, I. By assise of darrein presentation. II. By writ of quare impedit—to compel institution and recover damages: consequent to which are the writs of quare incumbavit, and quare non admisit; for subsequent damages. III. By writ of right of advowson; to compel institution, or establish the permanent right

CHAPTER XVII.

Of Injuries, proceeding from, or affecting, the Crown 254 to 265
1. Injuries to which the crown is a party, are, I. Where the crown is the aggressor. II. Where the crown is the sufferer

2. The crown is the aggressor, whenever it is in possession of any property to which the subject hath a right

3. This is remedied, I. By petition of right; where the right is grounded on facts disclosed in the petition itself. II. By monstrans de droit; where the claim is grounded on facts already appearing on record. The effect of both
CHAPTER XVIII.

OF THE PURSUIT OF REMEDIES BY ACTION, AND, FIRST, OF THE ORIGINAL WRIT.*

1. The pursuit of the several remedies furnished by the laws of England, is, I. By action in the courts of common law. II. By proceedings in the courts of equity.

2. Of an action in the court of Common Pleas (originally the proper court for prosecuting civil suits) the orderly parts are, I. The original writ. II. The process. III. The pleadings. IV. The issue, or demurrer. V. The trial. VI. The judgment. VII. The proceedings in nature of appeal. VIII. The execution.

3. The original writ is the beginning or foundation of a suit, and is either optional (called a praecipe) commanding the defendant to do something in certain, or otherwise show cause to the contrary; or peremptory (called a si fecerrit te securrem) commanding, upon security given by the plaintiff, the defendant to appear in court, to shew wherefore he hath injured the plaintiff: both issuing out of Chancery under the king’s great seal, and returnable in bank during term-time.

CHAPTER XIX.

OF PROCESS

1. Process is the means of compelling the defendant to appear in court.

2. This includes, I. Summons. II. The writ of attachment, or pont; which is sometimes the first or original process. III. The writ of distress, or distress infinite. IV. The writs of capias ad respondendum, and testatum capias: or, instead of these, in the King’s Bench, the bill of Middlesex, and writ of latters: and, in the Exchequer, the writ of quo minus. V. The alias and plural writs. VI. The exigent, or writ of exigio facias, proclamations, and outlawry. VII. Appearance, and common bail. VIII. The arrest. IX. Special bail, first to the sheriff, and then to the action.

CHAPTER XX.

OF PLEADINGS

1. Pleadings are the mutual alterations of the plaintiff and defendant, in writing; under which are comprised, I. The declaration or count (wherein, incidentally, of the visine, nonsuit, retraxit, and discontinuance). II. The defence, claim of cognizance, impalpae, view,oyer, aid-prayer, voucher, or age. III. The plea; which is either a dilatory plea (1st, to the jurisdiction; 2ndly, in disability of the plaintiff; 3rdly, in abatement): or it is a plea to the action; sometimes confessing the action, either in whole, or in part (wherein of a tender, paying money into court, and set-off); but usually denying the complaint, by pleading either, 1st, the general issue; or, 2ndly, a special bar (wherein of justifications, the statutes of limitation, &c.). IV. Replication, rejoinder, surrejoinder, rebutter, surrebutter, &c. Therein of estoppels, co-lour, duplicity, demurrer, new assignment, protestation, averment, and other incidents of pleading.

CHAPTER XXI.

OF ISSUE AND DEMURRER

1. Issue is where the parties, in a course of pleading, come to a point affirmed on one side and denied on the other: which, if it be a matter of law, is called a demurrer; if it be a matter of fact, still retains the name of an issue of fact.

2. Continuance is the detaining of the parties in court from time to time, by giving them a day certain to appear upon. And, if any new matter arises since the last continuance or adjournment, the defendant may take advantage of it, even after demurrer or issue, by alleging it in a plea suis darrein continuance.

3. The determination of an issue in law, or demurrer, is by the opinion of the judges of the court; which is afterwards entered on record.
CHAPTER XXII.

Of the Several Species of Trial

1. Trial is the examination of the matter of fact put in issue
2. The species of trials are, I. By the record. II. By inspection. III. By certificate. IV. By witnesses. V. By wager of battel. VI. By wager of law. VII. By jury
3. Trial by the record is bad, when the existence of such record is the point in issue
4. Trial by inspection or examination is had by the court, principally when the matter in issue is the evident object of the senses
5. Trial by certificate is had in those cases, where such certificate must have been conclusive to a jury
6. Trial by witnesses (the regular method in the civil law) is only used on a writ of dower, when the death of the husband is in issue
7. Trial by wager of battel, in civil cases, is only had on a writ of right: but, in lieu thereof, the tenant may have, at his option, the trial by the grand assise
8. Trial by wager of law is only had, where the matter in issue may be supposed to have been privily transacted, between the parties themselves, without the intervention of other witnesses

CHAPTER XXIII.

Of the Trial by Jury

1. Trial by jury is, I. Extraordinary; as, by the grand assise, in writs of right; and by the grand jury, in writs of attainct. II. Ordinary
2. The method and process of the ordinary trial by jury is, I. The writ of reire facias to the sheriff, coroners, or elisors; with the subsequent compulsive process of habeas corpora, or distraingas. II. The carrying down of the record to the court of nisi prius. III. The sheriff's return; or panel of, 1st, special, 2ndly, common jurors. IV. The challenges; 1st, to the array; 2ndly, to the polls of the jurors; either, propter honoris respectum, propter defectum, propter effectum (which is sometimes a principal challenge, sometimes to the favour), or, propter delictum. V. The tales de circumstanctibus. VI. The oath of the jury. VII. The evidence; which is either by proofs, 1st, written; 2ndly, parol—or, by the private knowledge of the jurors. VIII. The verdict: which may be, 1st, privy; 2ndly, public; 3rdly, special

CHAPTER XXIV.

Of Judgment, and its Incidents

1. Whatever is transacted at the trial, in the court of nisi prius, is added to the record under the name of a posten: consequent upon which is the judgment
2. Judgment may be arrested or stayed for causes, I. Extrinsic, or dehors the record: as in the case of new trials. II. Intrinsic, or within it: as where the declaration varies from the writ, or the verdict from the pleadings and issue; or where the case laid in the declaration is not sufficient to support the action in point of law
3. Where the issue is inmaterial, or insufficient, the court may award a repriamer
4. Judgment is the sentence of the law, pronounced by the court, upon the matter contained in the record
5. Judgments are, I. Interlocutory; which are incomplete till perfected by a writ of enquiry. II. Final
6. Costs, or expenses of suit, are now the necessary consequence of obtaining judgment

CHAPTER XXV.

Of Proceedings in the Nature of Appeals

1. Proceedings in the nature of appeals from judgment, are, I. A writ of attaint; to impeach the verdict of a jury: which of late has been superseded by new trials. II. A writ of audita querela; to discharge a judgment by matter that has since happened. III. A writ of error, from one court of record to another; to correct judgments, erroneous in point of law, and not helped by the statutes of amendment and jeofails
2. Writs of error lie, I. To the court of King's Bench, from all inferior courts of record; from the court of Common Pleas at Westminster; and from the court of King's Bench in Ireland. II. To the courts of Exchequer Chamber, from the law side of the court of Exchequer; and from proceedings in the court of King's Bench by bill. III. To the house of Peers, from proceedings in the court of King's Bench by original, and on writs of error; and from the several courts of Exchequer Chamber

CHAPTER XXVI.

Of Execution

1. Execution is the putting in force of the sentence or judgment of the law: which is effected, I. Where possession of any hereditament is recovered; by writ of habeas facias seisinam, possessionem, &c. II. Where any thing is awarded to be done or rendered, by a special writ for that purpose: as, by writ of abatement in case of nuisance; retorno habendo, and capias in vulneram in replevin; distraingas and scire
**ANALYSIS OF BOOK III.**

<table>
<thead>
<tr>
<th>Page</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>Facias in detinue. III. Where money only is recovered; by writ of, 1st, capias ad satisfaciendum, against the body of the defendant; or, in default thereof, acire facias against his bail. 2dly, fieri facias, against his goods and chattels. 3rdly, levari facias, against his goods, and the profits of his lands. 4thly, elegit, against his goods, and the possession of his lands. 5thly, extendi facias, and other process, on statutes, recognizances, &amp;c., against his body, lands, and goods. Page 412-425</td>
<td></td>
</tr>
</tbody>
</table>

**CHAPTER XXVII.**

**Of Proceedings in the Courts of Equity**

1. Matters of equity, which belong to the peculiar jurisdiction of the court of Chancery, are, I. The guardianship of infants. II. The custody of idiots and lunatics. III. The superintendence of charities. IV. Commissions of bankrupts. Page 426-428

2. The court of Exchequer, and the duchy court of Lancaster, have also some peculiar causes, in which the interest of the king is more immediately concerned. Page 428-429

3. Equity is the true sense and sound interpretation of the rules of law; and, as such, is equally attended to by the judges of the courts both of common law and equity. Page 430-436

4. The essential differences, whereby the English courts of equity are distinguished from the courts of law, are, I. The mode of proof, by a discovery on the oath of the party; which gives a jurisdiction in matters of account, and fraud. II. The mode of trial; by depositions taken in any part of the world. III. The mode of relief; by giving a more specific and extensive remedy than can be had in the courts of law: as, by carrying agreements into execution, staying waste or other injuries by injunction, directing the sale of incumbered lands, &c. IV. The true construction of securities for money, by considering them merely as a pledge. V. The execution of trusts, or second uses, in a manner analogous to the law of legal estates. Page 436-440

5. The proceedings in the court of Chancery (to which those in the Exchequer, &c. very nearly conform) are, I. Bill. II. Writ of subpoea; and perhaps, injunction. III. Process of contempt; viz. (ordinarily) attachment, attachment with proclamations, commission of rebellion, serjeant at arms, and sequestration. IV. Appearance. V. Demurrer. VI. Plea. VII. Answer. VIII. Exceptions; amendments; cross, or supplemental, bills; bills of revivor, interpleader, &c. IX. Replication. X. Issue. XI. Depositions, taken upon interrogatories; and subsequent publication thereof. XII. Hearing. XIII. Interlocutory decree; feigned issue, and trial; reference to the master, and report; &c. XIV. Final decree. XV. Rehearing, or bill of review. XVI. Appeal to Parliament. Page 442-455
CONTENTS

THE ANALYSIS OF BOOK IV.

PUBLIC WRONGS.

In which are considered

I. The general nature of crimes, and punishment

II. The persons capable of committing crimes

III. Their several degrees of guilt; as
   1. Principals,
   2. Accessories

IV. The several crimes (with their punishments) more peculiarly offending
   1. God and religion
   2. The law of nations
   3. The king and government; viz.
      1. High treason
      2. Felonies injurious to the prerogative
      3. Praemunire
      4. Misprisions and contempts
   4. The commonwealth; viz. offences against
      1. Public justice
      2. Public peace
      3. Public trade
      4. Public health,
      5. Public economy

V. Individuals; being crimes against
   1. Their persons; by
      1. Homicide
      2. Other corporal injuries
   2. Their habitations
   3. Their property

V. The means of prevention; by security for
   1. The peace,
   2. The good behaviour

VI. The method of punishment; wherein of
   1. The several courts of criminal jurisdiction
   2. The proceedings there,
      1. Summary
      2. Regular; by
         1. Arrest
         2. Commitment, and bail
         3. Prosecution; by
            1. Presentment,
            2. Indictment,
            3. Information,
            4. Appeal
         4. Process
         5. Arraignment, and its incidents
         6. Plea, and issue
         7. Trial, and conviction
         8. Clergy
         9. Judgment, and attainder; which induce
            1. Forfeiture,
            2. Corruption of blood
         10. Avoider of judgment, by
            1. Falsifying, or reversing, the attainder
            2. Reprieve, or pardon
         11. Execution

Chapter II

II

III

IV

V

VI

VII

VIII

IX

XI

XII

XIII

XIV

XV

XVI

XVII

XVIII

XIX

XX

XXI

XXII

XXIII

XXIV

XXV

XXVI

XXVII

XXVIII

XXIX

XXX

XXXI

XXXII

XXXIII
ANALYSIS.

BOOK IV.*—OF PUBLIC WRONGS.

CHAPTER I.

OF THE NATURE OF CRIMES, AND THEIR PUNISHMENT

1. In treating of public wrongs may be considered, I. The general nature of crimes and punishments. II. The persons capable of committing crimes. III. Their several degrees of guilt. IV. The several species of crimes, and their respective punishments. V. The means of prevention. VI. The method of punishment

2. A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it

3. Crimes are distinguished from civil injuries, in that there is a breach and violation of the public rights, due to the whole community, considered as a community

4. Punishments may be considered with regard to, I. The power. II. The end. III. The measure,—of their infliction

5. The power, or right, of inflicting human punishments, for natural crimes, or such as are *mala in se*, was by the law of nature vested in every individual; but, by the fundamental contract of society, is now transferred to the sovereign power: in which also is vested, by the same contract, the right of punishing positive offences, or such as are *mala prohibita*

6. The end of human punishments is to prevent future offences; I. By amending the offender himself. II. By deterring others through his example. III. By depriving him of the power to do future mischief

7. The measure of human punishments must be determined by the wisdom of the sovereign power, and not by any uniform universal rule: though that wisdom may be regulated, and assisted, by certain general, equitable, principles

CHAPTER II.

OF THE PERSONS CAPABLE OF COMMITTING CRIMES

1. All persons are capable of committing crimes, unless there be in them a defect of will; for, to constitute a legal crime, there must be both a vicious will, and a vicious act

2. The will does not concur with the act, I. Where there is a defect of understanding. II. Where no will is exercised. III. Where the act is constrained by force and violence

3. A vicious will may therefore be wanting, in the cases of, I. Infancy. II. Idiocy, or lunacy. III. Drunkenness; which doth not, however, excuse. IV. Misfortune. V. Ignorance, or mistake of fact. VI. Compulsion, or necessity; which is, 1st, that of civil subjection; 2dly; that of duress per *minas*; 3dly, that of abusing the least pernicious of two evils, where one is unavoidable; 4thly, that of want or hunger; which is no legitimate excuse

4. Of Principal and Assistants

5. The king, from his excellence and dignity, is also incapable of doing wrong

CHAPTER III.

OF PRINCIPALS AND ACCESSORIES

1. The different degrees of guilt in criminals are, I. As principals. II. As accessories

2. A principal in a crime is, I. He who commits the fact. II. He who is present at, aiding, and abetting, the commission

3. An accessory is he who doth not commit the fact, nor is present at the commission; but is in some sort concerned therein, either before or after

4. Accessories can only be in petit treason, and felony: in high treason, and misdemeanors, all are principals

5. An accessory before the fact, is one who, being absent when the crime is committed, hath procured, counselled, or commanded another to commit it

6. An accessory after the fact, is where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. Such accessory is usually entitled to the benefit of clergy; where the principal, and accessory before the fact, are excluded from it

CHAPTER IV.

OF OFFENCES AGAINST GOD AND RELIGION

1. Crimes and misdemeanors, cognizable by the laws of England, are such
as more immediately offend, I. God, and his holy religion. II. The law of nations. III. The king and his government. IV. The public, or commonwealth. V. Individuals

2. Crimes more immediately offending God and religion, are, I. Apostacy. For which the penalty is incapacity, and imprisonment. II. Heresy. Penalty for one species thereof: the same. III. Offences against the established church. — Either, by reviling its ordinances. Penalties: fine; deprivation; imprisonment; forfeiture. — Or, by non-conformity to its worship: 1st, through total irreligion. Penalty: fine. 2ndly, through protesting dissenting. Penalty: suspended (conditionally) by the toleration act. 3rdly, through popery, either in professors of the popish religion, popish recusants convict, or popish priests. Penalties: incapacity; double taxes; imprisonment; fines; forfeitures; abjuration of the realm; judgment of felony, without clergy; and judgment of high treason. IV. Blasphemy. Penalty: fine, imprisonment, and corporal punishment. V. Profane swearing and cursing. Penalty: fine, or house of correction. IV. Witchcraft; or, at least, the pretence thereto. Penalty: imprisonment, and pillory. VII. Religious impostures. Penalty: fine, imprisonment, and corporal punishment. VIII. Sabbath-breaking. Penalties: forfeiture of double value; incapacity. IX. Sabbath-breaking. Penalty: fine. X. Drunkenness. Penalty: fine, or stocks. XI. Lewdness. Penalties: fine; imprisonment; house of correction.

CHAPTER V.

Of Offences against the Law of Nations

1. The law of nations is a system of rules, deducible by natural reason, and established by universal consent, to regulate the intercourse between independent states

2. In England, the law of nations is adopted, in its full extent, as part of the law of the land

3. Offences against this law are principally incident to whole states or nations; but, when committed by private subjects, are then the objects of the municipal law


CHAPTER VI.

Of High Treason

1. Crimes, and misdemeanors, more pecu-...
mesnors affecting the coinage may be also referred). II. Conspiring or attempting to kill a privy counsellor. III. Serving foreign states, or enlisting soldiers for foreign service. IV. Embezzling the king's armour or stores. V. Desertion from the king's armies, by land or sea 99-102

CHAPTER VIII.

Of Praemunire 103 to 117
1. Praemunire, in its original sense, is the offence of adhering to the temporal power of the pope, in derogation of the regal authority. Penalty: outlawry, forfeiture, and imprisonment: which hath since been extended to some offences of a different nature 103
2. Among these are, I. Importing popish trinkets. II. Contributing to the maintenance of popish seminaries abroad, or popish priests in England. III. Molesting the possessors of abbey lands. IV. Acting as broker in an usurious contract, for more than ten per cent. V. Obtaining any stay of proceedings in suits for monopolies. VI. Obtaining an exclusive patent for gunpowder or arms. VII. Exertion of purveyance or pre-emption. VIII. Asserting a legislative authority in both or either house of Parliament. IX. Sending any subject a prisoner beyond sea. X. Refusing the oaths of allegiance and supremacy. XI. Preaching, teaching, or advised speaking, in defence of the right of any pretender to the crown, or in derogation of the power of Parliament to limit the succession. XII. Treating of other matters, by the assembly of peers of Scotland, convened for electing their representatives in Parliament. XIII. Unwarrantable undertakings by unlawful subscriptions to public funds 115-117

CHAPTER IX.

Of Misprisions and Contempts, affecting the King and government 119 to 126
1. Misprisions and contempts are all such high offences as are under the degree of capital 119
2. These are, I. Negative, in concealing what ought to be revealed. II. Positive, in committing what ought not to be done 119
4. Positive misprisions, or high misdemeanors and contempts, are, I. Mal-administration of public trusts, which includes the crime of peculation. Usual penalties: banishment; fines; imprisonment; disability. II. Contempts against the king's prerogative. Penalty: fine and imprisonment. III. Contempts against his person, and government. Penalty: fine; imprisonment, and infamous corporal punishment. IV. Contempts against his title. Penalties: fine and imprisonment; or, fine and disability. V. Contempts against his palaces, or courts of justice. Penalties: fine; imprisonment; corporal punishment; loss of right hand; forfeiture 121-126

CHAPTER X.

Of Offences against Public Justice 127 to 141
1. Crimes especially affecting the commonwealth, are offences, I. Against the public justice. II. Against the public peace. III. Against the public trade. IV. Against the public health. V. Against the public police, or economy 127
2. Offences, against the public justice, are, I. Embezzling or vacating records, and personating others in courts of justice. Penalty: judgment of felony, usually without clergy. II. Compelling prisoners to become approvers. Penalty: judgment of felony. III. Obstructing the execution of process. IV. Escapes. V. Breach of prison. VI. Rescue.—Which four may, (according to the circumstances) be either felonies, or misdemeanors punishable by fine and imprisonment. VII. Returning from transportation. This is felony, without clergy. VIII. Taking rewards, to help one to his stolen goods. Penalty: the same as for the theft. IX. Receiving stolen goods. Penalties: transportation; fine; and imprisonment. X. Theft-bote. XI. Common barbery, and stealing in a feigned name. XII. Maintenance. XIII. Champerty.—Penalty, in these four: fine and imprisonment. XIV. Compounding prosecutions on penal statutes. Penalty: fine, pillory, and disability. XV. Conspiracy; and threats of accusation in order to extort money, &c. Penalties: the villenous judgment; fine; imprisonment; pillory; whipping; transportation. XVI. Perjury, and subornation thereof. Penalties: infamy; imprisonment; fine, or pillory; and, sometimes, transportation or house of correction. XVII. Bribery. Penalty: fine, and imprisonment. XVIII. Embracery. Penalty: infamy, fine, and imprisonment. XIX. False verdict. Penalty: the judgment in attainue. XX. Negligence of public officers, &c. Penalty: fine and forfeiture of the office. XXI. Oppression by magistrates. XXII. Extortion of officers.—Penalty, in both: impr
**ANALYSIS OF BOOK IV.**

sonment, fine, and sometimes forfeiture of the office 128-141

CHAPTER XI.

Of Offences against the Public Peace 142 to 153
1. Offences, against the public peace, are, I. Riotous assemblies to the number of twelve. II. Appearing armed, or hunting, in disguise. III. Threatening, or demanding any valuable thing, by letter.—All these are felonies, without clergy. IV. Destroying of turnpikes, &c. Penalties: whipping; imprisonment; judgment of felony, with and without clergy. V. Affrays. VI. Riots, routs, and unlawful assemblies: VII. Tumultuous petitioning. VIII. Forcible entry and detainer.—Penalty, in all four: fine, and imprisonment. IX. Going unusually armed. Penalty: forfeiture of arms, and imprisonment. X. Spreading false news. Penalty: fine, and imprisonment. XI. Pretended prophecy. Penalties: fine; imprisonment; and forfeiture. XII. Challenges to fight. Penalty: fine; imprisonment; and sometimes forfeiture. XIII. Libels. Penalty: fine; imprisonment; and corporal punishment 149-153

CHAPTER XII.

Of Offences against Public Trade 154 to 160
1. Offences, against the public trade, are, I. Owling; Penalties: fines; forfeiture; imprisonment; loss of left hand; transportation; judgment of felony. II. Smuggling. Penalties: fines; loss of goods; judgment of felony, without clergy. III. Fraudulent bankruptcy. Penalty: judgment of felony, without clergy. IV. Usury. Penalty: fine, and imprisonment. V. Cheating. Penalties: fine; imprisonment; pillory; tumbril; whipping, or other corporal punishment; transportation. VI. Forestalling. VII. Regrating. VIII. Engrossing. Penalties, for all three: loss of goods; fine; imprisonment; pillory. IX. Monopolies, and combinations to raise the price of commodities. Penalties: fines; imprisonment; pillory; loss of ear; infamy; and, sometimes, the pains of premunire. X. Exercising a trade, not having served as apprentice. Penalty: fine. XI. Transporting, or residing abroad, of artificers. Penalties: fine; imprisonment; forfeiture; incapacity; becoming aliens 154-160

CHAPTER XIII.

Of Offences against the Public Health, and the Public Police or Economy 161 to 175
1. Offences, against the public health, are, I. Irregularity, in time of the plague, or of quarantine. Penalties: whipping; judgment of felony, with and without clergy. II. Selling unwholesome provisions. Penalties: amercement; pillory; fine; imprisonment; abjuration of the town 161-3
2. Offences, against the public police and economy, or domestic order of the kingdom, are, I. Those relating to clandestine and irregular marriages. Penalties: judgment of felony, with and without clergy. II. Bigamy, or (more properly) polygamy. Penalty: judgment of felony. III. Wandering, by soldiers or mariners. IV. Remaining in England, by Egyptians; or being in their fellowship one month. Both these are felonies, without clergy. V. Common nuisances: 1st, by annoyances or purpurestures in highways, bridges, and rivers; 2ndly, by offensive trades and manufactures; 3rdly, by disorderly houses; 4thly, by lotteries; 5thly, by cottages; 6thly, by firewalls; 7thly, by eyesdropping.—Penalty, in all: fine. 8thly, by common scolding. Penalty: the cucking stool. VI. Idleness, disorder, vagrancy, and incorrigible roguesy. Penalties: imprisonment; whipping; judgment of felony. VII. Luxury, in diet. Penalty: discretion ary. VIII. Gaming. Penalties: to gentlemen, fines; to others, fine and imprisonment; to cheating gamsters, fine, infamy, and the corporal pains of perjury. IX. Destroying the game. Penalties: fines; and corporal punishment 162-175

CHAPTER XIV.

Of Homicide 171 to 203
1. Crimes, especially affecting individuals, are, I. Against their persons. II. Against their habitations. III. Against their property 176
2. Crimes against the persons of individuals, are, I. By homicide, or destroying life. II. By other corporal injuries 177
3. Homicide is, I. Justifiable. II. Excusable. III. Felonious 178
4. Homicide is justifiable, I. By necessity, and command of law. II. By permission of law 1st, for the furtherance of public justice; 2ndly, for prevention of some forcible felony 178
5. Homicide is excusable, I. Per infortum, or by misadventure. II. Se defendendo, or self-defence, by chance-medley. Penalty, in both; forfeiture of goods; which however is pardoned of course 182
6. Felonious homicide is the killing of a human creature, without justification or excuse. This is, I. Killing one's self. II. Killing another 188
7. Kiling one's self, or self-murder, is where one deliberately, or by any un-
lawful malicious act, puts an end to his own life. This is felony; punished by ignominious burial, and forfeiture of goods and chattels. 189

8. Killing another is, I, Manslaughter. II. Murder 190

9. Manslaughter is the unlawful killing of another; without malice, express or implied. This is either, I. Voluntary, upon a sudden heat. II. In-\n
voluntary, in the commission of some unlawful act. Both are felony, but within clergy; except in the case of stabbing 191

10. Murder is 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. This is felony, without clergy; punished with speedy death, and hanging in chains, or dissection 194

11. Petit treason, (being an aggravated degree of murder), is where the servant kills his master, the wife her hus-\n
band, or the ecclesiastic his superior. Penalty: in men, to be drawn, and hanged; in women, to be drawn, and burned 203

CHAPTER XV.

Of Offences against the Persons of Individuals 205 to 219

1. Crimes affecting the persons of individuals, by other corporal injuries not amounting to homicide, are, I. Mayhem; and also shooting at another. Penalties: fine; imprisonment; judgment of felony, without clergy. II. Peculiar theft; and marriage or defilement, of an heiress, which is felony: also, stealing, and deflowering or marrying, any woman-child under the age of sixteen years; for which the penalty is imprisonment, fine, and temporary forfeiture of her lands. III. Rape; and also carnal knowledge of a woman-child under the age of four years. IV. Buggery, with man or beast.—Both these are felonies, without clergy. V. Assault. VI. Batter\n
y; especially of clergymen. VII. Wounding. Penalties, in all three: fine; imprisonment; and other corporal punishment. VIII. False imprison-\n
ment. Penalties: fine; imprisonment; and (in some atrocious cases) the pains of praemunire, and incapacity of office or pardon. IX. Kidnapping, or, forcibly stealing away the king's subjects. Penalty: fine; imprison-\n
ment; and pillory 205-219

CHAPTER XVI.

Of Offences against the Habita-\n\n\ntions of Individuals 220 to 222

1. Crimes, affecting the habitations of individuals, are, I. Arson. II. Burglary. Vol. II. 220

2. Arson is the malicious and wilful burning of the house, or out-house, of another man. This is felony; in some cases without, others with clergy; being above the value of twelve pence. Which is felony; in some cases within, in others without, clergy. II. Petit larceny; to the value of twelve pence or under. Which is also felony, but not capital; being punished with whipping, or transportation 229

4. Mixed, or compound, larceny, is that wherein the taking is accompanied with the aggravation of being, I. From the house. II. From the person 239

5. Larceny from the house, by day or night, are felonies without clergy, when they are, I. Larcenies, above twelve pence, from a church;—or by breaking a tent or booth in a market or fair, by day or night, the owner or his family being therein;—or by breaking a dwelling-house by day, any person being therein;—or from a dwelling-house by day, without breaking, any person therein being put in fear;—or from a dwelling-house by night, without breaking, the owner or his family being therein, and put in fear. II. Larcenies, of fifty shillings, by breaking the dwelling-house, shop, or warehouse, by day, though no person be therein;—or, by privately stealing in any shop, warehouse, coach-house, or stable, by day or night, without breaking, and though no person be therein. III. Larcenies, of forty shillings, from a dwelling-house or its out-houses, without breaking and though no person be therein 239

6. Larceny from the person is, I. By privately stealing, from the person of another, above the value of twelve pence. II. By robbery; or the felonious and forcible taking, from the person of another, goods or money of any value, by putting him in fear. These are both felonies without clergy. An attempt to rob is also felony 241

7. Malicious mischief, by destroying dikes, goods, cattle, ships, garments, fish-pools, trees, woods, churches, chapels, meeting-houses, houses, ou-
haves, corn, hay, straw, sea or river banks, hop-binds, coal-mines, (or engines thereunto belonging), or any fences for inclosures by act of Parliament, is felony, and, in most cases, without benefit of clergy

8. Forgery is the fraudulent making or alteration of a writing, in prejudice of another's right. Penalties: fine; imprisonment; pillory; loss of nose and ears; forfeiture; judgment of felony, without clergy

CHAPTER XVIII.

OF THE MEANS OF PREVENTING OFFENCES

1. Crimes and misdemeanors may be prevented, by compelling suspected persons to give security: which is effected by binding them in a conditional recognizance to the king, taken in court, or by a magistrate out of court

2. These recognizances may be conditioned, I. To keep the peace. II. To be of the good behaviour

3. They may be taken by any justice or conservator of the peace, at his own discretion; or, at the request of such as are entitled to demand the same

4. All persons, who have given sufficient cause to apprehend an intended breach of the peace, may be bound over to keep the peace; and all those that be not of good fame, may be bound to the good behaviour; and may, upon refusal in either case, be committed to gaol

CHAPTER XIX.

OF COURTS OF A CRIMINAL JURISDICTION

1. In the method of punishment may be considered, I. The several courts of criminal jurisdiction. II. The several proceedings therein.

2. The criminal courts are, I. Those of a public and general jurisdiction throughout the realm. II. Those of a private and special jurisdiction.

3. Public criminal courts are, I. The high court of parliament; which proceeds by impeachment. II. The court of the lord high steward; and the court of the king in full parliament: for the trial of capitaly indicted persons. III. The court of King's Bench. IV. The court of chivalry. V. The court of admiralty, under the king's commission. VI. The courts of oyer and terminer and general gaol-delivery. VII. The court of quarter-sessions of the peace. VIII. The sheriff's tour. IX. The court-leet. X. The court of the coroner. XI. The court of the clerk of the market.

4. Private criminal courts are, I. The court of the lord steward, &c. by statute of Henry VII. II. The court of the lord steward, &c. by statute of Henry VIII. III. The university courts

CHAPTER XX.

OF SUMMARY CONVICTIONS 280 to 288

1. Proceedings in criminal courts are, I. Summary. II. Regular

2. Summary proceedings are such, where-by a man may be convicted of divers offences, without any formal process or jury, at the discretion of the judge or judges appointed by act of parliament, or common law

3. Such are, I. Trials of offences and frauds against the laws of excise and other branches of the king's revenue. II. Convictions before justices of the peace upon a variety of minute offences chiefly against the public police. III. Attachments for contempt to the superior courts of justice

CHAPTER XXI.

OF ARRESTS 290 to 295

1. Regular proceedings, in the courts of common law, are, I. Arrest. II. Commitment and bail. III. Prosecution. IV. Process. V. Arraignment, and its incidents. VI. Plea and issue. VII. Trial and conviction. VIII. Clergy. IX. Judgment, and its consequences. X. Reversal of judgment. XI. Reprieve or pardon. XII. Execution

2. An arrest is the apprehending, or restraining, of one's person; in order to be forthcoming to answer a crime, whereof one is accused or suspected

3. This may be done, I. By warrant. II. By an officer, without warrant. III. By a private person, without warrant. IV. By hue and cry

CHAPTER XXII.

OF COMMITMENT AND BAIL 296 to 299

1. Commitment is the confinement of one's person in prison for safe custody, by warrant from proper authority; unless, in bailable offences, he puts in sufficient bail, or security for his future appearance

2. The magistrate is bound to take reasonable bail, if offered; unless the offender be not bailable

3. Such are, I. Persons accused of treason; or, II. Of murder; or, III. Of manslaughter, by indictment; or if the prisoner was clearly the slayer. IV. Prison-breakers, when committed for felony. V. Outlaws. VI. Those who have abjured the realm. VII. Approvers, and appellees. VIII. Persons taken with the mainour. IX. Persons accused of arson. X. Excommunicated persons

4. The magistrate may, at his discretion, admit or not admit to bail, persons not of good fame, charged with other folo-
Chapter XXIII.

Of the several modes of Prosecution.

1. Prosecution, or the manner of accusing offenders, is either by a previous finding of a grand jury, as, I. By presentation. II. By indictment. Or, without such finding—III. By information. IV. By appeal.

2. A presentment is the notice taken by a grand jury of any offence, from their own knowledge or observation.

3. An indictment is written accusation of one or more persons of a crime or misdemeanors, preferred to, and presented on oath by a grand jury; expressing, with sufficient certainty, the person, time, place, and offence.

4. An information is, I. At the suit of the king and a subject, upon penal statutes. II. At the suit of the king only. Either, 1. Filed by the attorney-general ex officio, for such misdemeanors as affect the king's person or government; or, 2. Filed by the master of the crown-office (with leave of the court of King's Bench) at the relation of some private subject, for other gross and notorious misdemeanors. All differing from indictments in this: that they are exhibited by the informer, or the king's officer, and not on the oath of a grand jury.

5. An appeal is an accusation or suit, brought by one private subject against another, for larceny, rape, mayhem, arson, or homicide: which the king cannot discharge or pardon, but the party alone can release.

Chapter XXIV.

Of Process upon an Indictment.

1. Process to bring in an offender, when indicted in his absence, is, in misdemeanors, by venire facias, distress infinite, and capias; in capital crimes, by capias only: and, in both, by outlawry.

2. During this stage of proceedings, the indictment may be removed into the court of King's Bench from any inferior jurisdiction, by writ of certiorari facias: and cognizance must be claimed in places of exclusive jurisdiction.

Chapter XXV.

Of Arraignment, and its Incidents.

1. Arraignment, is the calling of the prisoner to the bar of the court, to answer the matter of the indictment.

2. Incident hereunto are, I. The standing mute of the prisoner; for which, in petit treason, and felonies of death, he shall undergo the paine fort et dure. II. His confession: which is either simple; or by way of approvement.

Chapter XXVI.

Of Plea, and Issue.

1. The plea, or defensive matter alleged by the prisoner, may be, I. A plea to the jurisdiction. II. A demurrer in point of law. III. A plea in abatement. IV. A special plea in bar; which is 1st, autrefois acquit; 2dly, autrefois convict; 3dly, autrefois attenuat; 4thly, a pardon. V. The general issue, not guilty.

2. Hereupon issue is joined by the clerk of the arraigns, on behalf of the king.

Chapter XXVII.

Of Trial, and Conviction.

1. Trials of offences, by the laws of England, were and are, I. By ordeal, of either fire or water. II. By the corseled. Both these have been long abolished. III. By battel, in appeals and approvals. IV. By the peers of Great Britain. V. By jury.

2. The method and process of trial by jury is, I. The impanelling of the jury. II. Challenges: 1st, for cause; 2dly, peremptory. III. Tales de circumstantibus. IV. The oath of the jury. V. The evidence. VI. The verdict, either general or special.

3. Conviction, is when the prisoner pleads, or is found, guilty: whereupon, in felonies, the prosecutor is entitled to, I. His expenses. II. Restitution of his goods.

Chapter XXVIII.

Of the Benefit of Clergy.

1. Clergy, or the benefit thereof, was originally derived from the usurped jurisdiction of the popish ecclesiastics; but hath since been new modelled by several statutes.

2. It is an exemption of the clergy from any other secular punishment for felony, than imprisonment for a year, at the court's discretion; and it is extended likewise, absolutely, to lay peers, for the first offence; and to all lay commoners, for the first offence also, upon condition of branding, imprisonment, or transportation.

3. All felonies are entitled to the benefit of clergy, except such as are now ostend by particular statutes.

4. Felons, on receiving the benefit of clergy, (though they forfeit their goods to the crown), are discharged of all.
clergyable felonies before committed, and restored in all capacities and credits

CHAPTER XXIX.

OF JUDGMENT, AND ITS CONSEQUENCES 375 to 389
1. Judgment (unless any matter be offered in arrest thereof) follows upon conviction; being the pronouncing of that punishment which is expressly ordained by law
2. Attainder of a criminal, is the immediate consequence, I. Of having judgment of death pronounced upon him. II. Of outlawry for a capital offence
3. The consequences of attainder are, I. Forfeiture to the king. II. Corruption of blood
4. Forfeiture to the king is, I. Of real estates, upon attainder:—in high treason, absolutely, till the death of the late pretender’s sons;—in felonies, for the king’s year, day, and waste:— in misprision of treason, assaults on a judge, or battery sitting the courts; during the life of the offender. II. Of personal estates, upon conviction; in all treason, misprision of treason, felony, excusable homicide, petit larceny, standing mute upon arraignment, the above-named contempt of the king’s courts, and flight
5. Corruption of blood is an utter extinction of all inheritable quality therein: so that, after the king’s forfeiture is first satisfied, the criminal’s lands escheat to the lord of the fee; and he can never afterwards inherit, be inherited, or have any inheritance derived through him

CHAPTER XXX.

OF REVERSAL OF JUDGMENT 390 to 392
1. Judgments, and their consequences, may be avoided, I. By falsifying, or reversing, the attainder. II. By reprieve, or pardon
2. Attainders may be falsified, or reversed, I. Without a writ of error; for matter dehors the record. II. By writ of error; for mistakes in the judgment, or record. III. By act of Parliament; for favour
3. When a judgment is reversed, the party is restored to the same plight, as if he had appeared upon the capias. When a judgment on conviction is reversed, the party stands as if never accused

CHAPTER XXXI.

OF REPRIEVE AND PARDON 394 to 398
1. A reprieve is a temporary suspension of the judgment, I. Ex arbitrio judicis. II. Ex necessitate legis; for pregnancy, insanity, or the trial of identity of person, which must always be tried instanter
2. A pardon is a permanent avoider of the judgment by the king’s majesty, in offences against his crown and dignity; drawn in due form of law, allowed in open court, and thereby making the offender a new man
3. The king cannot pardon, I. Imprisonment of the subject beyond the seas. II. Offences prosecuted by appeal. III. Common nuisances. IV. Offences against popular or penal statutes, after information brought by a subject. Nor is his pardon pleasurable to an impeachment by the commons in Parliament

CHAPTER XXXII.

OF EXECUTION 403
1. Execution is the completion of human punishment, and must be strictly performed in the manner which the law directs
2. The warrant for execution is sometimes under the hand and seal of the Judge; sometimes by writ from the king; sometimes by rule of court; but commonly by the judge’s signing the calendar of prisoners, with their separate judgments in the margin.
COMMENTARIES
ON
THE LAWS OF ENGLAND,
——
BOOK THE THIRD.
OF PRIVATE WRONGS.
——
CHAPTER I.
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 inquiries, we distinguish 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

(a) Introd. § 2.
(c) Book I. ch. 1.
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 community; and are distinguished by the harsher appellation of crimes and misdemeanors. 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 one.

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 principally to be sought by application to these [3] 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 eccentrical 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,

1. 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

(1) It is said, that according to 1 Salk. 407, 1 Ld. Raym. 62, and Bul. N. P. 18, a master cannot justify an assault in defence of his servant, because he might have an action per quod servitium amisit. But according to 2 Rol. Ab. 546, D. pl. 2. Owen, 161, Bac. Ab. Master and Servant, P. such an interference by the master is lawful; and Ld. Hale, 1 vol. 494, says, "That the law had been for a master killing in the necessary defence of his servant, the husband in defence of his wife, the wife of the husband, the child of the parent, or the parent of the child, for the act of the assistant shall have the same an action in such cases as the act of the party assisted should have had if it had been done by himself, for they are in a mutual relation one to another." But though, as observed by the learn-

ed Commentator, the law respects the passions of the human mind, yet it does not allow this interference as an indulgence of revenge, but merely to prevent the injury, or a repetition of it; and therefore in a plea by a father, master, &c., founded on this ground, it is necessary to state that the plaintiff would have beat the son, servant, &c., if the defendant had not interfered; and if it be merely alleged that the plaintiff had assaulted or beat, &c., it will be demurable, for if the assault on the master, &c., be over, the servant cannot strike by way of revenge, but merely in order to prevent an injury. 2 Stra. 953. When a person does not stand in either of these relations, he cannot justify an interference on behalf of the party injured, but merely as an indifferent person, to preserve the peace. 2 Stra. 954.

(d) 2 Roll. Abr. 546. 1 Hawk. P. C. 131.
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 himself that immediate
justice, to which he *is* prompted by nature, and which no pru-
dential 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
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 (2).

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, where-
ever he happens to find them; so it be not in a riotous manner, or attended
with a breach of the peace (c). 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 proceed-
ing. 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 [*5]*
must occasion strife and bodily contention, or endanger the peace
of society. If, 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 (3).

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

---


(2) See 2 R. S. 660. § 3, and book 4. note 6, p. 192.
(3) In the case of personal property improperly detained or taken away, it may be
re-
taken from the house and custody of the wrongdoer, even without a previous request;
but unless it was seized or attempted to be
seized forcibly, the owner cannot justify doing
anything more than gently laying his hands
on the wrongdoer in order to recover it, 8 T.
R. 78. 2 Roll. Abbr. 56, 208. 2 Roll. Abbr. 565.
pl. 50. 2 Leonard, 202. Selw. N. P. tit. Ass-
sault and Battery; nor can he without leave
enter the door of a third person, not privy to
the wrongful detainer, to take his goods there-
from. 2 Roll. Abbr. 55, 6, 208. 2 Roll. Abbr.
565. I. pl. 2. Bac. Ab. Trespass, F.
person without any right has taken possession thereof (4). 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 (5); 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 (6). What nuisances are, and their several species, we shall find a more proper place to inquire under some of the subsequent divisions (7). At present I shall only observe, that whatsoever unlawfully annoys or doth damage to another is a nuisance; and such

(4) With respect to land and houses also, resumption of possession by the mere act of the party is frequently allowed. Thus, if a tenant omit at the expiration of his tenancy to deliver up possession, the landlord may legally, in his absence, break open the outer door and resume possession, though some articles of furniture remain therein; and if the landlord permit the tenant to remain in such possession, and train them as damage-feasant, he may be sued. 1 Bing. R. 158. 7 T. R. 431. 2. 1 Price R. 53. And 109. 6 Taun. 202. If the landlord, in resuming possession, be guilty of a forcible entry with strong hand, or other illegal breach of the peace, he will be liable to an indictment. 7 T. R. 432. 3 T. R. 295. 4 Taun. 202. 8 T. R. 364. 403. But the circumstance of the owner of property using too much force in regaining possession, but taking care to avoid personal injury to the party resisting, will not enable the latter to sue him. See cases in last two notes. But if any unnecessary violence to the person be used in rescuing or defending possession of real or personal property, the party guilty of it is liable to be sued. 8 T. R. 299. id. 78. 1 Saund. 296. n. 1. So, as the law allows taking of the possession of land, it also sanctions the due defence of the possession thereof; and therefore, though if one enter upon my ground, I must re to another, as by stopping I can lay hands on him to turn him out, yet if he refuse I may then push him out, and if he enter with actual force I need not first request him to be gone, but may lay hands on him immediately. 8 T. R. 78. 1 Salk. 641. See 1 Bing. 152.

(5) Post, 174.

(6) Thus, in case of a public nuisance, if a house be built across a highway any person may pull it down; and, it is said, he need not observe particular care in abating it, so as to prevent injury to the materials. And though a gate, illegally fastened, might have been opened without cutting it down, yet the cutting would be lawful. Nor having been made by the party, it is a general rule, that the abatement must be limited by its necessity, and no wanton or unnecessary injury must be committed. 2 Salk. 458. As to private nuisances, they also may be abated; and therefore it was recently held, that if a man in his own soil erect a thing which is a nuisance to another, such as a rivulet, and so diminishing the water used by the latter for his cattle, the party injured may enter on the soil of the other and abate the nuisance and justify the trespass; and this right of abatement is not confined merely to a house, mill, or land. 2 Smith's Rep. 9. 2 Rol. Ab. 565. 2 Leon. 202. Com. Dig. Plead. 3 M. 42. 3 Lev. 92. So it seems that a libellous print or paper, affecting a private individual, may be destroyed, or, which is the safer course, taken and burnt, to prevent its circulation. 5 Coke, 125. b. 2 Camp. 511. Per Best, J. in the Earl Lonsdale v. Nelson, 2 Bar. & Cres. 311, "nuisances, by an act of commission, are committed in defiance of those whom such nuisances injure, and the injured party may abate them, without notice to the person who committed the wrong, in such a manner as to prevent any damage which sanctions the abatement, by an individual, of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees, is an unequivocal act of negligence, which distinguishes this case from most of the other cases that have occurred. The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy it; in such cases an individual would be justified, in abating a nuisance by omission without notice. In all other cases of such nuisances persons should not take the law into their own hands, but follow the advice of lord Hale and appeal to a court of justice;" and see further, 3 Dowle. & R. 556. And it was held in the same case, that where a person is bound to repair works connected with a port and neglects to do so, another person cannot justify an entry to repair without averring and proving that immediate repairs were necessary, and the parties' right to use the port. As to cutting trees, "if the boughs of your trees grow out into my land, I may cut them." Per Croke, J. Rol. Rep. 394. 3 Duls. 198. Vin. Ab. Tress. & Ab. Tress. & Ab. Trees. 3 W. 2 pl. 3.

The abater of a private nuisance cannot remove the materials further than necessary; or convert them to his own use. Dalt. c. 50. And so much only of the thing as causes the nuisance shall be removed; as if a house be built too high, only so much of it as is too high should be pulled down. 9 Rep. 53. God. 221. 2 Stra. 686.

(7) Post, 216.
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 neighbour's land, and peacefully 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). *And the [ *6 ] 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 distreining cattle or goods for non-payment of rent, or other duties (8); or, distreining another's cattle the consequence that if a landlord, after rent has become due and before payment, conveys his legal estate to another, he cannot distrain. Gilb. Action Debt, 411. Bro. Debt, pl. 93. Vaughan, 40. Bac. Ab. Distress, A. And for the same reason, it is necessary to aver in an avowry and cognizance, that at the time of the distress the tenancy subsisted. The common law was altered as far as regards tenants holding over, by the 8 Ann. c. 14: which provided, that if a person retain possession of the estate after the expiration of his tenancy, the landlord, if his interest continue, may distrain within six months. Before this statute it was usual, and still may be expedient, to provide that the last half year's rent shall be paid at a day prior to the determination of the lease, so as to enable the landlord to distrain before the removal of the tenant. Co. Lit. 47. b. If by agreement or custom the tenant has an away going crop, and right to hold over to clear the same, the landlord may, during such excessence of the term, distrain at common law. 1 Hen. Bla. 8. So the 11 Geo. II. c. 19. s. 18. enables a landlord to distrain for double rent, if a tenant do not deliver up possession after the expiration of his own notice to quit, by which he incurs double rent so long as he holds over. When a lessor has not the legal estate or a reversion, he should reserve a power to distrain, which will entitle him to do so. Co. Lit. 47. a. 5 Co. 3. But though the principal object of a distress was to compel the performance of feudal services, and consequently if rent be reserved on a letting merely of personal property, no distress can be taken. 5 Co. 17. 3 Wils. 27. Yet a distress may be rent reserved out of any lands or tenements, shall not be paid or rendered when due, the person entitled thereto may distrain for the same. Does not this authorize a distress even where there is no reversion in the owner of the rent? No distress for rent can be made unless the warrant to distrain be accompanied by an affidavit of the amount due, and of the time when it became due. 2 R. S. 501, § 8.

(g) Rep. 101. 9 Rep. 55.
(8) 459.


As to distresses in general, see Gilbert on Distresses by Hunt; Bradley on Distress; Com. Dig. Distress, Bac. Ab. Distress; Vin. Ab. Distress; 2 Saunders, index, Distress; Wilkinson on Replevin. As the law allows a creditor to arrest the person of his debtor as a security for his being forthcoming at the determination of the suit; so in certain cases, it permits a landlord to distrain for arrear of rent, in order to compel the payment of it. It is laid down that the remedy for recovery of rent, by way of distress, was derived from the civil law; for anciently, in the feudal law, the neglect to attend at the lord's courts, or not doing feudal service, was a forfeiture of the estate; but these feudal forfeitures were afterwards turned into distresses according to the pignotary method of the civil law, that is, the land let out to the tenant is hypothecated, or as a pledge in his hands, to answer the rent agreed to be paid to the landlord, and the whole profits arising from the land are liable to the lord's seizure for the payment and satisfaction of it. Gilb. Dis. 2. Gilb. Rents. 3. Bacon on Gov. 77. Vigilius, 237. 321. 326. Crompt. Int. 9. 2 New. R. 224. The distress could not at common law, before the stat. 2 W. & M. c. 5, be sold, but could only be impounded and detained, in order to induce the tenant to perform the feudal service. * Distresses, therefore, were at common law only allowed when the relation of landlord and tenant subsisted, and when consequently there remained feudal service to be performed; and hence the necessity at the present day, that the landlord distraining should, at the time of the distress, be entitled to the legal reversion; and hence the consequence that if a landlord, after rent has become due and before payment, conveys his legal estate to another, he cannot distrain. Gilb. Action Debt, 411. Bro. Debt, pl. 93. Vaughan, 40. Bac. Ab. Distress, A. And for the same reason, it is necessary to aver in an avowry and cognizance, that at the time of the distress the tenancy subsisted. The common law was altered as far as regards tenants holding over, by the 8 Ann. c. 14: which provided, that if a person retain possession of the estate after the expiration of his tenancy, the landlord, if his interest continue, may distrain within six months. Before this statute it was usual, and still may be expedient, to provide that the last half year's rent shall be paid at a day prior to the determination of the lease, so as to enable the landlord to distrain before the removal of the tenant. Co. Lit. 47. b. If by agreement or custom the tenant has an away going crop, and right to hold over to clear the same, the landlord may, during such excessence of the term, distrain at common law. 1 Hen. Bla. 8. So the 11 Geo. II. c. 19. s. 18. enables a landlord to distrain for double rent, if a tenant do not deliver up possession after the expiration of his own notice to quit, by which he incurs double rent so long as he holds over. When a lessor has not the legal estate or a reversion, he should reserve a power to distrain, which will entitle him to do so. Co. Lit. 47. a. 5 Co. 3. But though the principal object of a distress was to compel the performance of feudal services, and consequently if rent be reserved on a letting merely of personal property, no distress can be taken. 5 Co. 17. 3 Wils. 27. Yet a distress may be rent reserved out of any lands or tenements, shall not be paid or rendered when due, the person entitled thereto may distrain for the same. Does not this authorize a distress even where there is no reversion in the owner of the rent? No distress for rent can be made unless the warrant to distrain be accompanied by an affidavit of the amount due, and of the time when it became due. 2 R. S. 501, § 8.
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 distriened; 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-seek, 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.

\[\text{[ *7 \]}\] So that now we may lay it down as an 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 \((9)\). 2. For neglecting to do suit to the lord's court \((l)\), or other certain personal service \((m)\), the lord may distrein, of common 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 distrein them, till satisfaction be made him for the injury he has thereby sus-

\[(j)\] 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. 3.

\[(l)\] Bro. Abr. tit. distress, 15.

\[(m)\] Co. Litt. 47.

\[(n)\] Brownl. 36.

made for rent of a ready furnished house or lodging, because it is then considered that the rent issues out of the principal, the real property demised. 2 New. Rep. 294.

Accepting a note of hand, and giving a receipt for the rent, does not, till payment, preclude the landlord from distraining; and so if the landlord accept a bond; but a judgment obtained on either of such instruments, would preclude the right of distress.* See Bull. N. P. 182. An agreement to take interest on rent in arrear, does not take away the right of distress. 2 Chit. R. 245. Where there are rents for which the party cannot distrain, although he may have an assise, yet remedy may be had in equity. Per Comyns, B. Exch. Trin. 5 & 6 Geo. II. 1 Selw. N. P. 6 ed. 673.

To entitle a person to distrain for non-payment of money, it must be due under a demise, and for rent *fixed* and certain in its nature; and therefore, if a person be let into possession under an agreement for a lease which does not contain words of immediate demise, no distress can be made, unless from a previous payment of rent or other circumstance, a tenancy from year to year can be inferred, and the only remedy is by action for use and occupation. 2 Taunt. 149. 5 B. & A. 322. 13 East, 19. So as lord Coke quaintly says, (Co. Lit. 96 a.) it is a maxim in law, that no distress can be taken for any services that are not put into certainty, nor can be reduced to any certainty, for id certum est quod certum reddi potest, but yet in some cases there may be a certainty in uncertainty. Therefore if a man hold land, paying so much per acre, although in the terms of the demise the number of acres be not fixed, the lord may distrain. Vin. Ab. Distress, E. See form of avowry, 3 Chitty on Pl. 4th edit. 1051. But where an estate has been let without in any way fixing the amount of rent, the only remedy is by action.

\[(9)\] See, however, 2 book, p. 42. and Co. Lit. 163, b. n. 6.

* See accordingly 2 R. S. 500, § 2.
PRIVATE WRONGS.

5. Lastly, for several duties and penalties inflicted by special acts of parliament (as for assessments made by commissioners of sewers (o), or for the 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 replievable 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 _fieri facias_, of which hereafter.

2. Secondly; as to the things which may be distreined, or taken in distress (11), we may lay it down as a general rule, that all chattels personal are liable to be distreined, unless particularly protected or exempted. Instead, therefore, of mentioning what things are distreinable, 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 distreined is presumed to be the property of the wrongdoer, it will follow that such things wherein no man can have an absolute and valuable property (as dogs,

(o) Stat. 7 Ann. c. 10
(p) Stat. 43 Eliz. c. 2.
(q) 1 Burr. 560.
(r) Co. Litt. 47.

(10) See law of New-York, 2 R. S. 517.
(11) Besides the rules in the text, it is a maxim of law, that _goods in the custody of the law_ cannot be distreined, thus goods drastained, damage-feasant, cannot be distreined, Co. Litt. 47. a.; so goods taken in execution, Willes, 151; but the goods so taken must be removed from the premises within a reasonable time, or they will not be protected, 1 Price, 277. 1 M. & S. 711; however, growing corn, sold under a writ of fi. fa., cannot be distreined unless the purchaser allow it to remain uneat an unreasonable time after it is ripe, 2 B. & B. 363. 5 Moore, 97. S. C.; but goods, taken under a void outlawry, are liable to distress, 7 T. R. 426.

For the protection of landlords, by the 8 Ann. c. 14. s. 1. no goods taken in execution upon any premises demised, can be removed until rent, * not exceeding one year's arrear, be paid. Under this act the sheriff is bound to satisfy the rent in the first instance. 4 Moore, 473. In cases to which the statute applies, the landlord is entitled to be paid his whole rent, without deducting poundage, 1 Str. 643; rent only due at the time of the levy can be obtained under the act, 1 M. & S. 245. 1 Price, 274; but forehand rent, or rent stipulated to be paid in advance, may be obtained, 7 Price, 690; so rent that falls due on the day of the levy, Tidd. Prac. 8th edit. 1054. After the landlord has had one year's rent paid him, he is not entitled to another upon a second execution, 2 Str. 1924. 2 B. & B. 362. 5 Moore, 97. S. C., unless, as we have just seen, the goods be not removed within a reasonable time. The ground landlord is not within the act, where there is an execution against the lessee. 2 Str. 787. If the sheriff remove the goods without payment of the rent, and after notice and a formal demand of the rent, an action on the case lies against him. Vin. Ab. Dist. c. 3.

* See accordingly in New-York, 1 R. S. 746, § 12, &c.

† See 2 R. S. 39, § 28. corresponding provision under the insolvent laws of New-York.
PRIVATE WRONGS.

[ *8 ] cats, rabbits, and *all animals \textit{ferae naturae} cannot be distress-
ed. Yet if deer (which are \textit{ferae naturae}) are kept in a private in-
closure for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandize, that they may be
distreined for rent (s). 2. Whatever is in the personal use or occupation of
any man, is for the time privileged and protected from any 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 distress-
ed 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 (notwith-
standing his rider) may be distressened and led away to the pound (13).
Valuable things in the way of trade shall not be liable to distress. As a
horse standing in a smith’s shop to be shoed, or in a common inn; or cloth
at a taylor’s house; or corn sent to a mill or a market. For all these are
protected and privileged for the benefit of trade; and are supposed in com-
mon presumption not to belong to the owner of the house, but to his cus-
tomer (14). 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 distressenable by him for rent; for otherwise a door would
be open to infinite frauds upon the landlord; and the stranger has his


(12) See this case fully reported, Willes Rep. 46.
Litt. 47. a. Rol. Ab. Distress, A. pl. 4; and
was expressly overruled in 6 Term. R. 138.
on the ground that the distressing a horse as
damage-feasant, whilst any person is riding him,
would perpetually lead to a breach of the
peace. And it has been held, that nets or fer-
rets cannot be taken damage-feasant in a war-
ren, if they are in the hands of the person
Eliz. 550. So a loom cannot be distress-

ed while in the hands of the weaver, Willes,
517; nor wearing apparel, if in actual use;
better if put off, though only for the purpose of
repose, it is liable to be distressened. 1 Esp.
(14) As to this exception in favour of trade,
see Gilb. Dis. by Hunt, 39; so cattle and
and goods of a guest at an inn are not distressable
for rent, but a chariot or horses standing at
livery are not exempt. 3 Burr. 1498. Mr. Sergt.
Williams, in 2 Saund. 260. n. 7, suggests, that
it should seem that at this day a court of law
would be of opinion, that cattle belonging to a
driver being put into ground with the consent
of the occupier, to graze only one night on
their way to a fair or market, are not liable to
the distress of the landlord for rent; and lord
Nottingham intimated the same opinion in 2
Vern. 130; and Mr. Christian, in his edition,
has the following note of a decision to the same
effect: ‘Cattle driven to a distant mar-
et, and put into land to rest for one night,
cannot be distressened for rent by the owner of
the land, such protection being absolutely for
the public interest.” Tate v. Gleed. C. P.
Hil. 24 Geo. III. Gilb. Dis. by Hunt, 47. It
was before held, that cattle going to London,
and put into a close with the consent of the
landlord and leave of the tenant, to graze for
a night, might be distressened by the landlord
for rent, 3 Lev. 260. 2 Vent. 50. 2 Lutw.
1161; but the owner of the cattle was after-
wards relieved in equity on the ground of fraud-
ulent connivance and concealment of the de-
mand for rent by the landlord, and he was de-
creed to pay all costs both of law and equity.
2 Vern. 129. Prec. Ch. 7. Gilb. Dis. by
Hunt, 47. As courts of law now take notice
of fraud as well as courts of equity, when it
can be fully proved, there would now be the
same result at law.

Goods of a principal in the hands of a factor
are privileged from distress for rent due from
such factor to his landlord, on the ground that
the rule of public convenience, out of which
the privilege arises, is within the exception of
a landlord’s general right to distress, and
therefore that such goods are protected for the
benefit of trade. 6 Moore Rep. 243. 3 B. &
B. 75. S. C. So goods landed at a wharf and
consigned to a broker, as agent of the consign-
or, for sale, and placed by the broker in the
wharfer’s warehouse for safe custody until an
opportunity for selling them should occur,
are not distressable for rent due in respect of
the wharf and warehouse, as they were brought
to the wharf in the course of trade. 1 Bing.
283. So goods carried to be weighed, even
at a private beam, if in the way of trade, are
exempt; so is a horse that has carried corn to
a mill to be ground, and during the grinding
of the corn is tied to the mill-door. Cro. Eliz.
549. 506. Goods in a public fair are exempt
from distress, unless for toll due from the
owner. 2 Lutw. 1380. Goods in possession
of a carrier are also exempt, and this though
the carrier be not a public one. 1 Salk. 249,
remedy over by action on the case against the tenant, if by the tenant’s default the chattels are distreined, so that he cannot render them when called upon (15). With regard to a stranger’s beasts which are found on 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 distreinable immediately afterwards for rent-arrears by the landlord (v). So also if the stranger’s cattle break the fences, and commit a trespass by coming on the land, they are distreinable 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 (w). But if the lands were not *sufficiently fenced so as to keep out cattle, the landlord 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 (16): 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 distreinable 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 (17). 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 common-

**PRIVATE WrONGs.**

(15) As if horses or cattle are sent to agist, they may be immediately distrained by the landlord for rent in arrear, and the owner must seek his remedy by action against the farmer; the principle of this rule extends to public livery stables, to which, if horses and carriages are sent to stand, it is determined that they are distrainable by the landlord, as if they were in any other place, 3 Burr. 1493; so upon the same principle the goods of lodgers, or any other person, on the premises, are liable to be distrained; and to exempt goods from distress on the ground of their being in an inn, they must be within the very precincts of the inn, and not on other premises at a distance belonging to it, Barns, 472; and even within the inn itself the exemption does not extend to a person dwelling therein, as a tenant, rather than a guest. 1 Bla. Rep. 484.

As to the remedy over by an under-tenant or lodger, see the cases cited in 3 Bar. & Cres. 750, in which it was held, that where the tenant of premises had underlet a part by deed, and the original landlord distrained for rent upon the under-tenant, the latter could not support an assumpsit against his immediate lessor, upon an implied promise to indemnify him against the rent payable to the superior landlord.

(16) Levant and couchant in this sense means, that the cattle must be lying down and rising up on the premises for a night and a day, without pursuit made by the owner of them. Gilb. Dis. by Hunt, 3d edit. 47.

(17) In the case of Poole v. Longueville, 2 Saund. 289. the contrary was determined, but that case was overruled in 2 Lutw. 1580. and the result of the cases seems to be, that if a stranger’s beasts escape into another’s land, by default of the owner of the beasts, as by breaking the fences, otherwise sufficient, they may be distrained for rent immediately, without being levant and couchant; but that if they escape there by default of the tenant of the land, or for want of his keeping a sufficient fence, then they cannot be distrained for rent or service of any kind till they have been levant and couchant, nor afterwards by a landlord for rent on a lease, unless the owner of the beasts neglect or refuse, after actual notice, to remove them within a reasonable time; but it is said, that such notice is not necessary where the distress is by the lord of the fee, or by the grantee of a rent-charge. 2 Lutw. 1573. Co. Litt. 47. b. n. 3. Gilb. Dis. by Hunt, 3d edit. 45. 2 Saund. 290. n. 7. 285. n. 4. See further, Vin. Ab. Fences.
wealth in his station (18). So, beasts of the plough (19), averia carucae, and sheep, are privileged from distresses, at common law (x); while dead

goods, or other sort of beasts, which Bracton calls catalla otiosa, may be dis-

treined. 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 execu-

tions (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 dis-

tress 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 par-

ty 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 like, cannot be distrained, a

[( *10 )] 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. & 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 (20), (21):

6. Lastly, things fixed to the freehold may not be distrained; as caldrons,

windows, doors, and chimney-pieces: for they savour of the realty (22),

(e) Stat. 51 Hen. III. st. 4. de districione scacco-

na. (g) 1 Burr. 559.

(2) Ibid. 558.

(18) A stock ing frame, Willes, 512. or a

loom, 4 T. R. 565, being implements of trade,
cannot be distrained; but it must be observed,

that utensils and implements of trade may be
distrained where they are not in actual use,

and no other sufficient distress can be found


And it should seem, that if there be reasonable

ground for presuming there are not sufficient

other goods, the party may distrain implements of

trade, and is not bound to sell the other

goods first. 6 Price Rep. 3. 2 Chitty's R.

167. And this rule of exemption does not extend
to cases where a distress is given in the

distress in the nature of an execution by any particular

statute, as for poor-rates and the like, 3 Salk.

136. 1 Burr. 579. Lord Raym. 394. 1 Salk.

249. S. C.; nor where the distress is for


(19) In actual use, but not otherwise. 4 T.

R. 566. Also see 2 Inst. 132, where other

authorities are collected. The modern case

just cited contains much learning upon what

is, and what is not, with reference to the free-

hold, distrainable.

(20) See accordingly in New-York, 2 R.

S. 501, § 10, pt. 2.

(21) This provision extends to corn in what-

ever state it may be, whether thrashed or un-

thrashed, 1 Littw. 214; and, as observed by

Mr. Bradby, inasmuch as this statute directs

the distress to be sold, unless reprieved within

five days, perhaps the rule of the ancient com-

mon law, with respect to the perishable nature

of the distress, no longer extends in the case

of a distress for rent, to any thing which is not

liable to deterioration within the five days.

Bradby on Distr. 213. A sale by a landlord of

standing corn, taken as a distress before it is

collected, is void, and the tenant need not repley,

neither can he sue the seller, in an action on the

case, for selling such corn before the ex-

piration of five days. 3 B. & A. 470.

(22) But if annexed for the purpose of trade

or manufacture, and not fixed into the wall so

as to be necessary for its support, they are dis-

trainable in New-York. (2 R. S. 501, § 10,

pt. 2.) By 2 R. S. 501, § 10, whatever is ex-

empt from execution is exempt from distress:

(see specifications below.) Beasts of the

plough, sheep, and the implements of a me-

chanic's trade, cannot be distrained for rent, if

other sufficient property can be found. (Id. 502,

§ 13). A landlord cannot distrain for rent

personal property deposited, hired, or lent with

his consent to the tenant, nor property of a

stranger accidentally straying on the premises,

or deposited with a tavern-keeper, or the keep-

er of any warehouse in the usual course of bu-

iness, or deposited with any one to be repair-

ed or manufactured, (id. 502, § 14); the officer

distraining is not, however, liable for taking the

property mentioned in the last section without

notice. The property exempt from execution

and distress by 2 R. S. 367, § 22, is the follow-

ing, which owned by a. husbander, and the

moveable articles continue exempt while the

owner or his family is removing; viz. 1. All

spinning wheels, weaving looms, and stoves

put up or kept for use in any dwelling

house. 2. The family bible, family pictures, and

school books used in the family; and books of the

family not exceeding 50 dollars in value. 3.

A seat or pew in a church occupied by the

family. 4. Ten sheep with their fleeces, and

the yarn or cloth manufactured from them:
(23). For this reason also corn growing could not be distreined; till the statute 11 Geo. II. c. 19. empowered landlords to distrein corn, grass, or other products of the earth, and to cut and gather them when ripe (24), (25).

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 distreiner has no other power than to retain them till satisfaction is made (26). 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 distreining, 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 (27). [ *11 ] unless 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 distress within six months after the determination of the lease; provided his own

one cow, two swine, and their necessary food: all necessary pork, beef, fish, flour, and vegetables actually provided for the family; and fuel necessary for the family for 60 days. 5. All necessary wearing apparel, beds, bedsteads and bedding for the family; arms and accouterments required to be kept by law; necessary cooking utensils; one table, six chairs, six knives and forks, plates, teacups and saucers, and spoons; one sugar dish, milk pot, teapot, crane and its appendages, one pair of andirons, and a shovel and tongs. 6. The tools and implements of a mechanic necessary for his trade not exceeding 25 dollars in value. (Id. 307, § 22).

(23) Co. Litt. 47. b. This rule extends to such things as are essentially parts of the freehold, although for a time removed therefrom, as a millstone, removed to be picked. Bro. Ab. Distress, pl. 23. 4 T.R. 567; as to what are fixtures, see 2 Chit. Com. Law, 368. Com. Dig. Biens. H. Chitty's Law of Descents, 256. 7. 4 Moore, 281. 440. 2 D. & R. 1. 5 B. & A. 826. 2 Stark. 403. 2 B. & C. 608. 4 D. & R. 62. S. C. 1 M'Clelan Rep. Ex. 217.

(24) The act applies only to corn and other produce of the land which may become ripe, and are capable of being cut and laid up; therefore trees, shrubs, and plants, growing on land which the defendant had demised to the plaintiffs for a term, and which they had converted into a nursery ground, and planted subsequently to the demise, were held not distreinable by the former for rent, 2 Moore, 491. 8 Taunt. 431. S. C. 3 Moore, 114. S. P.; and see ante, note 18, as to time of sale. 3 B. & A. 470.

(25) In New-York, the produce of the soil, or articles annexed to the freehold, cannot be removed till sold. (2 R. S. 502, § 11).

(26) In New-York they may be sold by the sheriff or keeper of the pound. (2 R. S. 516, § 5, 13).

(27) Mirrour, c. 2. s. 26. see also 7 Rep. 7. a. The distress cannot be made till the day after the rent falls due, unless, indeed, there be any agreement or local custom to the contrary. Gilb. Dist. 56. &c. Hargrave's Co. Litt. 47. b. n. 6. The distress must not be made after tender of payment of the entire rent due. According to 8 Co. 147. a. Gilb. Dist. by Hunt, 76, &c. 3 Stark. 171. 1 Taunt. 261. tender upon the land before the distress, makes the distress tortious; tender after the distress and before the impounding, makes the detainer, and not the taking, wrongful; tender after impounding makes neither the one nor the other wrongful, but in the case of a distress for rent upon the equity of the 2 W. & M. c. 5; a sale of the distress, after tender of the rent and costs, would be illegal.
title or interest, as well as the tenant’s possession, continue at the time of the distress (28). If the lessor does not find sufficient distress on the premises, formerly he could resort no where 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 distress 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 (29), (30). The landlord may also distress the beasts of his tenant, feeding upon any commons or wastes, appendant or appurtenant to the demised premises (31), (32). 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 day-time 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 (33). Where a man is entitled to distress for an entire duty, he ought to distress for the whole at once; and not for part at one time, and part at another (f) (34). But if he distresses for the whole, and there is not [ *12 ] sufficient on the premises, or he happens *to mistake in the value of the thing distressed, and so takes an insufficient distress, he may take a second distress to complete his remedy (g).

Distresses must be proportioned to the thing distressed for. By the statute of Marlbridge, 52 Hen. III. c. 4. if any man takes a great or unreasonable distress, for rent-arreree, he shall be heavily amerced for the same. As if (h) the landlord distresseth two oxen for twelve-pence rent; the taking

(c) Stat. 8 Ann. c. 14. 11 Geo. II. c. 10.
(e) Stat. 11 Geo. II. c. 19.
(f) 2 Lutw. 1332.

(g) Cro. Eliz. 13. Stat. 17 Car. II. c. 7. 1 Burr. 990.
(h) 2 Inst. 107.

(28) Ante 8. n. 8. Although this proviso is in terms confined to the possession of the tenant, yet it has been holden, that where the tenant dies before the term expires, and his personal representative continue in possession during the remainder and after the expiration of the term, the landlord may distress within six calendar months after the end of the term for rent due for the whole term. 1 H. Bla. 465. And in 1 H. Bla. 7. n. a. it was holden, that the term was continued by the custom of the country for the purpose of giving a right to the landlord to distress on the premises in which the way going crop remained. See 1 Selw. N. P. 6 ed. 681.

(29) See 11 Geo. II. c. 19. sects. 1, 2, 3. The act is remedial, not penal, 9 Price. 30. It applies to the goods of the tenant only which are fraudulently removed, and not those of a stranger. 5 M. & S. 38. And the rent must be in arrear at the time of the removal. 1 Saund. 284. a. 3 Esp. 15. 2 Saund. 2. n.b. sed vid. 4 Camp. 136.

(30) In New-York, the goods may be followed within 30 days after their removal, if rent were due at the time of their removal or becomes due in 30 days after: if not then due, they must be followed in 30 days after the rent does become due. (2 R. S. 502, § 15.)

(31) See accordingly in New-York. (2 R. S. 502, § 12.)

(32) If the lord come to distress cattle which he sees within his fee, and the tenant or any person, to prevent the lord from distressing, drive the cattle out of the lord’s fee into some other place, yet he may pursue and take the cattle. Co. Litt. 161. a. But this rule does not hold to distresses damage-feasant, which must be made on the land. Id.

(33) See 2 R. S. 503, § 18.

(34) It may be as well here to observe, that if a landlord come into a house and seize upon some goods as a distress, in the name of all the goods of the house, that will be a good seizure of all. 6 Mod. 215. 9 Vin. Ab. 127. But a fresh distress may be made on the same goods, which have been releived, for subsequent arrears of rent. 1 Taunt. 218. So if the cattle distressed in the pound, the loss will fall on the party distressed on, and not upon the distrainor. Burr. 1738. 1 Salk. 248. 11 East, 54.
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, sealty, 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) (35), (36).

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, 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 rescuo (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 & 2 P. & M. c. 12. no distress of cattle can be driven out of the hundred where it is taken, *unless to a pound-overt within the same shire; and within three miles of the place where it was taken (37). 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 be put in a pound-covert, as in a stable or the like, the landlord or distrainer must feed and sustain them (m) (38). 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.


(35) See 2 R. S. 503, § 19, in New-York. (36) And see 2 Str. 851. 3 Leon. 48. See exceptions, 1 Burr. 582. 1 H. Bla. 13. 9 East, 298. It is no bar to this action, that between the distress and sale of the goods distrained, the parties came to an arrangement respecting the sale, 1 Bing. 401. 4 D. & R. 539. 2 B. & C. 821. S. C.; and the action is sustainable though there was a tender of the rent before the distress was made. 2 D. & R. 250. Where more rent is distrained for than is due, the remedy is at common law, and is not founded on the 52 Hen. 3. c. 4; nor on the 2 W. & M. c. 5. s. 5. Str. 851. Where no rent is due, the owner of the goods distrained may, in an action of trespass on the case, recover double the value of the goods and full costs. 2 W. & M. sess. 1. c. 5. s. 5. 2 R. S. 504, § 27, in New-York.

(37) In New-York, if the distress be for rent, the pound must be a pound overt in the county, or such other convene place as the officer distraining may approve. (2 R. S. 503, § 20.) If the distress be for damage feasant, the pound must be the nearest in the county. (Id. 517, § 4.) The owner may feed them; if he do not do it, it would seem the pound keeper should. (Id. § 5, &c.)

(38) The distrainer cannot tie up cattle impounded; and if he tie a beast and it is strangled, he will be liable in damages. 1 Salk. 248. If the distress be lost by act of God, as by death, the distrainer may distrain again. 11 East, 51. Burr. 1738.
PRIVATE Wrongs.

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 (a), that the distressor is not at liberty to work or use a distressed 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 distressing, by replevying the chattels. To replevy (replegiare), that is, to take back the pledge) is, when a person distressed 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 of law, and, if that be determined against him, to return the cattle or goods once more into the hands of the distressedor. This is called a replevin, of which more will be said hereafter.

At present I shall only observe, that, as a distress is at common law only in nature of a security for the rent or damages done, a replevin answers the same end to the distressor as the distress itself; since the party replevyng 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 distressor. But for a debt due to the crown, unless paid within forty days, the distress was always saleable at 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 (39), and notice of the cause thereof given him, replevy the same with sufficient security; the distressor, with the sheriff or constable, 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 arrear, 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.

(o) Bro. Acr. t. distress, 71. (r) 2 W. & M. c. 5. 8 Amn. c. 14. 4 Geo. II. c. 28. 11 Geo. II. c. 19.
(p) 8 Rep. 41.

(39) A reasonable time after the expiration of the five days is allowed to the landlord for appraising and selling the goods. 4 B. & A. 208. sed vid. 1 H. Bla. 13. The five days are reckoned inclusive of the day of sale; as if the goods are distraint on the 1st, they must not be sold before the 6th. 1 H. Bla. 13. An action lies on the equity of this act for selling within the five days. Semb. id. If the distressors continue in possession more than a reasonable time beyond the five days, an action of case or trespass lies on the equity of the statute. 11 East, 395. Str. 717.

4 B. & A. 208. 1 B. & C. 145. Though the act authorizes a sale after the five days, it does not take away the right to replevy after the five days in case the distress is not sold, but it would be otherwise after a sale. 5 Taunt. 451. 1 Marsh. 135. By the consent of the tenant the landlord may continue in possession longer than the five days without incurring any liability; and his so continuing in possession will not of itself create any presumption of collusion between him and the tenant to defeat an execution. 7 Price, 690.
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 distressors trespassers ab initio (s) (40). But now 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 (41), and not even that, if tender of amends is made before any action is brought.

VI. 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 distress 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.

I. 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 [ *16 ] deliver a horse, and fail in it; 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) (42). By several late sta-

(s) 1 Vent. 37.
(t) Cop. § 25.
(w) 9 Rep. 79.

(40) In the case of a distress for damage by a tenant, this is still the law.
(41) See 2 R. S. 504. § 28.

The mere consent of a party to accept a satisfaction, without an actual satisfaction, is not sufficient to discharge the other; the accord and satisfaction must be perfect, complete, and executed, for were it otherwise, it would be only substituting one cause of action for another, which might go on to any extent. 9 Rep. 79. b. 5 T. R. 141. Satisfaction must be made to the whole of the original demand, and a party will not be discharged upon performance of a satisfaction to part of such demand, the residue remaining unperformed. 1 Taunt. 526. 6 East. 230. The performance of one or two things stipulated for by an accord is nugatory. Lord Raym. 203; and where it was agreed that the plaintiff and defendant should each deliver up his part of an indenture to be cancelled, and the defendant had delivered up his part, this was held no accord and satisfaction. 3 Lev. 189. The accord and satisfaction must be certain; an accord to pay a less sum on the same, or at a subsequent day, is not sufficient. 5 East. 230. So an accord, that the defendant shall employ workmen in two or three days, is bad, 4 Mod. 88; and performance of an uncertain accord will not aid the defect. 3 Lev. 189. Yelv. 124.

We have already seen, ante 2 book, how far a contract may be varied, released, or discharged by another contract. A deed before breach cannot be discharged by accord and satisfaction without a deed. 1 Taunt. 428. Com. Dig. Plead. 2. v. 8. but after breach accord and satisfaction without deed is a good plea, for there the satisfaction is of the breach, and not of the deed. Com. Dig. Accord, A.
PRIVATE WRONGS.

tutes (particularly 11 Geo. II. c. 19. in case of irregularity in the method of distreining, 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.

II. Arbitration is where the parties, injuring and injured (43), 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 imperator) (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 subtily 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 con-


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

(z) 1 Roll. Abr. 242. 1 Lord Raym. 115.

1 & C. 7 East, 150. 1 J. B. Moore, 358, 460. Cro. Eliz. 46. 2 Wils. 86. 6 Rep. 43. b.

The satisfaction must be a reasonable one. Generally speaking, the mere acceptance of a less sum is not in law a satisfaction of a greater sum, 5 East, 230. and this though an additional security be given. 1 Stra. 436. An agreement between a debtor and creditor, that part of a larger sum due should be paid by the debtor, and accepted by the creditor as a satisfaction for the whole, might, under special circumstances, operate as a discharge of the whole: but then the legal effect of such an agreement might be considered to be the same as if the whole debt had been paid, and part had been returned as a gift to the party paying. Per Holroyd, J. 2 B. & C. 481. A debtor's assignment of all his effects to a trustee, to raise a fund for the payment of a composition to his creditors, is a sufficient satisfaction, 2 T. R. 24; so if a third person guarantees the payment of the less sum. 11 East, 390. So if a creditor, by his undertaking to accept a composition, induce the debtor to part with his property to his creditors, or induce other creditors to discharge the debtor, to enter into a composition-deed, or deliver up securities to him, such creditor would be bound by such undertaking. 2 Stark. Rep. 407. 2 M. & S. 120. 1 Esp. 236. And where several creditors, with the knowledge of each other, agree on the faith of each other's undertaking to give time to, or accept a composition from, a debtor, the agreement will be binding on every creditor who is party to it. 3 Camp. 175. 2 M. & S. 122. 16 Ves. 374; and see further as to composition with creditors, 3 Citty's Com. L. 687 to 698. It should be here also observed, that when a bond, or other security under seal, has been given and accepted in satisfaction of a simple contract debt, the latter is merged in such higher security; and no action can be supported for the non-performance of the simple contract, Cro. Car. 415. Bac. Ab. Debt, G. unless indeed such new security be void: but the mere taking of an instrument of a higher order as a collateral or additional security, does not preclude the debtor from suing on the original contract, and this though judgment be obtained on such security. 2 Leon. 110. 6 T. R. 176. 7. Payment and acceptance of a part of a debt before the day it falls due, or at a place where the whole debt was not payable, in satisfaction of the whole, is a good satisfaction, Co. Litt. 212. b; and so if the debtor give a chose in possession for a chose in action, 2 T. R. 24. as the gift of a horse, or other property in specie. Co. Litt. 212. b. The mere fulfilment of an act which a party is bound in law to do, is no satisfaction. Per Grose, J. 5 East, 302. A release of an equity of redemption is no satisfaction. 2 Wils. 86. Conferring a benefit to a third person, at the debtor's request, is sufficient. See Skin. Rep. 391.

The satisfaction should proceed from the party who wishes to avail himself of it, for when it proceeds entirely from a stranger, it will be a nullity. See 5 East, 294. 1 Smith, 515. Cro. Eliz. 541.

Accord and satisfaction by copartner, is a bar to any action against the other partners, 9 Rep. 79. b; so the acceptance of satisfaction from a joint tort-feasor discharges the other wrongdoers, Sembl. 3 Taunt. 117. and accord and satisfaction to one of several co-plaintiffs will operate as a discharge from all. See 13 Ed. IV. 6. 5 Co. 117. b.

(43) For the law of arbitrations in general, see Com. Dig. Arbitrament; Tidd Prac, 8th ed. 873 to 885. Caldwell on Arbitration; Kyd on Arbitration; 3 Chit. Com. Law, 637 to 668.
sent 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 (44). 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 * or umpire therein named (a) (45). And experience having shewn 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; the legislature has now established the use of them,

(a) Append. No. III. § 6.

(44) And where a party's title to land is referred, with his consent, the award is conclusive evidence, and binding on him and his heir and assigns, as to such title. 3 East, 15. See, however, 2 R. S. 541; § 2.

(45) If the parties intend to refer all disputes, the terms of the reference should be, "of all matters in difference, between the parties;" when the reference is only intended to be of the matter in a particular cause, it should be, "of all matters in difference in the cause." 3 T. R. 628. A time should, in all cases, be mentioned within which the award is to be made; but if no time be mentioned, the award should be made in a reasonable time. 2 Keb. 10, 20. 3 M. & S. 145. It is usual to vest in the arbitrators a power of enlarging the time for making their award; but it should be stipulated, that this enlargement be made a rule of court. It is best to provide, that the arbitration is not to be defeated by the death of either party. 7 Taunt. 571. 2 B. & A. 394. 3 D. & R. 184. 608. In some cases the court will amend an order of reference. 5 Moore, 167.

A court of chancery will not decree a specific performance, 19 Ves. 431. 6 Ves. 815. and no action lies for not appointing an arbitrator, 2 B. & P. 13; but if a party has agreed not to revoke, or has covenanted to perform an award, and the award be made, he will be liable to an action for a breach of the agreement or covenant, if he revoke or refuse to perform the award; see 5 B. & A. 507. 1 B. & R. 106. 2 Chit. R. 316. 5 East, 263; and see 4 B. & C. 103; and an attachment for a contempt of court sometimes lies, where the submission is a rule of court. Crompt. Prac. 262. 1 Stra. 593. 7 East, 607.

With respect to the revocation of the arbitrator's authority, it is a rule of law, that every species of authority, being a delegated power, although by express words made irrevocable, is nevertheless in general revocable. See 8 Co. 82. A submission to arbitration may be revoked by the act of God, by operation of law, or by the act of the parties.

The death of either or any of the parties before the award is delivered, in general vacates the submission, unless it contain a stipulation to the contrary; see 1 Marsh. 366. 7 Taunt. 571. 1 Moore, 287. S. C. 2 B. & A. 394; but where all matters in difference in a cause are referred by order of nisi prius to arbitration, the death of one of the parties, at any time before award made, is a revocation of the arbitrator's authority, and the court will set aside an award made after his death; or, in other words, it should seem, if the cause of action is referred, the death abates the action, but not so if other matters besides the cause of action are referred. 3 D. & R. 608. 2 B. & A. 394.

If a sole party submit to arbitration, and marry before the award is delivered, such marriage is in effect a revocation, without notice to the arbitrators, 2 Keb. 865. Jones, 388. Roll. Arb. 331; but the husband and wife may be sued on their bond for such revoking. 5 East, 266.

Bankruptcy of one of the parties is no revocation. 2 Chit. Rep. 43. 4 B. & A. 250.

The death of the arbitrators, or one of them, will defeat the reference, unless there be a clause in the submission to the contrary, see 4 Moore, 3; so if the arbitrators do not make the award within the limited time, or they disagree, or refuse to act or intermeddle any further. 1 M. & S. Ab. 261. 2 Saund. 129. Tidd, 8 ed. 877.

The parties themselves, as we have just seen, may revoke the arbitrators' authority before the award is made; the revocation must follow the nature of the submission; if the latter be by parol, so may the revocation. 2 Keb. 64. If the submission be by deed, so must the revocation. 8 Co. 72. and see T. Jones, 134. Notice of the revocation by the act of the parties must be given to the arbitrators, in order to render it effectual. Roll. Arb. 331. 'Vin. Ab. Authority, 13. and see 5 B. & A. 507.

The law relating to the proceedings during the conduct of the arbitration, and the duties of arbitrators and umpires, will be found in 3 Chit. Com. Law, 650 to 656. and Caldw. on Arb. 42, 45, &c.; as to the power, &c. of awarding costs, see Tidd, 8 ed. 885 to 887; as to when a court of equity will compel an arbitrator to proceed, see 1 Swanst. 40. As to the general requisites of an award, and how it will be construed, see 3 Chit. Com. Law, 656 to 660. Tidd, 8 ed. 882. For the remedy to compel the performance of an award, see Tidd Prac. 8 ed. 887 to 894. 3 Chit. Com. Law, 660 to 665; and for the relief against an improper award, see 3 Chit. Com. Law, 665 to 666. Tidd Prac. 8 ed. 894 to 898.
as well in controversies where causes are depending, as in those where no action is brought: enacting, by statute 9 & 10 W. 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 (46). 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.

CHAPTER II.

OF REDRESS BY THE MERE OPERATION OF LAW.

The remedies for private wrongs, which are effected by the mere operation of the 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 (a) 1 Roll. Abr. 922. Plowd. 543. See Book II. page 511.

(46) 2 R. S. 541, &c.
(1) Toller, 4 ed. 295. 298. So if a creditor be made a co-executor. 1 B. & P. 630.

The same law as to an administrator, 8 T. R. 407. or heir. 2 Vern. 62. So if a debtor be made executor of creditor, it is a release at law. Ante, 2 book, 512. Plowd. 184. Salk. 299.

But now, in New-York, executors or administrators cannot retain in preference to other debts of equal degree (2 R. S. 88, § 33), nor does the appointment of a debtor as executor release the debt. (Id. 84, § 13.)
world besides. For, though a rateable payment of all the debts of the deceased, 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 (2) is where he, who hath the true property or jus proprietas 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) (3). 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 disseises B, that *is, turns him out of possession, and dies, leaving a [ *20 ] 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 disseisor, makes a lease for life to D, with remainder to B the diseseec for life, and D dies; hereby the remainder accrues to B, the diseseee: who thus gaining a new freehold by virtue of the remainder, which is a bad title, is by act of law remitted, or 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 waver 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

(c) 5 Rep. 30. (e) Co. Litt. 348. 350.
(d) Litt. § 659. (h) § 601.

(3) And this if part of the estate came to him by such a defeasible title. Litt. 662, 663.
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 (4). 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 destitutur, ipsa

re valet, si culpa absit. But there shall be no remitter to a right, for which the party has no remedy by action (k): as if the issue in tail be barred by the fine or warranty of his ancestor, and the freehold is afterwards cast upon him; he shall not be remitted to his estate tail (l): 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 extrajudicial 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 (1).

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 cooperate; 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 required 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 de-

(i) Elem. c. 9.
(k) Co. Litt. 349.
(l) Ch. 1.

(4) See post 190. for the advantages of this law of remitter.
(1) As to courts in general, and the several
tinue: 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 distress for rent, or have an action of debt, at my own option: if I do not distress my neighbour's cattle damage-sesant, I 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 seised 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.

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 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 court 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 (2) for a perpetual memorial and testi-

---

(2) In New-York they may be on paper or parchment. 2 R. S. 275, § 9.

Vol. II.
mony: which rolls are called the records of the court, and are of such high and super-eminent 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) (3). 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 (4). 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 [*25*] hath authority to fine or imprison; so that the very erection *of a new jurisdiction with the power of fine or imprisonment makes it instantly a court of record (g) (5). 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 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).

In every court there must be at least three constituent parts, the *actor*, *reus*, and *judex*: 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 *judex*, 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 licence under the king's letters patent (l). This is still the law in criminal cases (6). And an


(3) This rule is subject to some exceptions; for in the case of a judgment signed on a warrant of attorney given upon an unlawful consideration, or obtained by fraud, upon an affidavit thereof, the court will afford relief upon a summary application. Doug. 196. Camp. 727. 1 Hen. Bing. 75. And equity will relieve against a judgment obtained by fraud or collusion. 1 Ann. 8. 3 Ves. & B. 42. And third persons who have been defrauded by a collusive judgment may shew such fraud, so as to prevent themselves from being prejudiced by it. 2 Marsh. 392. 7 Taunt. 97. 13 Eliz. c. 5.

(4) But an Irish judgment, though one of record, is triable only by a jury. 5 East, 473. (5) But every court of record has not necessarily a power to fine and imprison. 1 Sid. 145. There are several of the king's courts not of record, as the court of equity in chancery, *the admiralty courts,* &c. 4 Inst. 37. H. 6. 14. b. 227. Com. Dig. tit. Chancery, C. 2.

(6) This is not universally so, for in prosecutions and informations for misdemeanors, especially in the court of king's bench, a defendant may, and usually does, appear and plead by his attorney or clerk in court. 1 Chitty's Crim. Law. But an attorney has no right
idiot cannot to this day appear by attorney, but in person (m), for he hath not discretion to enable him to appoint *a proper substit-
tute: and upon his being brought before the court in so defence-
less 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, "eum olim in usu fuisset, alterius no-
mine agi non posse, sed, quia hoc non minimam incommoditatem habebat, co-
eperunt homines per procuratores litiage (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 any 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 (7). No man can practise as an attorney in
any 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 practise
in the court of common pleas; nor vice versa. To practise 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 supe-
rior 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 ad-
mitted but such as were virtuous, learned, and sworn to do their duty.
And many subsequent statutes (p) have laid them under farther regula-
tions.

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 (p); and are in our old books *styled apprentices, appren-
ticii ad legem, being looked upon as merely learners, and not qua-
ified 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 honourable this state and degree is, with the form, splendour, and
profits attending it, hath been so fully displayed by many learned writ-
ers (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

(m) F. N. B. 27.
(n) Bro. Abr. t. idem. 1.
(o) Inst. 4. tit. 10.
(p) 3 Jac. 1. c. 7. 12 Geo. I. c. 29. 2 Geo. II. c.
23. 22 Geo. II. c. 46. 23 Geo. II. c. 26.
(q) See Book I. introd. § 1.
(r) De Lib. c. 50.
(s) Fortesc. ibid. 10 Rep. pref. Dugd. Orig.
Jurid. To which may be added a tract by the late
serjeant Wynne, printed in 1765, entitled "Observ-
ations touching the antiquity and dignity of the
degree of serjeant at law."
(t) 2 Inst. 214.

* As to law of New-York, see 4 book, p. 318, note 2.
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 *puisné* barons of the exchequer to become justices of assise, 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 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 licence (8); in which restriction they agree with the advocates of the fisc (y): but in the imperial law the prohibition was carried still farther, and perhaps was more for the dignity of the sovereign; for, excepting some peculiar causes, the fiscal advocates were not permitted to be at all concerned *in private suits between subject and subject* (z). 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; sometimes 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) (10) may take upon them the protection and defence of any suitors, whether plaintiff or defendant; who are therefore called their clients, like the dependants upon the ancient Roman orators. Those indeed practised gratis, for honour 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

(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 practitioners.
1. The king's premier serjeant (so constituted by special patent) (9).
2. The king's ancient serjeant, or the eldest among the king's serjeants (9).
3. The king's advocate-general.
4. The king's attorney-general (9).
5. The king's solicitor-general (9).
6. The king's serjeants.
7. The king's counsel, with the queen's attorney and solicitor.
8. Serjeants at law.
10. Advocates of the civil law.

(8) Hence none of the king's counsel can publicly plead in court for a prisoner, or a defendant in a criminal prosecution, without a licence, which is never refused; but an expense of about nine pounds must be incurred in obtaining it.
(9) By the king's mandate, 14th Dec. 1811, the king's attorney and solicitor-general are now to have place and audience before the king's premier serjeant.
(10) That is, in bank; for at trials at nisi prius in C. P. a barrister, who is not a serjeant, may even lead a cause.
PRIVATE WRONGS.

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) (11): 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 80l. of English money (f) (12). And, in order [*29] 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 held 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 pertinent to the cause in hand, he is then liable to an action from the party injured (g) (13). 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 sile

(11) Upon the same principle a physician cannot maintain an action for his fees. 4 Term. Rep. 317.* It has also been held, that no action lies to recover back a fee given to a barrister to argue a cause which he did not attend. Peake's R. 122. Formerly it was considered, that if a counsel disclosed his client's case or neglected to attend to it, he was liable to be sued. See Vin. Ab. Actions of Assumpsit, P. But in more modern times it has been considered, that no such action is sustainable. Peake's R. 90.

(12) On the other hand serjeants and barristers are entitled to certain privileges. Each is an esquire, and his eldest son is qualified to kill game. (1 T. R. 44). They are entitled when sued separately to have the venue laid in any action against them in Middlesex, 1 Stra. 610; and are privileged from arrest and from being taken in execution whilst they are on their proper circuit, and when they are attending the sittings at nisi prius. 1 Hen. Bla. 636.

(13) See the late important case establishing the correctness of this position. Holt, C. N. P. 691. 1 B. & A. 232. 1 Saund. Rep. 130.

(14) The courts of the U. S. are the Supreme, the Circuit, and the District Courts; their jurisdiction is limited by the constitution, Art. 3, Section 22. But Congress has not vested in them all the power that it might under the constitution, and they have only such jurisdiction as Congress may choose to confer. (id. § 2).

By the law of 1789, ch. 20, (1 Story's laws U. S. 58, § 13), the Supreme Court has exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, and except also between a state and citizens of other states or aliens; in which latter case it has original, but not exclusive, jurisdiction: it has also exclusive jurisdiction of all suits against ambassadors or other public ministers and their domestic; and original, but not exclusive,
jurisdiction of suits by ambassadors or other public ministers, or in which a consul or a vice-consul is a party. It has also appellate jurisdiction from the Circuit Courts, in civil actions brought there originally, or removed there from the state courts, or by appeal from a district court, when the matter in dispute exceeds 2,000 dollars: (id. 60. § 22): and from the highest state courts when there has been drawn in question the validity of a treaty or a statute of, or an authority exercised, under the U. S. and the decision below has been against its validity: or there has been drawn in question the validity of a statute of, or an authority exercised, under any state on the ground of their being repugnant to the constitution, treaties, or laws of the U. S. and the decision below has been in favor of the validity of such state law or authority: or where the decision below has been against a right claimed under any clause of the constitution of the U. S. or of a treaty, or statute of, or commission held under, the U. S. (Id. p. 61, § 25).

This is the highest court in the country, and may be considered the highest and most august in the world, for the controversies even of those states are determined by it, and it may declare unconstitutional, and therefore void, the acts of those states, and even the acts of Congress.

The Circuit Court is next in rank: it has original jurisdiction, concurrently with the state courts, of all civil suits where the matter in dispute exceeds 500 dollars, and the U. S. are plaintiffs, or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state. It has exclusive jurisdiction of all crimes and offences cognizable under the authority of the U. S. except when specially otherwise provided; and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein. (Id. 57. § 11.) It has also appellate jurisdiction from the district court. (Id.)

The District Court has jurisdiction, exclusively of the state courts, of all crimes and offences cognizable under the authority of the U. S. committed within its district or upon the high seas, where no other punishment than whipping not exceeding thirty stripes, a fine not exceeding 100 dollars, or a term of imprisonment not exceeding 6 months, is to be inflicted: and also has exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under the laws of import, navigation, or trade of the U. S., where the seizures are made on waters navigable from the sea by vessels of ten or more tons burthen within its district, as also the sale of the seizures, and the penalties and forfeitures incurred under those laws. It has also cognizance, concurrently with the state courts and the circuit courts, of all cases where an alien sues for a tort only in violation of the law of nations or a treaty of the U. S.: also of all suits at common law where the U. S. sue, and the matter in dispute amounts to 100 dollars. It also has jurisdiction, exclusively of the state courts, of all suits against consuls or vice-consuls, except for offences above the description above mentioned. It also has a concurrent jurisdiction in suits of common law, where the U. S. or any officer thereof, under any act of Congress, sue, although the amount is under 100 dollars. (Id. 1531, § 4).

In addition to these there are also Courts Martial, and Naval courts, for the army and navy.

In the state of New-York the highest court is the Court of Errors, consisting of the senate, the chancellor, and the judges of the Supreme Court: it is also the court for the trial of impeachments. In no case, except the trial of impeachments, has it original jurisdiction. A writ of error from the decisions of the Supreme Court lies to this court, and then the justices of that court merely assign the reasons of their decision without voting. An appeal lies to it from the decision of the chancellor, and then he merely assigns his reasons for his decision without voting. No other matters come before this court.

The chancellor has the same equity powers as the chancellor in England: appeals also lie to him from the decisions of the vice-chancellors, and in some cases from the decisions of surrogates.

The Supreme Court has jurisdiction in all common law cases. It is aided in practice, almost entirely relieved from the trial of causes, as the circuit judges try issues of fact in all civil common law causes; and with two of the judges of the county courts, are the judges in the court of Oyer and Terminer. The circuit judges are also the vice-chancellors of their own circuit, and appeals lie to them in some cases from the surrogates of their counties.

In the first circuit, including the city of New-York, the vice-chancellors of vice-chancellor and of circuit judge are distinct.

Courts of Common Pleas are appointed for each county, and have cognizance of all local actions within their county, and of all transitory actions and of appeals from the justices' courts: except in the city of New-York, where the decisions of the justices' courts are reviewed by the Superior Court for the city on a certiorari. In each town there are justices' courts, having jurisdiction generally of personal actions when the amount in controversy does not exceed 50 dollars, and the title to lands does not come in question. There is also in the city of New-York the Superior Court, having the same powers generally as the Common Pleas courts, with this addition: that however large the amount in controversy may be, causes cannot be removed from it to the Supreme Court before judgment.

In the city of New-York is also the Marine Court, having the same jurisdiction as the justices' courts: also jurisdiction in such cases to the amount of 100 dollars, and in all controversies between sailors and the masters of ships.

In addition to these courts, are the general and special sessions in each county, for the
of the state.

There is no Ecclesiastical Court in the state; the powers of such courts, so far as they relate to the estates of deceased persons, are executed by the surrogate; so far as they concern divorces, are executed by the Court of Chancery. (See the Revised Statutes of New-York).

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.

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 large streams from the [ *31 ] 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 Garcilasso 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

(e) Mod. Un. Hist. xxxviii. 469.
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 plaintiffs or actions thither from all the inferior jurisdictions; upon these accounts (amongst others) it has happened that

[ *32 ] *these petty tribunals have fallen into decay, and almost into oblivion; whether for the better or the worse, may be matter 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 pie poudre, 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 pied puldeaux (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 an 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 oc-

(b) Mod. Un. Hist. xxxix. 14. (f) Barrington's observat. on the stat. 337.
(c) Exod. c. 18. (g) Stat. 17 Edw. IV. c. 2.
(e) Ruth, c. 4.
ocation 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 (1): for that it is held before the freeholders who owe suit and service to the manor, the steward being rather the registrar 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 important 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 [ *34 ] three marks, that bounded the jurisdiction of the ancient Gothic courts in their lowest instance, or fierunging-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)." 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 loquellam.

III. A hundred-court is only a larger court-baron, being held for all the inhabitants of a particular hundred instead of a manor. 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

(i) Co. Litt. 58.

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

(l) Finch. 348.

(m) Sternhock, de jur. Goth. 1, 1, c. 2.

(o) 3 Rep. pref.

(p) See Append. No. I, § 3

(q) F. N. B. ch. 4, 70. Finch. L. 441, 445.

(r) F. N. B. 18.

(1) All the freeholders of the king were called barons; but the Editor is not aware that it appears from any authority that this word was ever applied to those who held freeholds of a subject. See an account of the ancient barons, ante 1 book, 399, n. 5. It seems to be the more obvious explanation of the court-baron, that it was the court of the baron or lord of the manor, to which his freeholders owed suit and service. In like manner, we say the king's court, and the sheriff's court.

Vol. II.
all points, except that in point of territory it is of 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 (o) 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 after

[ *35 ] wards only *called by that name (u); and who probably gave the same denomination to the district out of which they were chosen. Caesar 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. "Eligitur in concilii et principes, qui jura per pagos viscisque reddunt: centeni singulis, ex plebe comites, consilium simul et auctoritas, absunt (x)." This hundred-court was denominated haereda 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 (2) 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),

(e) Finch. L. 243. 4 Inst. 267.
(2) 2 Inst. 71.
(u) Book L. I. 116.
(2) Centeni ex singulis pagis sunt, idque ipsam inter suas vocantur; et, quod primo numerus fuist, jam nomen et honor est. Tac. de Mor. Germ. c. 6.

(2) As to the county-court in general, see Com. Dig. County-courts, B. 3; Bac. Ab. Court, County-court; Vin. Ab. Court, County, 7 vol. 5; 4 Inst. 266. No action can be brought in the county-court, unless the cause of action arose, and the defendant reside, within the county; and if that be not the case, the action may be brought in the superior court, although for a suit less than 40s.: for if no action can be brought in the inferior jurisdiction for so small a debt, the plaintiff is not therefore to lose it. Per Ld. Kenyon, 6 T. R. 175. 8 T. R. 235. 1 Bos. & P. 75. 1 Dowl. & R. 359. So if the contract be made on the high seas, as for wages, it cannot be recovered in county-court. 1 B. & A. 223. But the non-residence of the plaintiff within the jurisdiction constitutes no objection at common law to his proceeding in the county-court, 1 East, 352; though in some local courts of request, constituted by particular statutes, both plaintiff and defendant must reside within the jurisdiction. 8 T. R. 236. This court has no jurisdiction over trespasses said to have been committed vi et armis, per Ld. Kenyon, 3 T. R. 35; because the county-court, not

being a court of record, cannot fine the defendant. Com. Dig. County C. 8. But it is said to be otherwise, when the proceedings are by justices. Com. Dig. County C. 5. The writ of justices does not, however, except in this instance, and as respects the amount of the debt, enlarge the sheriff's jurisdiction. 1 Lev. 253. Vin. Ab. Court, County D. a. 2 pl. 6. An entire debt, exceeding 40s., cannot be split, so as to be sued for in this court, nor can the creditor falsely acknowledge satisfaction of a part, so as to proceed for the rest. '2 Inst. 312.' Palm. 564. Com. Dig. County C. 8. 2 Rol. a. 317. pl. 1. But where the debt has really been reduced, by payments, under 40s. it may be recovered in this court. Com. Dig. County C. 8. Sec. 1 B. & P. 223. 4. No capias against the person can issue out of this court, Com. Dig. County C. 9; and therefore, if the defendant has no goods, the plaintiff is without remedy there; but an action may at common law be brought in the superior courts, on a judgment obtained in the county court, and thus, ultimately, execution against the person may be obtained. Greenwood on Courts, 22. Finch. 318. F. N. B. 152.
a jurisdiction 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 justices, 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 (3). The statute also 43 Eliz. c. 6. which gives the judges in many personal actions, where the jury assess less damages than 40s. a power to certify the same and *abridge the plaintiff of his full costs, was also meant [*36 ] to prevent vexation by litigious plaintiffs; who, for purposes of mere oppression, might be inclined 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 plebeiae justiciae et theatrum comitivae 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); “praepositus (that is, the sheriff) ad quartam circiter septimana frequentem populii 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 recordari (g), in the same manner as from *hundred-courts, and courts-baron: and as the same writ of false [*37 ] judgment may be had, in nature of a writ of error; this has occasioned the same disuse of bringing actions 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,

(b) 2 Inst. 301. 3 T. R. 363. Bac. Ab. Court of King’s Bench. A. 2.
(c) Finch. 318. F. N. B. 152.
(d) Gloss. v. comitatus.

(3) And in any of the superior courts, when the debt sued for appears on the face of the declaration, 3 Burr. 1592; or is admitted by the plaintiff, or his attorney, 2 Bla. Rep. 754; or proved by an affidavit of the defendant, 4 T. R. 495. 5 id. 64. Todd Prc. 8 ed. 565. to be under 40s. and the plaintiff may recover it in an inferior jurisdiction, they will stay the proceedings, it being below their dignity to proceed in such action. But the plaintiff may by affidavit shew that the debt exceeds 40s. or that the defendant resided out of the jurisdiction, which will retain the cause in the superior court. 6 T. R. 175. 9 T. R. 235. 1 B. & P. 75. 1 Dowl. & R. 359.
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 wittenagemote, or general council, which assem-
bled annually or oftener, wherever the king kept his Christmas, Easter, or
Whitsuntide, as well to do private justice as to consult upon public busi-
ness. At the conquest the ecclesiastical jurisdiction was diverted into an-
other channel; and the conqueror, fearing danger from these annual par-
liaments, 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 an-
cient authors, aula regia, or aula regis. This court was composed of the
king's great officers of state resident in his palace, and usually attendant
on his person: such as the lord high constable and lord marleschal, 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
[ *38 ] household; the lord chancellor, whose peculiar business it was to keep
the king's seal, and examine all such writs, grants, and 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 bar-
rons 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 secur-
lar business both criminal and civil, and likewise the matters of the reve-
nue: and over all presided one special magistrate, called the chief justiciar
or capitalis justiciarius totius Angliae; who was also the principal minister
of state, the second man in the kingdom, and by virtue of his office guar-
dian 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 ex-
tensive jurisdiction; and from the plentitude 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 commu-
niaplacita non sequuntur curiam regis, sed teneantur in aliquo loco certo." This
certain place was established in Westminster-hall, the place where the
aula regis originally sate, when the king resided in that city; and there it
hath ever since continued. And the court being thus rendered fixed and
stationary, the judge became so too, and a chief with other justices of the
common pleas thereupon appointed; with jurisdiction to hear and de-

(h) 1. 3, tr. 1, c. 7.
termine 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 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 travelled 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 farther pursuance of this example, the other several officers of the chief justiciar were under Edward the First (who new-modelled 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 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 * made to form a cheque 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 (4).

(j) See Book I. introd. § 1.  
(l) Ibid. xxix. 46.  
(m) 4 Inst. 90.

(4) The jurisdiction of each court is so well established, that at this day the court of king's
PRIVATE WRONGS.

The judges of this court are at present (n) four in number, one chief and three 

pruisnē 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 corum ipso rege) (5) is the supreme court of common law in the kingdom; consisting of a chief justice and three pruisnē 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) (6).

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 "ab hisuis 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 moveable quality, as well as its dignity and power, are fully expressed by Bracton, when he says that the justices of this court are "capitales, generaies, perpetui, et maiores; a later regis residentes, qui omnium aliorum corrigere tententur injurias"

(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. Raym. 475.

(o) 4 Inst. 73.

(p) See Book I. ch. 7. The king used to decide bench cannot be authorized to determine a mere real action; so neither can the court of common pleas, to inquire of felony or treason. Hawk. b. 2. ch. 1. s. 4. Bac. Ab. Courts, A.

The king's bench, however, tries titles to land by the action of ejectment.

(5) This court is called the queen's bench in the reign of a queen, and during the protectorate of Cromwell it was styled the upper bench.

(6) Lord Mansfield, in 2 Burr. 851. does not mean to say, nor do the records there cited warrant the conclusion, that Edw. I. actually sat in the king's bench. Dr. Henry, in his very accurate History of Great Britain, informs us, that he has found no instance of any of our kings sitting in a court of justice before Edw. IV. "And Edw. IV. (he says) in the second year of his reign, sat three days together, during Michaelmas term, in the court of king's bench; but it is not said that he interfered in the business of the court; and as he was then a very young man, it is probable that it was his intention to learn in what manner justice was administered, rather than to act the part of a judge." 5 vol. 382. 4to. edit. Lord Coke says, that the words in magna charta, c. 29. nec super eum ibimus nec super eum situem. nisi, &c. signify, that we shall not sit in judgment ourselves, nor send our commissioners or judges to try him. 2 Inst. 46. But that this is an erroneous construction of these words, appears from a charter granted by king John in the 16th year of his reign, which is thus expressed: nec super eos per vim vel per arma ibimus nisi per legem regni nostri vel per judicium parium suorum. See Int. to Bl. Mag. Ch. p. xlii. Statutes and charters in pari materia must be construed by a reference to each other, and in the more ancient charter the meaning is clear, that the king will not proceed with violence against his subjects, unless justified by the law of his kingdom, or by a judgment of their peers.
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 [ *42 ] keeps all inferior jurisdictions within the bounds of their authority, and 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 speed, 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; of actions for 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 (w). The same doctrine is also now extended to all actions on the case whatsoever (w): 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) (7); 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 [ *43 ] supposed trespass, which he never has in reality committed; and, being thus in the custody of the marshal of the 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 fictione juris semper sustinuit aequitas (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 cir-

(a) J. 3. c. 10.
(b) Thus too in the civil law; contra fictionem non admititur probatio; qui enim exim effecerat probatio versatur, ubi fictio adversus veritatem fingit? Nam fictio nihili aliud est, quam legis adversus veritatem in re possibili ex justa causa dispositio. (Gothofred. in Eqj. 1. 22. f. 3.)
(d) 11 Rep. 51. Co. Litt. 150.

(7) This is not the present practice, R. T. Hardw. 317. Tidd’s Prac. 8 ed. 97.
ciety 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 (8); and to which a writ of error lies also from the court of king's bench in Ireland (9). Yet even this so high and honourable 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 (10).

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 [*44]law and a court of equity *also. It is a very ancient court of record, set up by William the Conqueror (c), 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, saccearium, from the chequed 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 (11).

(c) Lamb. Archet. 94. (f) Madox hist. exch. 100. (g) Spelm. Gild. I. in cod. leg. vet. apud Wil.

(8) Except in London, 2 Burr. 777. and some other places; and no writ of error lies from the cinque ports, 4 Inst. 224. or from the court of stannaries. 3 Bals. 193.

(9) This was altered by the 23 Geo. III. c. 28; and now by the act of union, 39 & 40 Geo. III. c. 67. art. 8, writs of error and appeals on judgments in Ireland, can only be to the house of lords of the united kingdom. Ante, I book, 104. n. 15.

(10) As to the composure of this court and when it will interfere, see post, 436. In the Exchequer there are seven courts. 1. The Court of Pleas. 2. The Court of Accounts. 3. The Court of Receipt. 4. The Court of Exchequer Chamber, being the assembly of all the judges of England for matters of law. 5. The Court of Exchequer Chamber, for errors in the Court of Exchequer. 6. The Court of Exchequer Chamber for errors in the King's Bench. 7. The Court of Equity in the Exchequer Chamber. Bac. Ab. Court of Exchequer, A.

(11) Though this court is inferior in rank as well to the court of common pleas as the king's bench, and though in general a subject has a right to resort to either of the superior courts for the redress of a civil injury; yet this court, having an original, and in many cases an exclusive, jurisdiction in fiscal matters, will not permit questions, in the decision of which the king's revenue or his officers are interested, to be discussed before any other tribunal; and therefore, if an action of trespass against a revenue officer for his conduct in the execution of his office, be brought in the court of C. P. or K. B., it may be removed into the office of pleas of this court of exchequer. 1 Anstr. 205. Hardr. 176. Parker, 143. 1 Price, 206. 8 Price, 584. Manning's Exchequer Pracl. 161. 164 n. On such occasions the court interposes on motion, by ordering the proceeding to be removed into the office of pleas, which order operates by way of injunction. The usual order in cases of this nature is, that the action be removed out of the king's bench or common pleas, or other court in which it is depending, into the office of pleas, and that it shall be there in the same forwardness as in the court out of which the action is removed. This order, however, does not operate as a certiorari to remove the proceedings, but as a personal order on the party to stay them there, and of course calls on the defendant in the action to appear, accept a declaration, and put the plaintiff in the same state of forwardness in the office of pleas as he was in the other court. Per Eyre, Ch. B. 1 Anstr. 205. in notes.
The court of equity is held in the exchequer chamber before the lord treasurer, the chancellor of the exchequer, the chief baron, and three puisné ones (12). 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 court 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 the exchequer to adjust *and recover his revenue, wherein [*45] 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 accountants 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 (13). They have likewise privilege to sue and implead one another, or any stranger, in the same kind of common law actions (where the personality 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 accountants, 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 (14): 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 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), 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

(i) Tit. Hon. 2. 5. 16.  
(ii) I. 2. 6. 3. c. 1. 6.  
(iii) 10 Edw. I. c. 11.  
(iv) 29 Edw. I. c. 4.

(12) By the stat. 57 Geo. III. c. 18. the lord chief baron is empowered to hear and determine all causes, matters, and things at any time depending in the court of exchequer as a court of equity; and if he should, from illness, &c. be prevented from setting for those purposes, the king may, from time to time, appoint by warrant under sign manual, any other of the barons to hear and determine the same. This enactment has greatly facili-

Vol. II.
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 ammountant. 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

[ *46 ] court: for there any person may file *a bill against another up-
on a bare suggestion that he is the king's ammountant; 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 (15).

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) (16). 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

[ *47 ] therefore *when seals came in use, he had always the custody of the king's great seal. So that the office of chancellor, or lord keeper (17), (whose authority by statute 5 Eliz. c. 18. is declared to be

(n) 4 Inst. 88.

(15) By the 31 Edward III. c. 12. this court of appeal is to consist of the chancellor and treasurer, and such justices and sage person as they shall think fit. It is altered by 31 Eliz. c. 1. 16 Car. II. c. 2. 20 Car. II. c. 4, from which it appears, that the court may consist of both the chief justices, or one of them, or of the chancellor, provided the chancellor is present when the judgment is given. See the proceedings in the case of Johnstone v. Sutton in this court. 1 T. R. 493.

(16) According to the opinion of several learned authors (as Mr. Camden in his Britannia, and Dr. Cowell in his Interpreter have observed), the chancery had its name original-

ly from certain bare laid one over another crosswise, like a lattice, wherein it was environed, to keep off the press of the people, and not to hinder the view of those officers who sat therein; such gates or cross-bars being, by the Latins, called cancelli. Vid. Dugd. 32. Camden, Cowell, Cassiod. Ep. 6. lib. 11. Pet. Pythæus, lib. 2. advers. c. 12. 1 Harr. Ch. 1. Dr. Johnson seems also inclined to this definition, and it indeed appears the most reasonable, for we have also the word "chancel," which signifies that part of the church formerly barred off from the body of it.

(17) King Hen. V. had two great seals, one of gold, which he delivered to the bishop of
exactly the same), is with us at this day created by the mere delivery of the king's great seal into his custody (a); 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 precedence to every temporal lord (p). He is a privy counsellor by his office (q), and, according to lord chancellor Ellesmere (r), procutor 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 (18). He is the general

Durham, and made him lord chancellor; another of silver, which he delivered to the bishop of London to keep; and historians often confound benefices and keepers, 1 Harr. Ch. 68, note. 4 Inst. 88; but, at the same time, being but one great seal, there cannot be both a chancellor and a lord keeper of the great seal at one time, because both are but one office, as is declared by the stat. 5 Eliz. 4 Inst. 88, and the taking away the seal determines the office. 1 Sid. 338. It seems that it is not inconsistent for the lord chancellor also to hold the office of chief justice of the king's bench. Lord Hardwicke held both offices from 20th February till 7th June. 1 Sid. 338. Com. Dig. tit. Chancery, (B. 1.)

(18) In Mr. Christian's edition is the following note:—With regard to the chancellor's patronage, there seems to be some inaccuracy in the learned judge's text and references. I humbly conceive that a truer statement is this, viz. that it appears from the rolls of parliament in the time of Edw. III. that it had been the usage before that time for the chancellors to give all the king's livings, taxed (by the subsidy assessments) at twenty marks or under, to the clerks who were then actually cleri or clergymen, who had long laboured in the court of chancery; but that the bishop of Lincoln, when he was chancellor, had given such livings to his own and other clerks contrary to the pleasure of the king and the ancient usage; and therefore it is recommended to the king by the council to command the chancellor to give such livings only to the clerks of chancery, the exchequer, and the other two benches or courts of Westminster-hall. 4 Edw. III. n. 51. But since the new valuation of benefices, or the king's books in the time of Henry the Eighth, and the clerk's ceased to be in order, the chancellor has had the absolute disposal of all the king's livings, even where the presentation devolves to the crown by lapse, of the value of twenty pounds a year or under in the king's books. It does not appear how this enlarged patronage has been obtained by the chancellor, but it is probable by a private grant of the crown, from a consideration that the twenty marks in the time of Edw. III. were equivalent to twenty pounds in the time of Henry VIII. Gibs. 764. I Burn. Ec. Law, 120.

So far this was the note in my first edition; but a reverend gentleman has been so obliging as to suggest to me, that, having once had occasion to examine the subject, he was inclined to think, that the chancellor's patronage was confined to benefices under 20l. a year, and that livings exactly of that value belonged to the king, to be presented to by himself or his minister. Having, in consequence, looked more attenively into the subject, I am still of opinion, that the authorities support what is advanced in the preceding part of the note. It cannot be doubted that since the new valor beneficiorum, pounds were intended to be substituted for marks, and this is expressly stated by bishop Gibson, p. 764. In the 4 Edw. III. cited above, the chancellor's patronage is stated to be of all livings of 20 marks and under, del tae vint marec et dedeym. In the 1 Hen. VI. no. 25. Rolls of Parliament, there is a record appointing the duke of Bedford protector, and the duke of Gloucester protector in his absence; and amongst other privileges it grants the protector for the time being, the patronage of all the livings belonging to the crown, ultra tazam viginti marcarum usque ad tazam triginta marcarum inclusivae, and reserves the rest of the royal patronage to the king, except the benefices belonging to the chancellor, virtute officii sui. The word inclusivae can only apply to the words usque ad triginta; it cannot be reconciled with ultra, which was intended to leave the chancellor 20 or under. This is also clearly expressed in the Registrum Brevisum 307. where there is an ancient writ called de primo beneficio ecclesiastico habendoe. Volumus quod sanciem a. ad primum beneficium ecclesiasticum (taxationem viginti marcarum excedens) vacatum, quod ad praisentitionem nostram pertinent, scf. In the year-book 38 Edw. III. 3, it is laid down as law, that the king shall present to toute esglises que passent l'exten de 20 mares; and in the next line it is said, that the chan

(a) Lamb, Archæon. 65. 1 Roll. Abr. 355.
(p) Stat. 31 Hen. VIII. c. 10.
(q) Selden, office of lord chanc. § 3.
(r) Of the office of lord chancellor, edit. 1631.

(s) Madox. hist. of exch. 42.
(t) 23 Edw. III. 3 F. N. B. 35, though Hobart (214.) extends this value to twenty pounds.

In the year-book 38 Edw. III. 3, it is laid down as law, that the king shall present to toute esglises que passent l'exten de 20 mares; and in the next line it is said, that the chan
guardian of all infants (19), 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 on 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).

[ *48 ] On proof of which, as the king can never *be supposed intentionally to do any 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 coparcenary (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,

(u) 4 Rep. 54.  
(v) 4 Inst. 50.  

...
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
\textit{propr\ae man\ae} into the court of king's bench, where it shall be tried by the
country, and judgment shall be there given thereon \textit{(a)} \textit{(20).} 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 \textit{(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 \textit{(c)} being actually
brought, since the fourteenth year of queen Elizabeth, \textit{A. D. 1572.}

In this ordinary, or legal, court is also kept the \textit{officina justitiae}: 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 and have, \textit{ex debito justitiae}, any writ that his occasions
"may call for. These writs (relating to the business of the sub-
ject) and the returns to them were, according to the simplicity of
ancient times, originally kept in a hamper, \textit{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 \textit{paroa baga}: and
thence hath arisen the distinction of the \textit{hanaper} office, and \textit{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 \textit{(d)}: and
yet the difference of one from the other, when administered by the same
tribunal, was perfectly familiar to the Romans \textit{(e)}; the \textit{jus praetorium}, or
discretion of the \textit{praetor}, being distinct from the \textit{leges} or standing laws \textit{(f)};
but the power of both centered in one and the same magistrate, who was
equally entrusted to pronounce the rule of law, and to apply it to particu-
lar cases, by the principles of equity. With us too, the \textit{aula regia}, which
was the supreme court of judicature, undoubtedly administered equal justi-
tice 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 \textit{(g)} as a thing con-
trasted to strict law, yet neither in that writer, nor in Glanvil or Pleta, nor
yet in Britton (composed under the auspices and in the name of
Edward \textit{I.}, and \textit{treating particularly of courts and their several} \textit{[49]}
\textit{(a)} Cro. Jac. 12. Latch. 112.
\textit{(c)} The opinion of lord keeper North, in 1692, \textit{(1 Vern.} 131. \textit{1 Equ. Cas.} abr. 129.) that no such writ of
error lay, and that an injunction might be issued
against it, seems to have been well considered.
\textit{(d)} The \textit{council of conscience}, instituted by \textit{John
III.} king of Portugal, to review the sentence of all
inferior courts, and moderate them by equity, \textit{(Mod. \textit{Un. Hist.} xxi. 237.)} seems rather to have been a
court of appeal.
\textit{(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. \textit{(Lord Kaims, his-
tor. law tracts, I. 325, 330, princ. of equity, 44.)}
\textit{(f)} Thus Cicero: \textit{"jam illis promissis, non esse
standum, quia non videt, quae coactus quis metu et
deceptur dolu promisit? quae quidem plerumque
jure praetorio liberatur, nonnulla legibus." Offic.
I. I.
\textit{(g)} I. 2, c. 7, fol. 23.
\textit{(20)} But on the equity side of the court
questions of fact may be decided without an
issue, but this jurisdiction ought to be exer-
cised very tenderly and sparingly. \textit{9 Vesey,
168.} On the trial of an issue directed out of
chancery, if either party be desirous of having
a special jury, it is said to be proper to move
the court of chancery for that purpose. See
\textit{Prec. Ch.} 264. 2 \textit{P. Wms.} 68. \textit{4 M. & S.}
195, 6.
PRIVATE WRONGS.

jurisdictions), is there a syllable to be found relating to the 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 16 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 "whenever from thenceforth in one case a writ shall be found in the chancery, and in a like case falling under the same [ *51 ] right and requiring like remedy *no precedent of a writ can be produced, the clerks in chancery shall 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 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 land 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

(b) 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.)

(c) Nemo ad regem appellat nisi jud domi conseque non possit. Si jus minus severum sit, alleviatio deinde quae ratur apud regem. LL. Edg. c. 2.

(d) Lambard. Archiv. 59.

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

Hic est, quit leges regni cancellat iniquas
Et mandata prisci principis aque fortis.

(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. Archiv. 61.

(o) This was the opinion of Fairfax, a very learned judge in the time of Edward the Fourth. "Le subpoena (says he) ne servit que soventement use comme il est ore, si nous attenduons tels actions sur les cases, et maintenances le jurisdiccion de cego court, et d'autre courts." (Yearb. 21 Edw. IV. 23.)

(p) See book II. ch. 20.

(q) Spelm. Gloss. 106. 1 Lev. 242.
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 use accountable to his cestuy 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. 0. directed to give damages to the party unjustly aggrieved. But as the *clergy*; so early as the reign [ *52 ] of king Stephen, had attempted to turn their ecclesiastical courts into courts of equity, by entertaining suits *pro laesione 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 debitibus, quae fide interposita debentur, vel *absque interpositione fidei*, sint in justitia regis." therefore probably the ecclesiastical chancellors, who then held the seal, were remiss in abridging their own new acquired jurisdiction; especially as the spiritual court continued (*t*) to grasp at the same authority as before in suits *pro laesione fidei*, so late as the fifteenth century (*u*), till finally prohibited by the unanimous concurrence of all the judges. However, it appears from the 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 subtily 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 the 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 Hen. IV. c. 23. whereby judgments at law are declared irrevocable unless by attaint 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, [ *53 ] entitled *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 sate 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 of sir Thomas More by king Henry VIII. in 1530. After which the great seal was indiscrimi-

(s) 1 Hen. II. c. 15. Speed. 458.
(t) In 4 Hen. III. suits in court christian *pro laesione fidei* upon temporal contracts were adjudged, to be contrary to law. (Fitzh. *Abr. t. Prohibition*, 15.) But in the statute or writ of *circumspetct agatis*, supposed by some to have issued 13 Edw. I., but more probably (3 Pryn. Rec. 296) 3 Edw. II. suits *pro laesione fidei* were allowed to the ecclesiastical courts; according to some ancients copies, (Berthelet *stat. antiqu. Lond.* 1531. 90. b. 3 Pryn. Rec. 296.) and the common English translation, of that statute; though, in Lyndewode's copy, (Pryn. 2, t. 2.) and in the Cotton MS. (*Claud. D. 2.*) that clause is omitted.
(w) Rot. Parl. 14 Edw. IV. n° 33. (not 14 Edw. III. as cited 1 Roll. Abr. 370, 4c.)
nately 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 serjeant 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 seat 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 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 most uncorrupted integrity; a thorough master and zealous defender of the laws and constitution of his

(a) Wrinethly, St. John, and Hatton.
(b) Goodrick, Gardiner, and Heath.
(c) Biogr. Brit. 4278.
(d) Bacon’s Works, IV. 611. 612. 652.
(f) *For that it appertaineth to our pryncely office only to judge over all judges, and to discern and determine such differences as at anytime may and shall arise between our several courts, touching their jurisdictions, and the same to settle and determine, as we in our pryncely wisdom shall find to stand most with our honour, &c.* (1 Chanc. Rep. append. 26.)
(g) See the entry in the council book, 26 July, 1616. (Biogr. 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.” (Biogr. 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. (Moor’s reports, SS.) Though sir Edward might probably have retained his seat, if, during his suspension, he would have complimented lord Villiers (the new favourite) with the disposal of the most lucrative office in his court. (Biogr. Brit. 1391.)
country; and endowed 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 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 (21).

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 chancellor. Id. 431.

Besides the master of the rolls (the chief), there are eleven other masters in chancery. Com. Dig. Chancery, B. 5. All answers and affidavits are sworn before one of them and signed; all matters of account, exceptions to answers, &c. irregularities, contempt, and such like, are referred to them. 13 C. II. st. 6. 12 G. I. c. 32. 5 G. III. c. 28. 32 G. III. c. 42. 9 G. III. c. 19. 46 G. III. c. 128. Besides these there are masters extraordinary, appointed in the country to take affidavits, &c. Next in precedence are the six clerks, each of whom has ten sworn clerks under him. The six clerks are principally concerned in matters in equity, and it is their business to transact and file all proceedings by bill and answer, and also to issue certain patents which pass the great seal, as pardons of men for chance medley, patents for ambassadors, sheriffs' patents, and some others; all these matters are transacted by their under clerks. 1 Har. Ch. P. 75. Though formerly otherwise, clients are now at liberty to choose their own clerks. Ord. Ch. 107. They claim besides fees of six clerks' office, others as comptrollers of the hanaper, and for enrolling warrants, for patents, grants, and other matters passing under the great seal, and returned into hanaper office. Six clerks, and three clerks of petty bag are by letters patent, 16 Eliz. incorporated and styled clerks of the enrolment of the high court of chancery, and have two deputies. See 14 & 15 H. VIII. c. 8.

The office of registrar of this court is of great importance. Com. Dig. Chancery, B. 6. The registrar has four deputies; two of whom always sit in court and take notes of orders and decrees, &c. and before the same are entered he signs them. 45 Geo. III. c. 75. Besides these, there are the master of the subpoena office, register of affidavits, examiners, ushers, accountant-general, 12 Geo. I. c. 32. 12 Geo. II. c. 24. 9 Geo. III. c. 19. 32 Geo. III. c. 49. 46 Geo. III. c. 129. 54 Geo. III. c. 14. curators, clerks of the petty bag office, serjeant at arms, warden of the fleet, clerk of the chapel of the rolls, &c.
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. c. 8. consisting of the justices of the common pleas, and the barons of the exchequer, before whom writs of error may be brought to reverse [*56] 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 *ula 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 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.

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 [ *57 ] both benches) to give directions for remedying these *inconveniences in the courts below. This committee 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

(l) See ch. 25. pag. 411.  (m) 4 Inst. 119. 2 Bulst. 146.
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 (22); and except the four northern counties, where the assizes are held only once a year) (23), 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, justiciari 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 assises; 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 commission, to determine all manner of causes, being constituted justiciarii ad omnia placita (p): but the present justices of assise 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.) assises 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 ap-

(o) Co. Litt. 293.—Anno 1961. justiciarii itinera-

nee vocaverunt apud Wigmorniam in octavis S. Jo-

hannis baptistae; et totus comitatus est admittere

(22) The courts of nisi prius in London and

Middlesex are called sittings; those for Midd-

lesex were established by the legislature in

the reign of queen Elizabeth. In ancient tics all issues in actions brought in that
county were tried at Westminster in the terms,
at the bar of the court in which the action was
instituted; but when the business of the courts increased, these trials were found so
great an inconvenience, that it was enacted by the 13 Eliz. c. 12. that the chief justice of
the king’s bench should be empowered to try
within the term, or within four days after the
end of the term, all the issues joined in the
courts of chancery and king’s bench; and that
the chief justice of the common pleas, and the
chief baron, should try in like manner the is-
sues joined in their respective courts. In the

recusavit, quod septem anni nondum erant elapsi,
postquam justiciarii ibidem ultimo sederunt. (An-

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

(23) But now the assizes here are held
twice a year.
proved 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 assise, so that one of such justices be a judge of the king's
bench or common pleas, or the king's serjeant sworn (24). They usually
make their circuits in the respective vacations after Hilary and Trinity
terms; assises being allowed to be taken in the holy time of lent by con-
sent of the bishops at the king's request, as expressed in statute Westm.
1. 3 Edw. I. c. 51. And it was also usual during the times of popery, for
the prelates to grant annual licences to the justices of assise 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 assise in his own county, wherein he was born or doth
inhabit (25); 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 saeri-
lege, 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 authori-
ties. 1. The commission of the peace. 2. A commission of oyer and
terminer. 3. A commission of general gaol-delivery. The consi-
deration of all which belongs properly to the subsequent book of
these commentaries. But the fourth commission is, 4. A com-
misson of assise, directed to the justices and serjeants therein named, to
take (together with their associates) assises in the several counties; that
is, to take the verdict of a peculiar species of jury, called an assise, 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 commis-
sion of assise (u), being annexed to the office of those justices by the sta-
tute of Westm. 2. 13 Edw. I. c. 30. and it empowers them to try all ques-
tions of fact issuing out of the courts of Westminster, that are then ripe
for trial by jury (26). 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
assise come into the county in question. This they are sure to do in the

(g) Instances hereof may be met with in the appendix to Spelman's original of the terms, and in
Mr. Parker's Antiquities, 269.
(e) Stat. 4 Edw. III. c. 2. 8 Rich. II. c. 2. 33
Hen. VIII. c. 24.

(24) And now by 1 Geo. IV. c. 55, sect. 5, any judge or baron may, on his circuit, amend a
record, and make any order in any cause, although it was not in a suit depending in his
own court.

(25) This restriction was construed to extend to every commission of the judges: but
it being found very inconvenient, the 12 Geo.
II. c. 27. was enacted for the express purpose
of authorizing the commissioners of oyer and
terminer, and of gaol-delivery, to execute their
commissions in the criminal courts within the
counties in which they were born, or in which
they reside. See 4 book, 271. This re-

nisi prius, was taken off by the 49 Geo. III.
c. 91.

(26) An important act, the 3 Geo. IV. c. 10,
was lately passed to remedy the defect of the
commission, not being opened on the day ap-
pointed; by which it is enacted, that the com-
mision may be opened on the succeeding day
to the one appointed; and if such succeeding
day be a Sunday, or any other day of public
rest, then on the next following day, provided
the opening the commission on the appointed
day was prevented by the pressure of business
elsewhere, or by some unforeseen cause or ac-
cident.
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 assise 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 assises, &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 [*60 ] county, hundred, or perhaps parish. Pleas 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 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 neighbours; 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 an uniformity and aequilibrium 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 their country. This is a faithful sketch of the English juridical constitution, as designed by the masterly hand 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.
CHAPTER V.

OF COURTS ECCLESIASTICAL, MILITARY, AND MARITIME (1).

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 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 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 indedefeasible 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)."

(a) Celeberrimo huius conventui episcopus et aldermannus inter susto; quorum alter jura divina, alter humana populum edocet. LL. Edidgar. c. 5.

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

(c) Ibid.

(1) In the U. S. there are no ecclesiastical courts or military courts, like those mentioned in this chapter. The surrogates in New-York have cognizance of matters affecting the estates of deceased persons.
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 not the cause, was un-

[ *63 ]
doubtedly 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 effected union. And when, upon the death of King Henry the First, *the [ *64 ] 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 (curiae Christianitatis), I shall begin with the lowest, and so ascend gradually to the supreme court of appeal (l).

(e) Nullus episcopus vel archidioecesano de legibus episcopatus amplius in hundre placita tenens, nec causam, qua ad regimen animarum pertinent, ad judicium secularem domino adducat: sed quisque seclam episopales leges, de quacunque causa vel culpa interpellebat fuerit, ad locum, quem ad hanc episcopos elegent et nominaverit, veniat; ibique de causa sua respondat; et non seclum hundre, sed seclum canones et episcopales leges, rectum Deo et episcopo suo faciat.
(f) Volo et præcipio, ut omnes de comitatu sunt ad comitatus et hundreda, nesci feerent tempore regis Edwards. (Cart. Hen. I. in Spelm. cod. vet. legum. 303.) 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. Generali comitatu placita certus locis et vetustus tenentes. Intervent autem episcopi, comites, &c.; et agantur prima debita verae christianitatis jura, secundo regis placita, prostrae causae singularum dignis satisfacti

(tionibus exequatur. (g) 2 Inst. 70.
(h) Ne episcopi secularium placitorum officium sustinant. Spelm. Cod. 301.
(i) Spelm. Cod. 310.
(j) See book I. introd. § 1.
(k) For further particulars, see Burn’s ecclesiasti
cal law, Wood’s institute of the common law, and Oughton’s Ordo judiciorum.
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 (santa 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 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 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, licences, faculties, and other remnants of the papal extortions), but do not concern themselves with administering redress to any injury: and shall proceed to

(m) Book II. ch. 32.
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 observes) that the civil and canon laws were first imported into England (a). 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 (e), 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 licence 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 [67] the pope, who was ever vigilant to improve all opportunities of extending his jurisdiction hither, at length rivetted 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 Hen. VIII. c. 12. to all the bishops of the realm, assembled in the upper house of convocation (2).

7. A commission of review is a commission sometimes granted, in extraordinary cases, the 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 & 25 Hen. VIII. before cited declare 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 26 Hen. VII. c. 1. and 1 Eliz. c. 1. But it is not matter of right, which the subject may demand ex debito justitiae; but merely a matter of favour, and which therefore is often denied.

(a) Cod. vet. leg. 315. (s) Chap. 9.
(b) 4 Inst. 341. (g) Ibid.

(2) No such assembly can exist as all the bishops of the realm in any house of convocation. But the statute says, that the appeal shall be to the bishops, abbots, and priors of the upper house of the convocation of the province in which the cause of the suit arises. Therefore, in the province of York, the appeal lies now to the archbishop and his three bishops. In the province of Canterbury, to the rest of the bench of bishops. See 1 Book, 280. n.36. When the delegates are equally divided in opinion, so that no judgment can be pronounced, a commission of adjucnts may issue. See an instance referred to in 4 Burr. 2254. A commission of review was applied for in the court of chancery in Michaelmas term 1798, when the chancellor, upon hearing the arguments of civilians and barristers respecting the judgment of the delegates, determined to recommend to the king to grant a commission of review. See 4 Ves. Jun. 186.

Vol. II. 10
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 favourable 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 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 (3). 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 the 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 (w), 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 statute 25 Hen. VIII. c. 19. which directs the appeal from the archbishop's courts to be determined by proceeding therein, see McArthur and Ady on Court of Constable and Earl Marshal. As to courts martial and the modern practice of pro-

---

PRIVATE WRONGS.

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 (4): 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 which this question is permitted in England, is the court of admiralty (5); and the court of appeal is in effect the king's privy council, the members 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 (6), whose masterly acquaintance with the law of nations was known and revered by every state in Europe (y).

(y) See the sentiments of the president Montesquieu, and M. Vattel (a subject of the king of Prussia), on the answer transmitted by the English court to his Prussian majesty's Exposition des motifs, &c. A. D. 1753. (Montesquieu's letters ; 5 Mar. 1753. Vattel's droit de gens. l. 2, c. 7, § 84.)

(4) And in order to give effect to this, the prize acts passed at the commencement of a war usually provide, that ships and goods taken from the enemy, whether by the royal navy or by privateers, must first be condemned in some court of admiralty as lawful prize, before any right, in point of solid enjoyment, can accrue to the captors; and specific directions are prescribed for duly proceeding to such sentence. See the 19 Geo. III. c. 67. 1 Wils. 229. 4 Rob. 55.

(5) This seems incorrect, for questions of this nature are tried in the prize court, which is quite distinct from the admiralty court, otherwise called the instance court. The whole system of litigation and jurisprudence in the prize court is peculiar to itself. See Doug. 594. The judge of the admiralty court, though also the judge of the prize court, is appointed by a commission under the great seal, which enumerates particularly, as well as generally, every object of his jurisdiction, but not a word of prize. See Doug. 614. The judge of the prize court is appointed, and the court authorized, by a commission under the great seal directed to him, to will and require the court of admiralty, and the lieutenant and judge of the same court, his surrogate or surrogates, and they are thereby authorized and required to proceed upon all, and all manner of captures, seizures, prize, and reprisals, of all ships and goods that are or shall be taken, and to hear and determine according to the course of the admiralty, and the law of nations. See id.; and see further as to the jurisdiction and proceedings in the prize court, post.

(6) "Lord Mansfield."
CHAPTER VI.

OF COURTS OF A SPECIAL JURISDICTION (1).

In the two preceding chapters we have considered the several courts, whose jurisdiction is public and general; and which are so contrived that some or other of them may administer redress to every possible injury that can arise in the kingdom at large. There yet remain certain others, whose jurisdiction is private and special, confined to particular spots, or instituted only to redress particular injuries. These are,

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, woodmotes, 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 man), 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 [*72] are to bring in their attachments, or presentments de viridi et venatione; and the verderors are to receive the same, and to enrol them, and, to certify them under their seals to the court of justice-seat, or sweinmote (d): for this court can only inquire of, but not convict offenders. The court of regard, or survey of dogs, is to be holden every third year for the lawing or expeditation of mastiffs, 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 others 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 defence 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 sweinmote thrice in every year (g), the swein or freeholders within the forest composing the jury. The principal jurisdiction of this court is, first, to inquire into the oppressions and grievances committed by the officers of the forest; "de super-eratione forestariorum, et aliorum ministrorum fores-vae; et de eorum oppressionibus populó regis illatis;" and, secondly, to receive and try presentments certified from the court of attachment 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

(a) Cart. de forest. 9 Hen. III. c. 8.  (f) 4 Inst. 308.
(b) 4 Inst. 289.  (g) Cart. de forest. c. 8.
(c) Cart. 73.  (h) Stat. 34 Edw. I. c. 1.
(d) Cart. de forest. c. 16.  (i) 4 Inst. 289.
(e) Ibid. c. 16.

(1) In New-York there are no courts strictly resembling those described in this chapter.
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 forests, and to give judgment upon conviction of the sweinmote. And the chief justice may therefore after presentment made, or indictment found, but *not before* (l), issue [ *73 ] 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) (2); 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 era of the revolution in 1688, the forest laws have fallen into total disuse, to the great advantage of the subject (3).

II. A second species of restricted courts is that of commissioners of sewers (4). 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) (5); and in the execution of their duty may proceed by jury, or upon their own view, and may take order for the removal of any annoyances, or the *safeguard and conserva-

(k) 4 Inst. 291.
(l) Stat. 1 Eliz. III. c. 8. 7 Ric. II. c. 4.
(m) 4 Inst. 313.
(n) Ibid. 237.
(o) Ibid. 233.
(p) Hovedon.
(q) North’s Life of Lord Guildford, 45.
(r) F. N. B. 118.

(2) By the 57 Geo. III. c. 61. the offices of these justices are abolished on the termination of their then existing interests; and the salaries of the abolished offices are to make part of the consolidated fund.

(3) All the forests which were made after the conquest, except New Forest in Hampshire, created by William the Conqueror, were disafforested by the *charta de foresta*. The forest of Hampton-court was established by the authority of parliament in the reign of Hen. VIII. The number of forests in England is sixty-nine. 4 Inst. 319. Charles I. enforced the odious forest laws, as a source of revenue independent of the parliament.

(4) See, in general, Bac. Ab. Courts, Court of Commissioners of Sewers; Com. Dig. Sewers. For the law relating to sewers in general, and the jurisdiction of this court, see Callis on Sewers, which is considered a work of very good authority. 2 T. R. 365.

(5) This must be taken to mean officers of the court, as the court cannot imprison, for a contempt, a person not being such officer. 1 Sid. 145.
tion. They may also assess 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 (w). And yet in the reign of king James I. (8 Nov. 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 (v). 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 insurance, when subsisting, is erected in the 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 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 assured 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 & 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 merchandise (y), and to suits brought by the assured only, and not by the insurers (z), no such commission has of late years issued (6); but insurance causes are now usually determined by the ver-

(6) And, as another reason for this, it should be observed that, a recovery in this court is no bar to another action for the same cause in the superior court. 2 Sid. 121.
dict 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.

*IV. The court of the marshalsea, and the palace-court at Westminster, though two distinct courts, are frequently confounded together. The former was originally holden before the steward and marshals of the king's 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 aula regis (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 affirman 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 justices, 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 10 Edw. III. st. 2. c. 3. which allowed such writ of error before the king in his palace. But this court being amulatory, 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 [ *77 ] deputy; with jurisdiction 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) (7). The court is now held once a week, together with the ancient court of marshalsea, in the borough of Southwark (8): 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

(c) Stat. 13 & 14 Car. II. c. 22, § 3 & 4.
(d) 1 Bulstr. 211.
(e) Flet. i. 2, c. 9.
(f) Artic. sup. cart. 25 Ed. I. c. 3. Stat. 5 Edw. III. c. 2. 10 Edw. III. st. 2, c. 2.
(g) 2 Inst. 548.
(h) By the ancient Saxon constitution, the pax regis, 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 treaty Roffensis cited in Dr. Hickes's dissertat. epistol. 114.
(i) 1 Bulstr. 211. 10 Rep. 70.
(j) F. N. B. 241. 2 Inst. 548.
(k) 1 Bulstr. 208.
(l) 1 Std. 190. Salk. 439.

(7) The charter under which the court now exists, appears to have been granted A. R. 16 Car. II. The court has no jurisdiction within the city of London, and none over causes where both the parties happen to be of the household; such causes being properly cognizable by the court of marshalsea.

(8) Now in Scotland-yard, Whitehall.
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, juris-
diction, 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 & 35
Hen. VIII. c. 26, though much had been before done, and the way pre-
pared 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) (9): though

[ *78 ] *process of execution does (p); as do also 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 where the venue is laid. But, on
the other hand, to prevent trifling and frivolous suits, it is enacted by sta-
tute 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 nonsu-
ited 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 defend-
ant's costs, deducting thereout the sum recovered by the verdict (10).

VI. The court of the duchy chamber of Lancaster is another special
jurisdiction, held before the chancellor of the duchy or his deputy; con-
cerning all matter of equity relating to lands helden of the king in 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

(i) See Book I. introd. 1 4.
(m) Stat. 18. Eliz. c. 8.
(n) See, for further regulations of the practice of
these courts, stat. 5 Eliz. c. 23. 8 Eliz. c. 20. 8
(o) 2 Roll. Rep. 141.
(p) 2 Bulstr. 156. 2 Saund. 193. Raym. 205.
(q) Cro. Jac. 484.
(r) Vaughan, 413. Hard. 66.
(s) Hob. 77. 2 Lev. 24.
(t) 1 Ventr. 257.

(9) A latit. now runs into Wales. (Doug.
213. Tidd, 8 ed. 149.
(10) See construction of this act, Tidd, 8
ed. index, tit. Wales. If goods be delivered
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 held 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 [*79]
jurisdiction, and have at the same time an exclusive cognizance of
pleas, in matters both of law and equity (m), are those which appertain to
the counties palatine of Chester, Lancaster, and Durham, and the royal
franchise of Ely (x). 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 (11). 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 admin-
ister justice between the suitors. But when the privileges of these coun-
ties 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 fran-
chises; the two former of which are now united to the crown, and the
two latter under the government of their several bishops. And the judges
of assise, 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 from the court of Shepway to the king's *bench (z). [*80]
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 re-
served to the crown at the original creation of the franchises. And all
prerogative writs (as those of habeas corpus, prohibition, certiorari and man-

(e) 4 Inst. 206.
(g) 4 Inst. 213. 218. Finch. R. 459.
(h) See Book I. introd. 4 4.
(i) 1 Sid. 166.

(a) Jenk. 71. Dynasctye des courtes, t. bank le
roy. 1 Sid. 356.
(b) Bro. Abr. t. error, 74. 101. Davis. 62. 4 Inst.
38. 214. 218.

(11) But a latitut may be issued into a
county palatine, properly directed: Tidd, 8
ed. 149. 150. And on an original writ sued out
in another county, a testatum capias may be
issued into a county palatine for bringing in
the defendant: Tidd, Prac. 8 ed. 125. And
how to take bail on such capias, see 3 Moore,
76. Tidd, 8 ed. 252. But an original capias
cannot regularly issue into it. 1 Moore, 514.

As to the direction and service of the process
into these courts, see Tidd’s Prac. 8 ed. 150.
167. 1036. 1 Brod. & B. 12. To entitle a
party to arrest in these counties, on process
issuing out of the inferior courts at Westmin-
ster, by 11 & 12 W. 3. c. 9. s. 2. he must
swear that the debt amounts to 20l. or up-
wards.

VOL. II.
damus) 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 of 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 of 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 Geo. III. c. 70. (12) 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

(b) 1 Sid. 92.
(c) Cro. Jac. 543.
(d) 4 Inst. 232.
(e) See tals at length in 4 Inst. 232.
(f) 4 Inst. 231.
(g) Ibid. 230.
(h) Bulstr. 183.
(i) Doderidge, Hist. of Cornw. 94.
(j) The chief of those in London are the sheriffs.
(k) Courts, holden before their steward or judge; from which a writ of error lies to the court of exchequer, 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.

(12) The 57 Geo. III. c. 101. continued this act, and see cases Tidd's Prac. 8th ed. 401, 2.
the city of London, and other trading and populous districts, which in their proceedings so vary from the course of 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 (13). 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. (14). 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 [ *82 ] way, by 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 (15).

The anxious desire that has been shewn 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 have 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 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
debt does not exceed 20s. shall be committed to prison for more than twenty days, and if the debt does not exceed 40s. for more than forty days; unless it be proved to the satisfaction of the court, that he has money or goods which he fraudulently conceals, and in the first case the imprisonment may be extended to thirty days, and in the latter to sixty.
PRIVATE WRONGS.

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 ancienly used: and shall make such order therein as they shall judge agreeable to conscience. 4. That no plaints 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: calculated to prevent a multitude of vexatious actions in the superior courts, 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 chancellor's courts in the two universities of England (16). 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 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 the students might not be distracted from their studies by legal process from distant courts, and other forensic avocations. And privileges of this kind are of 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

(m) Cod. 4, tit. 12.

(16) As the object of the privilege is, that students and others connected with the universities should not be distracted from the studies and duties to be there performed, the party proceeded against must in general be a resident member of the university, and that fact must be expressly sworn, or be collateral from the affidavit. The privilege of Cambridge differs from that of Oxford: in the former, it only extends to causes of action accruing in the town and its suburbs; but in Oxford it extends to all personal causes arising anywhere. R. T. Hardw. 241. 2 Wils. 406. Bac. Ab. Universities. The claim of converse must be made in due form, and in due time. 2 Wils. 406. Claim of converse of an action of trespass, brought in K. B. against a resident member of the university of Cambridge, for a cause of action verified by affidavit not to have arisen within the town and suburbs of Cambridge, was allowed upon the claim of the vice-chancellor on behalf of the chancellor, masters, and scholars of the university, entered on the roll in due form, setting out their jurisdictions under charters confirmed by statute, and averring that the cause of action arose within such jurisdiction. 12 East, 12. And claim of converse by the university of Oxford was allowed in an action of trespass in K. B. against a proctor, a proctor, and the marshal of the university; though the affidavit of the latter, describing him as of a parish in the suburbs of Oxford, only verified that he then was, and had been for the last fourteen years, a common servant of the university, called marshal of the university, and that he was sued for an act done by him in the discharge of his duty, and in obedience to the orders of the other two defendants, without stating that he resided within the university, or was matriculated. 15 East, 634.
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 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 without the help of an act of parliament. And therefore in 13 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 the last resort to judges delegates appointed by the crown under the great seal in chancery.

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 (t): 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 (17).

(s) 13 Eliz. c. 29.  
(o) 4 Inst. 227.  
(q) Hist. C. L. 33.  
(r) Tit. 21, 19.  
(s) Cod. 7, 70, 1.  
(t) 2 Inst. 543.

(17) 2 Wils. 408, 9.
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 shewing: 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 eccentrical tribunals (which are principally guided by the rules of the imperial and canon laws), as they subsist and [ *87 ] 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 intestates' 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 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

(a) See Book I. Introd. § 1.  
(b) Hal. Hist. C. L. c. 2.
mean such as are offered to private persons or individuals (1); which are cognizable by the ecclesiastical court, not for reformation of the offender himself or party injuring (pro salute animae, as is the case with immoralities in general, when unconnected with private injuries), but for the sake of the party injured, to 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 to institute a suit in the spiritual court.

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 debitatas:" 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 & 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 part *is duly set forth, or agreement is made with the proprietor, or shall willingly

(c) Stat. 23 Hen. VIII. c. 7.
(e) 2 Inst. 364. 489, 490.
(f) See Barrington, 123. 3 Prym. Rec. 336.
(g) 13 Edw. 1. st. 4. or rather 9 Edw. II.

(1) See in general, Bac. Ab. tit. Courts Ecclesiastical, D. & tit. Slander; Com. Dig. Prohibition; where see G. when the ecclesiastical court has jurisdiction and when not. The ecclesiastical court has no jurisdiction over trusts, and therefore where a party sued as a trustee, was arrested on a writ de contumace capiendo, the court of K. B. discharged him out of custody. 1 B. & C. 655.

Suits for defamation may be added to the three heads above considered: as to these in general, see Burn Ecc. L. Defamation; Com. Dig. Prohibition, G. 14; Bac. Ab. Slander, T. U.; Stark. on Slander, 32. 474. Words imputing an offence, merely spiritual, are not in themselves actionable at law, unless followed by special damage, and the party slandered can only institute a suit in the spiritual court; and though the law discourages suits of this kind, yet redress for the insult and injury is not denied. 2 Phil. Ec. Cases, 106. Words which impute an offence, merely cognizable in a spiritual court, may be punished in that court; as calling a person heretic, adulterer, fornicator, whore, &c.; but if the words are coupled with others for which an action at law would lie, as calling a woman a whore and a thief, the ecclesiastical court has no jurisdiction, and a prohibition lies. 2 Rol. Ab. 297. 1 Sid. 404. 3 Mod. 74. 1 Hagg. Rep. 463. in notes. So a suit cannot be instituted in the spiritual court for a written libel, because any slander of a person reduced into writing, and which can be the subject of any proceeding, is actionable or indictable. Comb. 71. Bac. Ab. Courts Ecclesiastical, D. The power of the ecclesiastical court is confined to the infliction of penance pro salute animae, and awarding damages, and does not extend to the awarding damages to the injured party. 4 Co. 20. 2 Inst. 402.
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) (2). However, it 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 & 8 W. 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 (3).

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: [ *90 ] 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 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.

(k) 2 Inst. 250.

(2) This statute enacts, that every person shall justly divide, set out, yield, and pay all manner of predial tithes in such manner as they have been of right yielded and paid within forty years, or of right or custom ought to have been paid, before the making of that act, under the forfeiture of treble value of the tithes so carried away.—And in an action upon this statute, in which the declaration stated that the tithes were within forty years before the statute yielded and payable, and yielded and paid, it was held that evidence that the land had been as far as any witness knew in pasture, and that it was never known to pay in predial tithe, was not sufficient to defeat the action. The same action might also be supported to recover tithes of lands enclosed out of wastes, which never paid tithes before. Mitchell v. Walker, 5 T. R. 260.

(3) The 53 Geo. III. c. 127. extends the jurisdiction of the two justices to tithes, oblations, and compositions, of the value of 10l.; and in respect of tithes and church-rates, due from quakers, to 50l., see statute and proceedings, Burn J. Tithes. The 54 Geo. III. c. 68. extends the same provisions to Ireland.
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 (p).

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 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 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 (q). 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), 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 grow-

\[(m) 1\text{ Ventr. 165.}\\(n) 1\text{ Burn. eccl. law, 438.}\\(o) 1\text{ Freem. 70.}\\(p) F. N. B. 30.\\(q) Circumspexit agatis; 13\text{ Edw. I. st. 4. Artic. Cleri.} 3\text{ Edw. II. c. 2. F. N. B. 45.}\\(r) Cart. 294. 3\text{ Lev. 268.}\]

(4) That such an action is sustainable, see Coyp. R. 437; Doug. 14; Burn. Ecc. L. Curate. The amount of the salary of a curate of a non-resident clergyman is, by 57 Geo. III. c. 99. under the control of the bishop, and any agreement contrary to the act is void, and the bishop may enforce payment of arrears of fixed salary.
PRIVATE WRONGS.

[ *92 ] ing on the patrimony of the church, unless for necessary repairs (r): and that a writ of prohibition will also lie against him in the courts of common law (s). 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 (t); and a suit may be brought therein for non-payment of a rate made by the churchwardens for that purpose (u). 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 right 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 ascendancy 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 humour 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 cases between man and wife. These 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

(r) 1 Roll. Rep. 86. 11 Rep. 95. Godb. 259. (s) 3 Bulstr. 158. 1 Roll. Rep. 355. (t) Circumspice agatis. 5 Rep. 66. (u) Warb. alliance, 173. (v) 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.

(5) The 53 Geo. III. c. 127. gives a summary remedy by two justices for non-payment of church-rates not exceeding 10l. If the rate be litigated in the ecclesiastical court, the justices are not to proceed. 5 M. & S. 248.
issue; who cannot so well defend the marriage, as the parties themselves, when both of them living might have done (v) (6).

Of matrimonial causes, one of the first and principal is, 1. Causa factitationis matrimonii; when one of the parties boasts (7) 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, 26 Geo. II. *c. 33. which [*44] enacts, that for the future no suit shall be had in any ecclesiastical court, to compel a celebration of marriage in facie ecclesiae, for or because of any contract of matrimony whatsoever (8). 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 (w), 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 (9), adultery, a perpetual disease, and the like (10); 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 pre-

(e) Inst. 614.  
(w) Book I. ch. 15.

(6) In New-York the court of Chancery has cognizance of the subject of marriage, but only so far as to divorce entirely for adultery, or to separate a mensa et thoro for the cruelty of the husband, or to declare the marriage void for either of the following causes existing at the time of the marriage, viz. 1. That one of the parties had not attained the age of consent; 2. that one of the parties was then married to another; 3. or was an idiot or lunatic; 4. or gave consent through force or fraud; 5. or was physically incapable of entering into the marriage state. (2 R. S. 142, 146.)

(7) But the boasting must be malicious. For we have a Lord Hawke, who had permitted the party to assume herself to be lady Hawke in his presence, and had introduced and acknowledged her to be clothed with that character, the court dismissed the suit. Lord Hawke v. Corri, 2 Dr. Hagg. 220.

(8) And see 4 Geo. IV. c. 76. s. 27. ante, 1 book, 433. note 1.

(9) We have seen in the first book, pag 440. 1. that it is stated, that a divorce a mensa et thoro, when marriage is just and lawful ab initio, is only allowed, for some supervenient cause, when it has become improper or impossible for the parties to live together, and that intolerable ill temper was there considered to be a sufficient cause; a position which, it was submitted by the Editor, was not tenable. Upon this interesting subject the reader is referred to the eloquent decisions of sir William Scott, from which it will appear, that a husband or a wife may sustain a suit for a divorce on the ground of cruelty, even in a single instance, when it really endangers life, limb, or health; and that even words menacing such danger are sufficient ground: but that mere insult, irritation, coldness, unkindness, ill temper, or even desertion, is not alone a sufficient ground for a divorce. Evans v. Evans, 1 Hagg. Rep. 36. 364. 409. 458. 2 id. 154. 158. 2 Phil. Éc. C. 132.

(10) It has been determined by the court of delegates, that the public infancy of the husband, arising from a judicial conviction of an attempt to commit an unnatural crime, is a sufficient cause for the ecclesiastical courts to decree a separation a mensa et thoro. Feb. 1794.
vious 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 [ *95 ] amounts to a forfeiture of her *dower* after his death, it is also a sufficient reason why she should not be partaker of his estate when living.

3. Testamentary causes (11) are the only remaining species belonging to the ecclesiastical jurisdiction (12); which, as they are certainly of a

(11) In New-York matters relating to the estates of deceased persons are decided by the surrogate. See 2 R. S. 56, &c.

(12) Com. Dig. Prohibition, *G. 16*. Although the ecclesiastical courts have by length of time acquired the original jurisdiction in *rebus testamentaris*, courts of equity have nevertheless obtained a concurrent jurisdiction with them in determinations upon personal bequests, as relief in those cases is generally dependent upon a discovery and an account of assets. And an executor being considered a trustee for the several legates named in the testaments, the execution of trusts is never refused by courts of equity. 1 P. Will. 544. 575. These courts, indeed, in some other instances which frequently occur upon the present subject, exercise a jurisdiction in exclusion of the ecclesiastical, inasmuch as the relief given by the former, is more efficient than that administered by the latter. One of these cases happens, when a husband endeavours to obtain payment of his wife's legacy, equity will oblige him to make a proper settlement upon her, before a decree will be made for payment of the money to him; but the ecclesiastical court cannot do, therefore the baron libel in that court for his wife's legacy, the court of chancery will grant an injunction to stay proceedings in it, he not having made any settlement or provision for her. 1 Dick. Rep. 373. Also 1 Atk. 401. 516. 2 Atk. 430. Pre. Ch. 548. S.P. Another of those instances occurs, when legacies are given to *infants*; for equity will protect their interests, and give proper directions for securing and improving the fund for their benefit, which could not be effected in the ecclesiastical court. 1 Vern. 26. It has been already observed, that the probate of wills belongs exclusively to the ecclesiastical court, except in the instance of an adduced *mentary*; whence it follows, that if a probate has been granted of a will obtained by fraud, the ecclesiastical court alone can revoke it, 2 Vern. 8. 1 P. Wms. 388; and a person cannot be convicted of forging a will of a deceased person of personal property, until the probate thereof has been sealed by the ecclesiastical court. 3 T. R. 127.

Although a court of equity cannot set aside a will of personal estate, the probate of which has been obtained from the spiritual court; yet the court will interfere when a probate has been granted, by the fraud of the person obtaining it; and either convert the wrong-doer into a *trustee*, in respect of such probate, or oblige him to consent to a repeal or revocation of it in the court from which it was granted. 1 Ves. 119. 284. 287. A court of equity will also interfere and prevent a person, taking an undue advantage by contesting the validity of a probate, when such person *has acted under it*, and *admitted facts* material to its validity. 1 Atk. 628.

The jurisdiction of the ecclesiastical courts is confined to testaments merely, or, in other words, to dispositions of personality; if, therefore, real estate be the subject of a devise to be sold for payment of debts, or portions, these courts cannot hold plea in relation to such bequests, but the proper forum is a court of equity. Dyer, 151. b. Palm. 120. S. P. But the ecclesiastical courts' jurisdiction may extend to affect interests arising out of real property, when those interests are less than freehold; as in devises of terms for years, or of rents payable out of them, for such dispositions relate to * chattels reale only*. 2 Keh. 8. Cro. J. 279. Buls. 153. If a legatee alter the nature of his demand, and change it into a debt or duty, as by accepting a bond from the executor for payment of the legacy, it seems that the effect of the transaction will be, either to deprive the ecclesiastical court of its jurisdiction, or to give an option to the person entitled, to sue in that or in a temporal court, at his discretion. 2 Rol. R. 160. Yelv. 39. 8 Mod. 327.

Cases have occurred in which *courts of common law* have assumed jurisdiction of testamentary matters, and permitted actions to be instituted for the recovery of legacies, upon
more 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 former book) (y) they were originally cognizable in the king's courts of common law, viz. the county courts (z); 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 Angliae, et super consensu regio et suorum prerox in taibus ab antico concesso (a)." 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, "consensus regio et magnatum regni Angliae (b)." The constitutions of cardinal Othobon also testify, that this provision "olim a praefatis cum approbatione regis et baronum dicitur emanasse (c)." And archbishop Parker (d), in queen Elizabeth's time, affirms in express words, that originally in matters testamentary "non ullam habebant episcopi authoritatem, praeter eam quam a rege acceptam referebant. Jus testamenti 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 (e) 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 (f). But this must only be understood to mean that it hath not always had this prerogative: for certainly it is of very high anti-

proof of an express assumpstatus or undertaking by the executor to pay them. Sid. 45. 11 Mod. 91. Ventr. 120. 2 Lev. 3. Cowp. 284. But it seems to be the opinion of modern judges, that this jurisdiction extends to cases of specific legacies only; for when the executor assents to those bequests, the legal interests vest in the legatees, which enable them to enforce their rights at law. 3 East R. 120. It seems to be the better opinion, that when the legacy is not specific, but merely a gift out of the general assets, and particularly when a married woman is the legatee, that a court of common law will not entertain a jurisdiction to compel payment of such a legacy, upon the ground that a court of common law is, from its rules, incompetent to administer that complete justice to the parties which courts of equity have the power, and are in the constant habit, of doing. 5 Term. Rep. K. B. 690. 7 T. R. 607. 2 P. Wm. 641. Peake's C. N. P. 73. There is one case in the books, where the declaration states, that in consideration of a forbearance by the plaintiff to sue, the executor promised to pay the legacy, and the court held, that the action might be maintained; but the circumstance of that action being brought on a promise, in consideration of forbearance, shews that it was understood that the bare possession of assets was not alone sufficient. 5 T. R. 693. 2 Lev. 3. But it has been suggested, that if it should seem that upon an express promise and admission of assets, an executor may be sued. 2 Saund. by Patteson, 137. note a.
quity. Lindewode, we have seen, declares that it was “ab antiquo;” Stratford, in the reign of king Edward III., mentions it as “ab olim ordina-
tum;” and cardinal Othobon, in the 52 Hen. III., speaks of it as an an-
cient tradition. Bracton holds it for clear law in the same reign of Henry III., that matters testamentary belonged to the spiritual court (g). And, yet earlier, the disposition of intestates’ goods “per visum ecclesiae” was one of the articles confirmed to the prelates by king John’s magna carta (h), Matthew Paris also informs us; that king Richard I. ordained in Norman-
dy “quod distributio rerum quae in testamento relinquentur autoritate ecclesiae
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. Glanvill is express, that “si quis aliquid dixerit contra testamentum, placitum illud in curia christianita-
tis audiri debet et terminari (i).” And the Scots book, called regiam majes-
tem, agrees verbatim with Glanvill in this point (k).

It appears that the foreign clergy were pretty early ambitious [ *97 ] of this branch of power; but their attempts to assume *it on the continent were effectually curbed by the edict of the emperor Justin (l), which restrained the institution or probate of testaments (as former-
ly) to the office of the magister census: for which the emperor subjoins this reason; “absurdum etenim clericis est, immo etiam opprobriosum, si peri-
tos se velint ostendere disceptationum esse forensium.” But afterwards by the canon law (m) it was allowed that the bishop might compel ecclesiastical
censures the performance of a bequest to pious uses. And therefore, as that was considered as a cause quae 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 sepa-
rated 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 (n), 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 area referred to by Strat-
ford 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 animae ejus, ecclesiae con-
silio (o); which latter words are equivalent to per visum ecclesiae 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 lega-
cies (p).

This jurisdiction, we have seen, is principally exercised with us [ *98 ] in the consistory courts of every diocesan *bishop, and in the pre-
rogative court 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 justitiae*, 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 mere ancillary to other inferior jurisdictions, the cause, when once brought there, receives there also its full determination (13).

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 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, 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 (q) 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

(q) Book I. introd. § 1.

(13) In addition to the relief before the surrogate or a court of equity, in New-York, after a year from the granting of letters testamentary or of administration, the legatee or next of kin may sue the executor in the common law courts if there be assets to pay him, and he first execute with sureties a bond of indemnity to the executor. (2 R. S. 114, § 10, &c.)
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 arduor 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 bulwark of *Gothic liberty) 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 (r) (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 (s). But, under these restrictions, their ordinary course of proceeding is (14); 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 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 ten-

---

<r> Warb. alliance, 179.</r> <s>2 Roll. Abr. 300. 302.</s>

---

(14) The recent act, 53 Geo. III. c. 127, prohibits excommunication, and the writ de excommunicato capiendo as a mode of enforcing performance or obedience to ecclesiastical orders and decrees; and instead of the sentence of excommunication in those cases, the court is to pronounce the defendant contumacious, and the ecclesiastical judge is to send his significavit in the prescribed form to the chancery, from which a writ de contumacia capiendo is to issue in the prescribed form, and which is to have the same force as the ancient writ. There is a similar act as to Ireland. 54 Geo. III. c. 68. In other cases, not of disobedience to the orders and decrees of the court, there may be excommunication, and a writ de excommunicato capiendo as heretofore. In the proceedings under this statute, it must clearly appear, that the ecclesiastical court had jurisdiction, and that the form of proceedings has been duly observed. 5 Bar. & Al. 791. 3 Dowli & R. 570. ante 87. note I.
der 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 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 (t); 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 (u) 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 of 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 and 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 jurisdiction, and kindly lends a supporting hand to an otherwise tottering authority. Imitating here-in the policy of our British ancestors, among whom, according to Caesar (x), whoever were interdicted by the Druids from their sacrifices, "*in numero impiorum ac sceleratorum habentur: ab iis omnes decedunt, aditum eorum surmonemque defugient, ne quid ex contagione incommodi accipiant: neque iis pretentibis 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 certificates, a *significavit*; or from its effects a writ *de excommunicato copiendo*: and the sheriff shall thereupon take the offender, and imprison him in the county gaol, till he is reconciled to the church, and such reconciliation certified by the bishop; under which another writ, *de excommunicato deliberrando*, issues out of chancery to deliver and release him (z) (15).

---

(1) Chap. 5.  
(w) Co. Litt. 133.  
(te) 2 Inst. 623.  
(y) Litt. § 201.  
(z) F. N. B. 62.

---

process seems founded on the charter of separation (so often referred to) of William the Conqueror. "Si aliquis per superniam elatus ad justitiam episcopalem venire noluerit, vocetur semel, secundo, et terto: quod sinec ad emendationem venerit, excommunicetur; et, siopus fuerit, ad hoc vindicandum fortitudo et justitia regis sive viccomitis 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.

[*103] Ior, or any *two justices of the peace (or, in case of disobedience to a definitive sentence, any two justices of the peace), may 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 notion which some are too apt to entertain, that the courts at 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 (16).

II. I am next to consider the injuries cognizable in the court military, or court of chivalry (17). 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 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

[*104] (16) In the ecclesiastical courts the maxim is, that nullum tempus occurrit ecclesia, or that there is no limitation to a prosecution for a spiritual offence; and it was thought a great grievance, that the peace of families might be disturbed by a prosecution for a crime of incontinence committed many years before; it was therefore enacted by the 27 Geo. III. c. 44. that no prosecution should be commenced in the spiritual courts for defamation after six months; or for fornication or incontinence, or for striking or brawling in a church or churchyard, after eight months; and that, in no case, parties who had intermarried should be prosecuted for their previous fornication.

(17) There being no titles of nobility in the U. S. there is no such court here.
and injuries escape the notice of the common law, and yet are fit to be re-
dressed 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 West-
minster: 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
was appointed to be given in the court of chivalry (a). But modern res-
olutions 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 any thing determinable by the common law, it therefore can give no
pecuniary satisfaction or damages, inasmuch as the quantity and determi-
nation 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 re-
paration 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.

*As to the other point of its civil jurisdiction, the redressing [*105]
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 parliament (which cannot be over-ruled 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 reso-
lutions 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 fami-
lies 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 com-
mon seal will not be received as evidence in any court of justice in the
kingdom (f). But their original visitation books, compiled when progress-
es were solemnly and regularly made into every part of the kingdom, to
inquire into the state of families, and to register such marriages and des-
cents 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 visi-
tation 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

(f) Salk. 533. 7 Mod. 125. 2 Hawk. P. C. 11.
(f) Hal. hist. C. L. 37.
(g) 1 Roll. Abr. 128.
(h) Co. Litt. 261.
(i) 2 Roll. Abr. 665. 2 Jon. 224.
(j) Comb. 63.
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 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 (18). 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) (19). 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 country, either by land or 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, 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 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) (20).

(a) 11 May. 1767. (j) Co. Litt. 261.
(b) Co. Litt. 360. Hob. 79. (m) 1 Venr. 146.
(d) 5 Rep. 160. (o) Hob. 212.

(18) See note 14, p. 29, as to the admiralty power of the U.S. courts.
(19) See much learning respecting the jurisdiction of the court of admiralty in the case of Le Caux v. Eden, Doug. 572.
(20) The case cited scarcely warrants the text. For the Admiralty has jurisdiction over an hypothecation-bond, although it was executed on land and under seal. Manetone v. Gibbons, 3 T. R. 267. Cases which are said to have determined the point mentioned in the text occurred upon seaman's wages; over which the Admiralty had undisputed jurisdiction, but in such it was ruled that the special agreement took it away. See How v. Nappier, 4 Burr. 1930, cited in and in effect overruled by Manetone v. Gibbons. The cases which have been mentioned in addition to that cited from Hob. 212, and How v. Nappier, are Day v. Searle, 2 Str. 906, and Opy v. Ad-
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 for ever 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).

*Where the admiral’s court hath not original jurisdiction of the [*108*] 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, 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).

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 recognizances or stipulations of certain fidejussors in the nature of bail (a), and in case of default may

---

(p) 4 Inst. 134.
(q) View of the civil law, b. 3, p. 1; 3.
(r) Inst. 1, tit. 33.
(s) Fy. 42. 15. 12, § 6.
(t) Fy. 49. 15. 18.
(u) Comp. 402.
(w) 1 Sld. 158.
(x) 2 Show. 233. Comb. 474.
(z) Clerke prax. cur. adin. § 13.
(a) Ibid. § 11. 1 Roll. Abr. 531. Raym. 78.

*Dison, 12 Mod. 33. Salk. 31. S. C. And it should upon the whole seem that whenever the Admiralty Court has jurisdiction over the sub-ject-matter, as in the hypothecation of a ship, the mere seal upon land will not take it away.
imprison both them and their principal (b). They may 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 did 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 jus-
tice. 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 writ of procedendo (21), or of mandamus. A writ of procedendo ad
judicium issues out of the court of chancery, where judges of any subor-
dinate court do delay the parties; for that they will not give judgment,
either on the one side or 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 particu-
lar judgment, for that (if erroneous) may *be set aside in the
course of appeal, or by writ of error or false 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
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 pre-
rogative writ, of a most extensively remedial nature; and may be issued
in some cases where the injured party has also another more tedious me-
thod of redress, as in the case of admission or restitution to an office; 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 man-
damus therefore lies to compel the admission or restoration of the party ap-
plying 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

(b) 1 Roll. Abbr. 531. Godb. 193, 260. (e) Bro. Abr. t. error. 177.
(c) 1 Ventr. 1. (f) F. N. B. 153, 154, 240.
(d) 1 Keb. 592.

(21) In New-York the effect of this writ issues out of the Supreme Court. (2 R. S.
would be obtained by the mandamus, which
586, § 54, &c.)
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 minis-
terial powers, with which the crown or legislature have invested them:
and this not only by restraining their excesses, but also by quick-
ening their negligence, and obviating their denial of justice. A [*111]
mandamus may therefore be had to the courts of the city of Lon-
don, to enter up judgment (g); to the spiritual courts to grant an adminis-
tration, 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 probable ground for such interposition, a rule is made (ex-
cept in some general cases, where the probable ground is manifest) directing
the party complained of to shew cause why a writ of mandamus should
not issue: and, if he shews no sufficient cause, the writ itself is issued, at
first in the alternative, either to do thus, or signify some reason to the con-
trary; 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 attach-
ment. 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 far-
ther on the mandamus (22), (23). 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 injury sustained; together with a
peremptory mandamus to the defendant to do his duty (24). 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 cogni-
zeance of the cause, is also a grievance, for which the common law has
provided a remedy by the writ of prohibition.

* A prohibition (25) is a writ issuing properly only out of the [*112]

(g) Raym. 214.

(22) In New-York the party prosecuting
the writ may plead or demur to the return, and
an issue in fact or in law may be joined. (2
R. S. 586, § 55, &c.)

(23) In the case of a peremptory mandamus
no writ of error lies. *Dean of Dublin v. The
King, Br. P. C. 73. Edit. 1803. 1 P. W. 348
351. But since stat. 9 Ann. c. 20, which
allows special matter to be pleaded to a man-
damus, it seems that a writ of error lies upon a
judgment thereon, because it is in the nature
of an action done. Case by the name of Dean

(24) See further upon the writ of manda-
mes, p. 264. post.

(25) As to the writ of prohibition in gen-
ral, see Com. Dig. tit. Prohibition; Bac. Ab.
tit.. Prohibition; 2 Saund. index, tit. Prohibi-
tion; and see an excellent illustration of the
nature and object of this proceeding, given by
the court in 2 Hen. Bla. 533.
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 (k), common pleas (i), or exchequer (k) (26); 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
case 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 living 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 cogni-
zance, they transgress the bounds prescribed to them by the laws of Eng-
land; 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 pay-
ment, 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 might be determined different ways, according to
the court in which the suit is depending: an impropriety, which
[113] no wise government can or ought to endure, and which is there-
fore a ground of prohibition. And if either 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 objects 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 ecclesiasti-
cal 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 (27), (28): The party aggrieved
in the court below applies to the superior court, setting forth in a sugges-

(k) 1 P. Wms. 476.
(l) Hob. 15.
(m) Finch. L. 451.
(n) Cro. Eliz. 666. Hob. 188.
(o) F. N. B. 40.
(p) 2 Inst. 601-618.

(26) In New-York it issues only from the
Supreme Court; the return may in like man-
ner be denied or demurred to. (2 R. S. 537,
2 R. S. 597, § 61, &c.)
tion upon record the nature and cause of his complaint, in being drawn ad
uiuid 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 (29). 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 ques-
tion, the party applying for the prohibition is directed by the court to de-
clare a 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 final-
ly be of opinion, that the matter suggested is a good and sufficient
ground of prohibition in point of law, then judgment with nomi-
nal 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 origi-
nal jurisdiction, to be there determined, in the inferior court. And, even
in ordinary cases, the writ of prohibition is not absolutely final and con-
clusive. For though the ground be a proper one in point of law, for grant-
ing the prohibition, yet if the fact that gave rise to it be afterwards falsi-
fied, 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, be-
cause that court has no authority to try it: but, if the fact of such a cus-
tom 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 pur-
sue 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 con-
sultation. 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 be-
low. Thus careful has the law been, in compelling the inferior 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 parlia-
ment, do properly belong to their jurisdiction.

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

(29) The general grounds for a prohibition
to the ecclesiastical courts are, either a defect
of jurisdiction or a defect in the mode of trial.
If any fact be pleaded in the court below, and
the parties are at issue, that court has no jur-
scription to try it, because it cannot proceed
according to the rules of the common law;
and in such case a prohibition lies. Or where
the spiritual court has no original jurisdiction,
a prohibition may be granted even after sen-
tence. But where it has jurisdiction, and gives
a wrong judgment, it is the subject matter of
appeal and not of prohibition. Lord Kenyon,
3 T. R. 4. But when a prohibition is granted
after sentence, the want of jurisdiction must
appear upon the face of the proceedings of the
spiritual court. Ibid. Comp. 422. See also 4 T.
R. 392. See also 2 H. Bl. 69. 100. 3 East, 472.

Vol. II.
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 hereafter, as the remedy in such cases is generally of a peculiar and eccentrical 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 aliqui 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

(a) See book II. ch. 29.  
(b) c. 2. § 1.  
(c) Inst. 4. 6. pr.
pandects, compositae sunt, quibus inter se homines disciparent: quas actiones, ne populus prout vellet instituaret, 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 *concealment was ridiculous: but [*117] 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 jura, sunt formulae, de omnibus rebus constitutae, ne quis aut in genere injuriae, aut in ratione actionis, errare possit. Expressae enim sunt ex uniuscujusque damno, dolore, incommode, calamitate, injuria, publicae a praeclure formulae, ad quas privata lis 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 legislators 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 (1), and mixed.

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, quae 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; 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), feodal 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 other *hereditaments, in fee-simple, fee-tail, or [*118] 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 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,

---

(d) F1. 1. 2. 2, § 6. (e) Cic. pro Suraena. 6. 11. de orat. 1. 1, c. 41. (f) Pro Qu. Rosco. 6. 3. (g) Sunt quaedam brevia forma super certis causibus de cursu, et de communi consilio totius regni approbata et concessa, quae guidem nullatenus militari poterint absque consensus et voluntate eorum. (l. 5. de exceptionibus, c. 17, § 2.) (h) Inst. 4. 6. 15. (i) c. 2, § 6.

(1) In New-York, ejectment is substituted by the Revised Statutes for the old real actions. 2 R. S. 343, § 24.
PRIVATE WRONGS.

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 either a man's person or his property; accounting 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 [*119] to the king, as well as a private satisfaction to the party 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 correspondent nature.

I. As to injuries which affect the personal security of individuals (2),

(k) 6 Edw. I. c. 5.
(l) Finch. L. 184.
(n) See book I. ch. 1.

(2) For injury to life, in general, cannot be the subject of a civil action; the civil remedy being merged in the offence to the public. Therefore no action will lie for battery of wife or servant, whereby death ensued. Styles, 347. 1 Lev. 247. Yelv. 80, 90. 1 Ld. Raym. 339. The remedy is by indictment for murder, or, formerly, by appeal, which the wife might have for killing her husband, provided she married not again before or pending her appeal; or the heir male for the death of his ancestor, and which differed principally from an indictment in respect of its not being in the power of the king to pardon the offender without the appello's consent. See post, 4 book, 312. 6. 5 Burr. 2643. But appeals of murder, treason, felony, and other offences, were abolished by 59 Geo. III. c. 46, s. 1. In general, all felonies suspend the civil remedies, Styles, 346; 7; and before conviction of the thief. The felony does not seem to affect the civil remedy with us. The owner may even recover the property against a bona fide purchaser. 1 Johns. R. The right of action of any person injured by any felony is not merged or in any way affected by the felony. 2 R., S. 292, § 2.

† In New-York, a person injured by the commission of a felony for which the offender is sentenced to the state prison, becomes a creditor of the felon's estate to the extent of his damage. 2 R. S. 700, § 14, &c. Stolen property is also returned to the owner on proving property and paying expenses, 2 R. S. 746, § 31; and that without convicting the
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, 3. The two next species of injuries, affecting the limbs or [*120] bodies of individuals, I shall consider in one and the same view. And these 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, insulatus, 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). 3. By battery; which is the unlawful beating of another. The least touching of another's

(p) Regist. 104. 27 Ass. 11. 7 Edw. IV. 24.
(q) Finch. L. 202.

offender there is no remedy against him at law or in equity, ibid. 17 Ves. 331; but after conviction and punishment on an indictment, of the party for stealing, the party robbed may support trespass or trover against the offender, Styles, 347. Latch. 144. Sir Wm. Jones, 147. 1 Lev. 247. Bro. Ab. tit. Trespass. And after an acquittal of the defendant, upon an indictment for a felonious assault upon a party by stabbing him, the latter may maintain trespass to recover damages for the civil injury, if it be not shown that he colluded in procuring such acquittal. 12 East, 409. In some cases, by express enactment, the civil remedy is not affected by the criminality of the offender. Thus it is provided by 52 Geo. III. c. 63, s. 5, that where bankers, &c. have been guilty of embezzlement, they may be prosecuted, but the civil remedy shall not be affect ed. The 21 Hen. VIII. c. 11, directs that goods stolen shall be restored to the owner upon certain conditions, namely, that he shall give or produce evidence against the felons, and that the felon be prosecuted to conviction thereon. Upon performance of these, the right of the owner, which was before suspended, becomes perfect and absolute; but he cannot recover the value from a person who purchased them in market overt, and sold them again before the conviction of the felon, notwithstanding the owner gave such person notice of the robbery while they were in his possession; but he must proceed against the original felon, or against the person who has the chattel in his possession at the time of the conviction. 2 T. R. 750. And the above act does not extend to goods obtained by false pretences. 5 T. R. 173; see further 1 Chitty’s Crim. L. 5.†

(3) See in general, Com. Dig. Battery, C. Bac. Ab. Assault and Battery, A. An assault is an attempt or offer, accompanied by a degree of violence, to commit some bodily harm, by any means calculated to produce the end, if carried into execution. Levelling a gun at another within a distance, from which, supposing it to have been loaded, the contents might wound, is an assault. Bac. Ab. Assault, A. Abusive words alone cannot constitute an assault, and indeed may sometimes so explain the aggressor’s intent, as to prevent an act, prima facie an assault, from amounting to such an injury: as where a man, during a size time, in a threatening posture, half drew his sword from its scabbard, and said, if it were not that it was assise time, I would run you through the body; this was held to be no assault, the words explaining that the party did not mean any immediate injury. 1 Mod. 3. Bul. N. P. 15. Vin. Ab. Trespass, A. 2. The intention as well as the act constitute an assault. 1 Mod. 3, case 13. Assault for money won at play is particularly punishable by 9 Ann. c. 14. 4 East, 174.

† In the U. S. or in most of them, the law will not support the title of a person to property that was embezzled against the original owner, although the holder purchased it in market overt. See Johnson’s Dig. title Trover. Com. Dig. Day’s ed. tit. Trover.
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 (4). And therefore upon a similar principle the Cornelian law de injuriis prohibited \textit{pulsation} as well as \textit{verberation}; distinguishing \textit{verberation}, which was accompanied with pain, from \textit{pulsation}, which was attended with none (7). 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 defence; and, if sued for it, may plead \textit{son assault demesne}, or that \textit{it was the plaintiff’s own original assault that occasioned it}. So likewise in defence of my goods or possession, if a man endeavours 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 (5). 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, \textit{molliter manus imposuit}, for this purpose. On account of these causes of justification, battery is defined to be the \textit{unlawful beating of another}; for which the remedy is, as for assault, by action of \textit{trespass vi et armis}: wherein the jury will give adequate damages. 4. By \textit{wounding}; which consists in giving another some dangerous hurt, and is only an aggravated species of battery. 5. By \textit{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 for ever 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 \textit{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 (5). If the

(4) Com. Dig. Battery, A. Bac. Ab. Assault and Battery, B. A battery is any unlawful touching the person of another by the aggressor himself, or any other substance put in motion by him. 1 Saund. 29. b. n. 1. Id. 13 & 14, n. 3. Taking a hat off the head of another is no battery. 1 Saund. 14. It must be either \textit{wilfully} committed, or proceed from want of due care, Stra. 596. Hob. 134. Plowd. 19, otherwise it is damnum absque injuria, and the party aggrieved is without remedy, 2 Wils. 302. Bac. Ab. Assault and Battery, B.; but the absence of intention to commit the injury constitutes no excuse, where there has been a want of due care. Stra. 596. Hob. 134. Plowd. 19. But if a person uninten-

cionally push against a person in the street, or if without any default in the rider a horse runs away and goes against another, no action lies. 4 Mod. 405. Every battery includes an assault, Co. Litt. 253; and the plaintiff may recover for the assault only, though he declares for an assault and battery. 4 Mod. 405.

(5) One remarkable property is peculiar to the action for a mayhem, viz. that the court in which the action is brought have a discretion ary power to increase the damages, if they think the jury at the trial have not been sufficiently liberal to the plaintiff; but this must be done \textit{super visum vulneris}, and upon proof that it is the same wound, concerning which evidence was given to the jury. 1 Wils. 5.

(c) Fy. 47. 10. 5.

(e) Finch. L. 204.

(t) 1 Sid. 301.

(4) Finch. L. 502.
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 the public; the other at the suit of the party [122] injured, to make him a reparation in damages (6).

4. Injuries, affecting a man’s health (7), are where by any unwholesome practices of another a man sustains any apparent damage in his vigour or constitution. As by selling him bad provisions, or wine (w); by the exercise of a noisome trade, which infects the air in his neighbourhood (z); or by the neglect or unskilful management of his physician, surgeon, or apothecary. For it hath been solemnly resolved (y), that mala praxis is a great misdesemnor 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, “culpae adnumerantur, veluti si medicus curationem dereliquerit, (w) 1 Roll. Abr. 90.
(z) 9 Rep. 32. Hutt. 135.
(y) Lord Raym. 214.
(z) Inst. 4. 3. 6, & 7.

Barnes, 106. 153. 3 Salkeld, 115. 1 Ld. Raym. 176. 339.

(6) The party injured may proceed by indictment and by action at the same time, and the court will not compel him to stay proceedings in either. 1 Bos. & P. 191. But in general the adoption of both proceedings is considered vexatious, and will induce the jury to give smaller damages in the action. The legislature has discouraged actions for trifling injuries of this nature, by enacting, that in all actions of trespass for assault and battery, in case the jury should find a verdict for damages under forty shillings, the plaintiff shall have no more costs than damages, unless the judge at the trial shall certify that an assault and battery was sufficiently proved. See constructions on the statute, Tidd Prac. 8 ed. 998.

In New-York, the plaintiff in an action for assault and battery, false imprisonment, slanderous words, or libel, if he sues in the supreme court, and recovers no more than 50 dollars, can have no more costs than damages: but if he sues in the common pleas, he recovers full costs. 2 R. S. 613, § 6. Id. 614, § 12.

(7) The law implies a contract on the part of a medical man, as well as those of other professions, to discharge their duty in a skilful and attentive manner, and the law will grant redress to the party injured by their neglect or ignorance, by an action on the case, as for a tortious misconduct. 1 Saund. 312. n. 2. 1 Ld. Raym. 213. 4. Reg. Brevium, 105. 6. 2 Wils. 359. 8 East, 348. And in that case the surgeon could not recover any fees. Peake, C. N. P. 59; see 2 New. Rep. 136.

But in the case of a physician, whose profession is honorary, he is not liable to an action, Peake, C. N. P. 96. 133. 4 T. R. 317, though he may be punished by the college of physi-

† In New-York, physicians are entitled to sue for their fees. See note * p. 28 ante.
mate quempiam scuerit, 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
[*123] debts, detaining one's goods, or the like; yet where *any special
consequential damage arises, which could not be foreseen and pro-
vided 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 an-
other's person or property, there the remedy is usually by an action of tres-
pass vi et armis; but where there is no act done, but only a culpable omis-
sion; or where the act is not immediately injurious, but only by consequence
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 (8).

5. Lastly; injuries affecting a man's reputation or good name are, first,
by malicious, scandalous, and slanderous words (9), tending to his damage

(a) For example: "Rex vicecomiti salutem, St A
fecerit te scurum de clamore suo prae sequundo, tunc
pate postumum et subeis plegias B quod est caram
justitiaris nostris apud Westmonastirum in octa-
bis sancti Michaelis, ostensurus quae cum idem B
ad dectrum oculum ipsum A casualiter laesionem bene
et competentem curandum apud S. pro quadem pecu-
niis summa prae natus solutis assumptis, idem
B curam quam circa oculum praeeditum tam neglig-
genter et improvide apposuit, quod idem A delectu

(b) See pag. 92.
(c) 1 Bish. 150. 6 Mod. 54.
(d) 1 Cro. Jac. 478.
(e) 11 Mod. 180. Lord Raym. 1402. Stra. 635.

(8) The Revised Statutes of New-York
seem to allow the action of trespass on the
case to be brought in all cases where trespass
may be brought, except for trespass on lands,
(2 R. S. 553, § 16.)

(9) As to actions for verbal slander and
libels in general, see Bac. Ab. Libel, and tit.
Slander; Com. Dig. Action upon the Case for
Defamation, and tit. Libel; Vin. Ab. tit. Li-
bel; Selw.. N. P. Libel, and tit. Slander;
Holt, George, Starkie, and Mence's Treatises
on Slander and 2 Starkie on Evidence, 944
to 983; and to indictment for libels, see
post, 4 book, 150.

With respect to an imputation of the guilt
of some offence punishable in the temporal
courts, as an infamous crime, or punishable
with imprisonment; the accusation must be
precise, or have such an allusion to some prior
transaction, that the hearers of the slander
must necessarily have understood that the
slanderer meant to impute the plaintiff's guilt

ipsius B visum ocult praeediti totaliter amavit, ad
damnnum ipsius A viginti librarum, ut dicit. Et
habes abhini plegiorum et hoc breve. Teste
meipso apud Westmonasterum, &c." (Registre
Brev. 105.)

of some punishable offence; for though the
rule of construing words in mitiori sensu is
now exploded, (5 East, 463. Fitzg. 253.
Bal. N. P. 4. 10 Mod. 198.) yet an innuendo
or construction cannot be given to words which
they do not necessarily import, either of them-
selves, independently of any other circum-
stances, or with necessary reference, or some
other circumstances occurring at the time of
the accusation. 6 T. R. 691. 4 Co. 17. b.
11 Mod. 99. 4 Esp. N. P. 218. 8 East, 457.
On this account it is not actionable to call a
person "villain," "cheat," "rascal," "swinder-
lor," or "rogue," or to say he is "forsworn,
without a colloquium of some proceeding in a
court of justice, in which the party had been
examined on oath. 6 T. R. 691. 2 H. Bla.
531. 2 Wils. 404. 87. 8 East, 425. 1 Bos.
& Pul. 331. 3 Saund. 307. 4 Co. 15. b.
2 Ventr. 28. 2 Buis. 150. Holt's Law of Li-
bel, 176. As to this point, see Com. Dig. tit.
Libel. Fitzg. 121. 253. The law does not
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 impeach-

consider these latter words as necessarily im-
puting the guilt of a crime punishable by the
temporal courts. So the term "forsworn" does not, in legal consideration, necessarily import perjury or false swearing in a regular judicial proceeding, and consequently does not necessarily impute to the party the guilt of having committed a punishable crime. 6 T. R. 694. 4 Co. 15. 2 Bulst. 150. Holt's Law verbal. 176.

But if either of the above expressions, not actionable in themselves, be accompanied by any other circumstances tending to throw the imputation of a punishable crime on the party accused, and be so understood by the hearers, they are actionable. 6 T. R. 694. So, on the other hand, words prima facie importing a charge of guilt, to call a person "thief," "seducer," "soliciting of seduction," "criminal," "adversary," "perjury," or false swearing, as actually, may be qualified by the expressions and other circumstances, evincing that the accuser did not mean to insinuate that the party had been guilty of such crime, and in that case no action will be sustainable; as, if the words be "you are a thief," for "you stole my tree," the stealing of which is not felony; or where the witnesses called to prove the slander, ad-

The accusation of a mere intent, propensi-
ity, or inclination to commit a crime, &c. is not actionable, because it only imputes an incipient immorality, and not the actual com-
misston of a crime for which the party accused could be punished. 4 Co. Rep. 16. b. 18. b. 4 Esp. R. 219. Cro. Jac. 158. 1 Rol. Ab. 41. Freem. 46. 7 Taunt. 431. 4 Price. 46. But an accusation of seducing another to commit a crime, as subornation of perjury, is actionable, 1 Rol. Ab. 41; or of soliciting a servant to steal, 3 Wils. 186. 2 East 5, but see Salk. 695.

A verbal imputation of the breach of any moral virtue, duty, or obligation, such as chastity, piety, &c. (which, though it may depre-
ciate a person in the opinion of society, and subject him to censure in the ecclesiastical court, does not expose him to punishment in the temporal courts), is not actionable, 4 Taunt. 355; though if in writing, it will be otherwise, 3 Wils. 187. 4 Co. 19. Com. Dig. tit. Action may be qualified by the expressions and other circumstances, evincing that the accuser did not mean to impute that the plaintiff had been guilty of felony. Cro. Jac. 114. B. N. P. 5. Peake, N. P. 4. Co. 19. Str. 142. 2 Esp. R. 218. 2 New. R. 335.

The accusation of a mere intent, propensi-
ity, or inclination to commit a crime, &c. is not actionable, because it only imputes an incipient immorality, and not the actual com-
misston of a crime for which the party accused could be punished. 4 Co. Rep. 16. b. 18. b. 4 Esp. R. 219. Cro. Jac. 158. 1 Rol. Ab. 41. Freem. 46. 7 Taunt. 431. 4 Price. 46. But an accusation of seducing another to commit a crime, as subornation of perjury, is actionable, 1 Rol. Ab. 41; or of soliciting a servant to steal, 3 Wils. 186. 2 East 5, but see Salk. 695.

A verbal imputation of the breach of any moral virtue, duty, or obligation, such as chastity, piety, &c. (which, though it may depre-
ciate a person in the opinion of society, and subject him to censure in the ecclesiastical court, does not expose him to punishment in the temporal courts), is not actionable, 4 Taunt. 355; though if in writing, it will be otherwise, 3 Wils. 187. 4 Co. 19. Com. Dig. tit. Action may be qualified by the expressions and other circumstances, evincing that the accuser did not mean to impute that the plaintiff had been guilty of felony. Cro. Jac. 114. B. N. P. 5. Peake, N. P. 4. Co. 19. Str. 142. 2 Esp. R. 218. 2 New. R. 335.
ing him of some heinous crime, as to say that a man hath poisoned another, or is perjured (f); or which may exclude him from society, as to

(f) Finch. L. 185.

person in trade, (however inferior, 1 Lev. 115.) of fraudulent or dishonourable conduct, or of being in insolvent circumstances. LD. Raym. 1490. And to say of one who carries on the business of a corn vender, "you are a rogue and a handling rascal, you delivered me 100 bushels of oats worse by far a bushel than I bargained for," is actionable, and entitles him to a verdict without proof of special damage. 3 Bing. 104. But an action is not sustainable for saying a tradesman has charged an exorbitant sum for his goods, &c. unless fraud be imputed, &c. Bac. Ab. tit. Slander. B. 4. If defamatory words be spoken of two persons affecting them in their joint trade, they may join in an action for the injury. 3 B. & P. 150. In all these cases the words are actionable, without proof of special damage, because they have a certain tendency to injure the person accused. Bac. Ab. Slander, B. 4. In these and the prior cases the words must be spoken of the party in relation to his office, trade, &c., and be so alleged in the declaration, as proved at the trial, or the words themselves must appear to have been spoken of the office, &c. or necessarily to affect in that view, unless special damage be averred and proved. 2 Saund. 307. a. 1 Saund. 242. n. 3. 1 Lev. 280. LD. Raym. 1480. Stra. 618. 696. 1109. Cro. Jac. 554. Salk. 694.

Words actionable in respect of Special Damage.—The special damage sufficient to support an action, must be a certain actual loss (as of a particular marriage), or the acquaintance or friendship of some specified person, 1 Rol. Ab. 36. 1 Lev. 261. 2 Bos. & Pul. 284. 1 Saund. 243. 3 B. & P. 372. 4. 6. 1 Taunt. 39. 2 Edw. II. Ed. 11. b. 1. Bac. Ab. Slander, C.; or where in consequence of the imputation of incontinency, cast upon a dissenting preacher at a licensed chapel, the congregation refuse to allow him to preach there any more, and discontinue the emolument they would otherwise have given him, he may maintain an action for the consequential damage. 8 T. R. 130. Probable damage has been in some instances declared sufficient, as to say to a father of an heir apparent, that he is a bastard, in consequence whereof the father has declared a design of disinheriting him, and does actually convey away the estate. 1 Rol. Ab. 38. Cro. Jac. 213. sed vide 3 Wils. 188. Yet having incurred the danger of being turned out of doors from the parents’ displeasure, from calamitous imputation, is not sufficient. 1 Lev. 261. 1 Taunt. 39.

The special damage must be incident and natural to the words spoken, and not the consequence of the unlawful act of a third person. 8 East, 1. Where the action is sustainable merely on account of special damage occasioned by words not actionable themselves, it suffices to bring the action within six years, and the plaintiff is entitled to full costs, however small the damages; but if the words be actionable in themselves, though special damages be proved, the plaintiff, unless he recover damages, will be entitled to no more costs than damages.† Willes, 438. 2 LD. Raym. 1589. 2 Str. 936. Tidd, 8 ed. 997.

II. Falsity of the Imputation.—To render any imputation against the character actionable, it must be false, 5 Co. 125, 6. Hob. 253; and though the falsity of the imputation is in general to be implied till the contrary be shewn, 2 East, 436. 1 Saund. 242. yet the defendant may, in any civil action, plead specially, though he cannot give in evidence under the general issue, that the slanderous representation was true. Willes, 20. 1 Saund. 130. The instance of a master making an unfavourable representation of his servant, upon an application for his character, seems to be an exception, in that case there being a presumption from the occasion of speaking, that the words were true. 1 T. R. 111. 3 Bos. and Pul. 587.

III. The Publication.—The sending a libel to the party labelled, is a sufficient publication to subject the libeller to an indictment, as tending to a breach of the peace. 2 Bla. Rep. 1038. 1 T. R. 110. 1 Saund. 132. n. 2. 4 Esp. N. P. 117. 2 Esp. 623. 2 East’s Rep. 361. 5 Barn. K. B. 102. 2 Kel. 58. 2 Stark. 245. But it is essential to the support of an action, that there be a publication by the defendant of the libel or words to a third person, and also that such person understood the words in the sense the plaintiff wishes to establish, or that they necessarily have that meaning. 1 Rol. Ab. 74. Cro. Eliz. 657. 661. 1 Saund. 242. n. 3. 2 Saund. 307. Bac. Ab. Slander, D. It is in the province of a jury to decide whether or not a publication be sufficiently proved. 2 Bla. Rep. 1037. 1 Saund. 132. n. 2. It is immaterial in what way the slander was conveyed, however obscure, if the person who heard it understood it in an actionable sense, and the court will put the witnesses’ construction on the words, the old rule of intention in witter sense being exploded. 5 East, 463. Bac. Ab. Libel, A. 3. If A. send a manuscript to the printer of a periodical work, and does not restrain the printing and publishing it, he print and publish it, A. is liable as the publisher, and liable to an action, 5 Dow. 201; and proof that the defendant knew that letters addressed to the plaintiff were usually opened by his clerk, is evidence to go to a jury, of his intention that the libel should be read by a third person, so as to amount to an actionable publication, 2 Stark. 63; and proof of the delivery of a copy of a newspaper, containing a libel, to the stamp office, is sufficient proof of publication. 4 B. & C. 35. Every copy of a libel sold by defendant is a separate publication, and a se-

† The Revised Statutes of New-York require both actions of slander to be brought in two years. (2 R. S. 296, 20.)
charge him with having an infectious disease; or which may impair or hurt his trade or livelihood, as to call a tradesman a bankrupt, a physician

parate offence, and the court will not restrain the proceedings against the party for second and subsequent publications. 1 Chitty R. 451.

IV. The Occasion.—To render words actionable, they must be uttered without legal occasion. On some occasions it is justifiable to utter slander of another, in others it is excusable, provided it be uttered without express malice. Bac. Ab. 150. If a servant, jury in a regular court of justice, where the court has jurisdiction, (Dyer, 285. 4 Co. 14. Holt's L. L. 179.) or before the house of commons, 1 Saund. 131. 2. 3. n. 1. 1 M. & S. 280. 3 Taunton, 456. will be actionable. A petition or memorial, addressed by a tradesman to the secretary at war, complaining of the conduct of a half-pay officer in not paying his debts, and stating the facts of his case bona fide, is not actionable as a libel. And evidence shewing the occasion of the writing, and his belief of the facts stated, may be given under the general issue. 5 B. & A. 642. 1 Dow. & Ry. 252. The declaration of a court-martial, that the charge of the prosecutor was malicious and groundless, and that his conduct in falsely calumniating the accused was highly injurious to the service, will not subject the president to an action for a libel for having delivered such declaration, annexed to their sentence of acquittal of the officer accused, to the judge advocate, 2 N. R. 341. or to the commander-in-chief. It is a privileged communication, and cannot be produced in evidence, or an office copy thereof. 4 Moore, 563. 2 Bro. 230. The act of sending a governor abroad to dismiss an officer does not, therefore, authorize his publishing the grounds of dismissal. 3 Taunt. 456. These words, "the Rev. John Robinson and Mr. James Robinson, inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room," published by posting a paper on which they were written, purporting to be a regulation of a particular society, were held not to be a libel. 1 Price, 11. And it is not lawful to reduce verbal slander into writing, and publish it, unless in confidence and without malice. 2 East R. 426. 1 T. R. 40. 3 B. & P. 567. And, therefore, a plea to a declaration for a libel, that it was copied from another newspaper, setting forth the proprietors of such newspaper; nor any allegation, as it did not set forth that they were the original authors of the libel, 4 B. & A. 603; and it seems that if they had been named by the defendant as such, in his publication, that would not amount to a justification. Ib. A servant cannot maintain an action against his former master for words spoken or written, giving him a character, even though the master make specific charges of fraud, unless the latter prove the falsehood and malice of the charges. Bul. N. P. 8. 3 Esp. 201. 1 Camp. 267. 1 T. R. 110. 4 Burr. 2425. 1 Carr. 279. A master is not generally bound to prove the truth of the character he gives to his servant, yet in a regular court of justice, in order to prevent him giving a second character, and then himself, upon application, give the servant a bad character, the truth of which he is not able to prove, an action is maintainable against him. Id. ibid. 3 B. & P. 597. and Holt L. L. 201. So a letter written, or words spoken to a father in relation to some supposed fault of his children, are actionable. 2 Brown. 151. 2 Burn. E. L. 126. 779. 1 Vin. Ab. 540. 60. If by the words are innocently read, as a story out of history, Cro. Jac. 91; or were spoken in a sense not defamatory, 4 Rep. 12; or confidently, as a warning against the mal-practices of another, 1 Camp. 267. The repeating or reading a libel out of merriment, if malicious, is actionable, 9 Rep. 39, but if there be no malice, it is sustainable. 2 Brown. 151. And, if an intended, or supposed intention, the law will protect such a publication, Delany v. Jones, 4 Esp. N. P. 191. Holt's L. L. 184; but if the legal object might have been obtained by means less injurious, then an action is sustainable. 2 Stark. 297. Where A. B. met the defendant, and said, "I hear that you say the plaintiff's bank at M. has stopped. Is it true?" Defendant answered, "Yes, it is; I was told so; it was so reported at C, and nobody would take their bills, and I came to town in consequence of it myself;" it is a question for the jury, whether the defendant understood A. B. asked the question for his own guidance, and if so, it was a privileged communication (if the facts were true), but if not so understood by the defendant, then the law infers malice, without its being shown by the jury. 4 B. & C. 247. It is not libelous to ridicule a literary composition, or the author of it, as far as he has embodied himself with this work; and if he is not followed into domestic life for purposes of personal slander, he cannot maintain an action for any damage he may suffer in consequence of being thus rendered ridiculous. 1 Camp. 385. Holt L. L. 205. 6 Selwyn. N. P. 1044. So a fair comment on a public entertainment or performance is lawful, 1 Esp. R. 28; but it is otherwise if the critic introduce facts and comments, or abuse, not connected with the work, for the purpose of
PRIVATE WRONGS.

a quack, or a lawyer a knave (g). Words spoken in derogation of a peer, a judge, or other great officer of the realm, which are called scandalum (g) Finch. L. 186.

defaming the private character of the author. 1 Camp. 355. Selw. N. P. 1044. 3 Bing. R. 88. 3 Brod. 144. 5 Com. Dig. 96. 13 Mod. 332. 15 Vin. 160. 15 Rol. Ab. 547. Co. Litt. 247, it should seem that when an injury has been sustained by the flippant and inconsiderate unfounded report of another, though not malicious, an action is sustainable. The averment in pleading, that the words were falsely uttered, is tantamount to an averment of malice. 1 Saund. 242. n. 2. In the case of written slander, the intent is to be collected from the paper itself, unless explained by the mode of publication and other circumstances; and the defendant must be presumed to intend that which his act is likely to produce. 4 B. & A. 95. This is elucidated in some modern cases, where it is laid down, that although malice is the gist of the action for slander, there are two sorts of malice, malice in fact, and malice in law; the former denoting an act done from ill will towards an individual; the latter a wrongful act, intentionally done, without just cause or excuse. In ordinary actions for slander, malice in law is to be inferred from the publishing the slandering matter, the act itself being wrongful and intentional, and without any just cause or excuse; but in actions for slander, prima facie excusable on account of the cause of publishing the slandering matter, malice in fact must be proved, 4 B. & C. 247; and see Gilb. Cases, L. & E. 190, 1, 2. where it is laid down, that though malice, in vulgar acceptance, is a desire of revenge, or a settled anger against a person, yet, in its legal sense, it means the doing an act without a just cause. See judgment of court in 3 B. & C. 584, 5. 2 B. & C. 257.


V. THE MALICE OR MOTIVE.—See in general, 2 Stark. on Evid. 862 to 871. 902 to 907. Malice is also considered essential to the support of an action for slanderous words. But malice is to be presumed until the contrary be proved, (4 B. & C. 247—355. 1 Saund. 242. n. 2. 1 T. R. 111. 544. 1 East, 563. 2 East, 436. 2 New. R. 335. Bul. N. P. 8,) except in those cases where the occasion prima facie excuses the publication, 4 B. & C. 247; as in the before-mentioned instance of a master giving the character of his servant, in which the plaintiff must prove express malice; or that the imputation was wholly false, from which malice may be inferred. 1 T. R. 111. 3 B. & P. 587. But if the plaintiff can prove that the defendant acted maliciously under the mask of the former excusable occasions, an action is always sustainable. 3 B. & P. 587. 150. 9 Rep. 59. 2 East, 426. And on the same ground that a lunatic has been held liable to make compensation, civilly, for any injury he may do, 15 Vin. 160. 12 Mod. 332. 1 Rol. Ab. 547. Co. Litt. 247, it should seem that when an injury has been sustained by the flippant and inconsiderate unfounded report
magnatum, are held to be still more heinous (k): 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, they amount to an atrocious injury; *which is redressed by an action [*124] 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 (10). 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 any action against me, unless he can shew 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 liv-

(a) 1 Vent. 60.  
(c) Westm. 1. 3 Edw. I. c. 34. 2 Ric. II. c. 5. 12 Ric. II. c. 11.  
(k) Lord Raym. 1369.  
(l) 2 Vent. 29.

the former being more deliberate, more capable of extensive circulation, and more permanent in its injurious consequences, than the latter. 2 East. 430. Hard. 470–92. Burr. 989. Fitzg. 253. Another distinction between them is, that written slander is indictable, as tending to a breach of the peace, whereas verbal is not indictable, unless against a magistrate in the execution of his office. And. 384. 1 Stra. 420. 2 Stra. 1157. Salk. 689. 698. Holt’s Law of Lib. 169. and cases there referred to, Holt’s Rep. 654; or calculated to provoke a person to fight a duel. So, with regard to the statute of limitations, an action for words, actionable in themselves, is not sustainable after two years have elapsed, 21 Jac. I. c. 16; but the remedy for a libel is not thereby affected, and may be brought within six years. With respect to the remedies for words and libels, an action on the case is the general remedy, the writ of conspiracy having grown obsolete. 1 Saund. 228. 1 Stra. 193. Co. Lit. 161. a. n. 4.

As to Slander of Title, see in general Vin. Ab. Slander of Title, pl. 16. 2 B. & C. 486. The slander is actionable if a malicious motive be proved. 4 Burr. 2432. But to say that a vendor cannot make a good title, believing at the same time that he cannot, from a supposed forfeiture of the estate, is not actionable. 3 Taunt. 246. See also 1 M. & S. 301. 639. 644. But a stranger who justifies

a publication defamatory of another’s title, under the party claiming title, must shew that it was made by his authority. 1 M. & S. 304. No action will lie when the slanderer prevents the sale of the land by asserting a claim in himself, though unfounded, unless it be knowingly bottomed in fraud, as, upon an instrument which the claimant knows to be forged, and it is so averred in the declaration, and proved on the trial. 4 Rep. 18.

(10) This action or public prosecution, (for it partakes of both) for scandalam magnatum, is totally different from the action of slander in the case of common persons. The scandalam magnatum is reduced to no rule or certain definition, but it may be whatever the courts in their discretion shall judge to be derogatory to the high character of the person of whom it is spoken; as it was held to be scandalam magnatum, to say of a peer, “he was no more to be valued than a dog,” which words would have been perfectly harmless if uttered of any inferior person. Bull. N. P. 4. This action is now seldom resorted to. By the two first statutes upon which it is founded, (3 Ed. I. c. 31. and 2 R. II. st. 2. c. 5,) the defendant may be imprisoned till he produces the first author of the scandal; hence probably is the origin of the vulgar notion that a person who has propagated slander may be compelled to give up his author.
ing (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). Neither (as was formerly 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): "*cum qui nocentem infamat, non est aequum 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 diminishes his reputation. With regard to libels in general, there are, as in many other cases, two remedies; one by indictment, and the other by action. The former for the public offence; for every libel has a tendency to the breach of the peace, by provoking the person libelled to break it: which offence is the same (in point of law) whether the matter contained be 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) (11). 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 shew 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 (12): but as to signs or pictures, it seems necessary always to shew, by proper innuendos and averments of the de

---

(m) 4 Rep. 17. 1 Lev. 248.
(o) Noy. 64. 1 Freem. 277.
(p) Finch. L. 186. 1 Lev. 82. Cro. Jac. 91.
(q) Pag. 29.

(11) In New-York he may show that the publication was true, and was made with good motives and for justifiable ends.

(12) But see the distinction that written slander is actionable when verbal is not, ante, note (9).
fendant's meaning, the import and application of the scandal, and that some special damage has followed (13); otherwise it cannot appear, that such libel by picture was understood to be 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 (14); which, under the

(13) To support an action for a libellous sign or picture, the learned judge says, it is necessary to shew, that some special damage has followed, but there is no ground for this opinion, and prove the intention to make any one ridiculous is equally actionable as if the same effect had been produced by any other mode of publication, though no damage can be proved. See note (10) ante.

(14) Malicious prosecutions are of a criminal or civil nature. To enable a party aggrieved to support an action for a criminal prosecution, four circumstances must occur. Gilb. L. & E. 185. 12 Mod. 208. 1 T. R. 493 to 551.

1st. Falsehood in the charge.
2d. Want of probable cause for instituting it.
3d. Malice in the prosecutor.
4th. Damage to the accused party.

1st. It is essential that the falsehood of the charge should have been substantiated by a verdict, or the decision of the court in which it was instituted, or by the proceedings having been otherwise legally determined, before the party aggrieved commence his action for the injury sustained. 2 T. R. 225. 1 Saund. 238.

Bul. N. P. 11. 1 Esp. Rep. 79. Doug. 215. Yelv. 116. Hob. 267. A husband alone may maintain an action for a malicious prosecution of his wife, the expenses of which have been defrayed by him. A. 977. C. Temp. Hardw. 54. And the action will lie, although the plaintiff has been acquitted on a defect in the indictment, the subject matter of which did not affect his reputation, 4 T. R. 247. Stra. 691, or for the malicious prosecution of a bad indictment for perjury. 5 B. & A. 634.

1 Dow. & Ry. 266. An action on the case lies for maliciously obtaining or executing a warrant to search a house for a buggah good for, where none such are found. 1 T. R. 535. n. 1 Dow. & R. 97. 2 Chitty R. 304. So a naval officer accused of neglect of duty, &c. by his commander, and tried by court-martial, though honourably acquitted, cannot maintain an action for a malicious prosecution against such commander. 1 T. R. 493. 1 Bro. P. C. 76. But an action of trespass lies for an injury against his superior military officer (both being under martial law), who imprisons him for disobedience to an order made under colour, but not within the scope of military authority, 4 T. R. 493. 67. Although the imprisonment be followed by a trial by a court-martial. Ib.

2d. It is necessary that the prosecution should have been carried on without probable cause, before an action can be brought against the prosecutor. 3 Dow. Rep. 160. It is a mixed proposition of law and fact, whether there was probable cause, and whether the circumstances, alleged to shew it probable, are true, and existed as matter of fact. But whether or not, supposing them to be true, they amount to a probable cause, is a question of law. 1 T. R. 520. 334. 5 Bul. N. P. 14. 4 Burr. 1974. 2 Bar. & C. 693. 4 Dow. & R. 107. 1 Carr. Rep. 138. 204. 1 Gow. Rep. 29.

3dly. Malice also is essential to the support of this action; it is not, however, necessary in all cases for the plaintiff to prove by positive evidence, that the defendant was actuated by malice, but he may establish it by inference or collateral proof, and the plaintiff having established want of probable cause, malice may thence be inferred. 1 T. R. 493. 5d. 9 East, 361. 1 Camp. 202. 204. Willes, 362. 363. Malice is not to be inferred from the mere proof of the plaintiff's acquittal for want of the prosecutor's appearing when called, 9 East, 361. or from proof that the bill was returned not found. 1 Marsh. 12. 5 Taunt. 187; but see 4 Bar. & Cres. 24. The defendant, however, may repel this presumptive evidence, by shewing sufficient grounds for suspicion in point of fact, or by inducing him to suspect the guilt of the party accused. Cro. Jac. 193. Selw. N. P. 105. 1 Rol. Ab. 113. Gilb. L. & E. 189. 3 Dow. R. 160.

4th. Damage is essential to the support of almost all civil actions; it appears from the case of Jones v. Gwynne. Gilb. L. & E. 185. 202, and that of Saville v. Roberts, 12 Mod. 208.

Str. 977. that there are three descriptions of damages, either of which is sufficient to support an action, but one of them must be proved or the action will fail. 5 Taunt. 187. 1 Marsh. 12. 9 East, 361. 1st. To the person by imprisonment.—2d. To the reputation by scandal.—3d. To the property by expense.

1st. To the Person by Imprisonment.—1st. Whenever an imprisonment is occasioned by a malicious unfounded criminal prosecution, it is a sufficient damage to support an action, although the detention might have been momentary, and the party released on bail.

2d. To the Reputation by Scandal.—Most criminal prosecutions charge the party accused with some breach of moral duty, and though, as observed by chief justice Holt, Hob. 266, when the court in which the proceeding is adopted has sufficient jurisdiction over the subject matter, the unfounded proceeding cannot be treated as a libel in respect to the maxim "executo juris non habit injuriama; yet the party defamed may proceed by action for the maliciously preferring such charge. Any charge which would be a libel if not preferred in the course of legal proceeding, may be considered as sufficiently defamatory to enable the party to support an action for malicious prosecution. But an indictment for a mere trespass as an assault, does not sufficiently scandalize the party accused to enable him, on the ground of injury to his reputation, to support an action. 12 Mod. 210.
mask of justice and public spirit, are sometimes made the engines of private spite and enmity. For this reason, however, the law has given a very ade-


As prosecutions must be carried on for the benefit of the public, and no one would be induced to pursue an offender for a criminal charge, if he were liable to an action, on an acquittal, the courts in general discharge actions for malicious prosecutions, unless the malice of the prosecutor, as well as the innocence of the party accused, be obvious; and in case of indictments for felonies they will not afford the defendant a copy of the indictment, without which a civil action cannot be supported, unless in the opinion of the court the prosecution appeared to be malicious. 1 T. R. 518. Carth. 421. 1 Ld. Raym. 253. Ante, 1 book, 385. 14 East, 302. 305.

But in an action for a malicious prosecution for defamation, the party need not produce a copy of the indictment. Blas. Rep. 385.

The remedy for a malicious prosecution of regular proceedings, is invariably an action on the case, and trespass cannot be sustained, Hob. 266. So if a magistrate issue a warrant without information on oath, when the action cannot be trespass, 2 T. R. 255, and the proper plea is the general issue, 3 Mod. 166; and every matter of defence may be given in evidence, under such plea, though it is otherwise in an action for words. Willes, 20.

Malicious proceedings of a civil nature are by malicious arrest, issuing a commission of bankruptcy, &c. It seems before the statutes entitling the defendant in civil actions to costs, if the suit terminated in his favour, he might support his action against the plaintiff. If the proceeding was malicious and without probable cause. Co. Litt. 161. n. 4. a. b. c. 162. (a.) 3 Lev. 210. 2 Wils. 305. Styles, 379. Hob. 266. 4 Mod. 13. 4. But since the statute, 4 Ja. I. c. 3, which gives costs to a defendant in all actions in case of a nonsuit or verdict against the plaintiff, and other statutes giving costs to defendant in other stages of the cause, it seems that no action can be supported merely in respect of a civil suit maliciously instituted, except in some cases under particular legislative provisions, 1 Salk. 14. and therefore no action is sustainable for a vexatious ejectment. 1 B. & P. 205. But when the plaintiff in a civil action has maliciously adopted a step not absolutely necessary for the ascertaining of his right, as in the case of an unfounded arrest, or an arrest for too large a sum, 1 Lev. 275. or on one side of an account. 3 B. & C. 139. (in any of which cases he might have proceeded in common process), the party injured by such arrest may support an action. 2 Wils. 305. As it is necessary the avenues of justice should not be narrowed, the courts do not encourage actions for malicious suits; 2 Wils. 307; but as a civil suit is not like a criminal prosecution, carried on for the benefit of the public, less favour and indulgence is to be shewn to a plaintiff who maliciously arrests another, than to the prosecutor of an indictment. In order to sustain such action, four points must occur, viz.

1st. Falsehood in the demand.
2d. Want of probable cause.
3d. Malice in the defendant.
4th. Damage by arrest or imprisonment.

1st. Falsehood in the Demand.—1st. With regard to the falsehood in the demand, the rules applicable to a criminal proceeding, equally affect a civil suit. 1 Salk. 1816. 2 T. R. 253; 1 Esp. Rep. 70. 14 East, 302. Selw. 106. 2. If there be a set off reducing the plaintiff’s demand, his maliciously inserting only one side of the account is actionable. 3 B. & C. 139. The suit must have been decided by some legal means, before an action for a malicious action can be commenced. 1 Esp. R. 80.

2dly. Want of probable cause also, as in criminal proceedings, is necessary and the same rule is applicable with regard to it. And though in point of fact an action may turn out to be unfounded, yet if there were reasonable ground to apprehend that the sum for which the party was arrested was due, no action can be supported. 3 Esp. R. 34. Where A. arrested B. upon the advice of his special pleader, that he had a good cause of action, but afterwards discontinued on being ruled to declare, and B. brought an action for a malicious arrest, without any reasonable or probable cause, it was held, that the reasonableness or probability of the cause was a mixed question of law and fact for the jury to decide; and that, if they believed the defendant acted bona fide upon the advice he had received, he was entitled to a verdict, but if otherwise, they were not bound to decide against the plaintiff. 2 B. & C. 163. 4 Dow. & R. 107. 1 Carr. 204.

3dly. Malice in the Defendant.—Malice also is an essential requisite to the support of this action, and it is not sufficient to prove that the writ was sued out, or the arrest made, after the payment of the debt, but express malice must in such case be proved, 1 Bos. & P. 388. 2 B. & P. 129. 3 East, 914; and in a late case, where a writ was issued by mistake against the son instead of the father, and he was imprisoned four days, Ch. J. Abbott held, that as there was no evidence of malice the action was not sustainable. Gouldhall, Oct. 1825. In ordinary cases, however, want of probable cause being proved, malice (as in criminal prosecutions) may be implied; ante, page 42. n. (a). 1 T. R. 545. 516. 9 East, 361. 1 Campb. C. N. P. 202. 4. 3 Camp. 139. The merely not proceeding with an action is not sufficient evidence of malice, 4 Taunt, 7; or neglecting to countermand the writ after the debt has been paid, by which plaintiff was arrested, 1 Bos. & Pul. 388, especially if the facts preclude any interference of malice. 2 Bos. & P. 129. But where A. arrested B. on an affidavit of debt for money paid to his use, but did not declare until ruled so to do, and soon afterwards discontinued the action.
and paid the costs, held that this was sufficient prima facie evidence of malice, and the absence of probable cause to support an action for a malicious arrest. 4 B. & C. 21.

4thly. With respect to the damage necessary to the support of this action, it has already been observed, that as a defendant is entitled to costs, his pecuniary interest is not, in legal consideration, affected by a civil action, though indeed the costs allowed are rarely equal to the expenditure incurred by a defence. His character also, as we have already seen, is not affected, and the imprisonment of his person is therefore the only legal damage which entitles him to compensation. But in some instances the court have power to interfere in a summary way to compel the plaintiff to make compensation. 3 Bos. & P. 115. Co. Litt. 161 b. in notes.

By a late statute, 43 Geo. III. c. 46 s. 3. 3 B. & P. 115. if the plaintiff in an action do not recover the amount of the sum for which he arrested the defendant, though he obtain a verdict, the defendant is entitled to his costs, if it appear to the satisfaction of the court upon a summary application, supported by affidavit, that plaintiff had not reasonable cause for obtaining the defendant to be arrested for the whole amount. An action on the case may also be supported for maliciously issuing a commission of bankruptcy, notwithstanding the specific remedy provided by the bankrupt laws. 1 book, ante, 427. Willes, 591. 2 Wils. 146. 3 Campb. 39. So also if the plaintiff in an action adopt an irregular proceeding, as issuing a second fi. fa. pending the first, Hob. 205. 266. 1 Brow. 12. So a plaintiff is bound to accept from a defendant in custody under a ca. sa., the debt and costs, when tendered, in satisfaction of his debt, and to sign an authority to the sheriff to discharge the defendant out of custody, and an action on the case will lie against a plaintiff for having maliciously refused so to do. And the refusal to sign the discharge is sufficient prima facie evidence of malice, in the absence of circumstances to rebut the presumption. 4 B. & C. 26.

(15) But the merely giving charge of a person to a peace-officer, not followed by any actual apprehension of the person, does not amount to an imprisonment, though the party to avoid it attend at a police office, 1 Esp. Rep. 431. 2 New. Rep. 211; and in Gardner v. Wedd, and others, Easter Term 1825, on a motion for a new trial, the court of common pleas held that the lifting up a person in his chair, and carrying him out of the room, in which he was sitting with others, and excluding him from the room, was not a false imprisonment, so as to entitle the plaintiff to a verdict on a count for false imprisonment. The circumstance of an imprisonment being committed under a mistake constitutes no excuse. 3 Wils. 309. And it has been decided, that if A. tell an officer who has a warrant against B., that his (A.'s) name is B., and thereupon the officer arrests A., it is false imprisonment; Moore, 457. Hard. 333; but see 3 Camp. 108; and this doctrine was overruled in a late case on the western circuit, on the principle voleat non fit injuriam, and that such a fraud upon legal proceedings cannot give a right of action.
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 unlawful time, as on a Sunday (f); for the statute hath declared, that such service or process shall be void (16). 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 mainprise. 2. By writ de odio et atia (17). 3. By writ de homine replegiando. 4. By writ of habeas corpus.

1. The writ of mainprise, manucaptio, is a writ directed to the sheriff (either generally, when any man is imprisoned for a bailable offence, and bail hath 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 mainperners, and to set him at large (g). Mainperners differ from bail, in that a man’s bail may imprison or surrender him up before the stipulated day of appearance; mainperners 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; mainperners 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. [129]

But the statute of Gloucester, 6 Edw. I. c. 9. restrained it in the case of killing by misadventure or self-defence, and the thing is now known in practice, their use and application being entirely superseded by summary resort to magistrates, or upon their refusal, to a judge of the Court, as the case may require.

---

(c) 2 Inst. 559.
(d) ibid. 40.
(e) Stat. 13 Geo. III. c. 78.
(f) Stat. 29 Car. II. c. 7. Salk. 78. 5 Mod. 95.
(g) F. N. B. 220. 1 Hal. P. C. 141. Coke on bail and mainp. ch. 16.
(h) Coke on bail and mainp. ch. 3. 4 Inst. 179.
(i) I. 3. tr. 2. c. 8.
PRIVATE Wrongs.

103

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) (18) 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 elongated, elongatus; upon which a process issues (called a capias in withernam) to imprison the defendant himself, without bail or mainprise (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 [*130] in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution (p). Such also are those ad prosequendum, testificandum, deliberrandum, &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 (19). 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 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 & 2 P. & M. c. 13. that no habeas cor-

(k) 2 Inst. 43. 55. 315.
(l) F. N. B. 66.
(m) Raym. 474.
(n) Nisi capias est per speciale praeceptum nostrum, vel capitalis justitiarum nostrarum, vel pro morte hominis, vel pro foresta nostra, vel pro aliquo alio

(18) In New-York this writ is allowed to any one who is claimed by another as a fugitive from another state, and bound to serve such other; although the person claiming the benefit of this writ may have been previously delivered over to his master on a habeas corpus. 2 R. S. 361, § 13.

(19) By 44 Geo. III. c. 702. any of the judges of England or Ireland may award a writ of habeas corpus ad testificandum to bring a prisoner detained in any gaol to be examined as a witness in any court of record, or sitting at nisi prius.
pus] 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), it is [*131] 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 (20), 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 (21).

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) (22). 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), 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), whenever 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 shall 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 be common

---

(r) Bohun. instit. legal, 55, edit. 1708.
(s) St. Trials, vili. 142.
(t) The pluralis habeas corpus directed to Berrivick in 43 Eliz. (cited 4 Burr. 856.) was testud de Jovis post quindecì. Sancti Martini. It appears by referring to the dominical letter of that year, that this quindecì (Nov. 25.) 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) 4 Burr. 856.
(w) Ibid. 460. 542. 606.

(20) By statute 57 Geo. III. c. 124, extended to 151. and by statute 7 & 8 Geo. IV. c. 71, § 6, extended to 207.
(21) Causes are removable from the common pleas court to the supreme court by certiorari, whenever the matter in dispute exceeds 250 dollars, but in the city of New-York where it exceeds 500 dollars; and in the following cases they may be removed, whatever the amount may be, viz. in actions in which the state is interested, or which are brought by or against any city: actions in which the title to real estate comes in question: and actions of replevin and of false imprisonment. 2 R. S. 389, § 1, 4, 14.
(22) In New-York this writ may be granted by the chancellor, or any of the judges of the Supreme Court, or any officer authorized to perform the duties of such judge at chambers, and residing in the county where the prisoner is detained: or if these cannot or will not act, then to a similar officer in an adjoining county: it may also be granted by the Supreme Court in term-time. (2 R. S. 563).
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. But since the mention of the king's [132]
bench and common pleas, as co-ordinate in this jurisdiction, by statute 16 Car. 1. c. 10. it hath been held, 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 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 (23).

(23) It was determined, after a very elaborate examination of all the authorities by lord Eldon in Crownings case, that the lord chancellor can issue the writ of habeas corpus at common law in vacation, overruling the decision in Jenks's case. See 2 Swanst. 1.

By two modern statutes, the 43 Geo. III. c. 140. and 44 Geo. III. c. 102. the habeas corpus ad testificandum has been rendered more efficient. By the first, a judge may award the writ for the purpose of bringing any prisoner from any goal in England or Ireland as a witness, before any court-martial, commissioners of bankrupt, or for auditing public accounts, or other commissioners, under any commission or warrant from his majesty; (the statute has the same application to the habeas corpus ad deliberandum). By the other statute, a similar power is given for bringing up any prisoner as a witness before any of the courts, or any justice of oyer and terminer, or goal delivery, or sitting at nisi prius, in England or Ireland.

The benefit of the writ of habeas corpus, which was limited by the former acts to cases of commitment or detain for criminal, or supposed criminal matter, has been still further extended by the 56 Geo. III. c. 100. which enacts, that any one of the judges may issue a writ of habeas corpus in vacation, returnable immediately, before himself or any other judge of the same court in cases other than for criminal matter or for debt; and the non-observance of such writ is to be deemed a contempt of court. But if the writ be awarded so late in the vacation that the return cannot be conveniently made before term, then it is to be made returnable in court at a day certain. And if the writ be awarded late in term, it may be made returnable in vacation in like manner. The act applies to Ireland as well as England, and the writ may run into counties palatine, linen ports, and privileged places, &c. Berwick-upon-Tweed, and the isles of Guernsey, Jersey, or Man.

The writ of habeas corpus is the privilege of the British subject only, and therefore cannot be obtained by an alien enemy, or a prisoner of war. See the case of the three Spanish sailors, 2 Blk. 1324. 2 Burr. 765. The relief in such cases is by application to the secretary at war. On a commitment by either house of parliament for contempt or breach of privilege, the courts at Westminster cannot discharge a habeas corpus; although on the return of the writ such commitment should appear illegal; for they have no power to control the privileges of parliament. 2 Hawk. c. 15. s. 73. 8 T. R. 314.

The writ of habeas corpus, whether at common law or under 31 Car. II. c. 2, does not issue as a matter of course upon application in the first instance, but must be grounded on an affidavit, upon which the court are to exercise their discretion whether the writ shall issue or not. 3 B. & A. 429. 2 Chitty R. 207. A habeas corpus commissum does not lie to remove proceedings from an inferior jurisdiction, into the court of K. B., unless it appears that the defendant is actually or virtually in the custody of the court below. 1 B. & C. 513. 2 Dowl. & R. 722. The court of K. B. will grant a habeas corpus to the warden of the Fleet, to take a prisoner confined there for debt before a magistrate to be examined from day to day respecting a charge of felony or misdemeanor. 5 B. & A. 730. The court of exchequer will not grant a habeas corpus to enable the defendant in an information, who is confined in a county goal for a libel under the sentence of another court, to attend at Westminster to conduct his defence in person;—the application should be made to the court by whom the defendant was sentenced. 9 Price, 147. Nor will the court of K. B. grant a writ of habeas corpus to bring up a defendant under sentence of imprisonment for a misdemeanor, to enable him to shew cause in person against a rule for a criminal information. 3 B. & A. 679. n. Where there are articles of separation between the husband and wife, if the husband afterwards confines her, she may have a habeas corpus and be set at
PRIVATE WRONGS.

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 shewing 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 shewing 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 a habeas corpus to one confined

(d) 2 Mod. 306. 1 Lev. 1.
(e) Bushell's case, 2 Jen. 13.

13 East. 173 n. A habeas corpus will be granted in the first instance, to bring up an infant who had absconded from his father and was detained by a third person without his consent. 4 Moore, 366. The court will not grant a habeas corpus to bring up the body of a feme-covert on an affidavit that she is desirous of disposing of her separate property, and that her husband will not admit the necessary parties, and that she is confined by illness and not likely to live long; nor will they under such circumstances, grant a rule to shew cause why the necessary parties should not be admitted to see her, for if there be no restraint of personal liberty, the matter is only cognizable in a court of equity. 1 Chitty R. 654. Where application had been made for the discharge of an impressed seaman, before the two years of his protection by the stat. 13 Geo. II. c. 17. were expired; which was then ineffectual, because the facts were not verified with sufficient certaintv; yet the doubt being removed by another affidavit, the court granted a writ of habeas corpus for the purpose of liberating him, though the two years were expired. 8 East. 27. The court on affidavit, suggesting probable cause to believe that a helpless and ignorant female foreigner was exhibited for money without her consent, granted a rule on her keeper to shew cause why a writ of habeas corpus should not issue to bring her before the court, and directed an examination before the coroner and attorney of the court, in the presence of the parties applying and applied against. Ex parte Hottentot Venus, 13 East. 195. The writ will be granted to a military officer under arrest for charges of misconduct, if he be not brought to trial pursuant to the articles of war, as soon as a court-martial can be conveniently assembled, unless the delay is satisfactorily explained. 2 M. & S. 428. The court will grant a habeas corpus to bring up the body of a bastard child within the age of nurture, for the purpose of restoring it to its mother, from whom it had been taken, first by fraud, and then by force, without prejudice to the question of guardianship, which belongs to the lord chancellor. 7 East, 579. Where a prisoner is brought up under a habeas corpus issued at common law, he may controvert the truth of the return by virtue of the 56 Geo. III. c. 100. s. 4. 4 B. & C. 136. Prisoner committed for manslaughter, upon the return of the habeas corpus, was allowed to give bail in the country, by reason of his poverty, which rendered him unable to appear with bail in court. 6 M. & S. 198. 1 B. & A. 209. 2 Chit. Rep. 110.

With respect to the Return. A return in the following words, "I had not at the time of receiving this writ, nor have I since, had the body of A. B. detained in my custody, so that I could not have her, &c." was helden bad, and an attachment was granted against the party who made it. 5 T. R. 89. It seems sufficient to set forth, that the defendant is in custody under the sentence of a court of competent jurisdiction to inquire of the offence and pass such sentence, without setting forth the particular circumstances necessary to warrant such a sentence. 1 East, 306. 5 Dow. 199, 200. The court will not extend matter dehors the return, in support of the sentence or proceeding against the defendant; 2 M. & S. 226. nor go into the merits, but decide upon the return of a regular conviction prima facie. 7 East, 376. Where a defendant was committed by an ecclesiastical judge of appeal for contumacy in not paying costs, and the significance only described the suit to be "a certain cause of appeal and complaint of nullity," without shewing that the defendant was committed for a cause within the jurisdiction of the spiritual judge, it was held, that the defendant was entitled to be discharged on habeas corpus. 5 B. & A. 791. 1 Dowl. & Ry, 460.
by the court of admiralty for piracy; there appearing, upon his own shewing, sufficient grounds to "confine him (g)." On the [*133] other hand, if a probable ground be shewn, 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 shewn 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 [*134] bench, 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 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 a *habeas corpus*, being already made acquainted with the cause of the imprisonment." But this was heard with indignation and astonishment by

(g) 3 Bulstr. 27. See also 2 Roll. Rep. 138.
(h) 2 Inst. 615.
(i) Com. Journ. 1 Apr. 1628.
(k) Book 1. chap. 1.
(l) State Tr. vil. 136.
(m) Ibid. 240.
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 [*135] himself in person, 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 practised 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. [*136] 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 upon 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 (24)


(24) In New-York the writ issues when a person is detained on any pretence, except the following: viz. 1. A commitment under process issued by any judge or court of the U
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 100l. and for the second offence 200l. 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 500l. 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 assises shall be opened [*137] for the county in which he is detained, shall be removed by habeas corpus, till after the assises are ended; but shall be left to the justice of the judges of assise. 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 500l. 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 500l. to be recovered with treble costs; shall be disabled to bear any office of trust or profit; shall incur the penalties of praemunire; 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 remedy the more necessary, because the oppression does not always arise from the ill-nature, but sometimes from the mere inattention of *government. 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 (25).

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


(25) Besides the efficacy of the writ of habeas corpus in liberating the subject from illegal confinement in a public prison, it also extends its influence to remove every unjust restraint of personal freedom in private life, though imposed by a husband or a father; but when women or infants are brought before the court by an habeas corpus, the court will only set them free from an unmerited or unreasonable confinement, and will not determine the validity of a marriage, or the right to the guardianship, but will leave them at liberty to choose where they will go; and if there be any reason to apprehend that they will be seized in returning from the court, they will be sent home under the protection of an officer. But if a child is too young to have any discretion of its own, then the court will deliver it into the custody of its parent, or the person who appears to be its legal guardian. See 3 Burr. 1434. where all the prior cases are considered by lord Mansfield. In a late case (Moore and Fitzgibbon), the court refused to permit an inquiry whether a child born during wedlock was the offspring of the former or the latter, but on a writ of habeas corpus, directed that the child, an infant under three years of age, should be restored to the former, who was the husband of the child's mother. M. T. 1825. K. B. If an equivocal return is made to an habeas corpus, the court will immediately grant an attachment. 5 T. R. 89.
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, are principally three (26): abduction, or taking away a man’s

(26) In ancient times adultery was inquiri-

able in tourns and leets, 3 Inst. 306. and pun-

ished by fine and imprisonment; and so re-

cently as the commencement of the seven-

teenth century, attempts were made by the

legislature to bring this offence within the pale

of criminal jurisdiction;—but they were inef-

fectual. 5th vol. Parl. Hist. 88. During the

commonwealth an act was passed; the provi-

sions of which were, that adultery should be

adjudged as a felony, * and every person, as well

the man as the woman, offending thereby, should

suffer death without benefit of clergy;

provided that this should not extend, first, to

any man who did not know at the time of such

offence committed, that the woman was then

married; or, 2dly, to any woman whose hus-

band should be beyond the seas for three years,

or reputed dead; or, 3dly, to any woman whose

husband should live of himself for three years

in any place, so as the wife should not know her

husband to be living within that time.” See Scobell’s Acts, part 2. p. 121. fo.

ed. But this law was not renewed at the rest-

oration. The damages given to the husband

are generally considerable, though lord Ken-

yon repudiated the idea that they were to be

given so as to operate as a punishment. 5

T. R. 360. If the husband has parted with the right to the society of his wife, absolutely and permanently, it has been said that he cannot support an action for a supposed injury during the separation; but if agree-

ment to separate is only conditional, or tem-

porary, it is otherwise. 5 T. R. 360. Peake

Rep. 7. 6 East. 241. 2 Smith. 356. And if

the husband has consented to, or facilitated the

injury, he cannot sue. Bull. N. P. 27. 2

T. R. 116. 4 T. R. 655. 5 T. R. 360. 3

Wood. 246. volenti non fit injuria. So if the

wife be suffered to live as a prostitute with the

privy of her husband, and the defendant has

been thereby drawn in to commit the act of

which the husband complains, the action can-

not be maintained, Bull. N. P. 27. Peake R.

39; but if the husband is ignorant of her pro-

stitution, then it goes only in mitigation of da-

mages, Bull. N. P. 27; as with negligence

or inattention to the conduct of his wife with

the defendant. 4 T. R. 651. So, according to

lord Kenyon’s opinion, if the husband has

himself been guilty of incontinency, he cannot

sue, 4 Esp. 16; but lord Alvanley, in a subse-

quent case, was of opinion that such conduct

only affected the damages, 4 Esp. R. 237.

The court will not grant a new trial in an ac-

tion for criminal conversation, merely because

the damages appear to them to be excessive,

4 T. R. 651. although they have the power to

do so. Ib. 659. n. (a).

By statute, a wife leaving her husband and

living in adultery with another shall lose her

dower. 2 Inst. 436. The law considers the

wife as incapable of consenting to a crim. con.

7 Mod. 81. F. N. B. 89. On which account

it is probable the usual remedy has been tres-

pass vi et armis, and not merely case, 6 East,

357. Selw. N. P. 18. And the courts seem

to have considered that whatever the form of

the declaration may be, it is in effect case. 2


The husband may not only bring an action for the

criminal conversation, for which he shall be

recompensed in damages, but may also pro-

ceed in the ecclesiastical courts for the adul-

tery, and solicitation of chastity, and the pro-

ceedings in one court shall be no bar to the

other. 4 Bac. Ab. 553. 1 T. R. 6.

Evidence.—The evidence of the fact of adul-

tery, which, from its very nature, is usually

circumstantial, must be sufficient to satisfy

the jury that an adulterous intercourse has actu-

ally taken place. Proof of familiarities, how-

ever indecent, is insufficient if there be reason

to apprehend, from the fact of the parties be-

ing interrupted, or on any other circumstance,

that a criminal conversation has not taken

place. Stark. on Evid. 2 vol. 440. Where

the statute of limitations has been pleaded, so

as to exclude the recovery of damages for

adulterous intercourse, which took place a

greater distance of time than six years previ-

ous to the commencement of the action, it has

been held, that anterior acts of adultery are

evidence for the purpose of showing the na-

ture of the connexion which subsisted within

six years. 8 St. Tr. 35. The confession of

the wife will be no evidence against the de-

fendant, Bull. N. P. 28, but a discourse be-

tween the wife and the defendant is evidence,

as also are letters written by the defendant to

the wife. Stark. on Evid. 2 vol. 441. The

defendant may shew in mitigation of damages,

that the wife had before eloped, or had been

connected with another, when she had borne a

bastard before marriage, Bull. N. P. 296. that

she had been a prostitute previous to her con-

nexion with the defendant, ib. 27; but it is

there laid down, that the defendant cannot
give evidence of the general reputation of her

being, or having been, a prostitute, for that

may have been occasioned by her familiarity.
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 imprisoned two years, and be fined at the pleasure of the king. Both the king and the husband may therefore have this action (u); 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, where- in the damages recovered are usually very large and exemplary. But these are properly increased and diminished by circumstances (a); as the rank and fortune of the plaintiff and defendant; the relation or [*140 ] connexion between them; the seduction or otherwise of 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). 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 mal-treatment 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 amissit; in which he shall recover a satisfaction in damages (c).

II. Injuries that may be offered to a person considered in the relation

(t) F. N. B. 59.
(u) 2 Inst. 434.
(a) Ibid.
(c) Law of nisi prius, 74.
(y) Bro. Abr. t. trespass, 213.
(z) Bro. Abr. 207. 440.
(a) Law of nisi prius, 26.
(b) Burr. 2967.
(c) Cro. Jec. 501. 538.

with the defendant; though perhaps having laid a foundation, by proving her being ac- quainted with other men, such general evi- dence may be admitted. Stark. on Evid. 2 vol. 244. n. For the same purpose he may also give in evidence, that she was a woman of loose conduct, and notoriously bad charac- ter; that she made the first overtures and ad- ventures to the defendant, 2 Esp. R. 562. 1 Sel. N. P. 25. that his means and expectations are inconsiderable.
of a parent (27) were likewise of two kinds: 1. *Abduction*, or taking his children 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 father to take "away the rest of his children, as well as his heir (as [*141 ] 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, rapto vel abducto* (e); in the same manner as the husband may have it, on account of the abduction of his wife.

(d) Cro. Eliz. 770.  
(e) F. N. B. 90.

(27) See in general, Bac. Ab. Master & Servant, O. Selw. N. P. Master & Servant. It has been disputed, but the better opinion is, that the father has an interest in his legitimate child, sufficient to enable him to support an action in that character, for taking the child away, he being entitled to the custody of it. Cro. Eliz. 770. 23 Vin. 451. 2 P. W. 116. 3 Co. 38. 5 East, 221. No modern instance of such action can be adduced, and it is now usual for the father to bring his action for an injury done to his child, as for debauching her, or beating him in the character of master, *per quod servitium amisit*, in which case some evidence must be adduced of service. 5 T. R. 360, 1. See post, 142. note 29.

In an action for debauching plaintiff's daughter, as his servant, it is necessary to prove her residence with him, and some acts of service, though the most trifling are sufficient. See 2 T. R. 167. 2 N. R. 476. 6 East, 357. It is unnecessary to prove any contract of service. Peake's R. 253. But if the seduction take place while she is residing elsewhere, and she in consequence return to her father, he cannot maintain the action, 5 East, 451; unless she be absent with his consent, and with the intention of returning, although she be of age, ib. 47. n.; or if the defendant engaged her as his servant, and induced her to live in his house as such, with intent to seduce her. 2 Starkie Rep. 493. If she live in another family, the person with whom she resides may maintain the action, 11 East, 24. 5 East, 45. 2 T. R. 4. and the jury are not limited in their verdict to the mere loss of service. 11 East, 24. The daughter is a competent witness, 2 Stra. 1064. and though not essential, the omission to call her would be open to observation. Holt's R. 451. Expenses actually incurred should be proved, and a physician's fee, unless actually paid, cannot be recovered. 1 Starkie R. 257. The state and situation of the family at the time should be proved in aggravation of damages, 3 Esp. R. 119; and if so, that the defendant resided to visit the family, and was received as the suitor of the daughter. 5 Price, 641. It has been said, that evidence to prove that defendant prevailed by a promise of marriage, is inadmissible. 3 Camp. 519. Peake L. E. 355. See 5 Price, 641. And no evidence of the daughter's general character for chastity is admissible, unless it is impugned. 1 Camp. 460. 3 Camp. 519. The defendant may, in mitigation of damages, adduce any evidence of the improper, negligent, and imprudent conduct of the plaintiff himself; as where he knew that defendant was a married man, and allowed his visits in the probability of a divorce, lord Kenyon held the action could not be maintained. Peake R. 240. And evidence may be given on an inquisition of damages in an action for seduction, that the defendant visited at the plaintiff's house for the purpose of paying his addresses to the daughter, with an intention of marriage. 5 Price, 641.

† In 1 Wendell, 447, it is decided that if the daughter be of age she must be in her father's service, so as to constitute in law and in fact, the relation of master and servant, in order to entitle her father to an action for seducing her. If she be under age, she is presumed to be under his control and protection so as to entitle him to the action, whether she actually resides with him or not.
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 a guardian in socage was also entitled at common law to a writ of right of ward, de custodia terrae et haeredis, 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 right. 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) (28).

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 to the first, the retaining another person's servant during the time he has agreed to serve his present master; this, as it is an 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 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 apprized 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 labour 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 (29). A similar practice to which, we find also to have obtained

(f) F. N. B. 139.
(g) Ibid.
(h) Hale on F. N. B. 139.
(i) F. N. B. 139.
(k) 2 P. Wms. 168.
(l) F. N. B. 167.
(m) Ibid. Winch. 51.

(28) 2 R. S. 150, § 3.
(29) Even in case of debauching, beating, or injuring a child, the father cannot sue without alleging and proving that he sustained some loss of service, or at least that he was obliged to incur expense in endeavouring to cure his child. 5 East, 45. 6 East, 391. 11 East, 23. Sir T. Raym. 259. And if it appear in evidence that the child was of such tender years as to be incapable of affording any assistance, then he cannot sustain any action. The rules and principles in support of
among the Athenians; where masters were entitled to an action against such as beat or ill-treated their servants (o) (30).

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 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 any thing 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 (31), and which will


this doctrine were elucidated in the recent case of Hall v. Hollander, decided 14th November, 1825, M. T., and in which the plaintiff declared in trespass, for driving a chaise on the highway against plaintiff's son and servant, by means whereof he was thrown down, and his skull fractured.

The lord chief justice was of opinion that the action could not be maintained in this form, inasmuch as the declaration was founded upon the loss of the services of a child who, from his tender years, (being only two years of age), was incapable of performing any acts of service, and therefore directed a nonsuit: which was confirmed by the court. See, however, note (†) p. 140, ante.

(30) It appears to be a remarkable omission in the law of England, which with such scrupulous solicitude guards the rights of individuals, and secures the morals and good order of the community, that it should have afforded so little protection to female chastity. It is true that it has defended it by the punishment of death from force and violence, but has left it exposed to perhaps greater danger from the artifices and solicitations of seduction. In no case whatever, unless she has had a promise of marriage, can a woman herself obtain any reparation for the injury she has sustained from the seducer of her virtue. And even where her weakness and credulity have been imposed upon by the most solemn promises of marriage, unless they have been overheard or made in writing, she cannot recover any compensation, being incapable of giving evidence in her own cause. Nor can a parent maintain any action in the temporal courts against the person who has done this wrong to his family, and to his honour and happiness, but by stating and proving, that from the consequences of the seduction his daughter is less able to assist him as a servant, or that the seducer in the pursuit of his daughter was a trespasser upon his premises. Hence no action can be maintained for the seduction of a daughter, which is not attended with a loss of service or an injury to property. Therefore, in that action for seduction which is in most general use, viz. a per quod servitium amissit, the father must prove that his daughter, when seduced, actually assisted in some degree, however inconsiderable, in the houswifery of his family; and that she has been rendered less serviceable to him by her pregnancy; or the action would probably be sustained upon the evidence of a consumption or any other disorder, contracted by the daughter, in consequence of her seduction, or of her shame and sorrow for the violation of her honour. It is immaterial what is the age of the daughter, but it is necessary that at the time of the seduction she should be living in, or be considered part of, her father's family. 4 Burr. 1573. 3 Wils. 18. It should seem that this action may be brought by a grandfather, brother, uncle, aunt, or any relation under the protection of whom, in loco parentis, a woman resides; especially if the case be such that she can bring no action herself; but the courts would not permit a person to be punished twice by exemplary damages for the same injury. 2 T. R. 4.

Another action for seduction is a common action for trespass, which may be brought when the seducer has illegally entered the father's house; in which action the debauching his daughter may be stated and proved as an aggravation of the trespass. 2 T. R. 166. Or where the seducer carries off the daughter from the father's house, an action might be brought for enticing away his servant, though I have never known an instance of an action of this nature.

In the two last-mentioned actions the seduction may be proved, though it may not have been followed by the consequences of pregnancy.

These are the only actions which have been extended by the modern ingenuity of the courts, to enable an unhappy parent to recover a recompense, under certain circumstances, for the injury he has sustained by the seduction of his daughter.

(31) Now abolished by statute 59 Geo. III. c. 46.
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.

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 moveable 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 immoveable; 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 emotion 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.

[*145] 1. And first of an unlawful taking. The right of property in all 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 have once 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 possessions 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

(a) See book II. ch. 2.  (b) Book II. c. 25.
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), (2); an institution, which

(1) See in general, Com. Dig. Replevin; Bac. Ab. Replevin and Avowry; Vin. Ab. Replevin; Gilbert on Distresses, by Hunt; Bradby on Distresses; Selw. N. P. 1155. and Wilkinson on Replevin; and see, as to distresses, the notes ante, 5 to 10.

A replevin in general lies only for goods and chattels, and it cannot be maintained for taking and removing things affixed to the freehold, even though wrongfully separated therefrom by the defendant. Co Lit. 146 b. 4 T. R. 504. But growing crops may be considered in the nature of goods and chattels, being under 11 Geo. II. c. 19, distrainable; therefore where a replevin bond was to prosecute for taking his goods and chattels, and growing crops, and in the declaration it was set out as to prosecute for "goods and chattels," it was held to be no variance. 7 Moore, 231. 1 Bing. 6.

It is said by the learned Commentator, in the text, that the action of replevin obtains only in one instance of an unlawful taking; that of a wrongful distress. But lord Redesdale remarked in 1 Sch. & Lef. 327. that this definition is too narrow, and many old authorities will be found in the books, of a replevin where there had been no distress. See Vin. Ab. Replevin, B. & C. 2. Com. Dig. Replevin. Replevin is now seldom brought but for distresses for rent, damage-feasant, poor's rate, &c. Com. Dig. Action, M. 6. It may certainly be brought to try the legality of a distress for rent, provided there were no sum whatever in arrear, 5 T. R. 248. n. c. 3 B. & P. 348; but if any sum, however small, were due, and the distress were for a greater sum, or excessive, or otherwise irregular, the remedy must be by action on the case. 1 Hen. Bla. 13. Replevin lies also for an illegal distress taken damage-feasant; and when the party in possession of the goods has no title thereto, this action is preferable to trespass for seizing the cattle, in order to put in issue the title of the party distraining. 1 Saund. 346. c. n. 2. So, to try the legality of a distress for poor rates, 3 Wils. 442. 1 Sumt. 295. 2 Bl. Rep. 1330. 1 Burr. 555. Willes, 672. b.; or of one of the several rates where the distress warrant includes a supposed arrear of several rates, 2 Moore, 417; or for sewer's rate, 6 T. R. 552. Hardw. 478. Com. Dig. Plediar, K. 26. Willes, 672. n. b.; or for a heriot, &c. Cro. Jac. 50. But if a superior court award an execution, it seems that no replevin lies for the goods distrained, and if the execution is maintained, and if any person shall pretend to take out a replevin, the court would commit him for a contempt of their jurisdiction, Gilb. Rep. 161. Willes, 672. n. b. 2 Lutw. 1191. 3 Lev. 204. 2 Stra. 1184; and where goods are taken by way of levy, as for a penalty on a conviction under a statute, it is generally in the nature of an execution, and unless replevin be given by the statute this action will not lie, the conviction being conclusive, and its legality not questionable in replevin, 2 New. Rep. 399. Bac. Ab. Replevin, (C) Com. Dig. Action, M. 6. Willes, 673. n. b. 1 Brod. & Bing. 57.; but where a special inferior jurisdiction is given to justices, &c. and they exceed it in some cases, replevin lies. Willes, 672. n. b. This action is also maintainable for goods distrained under a warrant from commissioners authorized by act of parliament to levy rates for specific local purposes, with power of distress. 1 Swanst. 304. 1 B. & B. 57.

The plaintiff ought to have either an absolute or special property in the goods in question, vested in him at the time of the taking. Bro. Repl. pl. 8. 20. A mere possessor right to the property if a return be adjudged, and to pay the amount that may be recovered.

The sheriff then delivers the property to the plaintiff, and gives notice to the defendant thereof, and of the time at which he is to appear in court to resist the plaintiff's claim. The sheriff, after demand of delivery of the goods, may break open any house in which they are concealed. If he cannot obtain the goods, he arrests the defendant until he enters into bond with two sureties to abide the order of the court, and to put in special bail.

If the defendant claims property in the goods, and pays to the sheriff his fees and the fees of a jury to try the claim, he may have his title tried before such jury; and in the mean time the goods remain in the custody of the sheriff. If the jury find for the defendant, he receives back again the goods: if the jury find for the plaintiff, the plaintiff, on refunding the expenses and indemnifying the sheriff, receives the goods.

See the other proceedings, 2 R. S. 522, &c.
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 (3); 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 it is a maxim that “lex neminem cogit ad vana, seu impossibilita,” it there-fore * contents itself in general with restoring, not the thing itself, but a 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 distreinor; 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 distreinor has a remedy in damages, either by writ of rescous (d), in case they were going to the pound, or by writ de pareo fractor, 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

(c) c. 2, 6 6.  (d) F. N. B. 101.  

is not sufficient. 10 Mod. 235. If the goods of a feme-sole are taken, and she marry, the husband alone may sue the replevin, or the wife may join, R. T. Hardw. 119; but it must appear on the face of the record that she held an interest in the things taken. 2 New. R. 402. Executors may maintain replevin for the goods of the testator taken in his lifetime. Bro. Repl. pl. 59. And parties who have a joint interest in the distress may join in the replevin, Co. Lit. 145. b; but where the interest is several, there ought to be several replevins. Bro. Abr. Repl. pl. 12. While the goods distrained for rent remain unsold, the tenant may replevy, although the five days allowed by the act have expired, and although they have been appraised and removed off the premises. 5 Taunt. 451. 1 Marsh. 135. 1 Chitty R. 196. a.  

Replevin Bonds.—Two modes have been adopted by sheriffs or other officers making replevins with respect to bonds; the first to take a bond from the pledges or sureties, Dalton’s Sheriff, 438. 9. Lord Raym. 278. Lutw. 687; the other method has been to take a bond from the party repleving. In all replevin bonds there are several independent conditions: one to prosecute, another to return the goods repleived, and a third to indemnify the sheriff, and a breach may be assigned upon any of these distinct conditions. 7 Mod. 380. Or the breach may be assigned thus, “that defendant did not prosecute his suit with effect, and hath not made return.” 3 M. & S. 180. A plaintiff must succeed in his suit, or he does not “prosecute with effect.” 7 Mod. 380. The sheriff may assign the bond to the avowant or cognizor, who may maintain an action upon it in the superior courts. 5 T. R. 195. The sureties are liable to the amount of the penalty in the bond and costs of suit thereon. 1 Taunt. 218. They will not be discharged by time being given to the plaintiff in replevin, 2 Marsh. 81. 6 Taunt. 379. S. C.; nor by the execution of a writ of inquiry, under the 17 Car. II. c. 19. s. 23. 2 Brod. & Bing. 107.  

When the defendant has obtained judgment, if the sheriff return to the writ de retorno ha-bendo, that the cattle are elounded, the defendant may, if the sheriff has omitted to take sufficient pledges, C. 446. Sir W. Jones, 278. 7 Mod. 387. Bull. N. P. 60. 3 Stark. 168. immediately without any previous proceedings, commence an action on the case against him. Ib. But the court will not attach him. 2 T. R. 617. In such action double the value of the goods distrained may be recovered against the sheriff, 2 H. Bl. 547, though it had been held in a previous case, that he should recover a full compensation in damages, though the sum exceeded in amount double the value the amount of the penalty in a replevin bond. 2 H. Bl. 36. See however a later case, 4 T. R. 433. where the value of the goods only was given. The court has upon the sheriff and his deputy refusing to disclose the names of the pledges taken, made an order on them, to pay the defendant in replevin the damages and costs recovered by him. 2 Bl. Rep. 1220.  

(3) This position is not correct; replevin lies in other cases of illegal taking. See cases 1 Chitty on Pl. 147. 4th ed. ante, 145.

notes 1, 2.
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): 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 re-delivery 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 (k); after which the distressor may keep it, till tender made of sufficient amends: but must then re-deliver it to the owner (l). And formerly, when the party distreined 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* (m); 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 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 (n). For which reason the statute of Marlbridge (o) 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. & 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 replevyng will pursue his action against the distressor, for which purpose he puts in plegios de prosequendo, or pleads 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 distreined, 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 (4). And certainly, as the end of all distresses is only to compel the party distreined upon to satisfy the debt or duty owing from him, this end is as well answered 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 distreined.

(b) See pag. 13.
(c) Co. Litt. 145.
(d) F. N. B. 68.
(e) 5 Inst. 139.
(f) 8 Rep. 147.
(g) 2 Inst. 139.
(h) 52 Hen. III. c. 21.

(4) See accordingly, 2 R. S. 526, § 27.
upon; unless the distreinor claims a property in the goods so taken. For if, by this method of distress, the distreinor * 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 gained possession; being a kind of personal remitter (o). If therefore the distreinor claims any such property, the party repleving 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 distreinor, 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 (g) (5).

But if no claim of property be put in, or if (upon trial) the sheriff's inquest determines it against the distreinor; then the sheriff is to replevy the goods (making use of even force, if the distreinor 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 repleving 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 distreinor, in lieu of the distress formerly taken, and eloigned, or withheld from the owner (t). So that here 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 distreinor. For which reason goods taken in withernam cannot be repleved till the original distress is forthcoming (v).

[*149] *But in common cases, the goods are delivered back to the party repleving, 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 (6). Upon this action brought, and declaration delivered, the distreinor, who is now the defend-

(o) See pag. 19.
(p) Finch L. 316.
(q) Co. Litt. 145. Finch L. 450.
(r) 2 Inst. 193.
(s) Smith's Commonw. b. 3, c. 10. 2 Inst. 141.
(t) Hickes's Treasur. 164.
(u) F. N. B. 69, 73.
(v) In the old northern languages the word withernam is used as equivalent to reprisals. (Sternhook, de jure Saxon. l. 1. c. 10.)
(w) Raym. 475. The substance of this rule composed the terms of that famous question, with which sir Thomas More (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 any science: in omni scibili, et de quotidii ente. Upon which Mr. More sent him this question, "utrum avera carumae, capta in vetito namio, sint terrepleviales?" whether beasts of the plough, taken in withernam, are incapable of being repleved. (Hoddesd. c. 5.)
(x) 2 Inst. 139.
(y) Ibid. 23.
(z) F. N. B. 69, 70.

(5) See note 2, p. 145: the return of an eloignment would not be allowed under the Revised Statutes: and the capias in withernam is abolished, (2 R. S. 533, § 63,) as also all writs of second deliverance. 1d.
(6) In New-York, writs of replevin issue from, and are returnable only into the Supreme Court or Common Pleas Court; and are removable by either party from the Common Pleas to the Supreme Court by certiorari as other personal actions. (2 R. S. 533, § 68: 389, § 4: 523, § 6.)
ant, 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 *arrears*, 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 disrein; 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 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 disreined and then repleived) 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, from [*150*] 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 arrears, 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 disreined for, the defendant may take a farther distress or distresses (e) (7). But otherwise, if, pending a replevin for a former distress, a man disreins again for the same rent or service, then the party is not driven to his action of replevin, but shall have a writ of *reception* (f), and recover damages for the defendant the re-distreinor'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 trans-

---

(a) 2 Saund. 195.
(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.

(7) See 2 R. S. 531, § 56: similar to 17 *Car.* II. c. 7. But by the Revised Statutes, 2 vol. 533, § 62, when judgment passes against the plaintiff in replevin by *default* or otherwise, and a return of the property is awarded; *no writ of second deliverance, nor other writ of replevin, is allowed*; but the plaintiff may bring an action of trover or trespass, unless the judgment was on the merits.
["151] gression, 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 (8). Or, if 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 (9). As if I distress 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 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 (10), 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 a 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 (k). But there is one disadvantage which attends this action; viz. that the defendant is herein permitted to wage his law,

[*152] that is, to exculpate himself by oath (l), 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 disputed, and has given place to the action of trover. This action of trover (11) and conversion was in its original an action of

\[ (g) \text{ F. N. B. 69. 3 Rep. 147.} \]
\[ (h) \text{ F. N. B. 138.} \]
\[ (i) \text{ Co. Litt. 286.} \]
\[ (j) \text{ Co. Enr. 170. Cro. Jac. 681.} \]
\[ (l) \text{ Co. Litt. 295.} \]

(8) In order to sustain trespass for taking goods, the actual or constructive possession must be vested in the plaintiff at the time the act complained of was done. For instance, the lord before seizure may bring the action against a stranger who should carry off an estray or wreck; for the right of possession, and thence the constructive possession, is in him. So the executor has the right immediately on the death of the testator, and the right draws after it a constructive possession. 1 T. R. 485. 2 Saund. 47. in notes. See: 1 Chitty on Pl. 4th ed. 151 to 159.

(9) As to the action of detinue in general, see Com. Dig. Detinue; 1 Chitty on Pl. 4th ed. 110 to 114. It has been supposed that detinue is not sustainable where the goods have been taken tortuously by the defendant, but that doctrine is erroneous, and it is the proper specific remedy for the recovery of the identical chattels personal, when they have not been taken as a distress. See cases and observations, 1 Chitty on Pl. 4th ed. 112, 3.

(10) In New-York this action is abolished, (2 R. S. 553, § 15.) replevin fully supplying its place.

(11) On the action of trover in general, see 1 Chitty's Pl. 4th ed. 135 to 145. Absolute
tresspass 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

and exclusive property, with actual possession, is not necessary; for a factor to whom goods have been consigned, and who has never received them, may maintain such an action. 1 Bos. & Pul. 47. But in order to maintain a trover, the plaintiff must have a right of property (though special and subject to the claims of others) and a right of immediate possession, (as the owner has against a wrongdoer, where the goods have been delivered to a carrier), 7 T. R. 12; and therefore where goods leased, as furniture with a house, have been wrongfully taken by the sheriff in execution, the lessee cannot maintain against the sheriff pending the lease, because till the term has expired he has no right of possession. lb. 9. 1 Ry. & Mood. 99. But the landlord may maintain trover against a purchaser of machinery taken out of a mill, and afterwards sold under a fi. fa. by the sheriff, although the tenant's term has not expired. 5 B. & A. 826. 2 Dow! & Ry. 1. And against a man who uses a cow on his farm, the possession is usually sufficient evidence of ownership. 7 T. R. 397. 2 Taunt. 302. 4 East. 130. 5 Esp. R. 88. Abbott's L. S. 73. So bailees of goods, 2 Bing. 173. Ld. Raym. 275. B. N. P. 33. 1 Mod. 31. Stra. 505. as carriers, assignees, pawns, trustees, 2 Saund. 47. a, agisters of cattle, one who borrows a horse to till his land, Bro. Tras. 67. and churchwardens, 2 Stra. 852. 2 P. Wms. 126. 2 Saund. 47. c. may maintain this action against any one who converts the property. But a special property, which may be sufficient as against a stranger, gives no right against one who has the general property. 1 T. R. 659. Where the sheriff under a writ of fi. fa. against A., sells the goods of B., though by palpable fraud, the purchaser is liable to the latter in trover. 3 Stark. 130. 5 B. & A. 826. 2 Dow! & R. 1. S. P. Where A. shipped goods by the order of, and for B. in London, and shortly afterwards ascertained that B. had stopped payment, and he then indorsed and forwarded the bill of lading to the plaintiff, directing him to take possession of the goods, held that on the defendants' (the carriers') refusal to deliver them to the plaintiff, he had a sufficient title to sue for them in trover. 2 Bing. 260. See also 5 M. & S. 350. as between vendor, and assignee of factor to the vendee. And where a purchase was made for A. and B. by a broker, who, after a division of the goods, pledged the warrants of B., with those of A., to C. for a debt of A., it was held that B. might maintain trover against C. 6 McV. 400. But it did not appear that B. had any interest in the warrants; the broker having no power to pledge them. 3 B. & A. 395. As between foreign merchant and pledgee of his consignee, see 5 Moore, 518. n. And where a customer of a country bank was in the habit of paying in bills of exchange, which were never written short, but entered to the full amount in the pass-book on the day they were paid in, and also in the books of the bank to the credit of the cus-

tomer, as "bills" (not as cash), and after such entry the customer was at liberty to draw to the full amount by checks, and the bankers became insolvent, having in their possession several of the customer's bills so paid in, and the assignees having converted the same to their use, it was held that the customer (who had a cash balance in his favour at the time of the bankruptcy) might maintain trover against the latter for the amount, there being no evidence that he had in point of fact agreed, that when the bills were paid in, they were to become the property of the bankers. 2 B. & C. 422. Dowl. & Ry. 733. But an exchequer bill (the blank in which was not filled up) having been placed for sale in the hands of J. S. he, instead of selling, deposited it at his banker's, who made him advances to the amount of its value, held that the owner thereof could not maintain trover against the banker, as the property in such bill passed by delivery, as in the cases of bank notes and bills of exchange. 2 Bing. & 30. churchwardens and overseers of a township leased lands belonging to the poor to the plaintiff, for a term of years, covenanting that it should be lawful for him to take all the manure, &c. from the poor-house, and use it upon the demised premises, and the plaintiff covenanted to provide straw for the use of the poor; it was decided that he could not maintain trover against a succeeding overseer, who used the manure on his own land, even though it arose from the straw supplied by the plaintiff, as the covenant entered into with the previous overseers could not bind their successors. 3 Stark. 29. An insolvent debtor cannot maintain trover for plate, although his assignees do not interfere to prevent him. 1 Carr. 146.

A conversion seems to consist in any tortious act, by which the defendant deprives the plaintiff of his goods, either wholly, or but for a time. 3 B. & A. 685. The mere abuse of a chattel by a bailee is no conversion, Gil. L. Ev. 365. ed., but, if he use it contrary to the design of the bailment, it is otherwise; as if a man lend his horse to go to York, and the bailee go to Carlisle. 2 Bulst. 309. But nonfeasance is not a conversion, 2 B. & P. 438; as that an agent employed to sell goods has neglected to sell them. If the goods come to the hands of the defendant by delivery, finding, or bailment, a demand and refusal should be proved at the trial, but in cases of tortious taking or actual conversion, proof of demand and refusal is unnecessary. 1 Sid. 284. The ordinary and sufficient proof of a conversion consists in evidence of a demand of the goods by the plaintiff, and a refusal to deliver them by the defendant, 6 Mod. 212. 6 East. 540. 5 East, 407. but the court cannot infer a conversion from such proof, it must be found by the jury. 2 Mod. 242. 10 Coke, 57. 2 Roll. Ab. 693. 1 T. R. 473. Hob. 181. If the refusal be absolute, and there be no evidence to justify or explain it, the jury ought to find a conversion. 1 Esp. R. 31. Clay. 122. pl. 114. But
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 for ever unknown (m): and therefore he must not convert them to his own use, which the law presumes him to do, if he refuses them to the owner: for which reason such refusal also 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 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*.

[*153*] *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, poisoning his cattle, or in any wise 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 (12); 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) (13).*  

---

(l) Salk. 654.  
(n) 10 Rep. 56.  
(o) Noy's Max. c. 44.  

A qualified refusal, as, because the holder does not know to whom the goods belong, 1 Esp. R. 53. 2 Buls. 312. B. N. P. 45; or that the claimant has not proved his right, 3 Camp. 215; or a servant refusing to deliver them, without an order from his employers, 5 B. & A. 247. or referring the plaintiff to his master, ib. or a false assertion of a carrier, that he has delivered the goods, 1 Camp. 409; in all these cases the facts do not amount to a conversion. An incorporated company may be guilty of a conversion by the act of their agent, done under the orders of the committee of management. 3 Stark. 50.

(12) Or in New-York, by 2 R. S. 553, § 16. case may be brought.  
(13) As to what is evidence of knowledge, see 4 Camp. 198. 2 Strom. 1264. 2 Esp. 482. But the owner is not answerable for the first mischief done by a dog, a bull, or other tame animal. Bull. N. P. 77. 12 Mod. 332. Ld. Raym. 608. Yet if he should carry his dog into a field, where he himself is a trespasser, and the dog should kill sheep, this, though the first offence, might be stated and proved as an aggravation of the trespass. Burr. 2092. 2 Lev. 172. But where a fierce and vicious dog is kept chained for the defence of the premi-
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 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 specifical 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 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 30l., I am not at liberty to prove a debt of 20l. 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 (14). But in an action on the case,

(q) See book II. ch. 30.  
(r) F. N. B. 119.  
(t) See Appendix, No. III. 4 1.

304.  
(14) This is no longer the case, for it is now completely settled, that the plaintiff in an action of debt may prove and recover less than the sum demanded in the writ. See 2 Bla. R. 1221. 1 Hen. Bla. 249. 11 East. 62. The judgment being final in the first instance (seeing a writ of injury and wager of law having become almost obsolete), renders debt on simple contract, as well as specialty, a favourite form of action, and is of daily occurrence. See 398. and notes, post.
on what is called an indebitatus assumpsit, which is not brought to compel a specific performance 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 30l. *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 shew 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 a 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 an 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* *(x)*; and is followed by the very same judgment *(v)*.

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 [*156]* day, or not to exercise 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 shew 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 proportion 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

*(w)* F. N. B. 119. *(y)* F. N. B. 145.

(15) See note 10, p. 152. ante.
that is a covenant \textit{real}, to convey or dispose of lands, which seems to be partly of a personal and partly of a real nature \((a)\). 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 complexion of which he brings this action. And, for the end of this supposed difference, the fine or \textit{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 \((b)\). And moreover, as leases for years were formerly considered only as contracts \((b)\) or covenants for the enjoyment of the rents and profits, and not as the conveyance *of* any real interest in the land, the \textit{ancient remedy 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 \((17)\).

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 \textit{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 \textit{assumpsit}; and shall recover a pecuniary satisfaction for the injury sustained by such delay \((18)\).

\((a)\) Hal. on F. N. B. 146.  
\((b)\) See book II. ch. 9.  
\((c)\) Bro. Abr. t. covenant, 33. F. N. B. 476.  

\((16)\) Fines are now abolished in New-York.  
\((17)\) See 1 R. S. 747, § 23, 24.  
\((18)\) "It is worthy of remark, that the learned Commentator has not either named, described, or even alluded to the consideration requisite to support an \textit{assumpsit}; and, what is more remarkable, the example put by him in the text-in order to illustrate the nature of the action, is, in the terms in which..."
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 indorsees (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 (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 [*158] five 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 (19), (20).

(e) 4 Rep. 99.

is there stated, a case of nulsum pactum. See 1 Roll. Ab. 9. 1. 41. Dict. & Stud. 2. ch. 24. and 5 T. R. 143. that the promise will not lie for a mere nonfeasance, unless the promise is founded on a consideration. This remark ought not, neither was it intended, to derogate from the merit of a justly celebrated writer, who, for comprehensive design, luminous arrangement, and elegance of diction, is unrivalled." Selw. N. P. 45.

(19) These provisions in the statute have produced many decisions, both in the courts of law and equity. See 3 Chitty's Com. L. per tot. It is now settled, that if two persons go to a shop, and one order goods, and the other say, "if he does not pay I will," or "I will see you paid," he is not bound unless his engagement is reduced into writing. In all such cases the question is, who is the buyer, or to whom the credit is given, and who is the surety: and that question, from all the circumstances, must be ascertained by the jury: for if the person for whose use the goods are furnished be liable at all, any promise by a third person to discharge the debt must be in writing, otherwise it is void. 2 T. R. 80. H. Bl. Rep. 120. 1 Bos. & Pul. 158. Mutual promises to marry need not be in writing; the statute relates only to agreements made in consideration of the marriage. A lease not exceeding three years from the making thereof, and in which the rent reserved amounts to two-thirds of the improved value, is good without writing; but all other parol leases or agreements for any interest in lands, have the effect of estates at will only. Bull. N. P. 279. All declarations of trusts, except such as result by implication of law, must be made in writing. 29 Car. II. c. 3. s. 7 & 8. If a promise depends upon a contingency, which may or may not fall within a year, it is not within the statute; as a promise to pay a sum of money upon a death or marriage, or upon the return of a ship, or to leave a legacy by will, is good by parol; for such a promise may by possibility be performed within the year. 3 Burr. 1278. 1 Salk. 280. 3 Salk. 9, &c. Partial performance within the year, where the original understanding is, that the whole is to extend to a longer period, does not take uses the word "signed" where ours uses "subscribed."—In other respects they are alike. Ours was probably intended as a repeal of the decisions construing a memorandum with a man's name written on it, a signature, though not written at the foot of the memorandum.

Leases, or contracts for leases, for a longer period than one year in New-York, must be in writing. (Id. 134, § 6: 135, § 8.)

See as to executors, 2 R. S. 113, § 1.
PRIVATE WRONGS.

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 certain sum, and neglects to take out execution *thereupon, he [*159] 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 shewing 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 judgment 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 bye-laws and private ordinances of a corporation upon

(g) Roll. Abr. 600, 601.

the case out of the statute. 11 East, 142. But even a written undertaking to pay the debt of another is void, unless a good consideration appears in the writing, and the consideration, if any, cannot be proved by parol evidence. 5 East, 10. If a growing crop is purchased without writing, the agreement, before part execution, may be put an end to by parol notice. 6 East, 602. But a court of equity will decree a specific performance of a verbal contract, when it is confessed by a defendant in his answer; or when there has been a part performance of it; as by payment of part of the consideration money, or by entering and expending money upon the estate, for such acts preclude the party from denying the existence of the contract, and prove that there can be no fraud or perjury in obtaining the execution of it. 3 Ves. Jun. 39. 378. & 712. But lord Eldon seems to think that a specific performance cannot be decreed, if the defendant in his answer admits a parol agreement, and at the same time insists upon the benefit of the statute. 6 Ves. Jun. 37. If one party only signs an agreement, he is bound by it; and if an agreement is by parol, but it is agreed it shall be reduced into writing, and this is prevented by the fraud of one of the parties, performance of it will be decreed. 2 Bro. 564, 5, 6. See 3 Woodd. Lect. ivii. and Fonblanque Tr. of Eq. b. 1 c. 3. s. 8 & 9. where this subject is fully and learnedly discussed.
any that belong to the body, or an amercement set in a court-leet or court-baron upon any of 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 [*160] 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 former 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 (21). 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 forestall 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 [*161] borrowed from *the rule of the Roman law, that if a person was acquitted of any accusation, merely by the prevarrication 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

---

(h) Law of nisi prius, 155. 
(i) 5 Rep. 54. Hob. 279. 
(k) 13 Edw. I. c. 1. 
(l) 27 Eliz. c. 13. 29 Car. II. c. 7. 8 Geo. II. c. 
(m) See book II. ch. 29. 
(n) 2 Hawk. P. c. 268. 
(o) Eyn. 47. 15. 3.

(21) See 3 Geo. IV. c. 3, and 7 & 8 Geo. IV. c. 3, and book 4, p. 293.
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 my 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 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 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 [162] and 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 aequo 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) (22).

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); com-

(p) 4 Burr. 1012.
(q) Carth. 446. 2. Keb. 90.
(r) F. N. B. 116.

(22) If a surety in a bond pays the debt of the principal, he may recover it back from the principal in an action of assumpsit, for so much money paid and advanced to his use; yet in ancient times this action could not be maintained; and it is said, that the first case of the kind in which the plaintiff succeeded, was tried before the late Mr. J. Gould, at Dorchester. But this is perfectly consistent with the equitable principles of an assumpsit. 2 T. R. 106.
manding the defendant to render a just account to the plaintiff, [*163] or shew 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 (23). 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. Therefore 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.

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 therefore 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 mis-feasance; as, if the sheriff does not execute a writ sent to him, or if he willfully 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 a sheriff or goaler suffers a prisoner, who is taken up on mesne process (that is, during the pendency of a suit), to escape, he is liable to an action on the case (u). But if, after judgment, a goaler 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 statute 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). 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 taylor, 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). But if I employ a person to transact any of these concerns, whose common pro-

---

(s) Co. Litt. 90.  
(t) Moor. 431. 11 Rep. 99.  
(w) Cro. Eliz. 625. Comb. 69.  
(u) Bro. Abr. t. parliament, 19. 2 Inst. 382.  
(x) Finch. L. 188.  
(y) 11 Rep. 54. 1 Saund. 324.

(23) See 2 R. S. 113, § 2.
fession 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 (24); [*165] and if it proves otherwise, an action on the case lies against him, to exact damages for 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 selletteth any thing, doth upon the sale warrant it to be good, the law annexes a tacit contract to this warranty, that if it be not so, he shall make compensation to the buyer: else it is an injury to

(z) 1 Vent. 333.

(a) 10 Rep. 56.

(24) As to warranties in general, see Bac. Ab. Actions on the Case, E. A warranty on the sale of a personal chattel, as to the right thereto, is generally implied, ante, 2 book, 451. 3 id. 166. 2 T. R. 57. Peake. C. N. P. 94. Cro. Jac. 474. 1 Rol. Ab. 90. 1 Salk. 210. Doug. 18; but not as to the right of real property (Doug. 654. 2 B. & P. 13. 3 B. & P. 166.) if a regular conveyance has been executed. 6 T. R. 606. Nor is a warranty of soundness, goodness, or value of a horse, or other personality, implied, 3 Campb. 351. 2 East, 314. 449. ante, 2 book, 451. And see further, 2 Rol. Rep. 5. F. N. B. 94. acc. Wooddes. 415. 3 Id. 199. cont.; and if a ship be sold, with all faults, the vendor will not be liable to an action in respect to latent defects which he knows of, unless he used some artifice to conceal them from the purchaser. 3 Camp. 154. 506. But if it be the usage of the trade to specify defects (as in case of sales of drugs, if they are sea damaged), and none are specified, an implied warranty arises, 4 Taunt. 847; and a warranty may be implied from the production of a sample, in a parol sale by sample, 4 Camp. 22. 144. 169. 4 B. & A. 357. 3 Stark. 32, and see notes; and if the bulk of the goods do not correspond with the sample, it would be a breach of the warranty. If the contract describe the goods as of a particular denomination, there is an implied warranty, that they shall be of a merchantable quality of the denomination mentioned in the contract. 4 Camp. 144. 3 Chit. Com. Law, 303. 1 Stark. 504. 4 Taunt. 853. 5 B. & A. 240. In all contracts for the sale of provisions, there is an implied contract that they shall be wholesome. 1 Stark. 384. 2 Camp. 391. 3 Camp. 286. An implied warranty arises in the sale of goods where no opportunity of an inspection is given, 4 Camp. 144. 169. 6 Taunt. 108; and if goods are ordered to be manufactured, a stipulation that they shall be proper is implied, 4 Camp. 144. 6 Taunt. 108. especially if for a foreign market. 4 Camp. 169. 6 Taunt. 108. As to what is an express warranty, see 3 Chit. Com. Law, 305. Where a horse has been warranted sound, any infirmity rendering it unfit for immediate use is a breach of warranty. 1 Stark. 137. The question of unsoundness is for the opinion of a jury. 7 Taunt. 153. It is not necessary for the purchaser to return the horse, unless it be expressly stipulated that he should do so. 2 Hen. Bla. 573. 2 T. R. 745. If not so stipulated, an action for the breach of warranty may be supported without returning the horse, or even giving notice of the unsoundness, and although the purchaser have re-sold the horse. 1 Hen. Bla. 17. 1 T. R. 136. 2 T. R. 745. But unless the horse be returned as soon as the defect is discovered, or if the horse has been long worked, the purchaser cannot recover back the purchase money on the count for money had and received, 1 T. R. 136. 5 East, 449. 7 East, 274. 2 Camp. 410. New Rep. 260; and in all cases the vendee should object within a reasonable time, 1 J. B. Moore, 106; and in these cases, or when the purchaser has not only the horse, he has no defence to an action by the vendee for the price, but must proceed in a cross action on the warranty, 1 T. R. 136. 5 East, 449. 7 Id. 274. 2 Camp. 410. 1 N. R. 260. 3 Esp. Rep. 82. 4 Esp. Rep. 95; and in these cases, if the vendee has accepted a bill, or given any other security, it should seem that the breach of warranty is no defence to an action thereon, but he must proceed by cross action, 2 Taunt. 2. 1 Stark. 51. 3 Campb. 38. S. C. 14 East, 486. 3 Stark. 175; but it would be otherwise if the vendee entirely repudiated the contract, 2 Taunt. 2. as if he, in the first instance, on discovery of the breach of warranty, returned or tendered back the horse. 2 Taunt. 2. and see 14 East, 484. 3 Campb. 38. Peake's C. N. P. 38. For what damage defendant is liable in this action, see 2 J. B. Moore, 106.
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 a 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 (25). 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 [*166] remedy, entitled an action of deceit (g), to give damages "in some particular cases of fraud; 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) (26). 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 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 estuy que use of such fine or recovery; and thereby he shall obtain judgment not only

(b) F. N. B. 94.  
(c) Finch. L. 159.  
(d) 2 Roll. Rep. 5.  
(e) Finch. L. 159.  
(f) Salk. 611.  
(g) F. N. B. 95.  
(h) Law of nisi prius, 30.  
(i) Booth, real actions, 251. Rast. Entr. 221, 222. See pag. 405.  
(k) F. N. B. 98.  
(m) 3 Lev. 419.

(25) There seems to be no reason or principle, why, upon a sufficient consideration, an express warranty that a horse should continue sound for two years, should not be valid. Lord Mansfield declared, in a case in which the sentence in the text was cited, "there is no doubt but you may warrant a future event." Doug. 735.  
(26) There seems to be no such action in New-York.
PRIVATE WRONGS.

135

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.

CHAPTER X.

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

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

(n) Rast. Entr. 100. b. 3 Lev. 415. Lutw. 711. 749.

(1) "The different degrees of title which a person dispossessing another of his lands acquires in them, in the eye of the law (independently of any anterior right), according to the length of time, and other circumstances which intervene from the time such dispossession is made, form different degrees of presumption, in favour of the title of the dispossessor; and in proportion as that presumption increases, his title is strengthened; the modes by which the possession may be recovered vary; and more, or rather different proof is required from the person dispossessed, to establish his title to recover. Thus, if A. is dispossessed by B.; while the possession continues in B. it is a mere naked possession, unsupported by any right; and A. may restore his own possession, and put a total end to the possession of B. by an entry on the lands, without any previous action. But if B. dies, the possession descends on the heir by act of law. In this case the heir comes to the land by a lawful title, and acquires in the eye of the law an apparent right of possession, which is so far good against the person dispossessed, that he has lost his right to recover the possession by entry, and can only recover it by an action at law. The actions used in these cases are called possessory actions, and the original writs by which the proceedings upon them are instituted, are called writs of entry. But if A. permits the possession to be withheld from him beyond a certain period of time without claiming it, or suffers judgment in a possessory action to be given against him, by default or upon the merits; in all these cases B.'s title in the eye of the law is strengthened, and A. can no longer recover by a possessory action, and his only remedy then is by an action on the right. These last actions are called driotuler actions, in contradistinction to possessory actions. They are the ultimate resort of the person dispossessed, so that if he fails to bring his writ of right within the time limited for the bringing of such writ, he is remediless, and the title of the dispossessor is complete. The original writs by which driotuler actions are instituted, are called writs of right. The dilatoriness and niceties in these processes introduced the writ of assise. The invention of this proceeding is attributed to Glanville, chief justice to Henry II. (See Mr. Reeves's History of the English Law, part I. ch. 3.) It was found so convenient a remedy, that persons to avail themselves of it, frequently supposed or admitted themselves to be dispossessed by acts which did not, in strictness, amount to a dispossessed. This dispossessed, being such only by the will of the party, is called a disseisin by election, in opposition to an actual disseisin; it is only a disseisin as between the disseisee and dispossessor, the dispossessor still continuing the freeholder, as to all persons but the disseisee. The old books, particularly the reports of assize, when they mention disessesins, generally relate to those cases where the owner admits himself dispossessed. (See 1 Burr. 111. and see Bract. 1. b. 4. cap. 3.) As the processes upon writs of entry were superseded by the assize, so the assize and all other real actions have been since superseded by the modern process of ejectment. This was introduced as a mode of trying titles to lands in the reign of Henry VII. From the ease and expedition with which the proceedings in it are conducted, it is now become the general remedy in these cases. Booth, who wrote about the end of the last century, mentions real actions as then worn out of use. It is rather singular that this should be the fact, as many cases must frequently have occurred in which a writ of ejectment was not a sufficient remedy. Within these few years past, some attempts have been made to revive real actions, and the most
substantial and permanent nature, than those transitory rights of which personal chattels are the object.


Ouster, or dispossession, is a wrong or injury that carries with it the amotion of possession: for thereby the wrongdoer 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 injury 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. Deforcement. 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 seised 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 called an abatement, and he himself is denominated an abator. 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; and in a like sense it is used in statute Westm. 1. 3 Edw. 1. 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.

This 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

---

(a) Finch. L. 195.  
(b) Pag. 5.

remarkable of these are the case of Tissen v. Clarke, reported in 3 Wils. 419. 541, and that of Carlos and Shuttleworth v. Lord Dormer. The writ of summons in this last case is dated the 1st day of December, 1775. The summons to the four knights to proceed to the election of the grand assize, is dated the 23d day of May, 1780. To this summons the sheriff made his return, and there the matter rested. The last instance in which a real action was used, is the case of Sidney v. Perry. All these were actions on the right. The part of sir William Blackstone's commentary, which treats upon real actions, is not the least valuable part of that most excellent work." See Co. Lit. 239. a. note 1. In M. T. 1825, a writ of right stood for trial in the court of common pleas, but the four knights summoned for the purpose not appearing, the case was adjourned to the next term.

(2) As to abatement in general, see Com. Dig. Abatement, A. Vin. Ab. Disseisin, A. 4. Cru. Dig. 1 vol. 4. 2 id. 593.
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.

**2.** The second species of injury by ouster, or motion of possession from the freehold, is by **intrusion** (3): 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 seised 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 seised 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** (4). Disseisin is a wrongful putting out of him that is seised 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. **[170]** Disseisin of 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 enclosed the house or land, that the lord cannot come to distress thereon, or demand it: 2. By **forestaller**, or lying in wait; when the tenant beseteth the way with force and arms, or by menaces of bodily hurt affrights the

---

(c) Co. Litt. 277. F. N. B. 203, 204.
(d) Co. Litt. 277.
(e) Co. Litt. 181.
(f) Finch. L. 165, 166. Litt. 6 237, 4c.

---

(3) See 1 Cru. Dig. 161–316. Co. Litt. 35. a. 59. b. 357. b. 4 Co. 24. a. 2 Saund. 32.
(4) See in general, Vin. Ab. Disseisin; Cru. Dig. index, Disseisin. And the judgment delivered by lord Mansfield, in Taylor ex dem. Atkins v. Horde, 1 Burr. 60. 5 Cru. Dig. 331. See also 6 Brown Parl. Ca. 533. 2 Saund. index, Disseisin; Adams on Exc. ment, 41. c. H. Chitty on Descent, index, Disseisin and Ouster.
lessor from coming: 3. By rescus; 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 replevis 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 dispossess, 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 assise of novel disseisin (which will be explained in the sequel of this chapter), [*171] instead of being *driven to the more tedious process of a writ of entry (h). 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 feodal 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 feodal 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 dispossessor 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 aliente. And when the remedy by assise was introduced under Henry II. to redress such disseisins as had been committed with 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 (5); which happens when

(g) Litt. 588, 589.
(h) Hengh. parv. c. 7. 4 Burr. 110.

(5) See in general, Adams on Ejectment, 35 to 41; Com. Dig. Discontinuance; Bac. Ab. Discontinuance; Vin. Ab. Discontinuance; Cru. Dig. index, Discontinuance; Co. Litt. 325; 2 Saund. index, tit. Discontinuance. The term discontinuance is used to distinguish those cases where the party, whose freehold is ousted, can restore it by action only, from those in which he may restore it by entry. Now things which lie in grant cannot either be devested or restored by entry. The owner therefore of any thing which lies in grant, has in no stage, and under no circumstances, any other remedy but by action. The books often mention both disseisins and discontinuances of incorporeal hereditaments, but these disseisins and discontinuances are only at the election of the party, for the purpose of availing himself of the remedy by action. Co. Litt. 390. b. n. But a dis- seisin or discontinuance of corporeal hereditaments necessarily operates as a disseisin or discontinuance of all the incorporeal rights or incidents which the disseisee or discon-
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 [*172] 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, can enter on and possess the lands so alienated. Also, by the common law, the alienation of a husband who was seised 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 (6). 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.

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 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 former, it is only, such a detainer of the *freehold, from him that hath the right of property, but [*173] 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 seignory, and lands escheat to him propter defectum sanguinis, but the seisin of the lands is withheld from him: here the injury is not abatement,

(i) Finch. I. 190.
(j) F. N. B. 194.
(k) Co. Litt. 277.

See 2 D. & R. 373; 1 B. & C. 238.

(6) In New-York no future estate can be defeated by any alienation or other act of the owner of the precedent estate, nor by the destruction of such precedent estate by disseisin, forfeiture, surrender, merger, or otherwise. (1 R. S. 725, § 32.) And no greater estate can pass by a conveyance than the grantor had at the delivery of the deed, (id. 739, § 143;) nor will a conveyance attempting to convey more, cause a forfeiture. (Id. § 145.) See also id. 749, § 7.
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 vest the woman’s right of possession; though, his entry being lawful, it does vest 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 nonsane 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 persons against whom the fictitious action is brought upon a supposed breach of covenant, is called the deforciant. 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 possession 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 of 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.

(l) F. N. B. 143.
(m) Ibid. 8. 147.
(n) Finch. L. 263. F. N. B. 201. 205, 6, 7. See book II. ch. 9, p. 151.
(o) F. N. B. 205.
(q) Finch. Ibid. F. N. B. 202.
(r) Finch. L. 293, 294. F. N. B. 197.
(s) F. N. B. 146.
PRIVATE WRONGS. 141

1. The first is that extrajudicial and summary one, which we slightly touched in the first chapter of the present book, 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 feodal investiture by the lord (v) or he may enter on any *part of it in the same county, declaring it to be in the name of the whole (u): but if it lies in different counties 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 feefoles, 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 deter-

from entering by menaces or bodily fear, he may make claim (7), 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 a day (which is called con-

tinual 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 imme-

diate 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.

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 a discon-

tinuance or defacement, 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 ten-

ancy 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 en-

try, ad terminum qui praeterit.

On the other hand, in case of abatement, intrusion, or disseisin, where entries are generally lawful, this right of entry may be tolled, that is, taken away by descent (d). Descents, which take away entries (d) (9), are

(1) See pag. 5.
(2) See book II. ch. 14, pag. 209.
(3) Litt. § 417.
(4) Co. Litt. 259.
(5) Litt. § 422.
(6) Ibid. 919, 423.
(7) See further as to continual claim and entry, Adams on Ejectment, 92, 3. The statute 4 Ann. c. 16. s. 16. renders it necessary to commence an effectual action of ejectment within a year.
See, as to New-York, 2 R. S. 293, § 7, though it seems doubtful whether a continual claim without entry would be of any avail.
(8) In New-York a right of entry is not tolled by a descent cast. (2 R. S. 295, § 13.)
(9) See the doctrine as to descents cast clearly explained in Adams on Ejectment, 41 to 45; and see H. Chitty on Descents, 25. 43. 56; Taylor v. Horde, 1 Burr. 60; 12 East, 141; and Watkins on Descents; Com. Dig. Descents; Bac. Ab. Descents. It is scarce-

Vol. II. 21
when any one, seised 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 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 devested, 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 seised. 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 seizinae conjunctio (h). Now if the possession be severed from the title, 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 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 seised 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

(e) Co. Litt. 237.
(f) See book II. ch. 13.
(g) Mirror, c. 2, § 27.
(h) l. 3, c. 15, § 5.

ly possible to suggest a case in which the doctrine of descent cast can be now applied, as to prevent a claimant from maintaining ejectment. Adams, 41. note e. We have before seen, that where the entry of the party or his ancestor was originally lawful, and the continuance in possession only unlawful, the entry is not tolled. See Dowl. & R. 41. "If a disseisor make a lease for term of his own life, and dieth, this descent shall not take away the entry of the disseissee; for though the fee and franktenement descend to the heir of the disseisor, yet the disseisor died not seised of the fee and franktenement; and Littleton saith, unless he hath the fee and franktenement at the time of his decease, such descent shall not take away the entire." Co Litt. 239. b. c. It was laid down in Carter v. Tash, by Holt, C. J. that if a feme-covert is disseissee, and after her husband dies she takes a second husband, and then the descent happens, this descent shall take away the entry of the feme, for she might have entered before the second marriage, and prevented the descent. 1 Salk. 241. See also 4 T. R. 300.
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 feodal constitutions always came into the tenure solemnly * 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 (10). And by statute 4 & 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.

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 alienes 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 discontinuoer 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 devested by the mere entry of the claimant, but continues in force till a better right be

(i) See the particular cases mentioned by Littleton, b. 3. ch. 6, the principles of which are well explained in Gilbert’s law of tenures.
(k) Co. Litt. 246.
(l) Ibid. 216.
(m) Ibid. 325.

(10) But by the second section, the same exceptions as are enumerated above, of infancy, coverture, imprisonment, insanity, and absence beyond seas, are made,† in which case, the party entitled may enter within ten years after the disability ceases, notwithstanding the twenty years should have elapsed after his title first accrued, and to his heir the statute gives ten years after the death of such party, dying under the disability. It gives the heir ten years, and no more, whatever disability he may labour under during all that time. 6 East, 85. And in 4 T. R. 300. it was agreed by the court, that in every statute of limitations, if a disability be once removed, the time must continue to run, notwithstanding any subsequent disability, either voluntary or involuntary. And in 5 B. & A. Abbott, C. J. said, the several statutes of limitation being all in pari materia, ought to receive an uniform construction, notwithstanding any slight variations of phrase, the object and intention being the same.

† In New-York, absence from the state, or being beyond seas, does not constitute an exception to the statute: nor does imprisonment, except on a criminal charge, or on a conviction for a criminal offence, for a period less than for life. (2 R. S. 295, § 16.)
shewn, 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 (11).

In case of deforcement also, where the deforciant had originally a lawful possession of the land, but now detains it wrongfully, he still [*179] continues to have the presumptive prima *facie evidence of right; that is, possession lawfully gained. Which possession shall not be overturned by the mere entry of another; but only by the demandant's shewing 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 (12). But this does not extend to such as endeavour to keep possession manu fforti, 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, when 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 shewn, that though [*180] he hath at present possession and therefore hath *the presumptive right, yet there is a right of possession, superior to his, residing in him who brings the action.

These remedies are either by a writ of entry (13), or an assise; 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 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

(11) As there are in New-York no estates tail, there is no such continuance as mentioned in the text. (1 R. S. 722, § 3.)
(13) In New-York, by 2 R. S. 343, § 24, all writs of right, dower, entry, and assise, and all fines and common recoveries, are abolished, as well as all other common law writs relating to real estate, and not specially retained by the chapter on suits relating to real property. The action of ejectment is substituted for writs of entry and of right. (Id. 303, § 1, 2.)

The rest of this chapter is therefore generally inapplicable to New-York: it however illustrates the law of title to real estate.
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 had 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 shewing 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, praeceipe 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 shew wherefore he hath not done it (p)." This is the original process, the praeceipe upon which all the rest of the suit is grounded; wherein it appears, that the tenant is required, either to deliver *seisin of the lands, or to shew cause why he will not. [*181] 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 wrongdoer, 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 alienence, to whom the intruder denied it; "non habuit ingressum nisi per Ricardum, cui Gulielmus illum 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. For as it was provided, for the *quietness of men's inheritances, that no one, even though he had [*182] the true right of possession, should enter upon him who had the

(n) Mir. C. 4, § 94.
(o) Finch, L. 261.
(p) See book II. Append. No. V. § 1.
(q) Finch, L. 202. 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, 181.
(s) Finch, L. 263. F. N. B. 203, 204.
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 *possessionary* action; but was driven to his *writ of right*, a long and final remedy, to punish his neglect in not sooner putting in his claim, while the degree subsisted, and for the ending of suits, and quieting of all controversies (t). But by the statute of Marlbridge, 52 Hen. III. c. 30. it was provided, that when the number of aliensations 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 claimed, 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 intrusione 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 (*writ of entry sur disseisin in the post*) that the form of our common recoveries of landed estates (v) is usually grounded; which, we may remember, were observed in the preceding volume (u) to be fictitious actions brought against the tenant of the freehold (usually called the tenant to the *præceipe*, 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 deformances. Such is that of *deforcement of dower*, by not assigning *any* dower to the widow within the [*183*] time limited by *law*; for which she has her remedy by *writ of dower, unde nihil habet* (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). 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

(t) 2 Inst. 153.
(u) See Book II. Append. No. V.
(x) Book II. ch. 21.
(y) F. N. B. 147.
(z) Ibid. 16.
(x) See Bracton, L. 4, tr. 7. c. 6, § 4. Britton. c. 114, fol. 204. 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 dam fuit infra aestatem*, and *dam fuit non conpar mensis* : (Ibid. 192. 202.) 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 *writ of cui in vita*, and *cui ante divorium* : (Ibid. 193. 204.) for a woman, when a widow or divorced, whose husband during the coverture (*cui in vita sua*, *cui ante divorium*, ipsa 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 *writ in consimili causa* : (Ibid. 205. 206.) which lay not *ad communem legem*, but are given by stat. Gloc. 6 Ed. L. c. 7. and Westm. 2. 13 Ed. 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 quis præseritari* : (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 causa matrimonii*
plainly and clearly chalked out in that most ancient and highly venerable collection of legal forms, the *registrum omnium brevium*, or register of such writs as are subsile 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 [*184*] to 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 statuto Westm. 2. 13 Ed. I. c. 24. for framing new writs when wanted, is almost rendered useless by the very great perfection of the 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 (α), 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 exceeding 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 (β).

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 *assises*: and the *assises* themselves (particularly those of *mort d'ancestor* and *novel disseisin*) were clearly pointed out and described (d). As a writ of entry *is* a real action, which *disproves* the title of the tenant by shewing the unlawful commencement of his possession; so an *assise* is a real action, which *proves* the title of the demandant merely by shewing his, or his ancestor's possession (e); 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 *assise* is derived by sir Edward Coke (f) 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 assise, or *ad assisas capiendas*; and hence the judicial as-

---

praedecutit: (Tbid. 305.) 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.

(a) Gilb. Ten. 42.
(b) Booth, 262.
(c) Mirror, c. 2, § 25.
(d) § 9. *Si dominus feodi negat hosteditus de functis saisinam ejusdem feodi, justitiae domini regis faciant inde fieri, recognitionem de dixissentis factis super saisinam, a temporis quo dominus rex venit in Angliam pro conspec post pacem factam inter ipsum et regem librum suum.* (Solum. Cod. 330.)
(e) Finch, L. 254.
(f) 1 Inst. 152.
seemles held by the king's commission in every county, as well to take these writs of assise, as to try causes at nisi prius, are termed in common speech the assises. By another somewhat similar figure, the name of assise 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 assises, was, for that in these writs the sheriff is ordered to summon a jury, or assise; which is not expressed in any other original writ (h).

This remedy, by writ of assise, 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 assise of mort d'ancestor, or the death of one's ancestor. This writ directs the sheriff to summon a jury or assise, who shall view the land in question, and recognize whether such ancestor was seised thereof on the day of his death, and whether the demandant be the next heir (i): soon after which the judges come down by the king's commission to take the recognition of assise: when, if these points are found in the affirmative, the law immediately transfers the possession from the tenant to the demandant. If the abatement happened on the death of one's grandfather or grandmother, then an assise 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 proovo: 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). And the same points shall be inquired of in all these actions ancestrel, as in an assise of mort d'ancestor; they being of the very same nature (l): though they differ in this point of form, that these ancestrel writs (like all other writs of praecipe) expressly assert a title in the demandant, (viz. the seisin of the ancestor at his death, and his own right of inheritance,) the assise asserts nothing directly, but only prays an inquiry whether those points be so (m). There is also another ancestrel writ, denominated a nuper obit, 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 ancestrel 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 devisable in a man's last will by the custom of the place, there an assise of mort d'ancestor did not lie. For, where lands were so devisable, 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

(n) Hale on F. N. B. 221.
(p) Fitzh. Abr. tit. cosinage, 15.
(q) Bracton, i. 4. de assist. mortis antecessoris, c. 13, § 3. F. N. B. 196.
able, an assise 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 assise 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 assise of novel (or recent) disseisin is an action of the same nature with the assise of mort d'ancestor before-mentioned, in that herein the demandant's possession must be shewn. 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 reseise the land and all the chattels thereon, and keep the same in his custody till the arrival of the justices of assise (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 assise before the justices (t). At which time the tenant may plead either the general issues null tort, null 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 injury 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 feodal services. But costs and damages were annexed to many other possessory actions by the statutes of Marlberge, 52 Hen. III. c. 16. and Glocester, 6 Edw. I. c. 1. And *to prevent frequent and vexatious disseisins, it is enacted by the [*188] statute of Merton, 20 Hen. III. c. 3, that if a person disseised recover seisin of the land again by assise 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 super-added double damages to the party aggrieved. In like manner, by the same statute of Merton, when any lands or tenements are recovered by assise 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 in convictus fuerit, dupliciter delinquit contra regem: quia facit disseisinam et roberiam contra pacem suam; et etiam ausus temerario irrita facit ea, quae in curia domini regis rite acta sunt: et propter duplex delictum merito sustainere 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;

(e) See 1 Leon. 267.  
(s) Booth, 211. Bract. 4. 1. 19, § 7.  
(t) F. N. B. 177.  
(4) 2 Inst. 83, 84.  
(e) I. 4, c. 49.
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 eras, viz. from the return of king John from Ireland, [*189] and from the coronation, &c. of king Henry the 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 for ever: 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. 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 an older date, it can with no propriety be called a fresh, recent, or novel disseisin; which name sir Edward Coke informs 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 assise 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.

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 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 an 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

(y) 32 Hen. VIII. c. 2.
(a) 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.
(b) 8 Rep. 65.
(c) Co. Litt. 115.
shewing 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 juscetseisinam separate; a good right, but a bad possession: now, by the remitter, he hath the most perfect of all titles, juris et seisinac 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 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.

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 aliencee; 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 deforecement; which however binds the right of possession, and suffereth it not to be ever again disputed, unless the right of property be also proved. 4. In case the demandant, who claims the right, is barred from the 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 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 (seundum formam doni), which is in the nature of a writ of right (a), 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 [*192]Edw. I. c. 1, which is therefore emphatically 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 diseised of them, and dies; in this case the heir

---

(a) Finch, L. 267.
(f) Co. Litt. 316.
(g) P. N. B. 255.
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 21 Jac. I. c. 16 is twenty years (14); within *which* space of time after his title accrues, the demandant must bring his action, or else he is for ever barred.

2. In the second case; if the owners of a particular estate, as for life, in dower, by the courtesy, 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 Ed. I. c. 4. gives a new writ for such persons, after their lands have been so recovered against them by default, called a *quod e* *dejectum*; 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 deformed 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*).

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 limita-

---

**Notes:**

(*h*) F. N. B. 211, 212.

(*i*) Ibid. 217.

(*k*) Ibid. 219. 8 Rep. 88.

(*l*) Finch, L. 268.

(*m*) F. N. B. 155.

(*n*) See Book II. ch. 21.

(14) The twenty years, within which a *formedon* in the *descender* ought to be commenced under the 21 Jac. I. c. 16. begin to run when the title descends to the first heir in tail, unless he lie under a disability; and the heirs of such person, who suffers the twenty years to elapse without commencing the formedon, are utterly excluded, and the right of entry is for ever lost. 3 Brod. & Bing. 217. 6 East, 83. and see note (10), ante 178.
tions, 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 writ of right may [*194] be brought, where the demandant is entitled to the possession, yet it rarely is adviseable 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 (15); 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 deforses 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 obit (which is a possessory remedy) (u) he must be seised at the time of his death. But, waving 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 (w) of the lord, of whom the lands are holden; and then it is open or patent: but if he holds no court, or hath waved his right, remisit curiam suam, it may be brought

(o) F. N. B. 1.
(p) Ibid. 1. 5.
(q) Ibid. 6. Co. Litt. 158.
(r) F. N. B. 143.
(s) Booth, 135.
(t) F. N. B. 9.
(u) See pag. 186.
(w) Append. No. I. § 1.

(15) In New-York, as before mentioned, writs of right are superseded by the action of ejectment; and by the 2 R. S. 309, § 36, &c. the judgment in ejectment rendered on a verdict or on default, is conclusive as to the title upon the party against whom it is rendered, and those claiming under him after suit brought. But if rendered on a verdict, a new trial must be allowed once if applied for in three years, and may be allowed again if applied for in two years after the judgment in the second suit. If rendered on default, the judgment may be vacated in five years, and a new trial granted. Persons under disabilities have the usual exception in their favour. See notes 10 and (f) ante, p. 178: and 2 R. S. 309, § 39.
in the king's courts by writ of praecipe 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 praecipe in capite (the improper use of which, as well as of the former praecipe 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 be removed into the county court, by writ of tollt (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 (16), or else in some person [*196] under whom he claims, and then derive the right *from the person so seised to himself; 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 shewn, it then puts the demandant upon the proof of his title: in which, if he fails, or if the tenant hath shewn 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 for ever. 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. l. 3 Edward I. c. 39. from the time of Richard the First; and now, by

(y) Booth, 91.
(a) c. 24.
(b) F. N. B. 3.
(c) See Book II. ch. 6.
(d) Kitchen, tit. copyhold.
(e) Bracton, l. 1, c. 11, l. 4, tr. 1, c. 9, & tr. 3, c.

(g) Ibid. § 3.
(h) F. N. B. 3, 4.
(i) Append. No. I. § 5.
(k) Glanv. l. 3, c. 3. Co. Litt. 114.

(16) A writ of right cannot be maintained without shewing an actual seisin by taking the expenses, either in the demandant himself or the ancestor from whom he claims. 1 H. B. 1. And the demandant must allege in his count that his ancestor was seised of right, as well as that he was seised in his demesne, as of fee. 2 B. & P. 570. 5 East, 272. And if the count state that the lands descended to four women, as nieces and co-heirs of J. S., it must also shew how they were nieces. 3 B. & P. 453. 1 N. R. 66. Proof of possession of land and pannery of the rents, is prima facie evidence of a seisin in fee of the pannery. But proof of forty years' subsequent possession by a daughter, while a son and heir lived near and knew the fact, is much stronger evidence that the first possessor had only a particular estate. 5 Taunt. 336. 1 Marsh. 68.

The court requires a strict observance of the prescribed forms in this proceeding, and will not assist the demandant who applies to rectify omissions or irregularities. 2 N. R. 429. 1 Marsh. 602. 1 Taunt. 415. 1 Bing. 208. The court will not permit the mise joined in a writ of right to be tried by a jury instead of the grand assize, though both parties desire it. 1 B. & P. 192. As to summoning and swearing the four knights, see 3 Moore, 249. 1 Taunt. & Brod. 17. They may be summoned from the grand jury when present at the assizes. Ib. As to the tender of the demark, and what the demandant must prove previous to the tenant being put upon proof of his title, see Holt C. N. P. 657; and see the precedents and notes, 3 Chitty on Pl. 4th ed. 1355 to 1390. See also ante, p. 167. note.
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 (17).

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 such obsolescent 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 connexion 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 from among the venerable monuments of our ancestors, so absolutely antiquated as to be out of [*197] 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, assise, 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.

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, recognition, or elegit (1), is only liable to happen by a species of disseisin, or

(1) This is far from being universally true; for an uninterrupted possession for sixty years will not create a title where the claimant or demandant had no right to enter within that time; as where an estate in tail, for life, or for years, continues above sixty years, still the reversioner may enter and recover the estate; the possession must be adverse, and lord Coke says, "it has been resolved, that although a man has been out of possession of land for sixty years, yet if his entry is not tolled he may enter and bring any action of his own possession; and if his entry be congeable, and he enter, he may have an action of his own possession." 4 Co. 11. b. See notes ante, 178, 193.

(1) There are no such estates in New-York. As to the law of New-York on ejectment, see note 17, p. 207.
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 assise of novel dissetin (a). But this depends upon the several statutes, which

[*199] *create these respective interests (b), and which expressly provide and allow this remedy in case of dispossession. 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 assise, as tenants of the freehold shall have; and in that respect they have the similitude of a freehold (d).

II. As for ouster, or an motion of possession, from an estate for years; this happens only by a like kind of dissetin, 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 firme; 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 eject 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 firme; or action of trespass in ejectment (2), 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.

[*200] *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 therefore be improper to delineate, with some degree of minute-

(a) F. N. B. 178.
(c) 1 Inst. 43.
(d) See book II. ch. 10.
(e) F. N. B. 220.
(f) See Appendix, No. II. § 1.

(2) See in general, Adams on Ejectment; Tidd. Prac. 8 ed. 518, &c.; Runington on Ejectm. by Ballantine; Com. Dig Ejectment; Chitty on Pl. 4th ed. 172.

In general ejectment will lie to recover possession of any thing whereon an entry can be made, and whereof the sheriff can deliver possession. But an ejectment cannot be maintained for a close, 11 Rep. 55. Godb. 53; a manor, without describing the quantity of land therein, Latch. 61. Lut. Rep. 301. Heil. 146; a messuage and tenement, 1 East, 441. Str. 834; but after verdict (even pending a rule to arrest the judgment on this ground) the court will give leave to enter the verdict according to the judge's notes for the messuage only, 8 East, 357; nor a messuage or tenement, 3 Wils. 23; nor a messuage situate in the parishes of A. and B. or one of them, 7 Mod. 457; nor for things that lie merely in

grant, not capable of being delivered in execution, as an advowson, common in gross, Cro. Jac. 146; a piscary, ib. Cro. Car. 492. 8 Mod. 277. I Brownl. 142. contra per Ashton, J. 1 T. R. 361. And where the owner of the fee, by indenture, granted to A. free liberty to dig for tin, and all other metals, throughout certain lands therein described, and the use of all water, watercourses, and to make adits, &c. reserving to himself liberty to drive any new adit, and to carry any new watercourse over the premises granted, habendum for twenty-one years, with right of reentry for breach of covenants; this deed, it was held, did not amount to a lease, but contained a mere licence to dig, &c. and the grantee could not maintain ejection for mines lying within the limits of the set, but not connected with the workings of the grantee. 2 B. & A. 724.
ness, 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 contract 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 ejectioe firmae, 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 damages merely, [*201] 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.

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 dispossessior. 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 dispossessior. 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 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

---

(g) See pag. 157.
(h) See Append. II. ch. 9.
(i) See Append. II. ch. 9.
(j) B. & Ric. II. Ejection firmae n'est que un action de trespass en son nature, et le plaintiff ne recouvre son terme que a venir, nient plus que en trespass home recouvre damages pur trespass nient fait, mes a faire; mes il convient a suer per action de covenant al comen law a recouvre son terme: quod tota curia conceassit. Et per Belknap, la comen ley est, low home est ouste de son terme par estranger, il auera ejcctione firmae versus coste que luy ouste; et si soi ouste par son lessor, brefe de covenant; et si par lessie ou grantee de reversion brefe de covenant versus son lessor, et cuntiera especial count, a. (Fitz. abr. t. eject. firm. 2.)
(k) See B. & Ric. II. ch. 9.
(l) See Rect. 1. 4. tr. 1. c. 36.
(m) See Rect. 1. 4. tr. 1. c. 36.
(n) See Rect. 1. 4. tr. 1. c. 36.
(o) See Rect. 1. 4. tr. 1. c. 36.

23

Vol. II.
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 agreement before-hand) 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 this casual ejector, whichever it was that ousted him, to recover back his term and damages. But where this action is brought 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 shew a good title in his lessor, which brings the matter of right entirely before the court; then, that the lessor, being seized or 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 shew 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 (3). 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 actual ouster by the defendant; but all are merely ideal, for the sole purpose of trying the title (4).

(3) When the remedy by ejectment is pursued in an inferior court, the fictions of the modern system are not applicable, for inferior courts have not the power of framing rules for conferring lease, entry, and ouster, nor the means, if such rules were entered into, of enforcing obedience to them. 1 Keb. 690. 795. Gilb. Ect. 38. Adams on Ect. 173. If the rule requiring service of notice upon the tenant in possession cannot be observed, on account of his having quitted, and his place of residence is unknown, 2 Stra. 1064. 4 T. R. 464. the claimant must resort to the ancient practice, Ad. Ect. 181. except in particular cases, provided for by the 4 Geo. II. c. 28, 11 Geo. II. c. 19, and 57 Geo. III. c. 52.

(4) An actual entry is necessary to avoid a fine levied with proclamations, according to the statute 4 Hen. VII. c. 24. see book 2. p. 352; and the demise laid in the ejectment must be subsequent to the entry; but that is the only case in which an actual entry is required, 2 Stra. 1086. Doug. 468. 1 T. R. 471. 4 Bro. P. C. 353. 3 Burr. 1895. 7 T. R. 433. 1 Prest. Conv. 207. 9 East, 17; unless it is an ejectment brought to recover on a vacant possession, and not by a landlord upon a right of re-entry under the 4 Geo. II.
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 \((r)\) \((5)\); it is also stated that Smith the lessee entered; and that the defendant William Stiles, who is called the \textit{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; \textit{viz.} the lease of Rogers the lessor, the \textit{entry} of Smith the plaintiff, and his \textit{ouster} by Saunders \([204]\) 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 \textit{lease, entry, and ouster}, the trial will now stand upon the merits of the \textit{title} only \((6)\). This done, the declaration is altered by

\[(q)\] See Append. No. II. § 1, 2.
\[(r)\] To Mod. 309.
\[(s)\] Ibid. No. H. § 2.

\[(t)\] Ibid.
\[(u)\] Ibid. § 3.

c. 28; in which case the lessor or his attorney must actually seal a lease upon the premises to the plaintiff, who must be ejected by a real person. See the mode of proceeding, Adams on Eject. 173.

\((5)\) The practice was reproved, because it was considered that it provided no responsibility for costs in case the defendant succeeded. But this objection is now obviated, by its being always part of the consent rule, that in such case the lessee of the plaintiff will pay the costs, and an attachment will lie against him for disobedience of this, as of every other rule of court. Adams on Eject. 233, 238.

\((6)\) It has been determined, that no ejectment can be maintained where the lessor of the plaintiff has not a legal right of entry; and the heir at law was barred from recovering in ejectment, where there was an unsatisfied term raised for the purpose of securing an annuity, though the heir claimed the estate subject to that charge. But a satisfied term may be presumed to be surrendered. 2 T. R. 695. 1 T. R. 758. In Doe on the demise of Bowerman v. Sybourn, 7 T. R. 2 lord Kenyon declared, that in all cases where trustees ought to convey to the beneficial owner, he would leave it to the jury to presume, where such a presumption might reasonably be made, that they had conveyed accordingly, in order to prevent a just title from being defeated by a matter of form. But if such a presumption cannot be made, he who has only the equitable estate, cannot recover in ejectment. Jones v. Jones, 7 T. R. 46. The doctrine respecting the presumption of a surrender of a term, though assigned to attend the inheritance, still prevails, 2 B. & A. 710. 782. 3 Bar. & Cres. 616; but see Mr. Sugden's able essay on the subject of presuming the surrender of a term. A person, who claims under an \textit{eligit} sued out against the landlord, cannot recover in ejectment against the tenant, whose lease was granted prior to the plaintiff's judgment. 8 T. R. 2.
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 (7). 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 (8); 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 (9); 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 remainderman 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) (10). But, if the new defendants, whether landlord or tenant, or both, after entering into the common rule, fail to appear at 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 defendant is broken, and therefore the plaintiff is put again in the [*205] 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 (11).

(7) Before the following rules, it was necessary for lessor of plaintiff to prove on the trial the defendant's possession of the premises in question, although the defendant had entered into the general consent rule, to confess lease, entry, and ouster. 7 T. R. 327. 1 B. & P. 573. But by rule K. B., M. T. 1820, it was ordered that in every action of ejectment, the defendant shall specify in the consent rule, for what premises he intends to defend, and shall consent in such rule to confess upon the trial, that the defendant (if he defends as tenant, or in case he defends as landlord, that his tenant) was at the time of the service of the declaration, in the possession of such premises; and that if upon the trial the defendant shall not confess such possession, as well as lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff, in that case to be taxed. In the following year, the same rule was adopted by the court of common pleas. See 2 Brod. & Bing. 470.

(9) 1 R. S. 745, § 27.
(10) 2 R. S. 342, § 17. See also id. 339, § 1, &c.
(11) A devisee, although he has never been in possession, has been permitted to defend, as a landlord under this statute. 11 Geo. II. c. 19. 4 T. R. 122.
The damages recovered in these actions, though formerly their only intent, are now usually (since the title has been considered as the principal question) 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 (12). 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 defence (13), (14).

(2) 4 Burr. 668.

ter, and then the plaintiff, as in other cases of nonsuits, to come forth or he will lose his writ of nisi prius. Though in this case the judgment is given against the casual ejector, yet the costs are taxed as in other cases, and if the real defendant refuses to pay them, the court will grant an attachment against him. Sul. 259. In like manner, if there be a verdict for the defendant, or the nominal plaintiff be nonsuited without the default of the defendant, the defendant must tax his costs and sue out a writ of execution against the nominal plaintiff; and if, upon serving the lessor of the plaintiff with his writ and a copy of the rule to confess lease, entry, and ouster, the lessor of the plaintiff does not pay the costs, the court will grant an attachment against him. 2 Croom. Pract. 214. In ejectment the unsuccessful party may re-try the same question as often as he pleases without the leave of the court; for by making a fresh demise to another nominal character, it becomes the action of a new plaintiff upon another right, and the courts of law cannot any farther prevent this repetition of the action, than by ordering the proceedings in one ejectment to be stayed till the costs of a former ejectment, though brought in another court, be discharged. 2 Bl. Rep. 1153, Burns, 133. But a court of equity, in some instances where there has been several trials in ejectment for the same premises, though the title was entirely legal, has granted a perpetual injunction. 1 P. W. 672.

(12) But with reference to mesne profits accrued up to the day of the verdict, and in cases where the tenancy existed under lease or agreement, resort to this separate action is superseded by sect. 2 of stat. 1 Geo. IV. c. 87, which enacts, "Wherever thereafter it shall appear on the trial of any ejectment, at the suit of a landlord against a tenant, that such tenant or his attorney hath been served with due notice of trial, the plaintiff shall not be nonsuited for default of the defendant's appearance, or of confession of lease, entry, and ouster; but the production of the consent rule and undertaking of the defendant, shall in all such cases be sufficient evidence of lease, entry, and ouster; and the pledge before whom such cause shall come on to be tried shall, whether the defendant shall appear upon such trial or not, permit the plaintiff on the trial, after proof of his right to recover possession of the whole or of any part of the premises mentioned in the declaration, to go into evidence of the mesne profits thereof, which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same, down to the time of the verdict given in the cause, or to some preceding day, to be specially mentioned therein; and the jury on the trial finding for the plaintiff, shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits. The said act not to bar landlord from bringing trespass for the mesne profits to accrue from the verdict or the day so specified therein down to the day of the delivery of possession of the premises recovered in the ejectment."


(14) The defendant may plead the statute of limitations, and by that means protect himself from the payment of all mesne profits, except those which have accrued within the last six years. Bull. N. P. 88.†

The common remedy by ejectment is generally treated as a mixed action, the party interested thereby recovering his estate, and damages for the ouster; but as those damages are nominal, and the claimant must, in order to recover the intermediate profits, resort to an action of trespass, such action of ejectment is in substance merely for the recovery of the improvements: the plaintiff recovers nothing for the use of the improvements. (2 R. S. 311, § 48, &c.)

† See p. 194, note 15, ante, contra.

‡ In New-York the statute expressly limits the recovery to six years' rent and profits, and the defendant may set off the value of his
PRIVATE WRONGS.

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 assise, 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 evascribe the very truth of the title. The writ of ejectment and its nominal parties (as was resolved by all judges) are "judicially to be considered as the fictitious

estate. But in one instance, in favour of landlards, a remedy by ejectment is given nearly resembling the ancient mixed action; for it is enacted by 1 Geo. IV. c. 87. that upon refusal by a late tenant to deliver up possession upon the expiration of his tenancy by lease or written agreement, and after lawful demand in writing, the landlord, on bringing an ejectment, may address a notice at the foot of the declaration to the tenant to appear in court on the first day of the next term; or if in Wales, or the counties palatine of Chester, Lancaster, or Durham, on the first day of the assizes, or appearance day, there to be made defendant, and to find bail; or in case of his non-appearance, upon production of the lease, agreement, &c. and the proper affidavits by the landlord, &c. the court may grant a rule calling on the tenant to shew cause why he should not, upon being admitted defendant, besides entering into the common rule, undertake, in case a verdict should pass against him, to give the plaintiff a judgment, to be entered up against the real defendant of the term next preceding the trial; and also, why he should not enter into a recognizance by himself and two sufficient sureties in a reasonable sum (to be named), conditioned to pay the costs and damages which shall be recovered by the plaintiff in the action. Upon the rule being made absolute, if the tenant do not conform, judgment to be for the plaintiff. The act further provides, that whether the defendant appear or not at the trial, the plaintiff may go into proof, and the jury give damages for mesne profits down to the verdict or a day specified therein. See 1 Dow. & Ry. 433. But when the required undertaking is given, it is provided, that if it appear to the judge that the finding of the jury was contrary to the evidence, he may order a stay of execution till the fifth day of the next term; and he is bound to make this order if the defendant desire it, upon his undertaking to give security not to commit any kind of waste, or sell the crops, &c. And if the result of the trial under this act be against the landlord, the tenant shall have judgment with double costs.

The statute 1 Geo. IV. c. 87. does not extend to the case of a lessee, holding over after notice to quit, given by himself, where his tenancy has not expired by the efflux of time. 1 Dow. & Ry. 540. And where a tenant holds from year to year, without a lease or agreement in writing, it is not within the first section of the statute (1 Geo. IV. c. 87.) 5 B. & A. 770. But an agreement in writing, for apartments for three months certain, comes within the meaning of the words of the act, where the party holds for any term, or number of years certain, or from year to year. 5 B. & A. 766. 1 Dow. & Ry. 433. A tenant being in possession, under an agreement that the landlord should grant a lease for eight years, and that the tenant should pay the money every day he held over, continued to hold the whole time, though the lease was never granted; and upon his holding over, notice to quit and demand of possession, with notice of ejectment, was regularly served. It was held that the tenant was not to be treated as a tenant from year to year, and that the demand of possession was sufficient notice within the statute, so as to entitle the plaintiff to the benefit of the undertaking, and security required by that statute. 2 Dow. and Ryl. 565.

The rule nisi, calling on a tenant to enter into a recognizance under this statute, need not specify all the particulars thereby required, as the court may mould the rule according to its requisites, upon shewing cause. 5 B. & A. 766. 1 Dow. & Ry. 433. The time within which the undertaking and security required by the statute shall be given, is to be fixed by the court at the time the rule is granted. 2 Dowl. & Ry. 688. After a rule granted in a cause, entitled Doe, &c. v. Roe, to which the tenant in possession appeared, judgment was entered up, and execution taken out against the tenant by name, and it was held not to be irregular. 3 Dow. & Ryl. 230.

The court, on making a rule absolute, under this act (no cause being shewn), for the tenant's undertaking to give the plaintiff judgment, to be entered up against the real defendant, and to enter into a recognizance in a reasonable sum, conditioned to pay the costs and damages which should be recovered by the plaintiff in the action; ordered the tenant to appear in the next succeeding term, to find such bail as was specified in the former rule; and on no cause being shewn to that order, they directed the rule for entering up judgment for the plaintiff to be made absolute. The court can only give a reasonable sum for the costs of the action, and not for the mesne profits, the amount of which must be ascertained by the prothonotary. 6 Moore, 54. See further, as to the proceedings on this statute, Tidd, 8 ed. 541, &c.
form of an action, really brought 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, wherein 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: 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: 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 (15), (16).

2. The writ of quare eject infra terminum lieth, by the ancient law, where the wrongdoer or ejector is not, himself in possession of the lands, but 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 se-highlight in fee, or for life, of the same lands to a stranger: now the lessee cannot bring a writ of ejectione firmae or eject- 

(15) 2 R. S. 505, § 30, &c.
(16) Where there is a sufficient distress upon the premises, the landlord cannot maintain an ejectment, upon his right of re-entry, for non-payment of rent, under this statute; nor can he maintain an action of ejectment for a forfeiture at common law, unless he has demanded the rent on the last of the specified days for the payment thereof, just before sunset. As where the proviso in a lease is, "that if the rent shall be behind, and unpaid by the space of thirty, or any other number of days after the days of payment, it shall be lawful for the lessor to re-enter." A demand must be made of the precise rent in arrear, on the thirtieth or other last day, a convenient time just before and until sunset upon the land, or at the dwelling-house, or the most notorious place. 1 Saund. 287. n. 16. 7 T. R. 117.

The 11 Geo. II. c. 19. s. 16. gives the landlord a summary remedy by application to two justices of the peace, where a tenant at rack-rent, or at full three-fourths of the yearly value, being in arrear a year's rent, deserts the premises and leaves the same uncultivated or unoccupied, and no sufficient distress thereon.

In such case, after fourteen days' notice, the justices may put the landlord in possession; and the 57 Geo. III. c. 52. extends the regulation to such tenants as are half a year in arrear. As to the proceeding of the justices under these acts, and how far the record of such proceedings will be conclusive in their behalf, see 3 Bar. & Cres. 649.

Difficulties having frequently arisen, and considerable expenses having been incurred by reason of the refusal of persons, who had been permitted to occupy, or who had intruded themselves into parson houses, to deliver up possession of such houses, by sect. 59 Geo. III. c. 12. s. 24. two justices are empowered in such cases to cause possession to be delivered to churchwardens and overseers. The mode of proceeding is prescribed by this statute. The visitors and feoffees of a free grammar school, who have dismissed the school-master for misconduct, cannot maintain ejectment for the school house till they have determined the master's interest therein, upon summons in the ordinary manner, when he might be heard to answer the charges forming the ground of dismissal. 1 Bing. 357. 8 T. R. 109.
ment 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 remedy was already provided (b). And the action is brought against the feoffee for enforcing, 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 he acquired it), and the subsequent recovery of damages by action of trespass for mesne profits, this action is fallen into disuse (17).

(17) In New-York the Revised Statutes have essentially altered the action of ejectment; all the old fictions are abolished. The plaintiff is the person actually claiming title, and the defendant must be an actual occupant of the lands, or, if there be no occupant, he must be a person claiming title. The action is commenced by serving a copy of the declaration on the defendant, and a notice subjoined in writing, stating that the declaration will be filed on some specified day in the same term if it be term time, or else in the next term; and that a rule will then be entered requiring him to appear and plead in 20 days, or judgment will be entered against him and he be deprived of the premises. The declaration must be served on the defendant personally, or on some person of suitable age at his residence: but if it be not served personally, the rule to plead cannot be entered without the special order of the court.

The declaration states that the plaintiff was possessed of the premises on some specified day after his title accrued, and that the defendant, on some subsequent day, entered and withheld them unlawfully from the plaintiff to his damage any nominal sum.

The premises must be described with such certainty that possession of them can be delivered. The plaintiff must also state whether he claims the whole or an undivided share, and what that share is; whether he claims in fee, for his own life or the life of another, or for a term of years; and must specify such lives and the duration of the term. If the action be to recover dower, the widow states that she was possessed of an undivided third part of the premises as her reasonable dower as widow of her husband, naming him.

In any case (except of dower) there may be several counties, and several parties may be named as plaintiffs, jointly in one count and separately in others.

The consent rule, and the confession of lease, entry, and ouster, being thus made unnecessary, are abolished.

The defendant may by rule of court or order of a judge, compel the attorney for the plaintiff to produce his authority to sue; the proceedings then are as in ordinary actions until the verdict, except that the defendant can only plead the general issue or demur. The verdict specifies minutely which of the plaintiffs is entitled to recover, and against which of the defendants; also, whether he is to recover the whole or an undivided share, the fee, or a smaller specified estate.

This action may he brought as well where a writ of ouster has been served on the defendant, as in the cases formerly allowed by the action of ejectment; but cannot be brought by a mortgagee, or his assigns or representatives.

As to the conclusiveness of the judgment, see ante, note 15. p. 194.

Instead of the action for mesne profits, the plaintiff, in one year after judgment, enters on the record a suggestion of his claim, which is in the same form as the declaration for use and occupation; but is served in the same way as the declaration in ejectment. The rule to plead and other proceedings are then as in ordinary personal actions. But the defendant cannot controvert the matters that might have been controverted in the ejectment suit: he may, however, show in mitigation of damages a subsequent alteration in the title of the defendant or another of the same premises, or of a part thereof: he may also show the actual time at which he entered. If the action be for dower, commissioners are appointed to make admeasurement of dower. (2 R. S. 303-312.)

By the 2 R. S. 312, &c, a person being three years in possession of lands or tenements, and claiming the fee, may compel any claimant to come into the Supreme Court and controvert the plaintiff's title, or be forever barred. But if the claimant be under any of the usual disabilities, the plaintiff cannot proceed in this way. See ante, p. 178, note (7).

Summary proceedings are also allowed (2 R. S. 512, &c.) against a tenant who holds over after the expiration of his term, or after taking the benefit of any insolvent act, or act for the relief of his person from imprisonment, or after a sale under an execution against him, and the title under such sale becoming perfected, or after default in payment of rent, while in this last case no goods are on the premises sufficient to satisfy the rent by distress: or if the tenant leaves the premises uncultivated and uncultivated, and there are not sufficient goods to satisfy such distress.
CHAPTER XII.

OF TRESPASS (1).

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 auspessit is grounded: and, in general, any misseansance or act of one man whereby another is injuriously treated or dannified, 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, and therefore necessarily accompanied with some force, [*209] 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 (2).

(1) See in general, Com. Dig. Trespass; Bac. Ab. Trespass; Vin. Ab. Trespass; 1 Chitty on Pl. 149 to 172.

(2) See these distinctions fully considered, 1 Chitty on Pl. 115 to 122, and 149 to 172. The distinctions between actions of trespass vi et armis for an immediate injury, and actions of trespass upon the case for a consequential damage, are frequently very subtle: see the subject much considered in 2 Bl. Rep. 892.† In a case where an action of trespass vi et armis was brought against the defendant for throwing a lighted squib in a public market, which fell upon a stall, the owner of which, to defend himself and his goods, took it up and threw it to another part of the market, where it struck the plaintiff and put out his eye; the question was much discussed, whether the person injured ought to have brought an action of trespass vi et armis, or an action upon the case; and one of the four judges strenuously contended that it ought to have been an action upon the case. But I should conceive, that the question was more properly this, viz. whether an action of trespass vi et armis lay against the original or the intermediate thrower, or whether the act of the second thrower was involuntary (which seems to have been the opinion of the jury), or wilful and mischievous, and if so, whether the first thrower alone ought not to have been answerable for the consequences. For if A. throws a stone at B., which, after it lies quietly at his foot, B. takes up and throws again at C., it is presumed that C. has his action against B. only; but if it is thrown at B., and B. by warding it off from himself, gives it a different direction, in consequence of which it strikes C., in that case, it is wholly the act of A., and B. must be considered merely as an inanimate object, which may chance to divert its course. In the case of Leame v. Bray, 3 East, 598, it was decided, that if one man drives a carriage, being on the wrong side of the road, against another carriage, though unintentionally, the action ought to be trespass vi et armis, and the court declare generally, that if the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass vi et armis by all the cases both ancient and modern.

† In New-York, by 2 R. S. 553, § 16, case may be brought wherever trespass could, except for wrongs to real estate.
PRIVATE WRONGS.

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 praeviderit, prohiberi ne ingrediatur (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 land (unless by the owner's leave, or in some very particular 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 (3).

Every unwarrantable entry on another's soil the law entitles a trespass by breaking his close: the words of the writ of trespass commanding the defendant to shew cause quare clausum querenris fregit. For every man's land is in the eye of the law enclosed and set apart from his neighbour'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,

[*210]*

*existing only in the contemplation of law, as when one man's land adjoins to another's in the same field (4). 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) (5).

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) (6). Thus if a meadow be

(6) Inst. 2. 1. 12.
(c) F. N. B. 87, 88.

(3) Trespass for breaking a close is sustainable without previous notice; but it is most prudent to serve a notice, and proceed for a subsequent trespass, upon which the judge on the trial will usually certify that the trespass was wilful, which will entitle plaintiff to full costs, though the damages be under 40s. S. & 9 W. III. c. 11. s. 4. 3 Wils. 325. 6 T. R. 11. 7 T. R. 449. 3 East. 405.

(4) Doctor & Stud. 30. 7 East, 207. 2 Stra. 1004. 1 Burr. 133.

(5) In an action of trespass for entering the grounds of another person, and sporting over them, the jury may take into consideration, in determining their verdict, not only the actual damage sustained by the plaintiff, but circumstances of aggravation and insult on the part of the defendant. Merest v. Harvey, 1 Marsh. 139. 5 Taunt. 442.

(6) As to the possession and title essential, see Chitty on Pl. 159 to 166. An exclusive interest in the crop, without an interest in the soil, is sufficient to sustain an action of trespass. 3 Burr. 1856. Bro. Abr. Tres. 273. Bull. N. P. 85. But possession, actual or constructive, must be proved. 1 East, 244. 4 Taunt. 547. 6 East, 602. Trespass will not lie for entering a pew or seat, because the plaintiff has not the exclusive possession, the possession of the church being in the person. 1 T. R. 430. If trees are excepted in the lease, the land whereon they grow is necessarily excepted also, consequently the landlord may maintain a trespass for breaking his close, if the tenant cut down the trees. Selw. N. P. 1287. Where two fields are separated by a hedge and ditch, the hedge prima facie belongs to the owner of the field in which the ditch is not. If

† See in New-York, 2 R. S. 614, § 12.
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 seised 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 postliminiati*, supposes the freehold to have all along continued in him (g). Neither, by the common law, in case of an intrusion or defacement, 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 seised *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 possession of the lands or tenements, without the consent of the person entitled thereto, they are adjudged to be trespassers (7); 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 (8). And by the statutes of 4 Geo. II. c. 28. and 11 Geo. II. c. 19. in case, after the determination of any term of life, lives, or years, 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 afterwards neglects to carry that notice into due execution (9), (10).

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 neighbour'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

---

*(e) Cro. Eliz. 421.
(f) 2 Roll. Abr. 555.

there is a ditch on each side, the ownership of the hedge must be proved by acts of ownership. Ib. 1288. A person may cut his ditch to the edge of his own land, but if he goes beyond, he is a trespasser on his neighbour's land, though he may cut as wide as he pleases on his own land. 3 Taunt. 138.

(7) 1 R. S. 749, 750.
(8) 2 R. S. 343, § 1, &c.
(9) 1 R. S. 745, § 10, &c.
(10) See 2 book, p. 151. Upon these statutes it has been determined, that it is not necessary that the notice from the tenant should be in writing; but notice from the landlord to the tenant must. Burr. 1603. Bla. Rep. 533. And the 4 Geo. II. extends to cases where the tenant holds over fraudulently and perversely only, not where he continues his possession under a bona fide claim of right. 5 Esp. 203. See also ib. 215. The action for double rent may be maintained after recovery in ejectment, 9 East, 310.
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 aperiis 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.

[*212*] And herein, if any unwarrantable act 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 trespasses 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) (11).

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 licence to any person to enter his doors. So a landlord may justify entering to distress 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 another’s ground [*213*] after the harvest, without being guilty of trespass (m): which humane provision seems borrowed from the mosaical law (n) (12).

---

(k) Registr. 94.
(l) 2 Roll. Abr. 545. Lord Raym. 240.
(k) Salk. 638, 639. Lord Raym. 823. 7 Mod. 152.
(k) 8 Rep. 146.
(l) 8 Rep. 146.
(m) Gilb. Ev. 253. Trials per pais. ch. 15, pag. 638.
(n) Levit. c. 19, v. 9, & c. 28, v. 22. Dent. c. 24, v. 19, &c.

---

(11) The latter mode prevails in modern practice, and the form of declaring with a continuando has grown obsolete. Under the statement that the defendant, on a day named, and on divers other days and times between that day and the commencement of the suit, trespassed, the plaintiff may prove any number of trespasses within those limits, though none are specified except those on the earliest day named. 1 Stark. R. 351.

(12) Two actions of trespass have been brought in the common pleas against gleaners, with an intent to try the general question, viz. whether such a right existed; in the first, the defendant pleaded that he being a poor, neces-

sitous, and indigent person, entered the plaintiff’s close to glean; in the second, the defendant’s plea was as before, with the addition that he was an inhabitant legally settled within the parish: to the plea in each case there was a general demurrer. Mr. J. Gould delivered a learned judgment in favour of gleaning, but the other three judges were clearly of opinion, that this claim had no foundation in law; that the only authority to support it was an extrajudicial dictum of lord Hale; that it was a practice incompatible with the exclusive enjoyment of property, and was productive of vagrancy, and many mischievous consequences. 1 H. Bl. Rep. 51. 53. n. (a).
In like manner the common law warrants the hunting of ravenous 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 (a) (13). But in cases where a man misdemeans 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 tarrying 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

(a) Cro. Jac. 291.  
(p) Finch, L. 47.  
(q) 2 Roll. Abr. 561.  
(s) Finch, L. 47.  
(t) 8 Rep. 146.  
(u) Cro. Jac. 321.

(13) It has been determined, that it is lawful to follow a fox with horses and hounds over another's ground, if no more damage be done than is necessary for the destruction of the animal by such a pursuit. 1 T. R. 333. But in the Earl of Essex v. Capel, Hertford assizes, A. D. 1803, 2 Chitty Game L. 1381, a different doctrine was laid down by lord Ellenborough, who said, "these pleasures are to be taken only when there is the consent of those who are likely to be injured by them, but they must be necessarily subservient to the consent of others. There may be such a public nuisance by a noxious animal as may justify the running him to his earth, but then you cannot justify the digging for him afterwards; that has been ascertained and settled to be law: but even if an animal may be pursued with dogs, it does not follow that fifty or sixty people have therefore a right to follow the dogs, and trespass on other people's lands." The jury, under his lordship's direction, found a verdict for the plaintiff. And see 1 Stark. 351.
other personal actions, it is (inter alia) enacted by statutes 43 Eliz. c. 6.
and 22 & 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 al-
lowed 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 (14).
But this rule now admits of two exceptions more, which have been made
by subsequent statutes. One is by statute 8 & 9 W. III. c. 11. which
enacts, that in all actions of trespass, wherein it shall appear that the tresp-
ass was wilful and malicious; and it be so certified by the judge, the plain-
tiff shall recover full costs (15). Every trespass is wilful, where the de-
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

["215] *be to harass and distress the plaintiff. The other exception is
by statute 4 & 5 W. & M. c. 23. which gives full costs against
any inferior tradesman, apprentice, or other dissolute person, who is con-
victed 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 infe-
rior 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) (16).

CHAPTER XIII.

OF NUSANCE (1).

A third species of real injuries to a man's lands and tenements, is by
nusance. Nusance, 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 annoyance to
all the king's subjects: for which reason we must refer them to the class
of public wrongs, or crimes and misdemesnors: and private nuisances,
which are the objects of our present consideration, and may be defined,
any thing done to the hurt or annoyance of the lands, tenements, or here-
dimensions 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,

(w) Lord Raym. 149.  (a) Finch, L. 188.

(14) And if this appears upon the face of
the pleadings, it is considered tantamount to
the judge's certificate, and the plaintiff is en-
titled to his full costs. 2 Lev. 234. 1 East,
330. Selw. N. P. 1324. 6 T. R. 281. 7 T.
R. 659. See also, post 401. n. 21.

(15) It has been supposed that the judge
must certify in open court after the trial, other-
wise the certificate is void, 2 Wils. 21; but
the contrary has recently been decided. 2 B.
& C. 580. 621.

(16) In New-York, in actions of trespass
upon lands, or for taking personal property, if
the action is brought in a Common Pleas
Court, the plaintiff recovers costs if the court
or jury certify that the trespass was wilful
and malicious, or the jury give over 50 dol-
lars damages: in actions for assault and bat-
tery in the Common Pleas, the plaintiff re-
covers full costs without such certificate. (2
R. S. 614, § 11.)

(1) See in general, Com. Dig. Action on
the Case for a Nusance; Bac. Ab. Nusances;
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 "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) (2). 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 (3), 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 neighbour sets up 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 exerted


(2) Where A. had enjoyed lights made in a building not erected at the extremity of his land, looking upon the premises of B., without interruption for at least thirty-eight years, and there was no evidence of the time when the lights were first put out, and C., the purchaser of B.’s premises, erected, in their stead, a building which obstructed A.’s lights: Held, that an action was maintainable for the obstruction, though there was no proof of knowledge in B. or his agents of the existence of the windows. Cross v. Lewis, 2 B. & C. 686. 4 D. & R. 231, S. C. Where the plaintiff is entitled to lights by means of blinds, fronting a garden of the defendant’s, which he takes away, and opens an uninterrupted view into the garden, the defendant cannot justify making an erection to prevent the plaintiff from so doing, if he thereby render the plaintiff’s house more dark than before. Cotterell v. Griffiths, 4 Esp. 69. A parol license to put a sky-light over the defendant’s area, (which impeded the light and air from coming to the plaintiff’s dwelling-house through a window), cannot be recalled at pleasure after it has been executed at the defendant’s expense, at least not without tending the expenses he had been put to; and therefore no action lies as for a private nuisance in stopping the light and air, &c., and communicating a stench from the defendant’s premises to the plaintiff’s house by means of such sky-light. Winter v. Brockwell, 8 East, 308. If an ancient window be raised and enlarged, the owner of the adjoining land cannot lawfully obstruct the passage of light and air to any part of the space occupied by the ancient window, although a greater portion of light and air be admitted through the unobstructed part of the enlarged window than was ancienly enjoyed. Chandler v. Thomp-
cised in remote places; for the rule is, “*sic utere tuo, ut alienum non laedas.*” this therefore is an actionable nuisance (*f*). So that the nuances 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 coelum* (*g*): 2. Stopping ancient lights: and, 3. Corrupting the air with noisome smells: for light and air are two indispensable requisites to every dwelling (*h*). 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 kills his corn and grass, and damages his cattle therein, this is held to be a nuisance (*k*). 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 [*218*] *him* to find some other place 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 (*l*) 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

---

*(f)* Cro. Car. 510.  
*(g)* 9 Rep. 58.  
*(h)* Hale on P. N. B. 427.  
*(k)* F. N. B. 184.  
*(l)* 9 Rep. 59.  
*(m)* F. N. B. 183.  
*(n)* 2 Roll. Abr. 140.  
*(5)* And where defendant employed a steam-engine in his business, as a printer, which produced a continual noise and vibration in the plaintiff’s apartment, which adjoined the premises of the defendant, it was held that this was a nuisance. Duke of Northumberland v. Clowes, C. P. at Westminster, A. D. 1824.

*(4)* But the following note of a case describes an injury not exactly coming within either of the above three sections. A. has immemorially had, for watering his lands, a channel through his own field, in a porous field, through the banks of which channel, when filled, the water percolates, and thence passes through the contiguous soil of B. below the surface, without producing visible injury. B. builds a new house in his land below the level of his soil, in the current of the percolating water: Held, that A. cannot now justify filling his channel, if the percolating water thereby injures the house of B. *Cooper v. Barber*, 3 Taunt. 99.

*(6)* After twenty years uninterrupted enjoyment of a spring of water, an absolute right to it is gained by the occupier of the close in which it issues above ground; and the owner of an adjoining close cannot lawfully cut a drain whereby the supply of water by the spring is diminished. *Balston v. Bensted*, 1 Campb. 463, Lord Ellenborough, L. C. J. And see *Bealey v. Shaw*, 6 East, 208. 2 Smith, 321. S. C.
own door. 2. That the market be erected within the third part of twenty miles from mine. *For sir Matthew Hale (o) construes the dicta, 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 *nu-

ance: for it is held reasonable that every man should have a market within one-third of a day's journey from his own house; that the day being divided into three parts, he may spend one part in going, another 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 case 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 abs-
que 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 governor, and pater-familias of the ["220] 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 a 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) (7). Also if a man hath

(o) Hale on F. N. B. 181.
(p) 2 Inst. 567.
(q) E. 2. 11. 1.
(r) 9 Roll. Abr. 140.
(s) Hale on F. N. B. 184.
(t) Ho. 311, 342.
(u) Co. Litt. 56. 5 Rep. 73.

(7) But the particular damage in this case must be direct, and not consequential, as by being delayed in a journey of importance. Bull. N. P. 26. Carthew, 194. And if the plaintiff has not acted with ordinary care and skill, with a view to protect himself from the mischief, he cannot recover. 11 East, 60. 2 Taunt. 314. It is upon the same principle that parties, suffering special damage by a public nuisance, are entitled under 5 W. & M. c. 11. s. 3. to receive their expenses in Prosecuting an indictment against the party guilty
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 (8); in which the party injured shall only recover a satisfaction for the injury 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 hardiness 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 assise of nuisance, and the writ of quod permettat propter nusus: 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 (9); so that a lessee for years is confined to his action upon the case (z).

[*221]

*2. An assise of nuisance is a writ: wherein it is stated that the party injured complains of some particular fact done, ad nocumen-
tum liberi tenementi sui, and therefore commanding the sheriff to summon an assise, that is a jury, and view the premises, and have them at the next commission of assises, that justice may be done therein (a): and, if the assise 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 assise of nuisance only lay against the very wrongdoing 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 Westm. 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 caetero non recedant querentes a curia dominii regis, pro eo quod tenementum transfertur de uno in alium," and then gives the form of a new writ in this

of the nuisance. See 16 East, 196. Withes, 71. Cro. Eliz. 664. If a party living in the neighbourhood, and who has been in the habit of passing to and fro on a highway, is obliged by a nuisance thereto to take a more circuitous route in his transit to and from the nearest market town to his house, it is a private injury, for which he may sue as well as inflict. 3 M. & S. 472. So, being delayed four hours by an obstruction in a highway, and being thereby prevented from performing the same journey, as many times in a day as if the obstruction had not existed, is a sufficient injury to entitle a party to sue for the obstruction. 2 Bingham 293. So, if the nuisance prevent the plaintiff navigating his barges on a public navigable creek, and compel him to convey his goods out of the same over a great distance of land, it is actionable. 4 M. & S. 101. But the mere obstruction of the plaintiff in his business, 1 Esp. N. P. C. 148. 4 M. & S. 103. or delaying him a little while in a journey, Carth. 191. is not such a damage as will entitle the party to his action; the damage ought to be direct, not consequential. Carth. 191.

There are also various other injuries which partake of both a criminal and civil nature, for which both an indictment as well as an action will lie, as for a forcible entry, enticing away a servant, using false weights, disobeying an order of justices, extortion, or for a libel, &c.

(8) See in general, 1 Chitty on Pl. 4 ed. 132.
(9) See 2 R. S. 332, § 3.
case: which only differs from the old one in this, that, where the assise is
brought against the very person only who levied the nuisance, it is said
“quod A. (the wrongdoer) in justa levavit tale nocentum;” 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 con-
tinuation, 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 proster-
nere; 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 prostertere, the nuisance com-
plained of; *and unless he so permits, to summon him to appear [*222]
in court, and shew 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 assise of nuisance, and of quod permittat proster-
nere, 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 nu-
sance, but only to recover damages. 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 pos-
session only, against another that hath like possession, the process is there-
fore 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 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 his posse comitatus,
or power of the county, to level it (10).

CHAPTER XIV.

OF WASTE (1).

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) (2), as it was a means

(c) 9 Rep. 55.
(d) 2 Inst. 405.
(e) F. N. B. 194.

(1) See in general, Bac. Ab. Waste; and
the very excellent notes in 2 Saunders Rep.
251. 259, &c. and id. index.

(2) See further, as to what is waste, 2
Saund. Rep. 259. in notes, and Bac. Ab.
Waste.

(10) In New-York the common law reme-
dy by writ of nuisance is retained: and it is
provided that the plaintiff may sue in one ac-
tion the party erecting a nuisance and him to
whom the land has been transferred. (2 R.
S. 332, § 1, &c.) See id. as to the mode of
proceeding.
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 shew, 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 (3), without any incumbrance or charge on the premises,

[*224*] he may commit whatever 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 haeres viven-tis*; 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 *haeres natus* and an *haeres factus*: or, in the more accurate phraseology of our English law, he may alienate or devise his estate to whomever he thinks proper, and by such alienation or devise may disinher it 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*.

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 housebote, 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 assise, 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 Glocester) (e) (4), 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 terms of the deed or will under which he claims.

[*225*]

(b) F. N. B. 59. 9 Rep. 112. 2 Inst. 299.
(c) 52 Hen. III. c. 23. 6 Edw. I. c. 5.
(d) See 2 R. S. 334, § 1.

(3) A tenant in fee-tail has the same uncontrolled and unlimited power in committing waste, as a tenant in fee-simple, unless expressly restrained from committing waste by

(4) See 2 R. S. 334, § 1.
principal. To him therefore in remainder and 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 (5). Yet a parson, vicar, archdeacon, prebendary, and the like, who are seised 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 successor a fee-simple qualified: and yet, as they are not seised in their own right, the writ of waste shall not say, ad exhaeredationem ipsius, as for other tenants in fee-simple; but ad exhaeredationem ecclesiae, 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 estrepeement, the latter by that of waste.

1. Estrepeement is an old French word, signifying the same as waste or extirpation: and the writ of estrepeement lay at the common law, after judgment obtained in any action real (h), and before possession was delivered by the sheriff; 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 estrepeement pending the suit, well knowing the weakness of his title, therefore the statute of Glocester (i) gave another writ of estrepeement, pendente placito, commanding the sheriff firmly *to inhibit the tenant "ne faciat vastum vel estrepeementum pendente [*226] placito dicto indiscusso (k) (6)." 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 possessorly, where no damages were recovered, a writ of estrepeement might be had at any time pendente lite, may 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 estrepeement, 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 Glocester, and in advancement of the remedy,

---

(f) Co. Litt. 53.  
(g) Ibid. 341.  
(h) 2 Inst. 228.  
(i) 6 Edw. I. c. 13.  
(j) Register. 77.  
(k) 2 Inst. 399.  
(l) F. N. B. 60, 61.

(5) No person is entitled to an action of waste against a tenant for life, but he who has the immediate estate of inheritance in remainder or reversion, expectant upon the estate for life: if between the estate of the tenant for life who commits waste, and the subsequent estate of inheritance, there is interposed an estate of freehold to any person in esse, then, during the continuance of such interposed estate, the action of waste is suspended; and if the first tenant for life dies during the continuance of such interposed estate, the action is gone for ever. Co. Litt. 218. b. 2 Saund. 232. note 7. See further, as to the persons who may maintain a writ or action for waste, id. ibid.  

(6) See, as to New-York, 2 R. S. 338, § 18, &c.: the court prevents waste by an order on the defendant, and enforce its order as the court of chancery does.
that a writ of estrepeinent, 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 estrepeinent 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 estrepeinent, 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 foundation of this writ; wherein the only plea of the tenant can be, non fecit vástum 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 estrepeinent 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 (7) is also an action, partly founded upon the common law, and partly upon the statute of Glocester (r); and may be brought by him who hath the immediate estate of inheritance in reversion or re-

[*227] (n) F. N. B. 61.
(o) 5 Rep. 115.
(p) Moor, 100.

(7) The action or writ of waste is now very seldom brought, and has given way to a much more expeditious and easy remedy, by an action on the case in the nature of waste. The plaintiff derives the same benefit from it, as from an action of waste in the tenet, where the term is expired, and he has got possession of his estate, and consequently can only recover damages for the waste; and though the plaintiff cannot in an action on the case recover the place wasted, where the tenant is still in possession, as he may do in an action of waste in the tenet, yet this latter action was found by experience to be so imperfect and defective a mode of recovering seisin of the place wasted, that the plaintiff obtained little or no advantage from it; and therefore, where the demise was by deed, care was taken to give the lessor power of re-entry, in case the lessee committed any waste or destruction, and an action on the case was then found to be much better adapted for the recovery of mere damages, than an action of waste in the tenet.

It has also this further advantage over an action of waste, that it may be brought by him, in the reversion or remainder for life or years, as well as in fee, or in tail; and the plaintiff is entitled to costs in this action, which he cannot have in an action of waste.† However, this action on the case prevailed at first, with some difficulty. 3 Lev. 130. 4 Burr. 2141.

But now it is become the usual action, as well for permissive as voluntary waste. Some recent decisions have made it doubtful, whether an action on the case, for permissive waste, can be maintained against any tenant for years. See 1 New. Rep. 290. 4 Taunt. 764. 7 Taunt. 302. 1 Moore, 100, S. C. See also 1 Saund. 323. a. n. (i).—Where the lessee even covenants not to do waste, the lessor has his election, to bring either an action on the case, or of covenant against the lessee, for waste done by him during the term. 2 Black. Rep. 1111. See further, 2 Saund. 252, and 1 Chitty on Pl. 4 ed. 132, 3.

† In New-York, the plaintiff in an action of waste may recover costs. (2 R. S. 334. 613, § 3).
mainder, 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 Glocester, 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) (8).

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 Glocester. The writ of waste calls upon the tenant to appear and shew cause why he hath committed waste and destruction in the place named, ad exhaeredationem, to the disinherison, of the plaintiff (w). 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) (9). But it is no defence

---

(8) See 2 Bos. & Pul. 86. But the doctrine that the smallness of the damages given by the jury shall defeat the action, does not extend to other actions. See 1 Dow. Rep. 209. 2 East, 154.

(9) Action on the case doth not lie for permissive waste. 5 Rep. 13. Hale MSS. The case cited by lord Hale, is that of the countess of Salop, who brought an action on the case against her tenant at will, for negligently keeping his fire, so that the house was burnt; and the whole court held that neither action on the case nor any other action lay; because at common law, and before the statute of Gloce-
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) (10).

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 Glocester, 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*), and also that the plaintiff shall recover treble the damages assessed by the jury (11), 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.

Subraction, 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 of 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

(a) Law of *nisi prius*, 112.

...
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.

I. Fealty, suit of court, and rent, are duties and services usually issuing and arising ratione tenuriae, 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 feodal 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 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 redivus, 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 seignory.

The general remedy for all these is by distress; and it is the only remedy at the common law for the two first 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 distressed 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, and therefore it ought to be such as is sufficiently compulsory (1); 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 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

(a) See pag. 6. 148.
(b) Finch, J. 285.
(c) 1 Roll. Abr. 595.

(1) Allodial tenures being adopted in New-York in place of feudal, fealty and distress for is seem to be abolished. (1 R. S. 718, § 3, &c.)

Vol. II.
rents (2). 2. An assise 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 rents, being in the nature of writs of right, and therefore more dilatory in their progress, are entirely disused, though not formally abolished by law. Of this species however is, 3. The writ de consuetudinibus et servititis, 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. c. 21. and 41. when a man who holds land 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 servititis 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 [233] two years, and there be not sufficient distress upon the premises; or unless the tenant hath so enclosed the land, that the lord cannot come upon it to distrein (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 sufficient 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. (3) 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

(d) F. N. B. 195.
(e) Ibid. 151.
(f) Ibid. 205.
(g) Cod. 4. 66. 2.
(h) F. N. B. 209. 3 Inst. 298.
(i) 2 Inst. 401. 480.
(k) See pag. 206.

(2) See 1 R. S. 747, § 19. rent is in arrear, and although no right of re-entry be reserved.
(3) And see by 57 Geo. III. c. 52. which gives similar power, though only half a year's
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 assise 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, *so it is expressly [*234]* to be met with in the feodal constitutions (m): "vasallus, 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) (4). It lies, where the tenant in fee-simple and his ancestors have held of the lord by certain services; and the lord hath ordained 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 hands: but is driven to this writ, to devest 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 (g). 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 *paravall*, to be distreised 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 acquitted (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 mesalty, and the tenant shall hold immediately of the lord paramount himself (u) (5).

*II. Thus far of the remedies for subtraction of rents or other [*235]* 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 shew 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 bakehouse; 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 neighbourhood, 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 (6), And thus much for the injury of subtraction.

CHAPTER XVI.

OF DISTURBANCE (1).

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 tenure. 5. Disturbance of patronage (2).

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, or seizing wails or estrays, or (in short) any other species of franchise whatsoever; and he is disturbed or incomforted 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 damnedified; and the profits arising from

---

(w) F. N. B. 123.
(x) Co. Entr. 461.
(y) fol. 153.
(a) Finch, L. 187.
(6) This is now the only action in use for most of the injuries specified in this chapter; the ancient appropriate writs having become obsolete. See further, 2 Saund. 113. b. (1) See in general, Com. Dig. Action upon

the Case for a Disturbance, and Quare Impedit, D.

(2) The first and last of these divisions are inapplicable to New-York.
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 distress if he pleases."*

II. The disturbance of common comes next to be considered (3); where any act is done, by which the right of another to his common is incommoded or 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 distress them damage-feasant (f): or the commoner may bring an action on the case to recover damages, provided the injury done be any thing 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) (4).

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, by depriving them of their respective portions, or at least *contracting them into a smaller compass. This injury [*238]

(c) 1 Roll. Abr. 396. (f) 9 Rep. 112.
(d) Co. Litt. 122. (g) Ibid.

(3) As to rights of common in general, see ante, 2 hbk. 32 to 35.

(4) If cattle escape into the common, and are driven out by the owner as soon as he has notice, though the lord may have his action of trespass, yet the commoner cannot bring his action upon the case, because sufficient feeding still remains for him. But if cattle are permitted to departure the common, whether they belong to a stranger, or are the supernumerary cattle of a commoner, an action lies; and it is not necessary to prove specific injury, for the right of the commoner is injured by such an act, and if permitted, the wrong-doer might gain a right by repeated acts of encroachment. 2 Bla. Rep. 1233. 4 T. R. 71. 2 East, 154. 1 Saund. 346. b. And where A., being possessed of a portion of a lamas field over which a right of common existed part of the year, took down the customary post and rail fence, containing gaps through which the commoner's cattle might pass, and built a walt with a single doorway, at which they might enter and return, it was held that this was a disturbance of the common right, and an action was maintainable, though the abridgment of the right was inconsiderable. 1 M'Cleland's Rep. 373. One farthing damages will sustain the verdict in such case. lb. and 2 East, 154. It has been held, that a claim of common for all the plaintiff's cattle levant and couchant on his land, was supported by evidence of a custom for all the occupiers of a large common field to turn cattle into the whole field when the corn was taken off, the number of cattle being regulated by the extent, and not the produce of each man's land in the field, although the cattle were not actually maintained on such land during the winter. 1 B. & A. 706. In an action for disturbance of common, where the plaintiff stated that he was possessed of a messuage and land, by reason whereof he was entitled to the right of common, and it appeared on the trial that he was possessed of land only, it was held that the allegation was divisible, and the plaintiff entitled to damages pro tanta. 2 B. & A. 360. See 15 East, 115. The declaration in all cases allege, that the plaintiff thereby could not use his common in so ample a manner as he ought to have done. 9 Co. 113. a.
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 (j).

The usual remedies, for surcharging the common, are either by distressing 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 (k). But the ancient and most effectual method of proceeding is by 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 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 admeasurement, has frequently, though erronously, 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 (6).

(a) See book II. ch. 3.  
(b) 1 Roll. Abr. 390.  
(c) Freem. 273.  
(d) 2 Inst. 369. Finch, L. 314.  
(e) F. N. B. 125.  
(f) Bro. Abr. t. prescription, 28.  
(g) Hardr. 117.  
(h) Lord Raym. 407.

[*239] (5) The modern doctrine upon this subject is somewhat different, for it is now held, that a prescription for a sole and several pasture, &c. in exclusion of the owner to the soil for the whole year, is good, 2 Lev. 2. Pollexf. 13. 1 Mod. 74. for it does not exclude the lord from all the profits of the soil, as he is entitled to the mines, trees, and quarries. And though a man cannot prescribe to have common eo nomine for the whole year in exclusion of the lord, 1 Lev. 268. 1 Vent. 395, still the lord may, by custom, be restrained to a qualified right of common during a part of the year. Yelv. 129. And it is said the lord may be restrained, together with the commoners, from using the common at all during a part of the year. 1 Saund. 353. n. (2). See also 2 H. Bl. 4. And it is said to have been clearly held, that the commoners may prescribe to have common in exclusion of the lord for a part of the year. 2 Roll. Abr. 267. L. pl. 1.

(6) The lord may restrain not only the cattle of a stranger, but also so many of a commoner’s cattle as surcharge the common. 2 Bla. R. 818. Willes, 638. A commoner can only restrain the cattle of a stranger, 1 Roll. Ab. 320. 405. pl. 5. Yelv. 104. and not of the lord, 2 Buls. 117; nor where a commoner
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 tenure 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 (*7*).

*There is yet another disturbance of common, when the owner [*240]* of the land, or other person, so encloses or otherwise obstructs it, that the 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*) (*8*). 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 assise 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

---


overcharges the common, by putting in cattle that are not *levant* and *couchant*, can another commoner restrain the surplus, at least before admeasurement. 3 Wils. 287. 2 Lutw. 1238. 4 Burr. 2426. But where the right of common is limited to a certain number of cattle, without any relation to the quantity of land which the commoner possesses, and he puts in a greater number, perhaps another commoner may restrain the supernumerary cattle. 4 Burr. 2431. It seems clear that a claim of common *pleaded* by an inhabitant, as an inhabitant merely, is bad; it must be pleaded either in the name of a corporation for the benefit of the inhabitants, or in a *que estate*. 6 Co. 69. b. 4 T. R. 717. 1 Saund. 346. f. n. (*g*). But if the defendant be lord of the manor, or one who puts his cattle on the common with the lord's licence, the commoner cannot maintain an action, unless he has sustained a specific injury. For the lord is entitled to what remains of the grass, and therefore may consume it himself, or license another to depasture it. 4 T. R. 73. 2 Mod. 6. Willes, 619.

(*7*) In New-York these *ancient* actions seem to be abolished, (2 R. S. 343, § 24.) as well as the other *real* actions mentioned in this chapter: the actions on the *case*, however, still remain. (*8*) It is the policy of the law not to allow commoners to abate, except only in few cases, for an action will best ascertain the just measure of the damage sustained. But if the lord erect a wall, gate, hedge, or fence round the common, to prevent the commoner's cattle from going into the common, the commoner may abate the erection, because it is inconsistent with the grant. 1 Burr. 259. 6 T. R. 485.
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 assise or a quod permittat (u).

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 [*241] to their estates; provided he leaves sufficient common to his tenants, according to the proportion of their land (9). 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. 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 assise of novel-disseisin, for common, shall lie against a lord for erecting on the common any windmill, sheephouse, 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 statute 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 (10), (11).

III. The third species of disturbance, that of ways (12), 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

(t) Finch, L. 375. F. N. B. 123.
(u) Cro. Jac. 195.

(9) See 2 book, p 34. notes.
(10) As the lord may approve, leaving a sufficiency of common, the commoner abates an ejection at the peril of an action. A person seized in fee of the waste may approve, although he be not lord. 3 T. R. 445. But there can be no approvement against the tenants of a manor, who have a right to dig gravel in the wastes, and take estovers, 2 T. R. 391. nor against common of turbary. 1 Taunt. 435. And although the lord may approve against common of pasture, by 20 H. III. c. 4. 5 T. R. 441, yet there may be other rights of common against which he cannot approve. 6 T. R. 741. A custom for tenants to approve by the lord’s consent, and by presentment of the homage, does not restrain the lord’s right to approve. 2 T. R. 392. (n). The lord may, with consent of the homage, grant part of the soil for building, if the exercise of the right be immemorial. 5 T. R. 417. n. But a custom for the lord to grant leases of the waste, without restriction, is bad in point of law. 3 B. & A. 153.

(11) The cultivation of common lands, and the enclosure and management of them, are now carried on under private acts of parliament, subject to, and adopting the regulations laid down in, the 13 Geo. III. c. 81. and 41 Geo. III. c. 109. which are incorporated into all special enclosure acts.

(12) As to private ways in general, see ante, 2 book, 35 to 37. Also Com. Dig. title: Chamin.
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 nusance, for which an assise 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 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 nusance, which must be laid, ad nocentum liberi tenementi (γ); 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 assise or any real action, but by the universal remedy of action on the case to recover damages (x).

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 (13); 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 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, so that he could not present again upon the next avoidance, unless in the mean time 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 (14). And the patron also lost the

---

(a) Ch. 13, p. 218.  
(b) F. N. B. 183.  
(c) Gale on F. N. B. 185. Lut. 111. 119.  
(13) See in general, Mirehouse on Advowsons, and ante, 2 book 22, notes 3, 5, 6, as to advowsons, rights of presentation, &c.  
(14) And this preference of the peace of the church to the litigated rights of patrons, was held to prevail in all cases without any regard to infamy, coverture, or any such like disability of the patron. For it was a maxim of the common law, "that he who came in by admission and institution, came in by a judicial act, and the law presumes that the bishop who has the care of the souls of all within his diocese, for which he shall answer at his fearful and final account (in respect of which he ought to keep and defend them against all heretics, and schismatics, and other ministers of the devil), will not do or assent to any wrong to be done to their patronages, which is of their earthly
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 plenarity, arising from his own presentation, became in fact seised of the advowson: which seisin it was impossible for the true patron to remove by any possessory action, or other means, during the plenarity or fulness 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 church, conveys no manner 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. 13 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

(d) 6 Rep. 49. (e) F. N. B. 30. (f) Ibid. 36. (g) 2 Inst. 357.

...but if the church be litigious, jure patronatus, and so do right." 6 Coke, that he will inform himself of the truth by a 49.
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 tends to and promotes the same inconvenience; and [*245] the ordinary, by refusing to admit the real patron’s clerk, or admitting the clerk of the pretender. 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 assise 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 assise 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 (k) directed to the sheriff to summon an assise or jury, to inquire who was the last patron that presented to the church now vacant, of which the plaintiff complains that he is deforced by the defendant: and, according as the assise 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 or 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 impedite, and to recover (if his title be good) notwithstanding the last presentation, by whomsoever made; assises 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 more general, and therefore a more usual action. For the assise of darrein presentment lies only where a man has an advowson by descent from his ancestors; but the writ of quare impedit is equally remediable 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.

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

(k) F. N. B. 31.
(l) See book II. ch. 18.
(m) See book I. ch. 11.
(i) See Boswell’s case, 6 Rep. 48.
void by the ecclesiastical law (a); 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 [*247] and examine who is the rightful patron (p); and if, upon such inquiry made and certificate thereof returned to the commissioners, 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 (q): 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 appellant.

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 his 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 [*248] the cause (t). If the *clerk be left out, and has received institution before the 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 shew the reason why they hinder him.

(a) 1 Burn. 207.
(b) 1 Roll. Rep. 191.
(c) 1 Burn. 16, 17.
(d) Ibid. 113.
(e) Cro. Jac. 98.
(f) Hob. 316.
(g) 7 Rep. 25.
(h) F. N. B. 32.
PRIVATE WRONGS.

193

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 incumbravit*; 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 incumbravit* lies: for the bishop hath no legal notice, till the writ of *ne admittas* is served upon him *(15)*. The patron 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 usurpation 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 *(z)*; and he must also shew 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 plenarity 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 semestre*. So that plenarity 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 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

---


*(15)* Yet it is said, that if the bishop incumbers when no *quare impedit* is pending, and no debate for the church, *quare incumbravit* lies.
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 admittit (e), and recover ample satisfaction in damages.

Besides these possessory actions, there may be also had (as hath before been incidentally mentioned) a writ of right of advowson, 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, *quae impedit, or assise 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 there was a parson of one of his ["251"] *churches, that had been incumbent there above fifty years; nor are instances wanting wherein two successive 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 shewn 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 (16).

---

(c) Stat. Westm. 2. 13 Ed. I. c. 5, § 3.
(d) F. N. B. 38.
(e) Ibid. 47.
(f) 1 Inst. 115.
(g) Two successive incumbents of the rectory of Chelsfield cum Farnborough in Kent, continued 101 years; of whom the former was admitted in 1650, the latter in 1700, and died in 1751.

(16) A quare impedit lies for a church, an hospital, and a donative, and by the equity of the statute of Westminster, it lies for prebends, chapels, vicarages. 3 T. R. 650. Willes Rep. 608. 2 Rol. Ab. 380. This action may be brought by the king in right of his crown, or on a title by lapse by a common parson, or by several who have the same title, by
PRIVATE WRONGS. 195

In a writ of quare impedit, which is almost the only real action that remains in common use, and also in the assise 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 against any person presenting [*252] to such livings, and disturbing their right of patronage, or his ces-
tuy 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

(h) Stat. 3 Jac. I. c. 5. 1 W. & M. c. 36. 12 Ann. st. 2, c. 14. 11 Geo. II. c. 17.
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, assise, ejectment, debt, or
trespass (as the case may happen), which it furnishes to the owners of lay
property. 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, which is sometimes styled the parson’s writ of
[*253] right (k), *being the highest writ which he can have (l). This
lies for a parson or prebendary at common law, and for a vicar by
statute 14 Edw. III. c. 17. and is in the nature of an assise, 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 there-
by the demandant may recover lands and tenements, belonging to the
church, which were alienated by the predecessor; or of which he was dis-
seised; or which were recovered against him by verdict, confession, or de-
fault, 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 re-
straining statute of 13 Eliz. c. 10. whereby the alienation of the predeces-
sor, 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 par-
son himself has been deforc’d 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 ori-
ginal 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 ag-
gressor, 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 preroga-
tive. 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) P. N. B. 49.
(k) Booth, 221.
(l) P. N. B. 48.
(m) Registrar. 32.
(n) F. N. B. 48, 49.
(o) Booth, 291.
(a) Bro. Abr. t. petition, 12. t. prerogative, 2.
1. 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 is not *chargeable personally on the [*255] 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 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.

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 in 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 inconvenience 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.

*The common law methods of obtaining possession or restitution from the crown, of either real or personal property, are (1), 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 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

(b) Book I. ch. 7, pag. 243—246.
(c) Plowd. 487.
(d) Jenkins, 78.
(e) Finch, L. 83.
(f) on Gov. p. 2, § 205.
(g) Bro. A br. t. prerog. 2. Fitz. A br. t. error, 8.
(h) Skin. 609.
(i) Finch, L. 256.

(1) In New-York the remedy would be by petition to the legislature.
PRIVATE WRONGS.

subject. Thus, if a disseisor of lands, which are holden of the crown, dies seised without any 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 disseisee 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 any heir), the party grieved shall have monstrans de droit at the

[*257] 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 & 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 restituatur pelenti, 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) (g) 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 dispossesion of the plaintiff; such as an assise or an ejectment (s) (2): but he may bring a quare impedit (t), which always supposes the complainant to be seised 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

(2) But this objection to an ejectment does not seem to apply where the king is lessor of the plaintiff, for it is the lessee, and not the lessor who is supposed by the legal fiction to be ousted; and it is held, that where the possession is not actually in the king, but in lease to another; then, if a stranger enter on the lessee, he gains possession without taking the reversion out of the crown, and may have his ejectment to recover the possession if he be afterwards ousted, because there is a possession in pais, and not in the king, and that possession is not privileged by prerogative. Hence it follows that the king's lessee may likewise have an ejectment to punish the trespasser, and to recover the possession which was taken from him. 2 Leon. 206. Cro. Eliz. 331. Adams on Eject. 72.

In New-York the State may bring the action of ejectment, and in its own name. (1 H. S. 282).

(4 Rep. 55.  
(n) Skin. 606.  
(o) 2 Inst. 695. Rasf. Entr. 463.  
(p) Finch, L. 460.  
(q) 21 Jac. I. c. 2. 9 Geo. III. c. 16.  
(r) Finch, L. 459.  
(s) Bro. Abr. t. prerogative, 89.  
(t) F. N. B. 32.  
(u) Dyspersity des coutres, c. bank le roy.
usual (though in strictness maintainable) for breaking his close, or other injury done upon his soil or possession (w). It would be equally tedious *and difficult, to run through every minute distinction that [*258] 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 seised, whereby the reversion accrues to the king: whether A, who 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 nativitate; 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 (3). 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 seised, 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 was 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 [*259] 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.

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 sur-

---

(3) See 1 R. S. 282, 6 1, &c.

Digitized by Microsoft®
mises 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 in-
quosition 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 ten-
ments before office found, or returned into the exchequer, shall be void.
And, by the bill of rights at the revolution, 1 W. & M. st. 2. c. 2. it is de-
clared, 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).

[*260] *With regard to real property, if an office be found for the king,
it puts him in immediate possession, without the trouble of a for-
mal 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.

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 dis-
closes 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 com-
mon 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 pa-
tent, which ought not to be granted (g), or where the patentee
hath done an act 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 repea-
lung 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) (4).

(z) Glib. hist. excl. 132. Hob. 347.
(a) 2 Inst. 48.
(b) Finch, L. 325, 326.
(c) 28 Edw. I. st. 3, c. 19.
(d) Finch, L. 324.
2 & 3 Edw. VI. c. 8.

(f) Law of nisi prius, 201, 202.
(g) See Book II. ch. 21.
(h) Dyer, 198.
(i) 3 Lev. 290. 2 Inst. 88.
(k) 2 Vent. 344.
(l) Bro. Abr. t. scire facias, 69, 185.

(4) In New-York this writ issues out of the
Supreme Court to vacate letters patent ob-
tained through mistake or ignorance of a ma-
terial fact, or from a fraudulent suggestion, or
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 (n). 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 misdemeanour 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 monies 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 for the establishment and support 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, seised by the king's officer for his use. Upon such 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 (q). 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 mis-user or abuse of it; being a writ commanding the defendant to shew by what warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse (6) (7). This was concealment of such fact, or for violation of the terms on which it was granted. So also an act of incorporation may be vacated in the same way and for the same reasons. (2 R. S. 578, § 12, 13).

(m) Moor, 375.
(n) Cro. Jac. 219. 1 Leon. 48. Savil. 49.
(o) See pag. 162.
(p) Hard. 201.
(q) Gilb. hist. of exch. c. 13.
(r) Finch, L. 322. 2 Inst. 282.

(6) See 2 R. S. 586, § 53. In New-York it lies also for the recovery of real property.
(7) It must not be forgotten, that although
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. c. 1. and 18 Edw. I. st. 2 (†); but since those justices have given place to the king's temporary commissioners of assise, the judges on the several circuits, this branch of the statutes hath lost its effect (‖); 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 intituled to no such franchise, or hath disused or abused it, the franchise is either seised 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 (*)

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, seising 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 informations in the nature of quo warranto were brought against others, upon a supposed, or frequently a real, forfeiture of their charters by neglect or abuse of them. And the consequence was, that the liberties of most of them were seised 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-modeling of all corporations being a very large 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. & M. c. 8, which enacts, that the franchises of the city of London shall never hereafter be seised or forejudged for any forfeiture or misdemesnor whatsoever.


(†) 2 Inst. 498.

(‖) Cro. Jac. 250. 1 Show. 280. 1 Sid. 86. 2 Show. 47. 12 Mod. 225.

it is said the writ of quo warranto lies against him who claims or usurps any office, a limitation is implied by the fact, that it is in the nature of a writ of right for the king. Upon this principle, when an application was made for a quo warranto information, to try the validity of an election to the office of churchwarden, lord Kenyon said, that this was not an usurpation on the rights or prerogatives of the crown, for which only the old writ of quo warranto lay; and that an information in nature of a quo warranto could only be granted in such cases. 4 T. R. 381. See also 2 Stra. 1196. Bott. pl. 107. And the writ was also refused in a case of forfeiture of a recorder's place. 2 Stra. 819.
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 (8), (9).

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, secondly, for wrongful removal, when a person is legally possessed (10). *These are injuries, for which though [*265*] redress for the party interested may be had by assise, 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 shewn 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 (x). 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,

(y) See pag. 110.
(a) Stat. 12 Geo. III. c. 21.
(b) 1 P. Wms. 351.

(8) This statute, with regard to costs, extends only to cases where the title of a person to be a corporate officer, as mayor, bailiff, or freeman, is in question; but an information to try the right of holding a court is not within it, but stands upon the common law only, and being a prosecution in the name of the king, no costs are given. 1 Burr. 402. The court of king's bench having a discretionary power of granting informations in the nature of *quo warranto*, had long ago established a general rule to guide their discretion, viz. not to allow in any case an information in the nature of *quo warranto* against any person who had been twenty years in the possession of his franchise, see 4 Burr. 162; but having reason to consider this too extensive a limit, they resolved upon a new rule, viz. not to allow such an information against any person who had been six years in possession. 4 T. R. 284.

The legislature, however, thinking this too sudden a change in the practice of the court, and because it did not extend to informations filed by the attorney-general, enacted by 32 Geo. III. c. 58. that to any information in the nature of *quo warranto*, for the exercise of any corporate office or franchise, the defendant might plead that he had been in possession of, or had executed, the office for six years or more. And by s. 3. no defendant shall be affected by any defect in the title of the person from whom he derived his right and title, if that person had been in the undisturbed exercise of his office or franchise six years previous to the filing of the information. A title to one office, which is a qualification to hold another, is not within this clause. 2 M. & S. 71.

(9) See 2 R. S. 585, § 50; p. 613, § 3.
(10) See 2 R. S. 586, § 54.
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 (11).

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 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 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

(11) Besides the cases arising in corporations, wills of mandamus have been granted to admit prebendaries, Str. 159; an appara- tor general, Str. 397; parish clerks, Say. R. 190. Concerning the office of a chancellor, the law is, that no person can be appointed to a chancellor, or to the administration of the seals of a province, without the advice and consent of the king; and such an administration is not to be assigned to a chancellor, or to any person, but in the king's council; which shall be done by the king: 1 Vent. 143. So to admit scavengers, &c. Ih. 2 T. R. 181; to restore a schoolmaster of a grammar school founded by the crown, Str. 58. So to restore a member of an university who had been improperly suspended from his degrees. In like manner a mandamus will lie to compel a dean and chapter to fill up a vacancy among canons residentiary, 1 T. R. 652; so to the ecclesiastical court, 1 Vent. 115; so to grant the probate of a will to an executor, 1 Vent. 335. So a mandamus lies to the judge of the prerogative court of Canterbury to grant administration to the husband of the wife's estate, when the husband has done nothing to depart from his right. Str. 891. 1116. A mandamus will lie to justices to nominate overseers of the poor, although the time mentioned in the 43 Eliz. has expired, Str. 1123. So to appoint a surveyor of the highways where the justices had not appointed at the time mentioned in the statute 13 Geo. III. c. 78. 4 East, 132; so to sign and allow a poor's rate, absolute in the first instance, Say. R. 160; so to admit a copyholder, directed to the lord of the manor, 2 T. R. 197. 484. 6 East, 431; so also to the lord to hold and the burgesses to attend a court, to present the conveyances of burgage tenements. 1 Wils. 283. 1 Blk. Rep. 60. Bull. N. P. 200.

Where it does not lie.—It is a general rule that a mandamus does not lie unless the party applying has no other specific legal remedy. 1 T. R. 404. 3 T. R. 652. See Doug. 526. Thus it does not lie to a bishop, to license a curate of a curacy, which had been twice augmented by queen Anne's bounty, where the right of appointing was claimed by two several parties, and there had been cross nominations; because the party had another specific remedy by quare impedit. So a mandamus does not lie to the governor and company of the bank of England to transfer stock, because the party has his remedy by assumpsit, Doug. 523; nor to insert certain persons in a poor's rate, although it is alleged to have been, to prevent their having votes for members of parliament. Str. 1259. The court will not award a mandamus for the licensing a public house. Str. 881. Str. R. 217. Nor to compel admission to the degree of a barrister, Doug. 353. or doctor of civil law as an advocate of the court of arches, 8 East, 213. (the only mode of appeal is to the twelve judges) nor to compel a judge or any judge of court to admit a person as a student, or to assign reasons for refusing to admit him, Wooler v. Society of Lincoln's Inn, K. B. Mich. T. 1825, 4 B. & C. 5 Dowell & Ry.; nor for a fellow of a college, where there is a visitor; nor to the mayor and corporation of the city of London, to admit a person to the office of auditor who had served it three years successively, because contrary to the custom of the city. 1 T. R. 423; nor to the college of physicians, to examine a doctor of physic who has been licensed in order to his being admitted a fellow of the college, 7 T. R. 282; nor to a visitor where he is clearly acting under a visitorial authority, 2 T. R. 345; nor to restore a minister of an endowed dissenting meeting house, for if he has been before regularly admitted he may try his right in an action for money had and received, 2 T. R. 198. A mandamus is granted only for public persons, and to compel the performance of public duties. Hence the court will not grant it to a trading corporation at the instance of one of its members, to compel the production of accounts to declare a dividend. 2 B. & A. 620. 5 B. & A. 899. The mode of burying the dead is a matter of ecclesiastical cognizance; and therefore where the question was, whether a parishioner had a right to be buried in a church-yard in an iron coffin, which was a new and unusual mode, the court refused a mandamus. 2 B. & A. 806. The court have no power to grant a mandamus to justices to compel them to come to a particular decision, as, to make an order of maintenance on a particular parish. The admission under a mandamus gives no right, but only a legal possession, to enable the party to assert his right, if he has any. Hence non finit electus has been helden not to be a good return to a mandamus to swear in a churchwarden, Str. 894, 5; because it is directed only to a ministerial officer, who is to do his duty, and no inconvenience can follow; for if the party has a right, he ought to have priority; if he has not, the admission will do him no good. Wherever the officer is but ministerial, he is to execute his part, let the consequence be what it will. Str. 895.
unavoidably be in all sciences; the easy conception and thorough comprehension of which must depend upon frequent and familiar use; and the more subdivided any branch of science is, the more terms must be used to express the nature of these several 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 feodal 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 [*267] have permitted the rights of real property 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
PRIVATE WRONGS.

(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 feodal actions (guarded with their several outworks of essoins, vouchers, aid-prayers, and a hundred other formidable [*268] intrenchments) were ill-suited to 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 sate in our courts of equity, to shew 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 circuits: but, when once we have discovered the proper clew, 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 [*269] out again into common use; but also because, as a sensible *writer has well observed (z), “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 assises and writs of entry, and only laid before him the modern method of prosecuting a writ of ejectment.

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, shewn 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 specifical 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 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. 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 courts of king's bench and exchequer, in order, without intrenching upon ancient forms, to extend their remedial influence to 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

(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 attend-
[*272] the court of common pleas, we shall at the same time give a general account of the proceedings of the other two courts; 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 (2); 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, 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 justitiae, the shop or mint of justice, wherein all the king's writs are framed (3). It is a mandatory letter from the king in parchment, sealed with his great (b) seal.

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. (1)

(b) Finch, L. 257.

(1) The more recent publications of Mr. Serj. Sellon and Mr. Tidd, and those of Mr. Impey and Mr. Lee, now afford still more explicit information on the subject of Practice.

(2) Before the passing the 6 Geo. IV. c. 96, one great object of proceeding by special original was to compel the defendant to bring a writ of error in parliament, if he intended to delay; but that not having restrained writs of error upon judgments, even before verdict, unless the defendant finds bail in error, proceedings are now more frequently by capias in the court of common pleas, and by latitut in the king's bench.

(3) In New-York original writs issue out of and under the seal of the court in which they are returnable. (2 R. S. 277, § 8). Plaints seem still to be proper in the Common Pleas Courts, (Id. 651, § 11): though the 2 R. S. 347, directs that actions may be commenced for the recovery of a debt or of damages by capias ad resp. — or, if against a corporation, by summons; or by service of a declaration. All proceedings in a cause may be on paper or parchment. Writs issue in the name of the people (2 R. S. 275, § 8. 9.), and are teste'd, generally, in the name of the first judge or chief justice of the court. (Id. 198, § 10.)
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 proceedings 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 common right to administer justice therein, without any special mandate [*274] 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 (4)."

Original writs are either optional or peremptory; or, in the language of our lawyers, they are either a praecipe, or a si te fecerit securn (e). The praecipe is in the alternative, commanding the defendant to do the thing required, or shew the reason wherefore he hath not done it (f). The use of this writ is 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 a praecipe or command, to do thus or shew 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 fecerit te securn, from the words of the writ; which directs the sheriff to cause

---

(c) Flet. 7. 2, c. 3. (d) Murr. c. 2, § 3. (e) Finch. L. 257. (f) Append. No. III, § 1.

(4) But to entitle a party to proceed by original, the debt must amount to 10l. 5 Geo. II. c. 27. s. 5, since extended to 15l. by 51 Geo. III. c. 124. s. 1. 57 Geo. III. c. 101. These latter acts have indeed both expired; but it is presumed, they will be revived in the present year. It is also a rule in the king's bench, if the plaintiff, proceeding by original, recover less than 50l. he will be entitled to no more costs than if he had proceeded by bill, except in cases where he could not proceed by bill, as for outlawry, &c. R. M. 23 Geo. III. But though in an action on a bond, with a penalty above 50l. the plaintiff recover 20l., yet he will be entitled to costs of suit by original. 2 Chit. R. 149.

This writ does not lie against an attorney or officer of the court, unless sued with an unprivileged person; neither does it lie against a prisoner in the actual custody of the marshal.

It is the only mode of proceeding against peers. 3 M. & S. 88; corporations or hundreds on the statutes of hue and cry, &c. Trye, 11. Barnes, 415; or for the purpose of outlawing the defendant.

One advantage of proceeding by this writ is, that if a writ of error be brought for delay, it must be brought direct into parliament, instead of first into the exchequer chamber, and from thence into parliament. 1 Sd. 424.

Where the demand exceeds 40l. a fine is payable to the king on these writs, by way of composition for the liberty of suing in his court: which fine is estimated according to the amount of the demand, paying 6s. 8d. for every hundred marks, or 10s. for every 100l. Trye, 58. G. R. H. 6 W. & M. R. B. Tidd, 8 ed. 101.
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 is sued 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 testèd, or witnessed in the king's own name; "witness ourselves at Westminster," or wherever the chancery may be held.

[*275] *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 judgment still is (h). In like manner, as by the Gothic constitutions no person was permitted to lay a complaint against another, "nisi subscriptura 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 (5), 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 shewn, 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.

[*276] *Throughout all christendom, in very early times, the whole year 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, be-

---

(g) Append. No. II. 41.
(h) Finch, L. 169. 292.
(i) Stiern. de jure Gothar. l. 3. c. 7.
(5) No certain number of days now necessary in New-York. (2 R. S. 555, 31).

PRIVATE WRONGS.

between Midsummer and 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) (6).

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 of holy church shall 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 Briton is express (p), that in the reign of king Edward the First no secular plea could be held, nor any man sworn on the *evangelists (q), in the times of advent, [277] 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 foedera) (r), that assises 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, assisses 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 (7).

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 (8). 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

(m) Spelman of the terms.
(n) c. 3. de temporibus et diebus pacis.
(o) c. 3, § 8.
(p) c. 53.
(q) See pag. 50.
(r) temp. Hen. III. passim.

(6) In New-York the terms of the Supreme Court are, the first Mondays of January, May, and July, and the third Monday of October; the first and last, are held at Albany; the second in the city of New-York; and the third in Utica. (2 R. S. 196. § 2, &c.)

(7) Michaelmas and Hilary are fixed terms, and invariably begin on the same day every year; but Easter and Trinity are movable, their commencement being regulated by the feast of Easter. See post, 278, note (11). Hilary and Trinity are called *issuable terms, being the terms after which the judges go their circuits, for the trial of causes wherein issues have been previously joined.

(8) Easter term has five return days, the rest four. These are called *general or common return days, all the others are *particular or *special return days.
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).

[*278] The first return in every term is, properly speaking, the first day in 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 (9). 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 (10). For our sturdy ancestors held it beneath the condition of a freeman to appear, or to do any other act, at the precise time appointed. The feodal 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 coevinitur." And a similar indulgence prevailed in the Gothic constitution: "illo enim nimiae libertatis instituc, concessa toties impunitas non parenti; nec enim trinis judicii concessibus poenam perditae causae 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 (11); 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 of them.

(9) At the present day, no essoign is allowed in any personal action whatever, even though the defendant be a peer or member of parliament. See 2 Term. R. 16. 16 East, 7. (a).
(10) But the appearance need not be entered until eight days after the quarto die post. 3 Bar. & Cres. 110.
(11) Michaelmas term always begins on the 6th of November, and ends on the 26th of the same month; Hilary term always begins on the 23rd of January, and ends on the 12th of February; unless either of those four days falls on a Sunday, and then the term begins or ends on the day following. Easter term begins always on the Wednesday fortnight after Easter Sunday, and ends on the Monday three weeks afterwards. Trinity term begins always on the Friday after Trinity Sunday, and ends on the Wednesday fortnight after it begins. 1 Crompt. Prac. 1. Tidd, 8 ed. 101, 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. *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 *praccepis*; 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 the door of the parish church.

If the defendant disobeys this verbal monition, the next process is by writ of *attachment* or *poné*, so called from the words of the writ (f), “*poné per radiun et salvos pleegios*, 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).

---

(a) Finch. L. 436.
(b) Ibid. 344. 352.
(c) E. 2. 4. 1.
(d) Dal. sher. c. 31.
(e) Stiern. de jure Sueon. l. 1, c. 6.
(f) Append. No. III. § 2.
(g) Finch. L. 345. Lord Raym. 273.
(h) Dal. sher. c. 32.
(i) Finch. L. 305. 352.
(j) Append. No. II. § 1.

(1) Upon this writ the sheriff cannot justify entering the defendant’s house, and continuing there till the defendant pay him a sum of money for surety for his appearance. 6 T. R. 137.

Vol. II.
If, after attachment, the defendant neglects to appear, he not only forfeits this security, but is moreover to be farther compelled by writ of distri-
gas (k), or distress infinite; which is a subsequent process issuing from the
court of common pleas, commanding the sheriff to distress 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 reasona-
oble costs of the plaintiff (m) (2). In like manner by the civil law,
if the defendant absconds, so that the citation is of no effect,
“mittitur adversarius in possessionem honorum ejus (n).”

And here by the common, as well as by the civil law, the process ended in
case of injuries without force: the defendant, if he had any substance, be-
ing gradually stripped of it all by repeated distresses, till he rendered obe-
dience to the king’s writ; and, if he had no substance, the law held him
incapable of making satisfaction, and therefore looked upon all further pro-
cess as nugatory. And besides, upon feudal principles, the person of a
feudatory was not liable to be attached for injuries merely civil, lest there-
by 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 pro-
cess of attachment, or had no substance whereby to be attached; subjec-
ting 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 wrong-
doers, 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 convivence 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 trou-
ble and expense, in suing out a special original *adapted to the
particular injury) still continues in almost all cases, except in ac-

---

(k) Append. No. III. §2.
(l) Finch, L. 395. (m) Stat. 10 Geo. III. c. 50.

(2) Now by 51 Geo. III. c. 124. s. 2. continued
by 57 Geo. III. c. 101. a distringas cannot
be issued: but at the foot of the summons
or attachment, notice as therein directed, is to
be given to defendant to appear, or in default
of an appearance, that plaintiff will enter one
for him, and proceed thereon as if he had ap-
ppeared. If, however, the summons or attach-
ment cannot be personally served on defendant,
and it be left for him at his house or place
of abode, the court or a judge in vacation may
grant leave to sue out a distringas, with a no-
tice thereon as pointed out in the act, and
plaintiff may levy 40s. and if defendant still
make default in appearing, an appearance may
be entered for him, and plaintiff may proceed
as usual. These acts have expired, but see
ante, 274, n. 4.

These provisions seem to extend to the proc-
cess by distringas in the exchequer, 5 Taunt.
71. (a); but see 3 Price, 263. 266. 5 Price,
522. 639. They do not extend to persons
having privilege of parliament, nor to the proc-
cess by attachment on a justicia in a county
palatine. 5 Taunt. 69.
tions of debt; though now, by 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 distreined; 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 others 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 teste'd, 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 returnable (3).

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 of 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 [*283]

his bailiwick: whereupon another writ issues, 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 become the settled practice; being one among many instances to illustrate that maxim of law, that in fictione juris consistit aequitas.

But where a defendant absconds, and the plaintiff would proceed to an outlawry (4) against him, an original writ must then be sued out regular-

(p) Append. No. III. § 2.  
(q) Ibid. 

(3) Or rather on the quarto die post, and even then only where the plaintiff means to proceed to outlawry; in which case there must be fifteen days at least between the testa and the return of each writ. Trye, 60. 2 Wils. 117; but the curator will expedite the process. Dyer, 175. Tidd, 8 ed. 103. Unless the plaintiff mean to proceed to outlawry, the capias may be tested before the original, and even before the cause of action accrued, provided it be actually taken out afterwards. See Tidd, 8 ed. 125. 3 Wils. 454. 

ly, and after that a capias (5). And if the sheriff cannot find the defendant upon the first writ of capias, and return 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, praecipimus." 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. c. 3, whether the defendant dwells within the same or another county than that 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 their 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 the 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 some time 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 (v). 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 (w). If after outlawry the defendant appears publicly, he may be arrested by a writ of capias utlagatum (w) (6), 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 & 5 W. & 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 (7).

(5) And if in a joint action against several defendants, one of them keep out of the way, the plaintiff may have a writ of exigi facias against that defendant, Trye, 155. And must proceed to outlawry against him before he can go on against the others, 1 Str. 473. 1 Wils. 78. 1 Bla. Rep. 20. Tidd, 8 ed. 126.

If the defendant be a woman, the proceeding is called a waiver. Lit. 186. Co. Lit. 122.

b. An infant under twelve years cannot be outlawed. Co. Lit. 128. a.

(6) By a special writ of capias utlagatum, the sheriff is commanded not only to take defendant, but to summon a jury to appraise the chattels, and value the lands, &c. of the outlaw; upon this an inquiry is executed, and execution issues. The money raised under the writ belongs to the crown, though upon motion in the exchequer the plaintiff may have it paid him if it do not exceed 50l., or if it does, then it may be paid him on petition. For further as to this, see Tidd, 8 ed. 133, 4, 5. If the outlawry be reversed, the defendant may have this property restored by writ of amoveas manus. Id. 141.

(7) Unless where the outlawry was obtained for the purpose of oppression, as where defendant was already in prison at plaintiff's
PRIVATE Wrongs.

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 (y); returnable, not at Westminster, where the common pleas are now fixed in consequence of magnæ chartâ, but "ubicunque fuerimus in Anglìâ," 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 (z). 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 (a), it needed no original writ from the crown to give it cognizance of any misdeemnor 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 (b), 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 (c) (which was formerly always founded on a plaint of trespass quare clausum fregit, entered on the records of the court) (d) 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 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 will give the court a jurisdiction to proceed (e).

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 latitut (f), 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 "latitavit et discurrerit," 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 (g). But, as in the common pleas the testatum capias

---

(y) Append. No. II. § 1.
(a) Bro. Abr. t. eyer & terminer, 8.
(b) Bro. Abr. t. jurisdiction, 66. 3 Inst. 27.
(c) Append. No. III. § 3.
(d) Tyre's Jus Filiar. 96.
(e) 4 Inst. 72.
(f) Append. No. III. § 3.
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 copias 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 (9).

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 (g) 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.

[*287] If the sheriff has found the defendant upon any of the former writs, the capias, latitat, &c. he was ancietly 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 shewn 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 (10). And if the defendant

---

(g) Append. No. III. § 4.

sued out. Tidd, 8 ed. 145. When it is doubtful in what county the defendant is to be found, there may be several writs at the same time into different counties. Id. 1 Chit. Rep. 544. In any of these writs there may be a clause of non omittas, commanding the sheriff that he do not omit, on account of any liberty in his county, but that he enter the same, &c. and take the defendant, &c. which non omittas writ may be issued in the first instance. Tidd, 8 ed. 145, 6. (9) And a latitat cannot be served out of the proper county, though, when a person has been served on the confines of a county, though out of it, the court will not, in general, set aside the service. 4 M. & S. 412. 1 Chitty's R. 15. and see Id. 233.

(10) But in this court the defendant cannot be outlawed, as the plaintiff cannot proceed therein by original writ. 1 Price, 399. Besides the writ of quo minus is a venire facias and subpoena ad respondendum. For the process in this court, see Tidd, 8 ed. 154 to 157. As to the form of the notice, see Tidd, 8 ed. 166. If there be no notice to appear, when necessary, or the notice be not properly directed, &c. the defendant may move the court to set aside the proceedings; but any trifling informality in the notice, as setting down the day of the month on which the defendant is to appear, without saying instant, next, or specifying the year, or mentioning an impossible day, will not invalidate it. Tidd, 8 ed. 167. As to the service of the process, see Id. 167 to 169.

If there be no process, or if it be defective in point of form, or in its direction, teste, or return, or the attorney's name be not indorsed upon it, the defendant may move the court to set aside the proceedings for irregularity; and
PRIVATE WRONGS.

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 (11), 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 (12), (13), then he may arrest the defendant, and make him put in substantial sureties for his app-

a writ having a wrong return, will not be aided by a correct day being mentioned in the notice to appear. But he cannot take advantage of any error or defect in the process after he has appeared to it, or taken the declaration out of the office; for it is the universal practice of the courts, that the application to set aside proceedings for irregularity should be made as early as possible, or, as it is commonly said, in the first instance; and where there has been an irregularity, if the party overlook it and take subsequent steps in the cause, he cannot afterwards revert back and object to it. In the common pleas the court will not quash a writ on the ground of its having been served in a wrong county. And it is said, that a mistake in the process is cured by the plaintiff’s entering an appearance for the defendant, which has been always looked upon as ef-
fectual for that purpose as if he had done it himself; but it is otherwise where the defendant has not been served with a copy of the process, or the notice subscribed thereto is de-
fective. It is also said, that no advantage can be taken of the irregularity of process without having it returned, and before the court; and where the irregularity complained of is not in the process, but in the notice to appear thereto, or in the service of it, the rule should be set aside such service, and not the process itself. See Tidd, 8 ed. 159. and the various cases there collected.

The process may in general be amended where there is anything to amend by; and it has been amended in the name of the def-

341fendant where he was a prisoner in custody under it. But the court of king’s bench would not grant a rule for amending the writ, under which the defendant had been arrested by a wrong name, after actions of false imprison-
ment had been brought for such arrest; so an amendment cannot be made of mesne process by adding the name of another person as plain-
tiff; a writ returnable on a dies non is alto-
gether void, and cannot be amended by the court, and the courts, we have seen, will not in general allow a writ to be amended to the prejudice of the bail. Tidd, 8 ed. 160. and cases there collected.

(11) In all cases where the defendant is served with a copy of the process, he has eight days to file common bail in the king’s bench, or to enter a common appearance in the common pleas, exclusive of the return day; and if the last of the eight days be a Sunday, he has all the next day. 1 Comp. Prac. 49. 1 Burr. 56.

As to what cause of action will justify an ar-
est, it is a rule that where a debt is certain, or damages may be reduced to a certainty, as in assumpsit or covenant for the payment of money, Barnes, 79. 80. 108. the defendant may be arrested as a matter of course, on an affida-

vitr stating the cause of action. Tidd, 171. But where damages are altogether uncertain, as in assumpsit, or covenant, to indemnify, &c. or in actions for a tort or trespass, there can be no arrest without a special order of the court, or a judge, on a full affidavit of the cir-
cumstances, Id. 171. and by rule of H. T. Geo. III. a personal cannot be held to special bail in trover or detinue without an order. And there are other cases where an arrest is not allowed, even though the action be brought for a sum certain. Thus a defendant cannot be arrested on a penal statute, Elv. 53. though he may on a remedial one, 7 T. R. 259 ; or where the act expressly authorizes an arrest. The defendant cannot be arrested on a bail bond, R. M. 8 Ann. or replevin bond, 1 Salk. 39. 6 T. R. 336. 8 T. R. 450. or on a recogni-

zance of bail, Tidd, 8 ed. 172; nor for goods bargained and sold, or sold without stating a delivery, 12 East, 398. 1 Bingh. 357; nor on a policy of insurance without an adjustment, or an express promise to pay the amount, 5 Taunt. 201. 1 Marsh. 19. S. C.; but he may be on a guarantee. 9 Price, 155. So defend-

ant cannot be arrested for more than is equi-

dy due. Thus he cannot be arrested on the penalty of a bond, 6 T. R. 217. 2 East, 409, but he may if the sum is agreed to be for li-

quidated damages. Tidd. 8 ed. 173. He can-

not be arrested for more than the balance due, where there is a set-off. 3 B. & C. 139. 5 B & A. 513. 1 D. & R. 67. S. C.

(12) As to the law of arrest in New-York, see the Act to abolish imprisonment for debt, passed 1831: to take effect in March 1832.

(13) Now by stat. 7 & 8 Geo. IV. c. 71, the debt must amount to 20l., and in Wales and the counties palatine to 50l. Intermediate statutes, viz. 51 Geo. III. c. 124, and 57 Geo. III. c. 101, extended the sum from 10l. to 15l., except upon bills of exchange and promissory notes. The statute of the present king con-


tains no such exception.
pearance, 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 40l. This statute (without any such intention in the [*288] makers) had like to have ousted the king's bench of *all its jurisdic-
tion over civil injuries without force; for as the bill of Middle-
sex was framed only for actions of trespass, a defendant could not be ar-
rested and held to bail thereupon for breaches of civil contracts. But to
remedy this inconvenience, the officers of the king's bench devised a me-
ethod 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
(f): 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. (g)." The sum sworn to by the plaintiff is marked
upon the back of the writ; and the sheriff, or his officer the bailiff, is
then obliged actually to arrest or take into custody the body of the de-
defendant, and, having so done, to return the writ with a cepti corpus endorsed
thereon (14).

An arrest must be by corporal seizing or touching the defendant's bo-
dy (15); after which the bailiff may justify breaking open the house in
which he is (16) 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 (17). Which principle is carried so far in the civil law,

(f) Trye's Jus Felizar. 102. Appendix No. III. § 3.
(g) Lilly Prac. Reg. t. ac etiam. North's life of

Lord Guildford, 99. This work is strongly recom-

(14) See 3 R. S. 348, § 6. 11.
(15) But this does not seem to be absolute-

ly necessary, for if a bailiff come into a room

and tell the defendant he arrests him, and lock

the door, it is sufficient. C. T. Hardw. 301.

words, however, will not constitute an arrest.
1 Ry. & M. C. N. P. 26. It is sufficient that the

officer have the authority, be near, and

acting in the arrest, without being the person

who actually arrests. Cowp. 65.

If the defendant be wrongfully taken with-

out process, 2 Anst. 461. 1 N. R. 135. or after

it is returnable, 2 H. Bla. 29. he cannot be

lawfully detained in custody under subsequent

process at the suit of the same plaintiff, though

he may at the suit of third persons. 2 B. &


(16) This appears to be stated too exten-

sively; it is the defendant's own dwelling

which by law is said to be his castle; for if he

be in the house of another, the bailiff or sheriff

may break and enter it to effect his purpose,

but he ought to be very certain that the de-

fendant be, at the time of such forcible entry,
in the house. See Johnson v. Leigh, 6 Taunt.

246.

(17) A bailiff before he has made the arrest

cannot break open an outer door of a house;

but if he enter the outer door peaceably, he

may then break open the inner door, though it

be the apartment of a lodger, if the owner

himself occupies part of the house. Cowp. 1.

2 Moore,207. 8 Taunt. 250. S. C. But if the

whole house be let in lodgings, as each lodg-

ing is then considered a dwelling-house, in

which burglary may be stated to have been

committed, it has been supposed that the door

of each apartment would be considered an

outer door, which could not be legally broken

open to execute an arrest. Cowp. 2. But to

justify breaking open an inner door belonging

to a lodger, admittance must be first demand-
ed, unless defendant is in the room. 3 B. &
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 (h). Peers of the realm, members of parliament, and corporations, are privileged from arrests; and of course from outlawries (i). And against them the process to enforce an appearance must be by summons and distress infinite (j), 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 (k) (18), (19). Clergymen performing divine service, and not merely staying in the church with a fraudulent design, are for the time privileged from arrests, by stat. 50 Edw. III. c. 5, and 1 Rich. 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 (20). And no arrest can be made in the king’s presence, nor within

(h) Ff. 2, 4, 18—21.  
(i) Whitelock of Parl. 206, 207.

P. 223. 4 Taunt. 619. And the breaking open an inner door of a stranger cannot be justified on a suspicion that defendant is in the room. 5 Taunt. 765. 6 ed. 240.  
(18) These privileges are allowed not so much for the benefit of attorneys as their clients, 2 Wils. 41. 4 Burr. 211. 3 Doug. 381. and are therefore confined to attorneys who practise, 2 Wils. 332. 4 Burr. 2113. 2 Bla Rep. 1096. 1 Bos. & Pul. 4. (2 Lutw. 1667. contra), or at least have practised within a year; for it is a rule that such attorneys as have not been attending their employment in the king’s bench for the space of a year, unless hindered by sickness, be not allowed their privilege of attorneys. R. M. 1554. S. 1. K. B. & C. P. 2. M. & S. 603.  
(19) In New-York, attorneys, counsellors, and solicitors are exempted from arrest only when employed in a cause pending in a court and to be then heard. (2 R. S. 290; 486). Other officers of the court may be arrested at any time, except during the sitting of the court. (Id. Clergymen have no exemption.  
(20) See further as to the privileges from arrest, Tidd, 8 ed. 192 to 214. Lee’s Dict. rit. Arrest, 90. 92. In addition to those named in the text are the following, viz. Administrator, as such, Yelv. 53; but not if he has personally promised to pay. 1 T. R. 716. Alien for debt beyond seas, 38 Gid. III. c. 50. s. 9. Ambassadors and servants. 7 T. R. 458. B. & C. 554. 3 D. & R. 833. 25. Bail, being about to justify, or otherwise attending court as bail. 1 H. Bla. 636. 1 M. & S. 638. Bankrupt for forty-two days, unless before in prison, and after forty-two days if the time for surrender be enlarged, 8 T. R. 475; also if summoned before the commissioners relative to his estate, though several years after his last examination. Id. 534. See the 6 Geo. IV. c. 16. ss. 117, 118. Barristers attending court or on circuit. 1 H. Bla. 636. Bishops

Consult-general. 9 East, 447. sed vid. 1 Taunt. 106. 3 M. & S. 284. Executor, as such. Feme-covert, 1 T. R. 486. 2 H. B. 17; but if she obtained it, pretending to be single, she may be arrested, 1 N. R. 54. and see 1 Bing. 344. 2 Marsh. 40. 7 Taunt. 55. Tidd, 8 ed. 197; though if a foreigner, and her husband be abroad, she is liable for her debts, though neither separated by deed nor having a separate maintenance, 2 N. R. 390; but if plaintiff knew her to be married, she will be discharged, 6 T. R. 453. 1 East, 17. n. 7 East, 582; and in such case, plaintiff will be ruled to pay costs of motion, 3 Taunt. 307; but if she cohabit with another man, and trade on her own account, she will not be discharged, 1 B. & P. 8; if she by mistake represent her husband to be dead, she will be discharged. 1 East, 16. 

Her, sued as such. 

Hundredors, as such. Insolvent debtor discharged, 3 M. & S. 939, unless on a subsequent express promise. 6 Taunt. 563. sed vide 1 Chit. R. 274. n. Irish peer, whether a representative or not. 39 & 40 Geo. III. c. 67. art. 4. Marshal of king’s bench. Officers, non-commissioned. 4 Taunt. 557; but volunteer drill sergeants are not exempt. 8 T. R. 105. Plaintiff attending execution of inquiry, &c. 4 Moore, 34. 

Sailors, under 20L. 1 Geo. II. st. 2. c. 14. s. 15. 32 Geo. III. c. 33. s. 22. 

Sergeants at law. 6 T. R. 686. 

Sailors attending court. 11 East, 430. 

Insolvent court is such a court. 2 Marsh. 57. 6 Taunt. 356. 

Warden of the Fleet. Witnesses subpoenaed, or summoned before commissioners under great seal, or attending an arbitrator appointed by the court. 1 Chit. Rep. 679. 3 B. & A. 252. S. C. 3 Anst. 941. 3 East, 189. A creditor attending commissioners of bankrupt to prove a debt. 7 Ves. 312. 1 Ves. & B. 316. 2 Rose, 24. By mutiny act witnesses attending courts-martial are privileged. But witnesses are not privileged if they delay
the verge of his royal palace (l) (21), nor in any place where the king's justices are actually sitting (22). The king hath moreover a special prerogative (which indeed is very seldom exerted) (m), that he may 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 (n). 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 debt were paid (o): but by the statute 25 Edw. III. st. 5. c. 19. notwithstanding such protection, another [*290] creditor may proceed to judgment against *him, with a stay of execution, till the king's debt 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 (23).

When the defendant is regularly arrested, he must either go to prison, for safe custody: or put in *special bail* to the sheriff (24). 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* (p) (25).

The sheriff, if he pleases, *may* let the defendant go without any sureties; but that is at his own peril: for, after

(1) See Book IV. 276. The verge of the palace of Westminster extends by stat. 28 Hen. VIII. c. 12. from Charing-Cross to Westminster-hall.

(m) Sir Edward Coke informs us, (1 Inst. 131.) that herein "he could say nothing of his own experience, for aibit quinip Elizabith 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 Cutts, to protect him from being outlawed by his taylor (3 Lev. 832): which is the last that appears upon our books.

(21) Except by an order of the board of green cloth, or unless the process issue out of the palace court. 3 T. R. 735. But an arrest within the verge of the palace has been held in the common pleas to be no ground for discharging the defendant out of custody. 7 Taunt. 311. and see 1 Chit. Rep. 375. 3 B. & A. 502.

(22) Sed vide 1 Lev. 106. Process cannot be executed in Kensington palace, 10 East, 578. 1 Camp. 475; or within the Tower, without leave from the governor. 2 Chit. Rep. 48. 51.

(23) See construction of this act, Tidd, 8 ed. 216. After a negligent escape, the defendant may be taken on a Sunday. 2 Lord Raym. 1028.

The arrest must be made in the county into which the process is issued; an arrest on the verge of a county into which the writ is issued, is bad, unless there be a dispute as to boundaries. 3 B. & A. 408.

(24) Or by 43 Geo. III. c. 46, deposit in the sheriff's hands the sum indorsed on the writ, with 10l. in addition to answer costs, &c. and the fine paid, if proceeding by original; and this deposit is paid into court, and repaid to the defendant on his perfecting bail, or rendering himself to prison, 4 Taunt. 669. 1 Bing.103. Chitty R. 143. 3 M. & S. 283; but if neither of these measures be taken, it is to be paid over to the plaintiff by order of the court. See cases on construction of this act, Tidd, 8 ed. 226, 7. quere if depositing goods instead of money will do. 7 Moore, 432.

(25) An agreement by a third person with a sheriff's officer to put in good bail, &c. 1 T. R. 418, or an attorney's undertaking to the office for defendant's appearance, 7 T. R. 100, or to give bail bond in due time, are void, and no action lies on it; but if given to the plaintiff in the action, it is valid. 4 East, 568.
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 (26). 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 (27); 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 (28). If this be not done, and the bail that were taken by "the sheriff below are responsible persons," [*291] the plaintiff may take an assignment from the sheriff of the bail-bond (under the statute 4 & 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. & 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 (q) 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 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 (r). And, if excepted to, the bail

(q) Append. No. III. § 5. (r) Ibid.

(26) But the action may be defeated by putting in bail in the original action, of the term in which the writ is returnable, though after the expiration of the time allowed for putting it in, and even after the action for the escape is brought. 1 Esp. Rep. 87. 2 B. & P. 35. 246. 1 Taunt. 25. 1 Chit. Rep. 575. a. sed vid. 7 T. R. 100. 4 East, 569. To prevent this plaintiff should oppose justification of bail, Tidd, 8 ed. 235. or render, 7 T. R. 105. 2 Marsh. 261. 1 Price, 103. 4 M. & S. 397.

Sheriff cannot sue defendant for money paid, when he has discharged him out of custody on mesne process, without a bail bond, and has, in consequence of his non-appearance, been obliged to pay debt and costs. 5 East, 171.

(27) If he so refuse, he is liable to a special action on the case, Gilb. C. P. 20. Cro. Car. 196. 6 T. R. 355; but to maintain such action, the parties offered as bail must have had sufficient property in the county where the arrest was made. 15 East, 320.

(28) In proceedings in the king's bench by bill, whenever special bail is not necessary, or has been dispensed with by the court, common bail (which are merely nominal) must be filed, or in proceedings in the common pleas of K. B. by original, a common appearance must be entered. In the king's bench, where defendant has been served with a copy of a bill of Middlesex, or other process therein, common bail should be filed at the return, or in eight days, exclusive (not including Sunday if the last) after it. 5 Geo. II. c. 27. s. 1. 1 Bur. 56. Tidd, 8 ed. 240.

In proceedings by original in the K. B., the appearance must be entered with the filacer of the county in which the action is laid, within eight days after appearance day or quarto die post of return of process. 3 B. & C. 110. 4 D. & R. 713. S. C. In C. P. the eight days are reckoned from the return day, and not from the quarto die post of the return of the writ. Id. Ibid. Impey C. P. 216, 17.

By 5 Geo. II. c. 27, to expedite the plaintiff's proceedings, if the defendant, having been served with process, shall not appear at the return thereof, or within eight days after such return, the plaintiff, upon affidavit of the service of such process, may enter a common appearance or file common bail for the defendant, and proceed therein as if such defendant had entered his appearance or filed common bail. The plaintiff cannot enter such appearance or file common bail till the ninth day. Tidd, 242.
must be perfected, that is, they must justify themselves in court, or before
the commissioner in the country, by swearing themselves housekeepers
(29), and each of them to be worth the full sum for which they are bail,
after payment of all their debts (30). This answers in some measure to
the stipulatio or satissatio of the Roman laws (s), 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-
juusores were there absolutely bound judicatum solvere, to see the

[*292] costs and condemnation *paid at all events: whereas our special
bail may be discharged, by surrendering the defendant into cus-
tody, within the time allowed by law; for which purpose they are at all
times entitled to a warrant to apprehend him (t) (31).

(29) Or a freeholder, or copyholder, or a
long lesholder. 8 Taunt. 148. 1 Chitty R.
7. 85. 144. 2 Chitty R. 96. 97.

(30) Upon special bail being put in, a notice
thereof must be given to the plaintiff's attorney
or agent, whereupon the latter may ex-
cept to the bail within twenty days after notice
given, by entering such exception, 4 D. & R.
365; and notice of the exception must be given
to the defendant's attorney before the sheriff
is ruled, Alexander v. Miller, 24 Nov. 1825,
K. B. But where bail is not put in, at the
time of ruling the sheriff to return the writ or
bring in the body, he must put in and perfect
of bail at his peril, or render the defendant
within four days in a town cause, or six days
in a country cause, without any exception. 2
Bla. R. 1206. 2 Chit. R. 82. 108. Tidd, 8
ed. 265.

Within a particular time (in general four
days), after the exception entered and notice
given, the bail must justify. See Tidd 237,
8, 9. If they do not mean to do so, others
should be added.

Previous to the bail justifying, there should
be a notice setting forth that the bail already
put in, will, on a certain day, justify them-
seves in open court, 2 Chit. R. 103. Tidd,
239; or that one or more persons will be ad-
ed, and justify themselves as good bail for
the defendant. Id.

In the king's bench, bail are added and
justified before one of the justices sitting in the
bail court, by virtue of the 57 Geo. III. c. 11.

The bail must be in Westminster-hall by half
past nine in the morning, and if the bail are
not ready, and the papers delivered to coun-
sel, before ten o'clock, they cannot be taken
after that hour. Rul. H. T. 59 Geo. III. K.
B. When there are but few bail, it is neces-
sary that they should be very punctual in
the time of their attendance, for if they are not
ready when the judge takes his seat, he will
not wait for them till ten o'clock; but when
the bail are numerous, the exact time of their
attendance is not so material, and on the last
day of term they are still allowed to justify as
formerly, in full court at its rising. Tidd, 262.

In the C. P. the bail must justify at the sit-
ting of the court only, except on the last day
of term, when bail, who may have been pre-
vented from attending at the sitting of the court,
shall be permitted to justify at the ris-
ing of the court. R. M. 51 Geo. III. C. P.
3 Taunt. 569. sed vid. 8 Taunt. 56. In the
exchequer, the junior baron attends in court
alone, a few minutes before ten o'clock every
morning during term, and it is expected justi-
fications of bail be then made, and no justi-
fication can take place after half past ten
o'clock. 8 Price, 613. R. E. 56 Geo. III.
2 Chit. 281. 9 Price, 57. Tidd, 263.

To justify themselves, each must swear
that he is worth double the amount of the
debt, after payment of his own debts. But if
the sum exceed 1000l. each is only required
to justify himself in 1000l. more than that
sum. M. 51 Geo. III. It is not sufficient for
bail to swear they are worth a certain sum
exclusive of their debts. 4 Taunt. 704. There
must also be an affidavit made of the service
of the notice of justification, which must state
the mode of service of such notice, Tidd, 264.

(31) And the bail may render the defendant
in their discharge, even after judgment; and
they may take him on a Sunday, 6 Mod. 231.
but see 2 Bla. R. 1273. or during his examina-
tion before commissioners of bankrupt, 1 Atk.
238. 5 T. R. 210; or going into a court of
justice, 1 Sel. Prac. 180. 3 Stark. 132. 1 D.
& R. M. P. C. 20; and they may justify enter-
ing the house of a stranger (the outer door
being open) to take the defendant though he
be not in the house, 2 Hen. Bla. 120; and if the
defendant is in custody, either in a civil action
or upon a criminal charge, they may in K. B.
have a writ of habeas corpus to bring him up
to the court, to be surrendered in their discharge.
7 T. R. 226. When the principal is taken,
one of the bail, it is said, must always remain
with him, 1 Sel. Pr. 180; but a third person
may assist in the taking and detaining defend-
ant, though the bail do not continue present.
3 Taunt. 425.

Besides the mode of discharging the bail,
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 (32): 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 devestavit, 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.

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 minutely down by the chief clerks, or prothonotaries; whence in our old law French the pleadings are frequently denominated the parol (1).

by rendering their principal, there are various other causes for discharging them, such as the death of the defendant, Tidd, 293. 1183; his bankruptcy and certificate, 1 Burr. 244. Comp. 624; his being made a peer, or member of parliament, Dougl. 45. Tidd, 293; or being sent abroad under the alien act, 6 T. R. 50. 52. 7 T. R. 517; or under sentence of transportation, 6 T. R. 247; or his being impressed or discharged on the 48 Geo. III. c. 123; or by the act of the plaintiff in not declaring in due time; by making a material variance in the declaration from the process or affidavit in the cause of action, 2 East, 305. 2 B. & P. 359. 6 T. R. 363; or a variance between the affidavit and judgment in C. P.; or in declaring in a different county by original in K. B.; or recovering under a bailable amount; or in giving time to the defendant on a cognovit, &c.; or removing the cause from an inferior court, or referring to arbitration, or taking principal in execution, Cro. Jac. 320; or any other irregularity in proceeding against the principal. Tidd, 1182. See the various cases on these points and other qualifications in Tidd’s Prac. 8 ed. 290 to 295. 403. 1147. 1182. 1187.

(32) Several extensions of the sum have taken place; and now, by the last statute, viz. 7 & 8 Geo. IV. c. 71, the cause of action must amount to 20l.

(1) Pleading is the statement in a logical and legal form of the facts which constitute the plaintiff’s cause of action, or the defendant’s ground of defence; it is the formal mode of alleging on the record that which would be the support, or the defence, of the party in evidence, per Buller, J. 3 T. R. 159. Dougl. 278. “It is (as also observed by the same learned judge, in Dougl. Rep. 159.) 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
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 (2):


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. And see the observations of Lord C. J. De Grey, Camp. 692. From this it will be seen, that the science of special pleading may be considered under two heads: 1st. The facts necessary to be stated. 2. The mode of stating them. In these considerations, the reader must be contented with a general outline of the law upon the subject.

1st. The Facts Necessary to be Stated.—No more should be stated than is essential to constitute the cause of complaint, or the ground of defence. Camp. 693. 1 Lord Ray. 171. And facts only should be stated, and not arguments or inferences, or matter of law. Camp. 694. 5 East. 275. The party can only succeed on the facts, as they are alleged and proved.

"There are various facts which need not be stated, though it may be essential, that they should be established in evidence, to entitle the party pleading to succeed.

Thus there are facts of which the court will, from the nature of its office, take notice without their being stated: as when the king came to the throne, (2 Lord Raym. 794.) his privileges, (id. 980.) proclamations, &c. (1 Lord Raym. 289. 2. Camp. 44. 4 M. & S. 532.) but private orders of council, pardons, and declarations of war, &c. must be stated. (2 Litt. Bac. Reg. 303. 3 M. & S. 67. 11 Ves. 292. 3 Camp. 61. 67.) The time and place of holding parliaments, and their course of proceedings, need not be stated, (1 Lord Raym. 343. 210. 1 Saund. 131.) but their journals must. (Lord Raym. 15. 3. Camp. 17.) Public statutes, and the facts they ascertain, (1 T. R. 145. Com. Dig. Pleeader, c. 76.) the ecclesiastical, civil, and marine laws (Bro. Quare. Impedit, pl. 12. Lord Ray. 338.) need not be stated; but private acts (Lord Raym. 381. 2 Dougll. 97.) and foreign, (2 Cart. 273. Camp. 174.) and plantation and forest (2 Leon. 209.) laws, must. Common law rights, duties, and general customs, customs of gavelkind, and borough English, (Dougl. 150. Lord Ray. 175. 1542. Carth. 83. Co. Litt. 175. Lord Raym. 1025. Cro. Car. 561.) need not be stated; but particular local customs must. (1 Rol. Rep. 509. 9 East. 185. Stra. 1187. Dougll. 387.) The almanack is part of the law of the land, and the courts take notice thereof, and the days of the week, and of the movable feasts, and terms. (Dougll. 380. Salk. 269. 1 Rol. Ab. 524. c. pl. 4. 6 Mod. 81. Salk. 626.) So the division of England into counties will be noticed without pleading. 2 Inst. 557. Marsh. 124.) but not so of a less division, (id.) nor of Ireland. (1 Chit. Rep. 28. 39. 3 B. & A. 301. S. C. 2 D. & R. 15. 1 B. & C. 16. S. C.) The court will take judicial notice of the incorporated towns, of the extent of ports, and the river Thames. (Stra. 469. 1 H. Bla. 356.) So it will take notice of the meaning of English words and terms of art, according to their ordinary acceptation, (1 Rol. Ab. 66. 525;) also of the names and quantities of legal weights and measures, (1 Rol. Ab. 525;) also courts will take notice of its own course of proceedings, (1 T. R. 118. 2 Lev. 176.) and of those of the superior courts, (2 Co. Rep. 18. Cro. Jac. 67.) the privileges they confer on their officers, (Lord Ray. 869. 898.) of courts of general jurisdiction, and the course of proceedings therein; as the court of exchequer in Wales, and of counties palatine, (1 Lord Raym. 154. 1 Saund. 73;) but the courts are not bound, ex officio, to take notice who were, or are the judges of another court at Westminster, (2 Andr. 74. Stra. 1296.) nor are the superior courts, ex officio, bound to notice the customs, laws, or proceedings of inferior courts of limited jurisdiction, (1 Roll. Rep. 105. Lord Raym. 1393. Cro. Eliz. 502.) unless indeed in courts of error. (Cro. Car. 179.)

Where the law presumes a fact, as that a person is innocent of a fraud or crime, or that a transaction is illegal, it need not be stated. 4 M. & S. 105. 2 Wils. 147. Co. Lit. 78. b. 1 B. & A. 403.

Matter which should come more properly from the other side, as it is presumed to lie more in the knowledge of the other party, or is an answer to the charge of the party pleading, need not be stated, unless in pleas of estoppel and alien enemy; but this rule must be acted upon with caution; for if the fact in any way constitutes a condition precedent, to enable the party to avail himself of the charge stated in his pleading, such fact should be stated. Com. Dig. Pleeader, c. 81. 1 Leon. 18. 2 Saund. 62. b. 4. Camp. 20. 11 East. 638. and see cases 1 Chit. on Pl. 206. Stephen, 354.

Though the facts of a case must be stated in pleading, it is not necessary to state that which is a mere matter of evidence of such fact. 9 Rep. 9 b. 9 Edw. III. 5. b. 6. a. Willes, 130. Raym. 8.

And though the general rule is, that facts only are to be stated, yet there are some instances in which the statement in the pleading is proper, though it does not accord with the real

1 Chit. on Pl. 4 ed. 234 to 360. The points relating to them are too numerous for any detail, though indeed the requisites relating to the venue, the several counts and pledges, will be here partially considered, the learned commentator having treated of them, though not very methodically.
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, and is therefore still warrantable in the common *pleas, to sue out a writ of trespass [*294] quare clausum fregit, for breaking the plaintiff’s close: and when the defendant is once brought in upon his writ, the plaintiff declares in whatever action the nature of his true injury may require; as in an action 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 (3).

(b) See pag. 295, 288.

(c) 2 Ventr. 259.

facts, the law allowing a fiction; as in ejection, trover, detinue, &c. 2 Burr. 667. 1 N. R. 140.

Nothing that is not essential to substantiate the pleading should be stated. The statement of immaterial or irrelevant matter is not only censurable on the ground of expense, but frequently affords an advantage to the opposite party, either as the ground of a variance, or as rendering it incumbent on the party pleading to adduce more evidence than would otherwise have been necessary; though, indeed, if the matter unnecessarily stated be wholly foreign and impertinent to the cause, so that no allegation whatever on the subject was necessary, it will be rejected as surplusage, it being a maxim that utile per inutile non vitatur. See cases, &c. in Chit. on Pl. 208, 9, 10. Besides this, the pleading must not state two or more facts, either of which would of itself; independently of the other, constitute a sufficient ground of action or defence. Co. Lit. 314. a. Com. Dig. Plead. C. 33. E. 2. 1 Chit. on P. 208.

2dly. The Mode of Stating Facts.—The facts should be stated logically, in their natural order; as, on the part of the plaintiff, his right, the injury and consequent damage; and these, with certainty, precision, and brevity. The facts, as stated, must not be insensible or repugnant, nor ambiguous or doubtful in meaning, nor argumentative, nor in the alternative, nor by way of recital, but positive, and according to their legal effect and operation. Doug. 666, 7. 1 Chit. on Pl. 211. Stephen, 378. to 405.

Certainty signifies a clear and distinct statement, so that it may be understood by the opposite party, by the jury, who are to ascertain the truth of such statement, and by the court, who are to give judgment. Cowp. 682. Com. Dig. Plead. C. 17. Less cer-

† In 4 Johns. R. 485, and 1 Wendell 305, it was decided that proceedings not commenced by original might be set aside, if the de-
tainty is requisite, when the law presumes that the knowledge of the facts is peculiarly in the opposite party; and so when it is to be presumed that the party pleading is not acquainted with minute circumstances. 13 East, 112. Com. Dig. Plead. C. 26. 8 East, 85. General statements of facts admitting of almost any proof, are objectionable, 1 M. & S. 441. 3 M. & S. 114; but where a subject comprehends multiplicity of matter, there, in order to avoid prolixity, general pleading is allowed. 2 Saund. 411. n. 4. 8 T. R. 462.

In the construction of facts stated in pleading, it is a general rule, that every thing shall be taken most strongly against the party pleading, 1 Saund. 259. n. 8; or rather, if the meaning of the words be equivocal, they shall be construed most strongly against the party pleading them, 2 H. Bla. 530; for it is to be intended, that every person states his case as favourably to himself as possible, Co. Litt. 30. 36; but the language is to have a reasonable intention and construction, Com. Dig. Plead. C. 25; and if the sense be clear, mere exceptions ought not to be regarded, 5 East, 529; and where an expression is capable of different meanings, that shall be taken which will support the averment, and not the other which would defeat it. 4 Taunt. 492. 5 East, 237. After verdict, an expression should be construed in such sense as would sustain the verdict. 1 B. & C. 297.

(3) And even then, the plaintiff will only lose the benefit of the bail, and the court will not set aside the proceedings.† 7 T. R. 80. 8 T. R. 27. 5 Moore, 483. 6 T. R. 363. So in the K. B. where the proceedings are by original, we have seen ante,—the venue must be laid in the county into which the original was issued; or in bailable cases the defendant will be discharged; but it would be otherwise clarification was for a different cause of action from the ac etiam in the writ.
PRIVATE WRONGS.

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 (4); but in transitory actions, for injuries that might have happened any where, 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 visue (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 Rich. 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 (d). And this power is discretionally exercised, so as to prevent 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 assises are holden only once a year, at the time of


in C. P. Imp. C. P. 159; and this would be the only advantage gained by the defendant.

The declaration should in other respects correspond with the process, as in the names and numbers of the parties, the character or right in which they sue or are sued; but as, according to the present practice of the courts, oyer of the writ cannot be craved, and a variance between the writ and declaration cannot in any case be pleaded in abatement, 1 Saund. 318. 3 B. & P. 295; and as there are several instances in which the court will not set aside the proceedings on account of a variance between the writ and declaration, 6 T. R. 364. many of the older decisions are no longer applicable in practice. But if the defect appear on the face of the declaration, the plaintiff may plead in abatement, or demur accordingly. As to these general requisites, see 1 Chit. on Pl. 222 to 229.

(4) Actions for every kind of injury to real property are local, as for nuisances, waste; &c. unless there be some contract between the parties, on which to ground the action. 1 Taunt. 379. 11 East, 226. And if the land be out of this kingdom, the plaintiff has no remedy in the English courts, if there be a court of justice to resort to where the land is situate. 4 T. R. 503. 1 Str. 646. Cowp. 180. 6 East, 598. Where an injury has been caused in one county, to land, &c. in another, or when the action is founded upon two or more material facts, which took place in different counties, the venue may be laid in either. 2 Taunt. 232. overruling (2 Campb. 266). 7 Co. 1. 3 Leon. 141. 7 T. R. 583. 1 Chitty on Pl. 242.

In an action upon a lease for the non-payment of rent, or other breach of covenant, when the action is founded on the privity of contract, it is transitory; but not so when the action is founded on the privity of estate. 3 T. R. 394. 3 Co. 23. 1 Saund. 237. Tidd. 431. 1 Chit. 244 to 246.

In some cases the action, though of a transitory nature, must, by act of parliament, be brought in a particular county, as by 31 Eliz. c. 5. s. 2. 21 Jac. I. c. 4. s. 2. In actions or informations on penal statutes, the venue must be laid where the offence was committed. Tidd, 432. 1 Chit. 246. So actions of case or trespass are local when against justices of the peace, mayors, bailiffs of cities, or towns corporate, headboroughs, portreves, constables, tithe men, churchwardens, &c. or other persons acting in their aid and assistance, or by their command, for any thing done in their official capacity, 21 Jac. I. c. 12. s. 5. or against any person or persons for any thing done by an officer of the excise, 23 Geo. III. c. 70. s. 34. or customs, 24 Geo. III. sess. 2. c. 47. s. 35. 39. and see 28 Geo. III. c. 37. s. 23. or others acting in his aid, in execution, or by reason of his office, or for any thing done in pursuance of the act relating to taxes, &c. 43 Geo. III. c. 99. s. 70. And the 42 Geo. III. c. 85. s. 6. extends the above provisions of the 21 Jac. I. to all persons in any public employment, or any office, station, (5) or capacity, any where, with a proviso that the action may be brought in Westminster, or where the defendant resides. There are also various other provisions in other acts, requiring that the venue shall be local, as in the highway, turnpike, militia acts, &c. Attorneys may lay and retain the venue in Middlesex.

(5) 2 R. S. 353, 4. 14. 409, 4. 3; see id. 353, 4. 2, &c. as to venue generally. In transitory actions, the Supreme Court of New-York change the venue to suit the convenience of witnesses.
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 there-in (e).

"It is generally usual in actions upon the case to set forth several cases by different counts in the same declaration; so that if the plaintiff fails in the proof of one, he may succeed in another. 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 (f); and at last concludes with declaring, that the defendant had refused to fulfil any of these agreements, whereby he is damaged 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 there-upon he brings suit," &c. "inde producit sectam, &c. (7)." 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 (8), which, as we be-

(e) Stra. 874.—Mylock v. Saladine. Trin. 4 Geo. III. B. R.
(f) Seld. on Fortesc. c. 21.
(g) Bract. 400. Fleit. l. 2, c. 6.

(6) The variations should be substantial; for if the different counts be so similar that the same evidence would support each of them, and be of any considerable length, and vaga-

tiously inserted, the court would, on applica-
tion, refer it to the master for examination,
and to strike out the redundant counts; and in
gross cases direct the costs to be paid by the
And as to striking out superfluous counts, see
Tidd, 8 ed. 667. 648; in 2 Bing. 412. nine
counts were allowed in an action for slander,
though the words used were very few. See 1
Chit. on Pl. 350, 1, 2. as to the insertion of
several counts. There must be no misjoinder of
different counts; and, in order to prevent the
confusion which might ensue, if different forms of action, requiring different pleas and
different judgments, were allowed to be found
in one action, it is a general rule, that actions in
form ex contractu cannot be joined with
those in form ex delicto. Thus, assumpst and
debt, 2 Smith, 618. 3 ib. 114. or assumpst
and an action on the case, as for a tort, cannot be
joined, 1 T. R. 276, 277. 1 Vent. 366. Carth.
189. nor assumpst with trover, 2 Leiv. 101. 3
Leiv. 99. 1 Saik. 10. 3 Wils. 354. 6 East, 335.
2 Chitty R. 343. nor trover with detinue. Wil-

les, 118. 1 Chitty on Plead. 182. Debt and
detinue may, however, be joined, although the
judgments be different. 2 Saund. 117. And
see further as to what is a misjoinder, 1 Chit.
on Pl. 199. Unless the subsequent count, ex-
pressly refers to the preceding, no defect there-
in will be aided by such preceding count. Bac.

(7) It does not so conclude in actions against attorneys and other officers of the
court, but thus; "and therefore he prays rel-

In actions at the suit of an executor or ad-
ministrator, immediately after the conclusion
to the damage, &c. and before the pledges, a
profeft of the letters testamentary, or letters of
administration, should be made. Bac. Ab.
Executor, C. Doug. 5. in notes. But omission
is added, unless defendant demur specially. 4
Ann. c. 16. a. 1.

(8) But these pledges need not be stated in
proceedings by original, or in the C. P., unless
in proceedings against attorneys, &c. Sum-
mary on Pl. 42. Barnes, 163. Nor are they
necessary in an action at the suit of the king
or queen. 8 Co. 61. Cro. Car. 161. And no
advantage can be taken of the omission in any
case, even on special demurrer. 3 T. R. 157, 8.

Vol. II. 32
fore 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 his remedy as he ought to do, and thereupon a nonsuit, or non prosequitur, is entered; and he is said to be nonpros'd \((9)\). And for thus deserting his complaint, after making a false claim or complaint \((pro falsa clamore suo)\), 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 for ever 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 defense 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 defender) 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 [*297] is afterwards extended *and maintained in his plea. For it would be ridiculous to suppose that the defendant comes and defends (or, in the vulgar acceptation, 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 assises 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 such 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 praecliti 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).

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 *novae 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 of the court, were allowed. By defending the force and injury, *the defendant waved [*298]*

all pleas of misnomers (t); by defending the damages, all exceptions to the person of the plaintiff; and by defending either one or the other *when and where* it should behave him, he acknowledged the jurisdiction of the 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 entitle 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 impeded in the courts at Westminster, for any cause of action whatsoever, unless upon a question of free-hold (z) (10). In these cases, by the charter of those learned bodies, con-

(10) But only resident members of either university are entitled to this privilege, it being local as well as personal. 2 Wils. 310.
firmed 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; 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) (11).

[*299] *After defence made, the defendant must put in his plea. But, before 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 logandi; 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 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 praetor,—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 (12), or of the bond (12), 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

[*300] plaintiff’s declaration (12). *In real actions also the tenant may

(a) Hardr. 505.
(b) Rast. 128, 4c. 1 Chitty on Pl. 304.
(c) 2 Ventr. 363.
(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 sergeant Rolfe, on behalf of the cognizance, is curious and worth transcribing.—Jeo vous dirai un sable. En aucun temps fut un pope, et avoit fait un grand affence, et le cardinals vindrent a lu y et
disoyent a luy "neccasti:" et il dit, "judica me:" et ils disoyent, "non possimus, quia caput es eccle- nciae : judica teipsum:" et l’apostol dit, "judice me cremeri; et fut combustus; et apres fut un saignant. Et in cee caso il fust son juge demene, et ea- sint n’est pas inconvenient que un home soit juge demene.

(e) Appendix. No. III. § 6.
(g) Matt. v. 25.
(h) Appendix. No. III. § 6.

(11) But a party may waive, and preclude himself from taking, any objection to a decision on this account; for if a defendant agree to refer the matter to the plaintiff, he cannot object to the award that the plaintiff was a judge in his own cause. Thus in Matthew v. Ollerton, 4 Mod. 226. Comb. 218. Hard. 44. which was an action of debt upon an award, and a verdict for the plaintiff; and, upon its being moved in arrest of judgment, the exception taken was, that the matter in difference was referred to the plaintiff himself, who made an award. Sed non allocutus. And the case of sergeant Hards was remembered by Dolben, justice, viz. The sergea_nt took a horse from my lord of Canterbury’s bailiff, for a deodand, and the archbishop brought his action; and it coming to a trial at the assizes in Kent, the sergeant, by rule of court, referred it to the archbishop, to set the price of the horse, which was done accordingly; and the sergeant afterwards moved the court to set aside the award for the reason now offered, but it was denied by lord Hale and per totam curiam.

(12) But now a defendant is not allowed oyer of the writ. 1 B. & P. 646. 3 B. & P. 395. 7 East, 353. As to the demand and crying of oyer, and the manner of setting out deeds, &c. therein, see 1 Saund. 9. (1). 289. (2). 2 Saund. 9. (12, 13). 46. (7). 336. (1). 405. (1). 410. (2). Tidd, 8 ed. 635 to 638, and index. Tit. oyer. 1 Chit. on Pl. 369 to 375.
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 afterwards makes default, recovery shall be had against the original defendant; and he shall recover over an equivalent in value against the deficient vouchee. In assises 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 chartae* 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 (*k*). In many real actions also (*l*), 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*, that is, that the pleadings may be said; and then they shall not proceed till his full age, unless it be apparent that he cannot be prejudiced thereby (*m*). But, by the statutes of Westm. 1. 3 Edw. I. c. 46. and of Glocester, 6 Edw. I. c. 2. in writs of entry sur *disseisin* in some particular cases, and in actions auncestrel brought by *an* infant, [*301*] the parol shall not demur: otherwise he might be deforced of his whole property, and event want a maintenance 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 (*n*). Nor shall an infant patron have it in a *quare impedit* (*o*), since the law holds it necessary and expedient that the church be immediately filled (*13*).

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 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, appointed for them, (id. 454, *g* 43); but the execution on the decree against such *infants* is not to be executed for one year after the decree. (Id. 455, *g* 54.)

By the rules of the court, and by special orders, the defendant has time to plead.

---

(c) *Book II.* Append. No. V. *g* 2.
(4) *F. N. B.* 133.
(6) *Dyer.* 137.
(m) *Finch.* L. 360.
(n) 1 Roll. Abr. 137.
(13) In New-York, imparlances, vouchers, aid prayers, and receipts are abolished, (2 R. S. 341, *g* 17): this was proper in consequence of abolishing the old real actions for trying title. Suits against heirs are not here delayed on account of their infancy, but guardians are

**Digitized by Microsoft®**
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 (p).

1. Dilatory pleas are (14), 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. To 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 praemunire, not in rerum natura (being only a fictitious person), an infant, a feme-covert, or a monk professed (15). In

["302"] abatement, which abatement is 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 (16). Or, it may be, that the plaintiff is dead; for the death of either party is at once an abatement of the suit. 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 (q); 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. But in actions arising ex 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 (r): being indeed rather actions against the property than the person, in which the executors have now the same interest that their testator had before (17).

(p) 12 Mod. 590.
(q) 4 Inst. 315.
(r) March 14.

(14) These pleas are not favoured by the courts, and they must be filed within four days after the day upon which the declaration is delivered, both days being inclusive. 1 T. R. 277. 5 T. R. 210.

(15) As to this plea, see 1 Chit. on Pl. 387, 388. Whenever the subject matter of the plea or defence is, that the plaintiff cannot maintain any action at any time, in respect of the supposed cause of action, it may, and usually should, be pleaded in bar; but matter which usually defeats the present proceeding, and does not shew that the plaintiff is for ever precluded, should in general be pleaded in abatement. 4 T. R. 227. Some matters may be pleaded either in abatement or bar; as outlawry for felony, alien enemy, or attainder, &c. Bac. Ab. Abatement, N. Com. Dig. Abatement, E. F.

The defendant may also plead in abatement, his, or her, own personal disability; as in case of coverture, when the husband ought to have been joined. 3 T. R. 627. Bac. Ab. Abatement, G.

(16) Pleas in abatement to the writ, are so termed rather from their effects, than from their being strictly such pleas; for as over of the writ can no longer be craved, no objection can be taken by plea to matter which is merely contained in the writ. 3 B. & P. 399. 1 B. & P. 645. But if the mistake in the writ be carried also into the declaration, or rather if the declaration, which is presumed to correspond with the writ or bill, be incorrect in respect of some extrinsic matter, it is then open to the defendant to plead in abatement to the writ or bill, 1 B. & P. 648; and as to such pleas, see 1 Chit. on Pl. 390 to 394. Consequently, a misnomer of the defendant, or giving him a wrong addition, or other want of form in the writ, unless it be contained in the declaration, is not now pleadable in abatement. See 1 Saund. 318. n. 3. 3 B. & P. 395. And the defendant, to take advantage of any defect in the writ, should in general, before appearance, move to set it aside for irregularity. 1 B. & P. 647. 5 Moore, 168.

(17) In New-York, actions of trespass may be brought by executors and administrators against any one who has wasted, destroyed,
PRIVATE WRONGS.

235

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 & 5 Ann. c. 16, no dilatory plea is to be admitted, without affidavit made of the truth thereof, or some probable matter shewn to the court to induce them to believe it true (18). 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 (s); that is, shew him how it might be amended, that there may not be two objections upon the same account. Neither, by statute 8 & 9 W. 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 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 (t): 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 still is ready, encore prist, to discharge it: for a tender by the debtor and refusal by the creditor will in all cases discharge the costs (v), but not the debt itself; though in some particular cases the creditor will totally lose his money (u). (19). *But frequently the defendant confesses one part [*304]

(t) Brownl. 130.
(u) 1 Vent. 91.
(s) 3 B. & P. 397. 1 Chit. on Pl. 401. As to the form of the affidavit, see 1 Chit. on Pl. 402.
(t) 1 Chit. on Pl. 401. As to the form and requisites of this plea in assumpsit, see 3 Chit. on Pl. 4. ed. 992; in debt, id. 955, and Lee Pract. Diet. tit. "Tender," and as to the payment of money into court on, see Tidd, 8 ed. index, tit. "Money;" Lee-Dict. tit. "Payment of Mo-

taken, carried away, or converted to his own use, the goods of the testator or intestate in his lifetime or afterwards; and also for trespass committed on the lands of the deceased in his lifetime. Executors, &c. are also liable for such trespasses committed by the deceased in his lifetime. (2 R. S. 114, § 4, 5, 6.)

(18) Sham pleas are not dilatory pleas within the statute, and an affidavit is not necessary in all cases; thus, a plea of privilege, as an attorney of the same court, to be sued by bill, it is supposed does not require an affidavit. 3 B. & P. 397. 1 Chit. on Pl. 401. As to the form of the affidavit, see 1 Chit. on Pl. 402. Tidd, 8 ed. 693.

(19) A plea to the action concludes by a confession without the form and requisites of this plea. As to the form and requisites of this plea in assumpsit, see 3 Chit. on Pl. 4. ed. 992; in debt, id. 955, and Lee Pract. Diet. tit. "Tender," and as to the payment of money into court on, see Tidd, 8 ed. index, tit. "Money;" Lee-Dict. tit. "Payment of Mo-
of the complaint (by a cognovit actionem in respect thereof) (20), and traverses or denies the rest: in order to avoid the expense of carrying that

(20) As to cognovits in general, see Tidd, 8 ed. 606 to 609. Lee's Dict. tit. Cognovit.

ney into Court." As to the replication &c. see also 3 Chit. on Pl. 1151 to 1156, and Lee Dict. tit. "Tender."

As questions relative to the tender of a debt or money are of so frequent occurrence, we will consider the respective rules and decisions under the following heads; 1st. What is a good tender. 2d. In what cases it may be made. And lastly, the effect and advantages gained by it; and how these may be superseded.

1st. What is a Good Tender.—It is a general rule, that in order to constitute a good legal tender, the party should not only be ready to pay, and make an actual offer of the sum due, but actually produce the same, unless such production be dispensed with by the express declaration of the creditor that he will not accept it, or by some equivalent act. 10 East, 101. 5 Esp. R. 48. 3 T. R. 684. Peake C. N. P. 88. 1 Cromp. 132. 2 M. & S. 86.

7 Moore, 59. If the plaintiff do not object to receive the money, it is not sufficient for the defendant to prove that he had the money with him, and held it in a bag under his arm, he ought to have laid it down for him. Id. ibid. Bul. N. P. 157. 6 Esp. 46. If A. says, I am not aware of the exact balance, but if any be due I am ready to pay it, this is no tender. 15 East, 428.

With respect to the nature of the money tendered, it should be in the current coin of the realm, and not in bank notes; and see the 56 Geo. III. c. 68. s. 11, by which gold coin is declared to be the only legal tender. But a tender in bank notes is good, unless particularly objected to on that account at the time. 3 T. R. 554. 2 B. & P. 536. So is a tender of foreign coin made current here by royal proclamation. 5 Rep. 114. b. So is a tender of provincial bank notes, or a draft on a banker, unless so objected to. 3 Peake N. P. 3 ed. 239.

Tidd, 8 ed. 187. n. f. It seems, that as any money coined at the mint upon which there is the king's stamp is good, and that all such money is good in proportion to its value, without a proclamation, such money would be a good tender. 2 Salk. 446.

With respect to the amount of the sum tendered, it should, in general be an offer of the sum due, unqualified by any circumstance whatever; and therefore tendering a larger sum, and making cross demand, is insufficient. 2 D. & R. 305. A tender of 20l. in bank notes, with a request to pay over the difference of fifteen guineas, is not a good tender as to the fifteen guineas, though it would have been otherwise if the tender had been in guineas. 3 Campb. 70. 1 Campb. 181. 6 Taunt. 336. But a demand of a large sum, if the money is good. 5 Rep. 114. 8 T. R. 683. sed vid. 2 Esp. 711. And a tender of a larger sum, and asking change, is good, provided the creditor do not object to it on that account, but only demands a larger sum. 6 Taunt. 336. Peake C. N. P. 88. 2 Esp. C. 711. 3 Campb. 70. and see 1 Gow. C. N. P. 121. A tender of a sum to A., including both a debt due to A., B., and C., and also a debt due to C., is a good tender of the debt due to the three, 3 T. R. 993; and if several creditors to whom money is due in the same right, assemble for the purpose of demanding payment, a tender of the gross sum, which they all refuse on account of the insufficiency of the amount, is good. Peake C. 88. 2 T. R. 414.

To constitute a good tender, it must be an unconditional one in payment of the debt; and therefore where a tender of payment was made, accompanied with a protestation against the plaintiff having made it, and no notice of insufficiency, 3 Esp. C. 91. So is a tender accompanied with the demand of a receipt in full, (5 Esp. Rep. 48. 2 Campb. 21. sed vid. Peake C. 179. Stark. on Evid. part 4. 1392. n. (g) or upon condition that it shall be received as the whole of the balance due, (4 Campb. 150.) or that a particular document shall be given up to be cancelled. 2 Campb. 21. To constitute a good tender of stock, the buyer must be called on opening the books, 1 Str. 533. and the defendant must do all in his power to make it good. 1 Str. 504.

With respect to the time of the tender, it should be observed, that in order to avoid the defendant's liability to damages for the non-performance of the contract, it should be made in the very time agreed upon for the performance of such contract; a tender after such time only goes in mitigation of damages for the breach of the contract, and not even then if the tender be not made before the writ sued out. 7 Taunt. 487. See 21 Jac i. c. 16. s. 5. It is said to have been decided by Buller, J., that a tender on the day the bill is filed is not available, there being no fraction of a day. Imp. K. B. 324; consequently, if payment of a bill has been demanded on the day it was due, and the acceptor plead a subsequent tender, it will not avail, 8 East, 168. 5 Taunt. 240. 1 Marsh. Rep. 36. 1 Saund. 33. a. note 2. But that doctrine is not law, and it is no answer to a plea of tender, that the plaintiff had before the tender instructed his attorney to sue out the writ, and that the attorney had applied before the tender for the writ which was afterwards granted out. 8 T. R. 629. t. 7. if the plaintiff brings his action, and discontinues it, and commences another, a tender before the latter action is good. 1 Moore, 200. To constitute a good tender of stock, it should be made on the very day, 1 Str. 579; and at the last part of the day it can be accepted. 2 Id. 777. 832. Any party, being an agent of the debtor, may tender the money. 2 M. & S. 86.

With respect to the persons to whom the tender should be made, it will suffice if it be to the creditor or any authorized agent. 1 Campb. 477. Tender to an attorney, authorized to issue out a writ, &c. is good. Doug. 623. And a tender to an agent has been held
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 (w) which is for


good, although the principal had previously prohibited the agent from receiving the money if offered, the principal having put his business in the hands of his attorney. 5 Taunt. 397. 1 Marsh. 55. S. C. A bailiff, who makes a distress, cannot delegate his authority; therefore a tender to his agent is insufficient, 6 Esp. 93; and a tender to one of several creditors is a tender to all. 3 T. R. 683.

2dly. In what cases a tender may be made with effect.—In general, a tender can only be made with effect in cases where the demand is of a liquidated sum, or of a sum capable of liquidation by computation. 1 Moore, Burr. 119 C. Therefore a tender cannot be pleaded to an action for general damages upon a contract, 1 Vent. 356. 2 Bla. Rep. 837. 2 B. & P. 234. 3 B. & P. 14; or in covenant, unless for the payment of money, 7 Taunt. 486. 1 Moore, 200. S. C. 5 Mod. 18. 1 Lord Raym. 506. 12 Mod. 376. 2 H. Bla. 837; or for a tort, 2 Stra. 787. 906. 7 T. R. 335; or trespass. 2 Wils. 115. It cannot be pleaded to an action for delinquations, 8 T. R. 47. Stra. 906; or for not repairing, 2 Salk. 596; or against a carrier for goods spoiled, though the tender should be of the invoice price, 2 B. & P. 234; or for not delivering goods at a certain price per ton, 3 B. & P. 14; or in an action for a false return, 7 T. R. 335; or for mesne profits, 2 Wils. 115. But in a suit against a carrier for not delivering goods, the defendant having advertised that he would not be answerable for any goods beyond the value of 20l, unless they were entered and paid for accordingly, a tender of the 20l. would, it seems, be available. 1 H. Bla. 299. So a tender may be made with effect to a demand, for navigation. Cals. 7 T. R. 36. 1 Stra. 142; or in an action for principal and interest due on bonds for payment of moneys by instalments. 3 Burr. 1370. So the penalty of a bond may with effect be tendered. 2 Bla. 1190. So the areas of a bond for 40l. payable for 5l. per annum. 2 Stra. 814. So a tender may with effect be made in covenant for rent, or for the advanced rent of 5l. per acre for ploughing meadow grounds, 2 H. Bla. 837. 7 Taunt. 486. 1 Moore, vide 2 Salk. 596. So also on a policy of insurance, 19 Geo. II. c. 37. a. 7. 2 Taunt. 317; or in debt for penalty for exercising trade contrary to 5 Eliz. c. 4. 1 Burr. 431; or for penalty on game laws, being actions popular, and not quiet. 2 H. Bla. 1052. 2 Stra. 1217. Where a party has wrongfully possessed himself of goods, no tender of freight is necessary in order to enable the party to maintain the action. 2 T. R. 295.

Justices of the peace, and in like manner excise and custom-house officers, and surveyors of highways, are enabled by several statutes to tender amends for any thing done by them in the execution of their offices. See ante, 1 book, 334 n. 37, et seq. Also by the 21 Jac. I. c. 16 s. 5. in case of involuntary trespasses, tender of amends may be made. See ante, 16.

Lastly, As to the Effect of a Tender, and the Advantages acquired by it.—It should in the first place be observed, that the debtor is liable for the non-performance of his contract, if the money be not paid at the time agreed upon; the more tendering the money afterwards is not sufficient to discharge him from such liability, it goes only in mitigation of damages; though indeed if a jury should find that no damages were sustained by reason of the defendant not tendering the money at the time agreed upon, the defendant would defeat the action by the tender afterwards. See Salk. 622. 8 East, 168. 1 Lord Raym. 234. 7 Taunt. 486. The tender of money due on a promissory note, accompanied with a demand of the note, stops the running of interest. 3 Campb. 296. 8 East. 168. 4 Leon. 209. The tender, if pleaded, admits the contract and facts stated in the declaration. 3 Taunt. 93. Peake, 15. 2 T. R. 275. 4 T. R. 579. If therefore the defendant's liability is to be disputed, a tender should not be pleaded. So if there be a special count, and the defendant mean to deny it, the tender should be pleaded to the other counts only; and see Tidd, 8 ed. 670; and if there be any doubt as to the sufficiency of the tender, it is not advisable to plead it, but more expedient to pay the amount into court upon the common rule; for if the defendant should not succeed in proving the tender, he will have to pay all the costs of the trial; whereas if the money be paid into court, and the plaintiff cannot prove more due, he will be liable to pay all costs subsequent to the time of paying the money into court. If the sum tendered be not sufficient, and the plaintiff should succeed on the general issue, the plaintiff would still be entitled to the costs of the issue on the plea of tender. 5 East. 282. 5 Taunt. 660. If the defendantbring money into court on a plea of tender, the plaintiff may take it out, though he deny the tender. 1 B. & P. 332. The plaintiff, it seems, can gain no advantage by not taking the money out of court; and it has been said, that if the plaintiff will not take the money, but takes issue on the tender, and it is found against him, the defendant shall have it. 1 B. & P. 334, note a. Lord Raym. 642. 2 Stra. 1027. If the plaintiff should
the most part necessary upon pleading a tender, and is itself a kind of tender to the plaintiff (21); 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 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. 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 (22). 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 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

succeed on the trial, in proving a larger sum to be due than that tendered, though that sum be below 40s., yet the plaintiff will be entitled to costs. Doug. 448. But where the debt originally was under 5l. the defendant is, it seems, entitled to the benefit of the court of requests' act for London, though he has pleaded a tender, 5 M. & S. 196. or paid money into court. 5 East, 194.

A tender, not being equivalent to payment itself, and only suspending the plaintiff's remedy, 2 T. R. 27. its effect may be superseded by a prior or subsequent demand and refusal, to pay the precise sum tendered. 1 Campb. 181. 5 B. & A. 630. A subsequent demand of a larger sum will not suffice, id.; or a subsequent demand, accompanied by another demand of another sum not due. 1 Esp. 115. 7 Taunt. 213. Such demand should be made by a person authorized to give the debtor a discharge. 1 Campb. 478; n. 1 Esp. 115. A demand made by the clerk of the plaintiff's attorney, who was an entire stranger to defendant, is insufficient. 1 Campb. 478. A subsequent application to one of two joint debtors, and a refusal, is sufficient. 1 Stark. 323. 4 Esp. 93. Noy. 135. Vin. Ab. Evid. T. b. 97. Delivering a letter at defendant's house to a clerk, who returned with an answer that the debt should be settled, is prima facie evidence of a demand. 1 Stark. 323. A

consequence to attend the refusal to accept the bail rendered to a condition relating to money to be paid in respect of land; but Co. Litt. 209, qualifies the position by saying, that if it were a duty before, as if A. borroweth a

prior demand, and refusal, is an answer to the plea of tender. 8 East, 198. 1 Saund. 33. n. 2. Bull. N. P. 156. 1 Campb. 478.

(21) The allowing the defendant to pay money into court was introduced for the purpose of avoiding the hazard of proving a tender, and in all cases where there has been no tender, or the tender cannot be proved, it should not be pleaded, but the defendant should merely pay the admitted claim into court. The cases in which the proceeding is allowed, are similar to those in which a tender may be pleaded, and which will be found supra, note (10). One case however should be noticed, viz. where the goods have been taken under a mistake, without any loss to the owner, the court, upon motion, will stay the proceedings in an action of trespass against a public officer, upon the defendant's undertaking to restore them, or to pay their full value, with the costs of the action. 7 T. R. 53.

(22) The effect of the payment of money into court, is nearly similar to that of a tender. See supra, note (10). Lee's P. Dist. 2 ed. 1013. Tidd, 3 ed. 676. This is the only case where a party is bound by the payment of money, 2 T. R. 645; and though paid in by mistake, the court will not order it to be restored to defendant; though perhaps in a case of fraud they would. 2 B. & P. 392.

hundred pounds of B. and subsequently mortgage land to A. for repayment, and afterwards tender A. the money and he refuse it, the land is discharged, but the debt remaineth and may be recovered by action of debt.
sold to the plaintiff, and in case he pleads such set-off, must pay the remaining balance into court. This answers very nearly to [205] 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 pleading 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 (23).

(z) Fy. 16 2 1.

(23) But in such case, notice must be given at the time of pleading the general issue; and as to the mode of setting off, see 1 Chit. on Pl. 4 ed. 494 to 497.

In some cases, this plea or notice is unnecessary, as where the defendant's demand is more in the nature of a deduction than a set-off. Thus a defendant is in all cases entitled to recover by way of deduction, all just allowances or demands accruing to him, or payments made by him, in respect of the same transaction or account which forms the ground of action, this is not a set-off, but rather a deduction. See 1 Bla. Rep. 651. 4 Burr. 2133. 2221. And where demands originally cross, and not arising out of the same transaction, have by subsequent express agreement been connected, and stipulated to be deducted or set off against each other, the balance is the debt, and the only sum recoverable by suit without any special plea of set-off, though it is advisable in most cases, and necessary when the action is on a specialty, to plead it. 5 T. R. 135. 3 T. R. 599. 3 Taunt. 76. 2 Taunt. 170. In actions at the suit of assignees of bankrupts, a set-off need not be pleaded or given notice of, 1 T. R. 115. 116. 6 T. R. 58. 59; though the practice is so to plead, or give notice of such set-off.†

It may be important here also to observe, that these acts were passed more for the benefit of the defendants than the plaintiffs, and are not imperative; so that a defendant may have his right to set off, and bring a cross action for the debt due to him from the plaintiff, 2 Campb. 594. 5 Taunt. 148; though he cannot safely arrest. 3 B. & Cres. 139. And where the defendant is not prepared at the time the plaintiff sues him to prove the set-off, it is best not to avail himself of it; for if the defendant should attempt but not succeed on the trial in proving the set-off, he could not afterwards sue for the amount; and a party cannot bring an action for what he has succeeded in setting off in a former suit against him; though if the set-off were more than sufficient to cover the plaintiff's demand in the former action, the defendant therein might then maintain an action for the surplus. 3 Esp. Rep. 104. Though the defendant does not avail himself of the set-off, intending to bring a cross action, the plaintiff may defeat it by taking a verdict for the whole sum he proves to be due to him, subject to be reduced to the sum really due on the balance of accounts, if the defendant will afterwards enter into a rule not to sue for the debt intended to be set off; or he may take a verdict for the smaller sum, with a special indorsement on the postea, as a foundation for the court to order a stay of proceedings, if an action should be brought for the amount of the set-off. 1 Campb. 252.

The demand, as well of the plaintiff as of the defendant, must be a debt. A set-off is not allowed in an action for uncertain damages, whether in assumpsit, covenant, or for a tort, trover, detinue, replevin, or trespass. Bull. N. P. 181. 3 Campb. 329. 4 T. R. 512. 1 Bla. Rep. 394. 2 Bla. Rep. 910.

The only cases in which a set-off is allowed, are in assumpsit, debt, and covenant for the non-payment of money, and for which an action of debt or indebitatus might be sustained, 2 Bla. Rep. 911; or where a bond in a penalty is given for securing the payment of money on an annuity, 2 Burr. 820; or at least stipulated damages. 2 T. R. 32. The demand to be set off, also, must not be for unliquidated damages, although incurred by a penalty. 1 Bla. Rep. 394. 6 T. R. 488. 1 Taunt. 137. 2 Burr. 109. 4 Bla. Rep. 910. 1 Taunt. 137. 5 B. & A. 92. 3 Campb. 329. Peake Rep. 41. 6 Taunt. 162. 1 Marsh. 514. S. C. 2 Brod. & B. 89. 1 M. & S. 499. 5 M. & S. 539, &c. See cases in 1 Chit. on Pl. 4 ed. 486, 7. Stark. on Evid. 1312. part 4. The defendant's bringing an action, or obtaining a verdict for a debt, is no waiver of the right to set off the debt. 2 Burr. 1229. 3 T. R. 186. And a judgment may be pleaded by way of set-off, though a writ of error be depending upon it, 3 T. R. 188. in notes; but not so after plaintiff be taken in execution. 5 M. & S. 103.

The debt to be set off must be a legal and subsisting demand; an equitable debt will not suffice. See 16 East, 36. 136. 7 East, 173. A demand, barred by the statute of limitations, cannot be set off. 2 Stra. 1271. Peake Rep. 121. Bull. N. P. 190. An attorney cannot set off his bill for business done in court, unless he has previously, and in a reasonable time to be taxed, delivered a bill signed. 1 Esp. C. 449. But it is not necessary that a month should intervene between the delivery of the bill and the trial. Id.

The debt sought to be recovered, and that to be set off, must be mutual, and due in the same right; therefore a joint debt cannot be set off against a separate demand, nor a separate debt against a joint one, 2 Taunt. 172. Montague, 23. 5 M. & S. 430. unless it be

† As to set-off in New-York, see 2 R. S. 354, § 18, &c.
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 vi et armis, or on the case, non culpabilis, not guilty (y); in debt upon contract, nihil debet, he owes nothing; in debt on 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 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 spe-

---

(y) Append. No. II. § 4.
sional 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, monage of the defendant, or some other fact which precludes the plaintiff from his action (a). 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 (24); or the

(a) Appendix No. III. § 6.

(24) As questions on the statute of limitations, 21 Jac. I. c. 16. so frequently occur, we will consider this subject more fully in the following order, viz. First, as to what cases the statute extends, and herein in what cases payment of a debt may be presumed at common law. Secondly, when the statute begins to take effect, and herein of the exceptions contained in the statute. Thirdly, what is a good commencement of an action to take the case out of the statute; and, Lastly, what acts or admissions will revive the claim.

First, To what Cases the Statute Extends.—The statute does not extend to actions of account, or of covenant, or debt on specialty, or other matter of a higher nature, but only to actions of debt upon a lending, or contract without specialty, or for arrearages of rent reserved on parol leases. Hut. 109. 1 Saund. 33. 2 Saund. 66. Tidd Pr. 8 ed. 15. It does not extend to warrants of attorney. 2 Stark. 234. It extends to bills of exchange, Carth. 3. attorney's fees, 3 Lev. 307. and to a demand for rent on a parol demise. 1 B. & A. 625.

It does not extend to debt on a bond, Cmp. 109; but where the bond has been given more than twenty years before the commencement of the action, and no interest has been paid upon it, nor any acknowledgment by the obligor of the existence of the debt during that period, the law will, in general, presume it to have been satisfied, 6 Mod. 22. 1 Bla. Rep. 532. 1 T. R. 270. 3 P. Wms. 305, particularly if the debt be large and the obligor has been all along in good circumstances, 1 T. R. 271; and in some cases, where a bond has been given and interest paid on it within twenty years, the law will presume it to have been satisfied; as where it has been given eighteen or nineteen years, and in the mean time an account has been settled between the parties, without taking any notice of the demand. 1 Burr. 434. 1 T. R. 271; but in such case, the presumption must be fortified by evidence of

some auxiliary circumstances. Cmp. 214. 1 T. R. 271. 1 Camp. 27. After a considerable length of time slight evidence is sufficient. 1 T. R. 271. and see Tidd. 8 ed. 17, 18. In assumption, though the statute be not pleaded, the jury may presume, from the length of time and other circumstances, that the debt has been satisfied. 2 Stark. C. N. P. 497, and see 5 Esp. 52. 3 Camp. 13. 1 Taut. 572. sed vid. 1 D. & R. 16.

This presumption may be repelled by proof of the recent admission of the debt, or of the payment of interest on the bond within twenty years, 1 T. R. 270; or that the obligee has resided abroad for the last twenty years, 1 Stark. 101. sed vid. 1 D. & R. 16; or that the obligor was in insolvent circumstances, and had not the means of payment, 19 Ves. 196. Cmp. 109. 1 Stark. 101; or that the demand was trifling, Cmp. 214; or other circumstances, explaining satisfactorily why an earlier demand has not been made. 1 Stark. 101. The fluctuation of credit, together with the circumstances of the security remaining with the obligee, is of great weight to rebut presumption of payment thereof, 19 Ves. 199. 1 Stark. 374; and an indorsement by the obligee, purporting that part of the principal sum has been received, if made after the presumption of payment has arisen, is inadmissible. 2 Sta. 827. 2 Ves. 42. sed vid. 1 Barnard. 432. And further, if the defendant produce direct evidence of the payment of the principal sum and interest at a certain time within twenty years, the plaintiff will not be allowed to encounter that evidence by an indorsement in the hand-writing of the obligee, purporting that interest was paid at a subsequent time. 2 Camp. 322.

Secondly, When the Statute Begins to Take Effect.—It does not do so till the cause of action is complete, and the party is capable of suing on it. Cro. Car. 139. 1 Lev. 442. 1 Bla. Rep. 354. No action lies against a consignee of goods for sale, for
time 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 not accounting and returning the goods undisposed of, until demand, and therefore the statute does not begin to run until the time when demand is made. 1 Taunt. 572. The statute begins to operate only from the time when a bill of exchange or promissory note, &c. is due, and not from the date, 1 H. B. 631. 6 B. & A. 212; and no debt-accrues can a bill payable at sight, until it is presented for payment. 2 Taunt. 323. The statute of limitations begins to run from the date of a note, payable on demand. 1 Ves. 344. 2 Selw. 4 ed. 131. 339. Cro. Eliz. 548. and see Chitty on Bills, 6 ed. 373. sed quere, see Hard. 36. 14 East. 500. 1 Taunt. 575. 6. Sir W. Jones, 194. 12 Mod. 444. 15 Ves. 487. Where a payee of a bill of exchange was dead at the time the bill became due, it was held that the statute did not begin to run until letters of administration were taken out, 5 B. & A. 212. Skin. 555; but where the cause of action is complete in the lifetime of the testator, then the statute begins to run from that time, and not from the granting of the probate. Willes, 27. Where a breach of a contract is attended with special damage, the statute runs from the time of the breach, which is the gist of the action, and not from the time it was discovered, 3 B. & A. 628. 288. 4 Moore, 505. 2 Brod. & B. 73. S. C. or the damage arose. 5 B. & A. 204. If there is mutual credit between two parties, though the items on both sides are above six years old, with the exception of one item on each side, which are just within the period, this is sufficient to take the whole out of the statute, for every new item and credit in an account given by one party to the other is an admission of there being some unsettled account between them. 6 T. R. 190. 2 Saund. 127. a. n. (6). But where all the items are on one side, so that the account is not mutual, as for instance, in an account between a tradesman and his customer, the last item which happens to be within six years, will not draw after it those which are of a longer standing. Bull. N. P. 149.

The exception in the statute, respecting merchants' accounts, extends only to those cases where there are mutual and reciprocal accounts and demands between two persons, and where such accounts are current and open, and not to accounts stated between them, 2 Ves. 158. Bull. N. P. 140. Sir Tho. rvborne, 411. 1 Sid. 465. 1 Vent. 89. for no other actions are excepted but actions of account. Carth. 226. 1 Show. 341. S. C. 2. Saund. 127. a. 2 Mod. 312. and 1 Mod. 70. 1 Lev. 299. 4 Mod. 105. Peake, 121. 1 Vern. 456. 2 Vern. 276. It has been considered, that by the effect of the above exception there can be no limitation to a merchant's open and unsettled account; this opinion however appears erroneous, and if there is no item in the account, or acknowledgment of the debt within six years, the statute will take effect; but as we have before seen, if even the last item of the account is within six years, that preserves all the preceding items of debt and credit from the operation of the statute, 6 Ves. 580. 15 Ves. 198. 18 Ves. 286. 2 Ves. 200. acc. sed vide opinion of lord Hardwicke mentioned in 19 Ves. 185. 6 T. R. 189. 192. cont., and from these decisions it appears, that merchants' accounts stand not upon better grounds, in regard to the statute, than other parties. The exception extends to all merchants, as well inland as to those trading beyond sea, Peake C. N. P. 121. 2 Saund. 127. B. acc. Châr. Ca. 152. cont.; and the effect of the exception has also been extended to other tradesmen, and persons having mutual dealings. 6 T. R. 189. Peake N. P. 127. overruling, sed vide 7 Mod. 270. cont. But in all these cases, the accounts must be mutual, together with reciprocal demands on each side, and not as in the case of a tradesman and his customer, where the items of credit are all on one side. Bull. N. P. 149.

The exception in the act, respecting infants, &c. only extends to plaintiffs, Carth. 136. 226. 6 Show. 99. Salk. 420. 2 Stra. 536; but by 4 & 5 Ann. c. 16. s. 19. it is extended to defendants beyond seas at the time of the cause of action accruing. If the plaintiff be in England when the cause of action accrues, though he afterwards go abroad, the time of limitation begins to run from the accruing of the action, 1 Wils. 134; and so, though one of several plaintiffs be abroad when the cause of action accrues, 4 T. R. 516.† It extends to persons absent in Scotland, 1 Bla. R. 286. 1 D. & R. 16; and the plaintiff, though absent there, must sue within the limited time; but it does not extend to persons in Ireland, 6 T. R. 226. 5 Wals. 145. S. C. Though the demand be on a bill of exchange, the plaintiff's absence beyond sea saves the statute. Strange, 836. Where the cause of action accrues within the jurisdiction of the supreme court at Bengal, whilst the parties are resident there, the statute of limitations, as far as respects a suit in this country, begins to run only from the time of their concurrent presence here. 13 East. 439.

When once the statute has begun to run, nothing stops its course, as where a tenant in cause of action accrues, and afterwards resides out of it, the time of his absence is not reckoned any part of the time of limitation. (2 R. S. 296, § 24. 27). In order to constitute a proper commencement of the action, there must be a bona fide endeavour to serve the writ. (Id. 299, § 39).

† In New-York the exceptions to the statute are, plaintiffs within age, insane, imprisoned on a criminal charge, or in execution under sentence of a criminal court for a term less than for life, or married women. The action is not barred till the return of the defendant to this state, if he be out of it when the action accrues; if he be in it after the
writ of right, is sixty years: in assises, writs of entry, or other possessory actions real, of the seisin of one's ancestors, in lands; and either of their
tail leaves two sons infants, and the eldest
having attained the age of twenty-one, dies
without issue, the statute begins to run against
his brother, though a minor. 4 Taunt. 626.
And see the cases, 1 Wils. 134. 4 T. R. 516.
just cited.

Thirdly, **WHAT IS A GOOD COMMENCE-
MENT OF AN ACTION, TO TAKE THE CASE
OUT OF THE STATUTE.** (see Tidd, 8 ed. 24, 5.
144. 156. 161.)

If the plaintiff, having commenced a suit in
due time, die, or, being a feme-sole at the
commencement of the action, marry, the represen-
tative in the one case, or husband and
wife in the other, if they commence a new ac-
tion after the reasonable time afterwards, it
will suffice; see Willes, 250. N. E. 2 Salk. 425.
Bull. N. P. 150: a year seems to be a
reasonable time within this rule, 1 Lord
Raym. 434. 1 Lutw. 256. S. C. 2 Stra. 907.
Cro. Car. 294. sed vid. 1 Lord Raym. 283.
1 Salk. 393. S. C. at all events half a year
would be. C. W. 739. 740.

Lastly, **WHAT ACTS OR ADMISSIONS WILL
REVOKE THE CLAIM.**—The object of this sta-
tute was to protect individuals against forgot-
ten claims of so obsolete a nature, that the
evidence relating to the contract might proba-
ble be no longer to be found, and thereby
might lead to perjury. It proceeds also upon
the supposition that the debtor has paid, but
after a lapse of time may have lost his voucher.
See 5 M. & S. 76. per Bayley, J. 3 B. & A.
142. per Abbott, J. In cases therefore, where
there is an acknowledgment of the debtor or
contractor, to prove the existence of the debt
or obligation, or an express promise to pay or
perform the same, the statute will not operate
to protect him, notwithstanding the lapse of
six years, or more, since the cause of the ac-
tion may have accrued. But if a cause of
action arising from the breach of a contract to
do an act at a specific time, be once barred by
the statute, a subsequent acknowledgment by
the party that he broke the contract, will not,
seems, take the case out of the statute, 2
Camp. 160. and see Peake's Evid. 205. 5
Moore, 105. 2 B. & C. 372. S. C. 5 B. &
A. 204. 3 B. & A. 288; and a subsequent
acknowledgment of a trespass will not take
the case out of the act. 1 B. & A. 92. 2
Chit. Rep. 249. S. C. The sufficiency of an
acknowledgment to take the case out of the
statute, will be considered; first, where it di-
rectly acknowledges the debt; secondly, where
it acknowledges the debt having existed, but
is accompanied by a declaration of its being
discharged; and thirdly, with reference to the
parties making the admission.

In the first case, the slightest acknowledg-
ment has been held sufficient, 2 Bull. 1099.
Bull. N. P. 149. Cowp. 549; as where the
debtor exclaimed to the plaintiff, **"What an
extravagant bill you have delivered me!"**
Peake N. P. 93. So where the defendant
met a man in a fair, and said that he went
there to avoid the plaintiff, to whom he was
indebted, this was held to save the statute.
Loft, 86. In an action by an administrator, an
agreement for a compromise executed between
intestate and defendant, wherein the exist-
ence of the debt sued for, was admitted, was
deemed sufficient to take the case out of the
statute. 9 Price, 132. It is sufficient to prove,
that a demand being made by a seaman on the
owner of a ship for wages, which had accrued
during an embargo, he said, "if others paid
he should do the same," 4 Camp. 155. A
promise, "if there should be any mistake,
it should be rectified," referring to payments
actually made, is sufficient. 2 B. & C. 149.
3 D. & R. 522. S. C. sed quare. And it
makes no difference whether the acknowledg-
ment be accompanied with a promise or refu-
sal to pay, a bare acknowledgment is suffi-
cient. 16 East, 492. 2 Burr. 1099. 5 M.
& S. 75. 2 B. & Cres. 154. The construc-
tion of an ambiguous letter or declaration of
a defendant on being served with a writ, or
requested to pay a debt, neither admitting or
denying it, is strong intimation that it is an
acknowledgment, since, if the defendant knew
he owed nothing, he would have declared so.
2 T. R. 760. 1 Bing. 266. A conditional
promise to pay when able, or by instalments,
&e., is sufficient, without proof of ability, or
waiting till instalment become due. 10 East,
430. 2 Stark. 98. 9. 5 M. & S. 75. sed vid.
3 D. & R. 207. Where the original agree-
ment is in writing, in order to take the case
out of the statute of frauds, a subsequent
promise, or admission of the liability to per-
form such agreement, need not be in writing
to take the case out of the statute of limita-
tions. 1 B. & A. 690. An acknowledgment
after action brought, is good. Selw. N. P.
tit. Limitations. Burr. 1099. The admission
to a third person is sufficient. 3 B. & A. 141.
Loft, 86. 2 B. & C. 154.

On the other hand, where the defendant
said, "the testator always promised not to
distress me," this was held no evidence of a
promise to the testator, to take the case out of
the statute, 6 Taunt. 210; so a declaration,
"I cannot afford to pay my new debts, much
more my old ones," is insufficient, 4 D. & R.
179; and so where in assumpsit by an attor-
ney to recover his charges, relative to the
grant of an annuity, evidence that the defend-
ant said, "he thought it had been settled when
the annuity was granted, but that he had been
in so much trouble since, that he could not
recollect any thing about it," is not a sufficient
acknowledgment of the debt to save the sta-
tute, notwithstanding proof that plaintiff's bill
was not paid when the annuity was granted.
1 J. B. Moore, 340. 7 Taunt. 608. S. C.
The referring plaintiff to the defendant's attorney,
who, he added, was in possession of his deter-
mination and ability, is not an admission that
anything is due, 1 New Rep. 20; and where
a defendant, on being applied to by the plain-
tiff's attorney for the payment of the debt,
wrote in answer, "that he would wait on the

† See 2 R. S. 297. § 26.
PRIVATE WRONGS.

seized, or one's own, in rents, suits, and services, fifty years: and in actions real for lands grounded upon one's own seized or possession, such possess-
plaintiff when he should be able to satisfy him respecting the misunderstanding which had occurred between them, this was held not sufficient to take the case out of the statute, Holt C. N. P. 380. and see 4 Esp. 184. 5 Esp. 81; a declaration, "I will see my attorney, and tell him to do what is right," is insufficient. 3 D. & R. 267. Payment of money into court on a special count, will not save the operation of the statute, 3 B. & C. 10. 4 D. & R. 632. S. C.; it only admits the debt to the amount paid in. Id. Bumb. 100.

In the second place, where the defendant makes no express acknowledgment of the debt, but says, he is not liable, because it is more than six years since; this will not take the case out of the statute. 3 Taunt. 380. 5 Esp. 81. 4 M. & S. 457. 5 Price, 636. But an acknowledgment that the defendant had been liable, but was not at the time of acknowledgment, because the demand was out of date; and that he would then pay, if it was not then due, takes the case out of the act. 16 East, 430. 2 Stark. 98, 99.

If a debtor admit that he was once liable, but that he was discharged by a particular mode of performance, to which he, with precision, referred himself, and where he has designated that time and mode of performance so strictly, that he can say it is impossible it can be done otherwise, then the courts have said, that if the plaintiff can disprove that mode, he lets himself in to recover, by striking from under the defendant the only ground on which he professes to rely, 7 Taunt. 608. 4 B. & A. 568. 1 Salk. 29. Cowp. 548. Peake N. P. C. 93; so where a party acknowledges, but refuses to pay the debt, relying on the fact that he has paid by some other mode, the courts have said, that the case out of the statute, upon proof of liability. 5 M. & S. 75. 6 Rep. 66. But a qualified admission by a party, who relies on an objection, which would, at any time, have been a good defence to the action, does not take the case out of the statute, as if the defendant said, "if you had presented the protest the same as the rest, it would have been paid, I had then funds in the acceptor's hands," 1 Stark. 7. see 3 Esp. N. P. C. 155. 2 Camp. 161. 2 B. & A. 759. 4 B. & A. 568. 4 East, 599. and cases there cited; this was held no sufficient acknowledgment.

Where the defendant, an executor, who was sued for money had and received from his testator, was proved to have said, "I acknowledge the receipt of the money, but the testatrix gave it me," it was held insufficient, Bull. N. P. C. 148; and so where the defendant, on being applied to for payment of a debt, said, "you owe me more money, I have a set-off against it." 2 B. & A. 759. Where a party on being asked for the payment of his attorney's bill, admitted that there had been such a bill, but stated that it had been paid to the deceased partner of the attorney, who had retained the amount out of the floating balance in his hands, it seems, that in order to take the case out of the statute, evidence is inadmissible to shew that the bill had never, in fact, been paid in this manner. 4 B. & A. 568. In all cases, unless the defendant shall acknowledge that the debt or obligation did originally exist, the statute will not be avoided. 4 Maule & S. 457. 2 Camp. 160.

In the third case, with respect to the party from whom the acknowledgment should come to render it sufficient; an acknowledgment by an agent or servant, intrusted by the defendant to transact his business for him, will suffice, 5 Esp. 145; and so will the admission of the wife who was accustomed to conduct her husband's business. Holt's Ca. Ni. Pri. 591. In an action against a husband, for goods supplied to his wife, for her accommodation, while he occasionally visited her, a letter written by the wife, acknowledging the debt within six years, is admissible evidence to take the case out of the statute. 1 Camp. 394, and see 2 Esp. N. P. C. 311. 5 Esp. N. P. C. 145. If a demand is owing from two parties, an acknowledgment by one will avoid the statute, 4 T. R. 516; so an acknowledgment by one of several makers of a joint and several promissory note, will take the case out of the statute, as against any one of the other makers, in a separate action on the note against him, Doug. 632, and this, though against a surety, 2 Bing. 306; and in an action against the two makers, and several promissory note of himself and B., to take case out of the statute, it is enough to give in evidence a letter written by A. to B. within six years, desiring him to settle the debt. 3 Camp. 32, and see 11 East, 585. 1 Stark. 81. But the acknowledgment of one partner to bind the other, must in such case be clear and explicit, as it is not sufficient, in order to take a case out of the statute, in an action on a promissory note, to shew a payment, by a joint maker of a note, to the payee within six years, so as to throw it upon the defendant, to shew that the payment was not made on account of the note. 1 Stark. 488. It has been held, that when one of two drawers of a joint and several promissory note having become bankrupt, the payee received a dividend under the commission on account of the note, this will prevent the other drawer from availing himself of the statute, in an action brought against him for the remainder of the money due on the note, the dividend having been received within six years before the action brought. 2 H. Bla. 340. But in a more recent case, where one of two joint drawers of a bill of exchange became bankrupt, and under his commission the indorsers proved a debt (beyond the amount of the bill) for goods sold, &c. and they exhibited the bill as a security, they then held for their debt, and afterwards received a dividend; it was held, that in an action by the indorsers of the bill against the solvent partner, the statute of limitations was a good defence, although the dividend had been paid by the assignees of the bankrupt partner within six years, 1 B. & A. 463, and see 1 B. & C. 248. 2 D. & R.
sion 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). But by the statute 21 [*307] Jac. I. c. 2. a time of limitation was extended to 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 question; so that a possession for sixty years is now a bar even against the prerogative, in derogation of the ancient maxim "nullum tempus occurrit regiti." 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 the statute 21 Jac. I. c. 26. no entry can be made by any man, unless within twenty years after his right shall accrue. Also all actions of trespass (quare clausum fregit, or otherwise), detinue, trover, reprieve, 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

(b) See pag. 250.  
(c) Inst. 189.  
(d) See pag. 206.

363. S. C. So where A. & B. made a joint and several promissory note, and A. died, and ten years after his death B. paid interest on the note, it was held in an action thereon against the executors of A., that the payment of interest by B. did not take the case out of the statute, so as to make the executors liable. 2 B. & C. 23. 3 D. & R. 200. S. C. An acknowledgment by an accommodation acceptor, within six years, of his liability to the payee, is not sufficient to take the case out of the statute, for the drawer. 3 Stark. 186.

It is enacted, by 9 Geo. IV. c. 14, that in actions of debt or upon the case, grounded upon any simple contract, no acknowledgments or promise by words only should be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the enactments of the statutes of limitations, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby. And that where there shall be two or more joint contractors, or executors or administrators of any contract or, no such joint contractor, executor or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect, or by reason only of any written acknowledgment or promise made and signed by any other or others of them. The act not to alter the effect of any payment of any principal or interest made by any person whatsoever. And in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by either of the said recited acts, or this act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise, judgment may be given, and costs allowed, for the plaintiff, as to such defendant or defendants against whom he shall recover; and for the other defendant or defendants against the plaintiff.

By sect. 2, that if defendant in action on simple contract shall plead in abatement to the effect that any other person ought to be jointly sued, and issue be joined on such plea, and it should appear at the trial that the action could not by reason of the said recited acts, or the present act, be maintained against the other person named in such plea, the issue joined on such plea should be found against the party pleading the same.

By sect. 3, no indorsement or memorandum of payment made after the 1st of January, 1829, upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes.

By sect. 4, said recited acts and the present act shall apply to the case of any debt on simple contracts by way of set-off on the part of any defendant, either by plea, notice, or otherwise.

By sect. 5, no memorandum or other writing made necessary by the act, shall be deemed to be an agreement within the meaning of the Stamp Acts.

In New-York, the law, as it was in England before 9 Geo. IV., is generally adopted as to the statute of limitation. In some of the other states the statute is construed much more liberally in favour of the defendant.
of assault, menace, battery, mayhem, and imprisonment, must be brought within four years, and actions for words within two years after the injury committed (25). And by the 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 (26), unless where any other time is specially limited by the statute. Lastly, by statute 10 W. 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. 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 therefore holds, that "interest republcaei ut sit finis litium:" and upon the same principle the Athenian laws in general prohibited all 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 (27), (28).

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 cognizer; 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 & 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

---

(25) The statute makes an exception for all persons who shall be under age, feme-coverts, non compos mentis, in prison or abroad, when the cause of action accrues; and the limitations of the statute shall only commence from the time when their respective impediments or disabilities are removed, sect. 7; and the 4 Ann. c. 16. s. 19. extends this provision to defendants beyond seas, at the time the cause of action accrues.

(26) Where the forfeiture is to the crown and a subject, a common informer must sue within one year, and the crown may prosecute for the whole penalty, at any time within two years after that year ended.

(27) Besides these statutes of limitations, pointed out by the learned commentator, there are various others, as the 4 Ann. c. 16. s. 17. relating to seamen's wages; and the 24 Geo. II. c. 44. s. 9. ante, 1 book, 354, n. (37). as to actions against justices, constables, &c.; and the 28 Geo. III. c. 37. s. 23. as to actions against persons in the customs and excise; and the 43 Geo. III. c. 99. s. 70. as to actions against tax-collectors, &c. &c.

(28) As to the statute of limitations in New-York, see 2 R. S. 292, &c.
PRIVATE Wrongs.

247

in every material point. 5. That it be so pleaded as to be capable of trial (29).

*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 assise 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, null tort, null disseisin, in assise, 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).

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 is, totally denying it; as, if on an action of debt upon bond the defendant 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 shews 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

(f) Dr. & Stud. 2, c. 53.

(29) In addition to these qualities, it should be observed, that every plea in bar, must be adapted to the nature of the action, and conformable to the count, Co. Lit. 303. a. 285. b. Bac. Ab. Pleas, I. per tol. 1 Rol. Rep. 210; must answer the whole declaration or count, or rather all that it assumes in the introductory part to answer, and no more; Co. Lit. 303. b. Com. Dig. Pleader, E. 1. 36. 1 Saund. 28. 2 B. & P. 427. 3 B. & P. 174; must admit or confess the fact it justifies, 3 T. R. 298. 1 Salk. 394. Carth. 350. 1 Saund. 28; must be certain, Com. Dig. tit. Pleader, E. 5, &c.; and must be true, and not too large. Hob. 295. Bac. Ab. tit. Pleas, G. 4. For more particular information as to these qualities, see 1 Chit. on Pl. 451 to 463; as to their forms and particular parts, see Id. 467 to 477.

The same rules which prevail in the construction and allowance of a declaration, do so in the case of pleas in bar. See ante, 289, notes 1, 2, 3. If the plea be bad in part, it is so for the whole. Com. Dig. Pleader, E. 36. 3 T. R. 376. 3 B. & P. 174, 1 Saund. 337. The rules, as to surplusage in a declaration, here also prevail, ante, 293, notes 1, 2, 3.
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 (30). 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 (k).

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 alteration. 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 ["311"] no such award was made: therefore he has now no 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 abutals 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 differ-

(k) Inst. 4. 14. Bract. l. 5, tr. 5, c. 1.
(i) Bro. Abr. t. trespass, 203, 284.

(30) As to the several replications in general, see 1 Chit. on P. 4 ed. 500 to 518; and as to their forms and parts in particular, Id. 518 to 555. The general *qualities* of a replication are, that it must answer the plea, and answer so much of it as it professes to answer, or it will be a discontinuance, Com. Dig. tit. Pledger, F. 4. W. 2. 1 Saund. 338; and it must answer the plea directly, not argumentatively, 10 East, 305; it must not depart from the declaration. 2 Saund. 84. a. n. 1. Co. Lit. 304. a. 2 Wils. 98. See 1 Chit. on Pl. 556 to 560. It must be certain, and it is said that more certainty is requisite in a replication than a declaration, though certainty to a common intent is in general sufficient, Com. Dig. Pledger, F. 17. 12 East, 263; and lastly, it must not be double, or, in other words, contain two answers to the same plea, 10 East, 73. 2 Camp. 176, 177. Com. Dig. Pledger, F. 16; and the plaintiff cannot reply double under the 4 Ann. c. 10. 1 Fortes. 335. unless in replevin, 2 B. & P. 368, 376; and more particularly as to these qualities, see 1 Chit. on Pl. 556 to 562. An entire replication bad in part is bad for the whole. Com. Dig. Pledger, F. 25. 3 T. R. 376. 1 Saund. 28. n. 3.

† In New-York the plaintiff may reply, and the defendant rejoin several matters by the *special leave of the court.* (2 R. S. 356, § 27.)
ent 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. 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 [*312] concluded with respect to some fact or circumstance, which cannot be 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 waved 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 waved his signiory; 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) favour (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).

*In any stage of the pleadings, when either side advances or [*313] affirms any new matter, he usually (as was said) avers it to be true; "and this 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 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 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 favour of the plaintiff or of the defendant.

CHAPTER XXI.

OF ISSUE AND DEMURRER.

Issue, exitus, 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 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 cases of exceptions to the form or manner of pleading, the party demurring must by statute 27 Eliz. c. 5. and 4 & 5 Ann. c. 16. set forth the causes of his demurrer, or wherein he apprehends the deficiency to consist (1). And

(a) Append. No. III. § 6.

(1) Either party may demur, when the preceding pleadings of his adversary are defective. A demurrer has been defined to be, a declaration that the party demurring will go
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 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 país, (in Latin per patrium,) 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 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 nonsuit, 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 no 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 certain day, he is no longer bound to attend upon that summons; but he must be warned afresh, and the whole must begin de novo.

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,

(b) Append. No. III. § 6.  
(c) Append. No. II. § 4.  
(d) Cic. de Orator. I. 1, c. 38.

no further, because the other has not shewn sufficient matter against him. 5 Mod. 132. Co. Lit. 71. b. When the pleading is defective in substance, a general demurrer will suffice; but where the objection is to the form, the demurrer must be special. Bac. Ab. Pleas, N. 5. A special demurrer must not merely shew the kind of fault, but the specific fault complained of.
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 (2). For it would be

[*317*] unjust to exclude him *from the benefit of this new defence, which it was not in his power to 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. 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 (3). 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 impariances, plea, replication, rejoinder, continuances, and whatever farther proceedings have been had; all entered *verbatim* on the roll, and also the issue or demurrer, and jointer therein (4).

These were formerly all written, as indeed all public proceedings were, in Norman or law French, and even the arguments of the counsel and decisions of the court were in the same barbarous dialect. An evident and shameful 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 causidicos 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 unbecoming 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, shewn, defended, answered, debated, and judged in the *English* tongue; but be entered and enrolled in Latin. In like

(e) Cro. Eliz. 49.  
(g) *J.R.*, xv. III.  
(h) *c. 15.*  

(2) This plea, though treated in some respects as a dilatory plea, the court cannot refuse to receive, 2 Wils. 157. 3 T. R. 554. 1 Marsh. 280. 5 Taunt. 333. 1 Stark. 62; but it must be verified on oath before it is filed. Freem. 252. 1 Stra. 493. 2 Smith's Rep. 396. It may be pleaded at nisi prius as well as in bank; but cannot be amended after the assizes are over. Yelv. 181. Freem. 252. Bul. N. P. 309. See further, 1 Chitty on Pl. 4 ed. 569 to 573.  
(3) The plaintiff, or his attorney, must deliver paper-books to the chief justice and senior judge; and the defendant, or his attorney, to the two other judges. R. M. 17 Car. I.  
(4) In New-York, the record, &c. may be on paper or parchment, and must be in English. 2 R. S. 275, § 9.
manner as don Alonso X. king of Castile, (the great grand-father 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 enrolment 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 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 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 Normandy, collected in their grand coustumier, as well, if not better, than a Frenchman bred within the walls of Paris.

The Latin, which succeeded the French for the entry and enrolment 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 promulgating 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

(i) Mod. Un. Hist. xx. 211.
(k) Ibid. xxxv. 235.
(l) Mirr. c. 4, § 3.

Vol. II.

35
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 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 beside it may be observed of the law-latin, as the very ingenious Sir John Davis (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 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 seisin; it is therefore to be imputed as much to necessity, as ignorance, that they were styled in our forensic dialect constabularius, recordum, and seismum. Thus again, another uncouth word of our ancient laws (for I defend not the ridiculous barbarisms sometimes introduced by the ignorance of modern practisers), the substantive murdrum, of 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 studied 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 fides comissarii, vidicetoimiasa-xous (p); cubiculum, xoubooeiioo (q); filium-familias, piuda-familias (r); re-pudium, aepnouio (s); compromissum, xoumiioosou (t); reverentia et observiu, deuerentia kai odeskeous (u); and the like. They studied more the ex-

(m) The following sentence, "si quis ad battalia curte suas eavertit, 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.
act 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 More's famous legal question (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 corporalitatis, 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 *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; 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 impediat, 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

See pag. 149.
Philosoph. natural. c. 1., 28, 4c.
For instance, these three words, "secondum" are now converted into seven, "according to the form of the statute."

This law is now abolished in England.
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: \textit{"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, if the defendant in his plea confesses the fact, but justifies it \textit{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.

\section*{CHAPTER XXII.}

\textbf{OF THE SEVERAL SPECIES OF TRIAL (1).}

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 in-

\textit{(x) de concept. digest. § 13.}

(1) In New-York all trials of issues of fact joined in any court proceeding according to the common law, must be by jury or referees: as also must they be if the issues were joined in another court and sent to the Supreme Court to be tried. The trial takes place before the Circuit Court when the cause is in the Supreme Court, unless, in cases of great difficulty, or requiring great examination, the court order a trial at bar. (2 R. S. 409, § 1. 4.) Special juries may be allowed by the court if conducive to a fair and impartial trial, or if the importance or intricacy of the cause requires it. (id. 418, § 46.)
quire 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 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, [*326] 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 freeman, 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 meet upon the road, and so put a short end *to every controversy. For in a state of [*327] 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 herds-men, 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.

(a) See the preface to sir John Davies's reports: wherein many of the following topics are discussed more at large.
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 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 law of England; and though the more ancient any system of law 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 circuminspection 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 vari-
ous disputes and controversies 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 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 of 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, in order to prevent this, [*330] 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 shew, 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 (2); and by jury.

I. First then of the trial by record. This is only used in one [*331] particular instance: and that is where a matter of record is pleaded in any action, as a fine, a judgment, or the like; and the opposite party pleads, "nulli 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 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 [*332] *from its usual resort, the verdict of twelve men, and relies 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 justiciarius nostris, si praedictus A sit plena aetatis 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

(b) 1 Inst. 117. 250.
(c) 6 Rep. 53.
(d) 9 Rep. 31.
(e) Ibid.
(f) This question of non-age was formerly, according to Glanvil, (L. 13, c. 15,) tried by a jury of eight men, though now it is tried by inspection.

(2) Wager of battel and of law are abolished in New-York. (2 R. S. 409, § 4.)
oath of voire 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 maihem, the issue joined is whether it be maihem or no maihem, this shall be decided by the court upon inspection; for which purpose they may *call in the assistance of surgeons (j). [*333] And, by analogy to this, in an action of trespass for maihem, the court (upon view of such maihem 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 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 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 circuity, 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, which shall be sent to [*334] 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.

(g) 9 Roll. Abr. 573.
(h) 9 Rep. 30.
(i) Ibid. 31.
(j) 3 Roll. Abr. 578.
(k) 1 Sid. 108.
(l) Hardr. 408.
(m) Cro. Eliz. 227.
(n) Litt. 6 102.
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, [*335] because one of the parties is a *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 (w): 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 defendant 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

(o) 9 Rep. 31.
(p) 2 Roll. Abr. 583.
(q) Dyer, 176, 177.
(r) Co. Litt. 74. 4 Burr. 248.
(s) Bro. Abr. tit. trial, pl. 96.
(t) Hob. 85.
(u) Co. Litt. 74.
(v) 2 Roll. Abr. 558.
(w) Co. Litt. 74. 2 Lev. 250.
(x) Hob. 179.
bastardy shall be tried by the bishop's certificate, but by a jury (y). For a special bastardy 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 to return or certify him legitimate (z). Ability [*336] 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 (3).

IV. A fourth species of trial is that by witnesses, per testes, without the intervention of a jury (4). 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 observations 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 (5), (6).

[V. The next species of trial is of great antiquity, but much dis- used; though still in force if the parties choose to abide by it (7); I 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 hea-

(g) Dyer, 79.
(a) See Intro. to the great charter, ed it. Oxon. sub anno 1233.
(e) See Book I. ch. 11.
(d) 2 Inst. 632. Show. Parl. c. 88. 2 Roll. Abr. 563, 46c.

(3) None of the matters here stated to be provable by certificate, would, it is probable, be allowed to be proved in that way in New-York.

(4) By numerous local acts for the recovery of small debts, the claim of a creditor may be sustained by his own oath without the intervention of a jury.

(5) In courts of law, in general, it suffices to prove a fact by one witness. In courts of equity it is sometimes otherwise, and two witnesses are required, vide post, ch. 27. and note.

(6) See note 1. p. 325, ante.

(7) In 1817, 1818, an act was passed to abolish appeals of murder, treason, felony, or other offences, and wager of battel, or joining issue and trial by battel in writs of right. 59 Geo. III. c. 46.

See note 2. p. 330, ante, as to New-York.
ven 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 Burgundians, 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 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 contests 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 incognitae disciplinae, ut solita armis decerni jure terminarentur.” And among the ancient Goths in Sweden we find the same 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 speak in the next book; and the third upon issue [*338] 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 battel 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 (8), it may be matter of curiosity, at least, to inquire into the forms of this proceeding, as we may gather them from ancient authors (p).

The last trial by battel 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

---

(a) Seld. of dueils, c. 5.
(b) 2 R. 9, c. 118.
(c) Stiermh. de jure Sueon. l. 1, c. 7.
(d) Co. Litt. 261.
(e) 2 Hawk. P. C. 45.
(f) 2 Sm. part. 2, caus. 2, qu. 5, c. 22.
(g) Append. No. I. § 5.
(h) Glanvill. l. 2, c. 3. Vet. nat. brev. fol. 2. Nov.

Nar. tit. Droit. patent. fol. 221. (edit. 1534.) Year-
(q) Rushw. coll. vol. 2, part 2, fol. 112. 19 Rym.
322.
(r) Cro. Car. 512.
(s) Dyer, 801.
(t) Gloss. 102.

(8) Not so now, see note 7, ante, 337.
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, 
\textit{viz.} that he hath more right to hold, than the *demandant hath to \[\text{\textsuperscript{339}}\] 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 \textit{wages} or stipulates battel with the champion of the de-
mandant; 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 there-
fore no judgment could be given for the lands in question, if either of the
parties were slain in battel \((u)\); and also that no person might claim an
exemption from this trial, as was allowed in criminal cases, where the bat-
tel was waged in person.

A piece of ground is then in due time set out, of sixty feet square, en-
closed 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, bare-
headed, 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 Rush-
worth; as likewise in France only villeins fought with the buckler and
baton, gentlemen armed at all points. And upon this and other circum-
stances, the president Montesquieu \((u)\) hath with great ingenuity not only
deduced the impious custom of private duels upon imaginary points of ho-
nour, 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 \[\text{\textsuperscript{340}}\]
the lists or place of combat, the champion of the tenant then 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 pursued 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; \textit{I hear this, ye justices, that I have this day neither eat, drank, nor
have upon me, neither bone, stone, ne grass; nor any enchantment, sorce-
ry, 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 battel 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 de-
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 battel,
his being already in possession; but, if victory declares itself for either par-
ty, for him is judgment finally given. This victory may arise, from the

\[\text{(u) Co. Litt. 294. Diversite des courts, 304.} \quad \text{(v) Sp. L. b. 28, c. 20. 22.}\]
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 (9). 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 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.

[*341] *This is the form of a trial by battel; 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 assise (v), 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 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 (10), vadiatio legis, as the foregoing is called wager of battel, vadiatio duelli: because, as in the former case, the defendant gave a pledge, gage, or vadium, to try the cause by battel; 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

(9) The word "craven" has an obvious and intelligible meaning from the occasion on which it is employed. It is of Anglo-Saxon derivation (crafian), and means to crave, to beg, or to implore—which to do, of an adversary in combat, was held to be cowardly and dishonourable, however hopeless the conflict, in the age of chivalry. See Kendall's Argument on Trial by Battel, 143 n.

(10) The right to wage law in an action of debt on simple contract still exists (11). See Barry v. Bobinson, 1 Bos. and Pul. New Rep. 297. In the case of King v. Williams, 2 B. & C. 538. the defendant having waged his law, and the master assigned a day for him to come in and perfect it, he applied, by his counsel, to the court to assign the number of compurgators with whom he should come to perfect it, on the ground that the number being uncertain, it was the duty of the court to say how many were necessary. But the court being disinclined to assist the revival of this obsolete mode of trial, refused the application, and left the defendant to bring such number as he should be advised were sufficient; and observed, that if the plaintiff were not satisfied with the number brought, the objection would be open to him, and then the court would hear both sides. The defendant afterwards prepared to bring eleven compurgators, but the plaintiff abandoned the action. 2 B. & C. 538. 4 Dow. & Ryl. 3.

(11) Not so in New-York, see note 2, p. 330, ante.
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 for ever acquitted of the debt, or other cause of action.

*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 (a); 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 hand 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 proposal 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.

*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 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

---

(a) Sp. L. h. 28, c. 13. Sternehook, de jure Sue-num, L. 1, c. 9. Feud. l. 1, f. 4. 10. 28.  
(b) Exod. xxii. 10.  
(c) Cod. 4. 1. 12.  
(d) Bro. Abr. t. ley gager, 77.  
(f) Salk. 682.  
(g) Co. Litt. 205.  
(2) Ventr. 171.
PRIVATE WRONGS.

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." 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, Diversi des courts, expressly confirms sir Edward Coke's opinion (l).

[*344] 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 caetero 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 concordes in inventur, tunc reus poterit vadiare legem suam contra petentem et contra sectam suam prolatam; sed si secta variabilis inveniatur, extunc 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 [345] canon law; and, having sown a plentiful crop of oaths in all judicial proceedings, reaped afterwards 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 (12), 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 ac-

(h) 1 L. 1, c. 9.
(l) Fitzz. Abr. t. leg. 78.
(k) Hencham magna. c. 5.
(m) 1 L. 2, c. 65.
(n) Bro. Abr. t. leg. gager. 9.
(o) Mod. Un. Hist. xxxii. 22.
(p) Stierhauk, de Jure Sueonum, l. 1, c. 9.

(12) In a court not of record; for if the amercement were imposed by a court of record, the defendant could not wage his law... Co. Litt. 295. a.
tions, I say, that the defendant is admitted to wage his law (q): so that wager of law lieth not, when there is any speciality (as a bond or deed), to charge the defendant, for that would be cancelled, if satisfied; but when the debt growth by word 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 battel, 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).

*It is moreover a rule, that where a man is compellable by law [*346] 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 labourers, 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 (w).

In no case where a contempt, trespass, deecit, or any injury with force is alleged against the defendant, is he permitted to wage his law (x): 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 justice rejected.

*Executors and administrators, when charged for the debt of [*347] the deceased, shall not be admitted to wage their law (y): for no

(q) Co. Litt. 295.
(r) 10 Rep. 103.
(s) Co. Litt. 295.
(t) Finch, L. 423.
(u) Co. Litt. 295.
(w) Ibid.
(x) Ibid. Raym. 296.
(y) Finch, L. 424.
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 (z). And this prerogative extends and is communicated to his debtor and accoantant; 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 (a).

Thus the wager of law was never permitted, but where the defendant bore a fair and unreproachable 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 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 hardiness 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 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, [*348] an action of trespass on the case in trover *and conversion is usually brought; 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 eccentrical 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.

(z) Finch, L. 523. (a) Co. Litt. 295.
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 feodal 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 not as a new invention (c). Stiernhook (d) ascribes the invention of the jury, which in the Teutonic language is denominated nemoda, to Regner, king of Sweden and Denmark, who was cotemporary with our king Egbert. Just as we are apt to impute the invention of this, and some other pieces of juridical [350] policy, 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 battel, 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 chap. 29. that no freeman shall be hurt in either his person or property; "nisi per legale judicium parium suorum vel per legem terrae." 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 judicium parium suorum." And it was ever esteemed, in all countries, a privilege of the highest and most beneficial nature.

(a) de jure Saxonic. p. 12. (c) Wilk. LL. Angl. Sax. 117.
(d) de jure Saxonic. l. 1, c. 4.
(e) LL. Longob. l. 3, t. 8, l. 4.

(1) The Athenians, according to sir Wm. Jones, had trials by jury. Sir Wm. Jones on Bailment, 74.
But I will not mislead 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.

[*351] *Trials by jury in civil causes are of two kinds; extraordinary, and 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 assise, 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 assisa 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 assise, or great jury, which is to try the matter of right, and must now consist of sixteen jurors (h) (2), (3).

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 (4); 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 in the county, who are called the grand jury in the attaint, 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.

[*352] *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 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

(f) P. N. R. 4.  
(g) I. 2. c. 11-21.  
(h) Finch, L. 412. 1 Leon. 303.

(2) It seems not to be ascertained that any specific number above twelve is absolutely necessary to constitute the grand assise: but it is the usual course to swear upon it the four knights and twelve others. Viner, Trial, Xe.

(3) Trials by the grand assise are abolished in New-York. (2 R. S. 409, § 4.)  
(4) Abolished by 6 Geo. IV. c. 50. s. 60. See tit. Legal Proceedings, note infra.  
Also abolished in New-York. (2 R. S. 421, § 69.)
issue between the said parties (i)." And such writ was accordingly issued to the sheriff (5).

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 Westmorland 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 (k); 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 assise (who came twice or thrice in the year into the several counties, ad capiendas assisas, to take or try writs of assise, of mort d'ancestor, novel disseisin, nuisance, and the like), a power was superadded by statute Westm. 2. 13 Edw. I. c. 30. to these justices of assise 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 assisses shall come into his said county." By virtue of which the sheriff returned his jurors to the court of the justices of assise, which was sure to be held in the vacation 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 assise and gaol delivery) should be taken by writ of nisi prius, till after the sheriff had returned the names of the jurors to the 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.

(i) Append. No. II. § 4.

(k) Semper dabitur dies partibus ad justiciaritatem de basco, sub tali conditione, "nisi justiciae assumpersonae prius venerint ad partes illas." (Bract. l. 3, tr. i, c. 11, § 8.)

(5) Venires, except for foreign juries, are abolished in New-York. (2 R. S. 410, § 9.) The sheriff summons such jurors as are named on a list furnished by him to the clerk of the county. (Id. 414, § 30.) As to trials at bar, see note 1. p. 325, ante.
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, or oblong piece of parchment) annexed to the writ. This [*354]* 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 distress them by their lands and goods, that they may appear upon the day appointed. The entry therefore on the roll or record is (l), “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 fourth of March, the justices of our lord the king, appointed to take assises in that county, shall have come to Oxford, that is, to the place assigned for holding the assises.” 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 assise, if before that time they come to Oxford; *viz.* on the fourth 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 the jury to appear at the assises, and there the trial is had before the justices of *assise* and *nisi prius*: among whom (as hath been said) (m) are usually two of the judges of the courts of Westminster, the whole kingdom being divided into six circuits 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 assise, is now, by the various revolutions of practice, become their principal civil employment: hardly any thing remaining in use of the real *assises*, but the name.

If the sheriff be not an indifferent person; as if he be a party in the suit, or be related by either 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 (6). If any exception lies to the coroners, the *venire* shall be directed to two clerks of the court, or two persons of the county *named* by the court, and sworn (n). 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) (o) 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

(m) See pag. 59.

(6) In New-York, one list of jurors for all causes in the court is made out by the clerk of the county, under the supervision of the sheriff or under-sheriff, and a county judge or justice of the peace, or of two judges or justices of the peace. (2 R. 414, § 28.) It is no objection to the panel that the sheriff is a party, (id. 420, § 5.) although, by 2 R. S. 441, § 84, where the sheriff is a party process is to be executed by the coroner, except where otherwise directed by law.

(o) Hist. C. L. c. 12.
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 obliga-
tion 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 suf-
ficiency or insufficiency, characters, connexions, and relations, that so
they may be challenged upon just cause (7); 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 assises, 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 proceed-
ing is preserved throughout the kingdom, and multiplicity of forms is pre-
vented; yet this is no great charge or trouble, one attorney being able to
transact the business of forty clients. But the troublesome and most ex-
pensive 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 [*356]
appear, and before whom the trial is to be held, are the judges of
the superior court, if it be a trial at bar; or the judges of assise, 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
small influence upon the multitude. The very point of their being stran-
gers 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 assise should hold pleas in any county wherein he was
born or inhabits (8). 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 assises, are all sworn to the same laws, have had the
same education, have pursued the same studies, converse and consult to-
gether, communicate their decisions and resolutions, and preside in those
courts which are mutually connected and their judgments blended to-
gether, 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 (9), (10). But let us now
return to the assises.

(7) In New-York they are summoned 6 days
before the sitting of the court. (2 R. S. 414, § 30.)
(8) No longer so. See ante, p. 6 n. 25.
(9) In New-York, although the Supreme
Court judges may, they very rarely do, preside
at trials; the circuit judges being specially
appointed for that purpose. (2 R. S. 203,
§ 14.) See id. 411, § 12, &c. as to qualifica-
tions of jurors and manner of drawing them.
(10) On the 22d of June 1825, the 6 Geo.
IV. c. 50. was passed for consolidating and
amending the laws relative to jurors and ju-
ries, and came into complete operation the 1st
of January, 1826.
PRIVATE WRONGS.

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 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 fourteen days' notice, in order to prevent surprize (11), (12): 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 (13). The defendant, however, or plaintiff, may, upon good cause shewn 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 (14).

But we will now suppose all previous steps to be 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

[*358] *indifferently forty-eight of the principal freeholders in the pre-

(11) This practice is confined to causes tried in London and Middlesex. Tidd, 8 ed. 814. In all causes tried at an assizes, ten days' notice suffice. Tidd, 8 ed. 815.

(12) In New-York, 14 days' notice of trial is necessary, (2 R. S. 410, § 7.) except where special provision is made in a different manner for some courts.

(13) At the sittings in London or Westminster, when defendant resides within forty miles from London, two days' notice of countermand, before it is to be tried, is sufficient. Tidd, 8 ed. 81. n.

(14) Where there have been no proceedings within four terms, a full term's notice of trial must be given previous to the assizes or sittings, unless the cause has been delayed by the defendant himself, by an injunction or other means. 2 Bl. Rep. 784. 3 T. R. 530. (15.) If the defendant proceeds to trial by proviso, he must give the same notice as would have been required from the plaintiff. 1 Cromp. Prac. 219. Sometimes the courts impose it as a condition upon the defendant, that he shall accept short notice of trial, which in country causes shall be given at the least four days before the commission day, one day being exclusive, and the other inclusive. 3 T. R. 600. But in town causes, two days' notice seems to be sufficient in such a case. Tidd. 250.

(15) In New-York this practice does not prevail.
sence of the attorneys on both sides: who are each of them to strike
off twelve, and the remaining twenty-four are returned upon the pa-
nel. 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 (16), as well at
the assises 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 (17).
A common jury is one returned by the sheriff according to the direc-
tions 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 for-
merly; but one and the same panel for every cause to be tried at the same
assises containing not less than forty-eight, nor more than seventy-two
jurors: 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 messages, lands, or place in question, shall have been thought neces-
sary by the court (p): in which case six or more of the jurors, returned,
to be agreed on by the parties, or named by a judge or other proper officer
of the court, shall be appointed by special writ of habeas corpus or distrin-
gas to have the matters in question shewn 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 par-
tiality in the sheriff, or any tampering with the jurors when returned.
As the jurors appear, when called, they shall be sworn, unless challeng-
ed 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, 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, or his under-officer who arrayed the panel. And ge-
genally 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 (q): but an unexpected use having been made of
this dormant privilege by a spiritual lord (r), it was abolished by statute
24 Geo. II. c. 18. But still, in an attainit, a knight must be returned on
the jury (s). 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;

(p) Stat. 4 Ann. c. 18.
(q) Co. Litt. 196. Selden baronage II. 11.
(r) K. v. Bishop of Worcester, M. 23 Geo. II. B. R.
(s) Co. Litt. 126.

(16) How treason and felony may be tried in the court of nisi prius, see 4th book, 309.
(17) As to special juries in New-York, see ante 325, note 1; they are allowed only on
special motion. (2 R. S. 418, § 46.)
and, if none were returned, the array might be challenged for defect of hundredors. Thus the Gothic jury, or nembo, was also collected out of every quarter of the country: "binos, trinos, vel etiam senos, ex singulis territortii quadrantibus (s)." For, living in the neighbourhood, 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, [*360] coming out of the immediate neighbourhood, would be apt to intermix their prejudices and partialities in the trial of right. And 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 & 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 (18). 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 linguae, 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 monticolis Walliae (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 dicunto." But where both parties 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 [*361] be denizens. And it now might be a question, how far the *sta-
tute 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

(a) Stierhook de jure Goth. l. 1. c. 4.  
(b) Gilb. Hist. C. P. c. 8.  
(c) de Laud. LL. c. 25.

(18) See an excellent note, Co. Lit. 125. a. b. note (2).
court might perhaps hesitate, whether it has now a power to direct a panel to be returned de medietate linguae, and thereby alter the method prescribed for striking a special jury, or balloting for common jurors (19).

Challenges to the polls, in capita, are exceptions to particular jurors; and seem to answer the reclusatio 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 defect; 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 defect; as if a juryman be an alien born, this is [362] 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 supposititious 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 assises within the county, but such as may dispense 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 & 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 & 5 W. & M. c. 24. it was again raised to 10l. per annum in England and 6l. 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

---

(19) The privilege is expressly preserved to aliens indicted or impeached by 6 Geo. IV. c. 50. § 47. In New-York, in no case, civil or criminal, can an alien insist on having part of the jury aliens or strangers. (2 R. S. 419, § 53: 734, § 7.)
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 20l. per annum over and above the rent reserved, is qualified to serve upon juries (20). When the jury is de mediatate linguae, 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 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, counsel, 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 it 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) (21).

4. Challenges *propter delictum, are for some crime or misdeemor, 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, umbrel, or the like; or to [*364] be branded, *whipt, or stigmatized; or if he be outlawed or excommunicated, or hath been attainted of false verdict, praemunire,

(d) See stat. 2 Hen. V. st. 2, c. 2. 8 Hen. VI. c. 29.
(e) Finch, L. 401.
(f) In the *nemnda, or jury of the ancient Goths, three challenges only were allowed to the favour,

but the principal challenges were indefinite, "Lecbat palam excipere, et semper ex probatis causa tres repudiari: etiam plures ex causa praemunire et manifesta." (Sternhock, l. 1, c. 4.)
(g) Co. Litt. 153.

(20) The qualifications in England are enlarged by 6 Geo. IV. c. 50: as to New-York, see 2 B. & C. 476; and in that case it was determined that no challenge, either to the array or to the polls, can be taken until a full jury shall have appeared; that the disallowing a challenge is not a ground for a new trial, but for a venire de novo; that every challenge, either to the array or to the polls, ought to be propounded in such a way that it may be put at the time upon the nisi prius record, so that, when a challenge is made, the adverse party may either demur or counterpleas, or he may deny what is alleged for matter of challenge; and it is then only that triers can be appointed. It was also thereby determined, that the whole special jury panel cannot be challenged for the supposed unidifferency of the Master of the Crown Office, he being the officer of the court appointed to nominate the jury. And a material point was also ruled in the same case, namely, that it is not competent to ask jurymen, whether special or talemen, whether they have not, previously to the trial, expressed opinions hostile to the defendants and their cause, in order to found a challenge to the polls on that ground; but such expressions must be proved by extrinsic evidence, But see now stat. 6 Geo. IV. c. 50, ss. 27, 89,
or forgery; or lastly, if he hath proved recreant when champion in the trial by battel, and thereby hath lost his liberum legem. A juror may himself be examined on oath of voir dire, veritatem dicere, with regard to such causes of challenge as are not to his dishonour or discredit; but not with regard to any crime, or any thing which tends to his disgrace or disadvantage (h).

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 excluded, 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 & 8 W. 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 shew their special exemption. Clergymen are also usually excused, out of favour and respect to their function: but, if they are seised 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 of some bishop: "in obsequio domini regis, vel alienus episcopi (i) (22)."

If by means of challenges, or other cause, a sufficient number of exceptional 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 assises or nisi prius, by virtue of the statute 35 Hen. VIII. c. 6. and other subsequent statutes, the judge is empowered at the prayer of either party to award a tales de circumstantibus (j), 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 denounced 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

---

(a) Co. Litt. 158. b.  
(j) Append. No. II. § 4.  
(k) 1 Inst. 153.  
(f) Pausanias relates, that at the trial of Mars, 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 se in ipso hoc numero secreta quaedam esset religio." (Dissert. epistolar. 49.) Spelm. Gloss. 329.

(22) They are now excused by 6 Geo. IV. c. 50.
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 shewn 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 praetor with the mutual 

[*366] consent of the parties. *Or, as Tully (m) expresses it: "neminem voluerunt majores nostri, non modo de existimatione curiisquam, sed ne pecuniaria quidem de re minima, esse judicem: nisi qui inter adversarios convenisset."

Indeed these selecti judices bore in many respects a remarkable resemblance to our juries: for they were first returned by the praetor; de decuria senatoria conscribuntur: then their names were drawn by lot, till a certain number was completed: in urnam sortito mittuntur, ut de pluribus necessarios numerus confici posset: then the parties were allowed their challenges; post urnam permittitur accusator, ac reo, ut ex illo numero rejiciant quos putavernint 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 praetor alias, quibus ille judicum legitimus numerus completertur: lastly, the judges, like our jury, were sworn; his perfectis, jurabit 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

[*367] was read to *them in English by the court, 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

---

(m) pro Cluentio, 43.
(n) Ascon. in Civ. Ver. 1. 6. A learned writer of our own, Dr. Pettingal, hath shewn in an elaborate work (published A. D. 1766), so many resemblances between the _Alexandri_ 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) _Ej. 32_, 5, 2. _Cod. 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 of the law of nisi prius_, 4to. 1767.
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 years standing, which prove themselves (23); but 3. Modern deeds, and 4. Other writings, must be attested and [*368] 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 (24). 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

(23) The same rule applies to wills thirty years old. 4 T. R. 793, note. This rule is laid down in books of evidence without sufficient explanation of its principle, or of the extent of its application. There seems to be danger in permitting a deed to be read merely because it bears date above thirty years before its production, and in requiring no evidence, where a forgery may be committed with the least probability of detection. Chief Baron Gilbert lays down, that where possession has gone agreeably to the limitations of a deed bearing date thirty years ago, it may be read without any evidence of its execution, though the subscribing witnesses be still living. Law of Ev. 94. For such possession affords so strong a presumption in favour of the authenticity of the deed, as to supersede the necessity of any other proof of the validity of its origin, or of its due execution. The court of king's bench have determined that the mere production of a parish certificate, dated above thirty years ago, was sufficient to make it evidence, without giving any account of the custody from which it was extracted. 5 T. R. 259.

(24) No rule of law is more frequently cited, and more generally misconceived, than this. It is certainly true when rightly understood; but it is very limited in its extent and application. It signifies nothing more than that, if the best legal evidence cannot possibly be produced, the next best legal evidence shall be admitted. Evidence may be divided into primary and secondary; and the secondary evidence is as accurately defined by the law as the primary. But in general the want of better evidence can never justify the admission of hearsay, interested witnesses, or the copies of copies, &c. Where there are exceptions to general rules, these exceptions are as much recognized by the law as the general rule; and where boundaries and limits are established by the law for every case that can possibly occur, it is immaterial what we call the rule, and what the exception.

Some of the numerous cases which are found even in modern books may be cited for illustration and in confirmation of the text and note.

If the subscribing witness be living and within the jurisdiction of the court, he must be called to prove the execution; or if he cannot be found, and that fact be satisfactorily explained, proof of his hand-writing will be sufficient evidence of the execution. Barnes v. Trompowsky, 7 T. R. 266. And the witness of the execution is necessary; acknowledgment of the party who executed the deed cannot be received. Johnson v. Mason, 1 Esp. 39. At least only as secondary evidence. Call, Bart. v. Dunning, 4 East. 53. And acknowledgment to a subscribing witness by an obligor of a bond that he has executed it, is sufficient. Powell v. Blackett, 9 Esp. 87; and see Greville v. Neale, Peake, 146. But a mere bystander may not be received to supply the absence of the subscribing witness, M'Craw v. Gentry, 3 Campb. 232. or only as secondary evidence, see the next case. If the appraiser attesting witness deny that he saw the execution, secondary evidence is admissible; that is to say, the hand-writing of the obligor, &c. may be proved. Ley v. Ballard, 3 Esp. 173. n. And, as a general rule, it seems that wherever a subscribing witness appears to an instrument, note, &c. he must be called or his absence explained. See Higgs v. Dixon, 2 Stark. 180. Breton v. Cope, Peake, 91.
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 (25). 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

(r) Law of nisi prius, 266.

(25) It is a general rule that the mere recital of a fact, that is, the mere oral assertion or written entry by an individual, that a particular fact is true, cannot be received in evidence. But the objection does not apply to any public documents made under lawful authority, such as gazettes, proclamations, public surveys, records, and other memorials of a similar description, and whenever the declaration or entry is in itself a fact, and is part of the res gestae. Stark, on Evid. p. 1. 46, 7. But it is to be carefully observed, that neither the declarations, nor any other acts of those who are mere strangers, or as it is usually termed, any res inter alios acta, is admissible in evidence against any one, as affording a presumption against him in the way of admission, or otherwise. Ib. 51.

In cases of customs and prescriptive rights, hearsay or traditional evidence is not admitted until some instances of the custom or exercise of the right claimed are first proved. The declarations of parents respecting their marriage, and the legitimacy of their children, are admitted after their decease as evidence. And hearsay is also received respecting pedigrees and the death of relations abroad. Bull. N. P. 294. 2 Esp. 784. What has been said in conversation in the hearing of any party, if not contradicted by him, may be given in evidence; for, not being denied, it amounts to a species of confession. But it can only be received where it must be presumed to have been heard by the party, and therefore in one case the court stopped the witness from repeating a conversation, which had passed in a room where the prisoner was, but at the time while she had fainted away. It has been the practice of the quarter-sessions to admit the declarations of paupers respecting their settlements, to be received as evidence after their death, or if living, where they could not be produced. See 3 T. R. 707, where the judges of the king’s bench were divided upon the legality of this practice, and where the subject of hearsay evidence is much discussed. For many years, whilst lord Mansfield presided in the court of king’s bench, the court were unanimously of opinion, that the declarations of a pauper respecting his settlement might, after his death, be proved and given in evidence. When lord Kenyon and another judge were introduced, the court were divided, and the former practice prevailed; but when the court were entirely changed, they determined that this hearsay evidence was not founded on any principles of law, and that the evidence at the quarter-sessions in the cases of settlement, ought to be the same as that in all other courts, in the trials which could respectively be brought before them. 2 East, 54 & 63.—The court of king’s bench has decided, that a father’s declaration of the place of the birth of his son is not evidence after the father’s death. 8 East, 539. But: it would not, probably, be difficult to prove, that this is of the nature of pedigree, and ought to be admitted, as the father’s declaration of the time of his son’s birth, which has always been legal evidence.—In criminal cases, the declarations of a person, who relates in extremis, or under an apprehension of dying, the cause of his death, or any other material circumstance, may be admitted in evidence; for the mind in that awful state is presumed to be under as great a religious obligation to disclose the truth, as is created by the administration of an oath. But declarations of a deceased person ought not to be received, unless the court is satisfied from the circumstances of the case, that they were made under the impression of approaching dissolution. Leach’s Cases, 400. But the declarations of a felon at the place of execution cannot be received, as he is incompetent to give evidence upon oath; and the situation of a dying man is only thought equivalent to that of a competent witness, when he is sworn. Ibid. 276. By the 1 & 2 Ph. & Mar. c. 13. depositions taken before a justice of peace in cases of felony, may be read in evidence at the trial, if the witness dies before the trial. But as the statute confines this to felony, and as it is an innovation upon the common law, it cannot be extended to any misdemeanor. 1 Balk. 281.
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); where a man's own books of ac-
counts, 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 (26). But as [*369]
this kind of evidence, even thus regulated, would be much too
hard upon the buyer at any long distance of time, the statute 7 Jac. 1. c:
12. (the penners of which seem to have imagined that the books of them-
selves 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 unravel-
led and adjusted (27).

With regard to parol evidence, or witnesses; it must first be 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 100l. to be forfeited to the king; to which the sta-
tute 5 Eliz. c. 9. has added a penalty of 10l. 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 mort-
ality, and is summoned to give evidence within the same. This compul-
sory 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 (28): 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 adjure it, or else to pay a fine of a thousand drachmas (v).

All witnesses, of whatever religion or country, that have the use of their
reason (29), are to be received and examined, except such as are infamous,

(26) In New-York, where there have been
regular dealings between the parties, and it is
proved that the merchant keeps honest and
fair books of account, and has no clerk, and
that he has furnished some of the articles, his
books of account may be received in evidence.
(12 Johns. R. 461.)

(27) The entries in the book of a person
deceased, not connected with the parties, are
of no more avail than hearsay. But the books
of an incumbent, respecting the tithes of the
parish, are evidence for his successor. 5 T.
R. 123. 2 Ves. 43.

(29) A copy of the writ, or the substance
thereof, 5 Mod. 355. Cro. Car. 540. should be
served personally on each witness, and the
original shown to him. The usual mode of
proceeding against witnesses, for disobedience
of the writ of subpoena, is by the summary
process of an attachment for a contempt, 2
Str. 1054. Cownp. 386. Doug. 561; but the
court will not grant an attachment against a
witness, unless all the necessary expenses of
the journey to and from, and the witness's
stay at the place of trial, be tendered at the
time of serving the subpoena. 1 H. Bl. 40.
1 Meriv. 191. 13 East, 15. Still the court
will not enter into nice calculations of ex-
 pense, but consider whether the non-attend-
ance originated in obstinacy or not. 2 Stra.
1150. The same rule prevails in the case of
witnesses bona fide brought from abroad. 1
Marsh. 563. 4 Taunt. 699. 6 Ib. 98. A wit-
ness is not in general entitled to remuneration
for loss of time, 1 B. & B. 515. 5 M. & S.
156; though in some instances it is allowed to
attorneys and medical practitioners. Ib.
159. The expenses of making scientific ex-
periments, with a view to evidence, are not
allowable. 3 B. & B. 72.

(29) A Mahometan may be sworn upon
the Alcoran, and a Gentoo according to the cus-

Vol. II. 39
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 credibility (30). *Infamous persons are such as may be challenges 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 to be 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


*The old cases upon the competency of witnesses have gone upon very subtle grounds. But of late years the courts have endeavoured, as far as possible, consistent with authorities, to let the objection go to the credit, rather than to the competency of a witness." Lord Mansfield, 1 T. R. 300.

It is now established, that if a witness does not immediately gain or lose by the event of the cause, and if the verdict in the cause cannot be evidence either for or against him in any other suit, he shall be admitted as a competent witness, though the circumstances of the case may in some degree lessen his credibility. 3 T. R. 27. The interest must be a present, certain, vested, interest, and not uncertain or contingent, Doug. 134. 1 T. R. 163. 1 P. Wms. 287; therefore the heir apparent is competent in support of the claim of the ancestor, though the remainder-man, having a vested interest, is incompetent, Salk. 283. Ld. Raym. 724. A clerk of the company of wire-drawers is competent, in an action against a person for acting as an assistant, although the verdict might cause the defendant to be sworn, upon which the clerk would obtain a fee. See Stark. on Ev. p. 4. 745.

A servant of a tradesman, from necessity, is permitted in an action by his master to prove the delivery of goods, though he himself may have purloined them; but in a suit brought against the master for the negligence of his servant, the servant cannot be a witness for his master without a release; for his master may afterwards have his action against the servant, and the verdict recovered against him may be given in evidence in that action to prove the damage which the master has sustained. 3 T. R. 286.

By the 46 Geo. III. c. 37, it is enacted, that a witness cannot refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to a penalty or forfeiture, by reason only that the answer to such question may establish, or tend to establish, that he owes a debt or is subject to a civil suit.†

This statute was passed, because upon a point where the question at Lord Melville's impeachment, the high living authorities of the law were nearly divided, whether a witness was compellable to answer such a question. But surely it was agreeable to the law of England, that a man should be compelled to be honest, and where, if he avoided the question, injustice would be done both between the parties before the court, and afterwards between the witness and some other party.

† The same provision is made 2 R. S. 405, § 71.
his own infamy (31). And no counsel, attorney, or other person, intrusted 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 (y) (32): 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 facts, 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, as the civil law universally requires. "Unius responsio testis omnino non audiatur (w)." 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 the plena probatio, they call the testimony of one, though never so clear and positive, semi-plena probatio only, on whom 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 inge-

(w) Law of nisi prius, 267.
(w) Cod. 4. 20. 9.

(31) A witness may be examined with regard to his own infamy, if the confession of it does not subject him to any future punishment; as a witness may be asked if he has not stood in the pillory for perjury, 4 T. R. 440; but he cannot be entirely rejected as a witness without the production of the record of conviction, by which he is rendered incompetent. 8 East, 77. "Though it has been held, in some other cases, that a witness is not bound to answer such questions, 4 St. Tri. 748. 1 Salk. 153. 4 Esp. 225. 242. It is quite certain that a man is not bound to answer any questions, either in a court of law or equity, which may tend to criminate himself, or which may render him liable to a penalty. Stra. 444. 3 Taunt. 424. 2 St. Tri. 6. 6 ib. 649. 16 Ves. 242. 2 Ld. Raym. 1088. Mif ford's Ch. Pl. 157. As to questions which merely disgrace the witness, there is some difficulty. See Stark, on Ev. pt. 2. 139. Still a witness is in no case legally incompetent to allege his own turpitude, or to give evidence which involves his own infamy, 2 Stark, Rep. 116. 8 East, 78. 11 East, 309; or impeaches his own solemn acts, 5 M. & S. 244. 7 T. R. 604; unless he be rendered incompetent by a legal interest in the event of the cause, or in the record. It seems to be an universal rule, that a participe criminis may be examined as a witness in both civil and criminal cases, provided he has not been incapacitated by a conviction of crime. As a clerk who had laid out, to which he had been convicted in illegal insurances, was held to be a competent witness for the master against the insurer. Cwmp. 197. So a man who has pretended to convey lands to another, may prove that he had no title. Ld. Raym. 1008. A co-assignee of a ship may prove that he had no interest in the vessel. Cited in 1 T. R. 301. The parents may give evidence to bastardize their issue, 6 T. R. 330, 331. or to prove the legitimacy, ib.; though it is said the sole evidence of the mother, a married woman, shall not be sufficient to bastardize her child. B. R. H. 79. 1 Wils. 340.

In New-York, conviction for a felony, and for that alone, incapacitates a person from being a witness on account of infamy: the incapacity may be removed by a pardon. (2 R. S. 701, § 23.)

(32) But the principles and policy of this rule restrain it to that confidence only, which is placed in a counsel or solicitor, and which must necessarily be inviolable where the use of advocates and legal assistants is admitted. But the purposes of public justice supersede the delicacy of every other species of confidential communication. In the trial of the duchess of Kingston, it was determined that a friend might be bound to disclose, if necessary in a court of justice, secrets of the most sacred nature which one sex could repose in the other. And that a surgeon was bound to communicate any information whatever, which he was possessed of in consequence of his professional attendance. 11 St. Tr. 243. 246. And those secrets only, communicated to a counsel or attorney, are inviolable in a court of justice, which have been intrusted to them whilst acting in their respective characters to the party as their client. 4 T. R. 431. 753.

In New-York, physicians, surgeons, and clergymen, are not now allowed to disclose matters confided to them in their professional character. (2 R. S. 406, § 72, &c.)
nious device satisfying at once the forms of the Roman law, and
acknowledging the superior *reasonableness of the law of Eng-
land: which permits one witness to be sufficient 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 (33).

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, cir-
cumstantial 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 circumstan-
ces which either necessarily, or usually, attend such facts; and these are
called presumptions, which are only to be relied upon till the contrary be actually proved. Stabur praesumptioni donec probetur in contrarium (x).

Violent presumption is many times equal to full proof (y); 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 for-
mer 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 (z) (34).

(z) Co. Litt. 373.
(y) Ibid. 6.

(33) In equity no decree can be made on the oath of one witness against the defend-
ants answer on oath, Vent. 161. 3 Ch. C. 123, 69; and one witness is not sufficient
against the husband, although it be supported by the answer of the wife, for she cannot be
a witness against her husband. 2 Ib. 30. 3 P. Wms. 238. But a decree may be made on
the evidence of a single witness, where the evidence of the other party is falsified, or dis-
credited by strong circumstances. 2 Vern. 554. 2 Atk. 19. 3 Ib. 419. 1 Bro. Ch. C.
53. In high treason, when it works corruption of blood, two witnesses are necessary,
by 7 W. 3. c. 3. So two are necessary in per-
jury. 10 Mod. 195. post. 4 book, 150. In all other
cases the effect of admissible evidence, whether given by one or more witnesses, is solely
for the consideration of the jury. See Stark. on Evid. p. 3. 399, 9.

(34) Presumptions are of three kinds: 1st, Legal presumptions, made by the law itself; 2dly. Legal presumptions to be made by a jury, of law and fact; 3dly. Natural presum-
ptions, or presumptions of mere fact.

1st. Legal presumptions are in some cases absolute, as that a bond or other specialty
was executed upon a good consideration, 4 Burr. 2225. so long as the deed or bond re-
 mains unimpeached; but it may be impeached
on the ground of fraud, and then the consid-
e ration becomes the subject of inquiry. But in
the case of bills of exchange, the presumption, that it was accepted for a good consideration, may be rebutted by evidence. So where a

† In New-York, the seal is now only pri-
ma facie evidence of consideration. (2 R. S.
406. § 77); but notice must be given by the par-
ty denying the consideration. (Id. § 78.)
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 (a), unless it be clearly shewn 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 to receive first the rents of longest standing. Light, or rash, presumptions have no weight or validity at all (35).

*The oath administered to the witness is not only that what [*372] 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 by-standers, 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 mistakes 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 Ed. I. c. 31. or, if he refuses so to do, the party may have a compulsory writ against him (b), 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 pleases demurr 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 (c): 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 bills of exceptions, are at present so much in [*373] 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.

This open examination of witnesses viva voce, in the presence of all

(a) Co. Litt. 373.  (b) Reg. Br. 182. 2 Inst. 487.  (c) Co. Litt, 72, 5 Rep. 104.

that it had been obtained by mistake or fraud, and that no rent had been received at the time." In a case of a similar nature tried before Ab- bott, C. J. at Guildhall, A. D. 1834, the land- lord adduced evidence to shew the mistake, and recovered.

(35) It is difficult to say what is a light and rash presumption, if it is any presumption at all. Any circumstance may be proved from which a fair inference can be drawn, though alone it would be too slight to support the ver- dict of the jury, yet it may corroborate other testimony, and a number of such presumptions may become of importance. Possumt diversa genera iuxta conjungunt, ut quae singula non nocerent, ea universa tangant grando rem opprimant, Maithaus de Crim.
mankind, is much more conducive to the clearing up of truth (d), 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 dispose 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 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

["374] the matter of "it. These are a few of the advantages attending this, the English way of giving testimony, or tenus. Which was also indeed familiar among the ancient Romans, as may be collected from Quintilian (e); 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 (f): 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 (g), 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 (h) 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 assise, 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 (i). And the same doctrine (when attaints came to be extended to trials by jury, as well as to recognitions of assise) was also applied to the case of com-

(d) Hale's Hist. C. L. 254, 5, 6.
(e) Institut. Orat. I. 5, c. 7.
(f) See his epistle to Varus, the legate or judge of Cilicia: "tu magis scire pote, quanta fides sit habenda testibus; qui, et cuius dignitatis, et cujus aetationis sint; et, qui simpliciter visi sint dicere; utrum unum cuendemque meditatum sermonem attulerint, an ad ea quae interrogaveras extemplo verisimilis respondert." (E f. 22, 5, 3.)
(h) Vaugh. 148, 149.
(i) Bract. l. 4, tr. 1, c. 19, § 3. Flot. l. 4, c. 9, § 2.
mon jurors; that they might escape the heavy penalties of the _attaint_, in case they could shew by any additional proof, that their verdict was agree-
able to the truth, though not according to the evidence produced; with which additional proof the law presumed they were privately ac-
quainted, though it did not appear in *court. But this doctrine [*375] was again gradually exploded, when _attaints_ began to be disused, 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, to-
getter 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 pub-
licly in court.

When the evidence is gone through on both sides, the judge, in the pre-

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 _inter
temperance_ 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 (_l_), 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, with-

Also if they speak with either of the parties or their agents, after they are gone *from the bar; or if they receive any fresh evi-
dence in private; or if to prevent disputes they cast lots for whom they shall find; any of these circumstances will entirely vitiate the verdict. 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_) (36). This necessity of a total unanimity seems to be peculiar to our own constitution (_o_); or, at least in the _remedia_ 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 ac-
quitted (_p_) (37).

(_k_) Styl. 233. 1 Sd. 133.  
(_l_) ch. 2.  
(_m_) Murr. c. 4, s. 24.  
(_n_) Lib. Ass. fol. 40, pl. 11.  
(_o_) See Barrington on the statutes, 19, 20, 21.  
(_p_) Stierm. l. i, c. 4.

(26) Pending a trial of long duration the jury may be adjourned, and in civil cases may separate; but after the judge has summed up they cannot separate. 2 Bar. & Ald. 462.

(37) The learned Judge has displayed much erudition in the beginning of this chapter, to prove the antiquity of the trial by jury; but the trials referred to by the authors there cited, and even the _judicium parium_, mentioned in the celebrated chapter of _magna charta_, are trials which were something similar to that by a jury, rather than instances of a trial by jury according to its present established form. The _judicium parium_ seems strictly the judgment.
PRIVATE WRONGS.

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 false clamore suo. The amercement is disputed, 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 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 for ever barred from attacking the defendant upon the same ground of complaint. But, in case the plaintiff appears, the jury by their foreman deliver in their verdict (38).

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 ver-

(q) Page 275. See also Book IV. 379.

of a subject's equals in the feudal courts of the king and barons. And so little appears to be ascertained by antiquarians respecting the introduction of the trial in criminal cases by two juries, that although it is one of the most important, it is certainly one of the most obscure and inexplicable parts of the law of England.

The unanimity of twelve men, so repugnant to all experience of human conduct, passions, and understandings, could hardly in any age have been introduced into practice by a deliberate act of the legislature.

But that the life, and perhaps the liberty and property of a subject, should not be affected by the concurring judgment of a less number than twelve, where more were present, was a law founded in reason and caution; and seems to be transmitted to us by the common law, or from immemorial antiquity. The grand assise might have consisted of more than twelve, yet the verdict must have been given by twelve or more; and if twelve did not agree, the assise was arrested, that is, others were added till twelve did concur. See 1 Reeve's Hist. of Eng. Law, 241. 480. This was a majority and not unanimity. A grand jury may consist of any number from twelve to twenty-three inclusive, but a presentment ought not to be made by less than twelve. 2 Hale P. C. 161. The same is true also of an inquisition before the coroner. In the high court of parliament, and the court of the lord high steward, a peer may be convicted by the greater number; yet there can be no conviction unless the greater number consists at least of twelve. 3 Inst. 30. Keling. 55. Moore, 222.

Under a commission of lunacy the jury was seventeen, but twelve joined in the verdict. 7 Ves. Jun. 450. A jury upon a writ of inquiry may be more than twelve. In all these cases if twelve only appeared, it followed as a necessary consequence, that to act with effect they must have been unanimous.

Hence this may be suggested as a conjecture respecting the origin of the unanimity of juries, that, as less than twelve, if twelve or more were present, could pronounce no effective verdict, when twelve only were sworn, their unanimity became indispensable.

(38) When a verdict will carry all the costs, and it is doubtful from the evidence for which party it will be given, it is a common practice for the judge to recommend, and the parties to consent, that a juror should be withdrawn; and thus no verdict is given, and each party pays his own costs.

Where there is a doubt at the trial whether the evidence produced by the plaintiff is sufficient to support the verdict given in his favour by the jury, the judge will give leave to apply to the court above to set aside the verdict and to enter a nonsuit; but if such liberty is not reserved at the trial, the court above can only grant the defendant a new trial, if they think the plaintiff's evidence insufficient to support his case. 6 T. R. 67.
PRIVATE WRONGS. 293

dict 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 (39). 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 to the opinion of the judge or the court above, on a special case 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 swifter 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 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.

(r) If the judge hath adjourned the court to his own lodgings, and there receives the verdict, it is a public and not a priey verdict.

(s) Litt. § 386.

(39) A privy verdict cannot be given in treason and felony. 2 H. P. C. 300.
[*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 neighbours 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 (1), 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 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 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 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 econo-
miums 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 [*382] through the expense and circuitry 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

(u) 2 Whitelocke of parl. 427.
(w) Mod. Ut. Hist. xxxii. 22.
(x) Ibid. 17.
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.

2. A second defect is of a nature somewhat similar to the first: the want of a compulsory power for the production of books and papers belonging to the parties. 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 (40), (41).

[*383]  3. Another want is that of powers to examine witnesses abroad, and to receive their depositions in writing, where the witnesses reside, and especially when the cause of action arises in a foreign country. 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 (42). 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) (43).

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 them-

(y) See page 75.  (z) Stat. 13 Geo. III. c. 63.

(40) Where one party is in possession of papers or any species of written evidence material to the other, if notice is given him to produce them at the trial, upon his refusal copies of them will be admitted; or if no copy has been made, parol evidence of their contents will be received. The court and jury presume in favour of such evidence; because, if it were not agreeable to the strict truth, it would be corrected by the production of the originals. There is no difference with respect to this species of evidence between criminal and civil cases. 2 T. R. 201.

(41) In New-York, the Supreme Court, or the Superior Court of the city of New-York, or the Common Pleas of the city, may make rules to compel the production and discovery of books, papers, and documents, in possession of a party. (2 R. S. 199, § 21. Act. Feb. 8, 1836.)

(42) A court can, in effect, compel the plaintiff to consent to have a witness going abroad examined upon interrogatories, or to have an absent witness examined under a commission, by the power the judges have of putting off the trial.

(43) In New-York, witnesses abroad, or going abroad, may be examined. (2 R. S. 391. 373.) So also testimony may be taken conditionally when it is expected that a suit will be brought. (Id. 398. § 33.)
selves, and such where assises 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 a 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, labouring under local prejudices, is laying a snare for their consciences: and, though (b) 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 making out a proper case, it is done upon the ground of being necessary to a fair, impartial, and satisfactory trial (c) (44).

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 convok the inhabitants of different vills 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-court, though they could have summoned a jury (c) 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.

(a) Stra. 177.
(b) See page 294.
(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. 1762.
(d) L. L. Edu. Conf. c. 32. Wilk. 203.
(e) See page 360.

(44) This may now be done in a court of law. Tidd, 8 ed. 655.
PRIVATE WRONGS.

I have ventured to mark these defects, that the just panegyrical, 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.

CHAPTER XXIV.

OF JUDGMENT AND ITS INCIDENTS.

In the present chapter we are to consider the transactions in a 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) (1). 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, (e) Append. No. II. 6.

(1) As to the postea in general, see Tidd, 8th ed. 931 to 934. The verdict is entered on the back of the record of nisi prius, which entry, from the Latin word it began with, is called the postea. When the cause is tried in the king's bench in London or Middlesex, the record is delivered to the attorney of the successful party; and he afterwards indorses the postea from the associate's minute on the panel; but in country causes the associate keeps the record, till the next term; and then delivers it with the postea indorsed to the party obtaining the verdict.† The practice is in some respects different in the common pleas, where in town causes also, the record remains with the associate till the quarto dies post of the return of the habeas corpora juramentum, who indorses the postea upon the record; but by a recent order it is not to be delivered till the morning of the fifth day of the term. See 1 Brod. & B. 298. 3 Moore, 643. If the postea be lost, a new one may, in some cases, be made out from the record above and the associate's notes, 2 Sta. 1264; if wrong, it may be amended by the plea roll, 1 Ld. Raym. 1253; by the memory or notes of the judge, Cro. Car. 338. Bul. N. P. 320. 2 Sta. 1197. 6 T. R. 694. 1 Bar. & Ald. 161. 2 Cha. R. 352; or the notes of the associate or clerk of assize, 2 Chitty R. 352. 1 Bos. & Pul. 329. The application to amend by the judge's notes must be made to the judge who tried the cause. 1 Chitty R. 383. The court will not alter a verdict, unless it appear on the face of it that the alteration would be according to the intention of the jury, 1 H. Bla. 78; but not after a considerable lapse of time, to increase damages, although the jury join in an affidavit stating their intention to have been to give the increased sum, and thought they had in effect done so, 2 T. R. 281. sed vide 1 Burr. 383. where a verdict was rectified, which had been mistakenly delivered by the foreman. Where the jury having found the treble value in an action of debt on the statute for not setting out tithes, on a writ of inquiry, the inquisition was amended by the insertion of nominal damages, 1 Bing. R. 192. In an action by one defendant in assumpsit against a co-defendant for contribution, the postea is evidence to prove the amount of the damages. 2 Stark. R. 364; see 9 Price 359. Tidd, 8 ed. 932. 3. The production of the postea is not sufficient evidence of a judgment; a copy of the judgment founded thereon must also be produced. Bul. N. P. 234. Willes, 367. But the nisi prius record, with the postea indorsed, is sufficient to prove that the cause came on to be tried, 1 Sta. 162. Willes, 368; or the day of trial. 6 Esp. R. 80. 83; see 9 Price, 359. Tidd, 8th ed. 977.

† In New-York, the record is immediately after verdict handed over by the clerk to the successful party, with a certified copy of the minutes of the trial. (2 R. S. 422, 72.)
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 (2), are present wholly extrinsice, arising from matter foreign to, or dehors the record. Of this sort are want of notice of trial; or any flagrant misbehaviour of (2) As to new trials in general, see Tidd, 8th ed. 934 to 949. When there are two contrary verdicts, it is not of course, but in the discretion of the court, to grant a new trial. 2 Bla. R. 963. In an inferior court it is said a new trial cannot be had, upon the merits, but only for irregularity, 1 Salk. 201, 2 Salk. 650. 1 Str. 113. 499. 1 Burr. 572. Doug. 380. 2 Chitty's R. 290; but it may be said, in regular interlocutory judgment to let in a trial of the merits. 1 Burr. 571. The principal grounds for setting aside a verdict or nonsuit, and granting a new trial, besides those mentioned in the text, are—1st. The discovery of new and material evidence since the trial, 2 Bla. Rep. 955. 2dly. If the witnesses, on whose testimony the verdict was obtained, have been since convicted of perjury in giving their evidence. M. 22 Gm. K B; or if probable ground be laid to induce the court to believe that the witnesses are perjured, they will stay the proceedings on the finding of a bill of indictment against them for perjury, till the indictment is tried, ib.; but the circumstance of an indictment for perjury having been found against a witness, is no ground of motion for a new trial. 4 M. & S. 140. 9 Taunt. 192. 3dly. For excessive damages, indicating passion or partiality in the jury. 1 Str. 692. 1 Burr. 609. 3 Wils. 15. 2 Bl. Rep. 929. Cowp. 230. 5 T. R. 257. 7 ib. 529. 11 East, 23. It is not usual to grant a new trial for smallness of damages, 2 Salk. 647. 2 Str. 940. Doug. 500. Barnes, 455, 6; in which latter case it is said, if the demand is certain, as on a promissory note, the court will set aside a verdict for too small a damage, but not where the damages are uncertain. Lastly, it is a general rule, not to grant a new trial, except for the misdirection of the judge, 4 T. R. 753. 5 ib. 19. 6 East, 316. (b). 1 Marsh, 555; or where a point has been saved at the trial, 1 B. & P. 328; in a penal, 2 Str. 809. 10 East, 268. 4 M. & S. 338. 2 Chitty R. 273; hard or trifling action, 2 Salk. 655. 3 Burr. 1366; and an action is considered trifling in this respect, when the sum to be recovered is under 200. 5 Taunt. 537. 1 Chitty R. 265. (a) unless the trial is to settle a right of a permanent nature. Ib. In all these cases, if the verdict be agreeable to equity and justice, the court will not grant a new trial, though there may have been an error in the admission or rejection of evidence, or in the direction of the judge, if it appear to the court on the whole matter disclosed by the report that the verdict ought to be confirmed. 4 T. R. 468.

A new trial cannot be granted in civil cases at the instance of one of several defendants, 12 Mod. 275. 2 Str. 814; nor for a part only of the cause of action. 2 Burr. 1224 3 Wils. 47. But there may be cases in which the new trial is restricted to a particular part of the record, as if the judge give leave to move on one part or point only, on a stipulation that counsel for defendant shall not move for a new trial; or if the court think injustice may be done by setting the whole matter at large again, they may restrict the second trial to certain particular points. 4 Taunt. 556.

In criminal cases no new trial can be granted where the defendant has been acquitted. 6 East. 315. 4 M. & S. 337. 1 B. & A. 64. Where several defendants are tried at the same time for a misdemeanor, and some are acquitted, and others convicted, the court may grant a new trial to those convicted, if they think the conviction improper. 6 East, 519. See further on this subject, Tidd, 8th ed. 934.

In civil cases a motion for a new trial cannot be made after an unsuccessful motion in arrest of judgment. 4 Bar. & Cres. 160. The granting of a new trial is either without or upon payment of the costs of the former trial; or such costs may be set aside, or paid by the party moving to set aside the former verdict. See Tidd, 5th ed. 945.
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 judges report, certified by 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-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 venire's 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 attainit; of which we shall speak in the next chapter, and which is at least as old as the institution of the grand assise by Henry II. (o), in lieu of the Norman trial by battel. Such a sanction [*389] was probably thought necessary, when instead of appealing to Providence for the decision of a dubious right, it was referred to

(b) Law of nisi prius, 303, 304.
(c) Comb. 267.
(d) 6 Mod. 22. Salik. 640.
(f) 11 Hen. IV. 18. Bro. Abr. t. enquest, 73.
(g) 14 Hen. VII. 1 Bro. Abr. t. verdite, 18.
(h) Styl. 466.
(i) Ibid. 238.
(j) 1 Sid. 235. Styl. pract. Reg. 310, 311. edit. 1657.
(k) Cro. El. 616. Palm. 395. 1 Brownl. 207.
(l) 1 Sid. 235. 2 Lev. 140.
(m) 4 Burr. 395.
(n) Ipse regali institutioni elegant inserita. (Glanv. I. 2, c. 19.)
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, shews 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, inattentio 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 assise, they devised a great variety of distinctions; by which an attain may 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 certificare of assise, 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 attain originally 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 be, [390] they referred it to another examination (s). When afterwards attains, by several statutes, were more universally extended, the judges frequently, even for the misbehaviour of jurymen, instead of prosecuting the writ of attain, awarded a second trial: and subsequent resolutions, for more than a century past, have so amplified the benefit of this remedy, that the attain 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

(p) Bract. l. 4, tr. 5, c. 4.
(q) Ibid. tr. 1, c. 19, 8 8.
(r) Ibid. l. 4, tr. 5, c. 6, t. 2. F. N. B. 181. 2 Inst.
(s) 415.
(t) Si juratores erraverint, et justiciarii secundum eorum dictum judicium pronuntiaerint, falsam faciant pronuntiationem; et ideo sequi non debent eorum dictum, sed illud emendare tenentur per diligentiam eximiationem. Si autem dijudicato neci- ant, recurriendum erit ad majus judicium. Bract. l. 4, tr. 5, c. 4, 8 2. (t) See page 209.
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 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 opinions of his counsel, or even in the opinion of by-standers, 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 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 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 reconcileable 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 were 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 (3), 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 please, to appeal from day to day and from court to court upon questions merely of fact; which is a perpetual source of obstinate chicane, 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 attainder 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 shewn, 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. Arrears of judgment (4) 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 1745; and (after many interlocutory orders and sentences below, appealed from and reheard as far as the course of proceedings 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) In New-York, the motion, if founded on irregularity, must be made at the next term after the trial, or the delay be excused: if the motion be founded on the merits, it would be an enumerated motion and heard in its regular order on the calendar. Rules Sup. Court, 47, &c. on the calendar. Rules Sup. Court, 47, &c.

(4) The parties cannot move in arrest of judgment for any thing that is said after verdict at common law, or by the statute of amendments, or cured, as matter of form by the statute of setoails. See 1 Saund. 228. n. (1). It is a general rule that a verdict will aid a title imperfectly set out, but not an imperfect title. 2 Burr. 1159. 3 Wils. 275. 4 T. R. 472. The defendant cannot move in arrest of judgment for any thing which he might have pleaded in abatement.† 2 Bla. R. 1120. Surplusage will not vitiate after verdict, as in trover stating the possession of the goods in plaintiff on the 3d of March, and the conversion by defendant "afterwards to wit on the 1st of March," it was held that afterwards might stand, and the other words be treated as surplusage. Cro. C. 428. The motion in arrest of judgment, &c. may be made in the king’s bench at any time before judgment is given, 5 T. R. 445. 2 Stra. 845. though a new trial has been previously moved for. Doug. 745, 6. In the common pleas, the motion must be made before or on the appearance day of the return

† Contra, 1 Chitty’s Pl. 32, 33.
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 detinue, 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. 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 finds specially that he said, "the plaintiff will be a bankrupt." Or, thirdly, if the case laid in the declaration is not sufficient in point of law to found an action [*394] upon. And this is an invariable rule with regard to arrests of judgment upon matter 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) (5); 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 [*395] 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 de-

(w) Carth. 389.
(x) Cro. Jac. 44.
(y) 1 Mod. 992.

of the habeas corpora juratorium. Barnes, 445. In the exchequer, the motion must be made within the first four days of the next term after the trial, and it may be made after an unsuccessful motion for a new trial. See Manning's Ex. Prac. 333. Tidd, 960, 1; but see 7 Price, 566.

If the judgment be arrested in consequence of mistake of the form of action, or otherwise, the plaintiff is at liberty to proceed de novo in a fresh action. 1 Mod. 307. Vin. Ab. tit. Judgment, Q. 4. Bla. R. 831. Each party pays his own costs upon the judgment being arrested. 4 Cob. 407.

(5) See, however, 1 Saund. 228, note 1.
PRIVATE WRONGS.

305

effective manner, but sets forth a title that is totally defective in itself (a), 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.

If, by the misconduct or inadvertence of the pleaders (6), 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 (6); 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 partes replacient; 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 (7). 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 [*396] the law arising thereon are admitted by the defendant; which is the case of judgments by confession or default: 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 retracit.

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 stands thus: against him, who hath rode over my corn, I may recover damages by law: but A hath rode over my

(a) Salk. 305.
(b) Cro. Eliz. 773.
(c) 2 Ventr. 190.
(d) Str. 994.
(e) 4 Burr. 301, 302.
(f) Raym. 488. Salk. 579.

(6) The following rules have been laid down on this subject: A repleader ought never to be allowed till trial, because the fault of the issue may be helped after the verdict by the statute of Jeofails. 2dly. If a repleader be denied, where it should be granted, or granted where it should be denied, it is error. 3dly. The judgment of repleader is general, and the parties must begin again at the first fault which occasioned the immaterial issue. 1 Lord Raym. 169. Thus if the declaration be ill, and the bar and replication are also ill, the parties must begin de novo; but if the bar be good and the replication ill, at the replication. 3 Kebr. 664. 4thly. No costs are allowed on either side. 6 T. R. 131. 2 B. & P. 376.

(7) If a verdict is taken generally, with entire damages, judgment may be arrested if any one count in the declaration is bad; but if there is a general verdict of guilty upon an indictment consisting of several counts, and any one count is good, that is held to be sufficient. Doug. 730.
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 [*397] *which it is 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 afterwards farther proceedings to be had, when the defendant has 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 nemnda or jurors were called in “ad executionem decretorum judicii, ad aestimationem 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 docquetted.

[*398] that is, abstracted and entered in a book, *according to the di-
Private Wrongs.

Rections of statute 4 & 5 W. & M. c. 20. But, where damages are to be recovered, a jury must be called in to assess them; unless the defendant, to save damages, will confess the whole charges laid in the declaration: otherwise the entry of the judgment is, "that the plaintiff ought to recover his damages (indeinitely), 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 laws 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 (8).

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

(8) It has been said, by C. J. Wilmot, that "this is an inquest of office to inquire into the conscience of the court, who, if they please, may themselves assess the damages." 3 Wils. 62. Hence a practice is now established in the courts of king's bench and common pleas, in actions where judgment is recovered by default upon a bill of exchange or a promissory note, to refer it to the master or prothonotary to ascertain what is due for principal, interest, and costs, whose report supersedes the necessity of a writ of inquiry. 4 T. R. 275. 1 H. Bl. 541. And this practice is now adopted by the court of exchequer. 4 Price, 134; see further, Tidd, 8 ed. 817, 8, 9. In cases of difficulty and importance, the court will give leave to have the writ of inquiry executed before a judge at sittings or nisi prius; and then the judge acts only as an assistant to the sheriff. The number of the jurors sworn upon this inquest need not be confined to twelve; for when a writ of inquiry was executed at the bar of the court of king's bench, in an action of scandalum magnatum, brought by the duke of York (afterwards James the Second) against Titus Oates, who had called him a traitor; fifteen were sworn upon the jury, who gave all the damages laid in the declaration, viz. 100,000l. In that case the sheriffs of Middlesex sat in court, covered, at the table below the judges. 3 St. Tr. 957.

Before the 8 & 9 W. III. c. 11. the penalty in a bond for the performance of covenants, became forfeited upon a single breach thereof. But now by the 8th section of that statute, though the plaintiff is permitted to enter up judgment for the whole penalty, it can only stand as a security for the damages actually sustained. The plaintiff must then proceed by suggesting breaches on the roll, of which it is usual to give a copy to the defendant, with notice of inquiry for the sittings or assess; and the damages are assessed upon the writ in the usual way by a jury; and upon payment of them, execution upon the judgment entered up is stayed, the judgment itself remaining as a security against further breaches. See Tidd, 8 ed. 692. This statute does not extend to a bond conditioned for the payment of a sum certain at a day certain, as a post obit bond, 2 B. & C. 82; or a common money bond, 4 Ann. e. 16. s. 13. 1 Saund. 58; or a warrant of attorney payable by instalments, 3 Taunt. 74. 5 Taunt. 264; though a bond be also given, 2 Taunt. 195; nor to a bail-bond, 2 B. & P. 446; nor a petitioning creditor's bond. 3 East, 22. 7 T. R. 300. But all other bonds, either for payment of money by instalments, or of annuities, or for the performance of any covenants or agreements, are within the statute. See 8 T. R. 186. 6 East, 550. 2 Saund. 187. n. (c). 3 M. & S. 156. 1 Chitty on Pl. 507, where the parties in a bond agree that the sum mentioned to be paid on a breach of any of its covenants, shall be taken to be, and be considered as, stipulated damages, the case is not then within the statute, and the whole sum becomes at once payable, according to the terms of the agreement; for, where the precise sum is the ascertained damage, the jury are confined to it. See 4 Burr. 2225. 2 B. & P. 346. 1 Camp. 78. 2 T. R. 32. Holt Rep. 43.

† In New-York, if the declaration set forth a written contract for the absolute payment of money, or on a promissory note, bill of exchange, or draft, or for the payment of a sum certain though payable in specific articles, or for the delivery of specific articles at a fixed price, or if it be on a bail-bond where the original suit contained such declaration, the clerk may assess the damages. (2 R. S. 356, § 1, 2: 358, § 10.) For the act corresponding to 8 & 9 W. III. c. 11. see 2 R. S. 375, § 5, &c.
the remedy he sues for. In which case, if the 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 (k); or be taken up, capiatur, till he pays a fine to the king for the public misdemeanour which is coupled with the private injury; in all cases of force (i), of 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 & 6 W. & M. c. 12. that no writ of copias 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 [*399] courts they take no notice of any fine or copias 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 further continuance or adjournment; the king's writ, commanding his attendance, being now fully satisfied, and his innocence publicly cleared (o) (10).

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,

(k) 8 Rep. 40. 61.
(l) 8 Rep. 59. 11 Rep. 43. 5 Mod. 255. See Appendix. No. II. § 4.
(m) 8 Rep. 60.
(n) 8 Rep. 59. 11 Rep. 43. 5 Mod. 255. See Appendix. No. II. § 4.
(o) 8 Rep. 60.

(10) At common law the death of a sole plaintiff or sole defendant at any time before final judgment abated the suit, but now, by 17 Car. II. c. 8. where either party dies between verdict and judgment, it may still be entered up within two terms after the verdict. This statute does not apply where either party dies after interlocutory judgment, and before the return of the inquiry. 4 Taunt. 884. There must be a scire facias to revive the judgment thus entered up, before execution. 1 Wils. 302. By the 8 & 9 W. III. c. 11. the casus omisus in the statute of Charles II. is supplied. It provides that in case of either party dying between interlocutory and final judgment in any action which might have been maintained by or against the personal representative of the party dying; or in case of one or more of the plaintiffs or defendants dying, in an action, the cause of which would by law survive to the survivors, the action shall not abate by reason thereof, but the death being suggested on the record, the action shall proceed. The death of either party in the interval of hearing and deciding upon motions in arrest of judgment, special verdicts, and the like, does not deprive the party of the right to enter up judgment, though the delay thus occasioned by the court may exceed two terms after verdict. See Tidd, 8 ed. 966, 7, 1168, 9. It has been held, that if the party die after the assises begin, though before the trial of the cause, it is within the statute, which, being remedial, must be construed favourably, and the assises being considered but as one day in law. 1 Salk. 8. 7 T. R. 31; see 2 Ed. Raym. 1415. n. But in the common pleas, a verdict and judgment were set aside where the defendant died the night before trial at the sitting in term. 3 B. & P. 549. And where the verdict has been taken subject to a reference, the death of a party before an award, revokes the authority of the arbitrator. 1 Marsh, 366. 2 B. & A. 394. 2 Chitty R. 432. The same law prevails in New-York, (2 R. S. 386, &c.) except that the death of a party before verdict actually rendered, though on a day of the sitting of the court, avoids the verdict as to such party. (Id. 397. § 6.)
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 always 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 (11). 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. VII. c. 15. 4 Jac. I. c. 3. 8 & 9 W. III. c. 11. 4 & 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 (12).

*The king (and any person suing to his use) (s) shall neither [*400] 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 (13). 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 (t). 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 (u): for the statute 23 Hen. VIII. c. 15. doth not give costs to defendants, unless where the action suppose the contract to be made with, or the wrong to be done to, the plaintiff himself (14), (15).

(q) Append. No. II. § 4.
(r) 10 Rep. 116.
(s) Stat. 34 Hen. VIII. c. 8.
(11) Wherever a party has sustained damage, and a new act gives another than the common law remedy, such party may recover costs as well as damages; for the statute of Gloucester extends to give costs in all cases where damages are given to any plaintiff, in any action, by any statute after that parliament. 2 Inst. 289. 6 T. R. 355.
(12) As to costs in New-York, see 2 R. S. 613. &c.; the state is liable for costs where it is the actual plaintiff; when the suit is in name of the People on behalf of a relator, he is then liable. (Id. 619. § 38, 39.)
(13) There are some exceptions to the rule, that the king neither pays nor receives costs. Thus, by 33 Hen. VIII. c. 39. § 54: the king, in all suits, upon any obligations or specialties made to himself, or to his use, shall have and recover his just debts, costs, and damages, as other common persons used to do. By the 25 Geo. III. c. 35. if the goods and chattels are insufficient, 3 Price. 40. and the lands are sold towards discharging the debt due to the crown, in such case, “all costs and expenses incurred by the crown, in enforcing the payment of such debt, are to be paid.” By 43 Geo. III. c. 99. s. 41. costs may be levied against collectors of taxes, in certain cases. See 3 Price, 280. In equity, the attorney-general receives costs, where he is made a defendant in respect of legacies given to charities, or in respect of the immediate rights of the crown in cases of intestacy. And see 1 S. & S. 394.
(14) If executors sue as executors for money paid to their use after the testator’s death, they shall pay costs. 5 T. R. 234. Tidd, 1014. When executors and administrators are defendants, they pay costs, like other persons. Tidd, 8 ed. 1016. Or wherever the cause of action arises in the time of the executor, as the conversion in the case of trover, the executor shall pay costs, because it is not necessary to bring the action in the character of executor. 7 T. R. 358. So an executor or administrator is liable to pay the costs of a nonpros. 6 T. R. 654. See in general, Tidd, 8 ed. 1014.
(15) In New-York, executors and administrators, whether plaintiffs or defendants, are
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 subpoenae gratuit, 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 (z) (16). It seems however agreed, that a pauper may recover costs, though he pays none (17); for the counsel and clerks are bound to give their labour to him, but not to his antagonist (y) (18). 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 (19), 21 Jac. I. c. 16, and 22 & 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 [*401] by statute 4 & 5 W. & M. *c. 23. and 8 & 9 W. 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 (x), 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.

(w) 1 Sid. 361. 7 Mod. II4. 
(y) 1 Equ. Caz. abr. 125. 
(z) See pag. 214, 215.

not liable to costs unless by the special order of the court. (2 R. S. 615, § 17.)
(16) But, as observed in Tidd Prac. 8 ed. 94, it does not appear that so disgraceful a proceeding was ever adopted by inflicting the punishment.
(17) 1 Bos. & P. 39. The pauper in such case can only recover as costs the sums he is actually out of pocket, not such sums as would have been so paid in an ordinary suit by any other plaintiff; and it seems that he and his solicitor may be required to state on oath the amount thus expended in equity. Hallock on Costs, 228.
(18) See 2 R. S. 444, § 1, &c.
(19) The 43 Eliz. c. 6, enacts, that where the plaintiff in any personal action, except for any title or interest in lands, or for a battery, recovers less than 40s. he shall have no more costs than damages, if the judge certifies that the debt or damages were under 40s. But if the judge does not grant such a certificate to the defendant, the plaintiff recovers full costs. Actions of trespass vi et armis, as for beating a dog, are within the statute. 3 T. R. 38. The certificate under the statute may be granted after the trial. This certificate, it will be remarked, is to restrain the costs; but a certificate under the 22 & 23 Car. II. c. 9, is given in favour of the plaintiff to extend them from a sum under 40s. to full costs. If the defendant justifies the battery, the plaintiff shall have full costs without the judge's certificate, though the damages are under 40s., for it is held the admission of the defendant precludes the necessity of the certificate. But a justification of the assault only will not be sufficient for this purpose; for the judge must certify an actual battery. 3 T. R. 391. This certificate also may be granted a reasonable time after the trial. 2 Bar. & Cres. 621 & 580.

In declarations for assault and battery, there is sometimes a count for tearing the plaintiff's clothes; and if this is stated as a substantive injury, and the jury find it to have been such, and not to have happened in consequence of the beating, the plaintiff will be entitled to full costs (1 T. R. 656.); unless the judge should assist the defendant under the 43 Eliz. c. 6. So in a trespass upon land, the carrying away, or asportant, of any independent personal property will entitle the plaintiff to full costs, unless the asportation, as by digging and carrying away turves, is in a mode or qualification of the trespass upon the land. Doug. 780: See these acts, and the cases upon them, fully collected, Tidd, 987, 8. 996 to 1005.
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.

I. A writ of 

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.

I. A writ of 

(1) The writ of attaint is abolished by the 60th section of the 6 Geo. IV. c. 50. sect. 60: and in New-York by 2 R. S. 421, § 69.

(a) Finch, 494.
(b) Bract. L. 4, tr. 1, c. 34, § 2, 3, 4.—tr. 3, c. 17.
(c) G. L. Booth, 513.
(d) Yearb. 23 Edw. III. 15. 17. 
(e) Proc. 1 Edw. III. st. I, c. 6. 
(f) Stat. 1 Edw. III. c. 7.
(g) See pag. 399. 5. 22. 16.
yet subsequent authorities have holden, that no attain is on a false verdict given upon the mere right, either at common law or by statute; because that is determined by the grand assise, 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 men should be attainted 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 free-hold to the annual value of twenty pounds. And he that brings the attain 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 prior jurisdiction for not believing evidence which they never knew. But those against whom it is brought are allowed, in affirmation 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 for ever 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 rased, 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 attain is allowed to be brought after the death of the party, and a more moderate punishment was inflicted upon attained jurors; viz. perpetual infamy, and, if the cause of action were above 40l. value, a forfeiture of 20l. apiece by the jurors, or, if under 40l., then 5l. apiece: to be divided between the king and the party injured. So that a man may now bring an attain 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 attain 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 attain may be derived.—If, upon a lawful trial before a superior tribunal, the jury were found to have given a false verdict, they 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

Hen. VI. 6 Bro. Abr. 1. atteint, 42. 1 Roll. Abr. 869.

(k) Bract. l. 4, tr. 5, c. 4, § 1. Flet. l. 5, c. 22, § 7.
(l) Finch, L. 486.

(m) 3 Inst. 164.


(o) "Si tamen evident argumento falsum juroesse convincantur (sd quod superius judicium cognoscere debet) multantur in bonis, de causis perjurii et in
testabiles." Stierenhook de jure Goth. l. 1, c. 4.
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. But of this enough hath been observed in a former chapter (p) (2).

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 darrin continuance*), which, as was shewn in a former chapter (q), must always be before judgment), an **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 defendentis**, 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 *seire facias* to answer the debt of their principal, and it happens afterwards that the original judgment against their principal is reversed: for here the bail, after judgment had against them, had 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 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 shewn 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 (s).


(2) By stat. 9 Geo. IV. c. 14, sect. 6, no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, liability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods, unless such representation or assurance be made in writing signed by the party to be charged therewith. Statute not to take effect till the 1st of January, 1829.

(3) Ch. J. Eyre says, "I take it to be the modern practice to interpose in a summary way, in all cases where the party would be entitled to relief on an audita querela." 1 Bos. & Pul. 428. In general the courts will not put the defendant to the trouble and expense of an audita querela, but will relieve him in a summary way on motion, 4 Burr. 2287: but where the ground of his relief is a release, when there is some doubt about the execution, or some matter of fact which cannot be clearly ascertained by affidavit, and therefore
IV. But, fourthly, the principal method of redress for erroneous judgments in the king’s court of record, is by writ of error to some superior court of appeal.

A writ of error \((w)\) lies for some supposed mistake in the proceedings of a 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 attainct, or a new trial, to correct the mistakes of the former verdict \((4), \(5)\).

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 \((z)\). 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

\((w)\) Append. No. III. \& 6.
\((e)\) Finch, L. 454.
\((u)\) Finch.
\((w)\) Co. Litt. 290.

Audita quercula was lately brought in the case of Nathan v. Giles, 7 Taunt. 557. 1 Marsh. 226 S. C.; and it was there held that a writ of audita quercula need not be moved for, but is a proceeding of common right and ex debito justiciæ. However the supersedeas found ed thereon must be moved for. If the plaintiff be nonsuited, he may have a new audita quercula, but he shall not have a supersedeas. F. N. B. 104. O. 9th edit. In Nathan v. Giles, the court declared their opinion, that there can be no motion in arrest of judgment on an audita quercula. 2 Saund. 148. a. 13:

\((4)\) A writ of error lies for some error or defect in substance, that is not aided, amendable, or cured at common law, or by some of the statutes of jeofails. And it lies to the same court in which the judgment was given, if it be erroneous in matter of fact only; for error in fact is not the error of the judges, and reversing it is not reversing their own judgment: as where an infant appeared by attorney instead of guardian, or the plaintiff or defendant at the time of commencing the suit was a married woman. If a judgment in the king’s bench be erroneous in matter of fact only, and not in point of law, it may be reversed in the same court by writ of error coram nobis, or quae coram nobis resident; so called from its being founded on the record and process, which are stated in the writ to remain in the court of the lord the king, before the king himself. But if the error be in the judgment itself, and not in the process, a writ of error does not lie in the same court upon such judgment. 1 Roll. Ab. 746. In the common pleas, the record and process being stated to remain before the king’s justices, the writ is called a writ of error coram nobis, or quae coram nobis resident. On a judgment against several parties, the writ of error must be brought in all their names, 6 Co. 25. 3 Mod. 134. 5 ib. 16. 1 Ld. Raym. 244. 2 ib. 1532. 3 Burr. 1792. 2 T. R. 737; but if one or more die, the survivors may bring the writ or error. Palm. 151. 1 Stra. 234. Or if it be brought in the names of several, and one or more refuse to appear and assign errors, they must be summoned, and seved, and then the rest may proceed alone. Yelv. 4. Cro. Eliz. 692. 6. Mod. 40. 1 Stra. 234. Cas. Temp. Hardw. 135. 6

\((5)\) But this writ cannot be brought after twenty years, unless in case of personal disability from infancy, covertures, persons of unsound mind, prisoners, or beyond seas; these respectively ceasing, the writ must be brought within five years afterwards. See stat. 10 & 11 W. III. e. 14.

In New-York the writ must be brought within two years, unless the party is under disability, and then within two years after the removal of the disability, provided the whole time shall not exceed five years. 2 R. S. 594, § 22, &c.

\((1)\) In New-York the Supreme Court may compel a witness to testify to a matter to be used on motion before the court. 2 R. S. 554, § 24, &c.
by the common law: but when judgment is once given and en-rolled, no amendment is permitted in any subsequent term (y).
Mistakes are also effectually helped by the statutes of amendment and jeo fails: so called, because when a pleader perceives any slip in the form of his proceedings, and acknowledges such error (jeo faili), 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 (6).

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 Rothelain, 12 Edw. I., the pleadings are directed to be carried on in that principality, "sine calumniis verborum, non observata illa dura consuetudine, qui cadit a syllaba cadit a tota causa." The judgments were entered up immediately by the clerks and officers 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 statute therein referred to, are those of Winchester and Westminster the second), a check 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 warrant for their own wrong, nor that they may raise 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

---

(y) Stat. 11 Hen. IV. c. 3.
(z) Stua. 1011.
(b) Brit. proem. 2, 3.

(6) And now, by stat. 9 Geo. IV. c. 15, every court of record holding pleas in civil actions, any judge sitting at nisi prius, and any court of oyer and terminer and general gaol delivery in England, &c. and Ireland, if any such court or judge shall see fit to do so, may cause the record on which any trial may be pending before any such judge or court, in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record, wherein the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs, if any, to the other party as such judge or court shall think reasonable, and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at nisi prius, the order for the amendment shall be indorsed on the Warrant, and returned together with the record; and thereupon the papers, rolls, and other records of the court from which such record issued, shall be awarded accordingly.

As to New-York, see 2 R. S. 424.
be a sanction for error; and that a record, originally made up according to the truth of the cause, 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 mal-practices, 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, [*409] even the most able and upright (d). The severity of which proceedings seems 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 record is said to import in itself (/). And, in the reign of Richard the Second, there are instances (g) of their refusing to amend the most palpable errors and mis-entries, unless by the authority of parliament.

To this real sullenness, but affected timidity, of the judges, such a narrowedness of thinking was added, that every slip (even of a syllable or letter) (k) was now held to be fatal to the pleader, and overturned his

(c) Judicia perverterunt, et in alia erroneunt. (Matt. West. A. D. 1289.)
(d) Among the other judges, sir Ralph Hengham, chief justice of the king's bench, is said to have been fined 7000 marks; sir Adam Stratton, chief baron of the exchequer, 34,000 marks; and Thomas Wayland, chief justice of the common pleas, to have been attainted of felony, and to have abjured the realm, with a forfeiture of all his estates: the whole amount of the forfeitures being upwards of 100,000 marks, or 70,000 pounds. (3 Prym. Rec. 401, 402.) An incredible sum in those days, before paper credit was in use, and when the annual salary of a chief justice was only sixty marks. (Clara. 6 Edw. I. & c. 6. Dugd. chron. ser. 26.) The charge against sir Ralph Hengham (a very learned judge, to whom we are obliged for two excellent treatises of kindness) was evidently given, according to a tradition that was current in Richard the Third's time, (yearbook, M. 2 Ric. III. 10.) his altering, out of mere compassion, a fine which was set upon a very poor man, from £3 4s. 4d. to £2 8s. 4d. for which he was fined 800 marks; a more probable sum than 7000. It is true, the book calls the judge so punished Ingham and not Hengham: but I find no judge of the name of Ingham in Dugdale's Series; and sir Edward Coke (4 Inst. 953.) and sir Matthew Hale (1 P. C. 646.) understand it to have been the chief justice. And certainly his offence (whatever it was) was nothing very atrocious or disgraceful: for though removed from the king's bench at this time (together with the rest of the judges), we find him, about eleven years afterwards, one of the justices in eyre for the general perambulation of the forests (Rot. perambul. forest, in turris Lond. 20 Edw. I. m. 8.); and the next year made chief justice of the common pleas, (Pat. 29 Edw. I. m. 7. Dugd. chron. ser. 22.) in which office he continued till his death in 2 Edw. II. (Clara. 1 Edw. II. m. 19. Pat. 2 Edw. II. p. 1, m. 3. Dugd. 34. Selden, pref. to Hengham.) There is an appendix to this tradition, remembered by justice Southcote in the reign of queen Elizabeth (2 Inst. 72. 4 Inst. 623.), that with this fine of chief justice Hengham a clock-house was built at Westminster, and furnished with a clock, to be heard into Westminster-hall. Upon which story I shall only remark, that (whatever early instances may be found of the private execution of mechanical genius, in constructing horological machines) clocks came not into common use till an hundred years afterwards, about the end of the fourteenth century. (Encyclopedia, lit. heritag. 6 Rym. Fœd. 590. Derham's Artif. Clockmaker, 91.)

(e) 1 Hal. P. C. 647.
(f) 1 Leon. 183. Co. Litt. 117. See pag. 331.
(g) 1 Hal. P. C. 648.
client's cause (i). If they durst *not, or would not, set right [*410]
more formal mistakes at any time, upon equitable terms and condi-
tions, they at least should have held, that trifling objections were at all
times inadmissible; and that more solid exceptions in point of form came
too late when the merits had been tried. They might, through a decent
degree of tenderness, have excused themselves from amending in criminal,
and especially in capital, cases. They needed not have granted an
amendment, where it would work an injustice to either party; or where
he could not be put in as good a condition, as if his adversary had made
no mistake. And, if it was feared that an amendment after trial might
subject the jury to an attainit, how easy was it to make waiving the att-
taint the condition of allowing the amendment! And yet these were
among the worst reasons alleged for never suffering amendments at all (k)!
The precedents then set were afterwards most religiously followed (l),
to the great obstruction of justice, and ruin of the suitors: who have for-
merly suffered as much by this scrupulous obstinacy and literal strictness
of the courts, as they could have done even by their iniquity. After ver-
dicts and judgments upon the merits, they were frequently reversed for
slips of the pen or mis-spellings; and justice was perpetually intangled in
a net of mere technical jargon. The legislature hath therefore been forced
to interpose, by no less than twelve statutes, to remedy these opprobrious
niceties: and its endeavours have been of late so well seconded by judges
of a more liberal cast, that this unseemly degree of strictness is almost
entirely eradicated: and will probably in a few years be no more remem-
bered than the learning of essoigns and defaults, or the counterpleas
of voucher, are at present. But to return to our writs of error.
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 pay-
ment of costs and damages, which are now payable by the van-
quished party in all, except in a few particular instances, by virtue of the
several statutes recited in the margin (n) (7).

(i) In those days it was strictly true, what Rugg-
gle (in his ignoramus) has humorously applied to
more modern pleadings, "in nostra legum comma eversit totum placentum."
(k) Styl. 507.

(7) By the 3 Jac. I. c. 8. (made perpetual
by 3 Car. I. c. 4. s. 4.) to restrain unnecessary
delays of executions, it was provided, "that
in the actions therein specified, no writ of er-
ror should be allowed, unless the party bring-
ing the same, with two sufficient sureties, shall
first be bound unto the party for whom the
judgment is given, by recognizance to be ac-
knowledged in the same court, in double the
sum, to be recovered by the former judgment,
to prosecute the said writ of error with effect,
and also to satisfy and pay, if the said judg-
ment be affirmed, or the writ of error non-
promised, all and singular the debts, damages,
and costs adjudged upon the former judgment,
and all costs and damages to be awarded for
the delaying of the execution." And now
by the 6 Geo. IV. c. 96. for further preventing
the delays occasioned by frivolous writs of er-
ror, it is enacted, that upon any judgment
hereafter to be given in any of the courts of
record at Westminster, in the counties palat-
dollars if returnable in the court of errors. (2
R. S. 595, § 27, &c.) Bonds must be given
in actions real or mixed as well as in personal
actions.

† In New-York, the condition of the bond is
as above, if intended to operate as a stay of
execution; if not so intended, then the bond is
in the penal sum of 150 dollars if the writ be
returnable in the supreme court, and in 300

VOL. II.
A writ of error lies from the inferior courts of record in England into the king's bench (a), and not into the common pleas (p). Also from the king's bench in Ireland to the king's bench in England (8). It likewise may be brought from the common pleas at Westminster to the king's bench; and then from the king's bench the cause is removable to the house of lords. From proceedings on the law side of the exchequer a writ of error lies into the court of exchequer chamber before the lord chancellor, lord treasurer, and the judges of the court of king's bench and common pleas (9); and from thence it lies to the house of peers. From proceedings in the king's bench, in debt, detinue, covenant, account, case, ejectment, or trespass, originally begun therein by bill (except where the king is party), it lies to the exchequer chamber, before the justices of the common pleas, and barons of the exchequer; and from thence also to the house of lords (q); but where the proceedings in the king's bench do not first 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 state of appeal, directly to the house of lords, the dernier resort for the ultimate decision of every civil action. 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 affirmation of judgments at law, by writs in the nature of appeals.

(a) See chap. 4.
(q) Stat. 27 Eliz. c. 8.
(r) See pag. 43.
(s) 1 Roll. Rep. 264. 1 Sid. 424. 1 Saund. 345.

tine, and in the courts of great session in Wales, in any personal action, execution shall not be stayed or delayed by any writ of error, or supersedeas thereupon, without the special order of the court, or some judge thereof, unless a recognizance, with a condition according to the 3 Jac. I. c. S. (above noticed) be first acknowledged in the same court. After final judgment, and before execution executed, a writ of error is, generally speaking, a supersedeas of execution from the time of its allowance, 1 Vent. 31. 1 Salk. 321. 5 T. R. 280. 2 B. & P. 370. 2 East. 493. 5 Taunt. 204. 1 Gow. 66. 1 Chitty R. 238. 241. 3 Moore, 89; but it is no supersedeas unless bail in error be put in, and notice thereof given within the time limited by the rules of the court. 2 DowI. & Ry. 85. And when it is apparent to the court, that a writ of error is brought against good faith, 2 T. R. 183. 8 Taunt. 434. or for the mere purpose of delay, 4 T. R. 436. 2 M. & S. 474. 476. 1 Bar. & Cres. 287; or it is returnable of a term previous to the signing of final judgment, Barnes, 197. it is not a supersedeas. Tidd, 8 ed. 1202. In Tidd, 1199. 8 ed. it is said, that there must be fifteen days between the testate and return of a writ of error; but it was said in Laidler v. Foster, where there was an interval of twelve days only, that there is a distinction between writs of error and those which are the commencement of a suit; and the usual course

of practice was followed in this case (viz. not to pass over more than one return between the testate and return), the court therefore refused to quash the writ. 4 Bar. & Cres. 116. And in another case, the court of king's bench held, that the court could not quash a writ of error upon a judgment of the common pleas of Durham, nor award execution upon the judgment of an inferior court. 4 DowI. & R. 153.

(8) This appeal is taken away by 23 Geo. III. c. 21. See 1 book, p. 104. n. 15. Since the union, however, a writ of error lies from the superior courts in Ireland to the house of lords. Before the union with Scotland, a writ of error lay not in this country upon any judgment in Scotland; but it is since given by statute 6 Ann. c. 26. s. 12. from the court of exchequer in Scotland, returnable in parliament. And see the 48 Geo. III. c. 151. concerning appeals to the house of lords from the court of session in Scotland.

(9) The 31 Edw. III. c. 12, directs, that the chancellor and treasurer shall take to their assistance the judges of the other courts, and autres sages come tour semblera. But the 20 Car. II. c. 4, has dispensed with the presence of the lord treasurer, when the office is vacant; and it is the practice, for the two chief justices alone to sit in this court of error, who report their opinion to the chancellor, and the judgment is pronounced by him.
CHAPTER XXVI.

OF EXECUTION.

If the regular judgment of the court, after the decisions 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 guare impedit, or assise of darrein presentment, "the execution is [413] by a writ de clerico admitendo; directed, not to the sheriff, but to the bishop or archbishop, and requiring him to admit and institute the clerk of the plaintiff (1).

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 assise of nuisance, or quod permitat prosternere, where one part of the judgment is quod nocentum 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) (2). Upon a replevin, the writ of execution is the writ de retumbo habendo (d): and, if the distress be eloined, 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) (3). 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 shew cause why

(a) Append. No. II. § 4.
(b) Finch. L. 479.
(c) Comb. 10.
(d) See pag. 150.
(e) See pag. 149.
(f) 2 Leon. 174.
(g) 1 Roll. Abr. 737. Rast. Entr. 215.

(1) The writ recites the judgment of the court, and orders him to admit a fit person to the rectory and parish church at the presentation of the plaintiff; and if upon this order he refuse to admit accordingly, the patron may sue the bishop in a quare non admitit, and recover ample satisfaction in damages. 2 Sel. Prac. 330.
(2) That is, if it be stated in the indictment that the nuisance is still existing. If it does not appear in the indictment that the nuisance was then in existence, it would be absurd to give judgment to abate a nuisance which does not exist. 8 T. R. 144.
(3) Vide p. 145. n. (1) ante.
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) (4) 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 (4).

[*414] *Executions in actions where money only is recovered, as a debt or damages (and not any specific chattel), are of five sorts: either against 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 a suit. And, properly speaking, this cannot be sued out against any but such as were liable to be taken upon the former capias (k). 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 poenam 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 misbehaviour (o), of the wife during her coverture, the capias shall issue against the husband only: which is one of the many great privileges of English wives (5).

(4) Bro. Abr. t. damages, 29.
(5) Kellw. 64.
(11) 1 Inst. 289.
(m) Moor, 704.
(n) Cro. Jac. 322.
(o) Cro. Car. 513.

(4) The action of detinue is abolished in New-York. (2 R. S. 553. § 15.) See the execution in replevin, 2 R. S. 530. § 50.
(5) There are many cases in which the defendant may be taken in execution after judgment, though he could not be arrested at the commencement of the suit; but it is a universal rule, that whenever a capias is allowed on memne process before judgment, it may be had upon the judgment itself. 3 Salk. 286. 3 Co. 12. It lies against peers, or members of parliament, upon a statute merchant, or staple, or recognizance in nature thereof. 2 Leon. 173. 1 Crompt. 345. But by 57 Geo. III. c. 99, s. 47. no penalty or costs incurred by any spiritual person by reason of non-residence on his benefice, shall be levied by execution against his body, whilst he holds the same or any other benefice, out of which the same can be levied by sequestration within the term of three years. An infant seems liable to this process. 2 Stra. 1217; see id. 708. 1 B. & P. 480. Husband and wife may be taken in execution in an action against both, and she shall not be discharged, unless it appear she has no separate property, out of which the demand can be satisfied. T. 2 Geo. IV. C. P.; see 5 B. & A. 759; or that there
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 executionary process, for costs, against a plaintiff as well as a defendant, when judgment is had against him.

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 & 9 W. 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 (*q*). Escapes are either voluntary, or negligent. Voluntary are such as are by the express consent of the keeper; alter 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 consent; and then upon fresh pursuit the defendant may be [*416*] retaken, and the sheriff shall be excused, if his 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 100L, will surrender all his effects to his creditors (except his apparel, bedding, and

\[\text{(p) See page 279.}\]
\[\text{(q) 3 Rep. 53. 1 Sid. 330.}\]
\[\text{(r) Stat. 8 & 9 W. III. c. 27.}\]

...
tools of his trade, not amounting in the whole to the value of 10l.,) and will make oath of his punctual compliance with the statute, the prisoner may be discharged, unless the creditor insists on retaining him; in which case he shall allow him 2s. 4d. 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 (7). And, on the other hand, the creditors may, as in case of bankruptcy, compel (under pain of transportation for seven years) such debtor charged in execution for any debt under 100l. 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 (8) †.

(7) The statute mentioned in the text is that which is commonly known by the appellation of the Lords' Act, from the circumstance of its originating in the upper house of parliament. By the 33 Geo. III. c. 5, made per petuam by 39 Geo. III. c. 50, the regulations of the former act are extended to debts amounting to 300l. and by other statutes, (see Tidd, 379.) persons in custody for contempt by the non-payment of money or costs ordered by courts of equity, 49 Geo. III. c. 6, or common law, are declared within the provisions for the relief of prisoners in custody for debt only. But a defendant in a qui tam action is not entitled to the benefit of the lords' act, 3 Burr. 1322. 1 Bla. R. 372; nor a defendant in custody under a writ de excommunicato coepiendo for continuity in not paying a sum for alimony, and also for costs in the ecclesiastical court. 11 East, 231. When the prisoner is charged in execution above twenty miles from Westminster-hall, or the court out of which the execution issued, he must be brought up to the next assizes; or by 32 Geo. III. c. 34, before the justices at quarter sessions, to be examined and discharged. The application is directed to be made by the prisoner before the end of the first term after his arrest; but ignorance or mistake will excuse a delay beyond that period. When the debt recovered does not exceed 20l. exclusive of costs, the 48 Geo. III. c. 123, provides for the discharge of the debtor's person after he has lain in prison twelve months. But this statute being confined to persons in execution upon a judgment, it has been held, that one in custody on an attachment for non-payment of a sum under 20l. found due upon an award made a rule of court, is not entitled to his discharge under it. 10 East, 408. 2 B. & A. 61.

The 1 Geo. IV. c. 119. established a new court of record, called the Court for the Relief of Insolvent Debtors, which is held twice a week in London throughout the year, with a short vacation in the summer; and by the 5 Geo. IV. c. 16. it is provided, that the judges of this court, who are four in number, shall make three circuits in the year, for the discharge of insolvents. A prisoner discharged under these acts becomes personally free, having first delivered a schedule on oath of all his debts, &c. and assigned all his property in possession or expectancy for the benefit of his creditors, to whose demands all property which he may afterwards acquire is made liable. If upon his examination it appear that he has been guilty of bad practices or fraud, in contracting debts, or have opposed a vexatious defence to any action brought against him for the recovery of any debt, concealed credits or debts, given a voluntary preference to any creditor, or made away with his property, or his imprisonment be for damages recovered in an action of erim. con., seduction, or malicious injury, or does not answer satisfactorily to the court, he may be sent back to prison for two or three years, at the discretion of the court. A fraudulent concealment of property in his schedule, subjects him to the additional punishment of hard labour. If a voluntary preference be given by him within three months before filing his petition for discharge, it is void.

(8) The creditors who can compel the surrender of the debtor's effects, and who are to have the benefit of it, are only those who have charged him in execution. This statute, the 32 Geo. II. c. 28, is generally called the lords' act. By the 26 Geo. III. c. 44. the provisions of it were extended to 200l., and by the 33 Geo. III. c. 5. they have been still further enlarged to 300l. By the 37 Geo. III. c. 85. one creditor shall agree in writing, in order to detain such a debtor, to make him a weekly allowance of 3s. 6d.; and where two or more shall agree to detain him, they shall pay him the court shall direct, not exceeding 2s. a week each. See the clauses of the act in 2 Burn, tit. Gaol. The prisoner shall never afterwards be liable to be arrested on any action for the same debt, unless convicted of perjury. But a prisoner, to have the benefit of this act, must petition the court from which the process issued upon which he shall be in custody, before the end of the first term after he is arrested, unless the complaint shows his neglect arose from ignorance or mistake. Although the prisoner cannot avail himself of the benefit of the lords' act, if his debts exceed 300l., yet he is liable to the compulsory clause, upon any debt within that amount, whatever may be the amount of all his debts for which he is in execution. 5 B. & A. 537. to imprisonment on surrender of their property.

† See 2 R. S. 28. 31, as to the discharge of insolvents from imprisonment and liability
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 (w). In order to which a writ of seire facias may be sued out against the bail, commanding them to shew cause why the plaintiff should not have execution against them for his *debt and damages: and on such writ, if they shew no sufficient cause, or the defendant does not surrender himself on the day of the return, or of shewing 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 (9).

2. The next species of execution is against the goods and chattels of the defendant: and is called a writ of fieri facias (w), 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 (10). 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 doors (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 the chattel real) (z) of the defendant, till he has raised enough to satisfy the judgment and costs (11): 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) (12).

The judges of K. B. have decided that an insolvent brought up under the compulsory clause in the lords' act, is not bound to answer questions as to the disposition of his property during his imprisonment, but merely as to the amount and condition of it at the time of making his schedule; and that the form of the oath must be altered conformably with this construction of the statute. Per Holroyd, J., in Re. Askew, 24th Nov. 1825.

(9) The undertaking of the bail does not subject them to execution against the body in the common pleas.

(10) If, upon a judgment in tort, against two or more, execution be levied for the whole damages upon the body, 1 Camp. 343. that one cannot recover a moiety against the other for his contribution; but he may maintain an action for the moiety, if the original action were founded upon contract. 8 T. R. 186; see also 2 Camp. 452.

(11) And by a late statute, viz. 43 Geo. III. c. 46, to satisfy also the costs of the writ of execution, together with the sheriff's fees, poundage, &c. But the statute does not extend to give the like costs, fees, poundages, &c. to the defendant. But, query, whether "expenses of execution" include expenses of levying? Ramsey v. Tuffnell, 9 J. B. Moore, 425.

(12) The statute enacts that such payment shall be made out of the proceeds, provided the sheriff have notice of the landlord's claim, at any time while the goods or the proceeds remain in his hands. See Arnitt v. Garrett, 3 B. & A. 440. In this case the goods had been removed from the premises previously to the notice. And where the sheriff takes corn in the blade under a fi. fa. and sells it before the rent is due, is not liable to account to the landlord for rent accruing subsequent to the levy and sale, although he has given notice, and though the corn be not removed from the premises until long afterwards. Gwilliam v. Barker, 1 Price, 274. And where the sheriff shall know the fact of the arrear of rent, no other specific notice is needful to bind him. Andrews v. Dixon, 3 B. & A. 645. And, semble, he need not set about finding out what rent is due. Smith v. Rassel, 3 Taunt. 400. And the sheriff is bound only as to the rent actually due at the time of the taking, and not such rent as shall have accrued due whilst he is in possession. Huskins v. Knight and Basset.
If part only of the debt be levied on a fieri facias, the plaintiff may have a capias ad satisfaciendum for the residue (b) (13).

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

[*418] *is now made 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 execution 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 fieri facias (d), to levy the debt and damage 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 fieri facias, or levari facias; but not the possession of the lands themselves; which was a natural consequence of the feodal 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

[*419] goods are not sufficient, then the moiety or *one half of his freehold lands, which he had at the time of the judgment given (f), whether held in his own name, or by any other trust for him (g) (14), 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

(b) 1 Roll. Abr. 904. Cro. Eliz. 344. (c) 2 Burn. eccl. law, 399. (d) Finch, L. 471. (f) 3 Inst. 395. (e) Registr. Orig. 300. Juric. 22. 2 Inst. 4. (g) Stat. 29 Car. II. c. 3. (13) In New-York, the only execution from a court of record against the property of a party is a fi. fa. which enforces the collection of the debt, interest, and sheriff's fees and poundage out of the personal property; or if that be not sufficient, then from a sale of all such real estate as he had at the time of seeking the judgment, or at any time afterwards. (2 R. S. 367. § 24). And if these be not sufficient, a ca: sa: may issue. (14) The words in the statute referred to (29 Car. II. c. 3.) are, at the time of the said execution sued, and refer to the seizing of the trustee; therefore, if the trustee has conveyed the lands before execution sued, though he was seized in trust for the defendant at the time of the judgment, the lands cannot be taken in execution. Com. Rep. 227.
till the death of the defendant, if he be tenant for life or in tail (15). During this period the plaintiff is called tenant by *elegit*, of whom we spoke in a former part of these commentaries (k). We there observed that till this statute, by the ancient common law, lands were not liable to be charged with, or seised 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 disreim upon for his services. And upon the same feodal principle, copyhold lands are at this day not liable to be taken in execution upon a judgment (i). 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 seise 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 outer of the vassal proceeded from his own command. This execution, or seising 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 in effect than a *fieri 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 [*420*] in the course of the common law. But,

5. Upon some prosecutions given by statute; as in the case of recognizances or 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, lands, and goods may all be taken at once in execution, to compel the payment of the debt. The process hereon is usually called an *extent* (16), or *extendi facias*, because the sheriff

---

(k) Book II. ch. 10.
(l) 1 Roll. Abr. 589.

(15) And the sheriff is not bound to deliver a moiety of each particular tenement and farm, but only certain tenements, &c. making in value a moiety of the whole. *Doe v. Taylor* *Earl of Abingdon*, 2 Doug. 473. He should return that he had delivered an equal moiety of the premises, and should set it out by metes and bounds, or the return is void. *Penny v. Masters* *v. Durrent*, 1 B. & A. 40. And the obligation lies at nisi prius on the trial of the ejectment. And where the sheriff delivered one moiety, and upon a second *elegit*, the other was held to be wholly void. *Morris v. Jones*, 3 D. & R. 603. 2 B. & C. 232. S. C.

It has been considered in practice that although the sheriff might deliver the moiety to the plaintiff in *elegit*, yet that executory ejectment was necessary to complete his title; but, *semblé*, that entry is good under the writ. *Roger v. Packer*, 6 Taunt. 202.

An examined copy of the judgment roll, containing the award of the *elegit*, is evidence of the plaintiff's title; and, in action for use and occupation against the tenant, the production of a copy of the *elegit* and of the inquisition thereunder is unnecessary. *Ramsbottom v. Buckhurst*, 2 M. & S. 565.

The defendant, in the writ of *elegit*, may, on motion, obtain a reference to the master to take an account of rents, &c. received by the plaintiff, and if it appear that the debt and costs have been satisfied, possession will be restored. *Price v. Varney*, 5 D. & R. 612. 3 B. & G. 733. S. C.

(16) The writ in aid was formerly grossly abused; the king's name often became an engine of great fraud or oppression, to remedy which, stat. 57 Geo. III. c. 117, was passed. The abuse to which I have adverted was this: not only any person indebted or likely to be indebted to the crown on specialty or record, but any one so indebted in part, or by simple contract only, might obtain the extent in aid to be issued in his favour. The instant that
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 any 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 entering on the office: so that, if such officer of the crown aliens fora 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 judgment 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 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 hereafter 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 (17); 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 shew 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 shew why process of execution should not be issued: or the plaintiff may still

the writ issued, all the property of the debtor became liable to the extent at the suit of the crown; and thus his creditors were deprived of participation in such property, the whole perhaps being absorbed by the alleged crown debtor. But the statute mentioned above limits the issuing of the writ to cases where a debt shall be actually due to, and previously demanded on the part of the crown. Before the statute, it was sufficient that the party suggested the existence of the debt to entitle him to sue out the writ, and to the money levied thereon. But now the writ cannot be issued unless the sum actually due to his majesty be stated and specified in the fiat indorsed thereon; and, when levied, the sheriff is to pay the amount over to his majesty’s use. Any overplus is to be paid into court subject to its disposition on summary application. The expectation of preference formerly capable of being realized is by the statute, therefore, in a great degree defeated.

(17) In New-York within two years. 2 R. S. 363. § 1.
bring an action of debt, founded on this dormant judgment, which was the only method of revival allowed by the common law (p).

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 courts application must be made for the redress of particular injuries, or the doctrine of jurisdictions and *cognizance. We afterwards proceeded 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 surprize; 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 intrenching upon those of any other individual in the 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

(p) Co. Litt. 290.
and justice; and who, to gratify the spleen, the dishonesty, and wilfulness of their clients, may endeavour 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 honour 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, 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 seised by their prince to-morrow. In Turkey, says Montesquieu (r), where little regard is shewn 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 [*424] *free states 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 to 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 an 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 jefails (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 triverbial (w) days allowed to the praetor for deciding causes (x): whereas, with us, one-fourth of the

---

(q) See pag. 327.
(r) Sp. L. b. 6, ch. 2.
(s) de Laud. LL. c. 53.
(t) Bodin. de Républ. I. 6, c. 6.
(u) See pag. 417.
(v) Otherwise called dies fasti in quibus licebat praetori fara tria verba, do, dico, addico. (Calv. Lec. 985.)
(w) Spelman of the terms, 4, c. 2.
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 assise and nisi prius 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 those courts. These will therefore be the subject of the ensuing chapter.

CHAPTER XXVIII.

OF PROCEEDINGS IN THE COURTS OF EQUITY (1).

Before we enter on the proposed subject of the ensuing chapter, viz. the nature and method of proceedings in the courts of equity, it will be proper to recollect the observations which were made in the beginning of

(1) That the courts of equity and courts of law are not opposed to each other, and often concur in the exercise of their powers, to promote the ends of substantial justice, is not now disputed. It is said, that matters of fact should be left to courts of law for the decision of a jury, 1 Ridgway’s Parl. Car. 9; and issues are oftentimes directed for that purpose; yet "there is no doubt," says Lord Eldon, "that according to the constitution of this court, it may take upon itself the decision of every fact put in issue upon the record." And again, "This court has a right (to be exercised very tenderly and sparingly) of deciding without issues." 9 Vcs. 163. The general rule is, that a court of equity will never exercise jurisdiction over criminal proceedings. Yet in a case where the plaintiffs indicted defendant’s agent at the sessions, where the plaintiffs themselves were judges, for a breach of the peace, lord Hardwicke made an order to restrain the prosecution till after hearing of the cause and further order; and where a bill is brought to quiet possession, if the plaintiff afterwards prefer an indictment for forcible entry, this court will stop the proceedings upon such indictment. 2 Atk. 302. The court of chancery has no jurisdiction to prevent a crime, except in the protection of infants. Therefore it is said, that the publication of a libel cannot be restrained. 2 Swan. 413, (see ante, 2 vol. 407. in ‘notes.’) Nor will the court compel a discovery in aid of criminal proceedings. 2 Ves. 256. The court of chancery has a concurrent jurisdiction with the admiralty, Gilb. Eq. Rep. 233; and may appeal letters of reprimand, after a peace, though there is a clause in the patent that no treaty of peace shall prejudice it. 1 Vern. 54. So equity may relieve after verdict in K. B. or C. P., and even grant a perpetual injunction after five trials at law on the same point and verdicts the same way: but equity is very tender in the exercise of this power. 2 P. W. 425. 10 Mod. 1. And a court of equity will not review the orders of the exchequer as a court of revenue; nor interfere where that court, as a court of revenue, is competent to decide the subject-matter. 3 Ridg. P. C. 80.

Matters arising out of England.—A question concerning the right and title to the Isle of Man may be determined in a court of chancery. 1 Ves. 202. Where the defendant is in England, though the cause of suit arose in the plantations, if the bill be brought here, the court agents in personam may, by compulsion of the person, force him to do justice, for the jurisdiction of the chancellor is not ousted, 3
PRIVATE WRONGS.

this book (a) on the principal tribunals of that kind, acknowledged by the constitution of England; and to premise a few remarks upon those parti-

cause of general inconvenience; but only where the observation of a rule is attended with some unusual and particular inconvenience. 10 Mod. 1.

I. Bonds, &c.—Equity will relieve against the loss of deeds, 3 V. & B. 54. or bonds, 5 Ves. 235. 6 Ves. 812. but not if the bond be voluntary, 1 Ch. Ca. 77. It will also set up a bond so lost or destroyed, against sureties, though the principal be out of the jurisdiction. 3 Atk. 93. 1 Ch. Ca. 77. 9 Ves. 404. Bonds made joint, instead of several, may be modified according to intent in some cases. 2 Atk. 33. 9 Ves. 118. 17 Ves. 514. 1 Meriv. 564.

Boundaries, &c.—Equity will ascertain the boundaries, or fix the value, where lands have been intermixed by union of possession. 2 Meriv. 507. 1 Swanst. 9. So to distinguish copyhold from freehold lands within the manor. 4 Ves. 189. Nels. 14.

Penalties, Forfeitures, &c, incurred by accident, are relieved against, 2 Vern. 594. 1 Str. 453. 1 Bro. C. C. 418. 2 Sch. & Lef. 685. where the thing may be done afterwards, or a compensation made for it. 1 Ch. Ca. 24. 2 Ventr. 352. 9 Mod. 22. 18 Ves. 63. But no relief is given in the case of a voluntary composition, payable at a fixed period. Amb. 332. See 1 Vern. 210. 2 Atk. 527. 3 Atk. 585. 16 Ves. 372. Equity will not relieve against the payment of stipulated, or as they are sometimes called, liquidated, damages, 2 Atk. 194. Finch, 117. 2 Ch. Ca. 195. 6 Bro. P. C. 470. 1 Cox. 27. 2 Bos. & P. 346. 3 Atk. 395; and forfeitures under acts of parliament, or conditions in law, which do not admit of compensation, or a forfeiture which may be considered as a limitation of an estate, which determines it when it happens, cannot be relieved against. 1 Ball & Bat. 373, 478. 1 Str. 447. 452. Prec. Ch. 574.

Mistake.—A defective conveyance to charitable use is always aided, 1 Eden. 14. 2 Vern. 755. Prec. Ch. 16. 2 Vern. 453. Hob. 136; but neither a mistake in a fine (if after death of conusor), or in the names in a recovery, are supplied, especially against a purchaser. 2 Vern. 3. Amb. 102. Nor an erroneous recovery in the manorial court. 1 Vern. 367. Mistakes in a deed or contract, founded on good consideration may be rectified by 1 Ves. 317. 2 Atk. 203. And if a bargain and sale be made and not enrolled within six months, equity will compel the vendor to make a good title, by executing another bargain and sale which may be enrolled. 6 Ves. 745. A conveyance defective in form may be rectified, 1 Eq. Ab. 320. 1 P. W. 279. even against assignees, 2 Vern. 564. 1 Atk. 162. 4 Bro. C. C. 472. or against representatives, 6 Ves. 745. 2 Atk. 203. So defects in surrenders of copyhold. 2 Vern. 564. Salk. 449. 2 Vern. 151. But not the omission of formalities required by act of parliament in conveyances. 5 Ves. 240. 3 Bro. C. C. 571. 13 Ves. 588. 15 Ves. 60. 6 Ves. 745. 11 Ves. 620. Defects in the mode of
cular causes, wherein any of them claims and exercises a sole jurisdiction, distinct from and exclusive of the other.

conveyance may be remedied. 4 Bro. C. C. 382. So the execution of powers. 2 P. W. 623.

2d. Account.—Mutual dealings and demands between parties, which are too complex to be accurately taken by trial at law, may be adjusted in equity, 1 Sch. & Lefroy. 309. 13 Ves. 278, 9. 1 Mad. Ch. 86. & note (c); but if the subject be matter of set-off at law, and capable of proof, a bill will not lie, 6 Ves. 136; and the difficulty in adjusting the account constitutes no legal objection to an action. 5 Taunt. 481. 1 Marsh. 115. 2 Camp. 239.

3. Fraud.—Equity has so great an abhorrence of fraud, that it will set aside its own decrees if founded thereupon; and a bill lies to prevent frauds obtained by fraud. 13 Vin. Ab. 543. pl. 9. 1 Vern. 277. All deceitful practices and artful devices, contrary to the plain rules of common honesty, are frauds at common law, and punishable there; but for some frauds or deceits there is no remedy at law, in which cases they are cognizable in equity, as one of the chief branches of its original jurisdiction. 2 Ch. Ca. 103. Finch. 161. 2 P. W. 243. 2 Vern. 189. 2 Atk. 324. 3 P. W. 130. Bridg. Ind. tit. Fraud, pl. 1. Where a person is prevented from fraud by executing a deed, equity will regard it as already done. 1 Jac. & W. 99.

1. Trustees are in no case permitted to purchase from themselves the trust estate, 1 Vern. 465. nor their solicitor. 3 Mer. 200. Nor in bankruptcy are the commissioners (6 Ves. 617.) or assignees, (6 Ves. 627.) nor their solicitors. 10 Ves. 321. Nor committee or keeper of a lunatic, 13 Ves. 156. nor an executor, 1 Ves. & B. 170. 1 Cox, 134. nor governors of charities, 17 Ves. 500.

2dly. Attorney and Client.—Fraud in transactions between attorneys and client is guarded against most watchfully. 2 Ves. J. 201. 1 Mad. Ch. 114. 5. 116.

3dly. Heirs, Sailors, &c.—Equity will protect improvident heirs against agreements binding on their future expectations, negotiated during some temporary embarrassment, provided such agreement manifest great inadequacy of consideration. 1 Vern. 169. 2 Vern. 27. 1 P. W. 310. 1 Bro. C. C. I. 2 Ves. 157. It will also set aside unequal contracts obtained from sailors respecting their prize-money, Newl. Cont. 443. 1 Wils. 229. 2 Ves. 281. 516; and the fourth sec. of 20 G. III. c 24, declares all bargains, &c. concerning any share of prize taken from any of his majesty's enemies, &c. void. Vid. Newl. Cont. 441.

4thly. Guardian.—Fraud between guardian and ward is also the subject of strict cognizance in the court of chancery. For the details under this head, see 1 book, ch XVII. and notes. 5thly. Injunctions.—In a modern work the subject of injunctions is considered under the head of fraud, (see 1 Mad. Ch. 125.) but it seems to deserve a distinct consideration. An injunction is a method by which the court of chancery interferes to prevent the commission of fraud and mischief. The exercise of this authority may be obtained, 1st. To stay proceedings in other courts. 2d. To restrain infringements of patent. 3d. To stay waste. 4th. To preserve copy-right. 5th. To restrain negotiation of bills, &c. or the transfer of stock. 6th. To prevent nuisances, and in most cases where the rights of others are invaded, and the remedy by action at law is too remote to prevent increasing damage. See 1 Mad. Ch. 157 to 165. An injunction to stay proceedings at law does not extend to a distress for rent. 1 Jac. & W. 392. Nor has equity any jurisdiction to stop goods in transitu in any case, nor will the court restrain the sailing of a vessel for such purpose by injunction. 2 Jac. & W. 349.

6thly. Bills of Peace, which form an essential check on litigation. 1 Bro. P. C. 266. 2 Bro. P. C. 217. Bumb. 158. 1 P. W. 671. Prec. Ch. 262. 1 Stra. 404. For this purpose a perpetual injunction will be granted. See 10 Mod. 1. 1 Bro. P. C. 268. This bill cannot hold in disputes between two persons only. 2 Atk. 483. 391. 4 Bro. C. C. 157. Vin. tit. Ch. 425. pl. 35. 2 P. W. 156.

7thly. Bills of Interpleader will lie to prevent fraud or injustice, where two or more parties claim adversely to each other, from him in possession (otherwise it will not lie, 1 Mer. 405.); for in such case, it is necessary the two claimants should settle their rights before the person holding possession be required to give up to either. 2 Ves. J. 310. Mitf. Pl. 39. 1 Mad. Ch. 173. And on the same principle.

8thly. Bills or Writs of Certiorari, to remove a cause from an inferior, or incompetent jurisdiction.

9thly. Bills to perpetuate testimony in danger of being lost before the right can be ascertained.

10thly. Bills to discover evidence in possession of defendant, whereof plaintiff would be otherwise wholly deprived, or of deeds, &c. in defendant's custody.

11thly. Bills of Quia Timet for the purpose of preventing a possible future injury, and thereby quieting men's minds and estates, &c. 1 Madd. Ch. 224. Newl. on Contr. 93. 493.

12thly. Bills for the delivering up of Deeds. —As where an instrument is void at common law, as being against the policy of the law, it belongs to the jurisdiction of equity to order it to be delivered up. 11 Ves. 335. In Mayor, &c. of Chester v. Bowling, Lord Eldon says, "My opinion has always been (different from others) that a court of equity has jurisdiction and duty to order a void deed to be delivered up, and placed with those whose property may be affected by it, if it remains in other hands." 1 Ves. & B. 244.

13th. Bills for apportionment or contribution between persons standing in particular relations one to another. 5 Ves. 792. 2 Freem. 97.

14th. For dower and partition.
I have already (b) attempted to trace (though very concisely) the history, rise, and progress, of the extraordinary court, or court of equity, in

(b) pag. 50, &c.

15th. To establish modeses.
16th. Bills to marshal securities.
17th. Bills to secure property in litigation in other courts. And
18th and lastly. Bills to compel lords of manors to hold courts, or to admit copyholders and bills to reverse erroneous judgments in copyhold courts. Vide 1 Madd. Ch. 242 to 252. 1

4th. Infants.—The protection and care which the court of chancery exercises over infants have already been incidentally noticed. Vide 1 book, chs. XVI. XVII. and notes.

Wards of Court.—To make a child a ward of court, it is sufficient to file a bill; and it is a contempt to marry a ward of court, though the infant's father be living. Ambl. 301. The court of chancery, representing the king as parens patriae, has jurisdiction to control the right of the father to the possession of his infant; but the court of K. B. has not any portion of that delegated authority. The court of chancery will restrain the father from removing his child, or doing any act towards removing it out of the jurisdiction. So will the court refuse the possession of the child to its mother, if she has withdrawn herself from her husband. 10 Ves. 52. Co. Lit. 89. (a). n. 70. 2 Pomb. Tr. Eq. 224. n. (a). 2 Bro. C. C. 499. 1 P. W. 705. 4 Bro. C. C. 101. 2 P. W. 102. The court retains its jurisdiction over the property of a ward of court after 21, if it remains in court; and if the ward marries, will order a proper settlement to be made, or reform an improper one, unless the ward consents to the settlement either in court or by special commission. 2 Sim. & Stu. 123. n. (a). In case the husband assign the property, who is a ward of court, it shall not prevail, but the court will direct even the whole of the property in question to be settled on the wife and her children, and the assignee will not be entitled even to the arrear of interest accrued since the marriage. 3 Ves. 506.

5th. Specific Performance of Agreements.—The jurisdiction of the courts of equity, in matters of this kind, though certainly as ancient as the reign of Edward IV., did not obtain an unresisting and uniform acquiescence on the part of the public till many years afterwards. See 1 Roll. Rep. 354. 2 ib. 412. Latch. 179.

Realty.—Thus equity enforces agreements for the purchase of lands, or things which relate to realities, but not (generally) those which relate to personal chattels, as the sale of stock, corn, hops, &c., in such cases the remedy is at law. 3 Atk. 383. Newl. Cont. 87.

That which is agreed to be done is in equity considered as already done, 2 P. W. 222; and therefore when a husband covenants on his marriage to make a settlement charged upon his land, which he is afterwards prevented from completing by sudden death, the heir shall make satisfaction of the settlement out of the estate. Id. 233.

Personality.—In agreements, with penalties for the breach of them, it is necessary to distinguish the cases of a penalty intended as a security, for a collateral object, from those where the contract itself has assessed the damages which the party is to pay, upon his doing or omitting anything particularly. In these latter cases, equity will not interfere either to prevent or to enforce the act in question, or to restrain the recovery of damages after they have become due. But in the former, where it plainly appears that the specific performance of that act was the primary object of the agreement, and the penalty intended merely to operate as collateral security for its being done, though at law the party might make his election, either to do the particular act or to pay the penalty, a court of equity will not permit him to exercise such right, but will compel him to perform the object of the agreement. Newl. Cont. cap. 17. Thus, as the principle whereon a specific performance of agreement relating to personalities is refused, is, that there is as complete a remedy to be obtained at law, therefore, where a party sues merely on a memorandum of agreement (a mere memorandum not being regarded as valid at law), a court of equity will give relief, for equity suffers not a right to be without a remedy. 3 Atk. 382. 385. But it is only where the legal remedy is inadequate or defective, that courts of equity interfere. 8 Ves. 163. Equity will not enforce an agreement for the transfer of stock, 10 Ves. 161; but it has been held that a bill will lie of agreement (a mere memorandum not being regarded as valid at law), a court of equity will give relief, for equity suffers not a right to be without a remedy. 1 Sim. & Stu. 500. And it seems the court will entertain a suit for the specific performance of a contract for the purchase of a debt. 5 Price, 325. So to sell the goodwill of a trade, and the exclusive use of a secret in dyeing. 1 Sim. & Stu. 74, but not without great caution. See 1 P. Wms. 181.

6th. Trusts.—Trusts may be created of real or personal estate, and are either, 1st, Express; or, 2d, Implied. Under the head of implied trusts may be included all resulting trusts, and all such trusts as are not express. Express trusts are created by deeds or will. Implied trusts arise, in general, by construction of law, upon the acts or situation of parties. 1 M. Ch. 446.

Lunaties.—The custody of the persons and estates of lunatics, was a power not originally in the crown, but was given to it by statute, for the benefit of the subject. 1 Ridg. P. C. 224. et vid. 2 Inst. 14. And now, by the statute de prerogativâ regis, 17 Edw. II. c. 9 & 10, the king shall have the real estates of idiots to his own use, and he shall provide for the safe keeping of the real estates of lunatics, so that they shall have a competent mainte-
thancery. 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 [*427] in his court of chancery, together with the general protection (c) of all other infants in the kingdom (2). When therefore a fatherless child has no other guardian, the court of chancery has a right to appoint

(c) F. N. B. 27.

nance, and the residue is to be kept for their use. 1 Ridg. P. C. 519. 535.† A liberal application of the property of a lunatic is made to secure every comfort his situation will admit, 6 Ves. 8, without regard to expectants on estate. 1 Ves. J. 297. The power of the chancellor extends to making grants from time to time of the lunatic's estate, and as this power is derived under the prerogative in virtue of the prerogative of the crown, the chancellor, who is usually invested with it, is responsible to the crown alone for the right exercise of it, per Ld. Hardw. 3 Atk. 635. It is said, that since the revolution the king has always granted the surplus profits of the estate of an idiot to some of his family. Ridg. P. C. 519. Appt. note (1).

Charities.—The general controlling power of the court over charities, does not extend to a charity regulated by governors under a charter, unless they have also the management of the revenue, and abuse their trust; which will not be presumed, but must be apparent, and made out by evidence. 2 Ves. J. 42. The internal management of a charity is the exclusive subject of visitatorial jurisdiction; but under a trust as to the revenue, abuse by misapplication is controlled in chancery. 2 Ves. & B. 134.

Executors.—Where an executor has an express legacy, the court of chancery looks upon him as a trustee with regard to the surplus, and will make him account, though the spiritual court has no such power. 1 P. W. 7. And where an executor, who was directed to lay out the testator's personality in the funds, unnecessarily sold out stock, kept large balances in his hand, and resisted payment of debts by false pretences of outstanding demands, he was charged with five per cent. interest and costs, but the court refused to make rests in the account. 1 Jac. & W. 586. And see on this subject, ante, 2 book, ch. 32.

Marshalling Assets.—The testator's whole personal property, whether devised or not, is assets both in law and equity, to which creditors by simple contract, or of any higher order, may have recourse for the satisfaction of their demands. But the testator may, by clear and explicit words, exempt his personality from payment of debts as against the devisee of his realty, though not as against creditors. The rule in equity is, that in case even of a specially debt, the personal assets shall be first applied, and if deficient, and there be no devise for payment of debts, the heir shall then be charged for assets descended. 2 Atk. 426. 434. For lands are in equity a favoured fund, insomuch that the heir at law, or devisee of a mortgagee, may demand to have the estate mortgaged by such deviser himself, cleared out of the personality. Vin. Ab. tit. Heir, U. pl. 35. 1 Atk. 457. And a specific devisee of a mortgaged estate is entitled to have it exonerated out of real assets descended. 3 Atk. 439. 439. But at law there is no such distinction of favour shown to lands; a bond creditor may, if he please, proceed immediately against the heir, without suing the personal representative of his deceased debtor;‡ As to the order in which real assets shall be applied in equity for payment of debts (after exhausting the personal effects, supposing them not exempted), the general rule is, first, to take lands devised simply for that purpose, then lands descended, and lastly estates specifically devised, even though they are generally charged with the payment of debts. 2 Bro. 263.

Equitable assets are such as at law cannot be reached by a creditor, as a devise in trust to pay debts, of an equity of redemption subject to a mortgage in fee, or where the descent is broke by a devise to sell for the payment of debts. 1 Vern. 411. 1 Ch. Ca. 128. n. 2 Atk. 290. But lands so devised, subject to a mortgage for years, are legal assets.

Bankruptcy.—See the consolidation act, 6 Geo. IV. c. 16, commencing its operation with the present year, and the decisions applicable to its several enactments, ante, 2 book, ch. 31, in notes. (2) See in general, ante; 1 book, c. XVI. & XVII. in notes. Also note (1) ante, tit. Infants.

† In New-York, the chancellor is guardian of all the estate of the lunatic and of his person, but exercises this charge solely for the benefit of the lunatic and of his family. (2 R. S. 52, &c.) He may direct to be sold so much of the estate real or personal of the lunatic as may be necessary for payment of his debts, or for his support. Id. 53, § 11, &c.

‡ See, however, now in New-York, 2 R. S. 454, § 42, &c. proceedings against him by creditors can now only be in equity.
PRIVATE WRONGS.

one (3): 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 commenced 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 (4): 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 (c) 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) (5). 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 (6).

3. The king, as parens patriae, 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 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

(3) As to guardian and ward in general, see ante, 1 book, c. XVII in note. Also note (1) ante, tit. INFANTS.

(4) See 1 book, p. 302 to 306. 2 book, p. 291. n. b. Also note (1) ante, tit. LUNATICS.


(6) By stat. 9 Geo. IV. c. 41, s. 41, all persons wheresoever in England, (not keeping licensed houses and not being relatives, or a committee appointed by the lord chancellor) receiving into their exclusive care and maintenance any insane person or persons, or represented or alleged to be insane, are required, under pain of misdemeanor, to have a certificate of insanity, an order for reception of every such person so received after 1st of Au-

gust, 1829, and to transmit copies thereof within five days to the office of metropolitan commissioners in lunacy, to be marked "private return," and also forthwith to give notice of the death or removal of any such person.

And by s. 36 of the same stat. the persons by whose authority any patient shall be delivered into the care of the keeper of any licensed house for the reception of the insane, are, under like pain, required in person, or by some other person appointed in writing under hand and seal, to visit such person once at least every six months during his confinement, and to enter in the journal kept at such houses for registering the visits of the commissioners, the date of such visit.
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 (7).

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) (8). Such causes must be determined in the court of exchequer, as a court of revenue; which alone has power over the king's treasure, and the officers employed in its management: unless where it properly belongs to the duchy court of Lancaster, which hath also a similar jurisdiction 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 (9).

Let us next take a brief, but comprehensive, view of the general nature of equity, as now understood and practised 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 attended 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

---

(7) The summary jurisdiction of the court of equity, in cases of bankruptcy, must be personally exercised by the chancellor, lord-keeper, or the lords commissioners of the great seal. 2 Wood. 400.

(8) Where the rights of the crown are concerned, if they extend only to the superintendence of a public trust, as in the case of a charity, the king's attorney-general may be made a party to sustain those rights; and in other cases where the crown is not in possession, a title vested in it is not impeached, and its rights only incidentally concerned; it has generally been considered, that the king's attorney-general may be made a party in respect of those rights, and the practice has been accordingly. 1 P. Wms. 445. But where the crown is in possession, or any title is vested in it which the suit seeks to divest, or its rights are the immediate and sole object of the suit, the application must be to the king, by petition of right, Reeve v. Attorney-general, mentioned in Penn v. Lord Baltimore, 1 Ves. 445, 446, upon which, however, the crown may refer it to the chancellor to do right, and may direct that the attorney-general shall be made a party to a suit for that purpose. The queen has also the same prerogative. 2 Roll. Abr. 213. Mitf. Tract. on Pleadings in Chan.

(9) The court of chancery in New-York has all the powers above enumerated, except as to bankrupts. See 2 R. S. 173, § 36: 462, § 61, &c.
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 [*430*] and equity *in opposition to each other, will be found either totally erroneous, or erroneous to a certain 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 contemplated 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 devisor (n), although the money was laid out in purchasing the very land; 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. 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 per quam durum est, sed ita lex scripta est* (10).”

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, of the legislator; and others, which may fall within the letter, may be 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:

(l) Lord Kaimis, princ. of equit. 44.  
(m) See book II, ch. 23, pag. 378.  
(n) See book II. ch. 15, page 243, 244. chap. 23, pag. 577.  
(o) Ibid. ch. 14, pag. 208.  
(p) Ibid. pag. 227.  
(q) See pag. 300.  
(r) *Fy.* 40. 9. 12.  
(s) Lord Kaimis, princ. of equit. 177.  
(t) *de aequitate*, 1 3.

(10) These rules no longer exist in New-York: and those as to creditors are removed in England, by 47 Geo. III. ch. 74. sess. 2, See book 2, p. 378.
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 endeavours to fix and adopt the true sense of the law in question; neither can enlarge, diminish, or alter, that sense in a single title.

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 makes 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 a second use, was forced into *the courts of equity in the manner formerly [*432] mentioned (w); and this species of trust, 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 circumstance of every particular case. Whereas the system of our courts of equity is a labourcd 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 a wife her dower in a trust-estate (z), yet allowing the husband his courtesy: 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 *the reference that is shewn, and generally very properly shewn, 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.

(u) 1 Roll. Abr. 374. 4 Inst. 8. 10. Mod. 1.
(v) Book II. ch. 39.
(w) See pag. 163.
(x) This is stated by Mr. Selden (Table-talk. tit. Equity), with more pleasantry than truth. " For Jove, 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 and 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."
(y) 2 P. Wms. 640. See book II. pag. 337.
(z) Salk. 134.
(a) 2 Vern. 389. 316. 3 Atk. 590.
(b) See the case of Foster and Munt, 1 Vern. 473, with regard to the undisposed residues of personal estates.
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 above a century past. The decrees of a court of equity were then rather in the nature of awards, formed on the sudden pro ne nata, with [434] more probity of intention than knowledge of the subject, *found on no settled principles, as never being 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 feodal 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

(d) Quae in summis tribunalibus multi a legum canone decernunt judices, solus ( si res exigitteri co- nubet cancellarius ex arbitrio; nec olter decessit tenetur suae curiae vel sui status, quin, elecente nova ratione, recognoscat quae voluntur; mutet et delet prout sua videbitur prudentiae. (Glos. 108.)
(e) See pag. 54, 55.
(f) Archeion, 71, 72, 73.
(g) ubi supra.
(h) de Ang. Scient. b. 8. c. 3.
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 the statute of 37 Hen. VIII. c. 9, had declared the *debt or loan itself to be “the just and true intent” for [435] 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 & 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 both of them 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 5l. 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 renewal of leases. Both courts will equitably construe, but neither pretends to control or change, a lawful stipulation or engagement.

*The rules of decision are in both courts equally apposite to [436] the subjects of which they take cognizance. Where the subject-matter is such as requires to be determined *secundum aequum 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 “*qua relicta 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 embassadors (m), hostages, or ransom-bills (n) (11). In mercantile transactions they follow the marine law (o), and argue from the usages and

(i) See book II. pag. 456.
(j) 2 Reb. 552. 553. Salk. 597. 6 Mod. 11. 60. 101.
(k) 2 Atk. 239.
(l) De jure naturae cognitare per nos atque dicere debemos; de jure populi Romani, quae relicta sunt et tradita. (Cic. de Leg. I. 3. ad calc.)
(m) See book I. pag. 253.
(n) Ricord v. Bettenham, Tr. 5 Geo. III. B. R.

(11) By the 22 Geo. III. c. 25, all contracts on board, are rendered absolutely void. Not for the ransom of a captured ship, or the goods so in U. S.
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 [*437] lent, and the form and effect *of a trust or second use; upon these main pillars hath been gradually erected 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 (12).

(pg) See book II. pag. 513.
(qg) Ibid. 504.
(r) Ibid. 463.
(s) 1 Chan. Cas. 57.
(t) 2 P. Wms. 145.
(u) 2 Chan. Cas. 152.
(v) 1 Equ. Cas. abr. 367.
(w) 2 Vern. 277.
(x) Ibid. 638.
(y) 2 Chan. Cas. 40.

(12) One material difference between a court of equity and a court of law as to the mode of proof, is thus described by Lord Chancellor Eldon: "A defendant in a court of equi-
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) (13) 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. 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 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 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 (k), a court of equity holds plea of all debts, incumbrances, and charges, that may affect it or issue thereout.

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 deter-

(5) Eqn. Cas. abr. 16.
(6) 3 P. Wms. 215.
(7) 1 Ch. Rep. 14.; 2 Chan. Cas. 32.
(c) 1 Vern. 308. Prec. Chan. 261. 1 P. Wms. 672. Str. 404.
(13) 2 P. Wms. 156.
(14) 1 Vern. 32. 1 P. Wms. 239.
(15) 1 Vern. 237.
(16) 2 Vern. 84.
(17) 1 Eqn. Cas. abr. 337.

(13) It is not correct, that where a court of equity will grant a commission to examine witnesses, whose attendance cannot be procured to give testimony in a court of common law, it will in such case also grant relief. For though it is very usual to file a bill praying a discovery, and that a commission may be issued to examine witnesses who live abroad, no doubt can be entertained that if the bill proceeded to pray relief, and that relief was such as a court of law was fully competent to administer, a demurrer to the bill would hold, unless it was a case where the courts exercise a concurrent jurisdiction.

Vol. II. 46
minations, 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.

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 conveyancing. This is a very ample source of jurisdiction: but the trust is governed by very nearly the same rules, as would govern the

[*440] estate in a court of law (l), 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 (m); 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 (n), 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 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 inconvenience 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 (o), 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 (p), who have successively held the great seat, have by degrees erected the system of relief administered by a court of equity into a regular *science, 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

---

(l) 2 P. Wms. 645, 668, 669.  
(m) See page 433.  
(n) Archeion, 71, 78.  
(o) 2 P. Wms. 655, 656.  
(p) See pages 54, 55, 56.
most effectual rules for attaining those desirable ends. It is a maxim that equity follows the law; and in former days the law had 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 (q) and copyholds) (r) and the forms of administering justice (s), 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 further 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 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 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 (*). The master is to examine the propriety of the [*443]

(9) Gilbert of ejectment, 2. 2 Bac. Abr. 160.  
(r) Bro. Abr. 1. tenant per copie. 10 Litt. § 77.  
(s) See page 300.  
(t) Smith's Commonw. b. 2, c. 12.
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 (14).

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 (15). 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 affidavit, 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 100l. (16). 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 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 wheresoever 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 serjeant at arms in quest of him; and if he eludes the search of the serjeant also, then a se-


(15) An injunction in the court of exchequer stays all further proceedings in whatever stage the cause may be; but in chancery, if a declaration be delivered, the party may proceed to judgment notwithstanding an injunction, and execution is only stayed; but if no declaration has been delivered, all proceedings at law are restrained. 3 Woodd. 411.

(16) As to the practice in New-York, see the rules of the court and the Revised Statutes.
奎斯特遣权 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 process to bring in the 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, [*445] and also clears his contempts by paying the costs which the plaintiff has incurred thereby. 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 court.

The process against a body corporate is by distringas, to distressen 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 subpoena; 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 the service of the subpoena, for then the contempt begins; otherwise he is not presumed to have notice of the bill: and therefore by absconding to avoid the subpoena 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 subpoena, 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 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 shewing, 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 de-
fendant prevails, the plaintiff's bill shall be dismissed: if the demurrer be
over-ruled, the defendant is ordered to answer (17).

A plea may be either to the jurisdiction; shewing that the court has
no cognizance of the cause: or to the person; shewing some disability in
the plaintiff, as by outlawry, excommunication, and the like: or it is in
bar; shewing 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 va-
rious matter, a man may plead as to part, demur as to part, and answer to
the residue. But no exceptions to formal minitiae 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 the plaintiff. This method of proceeding is taken from the
ecclesiastical courts, like the rest of the practice in chancery: for
[*447] there, in almost every case, the plaintiff may demand the oath
of his adversary in supply of proof. 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 purga-
tion, 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 eccle-
siastical 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 dedi-
mus potestatem or commission to take his answer in the country, where the
commissioners administer 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 commis-

(a) En ceu court de chauncerie, home ne sera
prejudice par son meespilleging au par default de forms,
solongue consciens, et nemi ex rigore juris. (Dyverctte
jurisdiction, 50.)

(17) If a demurrer be overruled, the defend-
ant may at the hearing demur ore tenus, though
not where he pleads to the bill. 1 Sim. &
sioners, and that the same has not been opened or altered since he received it. An answer must be signed by counsel, and must either deny or confess all the *material parts of the bill; or it may confess and [∗448] 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 any thing 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 (18).

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 [∗449] reverse; which he is ready to prove as the court shall award; upon which the defendant rejoins, 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 (19). 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 skil-


(19) In New-York, witnesses may be examined before examiners in the presence of the parties and their counsel, and without interrogatories. (2 R. S. 190, § 83.)
ful 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 examination 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.

[*450] *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 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 the costs, even though he contests the will. This is what is usually meant by proving a bill 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 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 party may be subpoena'd 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 cost of attendance, and shews 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

(9) Omichund v. Barker. 1 Atk. 21.
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 (20). 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 the circumstances of the case, as they *appear [*452] 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 assises, 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 5l. with the defendant, that A was heir at law to B; and then avers that he is so; and therefore demands the 5l. The defendant admits the feigned wager, but avers that A is not the heir to B; and thereupon 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 of the parties, to determine some disputed rights without the for-

---

(z) 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 shews a reliance on the truth of the defendant's testimony, and makes the whole of his answer evidence.


(20) It is not now the practice for the registrar to read the minutes of the decree openly in court; but any party to the suit may procure a copy of them, and if there is any mistake, may move to have them amended. But after a decree has been drawn up and entered, no errors in it can be rectified on motion, or by any other proceeding than by rehearing the cause.
mality of pleading, and thereby to save much time and expense in the decision of a cause (21).

So likewise, if a question of mere law arises in the course of [*453] 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 (22), (23); wherein all the material facts are admitted, and the point of law is 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 party'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 [*454] 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.

(21) The consent of the court ought also to be previously obtained, for a trial of a feigned issue without such consent is a contempt, which will authorize the court to order the proceedings to be stayed. 4 T. R. 402.

(22) In New-York, the practice of sending a matter from chancery to a court of law for its opinion, does not prevail.

(23) Formerly, when a case was heard before the master of the rolls sitting in his own court, on which he wished to have the opinion of a court of law, he directed an action to be commenced by the parties in a court of law in such a form, that the question on which he had a doubt might be decided in that suit, and he suspended his decree till the court of law had given its judgment. It appears that the first case sent from the rolls to the king's bench, is in 6 T. R. 313. where lord Kenyon says, "I believe that there is no instance in which this court ever certified their opinion on a case sent here from the master of the rolls. In Colson v. Colson it was refused; but I think it was an idle formality, and I shall feel no reluctance in certifying in such cases, because I think it is convenient to the suitors of that court."
PRIVATE WRONGS.

351

A bill of review (24) 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 in 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 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 chantries, &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.

(e) Lords' Journ. 23 Mar. 1620.
(g) Com. Journ. 19 Nov. 1676, &c.
(h) Show. Parl. C. 61.
(i) Duke's Charitable Uses, 62
(k) Gilb. Rep. 155, 156.

(24) A bill of review is only necessary years. Id. 69. 1 Bro. P. C. 95. 5 Bro. P.
where a decree is signed and enrolled. Mitf. Pl. 71. It cannot be brought after twenty

THE END OF THE THIRD BOOK.
APPENDIX.

No. 1.


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 deforeses 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, \{ \text{John Doe.} \} \text{Richard Roe.}

Sect. 2. Writ of Tolt, to remove it into the County Court.

Charles Morton, Esquire, Sheriff of Oxfordshire, to John Long, Bailiff errant 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 shirehouse 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 deforeses him, hath brought to the said Willoughby, Earl of Abingdon; yet for that the said Willoughby, Earl of Abingdon, 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 Dorchester 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 shirehouse 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 shirehouse, the sixth day of September, in the year aforesaid.

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 Ireland King, Defender of the Faith, and so forth, to the Sheriff of Oxfordshire, greeting. Pursu’d at the request of William Kent, before our justices at Westminster, 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 Richard Allen, tenant, of one messuage and twenty acres of land, with the appurtenances, 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.
APPENDIX.

Sect. 4. Writ of Ricrt, quia Dominus remisit 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 descreses him. And unless he shall so do, and *if* the said William shall give you security of prosecuting his claim, then summon by good sumoners 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.

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 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. Oxon, William Kent, Esquire, by James Parker, his attorney, de
to wit. mands against Richard Allen, Gentleman, one messuage and twenty acres of land, with the appurtenances, in Dorchester, as his right and inheritance, by 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 hereupon he saith, that he himself was seised 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 valuet [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, and his seisin, when [and where it shall behave 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 befal 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 seised 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;

† 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.
APPENDIX.

and if any mischance should befal 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 battel, 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 anything 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; 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 battel 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 battel aforesaid, as they had 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 Tophill, 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 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 battel aforesaid, and that their bodies in the mean time, &c. At which day here, to wit, at Tophill 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, to make the battel 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, for ever, &c.

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 seised 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 Allen, to make recognition of the grand assize aforesaid. THEREFORE it is commanded 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 Wheler, 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 Kirby, 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. THEREFORE it is considered, 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 for ever: and the said Richard Allen in mercy, &c.

Proceedings on an Action of Trespass in Ejectment, by Original, in the King’s Bench.

Sect. I. The Original Writ.

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.
APPENDIX.

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.

Herks, | William Stiles, late of Newbury in the said county, gentle-

man, was attached to answer Richard Smith, of a plea, where-

fore with force and arms he entered into one messuage, with the appur-

tenances, 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 com-
plete and ended, by virtue of which demise the said Richard entered 
into the said tenement, with the appurtenances, and was thereof possess-
ed; and the said Richard being so possessed thereof, the said William 
thereafter, 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, 
stakes, and knives, entered into the said tenement, with the appurten-
ances, 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.

Mr. George Saunders,

I am informed that you are in possession of, or claim title to, the pre-

mises 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 Ma-

jesty's Court of King's Bench at Westminster, by some attorney of that 
Court, and there 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 posses-

sion.

Your loving friend,

William Stiles.

5th January, 1756.

Sect. 3. *The Rule of Court.*

Hilary Term, in the twenty-ninth Year of King George the Second.

Herks, | It is ordered by the Court, by the assent of both parties, and 
to wit. their attorneys, that George Saunders, Gentleman, may be made 
defendant, in the place of the now defendant, William Stiles, and shall 
immediately appear to the plaintiff's action, and shall receive a declara-
tion in a plea of trespass and ejectment of the tenements in question, and 
shall immediately plead thereto Not Guilty: and, upon the trial of the 
issue, shall confess lease, entry, and ouster, and insist upon his title only. 
And if upon the trial of the issue, the said George do not confess lease, 
entry, and ouster, and by reason thereof 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 of 
Vol. II. 48
our Lord the King here shall be taxed and adjudged, for such his default in non-performance of this rule; and judgment shall be entered against the said William Stiles, now the casual ejector, by default. And it is further ordered, that if upon the trial of the said issue a verdict shall be given for the defendant, or if the plaintiff shall not prosecute his writ upon any other cause than for the not confessing lease, entry, and ouster as aforesaid, then the lessor of the plaintiff shall pay costs, if the plaintiff himself doth not pay them.

By the Court.

Martín, for the plaintiff,

Newman, for the defendant.

Sect. 4. The Record.

Plea 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, gentleman to wit, man, was attached to answer Richard Smith, of a plea, wherefore with force and arms he entered into one messuage, with the appurtenances, in Sutton, 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 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 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 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, [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 be heave him;] and saith that he is in no wise guilty of the trespass and ejectment aforesaid, as the said 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. Afterwards 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, 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 assises in the county aforesaid, shall have come before that time, to wit, on Monday the eighth day 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 *assise, before whom [the jury aforesaid came,] sent here their record before them, had in these words, to wit. Afterwards, at the day and place within contained, before Henage Legger, Esquire, one of the Barons of the Exchequer of the Lord the King, and Sir John Eardley 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 assises in 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 that jury; and because the rest of the jurors of the same jury did not appear, therefore others of the by-standingers 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 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 understood, 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. And let the said George be taken, until he maketh...
APPENDIX.

No. II. Write of possession, and return.

"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.

[*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.

Præcipe.

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 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 so do, 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 whereof 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.

Sheriff's return.

Pledges of prosecution.

{John Doe.}

{Richard Roe.}

Summoners of the within named

{Charles Long.}

{Roger Morris.}

{Henry Johnson.}

Sect. 2. Process.

Attachment.

Pone.

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. 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 whereof 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 Wille, Knight, at Westminster, the twenty-third day of January, in the twenty-eighth year of our reign.

Sheriff's return.


is attached by Pledges, Robert Tanner.

Distinguias.

[*xiv] 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 distress Charles Long, late of Burford, 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 issues of the same; and that you have his body before our justices at Westminster from

† Now omitted. See page 398.
APPENDIX.

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.

"The within named Charles Long hath nothing in my bailiwick, whereby he may be distreined.

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.

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 at 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.

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 Outlavery: thus:

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 there then this writ. Witness, Sir John Willes, Knight, at Westminster, the seventh day of May, in the twenty-eighth year of our reign.

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
APPENDIX.

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 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 thirtyieth day of May, in the twenty-eighth year of our reign.

The within named Charles Long is not found in my bailiwick.

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 July 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.

George the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the Sherif 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 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: 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.

*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 there then this writ.

WITNESS, Sir John Willes, Knight, at Westminster, the eighteenth day of June, in the twenty-eighth year of our reign.

APPENDIX.

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-sixth day of June, in the twenty-ninth year of the reign of the Lord the 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.

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 justices 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.

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.

Middlesex, the Sheriff is commanded that he take Charles Long, late of Burford, in the county of Oxford, if he may be found in his bailiwick, and him safely keep, so that he may have his body before the Lord the King at Westminster, on Wednesday next after fifteen days of Easter, to answer 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 the King, before the King himself to be exhibited; and that he have there then this precept.

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. 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

† Note, that sect. 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 that of the Court of Common Pleas; the subsequent stages of proceeding being nearly alike in them all.
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.

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 hundred 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 saith 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.

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.

Sect. 5. Special Bail, on the Arrest of the Defendant, pursuant to the Testatum Capias, in page xiv.

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.

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.

Sealed and delivered, being first duly stamped, in the presence of [signature]

CHARLES LONG. (L. S.)
PETER HAMOND. (L. S.)
EDWARD THOMLINSON. (L. S.)

HENRY SHAW.
TIMOTHY GRIFFITH.

Recognizance 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.

Trinity Term, 28 Geo. II.

**Bail piece.**

**Sect. 6. The Record, as removed by Writ of Error.**

The Lord the King hath given in charge to his trusty and beloved Sir John Wixles, 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 Wixles, 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 ourselves at Westminster, the twelfth day of February, in the twentieth year of our reign.

The record and process whereof in the said writ mention above is made, follow in these words to wit:—

**Chief justice's return.**

**The record.**

Please at Westminster before Sir John Wixles, 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.**

Oxon, Charles Long, late of Burford in the county aforesaid, Gentleman, was summoned to answer William Burton, of Yar...
APPENDIX.

Declaration, or count, on a bond.

[ *xxii ]

*Præfert in cura.*

Defence.

Oyer prayed of the bond and condition, etc. to perform an award.

Imparliance.

Continuance.

[ *xxiii ]

Plea; No such award.

Replication, setting forth an award.

In the said 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 and 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 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. And the aforesaid Charles, by Richard Price his attorney, comes and defends the force and injury when [and where it shall behave 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, fulfill, 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." Whence being read and heard, the said Charles prays leave to impair 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 come 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 aforesaid 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 beforenamed 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 excluded 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 Wytham, 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 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 causes 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 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.

APPENDIX.

And because the justices here will advise themselves of and upon the premises before they give judgment thereupon, a day is thereupon given to the parties aforesaid here, until the Morrow of All Souls, 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 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 Saint 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. Wherefore, 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 suffi-
APPENDIX.

No. III.

Judgment for the defendant.

General error assigned.

Writ of Scire facias, to hear errors.

Sheriff's return; Scire faci.

Error assigned afresh.

Rejoinder; In nullo est erratum.

Continuance.

Opinion of the court.

In certain in law, to have and maintain the action of the aforesaid William against the aforesaid Charles; therefore it is considered, 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 there-of without a day, &c. And it is further considered, that the aforesaid Charles do recover against the aforesaid William, eleven pounds and seven shillings, for his costs and charges by him about his defence 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.

Afterwards, 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 said, 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. And 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 men of his bailiwick] 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 this behalf:] The same day is given to the aforesaid William Burton. At which time 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. Whereupon 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. And 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. And because the court of the Lord the King here is not yet advised what judgment to give of and upon the premises, a day is thereof 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 their attorneys aforesaid: Whereupon, 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, 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 his 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.

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.

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.

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 there then this writ. Witness, Sir Thomas Denison, Knight, at Westminster, the nineteenth day of June, in the twenty-ninth year of our reign.

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.

† The senior puisne justice; there being no chief justice that term.
COMMENTARIES ON THE LAWS OF ENGLAND.

BOOK THE FOURTH.
OF PUBLIC WRONGS (1).

CHAPTER I.
OF THE NATURE OF CRIMES, AND THEIR PUNISHMENT.

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, [ *2 ] the several species of crimes, 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 misdemeanour.

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).  

(a) Book III. ch. 1.  

In the U. S. the several states enact nearly all the criminal laws. Congress passes such as relate to the laws of nations, and as are necessary to enforce its powers under the constitution.
The knowledge of this branch of jurisprudence, which teaches the nature, extent, and degrees of every crime, and adjusts it to 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 (e) 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 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 willful 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 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 [ *4 ] arbitrary; where all our accusations are public (2), and our *trials in the face of the world; where torture is unknown, and 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

---

(c) Sir Michael Foster, pref. to rep.  (d) Baron Montesquieu, marquis Beccaria, &c.

(2) Some of the proceedings prior to an indictment must be, others may be, private: after that period they are public.
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 fishpond, whereby any fish shall escape; or to cut down a cherry-tree in an orchard (f) (3). Were even a committee appointed but once in an 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 one month in the company of persons who call themselves, or are called, Egyptians (g) (4).

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. 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 misdemeanour, 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 names of "misdemeanors" only (5), (6).

(e) See Book II. p. 335.
(f) Stat. 9 Geo. I. c. 22. 31 Geo. II. c. 42.
(g) Stat. 5 Eliz. c. 20.

(3) The two Acts inflicting this severe punishment are repealed, as far as regards the benefit of clergy, by 4 Geo. IV. c. 54, § 1 and 2; and the offender or offenders, together with their accessories, are liable, at the discretion of the court, to be transported or imprisoned. And see still more recent enactments with respect to these offences, in 7 and 8 Geo. IV. c. 30, § 15, 19, and 20; post 232, 234, and 246.

(4) The 5 Eliz. c. 20, which introduced this crime and its severe punishment, is repealed by the 23 Geo. III. c. 51. Also the 1 & 2 Ph. & M. c. 4, as far as it made it a capital felony for gypsies to remain one month in England,

is repealed by 1 Geo. IV. c. 116.

(5) In the English law, misdemeanour is generally used in contradistinction to felony, and misdemeanors comprehend all indictable offences which do not amount to felony; as perjury, battery, libel, conspiracies, attempts and solicitations to commit felonies, &c.

(6) By the Revised Statutes of New-York, "felony," or "infamous crime," when used in a statute, includes every offence punishable with death or imprisonment in a state prison: "crime," or "offence," includes every offence punishable criminally. 2 R. S. 702. But by the amendments to those statutes, the adjec-
The distinction of public wrongs from private, of crimes and misdeme-
nors 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 com-
community, in its social aggregate capacity. As if I detain a field from an-
other 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, be-
sides 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 es-
cape with impunity (7).

In all cases the crime includes an injury; every public offence is also a
private wrong, and somewhat more; it affects the individual, and

[ *6 ]

it likewise 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 prin-
cipally tends to the dissolution of government, and the destruction thereby
of the order and peace of society, this denominates it a crime of the high-
test "felonious" and "criminal," and the ad-
verbs "feloniously" and "criminally," are made
 synonymous. 3 R. S. App. p. 158.

(7) The distinction between public crimes
and private injuries seems entirely to be creat-
ed by positive laws, and is referable only to
civil institutions. Every violation of a moral
law, or national obligation, is an injury, for
which the offender ought to make retribution
to the individuals who immediately suffer from
it; and it is also a crime for which he ought
to be punished to that extent, which would
deter both him and others from a repetition of
the offence. In positive laws those acts are
denominated injuries, for which the legisla-
ture has provided only retribution, or a com-
penation in damages: but when from expe-
rience it is discovered that this is not sufficient
to restrain within moderate bounds certain
classes of injuries, it then becomes necessary
for the legislative power to raise them into
crimes, and to endeavour to repress them by
the terror of punishment, or the sword of the
public magistrate. The word crime has no
technical meaning in the law of England. It
seems, when it has a reference to positive law,
to comprehend those acts which subject the
offender to punishment. When the words high
crimes and misdemeanors are used in prosecu-
tions by impeachments, the words high crimes
have no definite signification, but are used
merely to give greater solemnity to the charge.
When the word crime is used with a reference
to moral law, it implies this is not sufficient from
moral rectitude. Hence we say, it is a crime
refuse the payment of a just debt: it is a

† This has now been done. By 7 and 8
Geo. IV. c. 30, § 17, "if any person shall un-
alloyedly and maliciously set fire to any crop of
corn, grain, or pulse, whether standing or cut
down, every such offender shall be guilty of

felony, and be liable to be transported for seven
years, or to be imprisoned not exceeding two
years; and, if a male, to be once, twice, or
thrice, publicly or privately whipped."
est 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 alone 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 (8), (9). 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 (10); 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 (11). 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 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 (12).

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

(8) The civil right to sue for the injury the party has received in a case of felony is not in general merged or destroyed, but only suspended, until he has performed his duty to society, by an endeavour to bring the offender to justice; and after the party on whom suspicion was fixed has been convicted or acquitted, without collusion, the prosecutor may support an action for the same cause as that on which the criminal prosecution was founded. Styles, 346. 12 East, 409. Rep. T. Hardw. 350. 17 Ves. 399. No action can be brought, or bill in equity filed, in relation to a felony, until the offender has been duly tried for the offence, id. ibid.; or that every exertion has been made to bring him to justice. See further on this point, ante, 3 book, 119. note.

(9) In New-York, stolen property in the possession of any officer, is to be returned to the owner on his paying the expenses incurred in its preservation, at any time within six months after the conviction of the offender, or before such conviction. If not claimed in that time, it is applied to the use of the poor. (2 R. S. 746, 747.) If in possession of any other person, it may be claimed the same as any other property. Any person injured by a felony for which the offender is committed to the state prison, can recover damages in a suit against the trustees of the felon's estate. (Id. 700.)

(10) See 6 East, 158.

(11) The court of Common Pleas will not compel a party who has proceeded both by indictment and action for the same assault, to make his election upon which he will rely. Jones v. Clay, 1 Bos. & Pul. 191; and, though it was formerly held, that in general, if the party moved for a criminal information, he must abandon any action, that doctrine seems to have been broken in upon by a very recent case in the court of King's Bench, Caddy v. Barlow, 1 Man. & Ryl. 275, where it was held in an action by A. for the malicious prosecution by C. of an indictment against A. and B., and that a rule for a criminal information obtained by A., and made absolute, was no bar to the action. See also the note to that case, Id. 278.

(12) 6 East, 159. See cases of actions, ante, 3 book 220, note.
every breach and violation of those laws, which the sovereign power has thought proper to establish for the government and tranquillity 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 misbehaviour in those, to regulate 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 law 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 *8] vested in all mankind; *since all 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, [ *9 ] Which has *occasioned some to doubt, how far a human le-

gislature 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 infringement 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 (13).

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 death that commits it. *It [ *10] 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 never can follow them 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 Russians 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 adminis-

(i) Gen. ix. 6.  
(m) Book H. c. 1.  
(n) 1 Hal. P. C. 13.

(13) It is strange that the learned Judge’s conclusion, viz. that theft itself is not an offence against natural rights, did not lead him to suspect the fallacy of the position, that the right of property owes its origin not to the law of nature, but merely to civil society, which he has also advanced in a former book, (2 book, p. 11.) and which I have there presumed to controvert. If theft be not a violation of the law of nature and reason, it would follow that there is no moral turpitude in dishonesty. “Non igitur magis est contra naturam morbus aut cestas aut quid hujusmodi quam detractio aut appetitio alieni.”—Cic. Thou shalt not steal, is certainly one of the first precepts both of nature and religion.
tration, inflicted the penalty of death: and the latter has, upon full pursu-
sion of its being useless, nay even pernicious, given orders for abolishing it
tirely throughout her extensive dominions (o). But indeed, were capi-
tal 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 expediens 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 never justify such a law to the dictates
[ *11 ] of conscience and humanity. 'To shed the blood of our fellow-
creatures 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 express-
ly 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 principle 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 in-
flexed: or, by deterring others by the dread of his example from offending
in the like way, "ut poena (as Tully (p) expresses it) ad paucos, metus ad
omnes, perveniat;" which gives rise to all ignominious punish-
[ *12 ] ments, and to such executions of justice as are open and public: *or,
lastly, by depriving the party injuring of the 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 offended himself be amended by wholesome correction, or whether he
be disabled from doing any farther harm: and if the penalty fails of both
these effects, as it may do, still the terror of his example remains as a warn-

(o) Grand instructions for framing a new code

(p) Pro Cunctio, 46.
ing 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 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 will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished by 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 expiration, 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 (*14*). But the reason upon which


(*14*) Is it possible that the commentator meant to flatter an audience of the sons of no-
this sentence is grounded seems to be, that this is the highest
[ 14 ] 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 irreparable, that of the guilty is fu-
ture, 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 villany 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 imprisoned informer.
Accordingly, when it was once attempted to introduce into England the
law of retaliation, it was intended as a punishment for such only as pre-
ferred malicious accusations against others; it being enacted by statute 37
Edw. III. ch. 18. that such as preferred any suggestions to the king's great
council should put in sureties of retaliation; that is, to incur the same pain
that the other should have had, in case the suggestion were found untrue.
But, after one year's experience, this punishment of retaliation was rejected,
and imprisonment adopted in its stead (s).

But though from what has been said it appears, that there
[ 15 ] cannot be any regular or determinate method of rating the *quant-
tity of punishments 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 the circum-
stances 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 in-
jury, 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 till the last stage of any crime, that it never is 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

(b) Beccar. c. 15. (c) Stat. 38 Edw. III. c. 9.

blemen by intimating that it was a less crime
to kill a poor old man, than to kill a nobleman
even in the bloom of youth? In the eye of
every sound moralist there can be no differ-
ence.
less penal than the actual robbery, rape, or murder. But in the case of a reasonable 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 reasonable 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, [*16] the place, the company wherein it was committed; all these, and a thousand other incidents, may aggravate or extenuate the crime (*).

Farther: 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 animadverta tenda poecatatamaxime, quae difficillime praeceventur." 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 (15); 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 (16); 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 an horse or an 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 a 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 distinctions of severity. It is the sentiment of [*17]

(4) Thus Demosthenes (in his oration against Midias) finely works up the aggravations of the insults he had received. "I was abused," says ye, "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, whether the duty of my office called me."

(u) Beccar. c. 6.

(v) pro Sezio Roscio. 40.

(15) This is no longer law: By 9 Geo. IV. c. 31, § 2, repealing 25 Ed. III. st. 5, c. 2, respecting petit treason, it is enacted, "that every offence which before the commencement of that Act would have amounted to petit treason, shall be deemed to be murder only; and no greater offence; and that all persons guilty in respect thereof, whether as principals or accessories, shall be dealt with, indicted, tried and punished as principals and accessories in murder." See 1 Hawk. P. C. 6th edit. 105. 5 Burn's J. last edit. 551; post 75, 203.

(16) This is altered by 7 and 8 Geo. IV. c. 29, § 6, which enacts, "that if any person shall steal any chattel, money, or valuable security from the person of another, or shall assault any other person with intent to rob him, or shall with menaces or by force demand any such property of any other person with intent to steal the same, he shall be guilty of felony, and liable to be transported for life, or for not less than seven years, or to be imprisoned for not exceeding four years; and, if a male, to be once, twice, or thrice, publicly or privately whipped."
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 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 deccemviri, 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 (17).

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 ultimun supplicium, to every case of difficulty. It is, it must be owned, much easier to extirpate than to amend mankind: yet [*18] *that magistrate must be esteemed both a weak and a cruel surgeon, who cuts off every limb, which through ignorance or indolence he will not attempt to cure. It has been therefore ingeniously proposed (z), 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

(z) Beccar. c. 7. (y) Sp. L. b. 6; c. 13.

(17) The most admirable and excellent statute ever passed by the English legislature is the 1 Edw. VI. c. 12. In the preamble it states, in a beautiful and simple strain of eloquence, that "Nothing is more godly, more sure, more to be wished and desired betwixt a prince, the supreme head and ruler, and the subjects whose governor and head he is, than on the prince's part great clemency and indulgence, and rather too much forgiveness and remission of his royal power and just punishment, than exact severity and justice to be shewed; and on the subjects' behalf, that they should obey rather for love, and for the necessity and love of a king and prince, than for fear of his strait and severe laws. But as in tempest or winter one course and garment is convenient, in calm or warm weather a more liberal case or lighter garment both may and ought to be followed and used; so we have seen divers strait and sore laws made in one parliament (the time so requiring), in a more calm and quiet reign of another prince by the like authority and parliament taken away," &c. It therefore repeals every statute which has created any treason since the 25 Edw. III. st. 5. c. 2. It repeals "all and every act of parliament concerning doctrine or matters of religion." It repeals every felony created by the legislature, during the preceding long and cruel reign of Henry VIII. It repeals the statute 31 Hen. VIII. "that proclamations made by the king's highness, by the advice of his honourable council, should be made and kept as though they were made by authority of parliament." It repeals also the extraordinary statute de bigamis, 4 Edw. I. st. 3. c. 5, which enacted, that if any man married a widow, or married a second wife after the death of the first, he should be deprived of the benefit of clergy, if he was convicted of any clerical felony whatever.
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 (18). 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 or 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 assassinatfon 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 other words, to be worthy of instant death (19). So dreadful a list, instead of diminishing, increases the number of offenders. *The injured through compassion, will often forbear to [ *19 ] 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 the 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.

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, (a) Sp. L. b. 6, c. 10. (b) See Kuffhead's index to the statutes (tit. Fe-

(18) This is not now the law of France. By the present Criminal Code, founded on the Code Napoleon, robbery without murder has ceased to be a capital offence. And the result mentioned by the learned judge has ceased also; nothing is more common now than instances of robberies without murder, in France.

(19) Many of these rigorous Acts, through the well ascertained policy and humanity of the legislature, have lately been repealed, and milder punishments have been substituted. Throughout the United States generally the criminal code has been a subject of great attention, and has been much ameliorated.
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 actions either praiseworthy or culpable. Indeed, to make a complete crime cognizable by 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 consents 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; 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 discretion is, in various nations, is matter of some variety. The civil law

(a) 1 Hawk. P. C. 2.
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 ætias infantiae proxima; from ten and an half to fourteen was ætias pubertati proxima. During the first stage of infancy, and the next half stage of childhood, infantiae 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 capitably, 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 till 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 others to commit), for these an infant, above the age of fourteen, is equally liable to suffer, as a [23] person of the full age of twenty-one.

With regard to capital crimes, the law is still more minute and circum-spect; 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 ætias 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 primis 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. 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 killed, which hiding manifested a consciousness of guilt, and a discretion *to discern between [24]

(b) Inst. 3. 20. 10.  
(c)  
(d) 1 Hal. P. C. 20, 21, 22.

(e) LL. Athelstan. Wilk. 65.  
(f) Mir. c. 4, § 16. 1 Hal. P. C. 27.  
(g) Dalt. Just. c. 147.
good and evil (e). And there was an instance in 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 (h). 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 (i). 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 (1), (2).

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 furere solum punitur." In criminal cases therefore idiots and lunatics are not chargeable for their own acts, if committed when under these capacities: no, not even for treason itself (k) (3). 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

(e) 1 Hal. P. C. 26, 27.
(k) Emlen on 1 Hal. P. C. 25.
(h) Foster, 72.
(1) 3 Inst. 6.
(2) By 2 R. S. 701. Any person under sixteen years of age convicted of any felony, instead of being sentenced to imprisonment in a State Prison may be sent to the house of refuge for the reformation of juvenile delinquents in the city of New-York.
(3) Where an act is made felony or treason, it extends as well to infants, if above the age of fourteen as to others, see Co. Lit. 247. Hal. Hist. P. C. 21, 22; and this appears by several acts of parliament, as by 1 Jac. I ch. 11, of felony for marrying two wives, where there is a special exception of marriages below the age of consent; which in females is twelve and males fourteen: so that if the marriage were above the age of consent, though within the age of twenty-one years, it is not exemped from the penalty. See Bing. on Inf. 99. 100. So, by the 21 Hen. VIII c. 7, concerning felony, by servants that embezzle their masters’ goods delivered to them, there is a special proviso that it shall not extend to servants under the age of eighteen, who certainly would have been within the penalty, if above the age of fourteen, though under eighteen years, unless thus excluded by a special proviso, Hale Hist. P. C. 22. So, the 12 Ann. c. 7, for punishing robberies in dwelling-houses excepts apprentices under the age of fifteen, who shall rob their masters, from the act.
(3) It is not every frantic and idle humour of a man that will exempt him from justice, and the punishment of the law. When a man is guilty of a great offence, it must be very plain and clear before he is allowed such an exemption on the ground of lunacy; therefore, it is not something unaccountable in a man’s actions, that points him out to be such a madman as is to be exempted from punishment. It must be a man that is totally deprived of his understanding and memory; one who doth not know what he is doing any more than an infant, or a wild beast; it is only such a one who is never the object of punishment. 16 How. St. Tr. 764. If there be a total want of reason, it will acquit the prisoner; if there be an absolute temporary want of it, when the offence was committed, it will acquit the prisoner; but if there be only a partial degree of insanity, mixed with a partial degree of reason, not a full and complete use of reason (as Lord Hale carefully and emphatically expresses himself), by a competent use of it, sufficient to have restrained those passions which produce the crime; if there be thought and design, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil, then upon the fact of the offence proved, the judgment of the law must take place. Per Yorke, Solicitor Gen, in Lord Ferrer’s case, 19 How. St. Tr. 947, 8, et per Lawrence, J., 3 Burn J. 24. ed. 312, 3.
becomes of nonsane memory, execution shall be stayed: for peradventure, 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) (4). Indeed, in the bloody reign of Henry the Eighth, a statute was made (m), which enacted, that if a person, being composit 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 & 2 Ph. & M. c. 10. For, as is observed by Sir Edward Coke (n), "the execution of an offender is for example, ut poena ad pauco, metus ad omnes perveniatur: but so it is not 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 compors or not, this shall be tried by a jury (5). 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 (6). 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 recovered their senses (p), without waiting for the forms of a commission or other special authority from the crown:

(4) See accordingly, 2 R. S. 697, 698: and for the mode of trying the question of insanity after sentence, see id. 638.
(5) The most of the previous Acts are now repealed by 9 Geo. IV. c. 40, which enacts, in section 36, that justices at their petty sessions, held next after the 15th day of August in every year, shall call upon the overseers to make returns of insane persons, under a penalty of 16l. for neglect.
Section 38 authorizes the justices of the peace to call upon the overseers to bring any poor person deemed to be insane before two justices, who, upon due examination, may cause the party to be sent to the lunatic asylum or licensed house, and make an order for his allowance: no person to be removed, unless under a justice's order, or, when cured, overseers are to deliver to the keeper a certificate of examination.
By section 44, persons wandering about, deemed to be insane, though not chargeable, two justices may make an order for maintenance, as in cases of persons actually chargeable. If the estate of the party shall be sufficient, overseers may recover their expenses by levy.
By section 53, persons convicted of any offence becoming insane whilst under imprisonment, may be removed by an order of the Secretary of State to any county asylum;  
† As to the form and extent of such orders, see Rex v. Maulden, 2 M. and R. and, if they should recover before the time of their imprisonment shall have expired, they may be remanded to prison; so, if their imprisonment shall have expired, they are to be discharged.
By section 56, the visitors of county asylums are directed to prepare annual reports of the patients confined therein, and to furnish the Secretary of State, and the Clerk to the Commissioners, under 9 Geo. IV. c. 41, with a copy.
Vide also 9 Geo. IV. c. 41, intituled "An Act to regulate the Care and Treatment of Insane Persons in England;" which, by section 21, makes it a misdemeanour in the keeper or other superintendent of any licensed house concealing any insane person from the inspection of the commissioners or visitors.
An idiot, or person born deaf and dumb, or any one who is non compos at the time, cannot be an approver. H. P. C. 282, § 5, vol. 2. But, if he who wants discretion, commit a trespass against the person or possession of another, he shall be compelled in a civil action to give satisfaction for the damage. Id. vol. 1 and 3, § 5. 3 Bac. Abr. 131. So he who invites a madman to commit murder, or other crime, is a principal offender, and as much punishable as if he had done it himself. Id. 4, § 7. 1 Hale, 647.  
See also 10 Geo. IV. c. 18.
and now, by the vagrant acts (q), a method is chalked out for imprisoning, chaining, and sending them to their proper homes (7).

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 than as an excuse for any criminal misbehaviour. A drunkard, says sir Edward Coke (r), who is volunta rius daemon, hath no privilege thereby; but what hurt or ill soever he doth, his drunkenness doth aggravate it: nam omne crimen ebrietos, 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 wantomness 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 delapsitis 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).

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 (x) happens to follow from the performance of a 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 (z) (8).

(q) 17 Geo. II. c. 5.
(r) 1 Inst. 247.
(s) Sp. L. b. 14, c. 10.
(t) Puff. L. of N. b. 8, c. 3.
(u) 49. 16. 6.
(v) Ploff. 19.
(w) 1 Hal. P. C. 39.
(x) 1 Hal. P. C. 60.
(y) 1 Hal. P. C. 601.
(z) 2 Hal.

P. C. 475.

A person committing or attempting a trespass, or other injury to private rights or property, and while so doing involuntarily killing another, is guilty of manslaughter in the third degree, and punishable with imprisonment for not more than four nor less than two years; (2 R. S. 601) if the killing were by one actually committing felony, it seems to be murder. (Id. 657).
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 housebreaker 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 (e) (9).

VI. A sixth species of defect of will is that arising from compulsion and inevitable necessity. These are a 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 [ *28 ] subjection, whereby the inferior is constrained by the superior to act contrary 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 to religion or sound morality. How far this excuse will be admitted in foro conscientiae, 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 ashes of its merciless sister, persecution.

(y) Cro. Car. 588.
(z) Fy. 22. 6. 9.

(9) "Ignorance of the law, which every man is bound to know, excuses no man." It may be a ground for pardon. Rex v. Bailey, R. and R. C. C. 1. The rule is borrowed from the civil law, (D. lib. 22, tit. 6,) without, however, adopting with it those equitable modifications by which the rule was originally accompanied, some of which it may be proper to state. "Juris ignorantia non proest adquirere volentibus, suum errorem patentibus non nocet," D. 22, 6, 7; or, as it is expressed by the commentators, "Juris error, ubi de damno evitando agitur, non nocet: uti de lucre capiendo, nocet: error facti neutro casu nocet." "Minoribus 25 annis jus ignorare permissum est: quod et in feminis in quibusdam causis propter seriem infirmitatem dicitur; et ideo, sicubi non est delictum, sed juris ignorantia, non sedendantur." D 22, 6, 9. And see Pothier, Traité de l’Action, Condéctio indebiti, part 2, sect. 2, art. 3. In Vernon's case, Mich. 20 Hen. VII. fo. 2, pl. 4, the defendants justified taking away the plaintiff's wife, on the ground that they were accompanying her to Westminster, to sue for a divorce in case of her conscience. It was objected to the plea, that the defendants ought to have taken her to the ordinary or the metropolitan; but the plea was held good, "for perhaps they had not knowledge of the law so as to where the divorce should be sued." And see Manser's case, 2 Co. Rep. 4; Doctor and Student, book 2, cap. 46, 47; Bichetton v. Le Maître, 2 Willis, 369.

To prevent the ignorance of a recent act from injuring a party, the act does not take effect in New-York till twenty days after it is passed, unless there be a special provision to the contrary. 1 R. S. 157, § 12.
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; 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. 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 *maia in se,* and prohibited by the law of nature, as murder and the like (11): 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: as well because of the odiousness and dangerous consequences of the crime itself, as because the husband, having broken through the most sacred tie of social community by rebellion against the state, has no right to that obedience from a wife, which he himself 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) (12). And in all cases, (10) The husband, however, must be present when the offence is committed, or the presumption of coercion by him does not arise. *Rex v. Morris,* R. and R. C. C. 270. The wife is not treated as an accessory to a felony for receiving her husband who has been guilty of it, though, on the contrary, it appears the husband would be for receiving his wife. H. P. C. vol. 1, § 10, 1 Hale, 44. And if an offence be committed by the wife alone, without the husband's concurrence, she may be punished by way of indictment, without him. Id. and see Moor, 813. (11) The law seems to protect the wife in all *felonies* committed by her in company with her husband, except murder and manslaughter. Hal. P. C. 47. (12) In all *misdemeanors* it appears that the wife may be found guilty with the husband. It is said, the reason why she was excused in burglary, larceny, &c. was because she could not tell what property the husband might claim in the goods. 10 Mod. 63. & 335. But the better reason seems to be, that by the ancient law the husband had the benefit of the clergy, if he could read, but in no case could women

(b) 1 Hawk. P. C. 3.  
(c) 1 Hal. P. C. 45.  
(d) cap. 57.  
(e) Stiernh. de jure Sueon. l. 2, c. 4.  
(f) 1 Hal. P. C. 47.  
(g) 1 Hawk. P. C. 2. 3.
where the wife offends alone, without the company or coercion of her husband, she is responsible for her offence, as much as any female.

2. Another species of compulsion or necessity is what our law [30] calls duress per minas (a); 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) (13). 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 obliges 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 the necessity of choosing one, he chooses the "least pernicious of the two. Here the will cannot be said freely [31] 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 (14). For the preservation of the peace of the kingdom, and the apprehending of notorious malefactors, are of the utmost consequence to the public; and therefore excuse the felony, which the killing would otherwise amount to (n).

4. There is yet another case of necessity, which has occasioned great speculation among the writers upon general law; viz. whether a man in ex-

(a) See Book I. p. 391.
(b) See Book I. p. 391.
(c) L. 2, f. 16.
(d) F. 4, 2, 5 & 6.

have that benefit; it would therefore have been an odious proceeding to have executed the wife, and to have dismissed the husband with a slight punishment: to avoid this, it was thought better that in such cases she should be altogether acquitted; but this reason did not apply to misdemeanors.

(13) The fear of having houses burnt, or goods spoiled, is no excuse in the eye of the law, for joining and marching with rebels.

The only force that doth excuse, is a force upon the person, and present fear of death; and this force and fear must continue all the time the party remains with the rebels. It is incumbent upon men, who make force their defence, to shew an actual force, and that they joined pro timore mortis, et reecesserunt quan citat potesturum. Post. 14. 216.

(14) See 2 R. S. 660.
treme want of food or cloathing 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 citizens: 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 "suum 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 thief steal to satisfy his soul when he [ *32 ] is hungry, he shall restore *seven-fold, and 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. This 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 undistinguishable 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 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 (e); which will not suppose him capable of committing a folly, much less a crime (15). We are therefore, out of reverence and decen-

(15) In the U. S. the highest officer has no such exemption.

(o) de jure b. 4 p. 1. 9. c. 2.
(p) L. of Nat. and N. 1. 2. c. 6.
(q) Britton. c. 10. Mirr. c. 4. § 16.
(r) 1 Hal. P. C. 54.
(s) de off. 1. 3. c. 5.
(t) Prov. vii. 30.
(e) 1 Hal. P. C. 44.
cy, to forbear any idle inquiries, of what would be the consequence if the king were 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 provision to remedy such a grievance. But of this sufficient was said in a former volume (a), to which I must refer the reader.

CHAPTER III.

OF PRINCIPALS AND ACCESSORIES (1).

If having been shewn 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 is 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) (2).

(a) Book I. ch. 7. pag. 241.
(b) Foster. 350.

(1) See in general, 1 Chitty Crim. L. 255 to 275. 3 ed. id. index, tit. Accessaries, and tit. Principals.

(2) Where a person stood outside a house, to receive goods which a confederate was stealing within it, he was held a principal, 1 Ry. & M. C. C. 96; and in the case of privately stealing in a shop, if several are acting together, some in the shop and some out of it, and the property is stolen by the hands of one of those who are in the shop, those who are outside are equally guilty as principals, Russ. & R. C. C. 343; and if several combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals. Russ. & R. C. C. 446. But where a man incites a guilty agent to commit murder, and he is not actually nor constructively present, the perpetrator is the principal felon, and the former only an accessory before the fact. 1 Hale, 435. 3 Inst. 49. Persons not present nor sufficiently near to give assistance, are not principals. Russ. & R. C. C. 363. 421.

Mere presence is not sufficient to constitute the party a principal, without he aids, assists, and abets. Thus if two are fighting and a third comes by and looks on, but assists neither, he is not guilty if homicide ensue, 1 Hale, 429. 2 Hawk. c. 29. s. 10; but if several come with intent to do mischief, though only one does it, all the rest are principals in the second degree. 1 Hale, 440. 2 Hawk. c. 29. s. 8. So, if one present command another to kill a third, both the agent and conspirer are guilty. Id.; and see 1 Hale, 442, 3. 4. 2 Hawk. c. 29. s. 8. In a late singular case it was held, that if a man encourage a woman to murder herself, and is present abetting her while she does so, such person is guilty of murder as a principal; and that if two encourage each other to murder themselves together, and one does so, but the other fails in the attempt upon himself, he is a principal in the murder of the other; but if it be uncertain whether the deceased really killed herself, or whether she came to her death by accident before the moment when she meant to destroy herself, it will not be murder in either. Russ. & R. C. C. 523.

Besides presence, and aiding and abetting the principal, there must be a participation in the felonious design, or at least the offence must be within the compass of the original intention, to constitute a principal in the second degree. Thus, if a master assaults another with malice prepense, and the servant being ignorant of his master's malignant design, takes part with him, the servant is not an abettor of murder but manslaughter only. See 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 pursuing 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 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 one 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 is someway 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.

I. 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, 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),

(e) Kel. 52.
(d) Foster, 349.
(c) 3 Inst. 138.
(f) 1 Hal. P. C. 617. 2 Haw. P. C. 215.
(g) 3 Inst. 138. 1 Hal. P. C. 613.
(h) Foster. 342.

Hale, 446. Russ. & R. C. C. 99. And in order to render persons liable as principals in the second degree, the killing or other act must be in pursuance of some original unlawful purpose, and not collateral to it. 1 East P. C. 258.

The punishment of principals in the second degree, is in general the same as principals in the first degree. 1 Leach, 64. 4 Burr. 2076. But where the act is necessarily personal, as in stealing privately from the person, he whose hand took the property can alone be guilty, under the statute, and aiders and abetters are only principals in a simple larceny. 1 Hale, 529. So on an indictment on the statute against stabbing, only the party who actually stabs is oust of clergy. 1 Jac. 1. c. 8. 1 East, P. C. 348. 450. 1 Hale, 468.

Principals, in the second degree, may be arraigned and tried, before the principal in the first degree has been outlawed or found guilty. 1 Hale, 437. 4 Burr. 2076. 2 Hale, 223. 9 Co. 67.
In petit treason, murder, and felonies with or without benefit of clergy (3),
that which therefore cannot have any accessories after 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, propeltr odium delicti; in trespass all are prin-
cipals, because the law, quae de minimis non curat, does not descend to dis-
tinguish the different shades of guilt in petty misdemeanors. It is a maxim,
that accessorius sequitur naturam sui principalis (l): and therefore an acces-
sary 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 advises B to kill another, and *B [*37] does it in the absence of A, now B is principal, and A is accessa-
ry in the murder. And this holds, even though the party killed be not in rerum naturâ at the time of the advice 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 set-
tled (p), that whoever procureth a felony to be committed, thought 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 unlaw-
ful 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 (4). But if A commands B to
burn C's house; and he, in so doing, commits a robbery; now A, though
accessory to the burning, is not accessory to the robbery, for that is a thing
of a distinct and unconsequential nature (q) (5). But if the felony com-


(3) This seems to apply merely to felonies, where, by the law, judgment of death ought regularly to ensue, 1 Hale, 615. 1 Burn. 3.
The crime of petit treason is now abolished.
See ante 16, note (15).

Petit treason is also abolished in New-York. (2 R. S. 657.)

(4) This must be understood to have reference to a case where the command is to beat violently. 1 Hale, 442, 3, and 4. 1 East. P.

(5) The crime must be of the same com-
plexion, and not on a different object than that to which the agent was instigated. Thus if
A, commands B, to burn a certain house with which he is well acquainted, and he burns an-
other, or to steal a certain horse, and he steals a different one, A. will not be liable to be in-
dicted as accessory to the crimes committed, because B, acting in contradiction to the com-
mands of A., and that knowingly, it is on his part a mere ineffectual temptation, and the
specific crime he planned was never complet-
mitted 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 (7).

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) (6). 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. [ *38 ] As furnishing him with a horse to escape his *pursuers, money or victuals to support him, a house or other 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 accessory to the felony. But to relieve a felon in gaol with clothes or other necessaries, 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. (7) all such receivers are made accessories (where the principal felony admits of accessaries) (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 (8). In France such receivers are punished with death: and the Gothic constitutions distinguished also three sorts of thieves, "unum qui consilium daret, alterum qui contractaret, tertium qui receptaret et occulseret; pari poenae 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

---

(6) He must know that the felon is guilty; and it seems to be the better opinion, that an implied notice is not sufficient. 1 Hale, 323 and 622.

In New-York, one who conceals an offender, knowing that he has committed a felony, or gives him any other aid that he may avoid arrest, trial, conviction, or punishment, is an accessory after the fact, and no others are. (2 R. S. 699.)

(7) 5 Ann. c. 31, is repealed by 7 Geo. IV. c. 31, as relating to this subject, and 4 Geo. I. c. 11 as to this offence, is repealed by 7 and 8 Geo. IV. c. 27; and now by 7 and 8 Geo. IV. c. 29, such receivers may be indicted as accessaries after the fact, or for a substantive felony; and in the latter case, whether the principal shall or shall not have been previously convicted, or shall not be amenable to justice, and are liable to transportation or imprisonment.

(8) By 7 and 8 Geo. IV. c. 29, § 16, this offence is punishable by transportation for life, or for any term not less than seven years, or by imprisonment not exceeding four years, with public or private whippings for male offenders.
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 (9). If the parent assists his child, or the child the parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband relieves his wife, who have any of them committed a felony, the receivers become accessories ex post [°39] facto (x). 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 (a).

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) (b) is this, that accessories shall suffer the same punishment as their principals: if one be liable to death, the other is also liable (c): as, by the laws of Athens, delinquents and their abettors were to receive the same punishment (d). 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 harbouring 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 (e) and stealing of linen from bleaching-grounds (f) (10): which is denied to the principals and accessories before the fact, in many cases; as, among others, in petit treason, murder, robbery, and wilful burning (g). 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 be greater than that of his accomplices, by reason of the difference of his punishment (h). 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

(a) 3 Inst. 103. 2 Hawk. P. C. 320.
(b) 1 Hal. P. C. 621.
(c) See Stiernhock, ibid.
(d) 3 Inst. 188.
(e) Pott. Antiq. b. 1, c. 20.
(f) Stat. 31 Eliz. c. 12.
(g) Stat. 13 Geo. II. c. 27.
(h) 1 Hal. P. C. 615.
(i) Beccar. c. 37.

[9] That is (as stated in the last section) if done in order to prevent an arrest, &c.
(10) See ante 39 in notes.

By st. 9 Geo. IV. c. 31, accessories before the fact in cases of murder, are rendered equally guilty with the principal.

By st. 7 and 8 Geo. IV. c. 29, it is enacted, in the 61st section, "That in every case of felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable with death, or otherwise in the same manner as the principal in the first degree, by this Act punishable; and every accessory after the fact to any felony punishable under this Act, (except only a receiver of stolen property,) shall on conviction be liable to be imprisoned for any term not exceeding two years; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanour punishable under this Act, shall be liable to be indicted and punished as a principal offender."

And by 7 and 8 Geo. IV. c. 30, a similar enactment is made in § 26 to the above.

These three Acts incorporate nearly every offence of murder, felony, and misdemeanour mentioned and adverted to by the learned Commentator.
him: though that law is now much altered, as will be shewn more fully in its proper place (11). 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 (i). But it is clearly held, that one acquitted as 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 (12).

CHAPTER IV.

OF OFFENCES AGAINST GOD AND RELIGION (1).

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 law 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 shewn 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 becomes 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 vio-

(i) 1 Hal. P. C. 625, 626. 2 Hawk. P. C. 373. Foster, 361.
(c) See page 5.
(b) See Book I. pag. 123, 124.
(c) Beccar. ch. 8.

(11) See post, 323.
(12) But if the principal felony is committed on the high seas, then the accessory shall be tried like the principal, under the 28 Hen. VIII. c. 15, which provides for the trial of felonies upon the high seas; but no one tried for an offence by one jurisdiction shall after-
lating of truth, and therefore in any *shape is derogatory from [*42] 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 conscientiae 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 vengeance of eternal justice; and public vices are besides liable to the temporal punishment 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 inconvenience; such as poaching, exportation of wool, and the like. These are naturally no offences at all; but their whole criminality consists in their 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 are 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 king and his government; fourthly, such as more directly *infringe the rights of the [*43] 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 mediatly 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 ances-

(d) Cod. 1. 7. 1. (e) Ibid. 9.

(2) See reference, ante 41. note 1.
tors 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

[ *44 ] known to him and the party 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 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 a long time the object only of the ecclesiastical courts, which corrected the offender pro salute animae. 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 & 10 W. 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

[ *45 ] 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 pertinenti ter defensa (i)." 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 doctrines 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 Lynde-

(f) 1. 3. c. 9.
(g) Utiles eae opiniones has, quia negat, cum in telligat, quam multa fermentur jurejurando; quantum soluas sint foedorum religiones; quam multos divini supplici metu a scelere revocavit; quamque sancta sit societas civium inter space, Dite immortu-
(h) Mecroyantz in our ancient law books is the name of unbelievers.
(i) 1 Hal. P. C. 384.
wode (k), extends to the smallest deviation from the doctrines of holy church: "haereticus est qui dubitat de fide catholica, et qui negligit servare ea, quae 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 bigotted 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 victim to certain death. Hence the capital punishments inflicted on the ancient Donatists and Manichaeans 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 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 daemon 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 haeretico 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

(k) cap. de haereticis.
(l) Decretal. l. 5, i. 60, c. 27.
(m) Cod. l. 1, tit. 5.
(n) c. de haereticis.
(o) Cod. 1. 5. 4.
(p) Baldus in Cod. 1. 5. 4.
(q) F. N. B. 260.
But 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 this 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, which established

[48] 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 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 (v). Sir Matthew Hale is indeed of a different opinion,

---

*47] him; the writ de haeretico comburendo being not a writ *of course, but issuing only by the special direction of the king in council (r).

---

(r) 1 Hal. P. C. 395.
(s) So called not from lollium, or tares, (an etymology which was afterwards devised in order to justify the burning of them, Matth. xiii. 30,) but

(t) 2 Hen. IV. c. 15.
and holds that such power resided in the diocesan also, though he agrees,
that in either case the writ de haeretico comburendo was not demandable of
common right, but grantable or otherwise merely at the king's discre-
tion (u). 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; no-
thing 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 —
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 haeretico comburendo remained still in force; and we have
instances of its being put in execution upon two anabaptists in the seven-
teenth 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 animae, 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 cor-
pus act; and our minds from the tyranny of superstitious bigotry, by de-
molishing 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 favour a loose latitude of pro-
pagating any crude undigested sentiments in religious matters. Of prop-
gagating, I say; for the bare entertaining them, without an endeavour 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 prosecu-
tion 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 pro-
per, that the civil magistrate should again interpose, with regard
to one species of heresy very prevalent in modern times; for by statute 9
& 10 W. III. c. 32. if any person educated in the christian religion, or pro-
fessing the same, shall by writing, printing, teaching, or advised speaking,
deny any one of the persons of the holy Trinity to be God, or maintain that
there are more gods than one, he shall undergo the same penalties and in-
capacities, which were just now mentioned to be inflicted on apostacy by
the same statute (3). And thus much for the crime of heresy.

(u) I Hal. P. C. 405.

(3) This statute has been repealed as far
as it affects unitarians only, by the 53 Geo.
III. c. 160. Prosecutions for reviving the
Trinity, seem to have been generally framed
on the construction of the common law. The
9 & 10 W. III. has not altered the common
law as to the offence of blasphemy, but only
given a cumulative punishment. See post,
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 these in their order.

1. And, first, of the offence of reviling the ordinances of the church (4). 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 the 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:

[*51] and, for the third, 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 (5). 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 (v). 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

(v) By an ordinance 23 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 pounds. (Scobell. 93.)

54. n. 7. And it seems also the 53 Geo. III. c. 160. does not alter the common law, but only removes the penalties imposed upon persons denying the Trinity, by 9 & 10 W. III. c. 32. and extends to such persons the benefits conferred upon all other protestant dissenters, by

1 W. & M. s. 1. c. 18. 1 Bar. & Cres. 26.
(5) This statute of 1 Eliz. c. 2. was repealed, as far as relates to protestant dissenters, by the 31 Geo. III. c. 32. s. 3.
hinted at in a former volume (w), it would now be extremely unadvisable to make any alterations in the service of the church; unless by its own consent, or unless it can be shewn 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 of which our present laws have shewn 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 20l. 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 10l. 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 which 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 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 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 or 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 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 (x), yet at length the legislature, with a

---

(w) Book I. p. 8.
(x) 33 Eliz. c. 1. 33 Eliz. c. 6. 35 Eliz. c. 1. 22 &c. II. c. 1.

Vol. II.
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 (y). 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 the statute 10 Ann. c. 2. and declares that neither the laws above mentioned, nor the statutes 1 Eliz. c. 2. § 14. 3 Jac. I. c. 4 & 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, 1. that they take the oaths of allegiance and supremacy (or make a similar affirmation, being quakers) (z) and subscribe the declaration against popery; 2. that they repair to some congregation certified to and registered in the court of the bishop or archdeacon, or at the county sessions; 3. that the doors of such meeting-house shall be unlocked, unbarred, and unbolted; in default of

[*54*]

which 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 & 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 contumaciously 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. & M.) be bound over to the sessions of the peace, and forfeit twenty pounds (6). 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 (a), on pain of disability to hold that or any other office: the legis-

(y) The ordinance of 1645 (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. (z) See stat. 8 Geo. I. c. 6.

(6) To constitute an offence within this act, the party must come into the place of worship. See 5 T. R. 542. The enactment is repeated, without the words, "come into," in the 52 Geo. III. c. 155. s. 12, which imposes the heavier penalty of 40l. The act applies only where the thing is done wilfully and of purpose, maliciously to disturb the congrega-

(a) 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.
Public Wrongs.

The 13 & 14 Car. II. c. 1, 17 Car. II. c. 2, and 32 Car. II. c. 1, are repealed by the 32 Geo. III. c. 155. s. 1, by which all places of religious worship of protestants must be certified to the bishop of the diocese, or the archdeacon of the archdeaconry, or to the justices at the general or quarter sessions, and shall be also registered, and a penalty to the amount of 20l. and not less than 20s. may be inflicted for permitting meetings in places not so certified or registered. And by sect. 4, every person teaching or preaching at, or being in, such place so certified, is exempted from penalties, as a person who has taken the oath, and made the declaration prescribed by the 1 W. & M. st. 1. c. 18, or any act amending the same. By sect. 5, every one preaching or teaching at such place so certified, shall, when required by a magistrate, take and subscribe the oath and declaration specified in the 19 Geo. III. c. 41; and if he refuse to take it, he must not teach or preach, under a penalty of not exceeding 10l. nor less than 10s.; but he need not go more than five miles from his place of residence to take such oath. And by sect. 6, such person may compel a justice to administer such oath to him, and to attest his subscription to such declaration, and give him a certificate thereof. By sect. 11, no place of public meeting for religious worship must have the doors fastened, so as to prevent persons entering therein during the time of such meeting, under a penalty to the teacher of not exceeding 20l. nor less than 10s. By sect. 13, the act is not to affect the celebration of divine service, according to the rights of the church of England and Ireland, by ministers of such church, in places before then used for that purpose, or licensed or consecrated by any person to do, nor affect the jurisdiction of bishops, or others exercising lawful authority in the church, over the said church, according to the rules and discipline of the same, and to the laws of the realm. And by sect. 14, the act is not to extend to quakers, nor to meetings convened by them, or in any manner to affect any act relating to them, except those expressly above repealed.
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 con-
tributes to their maintenance when there; *both the sender, the
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 offense amounts
to high treason. 2. Popish recusants, convicted in a court of law of not-at-
tending the service of the church of England, are subject to the following
disabilities, penalties, and forfeitures, over and above those before men-
tioned. 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 100l.; they can bring no action at
law, or suit in equity; they are not permitted to travel above five miles
from home, unless by licence, upon pain of forfeiting all their goods; and
they may not come to court under pain of 100l. 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 mar-
rried woman, when recusant, shall forfeit two-thirds of her dower or joint-
ture, 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 10l. 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 with-
out the king's licence, they shall be guilty of felony, and suffer death as
felons without the 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 re-
cusant convict; or if at a greater distance, suspends him from

[ *57 ]

having any seat in *parliament, keeping arms in his house, or
any horse above the value of five pounds. This is the state, by
the laws now in being (b), of a lay papist. But, 3. The remaining spe-
cies or degree, viz. popish priests, are in a still more dangerous condition.
For by statute 11 & 12 W. 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 priest, 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) (c), or shall be
in England three days without conforming and taking the oaths, is guilty

(b) Stat. 23 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 & 5. 7 Jac. I. c. 6. 3 Car. I. c. 4. 30 Car. I. c. 2. 30 Car. II. st. 2. 1 W. & M. c. 9.15. & 26. 11 & 19

W. III. c. 4. 12 Ann. st. 2. c. 14. 1 Geo. I. st. 2. c. 55. 3 Geo. I. c. 18. 11 Geo. II. c. 17.
(c) Raym. 577. Latch. 1.

 Digitized by Microsoft®
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 (4), 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 powder-treason, in the succeeding reign, struck a panic into *James I. which operated in different ways: it occasioned the [ *58 ] enacting of new laws against the papists; but deterred him from putting them in 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 inclination 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 & 12 W. 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 (8).

(d) Sp. L. b. 19, c. 27.

(8) But now by the statute 31 Geo. III. c. 32. (amended and explained by the 43 Geo. III. c. 30), which may be called the toleration act of the Roman catholics, all the severe and cruel restrictions and penalties, enumerated by the learned Judge, are removed from those Roman catholics, who are willing to comply with the requisitions of that statute; which are, that they must appear at some of the courts of Westminster, or at the quarter-ses;
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 (10); called

sions held for the county, city, or place where they shall reside, and shall make and subscribe a declaration, that they profess the Roman catholic religion, and also an oath which is exactly similar to that required by the 18 Geo. III. c. 60, the substance of which is stated above in the text. On this declaration and oath being duly made by any Roman catholic, the officer of the court shall grant him a certificate; and such officer shall yearly transmit to the privy council lists of all persons who have not, or who qualified themselves within the year in his respective court. The statute (sect. 4) then provides, that a Roman catholic, thus qualified, shall not be prosecuted under any statute for not repairing to a parish church, nor shall he be prosecuted for being a papist, nor for attending or performing mass or other ceremonies of the Church of Rome, provided (by sect. 5) that no place shall be allowed for an assembly to celebrate such worship until it is certified to the sessions; nor shall any minister officiate in it, until his name and description are recorded there. And (by sect. 6 of 31 Geo. III. c. 32) no such place of worship shall be exempt from serving upon juries, and from being elected into any parochial office. (Id. s. 8.) And all the laws for frequenting divine service on Sundays, shall continue in force, except where persons attend some place of worship allowed by this statute, or the toleration of the dissenters. 7 V. & M. s. 1 e. 18. Id. s. 9.

If any person disturb a congregation allowed under this act, he shall, as for disturbing a dissenting meeting, be bound over to the next sessions, and upon conviction there, shall forfeit twenty pounds. Sect. 10.

But no Roman minister shall officiate in any place of worship having a steeple and a bell, or at any funeral in a church or church-yard, or shall wear the habits of his order, except in a place allowed by this statute, or in a private house, where there shall not be more than five persons besides the family. Id. s. 11. This statute shall not exempt Roman catholics from the payment of tithes, or other dues, to the church; nor shall it affect the statutes concerning marriages, or any law respecting the succession to the crown. Id. s. 12. No person, who has qualified, shall be prosecuted for instructing youth, except in an endowed school, or a school in one of the colleges; nor, except also, that no Roman catholic schoolmaster shall receive into his school the child of any

protestant father, id. ss. 13, 14, 15; nor shall any Roman catholic keep a school until his, or her, name be recorded as a teacher at the sessions. Id. s. 16.

But no religious order is to be established; and every endowment of a school or college by a Roman catholic shall still be superstitious and unlawful. Id. s. 17. And no person henceforth shall be summoned to take the oath of supremacy, and the declaration against transubstantiation. Id. s. 18. Nor shall Roman catholic, who has qualified, may be permitted to act as a barrister, attorney, and notary. Id s. 22.

By the 43 Geo. III. c. 30. Roman catholics, taking the oath, and making the declaration prescribed by 31 Geo. III. c. 32, shall be entitled to all the privileges for the members of the house of commons, because, before they vote, they must take the oath of supremacy. Ibid. 180.

The Roman catholics in Ireland are permitted to vote at elections, but they cannot sit in either house of parliament.

A bequest for the purpose of the education of children in the Roman catholic religion is unlawful. But the fund will not pass to the testator's next of kin, but it shall be applied to such charitable purposes as his majesty shall please to direct by his sign manual. 7 Ves. Jun. 400. (9.)

By 43 Geo. III. c. 30. all Roman catholics who shall take and subscribe the declaration and oath specified in the 31 Geo. III. c. 32, are as fully entitled to the benefits of the 18 Geo. III. c. 60, as if the oath prescribed by that act had been taken.

53 Geo. III. c. 128, provides certain rules as to taking commissions in the army, and relieves Roman catholics from the restrictions and penalties contained in 25 C. II. c. 2.

(10) These "bulwarks of the church," as the learned judge enthusiastically terms them, have now, to the loudly expressed satisfaction of almost all classes of society, been swept away; nor do any fears appear at present to be entertained that the Established church will in consequence be robbed of her security from "the perils of non-conformists."
the corporation and test acts: by the former of which (e) 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 [*59] default of either of these requisites, such election shall be void (11). The other, called the test act (f), 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 (12) 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 churchwarden, and also to prove the same by two credible witnesses; upon forfeiture of 500l. and disability to hold the said office (13). 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 favour 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 immoralties, 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 animae; 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 (14).

(e) Stat. 13 Car. II. st. 2, c. 1.

(11) By the 5 Geo. I. c. 6, 4.3, the election into a corporate office shall not be void on account of the person elected having omitted to receive the sacrament within a year before the election, unless he shall be removed within six months after his election, or unless a prosecution be commenced within that time, and be carried on without delay; and during that time the office is not void, but only voidable; and the person elected, until a removal or prosecution within the time limited, is entitled to all the incidental rights of his office in as full an extent as if he had actually received the sacrament within a year previous to his election. 2 Burr. 1016.

(12) The 25 Car. II. c. 2, the original test act, required that both the sacrament and the oaths should be taken within three months; and by subsequent statutes, the time for taking the oaths has been enlarged to six months; but the time for taking the sacrament remains unaltered, which must still be taken within three months after admission into the office. And by several statutes subsequent to the test act, various descriptions of persons, whose offices are not considered civil or military, are required to take the oaths within six months after their respective appointments, though they are not required to take the sacrament. Amongst these are all ecclesiastical persons promoted to benefices, members of colleges, who have attained the age of 19 years, teachers of scholars or pupils, dissenting ministers, high constables, and practisers of the law. 1 Geo. I. st. 2. c. 13. 2 Geo. II. c. 31. 9 Geo. II. c. 26.

(13) But before the end of every session of parliament, an act is passed to indemnify all persons who have not complied with the requisition of the corporation and test acts, provided they qualify themselves within a time specified in the act; and provided also, that judgment in any action or prosecution has not been obtained against them for their former omission.

(14) In New-York cursing and swearing are punished by fine. (1 R. S. 673, 4 61.) So also is the disturbance of any religious meet-
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 (15). 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 (g): for Christianity is part of the laws of England (h).

V. Somewhat allied to this, though in an inferior degree, is the [ *60 ] 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, sailor, or soldier profanely cursing or swearing shall forfeit 1s.; every other person under the degree of a gentleman 2s.; and every gentleman or person of superior rank 5s. 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 (16). If the justice omits his duty, he forfeits 5l. and the constable 40s. And the act is to be read in all parish churches and public chapels, the Sunday after every quarter-day, on pain of 5l. to be levied by warrant from any justice (17). 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 shew, the name of the holy Trinity or any of the persons therein, be jestingly or profanely used, the offender shall forfeit 10l. 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, incantation, or sorcery. To deny the possibility, nay, actual existence of witchcraft and

(g) 1 Hawk. P. C. 7.  
(h) 1 Ventr. 293. 2 Strange, 634.
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 (i), imitating in the former the express law of God (k), "thou shalt not suffer a witch to live." And our own laws, both before and since the conquest, have been *equally [ 45 ] 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 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 [ 46 ] thought proper by an edict to 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 misdemeanors of persons pretending to use witchcraft, tell fortunes, or discover stolen goods by skill in the occult sciences, is

---

(i) Cod. I. 9, c. 18.
(k) Exod. xxii. 18.
(l) 2 Inst. 44.
(m) Mr. Addison, Spect. No. 117.
(o) Voltaire, Syst. Louis XIV. ch. 29. Mod. Un.

55
still deservedly punished with a year's imprisonment, and standing four times in the pillory (18).

VII. A seventh species of offenders in this class are all religious impostors: 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) (19). 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 taker shall in like manner forfeit double the value of the money or other corrupt consideration (20). 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), 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 a devolution of the right of election for that turn to the crown (21).

IX. Profanation of the Lord's day, vulgarly (but improperly) called sabbath-breaking, is a ninth offence against God and religion, punished by

(p) 1 Hawk. P. C. 7.
(q) 3 Inst. 156.
(r) See book II. p. 279.

(18) By the vagrant act, 5 Geo. IV. e. 8. s. 4, persons pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry, or otherwise, to deceive and impose on any of his majesty's subjects, are rogues and vagabonds. See further, as to this and the vagrant act, post, 160.


(20) Any resignation or exchange for money is corrupt, however apparently fair the transaction: as where a father, wishing that his son in orders should be employed in the duties of his profession, agreed to secure, by a bond, the payment of an annuity exactly equal to the annual produce of a benefice, in consideration of the incumbent's resigning in favour of his son. The annuity being afterwards in arrear, the bond was put in suit, and the defendant pleaded the simoniacl resigna-

(21) By stat. 9 Geo. IV. c. 94, bonds of resignation of any benefice in favour of a son, grandson, brother, uncle, nephew, or grandnephew, upon notice or request, are rendered void, notwithstanding the 31 Eliz. c. 6; but the new Act is not to extend to any engagements, unless the deed be deposited, within two months, with the registrar of the diocese, or peculiar jurisdiction, wherein the benefice is situated. The passing of this Act, it is believed, arose out of the fluctuating and contradictory decisions of our courts upon the subject.
the municipal law of England. For, besides the notorious indecency and 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) forbad 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 *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 (22).

X. Drunkenness is also punished by statute 4 Jac. I. c. 5 with the forfeiture of 5x.; 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

---

(22) It has been recently held, that the driver of a stage-van to and from London to York is a common carrier within the meaning of 3 Car. I. c. 1, and subject to the penalties thereof for travelling on Sunday. Rees v. Middleton, 4 D. & R. 824. Where a parcel contract was entered into for the purchase of a horse above the value of 10L, on a Sunday, with a warranty of soundness, and the horse was not delivered and paid for until the following Tuesday, held, first, that the contract was not complete until the latter day; and second, that supposing it to be void within the 29 Car. II. c. 7, s. 2, still it was not an available objection, because the party in an action for a breach of the warranty, the vendee being ignorant of the fact, that the former was exercising his ordinary calling on the Sunday. Blossom v. Williams, 5 D. & R. 82. 3 B. & C. 232.

The 11 and 12 W. c. 21, and all other Acts for the regulation of watermen plying upon the river Thames, are repealed by the 7 and 8 Geo. IV. c. 75, which permits a limited number of watermen, under certain regulations, to ply upon the Thames, within certain specified limits, on Sundays. By 29 Car. II. c. 7. no arrest can be made, nor process served, on a Sunday, except for treason, felony, or breach of the peace. Ante book iii. 290. Neither is the hundred answerable to the party robbed, for a robbery committed on a Sunday. But where a plaintiff was robbed in going to his parish church, in his coach, on a Sunday, he recovered against the hundred, under the statute of Winton, 13 Ed. I. st. 2. the court observing, that the statute of Charles must be construed to extend only to cases of travelling, and that it might have been otherwise if the plaintiff had been making visits, or the like. Teshmaker v. the Hundred of Edmonton, M. 7 Geo. I. See 1 Stra. 406. Com. 345. Killing game on a Sunday is prohibited, under heavy penalties, by 13 Geo. III. c. 80.
PUBLIC WRONGS.

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 (23).

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) (24); or by some grossly scandalous and public indecency for which the punishment is by fine and imprisonment (w) (25). In the year 1650, when the ruling power 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 un-fashionable rigour. And these offences have been ever since left to the 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

(t) Poph. 205.
(w) Scobell, 131.

(23) Justices of the peace have an absolute and uncontrolled power and discretion in granting and refusing ale-licences; but if it should appear from their own declarations, or the circumstances of their conduct, that they have either refused or granted a licence from a partial or corrupt motive, they are punishable in the court of King's Bench by information, or they may be prosecuted by indictment. 1 Burr. 556. 1 T. R. 692.

But the court of King's Bench refused a mandamus to justices to rehear an application for an alehouse licence, which they had refused, though it was suggested that their refusal had proceeded from a mistaken view of their jurisdiction. Rex v. Farringdon Without (Justices), 4 D. and R. 735. So they refused a mandamus to rehear a similar application, at any other period of the year than within the first twenty days of September, though the justices might have refused the licence under a mistake of the law. Rex v. Surrey (Justices), 5 D. and R. 308.

(24) As to the offence of keeping or frequenting bawdy-houses, see post, 167. A woman cannot be indicted for being a bawd generally; for the bare solicitation of chastity is not indictable. Hawk. b. 1. c. 74. 1 Salk. 382. As to committing fornication, see post, 315.

(25) Many offences of private incontinence fall properly and exclusively under the jurisdiction of the ecclesiastical court, and are appropriated to it. But where the incontinence or lewdness is public, or accompanied with conspiracy, it is indictable.

Exposing a party's person to the public view, is an offence contra bonos mores, and indictable. See 1 Sid. 168. 2 Camp. 89. 1 Keb. 620. And by the vagrant act, 5 Geo. IV. c. 83. s. 4. exposing a man's person with intent to insult a female, is an offence for which the offender may be treated as a rogue and vagabond; and so is the wilfully exposing an obscene print or indecent exhibition—indeed this would be an indictable offence at common law. 2 Stra. 789. 1 Barn. Rep. 29. 4 Burr. 2527. 2574. And by the same act of 5 Geo. IV. c. 83. s. 3. every common prostitute wandering in public, and behaving in a riotous and indecent manner, may be treated as an idle and disorderly person within the meaning of that act.

Publicly selling and buying a wife is clearly an indictable offence. 3 Burr. 1498; and many prosecutious against husbands for selling, and others for buying, have recently been sustained, and imprisonment for six months inflicted.

Procuring or endeavouring to procure the seduction of a girl, seems indictable. 3 St. Tri. 519. So is endeavouring to lead a girl into prostitution. 3 Burr. 1438. And see post, 209, 212, as to the offence of seduction.

It is an indictable offence to dig up and carry away a dead body out of a church-yard.† 2 T. R. 733. Leach C. L. 4 ed. 497. S. C. 2 East P. C. 652. post, 236. ante; 2 book 429. And the mere disposing of a dead body for gain and profit, is an indictable offence. Russ. & R. C. 34 ed. 915. 1 Derel. & R. N. P. C. 13. And it is a misdemeanor to arrest a dead body, and thereby prevent a burial in due time. 4 East. 465. The punishment for such an offence is fine and imprisonment. 2 T. R. 733.

All such acts of indecency and immorality are public misdemeanors, and the offenders may be punished either by an information granted by the court of king's bench, or by an indictment preferred before a grand jury at the assizes or quarter sessions.

† See accordingly, 2 R. S. 688.
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) (26).

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 what 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 (27).

CHAPTER V.

OF OFFENCES AGAINST THE LAW OF NATIONS (1).

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; those, I mean, which are particularly animadverted on, as such, by the English law (2).

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

---

(26) In New-York, incest is punished by imprisonment for not more than 10 years. (2 R. S. 988.)

(27) The 7 Jac. I. c. 4. s 7, (which provided certain punishments for lewd females who had bastards), is repealed by 50 Geo. III. c. 51, s 1, which enacts "that in cases when a woman shall have a bastard child which may be chargeable to the parish, any two justices before whom such woman shall be brought, may commit her, at their discretion, to the house of correction, in their district, for a time not exceeding twelve calendar months, nor less than six weeks. By section 3, upon the woman's good behaviour during her confinement, any two justices may release and dis-

charge her from further confinement. By section 4, justices are restrained from committing any woman till she has been delivered one month. The child must be chargeable, or likely to become so, in order to authorize a conviction. 2 Nolan. 256. Third edition.

(1) As the law of nations in general, see Vattel's L. Nat. 1 Chitty's Com. L. 28. 74. 2 Chitty's Crim. L. 32 to 58.

(2) The matters contained in this chapter are beyond the legislative power of the several states; they are regulated by the general law of nations, or by Congress, or by treaties. These offences are punishable in the U. S. courts.
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
[ *67 ] rules must necessarily result from those *principles of natural
justice, in which all the learned of every nation agree; or they
depend upon mutual compacts or treaties between the respective commu-
nities; 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 contract-
ing 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 de-
cisions, are not to be considered as introductive of any new rule, but mere-
ly 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 dis-
putes relating to prizes, to shipwrecks, to hostages, and ransom bills, there
is no other rule of decision but this great universal law, collected from his-
tory and usage, and such writers of all nations and languages as are ge-
nerally approved and allowed of (3).

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
[ *68 ] inquiries 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 in-
cident 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 infrac-
tions of public faith, as are committed by one independent people against
another: neither state having any superior jurisdiction to resort to upon
everth 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, un-
der which they live, to animadvert upon them with a becoming severity,
that the peace of the world may be maintained. For in vain would na-

(6) See Book I. p. 43.
(c) See Book I. pag. 273.

(3) By the 33 Geo. III. c. 66. it was enact-
ed, that it was unlawful for any of his majes-
ty's subjects to ransom, or enter into any con-
tract for ransoming, any ship or merchandise
captured by an enemy; and that all contracts
and securities for that purpose, without the li-
cence therein mentioned, were absolutely
void; and that every person who entered into
such a contract, should be subject to a penalty
of 500l.

In the U. S. the common law remains unal-
tered.
tions 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 injur-
ed, 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 embassadors; and 3.
Piracy.

I. As to the first, violation of safe-conducts or passports, expressly grant-
ed by the king or his embassadors (e) to the subjects of a foreign power in
time of mutual war (4); 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 preserva-
tion of which there can be no intercourse or commerce between one na-
tion 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 [ *69 ]
to his subjects by the very individual delinquent, but he must re-
quire 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 charta (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 honour 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 trea-
son 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 practised in the admiral's court; and, together
with two men learned in the law of the land, to hear and determine ac-
cording 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 belong-
ed to the conservators of truce and their accessors; and enacted that, not-
withstanding 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 obeysance, against any stranger in amity, league, or truce, or

(e) See Book I. pag. 260.
(f) 9 Hen. III. c. 30. See Book I. pag. 259, &c.

(4) See 1 Story's laws U. S. 89, § 27.
["70] under safe conduct; and especially by attaching his person, or spoiling him or robbing him 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 & 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, 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 embassadors, 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 such 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 7 Ann. c. 12. that all process whereby the person of any embassadors (5), or of his domestic or domestic servant, may be arrested, or his goods distreined or seized, shall be utterly null and void (6); 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) (7). 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 be-

---

(g) See Book I. pag. 253.
(h) See Book I. pag. 253.
(i) See the occasion of making this statute, Book I. pag. 255.

(5) "Or other public minister of a foreign prince or state."
(6) A consul is not a public minister within the act. Ante, 3 book, 290. The party, to entitle him to the protection of the act, must be a servant, or employed in the ambassador's house, 3 D. & R. 25; and a servant within the meaning of the act must be actually and bona fide such servant. Tidd. Prac. 8 ed. 193. 4 Burr. 2016, 7. It does not matter whether the servant is a native of the county where the ambassador resides, or a foreigner; and real servants, though not residing with the ambassador, are within the act. 2 Stra. 797. 3 Wils. 35. 1 B. & C. 563. 2 D. & R. 840.

S. C. But if the servant do not reside in the ambassador's house, and have goods in his own house, more than are necessary for his convenience as such servant, they are not within the protection of the act. 1 D. & C. 554. 2 D. & R. 253. The servant's name must be registered in the secretary of state's office, and transmitted to the sheriff's office, to support a proceeding against the sheriff for such arrest. 1 Wils. 20. and sect. 5. of the statute. Tidd. Prac. 8 ed. 194. See further on this subject, ante, 1 book, 257. n. (13).

(7) See post, 299. and see 3 Chitty's Cr. L. 1050 to 1063.
ing, according to sir Edward Coke (k), hostis humanis 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 high treason, being contrary to his natural allegiance; and by an alien to be felony only: but now, since the statute of treason, 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 should be taken away, unless by the judgment of his peers, or 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 (8).

*The offence of piracy, by common law, consists in committing those 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 W. 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 endeavouring 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 over-board, 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,
[ *73 ] in any piratical engagement, shall be entitled to a bounty, to *be divided among them, not exceeding one-fiftieth part of the value of the cargo on board: and such wounded seamen shall be entitled to the pension of the 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 (9). 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 (10).

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, committed 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 crime branches itself into a much larger extent, than either of those of which we have already treated.

CHAPTER VI.

OF HIGH TREASON (I).

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 ligament 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

(a) Book I. ch. 10.

(9) In the construction of the common law, as enlarged by the statutes mentioned in the text, it appears that for mariners to seize the captain, put him on shore against his will, and afterwards employ the ship for their use, is piracy. 2 East P. C. 796. And embezelling a ship's anchor and cable is piracy, though the master of the vessel concur in it, and though the object is to defraud the underwriters, not the insurers. Russ. & R. C. C. 123. Where the master of a vessel insured the ship and cargo, landed the goods, and on the destruction of the former, protested both as lost, with intent to defraud the owners and insurers, this was helden to be a mere breach of trust and no felony, because there was no determination of the special authority with which the defendant was intrusted. 2 East P. C. 776.

The rules as to larceny will here apply. See post, Chap. XVII.

(10) See 2 Haw. P. C. p. 305, 461-5, 480, § 1. See also 5 G. IV. c. 17, by which dealing in slaves on the high seas, &c. is made piracy, and punishable with death. See also 5 Geo. IV. c. 113, § 9, and Forbes v. Cochran, 3 D. and R. 679. 2 B. and C. 448, on the same subject.

The 9 Geo. IV. c. 31, repeals so much of the 22 and 23 Car. II. c. 11, “as relates to any mariner laying violent hands on his commander as therein mentioned.” See also 9 Geo. IV. c. 84.

(1) As to this offence in general, see 1 East P. C. 37. to 140. Com. Dig. Justices, K. 2 Chitty's Crim. L. 60 to 67.
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 digni-
ty, 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 distin-
guished into four kinds; 1. Treason. 2. Felonies injurious to the king's
prerogative. 3. Praemunire. 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
French) imports a betraying, treachery, or breach of faith. It
therefore happens only between allies, saith the Mirror (b): for treason is in-
deed a general appellation, made use of by the law, to denote not only of-
fences 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 the confidence, so for-
gets 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 denomi-
nated petit treasons (2). But when disloyalty so rears its crest, as to at-
 tack even majesty itself, it is called by way of eminent distinction high trea-
son, alta proditio; being equivalent to the crimen laesae 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 indeter-
minate, this alone (says the president Montesquieu) is sufficient to make
any government degenerate into arbitrary power (e). And yet, by the
ancient common law, 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 forced and arbitrary constructions, offences
into the *crime and punishment of treason which never
were suspected to be such. Thus the accroaching, or attempting
to exercise, royal power (a very uncertain charge) 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 90l. (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 denomi-
nation (g). The latter of which is almost as tyrannical a doctrine as that

(b) c. 1, § 7.
(c) L.L. Aelfred. c. 4. Aethelst. c. 4. Canuti. c. 24. § 1.
(d) 1, 1, c. 2.
(e) Sp. L. b. 12, c. 7.
(f) 1 Hal. P. C. 80.
(g) Britt. c. 22. 1 Hawk. P. C. 34.

(2) Petit treason is abolished by 2 R. S. committed by a stranger. See ante, p. 16.
537, and these offences are the same as if
note 15.
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 \textit{lex Julia majestatis} among the Romans promulged by Augustus Caesar, comprehended all the ancient laws, that had before been enacted to punish transgressors against the state \( i \) \( (3) \). 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 \( 4 \).

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, \( *77 \) and therefore no treason can be committed 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 \textit{de facto} and not \textit{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 \textit{de jure} and not \textit{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

\begin{align*}
\text{(h) Qui de nece vivorum illustrium, qui consiliis et consistorio nostro intersunt, senatum etiam nan et ipse par corporis nostri sunt vel causibus postremo, qui militiae nobilissim, cognitioverti: cadem enim selvastate voluntatem nostram, quae effectum, puniiri jura valuerint] sive guidem, utpote majestatis. (Cod. 9. 8. 5.)}
\end{align*}

\begin{align*}
\text{(i) Gravir. Orig. 1. § 34.}
\end{align*}

\begin{align*}
\text{(j) 1 Hal. P. C. 101.}
\end{align*}

\begin{align*}
\text{(k) 3 Inst. 7. 1 Hal. P. C. 106.}
\end{align*}

\begin{align*}
\text{tis reus, gladio ferrorum, dominus ejus omnibus fasco nostro addictis. (Cod. 9. 8. 5.)}
\end{align*}

\begin{align*}
\text{\( (3) \) The provisions of this act are confirmed by the 36 Geo. III. c. 7. which is made perpetual by the 57 Geo. III. c. 6. This latter statute renders the law of high treason more clear and definite. It provides, that if any one within the realm, or without, shall compass or intend death, destruction, or any bodily harm tending thereto, maiming or wounding, imprisonment or restraint of his majesty, or to depose him from the style, honour, or kingly name of the imperial crown of these realms, or to levy war against him within this realm, in order by force or constraint to compel him to change his measures or counsels, or in order to put any constraint upon, or intimidate both or either house of parliament, or to move or stir any foreigner with force to invade this realm, or any of his majesty's dominions; and such compassing or intentions shall express by publishing any printing or writing, or by any other overt act, being convicted thereof on the oath of two witnesses upon trial, or otherwise, by due course of law, such person shall be adjudged a traitor, and suffer death as in cases of high treason.}
\end{align*}

\begin{align*}
\text{(4) Treason may be either against the U. S. or against the state: the first is, lying war against the U. S. or adhering to their enemies, giving them aid and comfort. (Const. art. 3. sect. 3, § 1.) The last is, lying war against the people of this state within the state: or a combination by force to usurp the government of the state, or overturn it, evidenced by a forcible attempt made within the state: or adhering to the enemies of this state and giving them aid and comfort, when the state is engaged in war with a foreign enemy, in cases prescribed in the Constitution of the U. S. (2 R. S. 656.) An overt act must be done to constitute the offence, (2 R. S. 692.) and two witnesses must prove the same overt act; or one must prove one overt act, and another witness another overt act of the same treason. No evidence can be given of any overt acts except such as are laid expressly in the indictment: and no conviction can be had unless one or more such acts are so alleged. (2 R. S. 735, § 15, 16.)}
\end{align*}
trespasses may be committed (l). And a very sensible writer on the crownlaw 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 excused 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 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 *the Seventh does by no means command any opposition [*78] 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 infortunium, without any traitorous intent, is no treason: as was the case of sir Walter Tyrrell, who, by the command of king William Rufus, *shooting at a [*79] hart, the arrow glanced against a tree, and killed the king on 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 demonstrat-

(l) 3 Inst. 7. 1 Hal. P. C. 104.
(m) 1 Hawk. P. C. 36.
(n) 1 Hal. P. C. 104.
(o) Book I. pag. 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.
ed by some open, or overt act (5). 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 attained 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 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) (6).

(s) Plutarch, in vit.
(t) 3 Inst. 12.
(u) 1 Hal. P. C. 109.
(w) 1 Hawk. P. C. 38. 1 Hal. P. C. 119.

(5) In the case of the regicides, the indictment charged, that they did traitorously compass and imagine the death of the king. And the taking off his head was laid, among others, as an overt act of compassing. And the person who was supposed to have given the stroke was convicted on the same indictment. For the compassing is considered as the treason, the overt acts as the means made use of to effectuate the intentions of the heart. And in every indictment for this species of treason, and indeed for levying war, or adhering to the king's enemies, an overt act must be alleged and proved. For the overt act is the charge, to which the prisoner must apply his defence. But it is not necessary, that the whole of the evidence intended to be given should be set forth; the common law never required this exactness, nor doth the statute of king William require it. It is sufficient, that the charge be reduced to a reasonable certainty, so that the defendant may be apprized of the nature of it, and prepared to give an answer to it. Foot. 194.

(6) This subject is so ably explained by Mr. Justice Foster in his first discourse on high treason, that it may be useful to annex here two of his sections. "In the case of the king the statute of treasons hath, with great propriety, retained the rule voluntas pro facto. The principle upon which this is founded is to obvious to need much enlargement. The king is considered as the head of the body-politic, and the members of that body are considered as united and kept together by a political union with him and with each other. His life cannot, in the ordinary course of things, be taken away by treasonable practices, without involving a whole nation in blood and confusion; consequently every stroke levelled at his person is, in the ordinary course of things, levelled at the public tranquillity. The law, therefore, tendereth the safety of the king with an anxious concern; and, if I may use the expression, with a concern bordering upon jealousy. It considereth the wicked imaginations of the heart, in the same degree of guilt as if carried into actual execution, from the moment measures appear to have been taken to render them effectual. And, therefore, if conspirators meet and consult how to kill the king, though they do not then fall upon any scheme for that purpose, this is an overt act of compassing his death; and so are all means made use of, be it advice, persuasion, or command, to incite or encourage others to commit the fact, or join in the attempt; and every person who but assenteth to any overtures for that purpose will be involved in the same guilt.

The care the law hath taken for the personal safety of the king is not confined to actions or attempts of the more flagitious kind, to assassination or poison, or other attempts directly and immediately aiming at his life. It is extended to every thing wilfully and deliberately done or attempted, whereby his life may be endangered. And, therefore, the entering into measures for depositing or imprisoning him, or to get his person into the power of the conspirators, these offences are overt acts of treason within this branch of the statute. For experience has shown that between the prisons and the graves of princes the distance is very small. Foot. 194."

This was the species of treason with which the state-prisoners were charged, who were tried in 1794. And the question, as stated by
PUBLIC WRONGS.

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, being the sign of the house in which he lived; the other a gentleman, whose favourite buck the king killed in hunting, whereupon he wished it, horns and all, in the king's belly (7). 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 misdemeanour, 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 connexion 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) (8)." 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; 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 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

(a) 1 Hal. P. C. 115.
(8) This subject is fully and ably discussed by Mr. J. Foster, who maintains that words alone cannot amount to an overt act of treason; but if they are attended or followed by a consultation, meeting, or any act, then they will be evidence, or a confession, of the intent of such consultation, meeting, or act; and he concludes, that "loose words, not relative to facts, are at the worst no more than bare indications of the malignity of the heart." Post. 202. et seq.

(x) Ibid.
(a) Foster, 198.
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 unmaried, 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 held to be no treason (c) (9): in like manner as, by the feodal law, it was a felony and attended with a forfeiture of the fief, if the vassal vitiates the wife or daughter of his lord (d); but not so, if he only vitiates 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) (10). For the law does not, neither can it, permit

[ 82 ] *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 feodal 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 misdemeanour (i). A bare conspiracy to

(b) 1 Hal. P. C. 118. 1 Hawk. P. C. 38.
(c) 3 Inst. 9.
(d) Peud. t. 1, t. 5.
(e) Ibid. t. 21.
(f) 1 Hawk. P. C. 37.
(g) 1 Hal. P. C. 132.
(h) Robertson Ch. V. i 45. 286.
(i) 1 Hal. P. C. 136.

(9) But the instances specified in the statute do not prove much consistency in the application of this reason; for there is no protection given to the wives of the younger sons of the king, though their issue must inherit the crown before the issue of the king’s eldest daughter, and her chastity is only inviolable before marriage, whilst her children would be clearly illegitimate.

Before the 23 Ed. III. it was held to be high treason not only to violate the wife and daughters of the king, but also the nurses of his children, les nurses de lour enfants. Britt. c. 8.

(9) Lord Mansfield declared, upon the trial of Lord George Gordon, that it was the unanimous opinion of the court, that an attempt, by intimidation and violence, to force the repeal of a law, was a levying war against the king, and high treason. Doug. 570.
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 (l), by sending them provisions, by selling
them arms, by treacherously surrendering a fortress, or the *like [ *83 ]
(l). By enemies are here understood the subjects of foreign pow-
ers with whom we are at open war. As 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 as-
assistance is also clearly treason; either in the light of adhering to the pub-
lic 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 un-
der this branch of the statute, will (when afforded to our own fellow-sub-
jects in actual rebellion at home) amount to high treason under the de-
scription 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 en-
emies in the kingdom, provided he leaves them whenever he hath a safe op-
portunity (p) (11).

5. “If a man counterfeits the king’s great or privy seal,” this is also
high treason. But if a man take wax bearing the impression of the great
seal off from one patent, and fixes it to another, this is held to be only an
abuse of the seal, and not a counterfeiting of it: as was the case of a cer-
tain 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 gewed together two pieces of parchment;
on the uppermost of which he wrote a patent, to which he regularly obtain-
ed the great seal, the label going through both the skins. He
then dissolved the cement; and taking off the written patent, on [ *84 ]
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 Coke (q) mentions
it with some indignation, that the party was living at that day.

(k) 3 Inst. 9. Foster, 211. 213.
(l) 3 Inst. 16.
(m) Foster, 219.
(n) Ibid. 216.
(o) 1 Hawk, P. C. 38.
(p) Foster, 216.
(q) 2 Inst. 16.

(10) Sending intelligence to the enemy of the destinations and designs of this kingdom,
in order to assist them in their operations against us, or in defence of themselves, is
high treason, although such correspondence should be intercepted. Dr. Heasly’s case, 1
Burr. 650. The same doctrine was held by Lord Kenyon and the court in the case of Wil-
liam Stone, who was tried at the bar of the
court of king’s bench in Hilary term 1796.
In that case it was held, that sending a paper to the enemy, though it was afterwards inter-
cepted, containing advice not to invade this country, if sent with the intention of assist-
ing their councils in their conduct and in the
prosecution of the war, was high treason. 6
T. R. 527.
6. The sixth species of treason under this statute, is "if a man counterfeits 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 merchandize 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 (q) (12). 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 (r). But of this we shall presently say more.

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 assise, 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 (s): 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. & M. c. 21. (13).

*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

(q) 1 Hawk. P. C. 42.
(r) ibid. 43.

(12) The monies charged to be counterfeited must resemble the true and lawful coin, but this resemblance is a mere matter of fact, of which the jury are to judge upon the evidence before them; the rule being, that the resemblance need not be perfect, but such as may in circulation ordinarily impose upon the world. Thus a counterfeiting with some little variation in the inscription, effigies, or arms, done probably with intent to evade the law, is yet within it; and so is the counterfeiting a different metal, if in appearance it be made to resemble the true coin. Hawk. b. 1. c. 17. a. 81. 1 Russ. 50. 1 Hale, 178. 184. 211. 215. 1 East P. C. 163. Round blanks, without any impression, are sufficient, if they resemble the coin in circulation. 1 Leach, 285; and see 1 East P. C. 164. But where the impression of money was stamped on an irregular piece of metal not rounded without finishing it, so as not to be in a state to pass current, the offence was held to be incomplete, although the prisoner had actually attempted to pass it in that condition. 2 Bla. Rep. 632; and see 1 Leach, 135.

In treason, as we have before seen, all concerned are in general principals, 1 Hale, 233; but it has been doubted whether receivers of contraband are guilty of more than misprision of treason, 1 East P. C. 94, &c.; and on this doubt a convict was pardoned, Dyer, 296. a; but it seems they are traitors, 1 East P. C. 95. except where accesses before, and principals in the second degree are expressly included in the terms of the act which creates the treason, when the construction has been in general lenient, according to the maxim expressum facit cessare tacitum. 1 East P. C. 96. A party who agrees before the fact to receive and vend counterfeit coin, is a principal traitor. 1 Hale, 214.

(13) By the statute 7 Ann. c. 12, it is made high treason to slay any of the lords of session, or lords of justiciary, sitting in judgment; or to counterfeit the king's seals appointed by the act of union. The statute 7 Ann. c. 21. has also enacted that the crimes of high treason and misprision of treason shall be exactly the same in England and Scotland; and that no acts in Scotland, except those above specified, shall be construed high treason in Scotland, which are not high treason in England. And all persons prosecuted in Scotland for high treason, or misprision of treason, shall be tried by a jury, and in the same manner as if they had been prosecuted for the same crime in England.
accorded, that if any other cause 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 shewed and declared before the king and his parliament, whether it ought to be judged treason, or other felony.” Sir Matthew Hale (t) 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 or 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 [ *86 ] founded upon better reason than the multitude of other points, that were then strained up to this high offence: the most arbitrary and absurd of all which was by the statute 21 Ric. II. c. 3. 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 (u), 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 licence, 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

(t) 1 Hale. P. C. 259. (u) Stat. 1 Hen. IV. c. 10.
by any overt act) the king to have been lawfully married to Ann of Cleve; derogating from the king's royal style and title; impugning his supremacy; and assembling riotously to the number of twelve, and 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 (14).

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 misdemeanour: 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 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 (15)".

(14) The 1 Mar. c. 1. was only a confirmation so far of a much more important statute, vis. 1 Ed. VI. c. 12. See the statute 36 Geo. III. c. 7. (rendered perpetual by 57 Geo. III. c. 6.) confirming the statute of 25 Edw. III.

(15) In consequence of insults and outrages, which had been publicly offered to the person of the king, and of the great multitude of seditious publications aiming at the overthrow of the government of this country, and also of the frequent seditious meetings and assemblies held at that time to destroy the security and tranquility of the public, two acts of parliament were passed in the 36th year of his present Majesty's reign, one (c. 7.) intitled "An act for the safety and preservation of his Majesty's person and government against treasonable and seditious practices and attempts," and the other (c. 8.) "An act for the more effectually preventing seditious meetings and assemblies."

By the first it was enacted; that if any person should compass, imagine, or intend, death, destruction, or any bodily harm to the person of the king, or to depose him, or to levy war, in order by force to compel him to change his measures or counsels, or to overawe either house of parliament, or to excite an invasion of any of his majesty's dominions, and shall express and declare such intentions by print-
2. With regard to treasons relative to the coin (16) or other royal signatures, we may recollect that the only two offences respecting the coinage, which are made treason by the statute 25 Edw. Ill., are the actual counterfeiting the gold and silver coin of this kingdom; or the importing 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 counterfeitters, 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 practised, rather for the sake of private and unlawful lucre, than out of any disaffection for the sovereign. And therefore both this and its kindred [ *89 ] 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 laesae 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. Ill. 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.

(y) C. 9. 24. 2 Cod. Theod. de falsa moneta, l. 9.
(a) l. 14, c. 7.
(b) l. 3, c. 3, § 1 & 2.
(c) l. 1, c. 22.
(d) 1 Hal. P. C. 224.

ing, writing, or any overt act, he shall suffer death as a traitor.

And if any one by writing, printing, preaching, or other speaking, shall use any words or sentences to excite the people to hatred and contempt of the king, or of the government and constitution of this realm, he shall incur the punishment of a high misdemeanour; that is, fine, imprisonment, and pillory; and for a second offence, he is subject to a similar punishment, or transportation for seven years, at the discretion of the court.

But a prosecution for a misdemeanour under this act must be brought within six months. And this statute shall not affect any prosecu-

tion for the same crimes by the common law, unless a prosecution be previously commenced under the statute.

The contagion of French revolutionary principles in 1795, gave occasion for the passing of these acts. The last of them passed for three years only; and of the former, ss. 1. 5. 6. are made perpetual by 57 Geo. III. c. 6; the rest is expired.

(16) Counterfeiting the current gold or silver coin current in the U. S. is punishable by fine not exceeding 5000 dollars, and imprisonment not exceeding 10 years. Story's laws; 2005, § 30.
In consequence of the principle thus adopted, the statute 1 Mar. e. 1. having at one stroke (17) 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 thereof, 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 & 2 P. & 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; therefore to counterfeit it is not high treason, but another inferior offence.

[*90] *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 admirerint." 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 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 & 9 W. 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 (18); 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, gild, 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

(e) *Fy. 48. 4. 6.*

(17) This was done far more effectually six years before by 1 Ed. VI. c. 12. The object of the above statute, by this needless repetition, seems only an endeavour to continue to Mary the popularity which had so justly been gained by her brother.

(18) As to what tools or instruments are within the act, see *Fost.* 430. 1 East P. C. 170. 171. 1 Leach, 189. A mould for coinage is within the act. 1 East P. C. 170. So is a press for coinage. *Fost.* 430. By the 8 & 9 Wm. III. c. 26. a. 5. the tools, &c. may be seized to produce in evidence.
within three months after the commission of the offence (19): [ *91 ] except those for making or amending 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) (20). And, lastly, by statute 15 & 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.

3. The other 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 & 14 W. 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, 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 endeavour 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 [ *92 ] offence 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


(19) And it is incumbent on the prosecutor to shew the prosecution was commenced within that time. Proof by parol that the prisoner was apprehended for treason respecting the coin within the three months, will not be sufficient, if the indictment is after the three months, and the warrant to apprehend or commit are produced. Russ. & R. C. C. 369.

(20) If a person is apprehended in the act of coining, or is proved to have made considerable progress in making counterfeit pieces resembling the gold or silver coin of this realm, yet if they are so imperfect as that no one would take them, he cannot be convicted upon the charge of coining under this statute. Leach, 71. 126. But he may be convicted, if he has made blank pieces without any impression to the similitude of silver coin worn smooth by time. Welch's case, Ibid. 293. Or if any one shall put pieces of mixed metal into aqua fortis, which attracts the baser metal and leaves the silver upon the surface, or as the vulgar say, draws out the silver, this is held to be colouring under this statute. Lavey's case, Ibid. 140.

In a case at Durham, where a man had been committed more than three months before his trial, for an offence under this statute, and upon conviction his case was reserved for the opinion of the judges, they determined that the commitment was the commencement of the prosecution, otherwise this crime might be committed with impunity half the year in the four northern counties. See further, ante, 84.
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 misdeemor, punishable with forfeiture of goods and chattels, even in the most flourishing era 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 reasonable pamphlet, entitled "vox populi vox Dei (g)."

Thus much for the crime of treason, or laesae majestatis, in all its branches; which consists, we may observe, originally, in grossly counter-acting 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. [*93 ] That he be 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).

The king may, and often doth, discharge all the punishment, except beheading, especially where any of noble blood are attained. 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).

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) (19).

(g) State Ty. 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, Hitham 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. 32.
(o) 1 Hal. P. C. 351.
(p) 2 Hal. P. C. 399.

(21) But now by the statute 30 Geo. III. c. 49. women convicted in all cases of treason, shall receive judgment to be drawn to the place of execution, and there to be hanged by the neck till dead. Before this humane statute, women from the remotest times were sentence-
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 (1) INJURIOUS TO THE KING'S PREROGATIVE.

As, according to the method I have adopted, we are next to consider such felonies (1) 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 (2), in the general acceptation of our English law, comprises every species of crime, which occasioned at common law the forfeiture of lands and goods. 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 treason, or [ "95] other felony." All treasons therefore, strictly speaking, are felonies; though all felonies are not treason. 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 forfeiture of either lands, or goods, or both, at the

(a) 3 Inst. 15.

ed to be burned alive for every species of treason: Et si nulle femme de assumpere treason soit attainde, soit arris. Britt. c. 6.

And now by 54 Geo. III. c. 146. the judgment against a man for high treason is, in effect, that he shall be drawn on a hurdle to the place of execution, and be there hanged by the neck until he be dead, and that afterwards his head shall be severed from his body, and his body, divided into four quarters, shall be disposed of as the king shall think fit; with power to the king, by special warrant, in part to alter the punishment. A month's time has been allowed between sentence and execution. 1 Burr. 650. 1. But the last executions for this offence followed (and properly so, for the purpose of example) more closely upon conviction. Thistlewood and his fellow conspirators, were condemned and executed within a few days after their trial.

(1) As the author also considers misdemeanors in this chapter, the proper title would be, "Of Offences against the King's Prerogative."

(2) See p. 5, note 6.
common law; and to which capital or other punishment may be superadd-
ed, according to the degree of guilt.

To explain this matter a little farther: the word felony or felonía, is of
undoubted feodal original, being frequently to be met with in the books of
feuds, &c.: but the derivation of it has much puzzled the juridical lex-
cographers, Prateus, Calvinus, and the rest: some deriving it from the
Greek αερίας, an imposter or deceiver; others from the Latin falsa, falselli,
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 animo 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 proba-
bility to sir Henry Spelman’s Teutonic or German derivation of it (c): in
which language indeed, as the word is clearly of feodal 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: fec,
which signifies (we well know) the fief, feud, or beneficiary estate: and
lon, which signifies price or value. Felony is therefore the same
[ *96 ]
as pretium feudi, the *consideration for which a man 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 feodal for-
feiture, or act by which an estate is forfeited, or escheats to the lord (3).

To confirm this we may observe, that it is in this sense, of forfeiture to
the lord, that the feodal writers constantly use it. For all those acts,
whether of a criminal nature or not, which at this day are generally for-
feitures of copyhold estates (d), are styled felonía in the feodal law: “sci-
licitet, per quas feudum amittitur (e).” As, “si domino deservire noluerit (f);
si per annum et diem cessaverit in patenda investitura (g); si dominum ejuravit,
i. e. negavit 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 denounced felonies by the
feodal constitutions. So likewise injuries of a more substantial or criminal
nature were denounced felonies, that is, forfeitures: as assaulting or
beating the lord (k); vitiating his wife or daughter, “si dominum cucurbita-
verit, i. e. cum uxore ejus concubuerit (l);” all these are esteemed felonies,
and the latter is expressly so denominated, “si fecerit feloniam, dominum
forte cucurbitando (m).” And as these contempts, or smaller offences, were
felonies, or acts of forfeiture, of course greater crimes, as murder and rob-
bbery, fell under the same denomination. On the other hand, the lord might
be guilty of felony, or forfeit his seignory to the vassal, by the same acts
as the vassal would have forfeited his feud to the lord. “Si dominus com-
missit feloniam, per quam vasalli usummitteret feudum si eam commiserit in domi-
num, 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 as

(b) 1 Inst. 391.
(c) Glossar, tit. Felon.
(d) See Book II. pag. 284.
(e) Fond. l. 1, t. 15, in calc.
(f) Ibid. l. 1, t. 21.
(g) Ibid. l. 2, t. 24.
(h) Ibid. l. 2, t. 34, l. 2, t. 26, § 3.
(i) Ibid. l. 2, t. 22.
(k) Ibid. l. 2, t. 24, § 2.
(l) Ibid. l. 1, t. 5.
(m) Ibid. l. 2, t. 38. Britton, l. 1, c. 22.
(n) Ibid. l. 2, t. 26, § 47.

(3) But a forfeiture of land is not a neces-
sary consequence of felony; for petit larceny is felony, which does not produce a forfeiture
of lands; but every species of felony is fol-
lowed by forfeiture of goods and personal
chattels.
that he loses his services; which seems 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 partium suorum" in the lord's court; as with us forfeitures 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 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 the 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, in 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 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 generical 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 de-

(o) 3 Inst. 43.
(p) 1 Inst. 391.
(q) 1 Hawk. P. C. 107. 2 Hawk. P. C. 444.
storing 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 (4), under which may be ranked some inferior misdemes nors 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 false and ill money into the realm, on pain of forfeiture of life and member by the persons importing, and the searchers permitting such importation (5). By statute 3 Hen. V. st. 1. to make, coin, buy, or bring into the realm any gally-halfpence, fuskins, 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 (6). By statute 13 & 14 Car. II. c. 31. the offence of melting down any 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 & 7 W. 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 500l.; one moiety to the king, and the other to the informer; and be branded in the cheek with the letter R. By statute 8 & 9 W. 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

(4) See note 16, p. 88.
(5) Repealed by 59 Geo. III. c. 49. § 10. which enacts, "That it shall and may be lawful for any person or persons to export the gold or silver coin of the realm to parts beyond the seas, and also to melt the gold and silver coin of the realm, and to manufacture or export, or otherwise dispose of the gold or silver bullion produced thereby; and no person who shall export or melt such gold or silver coin, or who shall manufacture, export, or dispose of such bullion, shall be subject to any restriction, forfeiture, pain, penalty, incapacity, or disability whatever, for or in respect of such melting, manufacturing, or exporting the same respectively; any thing in any Act or Acts in force in Great Britain or Ireland to the contrary thereof in anywise notwithstanding."

(6) See post, 120. The importation of foreign bad coin is further provided against. Thus, by the 37 Geo. III. c. 126. s. 2. coining or counterfeiting any kind of coin, not the proper coin of the realm, nor permitted to be current (id est, by proclamation under great seal) within it, but resembling, or made with intent to resemble, or look like any gold or silver coin of any foreign state, &c. or to pass as such foreign coin, is a felony punishable with seven years' transportation. And by the same act, (sect. 6) having in custody, without lawful excuse, more than five pieces of bad coin, is punishable with a forfeiture of not exceeding 5l. nor less than 40s. for every piece. By sect. 3. importing counterfeit gold or silver, foreign coin, not current, with intent to utter, is felony, punishable with transportation for not exceeding seven years. Importing with an intent to utter, is a sufficient offence within the act. 1 East P. C. 176. And by 43 Geo. III. c. 139. s. 3. counterfeiting foreign coin, not current by proclamation, but resembling copper or mixed metal coin of a foreign state, is a misdemeanor, punishable, for the first offence, by not exceeding one year's imprisonment, and for the second, transportation for seven years. And sect. 6. inflicts a penalty of not exceeding 40s. nor less than 10s. for every such piece of coin in possession of a person who shall have more than five pieces in his custody, without lawful excuse. And by sect. 7. houses of suspected persons, may be searched by warrant for such counterfeit coin.

See also 3 Geo. IV. c. 114.
its baseness, and a fraudulent design) any counterfeit or diminished milled money of this kingdom, not being cut in pieces (7); (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 & 10 W. 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. *But these precautions not being [*100] found sufficient to prevent the uttering of false or diminished money, which was only a misdemeanour at common law, it is enacted by statute 15 & 16 Geo. II. c. 28, that if any person shall utter or tender in payment (8) 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 (9). Also, if a person know-

(7) Selling base and counterfeit money at a lower rate than its denomination imports, as twenty bad half-crowns for a guinea, is a crime of great magnitude, and in populous towns is much practised. The offender in this case is either the coiner himself, or the wholesale dealer between the coiner and the utterer, who puts each piece into circulation at its full apparent value. The statute declares that the offender shall suffer death as in case of felony; but not having expressly taken away the benefit of clergy, for the first offence he was subject only to be burnt in the hand, and to suffer any imprisonment not exceeding a year; and since the 19 Geo. III. c. 74, the burning in the hand may be changed by the court into a fine, or whipping publicly or privately, but not more than three times. An offender of this description must necessarily be so conversant with counterfeiting as public policy requires that in the first instance he should be sent out of the kingdom.

It has been determined that the term milled money, does not mean edged money, or money marked on the edges.

The word milled seems to be superfluous, and to signify nothing more than coined money. Running's case, Leach, 708.

In a case where the prisoner had counted out a quantity of bad money, and placed it upon a table for a person who had agreed to buy it, but before it was paid for, and whilst it lay upon the table, the prisoner was apprehended, it was held that he had not paid it or put it off, so as to be guilty of this crime. Wooldridge's case, Leach, 292.

But in this case he certainly might have been prosecuted for a misdemeanour; for every attempt to commit either a felony or a misdemeanour, is a misdemeanour. K. v. Scofield, Calf, 397.

The K. v. Sutton, 2 Str. 1074, which is the basis of the cases, K. v. Scofield, and K. v. Higgins, 2 East, 5, is precisely in point upon this subject. A man was convicted of a misdemeanour, for having in his possession two iron stamps, with intent to impress the sceptres on sixpences. The court, after hearing two arguments, declared, "the intent is the offence, and the having in his custody an act that is the evidence of that intent."

This case is more fully reported in Cases in the Time of Lord Hardwicke, 370; and there it appears that one count was for having in his custody a counterfeit half-guinea, with intent to utter it. The court take no notice of that count in their judgment. But in the argument four indictments are cited, for unlawfully procuring false money with intent to utter it, and with intent to defraud the people of England.

The words in the statute 15 and 16 Geo, II. are "shall utter, or tender in payment," and it has been decided that the words in payment refer to the word tender only, so that to tender in payment is one offence, and to utter is another; and a man was convicted of uttering, who having received a good shilling, immediately changed it, and gave back a bad one, insisting it was the one he received. Frank's case, Leach, 736.

If a man is prosecuted for having uttered, or tendered in payment, any false money, and for having done the same within ten days afterwards, these two acts must be charged in one count. Tandy's case, Leach, 970.

But it is not necessary to aver in such count, that the defendant was a common utterer of false money. Smith's case, Ib. 1001.

(8) It is now settled, that the mere act of having counterfeit silver in possession, with an intent to utter it as good, is no offence, for there is no criminal act done. Russ. & R. C. C. 184, 288. But procuring base coin, with intent to utter it as good, is a misdemeanour; and having a large quantity of such coin is evidence of having procured it with such intent, unless there are other circumstances to induce a suspicion that the defendant was the maker. Russ. & R. C. C. 308.

(9) By the 3 Geo. IV. c. 114, the prisoner may be sentenced to hard labour. The reward
ingly 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 halfpence 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 of; shall be guilty of single felony (10). 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 moities to the crown and prosecutor (11). 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. Felonies, against the king’s council (s), are these. First, by statute 3 Hen. VII. c. 14. if any sworn servant of the king’s household [*101] conspires or confederates to kill any lord of this *realm, or other person, sworn of the king’s council, he shall be guilty of felony. Secondly, by statute 9 Ann. c. 16. to assault, strike, wound, or attempt to kill, any privy counsellor in the execution of his office, is made felony without benefit of clergy.

3. Felonies in serving foreign states (12), 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 farther, 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 de-

(10) The 15 & 16 Geo. II. c. 28, and the 11 Geo. III. c. 40, specify halfpence and farthings only; but other pieces of copper money having been since coined, the provisions of those statutes, by the 37 Geo. III. c. 126. are extended to all other pieces of copper money which are ordered to be current by the king’s proclamation. A remarkable error is made in two different pages of Mr. East’s publication upon criminal law, which states the punishment for coining copper money, and for selling counterfeit money for less than its denomination imports, to be only burning in the hand, and imprisonment not exceeding a year. 1 East P. C. 162 & 181. But the punishment before the 19 Geo. III. in all cases of felony, which had the benefit of clergy, was burning in the hand; and imprisonment for any time, at the discretion of the judge, not more than for one year, under the 18 Eliz. c. 7. § 3. By the 19 Geo. III. c. 74. burning in the hand may be changed at the discretion of the judge into a fine, or whipping not more than three times. See p. 373, post.

(11) This statute, by the 39 Geo. III. c. 74. is revived and made perpetual.

(12) The serving a foreign state seems punishable in the U. S. only when that state is at war with another state with which the U. S. are at peace. See Story’s laws U. S. 1694. As to embezzlement and desertion, see id. 992, &c.
tain or embark him for that purpose, without licence 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 sederer within fifteen days, so as he may be apprehended and convicted of the same, he shall be indemnified. By 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 500l. (13).

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, ordnance, 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, imbezzle the same *to the value of [*102] twenty shillings, such offence shall be felony. And the statute 22 Car. II. c. 5. takes away the benefit of clergy from this offence (14), 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 imbezzlements and misdemeanors, that fall under this denomination, are punished by statutes 9 & 10 W. 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 (15). 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 & 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 (16).

(13) These statutes of 9 Geo. II. and 29 Geo. II. are repealed by the 59 Geo. III. c. 69. which re-enacts and adds to their provisions, and by it the entering into, or agreeing to enter into, the aid of a foreign prince or people, &c. in any warlike capacity whatever, or going abroad with that intent, or attempting to get others to do so, is a misdemeanor, and punishable by fine or imprisonment, or both; and a penalty of 50l. is imposed on masters of ships and owner for assisting in the offence; there are further provisions for preventing the offence.

(14) This provision of the statute 22 Car. II. c. 5, which take away the benefit of the clergy, is repealed by the 5 Geo. IV. c. 53, and offenders may be transported for life, or for not less than seven years, or imprisoned, with or without hard labour, for not exceeding seven years.

(15) By the 39 & 40 Geo. III. c. 89. s. 1. persons, other than contractors, receiving or having stores of war in their possession, may be transported for fourteen years; and by sec. 2. persons convicted of offences against the 9 & 10 Wm. III. may, in addition to the punishment thereby to be inflicted, be punished with whipping and imprisonment, or either, but the penalty may be mitigated.

(16) To this class of felonies injurious to the king's prerogative, may be added two felonies lately created by the legislature, who thought it expedient to repress the attempts of mischievous and disaffected persons, by transportation or capital punishment. The 37 Geo. III. c. 70. (revived and made perpetual by the 57 Geo. III. c. 7.) enacts, that if any person shall maliciously and advisedly endeav-
CHAPTER VIII.

OF PRAEMUNIRE.

A third species of offence more immediately affecting the king and
his government, though not subject to capital punishment, is that of praemunire; so called from the words of the writ preparatory to the prosecution
thereof: "praemunire (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.

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 un-
questionably 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 eccle-
siastical 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 de-
structive of those ties and obligations by which all society is kept together;
equally encroaching on those rights, which reason and the original con-

(a) A barbarous word for praemonori (1).
(c) Address to James II. 1687.

your to seduce any person serving in his ma-
jesty's service by sea or land from his duty and
allegiance, or to incite any person to commit
any act of mutiny or mutinous practice, he
shall be guilty of felony, and shall suffer death
without benefit of clergy. The crime, where-
ever committed, may be tried in any county:
A sailor in a sick hospital, where he had been
for thirty days, and therefore not entitled to
pay, nor liable for what he then does to a
court-martial, is a person serving in the king's
forces by sea, within the 37 Geo. III. so as to
make the seducing him an offence within that
act. Russ. & R. C. C. 76.

(1) Praemunio, in law-latin, is used in all its tenses and participles, for praemoneo or cite. Ducange Gloss.
tract of every free state in the universe have vested in the sovereign pow-
er; 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 covenanriters 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 difficulty, 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 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 aera 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, he 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 the most implicit obedience to their own superiors or prelates; and they, in their turns, 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.

Vol. II.
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 apprized that (among thebulk of mankind) power cannot be maintained without property; and therefore its attention began very early to be rivetted 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, injoin-ed penance pro salute animae, 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 feodal 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 gradually spread itself to England. The pope became a *feodal lord; and all ordinary patrons were to hold their right of patronage under this universal superior. Estates held by feodal 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 corporeal possession; and spiritual benefices, which at first were universally do-native, 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 elapsed 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 feodal ren-der, 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 feodal 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

(d) Extrav. l. 3, t. 2, c. 13,
his journey thither, or back again; and moreover such also as became vacant by his promotion to a bishoprick or abbey: "etiamsi ad illa personae 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 feodal 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 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 adverse to the laws and constitution of England. The very nomination to bishopricks, 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 for ever St. Peter's patrimony; and the dastardly monarch re-accepted 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 austere 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 deaths would atone for a life of incontinence, disorder, and bloodshed. Hence innumerable abbeys and religious houses were built within a *cen-
tury after the conquest, and endowed, not only with the tithes of parishes which were ravished by 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 to what might befal that posterity to which they bore no endearing relation:—yet it vanished into *nothing*, when the 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 *praemunire*, 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 bullies 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 ordered 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 *praemunire*, 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 endeavoured 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 bullies of the see of Rome. But Edward the Third was of a temper extremely different: and to remedy these

[*111]*

---

(*e*) See Book III. pag. 61.
(*f*) See Book II. pag. 268.
(*g*) Dav. 83, 4c.
(*i*) 2 Inst. 583.
an expostulation to the pope: but receiving a menacing and contumacious answer, withheld acquainting him, that the emperor (who a few years before at the diet of Nurember, 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 preferments: and afterwards, that no alien *should be capable to be presented to any ecclesiastical preferment, [*112] 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 benefice made void. To which the statute 13 Ric. II. st. 2. c. 2. adds banishment and forfeiture of lands and goods: and by c. 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 *praemunire facias*, being (as we said) used to command a citation of the party, have denominated in common speech not only the writ, but the offence itself of maintaining the papal power, by the name of *praemunire*. And accordingly the next statute I shall mention, which is generally referred to by all subsequent statutes, is usually called the statute of *praemunire*. 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 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 *praemunire facias* shall be made out against them as in other cases of provisors.

(k) Mod. Un. Hist. xxix. 893.
(l) Stat. 29 Edw. III. st. 6. 27 Edw. III. st. 1.
(m) Sold. in Flot. 10. 4.
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 praemunire. 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; [*113] the spirit of the nation being so much raised against foreigners, that about this time, in the reign of 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 (a), 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 made not by the bishops only, but by the unanimous consent of a provisional 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 jurisdictions: 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 by 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).

[*114] *And indeed so far was the archbishop, who presided in this synod, from countenancing the usurped power of the pope in this realm, that 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

(a) Dav. 96.  
to exert his endeavours to repeal the statute of praemunire ("execrable 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 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 prince's merit, 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).

*This then is the original meaning of the offence, which we call [*115] praemunire; 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 praemunire were indeed extended to more papal abuses than before; as the kingdom then entirely renounced the authority of the see of Rome, though not all the corrupted doctrines of the Roman church. And therefore by the several statutes of 24 Hen. VIII. c. 12. and 25 Hen. VIII. c. 19 & 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 licence or dispensation; or to obey any process from thence; are made liable to the pains of praemunire. And, in order to restore to the king in effect the nomination of vacant bishopricks, 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 praemunire. Also by statute 5 Eliz. c. 1. to refuse the oath of supremacy will incur the pains of praemunire; and to defend the pope's jurisdiction in this realm, is a praemunire for the first offence, and high treason for the second. So too, by statute 13 Eliz. c. 2. to 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 to 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 praemunire. But importing or selling mass-books, or other popish books, is by statute 13 Jac. I. c. 5. § 25. only liable to the 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 praemunire.

*Thus far the penalties of praemunire seem to have kept within [*116] 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.

(p) See Wilk. Concil. 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 shew 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 praemunire and provisors were made to restrain.
Thus, 1. By the statute 1 & 2 Ph. & Mar. c. 8. to molest the possessors of abbey lands granted by parliament to Henry the Eighth, and Edward the Sixth, is a praemunire. 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. (2). 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 praemunire, 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 praemunire by two statutes: the one 16 Car. I. c. 21. the other 1 Jac. II. c. 8. (3). 5. On the abolition, by statute 12 Car. II. c.24. of purveyance (q), and to 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 praemunire. 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 praemunire by statute 13 Car. II. c. 1. 7. By the habeas corpus act also, 31 Car. II. c. 2. it is a praemunire, 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. & 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 praemunire (4); and by statute 7 [*117] & *8 W. III. c. 24. serjeants, counsellors, proctors, attorneys, and all officers of courts, practising without having taken the oaths of allegiance and supremacy, and subscribing the declaration against popery, are guilty of a praemunire, 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 praemunire: 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 praemunire. 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 praemunire (5). 12. The statute 12 Geo. III. c. 11. subjects to the penalties of the statute of praemunire all such as knowingly and wilfully solemnize, assist, or are present at, any forbidden marriage of such of the

(2) This act was made perpetual by the 39 Eliz. c. 18. s. 30. & 32; but though not expressly repealed, yet it seems to have virtually expired since the 12 Ann. st. 2. c. 16. s. 1.

(3) By the second section of 1 Jac. II. c. 8, the importation must be with the king’s licence (except from Ireland by the 46 Geo. III. c. 121.)

(4) By the 31 Geo. III. c. 32. § 18, it is enacted, that no persons shall be summoned to take the oath of supremacy, or make the declaration against transubstantiation, or be prosecuted for not obeying the summons for that purpose.

(5) By the 6 Geo. IV. the greater part of the provisions of this statute are repealed, and illegal companies are left to be dealt with according to the common law.
descendants of the body of king George II. as are by that act prohibited to contract matrimony without the consent of the crown (x).

Having thus inquired into the nature and several species of praemunire; 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 [*118] 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 in 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 praemunire, 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 (w), 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 praemunire, any law, statute, opinion, 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) (6), (7).

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 acceptance of our law, generally understood to be

---

(x) See Book I. ch. 4.
(t) 1 Inst. 129.
(u) 1 Bulst. 199.

(6) The terrible penalties of a praemunire are denounced by a great variety of statutes, yet prosecutions upon a praemunire are unheard of in our courts. There is only one instance of such a prosecution in the State Trials, in which case the penalties of a praemunire were inflicted upon some persons, for refusing to take the oath of allegiance in the reign of Charles the Second. Harg. St. Tr. 2 vol. 403.

(7) In New-York, and it is believed, in the whole of the U. S. statutes of praemunire are unknown: the pope making no pretensions to any power here that could injure our government.
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 misdeemor: 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 other states of Italy (c). But it is now enacted by the statute 1 & 2 Ph. & 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 assise 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 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 lands during life, forfeiture of goods, and imprisonment during life (f) (3). Which total forfeiture of the goods was originally inflicted while *the 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.


(1) See p. 76. note (4). As misprisions of treason and felony seem to be the creatures of the statute law, they probably do not exist in New-York, nor in any other state, without a special statute.

(2) But see the 37 Geo. III. c. 126 ante, p. 90. n. (3) But this is only in ease of high treason. Misprision of a lower degree is punishable only by fine and imprisonment. 1 Hale, 375.
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 Westm. 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 extrajudicial 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 (k)."

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.

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 peers shall seem proper; consisting usually of banishment, imprisonment, fines, or perpetual disability. Hitherto also may be referred the offence of embez-[^122]ling the public money, called among the Romans peculatus, which the Julian law punished with death in a magistrate, and with deportation, or banishment, in a private person (k).

Other misprisions are, in general, such contempts of the executive magistrate, as demonstrate themselves by 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 (6); or in his wars, by personal service for defence of the realm, against a rebellion or invasion (i). 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) (7). Contempts (8)

(a) 2 Hal. P. C. 375.
(b) Inst. 4. 18. 9.
(c) 3 Inst. 133.
(d) 1 Hawk. P. C. 59.
(e) Lamb. Eir. 315.

(4) In New-York, the senate is the court for the trial of impeachments, and can only remove from office and disqualify the guilty person from office in future. The impeachment does not prevent an indictment, but it causes a suspension from office till acquittal. (2 R. S. 165. 166.) Every wilful neglect by a public officer of a duty enjoined by law, is a misdemeanor, when no special punishment is provided for the offence. Id. 690.

(5) But now by 50 Geo. III. c. 59, § 1, it is enacted, that if any person shall embezze or fraudulently apply monies issued to him for the public services, he shall be adjudged guilty of a misdemeanor, and shall be subject to transportation, or receive such punishment as the court in which he is convicted, may in its discretion think proper.

Section 2 enacts, that if any officer, collector, or receiver, intrusted with the receipt, or management, of the public revenues, shall furnish false statements, or returns, of the monies collected by him, or of the balances left in his hands, he shall be guilty of a misdemeanor, and be fined and imprisoned at the discretion of the court, and be for ever rendered incapable of holding or enjoying any office under the crown.

(6) In the U. S. there has been no need of making this an offence.

(7) In New-York it is a duty incumbent on every male inhabitant of the county. 2 R. S. 441.
against the prerogative may also be, by preferring the interests of a foreign potentate to those of their 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) (8). Or, by disobeying the king's lawful commands; whether by writs 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 execut 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 (9): 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 (10). It has been also held an offence of this species to drink to the pious memory of a traitor; or for a clergymen 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 (11) or other infamous corporal punishment (q): in like manner, as in the ancient German empire, such persons as endeavoured to sow sedition, and disturb the public tranquillity, 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 praemunire, 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 praemunire. This heedless species of contempt is however

(n) 3 Inst. 144.
(o) See Book I. pag. 266.
(p) 1 Hawk. P. C. 60.
(q) Ibid.
(r) Mod. Un. Hist. xxix. 25. 119.
(s) See page 91.

(8) This is unlawful in any officer under the U. S., but not in citizens generally. See Const. Art. 1. sect. 9, § 7.
(9) See 2 R. S. 696, § 39. The doing an act prohibited by statute, is a misdemeanar if not specific penalty be imposed.
(10) To assert falsely that the king labours under the affliction of mental derangement is criminal, and an indictable offence. 3 D. & R. 464. 3 B. & C. 257. S. C. In Rex v. Cobbett, E. T. 1805. Holt on Libel, 114, 5. 6 East, 583, where the defendant was convicted of publishing a libel upon the administration of the Irish government, and upon the public conduct and character of the lord lieutenant and the lord chancellor of Ireland, lord Ellenborough, C. J., observed, "It is no new doctrine, that if a publication be calculated to alienate the affections of the people, by bringing the government into disesteem, whether

the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the law. See also Holt. Rep. 424. 14 How. St. Tr. 1095. S. C.

By the 60 Geo. III. c. 8, the offence of publishing seditious libels is further provided against by empowering the court after verdict to seize upon all copies of the libel, &c.; and by sect. 4. persons convicted of a second offence may be punished, as in cases of high misdemeanors, or by banishment for so long as the court may order. By sect. 5. persons not departing within thirty days after sentence of banishment, may be conveyed out of the kingdom; and by sect. 6. persons banished, found at large within the king's dominions, may be transported.

(11) This provision is now abolished by the 56 Geo. III. c. 138.
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 misdemeanour, 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; and yet *acting in a public [*124] 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 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 a praemunire: 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 500l. to him or them that will sue for the same (12). 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 subject to the same penalties that were mentioned in a former chapter (t); which in the end may amount to the alternative of abjuring the realm, or suffering death as a felon (13).

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 (v). So too, in the old Gothic constitution, there were many places privileged by law, quibus major reverentia et securitas debetur, ut tempa et judicia, quae sancta habebantur,—arces et aula regis,—denique locus quilibet praesente aut adventante rege (u). And at present, with us, by the statute *33 Hen. VIII. c. 12. malicious striking in [*125] the king's palace, wherein his royal person resides, whereby blood is drawn, is punishable by perpetual 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 (14), (15).

(1) See page 55.
(2) 3 Inst. 140. LL. Allured. cop. 7. § 34.
(12) See page 59. n.
(13) See page 116. note.
(14) Mr. Hargrave has given in the 11th vol. of the State Trials, p. 16. an extract from Stowe's Annals, containing a very curious account of the circumstances of the trial of sir Edmund Knevet, who was prosecuted upon this statute, soon after it was enacted: "for which offence he was not only judged to lose his hand, but also his body to remain in prison, and his lands and goods at the king's pleasure. Then the said sir Edmund Knevet desired that the king, of his benigne grace, would pardon him of his right hand, and take the left: for (quoth he) if my right be spared, I may hereafter doe such good service to his grace, as shall please him to appoint. Of this submission and request, the justices forthwith informed the king, who of his goodness, considering the gentle heart of the said Edmund, and the good report of lords and ladies, granted him pardon, that he should lose neither hand, land, nor goods, but should go free at liberty." (15) So much of the 33 H. VIII. c. 12, (part of § 6 to § 18,) as relates to the punish-
But striking in the king's superior courts of justice, in Westminster-hall, or at the assises, 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 court 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 (z). 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, 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) (16).

[*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 proceeded 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

"\[w\] LL. Inac. c. 6. LL. Canut. 56. LL. Alured. c. 3.
\(\text{(z)}\) Staund. P. C. 33. 3 Inst. 140, 141.
\(\text{(y)}\) 1 Hawk. P. C. 57.
\(\text{(a)}\) Ibid. 503.
\(\text{(b)}\) 1 Hawk. P. C. 58.
\(\text{(c)}\) 3 Inst. 141, 142.
\(\text{(d)}\) Stierinl. de jure Goth. 1, 3, c. 3.

ment of manslaughter, and of malicious striking, by reason whereof blood shall be shed, is repealed by 9 Geo. IV. c. 31. As to manslaughter, generally, vide post 191. (16) Lord Thanet and others were prosecuted by an information filed by the attorney-general for a riot at the trial of Arthur O'Connor and others for high treason under a special commission at Maidstone. Two of the defendants were found guilty generally. The three first counts charged (inter alia) that the defendants did riotously make an assault on one J. R., and did then and there beat, bruise, wound, and ill-treat the said J. R., in the presence of the commissioners. When the defendants were brought up for judgment, lord Kenyon expressed doubts, whether upon this information the court was not bound to pronounce the judgment of amputation of the right hand, &c. as required in a prosecution expressly for striking in a court of justice. In consequence of these doubts the attorney-general entered a noli prosequi upon the first three counts, and the court pronounced judgment of fine and imprisonment as for a common riot. 1 East P. C. 438.
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 (17). And ancietly 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 misprison (e), and liable to be fined and imprisoned (f) (18), (19).

CHAPTER X.

OF OFFENCES AGAINST PUBLIC JUSTICE.

The order of our distribution will next lead us to take into consideration such crimes and misdemesnors 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 representatives, or by a tacit and implied consent presumed and proved by immemorial usage.

The species of crimes which we have now before us, is subdivided into

(e) See Bar. 212. 27 Ass. pl. 44, § 4, fol. 138.
(f) 1 Hawk. P. C. 59.

(17) The mere attempt to stifle evidence is also criminal, though the persuasion should not succeed, on the principle now fully established, that an incitement to commit any crime is itself criminal. 6 East, 464. 2 East, 5. 21, 22. 2 Stra. 904. 2 Leach, 925. As to conspiring to prevent a witness from giving evidence, see 2 East, 362. Knowing-ly making use of a false affidavit is indictable. 3 East, 364. 2 Stra. 1144.

(18) A few years ago, at York, a gentleman of the grand jury hear a witness swear in court, upon the trial of a prisoner, directly contrary to the evidence which he had given before the grand jury. He immediately communicated the circumstance to the judge, who upon consulting the judge in the other court, was of opinion that public justice in this case required that the evidence which the witness had given before the grand jury should be disclosed, and the witness was committed for perjury, to be tried upon the testimony of the gentlemen of the grand jury. It was held, that the object of this concealment was only to prevent the testimony produced before them from being contradicted by subornation of perjury on the part of the persons against whom bills were found. This is a privilege which may be waived by the crown. See p. 303. post.

(19) In New-York every court of record (including the court of chancery, 2 R. S. 276. § 1,) may punish as a criminal contempt, 1. any disorderly, contemptuous, or insolent behaviour committed during its sitting in immediate view and presence, and directly tending to interrupt its proceedings or impair the respect due to its authority; 2. any disturbance whatever directly tending to interrupt its proceedings: 3. 4. willful disobedience or resistance of any process or order; 5. contumaciously refusing to be sworn as a witness, or to testify: 6. the publication of a false or grossly inaccurate report of the proceedings of the court. The punishment may be by fine not exceeding 250 dollars, and by imprisonment not exceeding 30 days. (2 R. S. 278.) A justice of the peace may also punish the first and second classes of contempt, and the third also, if it be committed in his presence, by fine not exceeding 25 dollars, and by imprisonment not exceeding 5 days: the imprisonment for non-payment of the fine not to exceed 10 days: so too, if a witness refuses to be sworn or to testify, and the party calling him swears that he is a material witness, the justice may imprison him till he answer, (id. 273. 274,) period less definite than that fixed in other courts. These punishments do not prevent an indictment, but mitigate the sentence thereon. (Id. 273.) These acts seem to be intended to define all contempts of court.
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 oeconomy: of each of which we will take a cursory view in their order.

First, then, of offences against public justice: some of which are felonious, 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. Imbezzling 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 willfully 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 (1). And this may be tried either in the king's bench or common pleas, by a jury de medictate: half officers of any of the superior courts, and the other half common jurors (2). 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. & 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 (3). For no man's property

(1) The 8 Hen. VI. c. 12, § 3, is now repeated by 7 and 8 Geo. IV. c. 27; by § 21 of which it is enacted, that "if any person shall steal, or shall for any fraudulent purpose, take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterato, injure, or destroy any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or any original document whatsoever, of or belonging to any court of record, or relating to any matter civil or criminal, begun, depending, or terminated, in any such court, or any bill, answer, interrogatory, deposition, affidavit, order, or decree, or any original document whatsoever, of or belonging to any court of equity, or relating to any cause or matter, begun, depending, or terminated in any such court, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; and it shall not in any indictment for such offence be necessary to allege that the article, in respect of which the offence is committed, is the property of any person, or that the same is of any value."

(2) R. S. 689, § 69, 70. punishes these offences, and id. 671, § 25, 26. make it forgery in the second degree to alter any record of any instrument, the record of which is evidence, or any return to process; or to falsely enter any such as true. It is a high misprision in an officer to alter the enrolment of a memorial of an annuity deed, without the sanction of the court. 3 Taunt. 543.

By the 5 Geo. IV. c. 20. s. 10. persons in the post-office embezzling or destroying parliamentary proceedings, &c. sent by post, will be guilty of a misdemeanor, and punishable with fine and imprisonment.

(3) The merely personating bail before a
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 [*129] his will: that is, as we shall see hereafter, to accuse and turn evidence against some other person; it is felony in the gaoler (4). 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.

3. A third offence against public justice is obstructing the execution of lawful process (5). 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 (6), (7). 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 & 9 Will. 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

(a) 3 Inst. 91.
(b) 2 Hawk. P. C. 121.
(c) Such as White-Friers, and its environs; the Savoy; and the Mint in Southwark.

judge at chambers, or acknowledging bail in a false name, is only a misdemeanor, unless the bail are filed; 3 East, P. C. 109; and putting in bail in the name of a person not in existence, is not within the Act. 1 Stra. 304. The courts will not vacate the proceedings against the party personated, until the offender is convicted; T. Jones, 64, 1 Ventr. 501, 3 Kebr. 694, 1 Id. Rd. 445; and a conviction cannot take place until the bail-piece is filed, 2 Sid. 90.

See 2 R. S. 676, § 48.

(4) This act of Edw. III. is now repeated by the 4 Geo. IV. c. 64. s. 1. As to the duties of gaolers, see ante, 1 book, p. 316.

(5) In New-York it is punished by imprisonment not exceeding one year, and by fine not exceeding 250 dollars. 2 R. S. 684, § 17.

(6) By the 25 Geo. II. c. 37. s. 9, attempting to rescue a person convicted of murder, whilst proceeding to execution, is felony, and punishment is death, by the Geo. III. c. 58. s. 1, shooting at, or levelling loaded firearms at a person, and attempting to discharge the same, or stabbing or cutting with intent to obstruct, resist, or prevent the lawful apprehension and detainer of the person so stabbing, &c. or the lawful apprehension and detainer of his accomplice, is a felony, without benefit of clergy. It seems the right of the party to arrest should be proved, to bring a party resisting within the meaning of the act. 1 Stark. C. N. P. 246. If a cutting or wounding, &c. take place in an attempt to apprehend the prisoner, without a due notification of the warrant or authority by which the person acts, it does not fall within the meaning of the act, as it is not a wilful resistance of a lawful apprehension. 3 Camp. 68. per lord Ellenborough, C. J. at Maidstone, 6 Aug. 1816.

(7) By 9 Geo. IV. c. 31, § 25, it is enacted, that where any person shall be charged with, and convicted of, as a misdemeanor, any assault upon any person with intent to resist or prevent the lawful apprehension or detainer of the party so assaulting, or of any other person, for any offence for which he or they may be liable by law to be apprehended or detained; the court may sentence the offender to be imprisoned, or with or without hard labour, for any term not exceeding two years, and may also fine the offender, and require him to find sureties for keeping the peace. See 1 and 2 Geo. IV. c. 88, § 2. 3 Geo. IV. c. 114. 1 Burn's J. 230, et seq.
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. 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 [*130] against public justice, and the party himself is punishable by fine or imprisonment(d). 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 might 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 misdemeanour (g) (8), (9).

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) (10). But this severity is mitigated by the statuto de frangentibus prisonam, 1 Edw. II. which enacts, that no person shall have judgment of life or member for breaking prison, unless committed for some capital of-

(d) 2 Hawk. P. C. 129.
(e) 1 Hal. P. C. 600.
(f) 1 Hal. P. C. 590. 2 Hawk. P. C. 134.
(g) 1 Hal. P. C. 588, 9. 2 Hawk. P. C. 134, 5.
(h) 1 Hal. P. C. 607.
(i) Bract. l. 3, c. 9.

(8) In New-York it is punishable with imprisonment not exceeding one year, and fine not exceeding 1,000 dollars. 2 R. S. 694, § 18.
(9) There must be an actual arrest, as well as a lawful arrest, to make an escape criminal in an officer. 2 Hawk. c. 19. s. 1, 2. It must also be for a criminal matter. Id. s. 3. And the imprisonment must be continuing at the time of the offence. Id. s. 4. 1 Russ. 531. 1 Hale, 594. In some cases it is an escape to suffer a prisoner to have greater liberty than can by law be allowed him; as, to admit him to bail against law, or to suffer him to go beyond the limits of the prison, though he return. 2 Hawk. c. 19. s. 5. A retaking will not excuse an escape. Id. s. 12.

Private individuals, who have persons lawfully in their custody, are guilty of an escape if they suffer them illegally to depart, 1 Hale, 595; but they may protect themselves from liability by delivering over their prisoner to some legal and proper officer. 1 Hale, 594.

5. A private person, thus guilty of an escape, the punishment is fine, or imprisonment, or both. 2 Hawk. c. 20. s. 6.

By the 52 Geo. III. c. 156, persons aiding the escape of prisoners of war are guilty of felony, and liable to transportation. It has been held, that the offence of aiding a prisoner of war to escape is not complete, if such prisoner is acting in concert with those under whose charge he is, merely to detect the defendant, and has no intention to escape. Russ. & R. C. C. 196.

(10) Any one breaking a county jail with a view to escape, is punishable in New-York with imprisonment not exceeding one year: if, after conviction for a criminal offence he break jail and escape, he may be imprisoned for not more than two years: if the escape is after conviction, and from a state prison, the punishment may be for a period not exceeding 5 years. 2 R. S. 685.
fence. 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 misdemeanour by fine and imprisonment. For the statute which ordains that such offence shall be no longer capital, never meant to exempt it entirely from every degree of punishment (j) (11).

6. Rescue is the forcibly and knowingly freeing another from an arrest or imprisonment (12); 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 misdemeanour, a misdemeanour 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 that there has been no offence committed (k) (13). By statute 11 Geo. II. c. 26. and 24 Geo. II. c. 40. if five or more persons assemble to rescue any retailers of spiritual liquors, or to assault the informers against them, it is felony, and subject to transportation for seven years. But 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 (14): or if the prisoner be in custody for petit larceny or other inferior offence, or charged with a debt of 100l., it is then a misdemeanour, punishable with fine and imprisonment (15). And by several special statutes (l), to rescue, or attempt to rescue, an escape, is punished with a fine of 50l. and imprisonment for one year (16).

(j) 2 Hawk. P. C. 198.  
(k) 1 Hal. P. C. 607. Fost. 344.  
(l) 6 Geo. I. c. 23. (Transportation.) 9 Geo. I. c. 22. (Black-act.) 8 Geo. II. c. 20. (Destroying a prison).  

(11) An actual breaking is the gist of this offence, and must be stated in the indictment. It must also appear that the party was lawfully in the custody of the justifying judgment of life or member; it is not enough to allege that he "feloniously broke prison." 2 Inst. 591. 1 Russell, 381. If lawfully committed, a party breaking prison is within the statute, although he may be innocent: as, if committed by a magistrate upon strong suspicion. 2 Inst. 590, 1 Hale, P. C. 610, 1 Russell, 378. To constitute a felonious prison breach, the party must be committed for a crime which is capital at the time of the breaking. 1 Russell, 379. Cole's case. Plowd. Comm. 401. A constructive breaking is not sufficient; therefore, if a person goes out of prison without obstruction, as by a door being left open, it is only a misdemeanor. 1 Hale, P. C. 611. An actual intent to break is not necessary. The statute extends to a prison in law, as well as to a prison in fact. 2 Inst. 598. "Prison breach or rescue is a common law felony, if the prisoner breaking prison, or rescued, is a convicted felon, and it is punishable by imprisonment, and under 19 Geo. III. c. 74, § 4, by three times whipping. Throwing down loose bricks at the top of a prison wall, placed there to impede escape and give alarm, is prison breach, though they were thrown by accident." Rex v. Haswell, R. and R. C. C. 458.

(12) In New-York the punishment is imprisonment, or imprisonment for not less than one year, and not more than three years. And by s. 1, assaulting any lawful officer, to prevent the apprehension or detention of persons charged with felony, is punishable with seven years' imprisonment, or imprisonment for not less than one year, and not more than three years. And by s. 1, assaulting any lawful officer, to prevent the apprehension or detention of persons charged with felony, is punishable with seven years' imprisonment, or imprisonment for not less than one year, and not more than three years. And by s. 1, assaulting any lawful officer, to prevent the apprehension or detention of persons charged with felony, is punishable with two years' imprisonment in addition to other pains and penalties incurred. (vide also Geo. IV. c. 84, § 22.) This section is repealed by 9 Geo. IV. c. 31, which, by section 25, provides a punishment for these offences: vide post 217.

By 9 Geo. IV. c. 4, s. 13, (entitled the Mutiny Act,) persons under sentence of death by court martial, having obtained a conditional pardon, escaping out of custody, and all parties aiding such escape, are punishable as felons. See Rex v. Stanley, R. and R.C.C. 432.

(14) In New-York the punishment is not to exceed 10 years' imprisonment. 2 R. S. 663, § 1.

(15) On an indictment under this Act, the
tempt 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, is 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, [*132] 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 conceal, aid, abet, or succour him, are felons without benefit of clergy (16).

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 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. 13, as is also the assisting them to escape from such as are conveying them to the port of transportation (17).

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 further 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) (18).

(17) These provisions are virtually repealed by the 5 Geo. IV. c. 84, which revives and consolidates into one act the laws relative to the transportation of offenders. By the 22d section, it is enacted, that if any offender, sentenced or ordered to be transported or banished, or having agreed to transport or banish himself, shall be afterwards found at large, without lawful excuse, before the expiration of the term of transportation or banishment, he shall suffer death without clergy. By sect. 84. the act is not to extend to persons banished under the 60 Geo. III. and 1 Geo. IV. c. 8 for blasphemous and seditious libels. If the prisoner can shew such circumstances of poverty or sickness, which amount to an absolute impossibility to transport himself, or leave the kingdom, he will not be within the act. 1 Leach, 396. By the 22d sect. of 5 Geo. IV. c. 84. a reward of 20l. is given for prosecuting an offender against the act to conviction.

(18) In Rex v. Ledbitter, R. and R. C. C. 76, a police officer was indicted under 4 Geo. I. c. 11, § 4, for taking money under the pretence of helping a person to goods stolen from him, and convicted of felony, though the officer had no knowledge of the felon, and though
9. Receiving of stolen goods, knowing them to be stolen, is also a high misdemeanor and affront to public justice (19). We have seen in a former chapter (n), that this offence, which is only a misdemeanor at common law, by the statute 3 & 4 W. & M. c. 9. and 5 Ann. c. 31. makes the offender accessory to the 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 (20). 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 (e). 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, and whether he be in or out of custody; and, if convicted, shall be adjudged guilty of felony, and transported for fourteen years (21).

10. Of a nature somewhat similar to the two last is the offence of theft byt, 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 (22); and formerly was

(a) See page 38.
(b) See also statute 2 Geo. III. c. 25, § 12, for the punishment of receivers of goods stolen by

he possessed no power to apprehend the felon, and though the property was never restored, and the officer had no power to restore it.

By statute 7 and 8 Geo IV. c. 29, § 58, it is enacted, "That every person who shall corruptly take any money or reward, directly or indirectly, under pretence, or upon account of helping any person, to any chattel, money, valuable security, or other property whatsoever, which shall by any felony or misdemeanor have been stolen, taken, obtained, or converted as aforesaid, shall (unless he cause the offender to be apprehended and brought to trial for the same,) be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit,) in addition to such imprisonment."

By § 59, advertising a reward for the return of any stolen property whatsoever, which shall have been stolen or lost, purporting that

no questions shall be asked, or printing such advertisements, renders the offending party liable to a penalty of fifty pounds, and full costs, to any person who will sue for the same, by action of debt. This Act repeals the 25 Geo. II. c. 36, § 1, as far as relates to the advertising rewards for stolen goods.

The 4 Geo. I. c. 11, § 4, relating to, and the 1 Geo. IV. c. 115, directing the degree of punishment for this offence, are also repealed by this statute.

(19) In New-York, it is punishable with imprisonment not exceeding 5 years, and a fine not exceeding 250 dollars. (2 R. S. 680, § 71.) See also id. 673, § 61.

(20) See accordingly, 2 R. S. 680, § 73.

(21) The acts mentioned above are mostly repealed by later acts, which are nearly similar to them: see 1 & 2 Geo. IV. c. 75: 7 & 8 Geo. IV. c. 29: 3 Geo. IV. c. 24.

(22) In New-York, compounding any offence punishable by death or imprisonment for life, is punishable by imprisonment not exceeding 5 years; if the offence compounded were punishable by imprisonment in the state
held to make a man an accessory; but 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.

[*134] And the Salic law, "latroni eum* similem habuit, qui furtum celare vellet, et occulte sine judice compositionem ejus admittere (r)." By statute 25 Geo. II. c. 36. even to advertise 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 50l. each (23).

11. Common barrettry is the offence of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise (s) (24). 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 barretor, 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, subornation of perjury, or common barrettry, shall practise 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 audaciously; 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

---

(q) 1 Hawk. P. C. 125.
(r) Stierm. de jure Goth. I. 3, c. 5.
(s) 1 Hawk. P. C. 243.
(t) Ibid. 244.
(u) Ibid. 249.
(v) Dr. & St. 203.

prison for a shorter term than for life, the person compounding may be imprisoned not more than 3 years: (2 R. S. 689, § 17. 19:) if the offence were punishable by imprisonment in a county jail, or by any penalty or forfeiture, the compounding is a misdemeanor, (id. 699, § 19:) and punishable by imprisonment not more than 1 year. (Id. 697, § 40.) In the two first cases it is unnecessary to prove the conviction of the principal offender. Id. 689, § 19.

Assaults and other misdemeanors, for which the party injured has a civil remedy, may, however be compromised before indictment, or with the consent of the court, after indictment, unless they be charged to have been committed riotously, or with intent to commit a felony, or by or upon any officer or minister of justice while in the execution of the duties of his office. Id. 730, § 66, &c.

(23) 7 & 8 Geo. IV. c. 27 & 29. relate to this offence.

(24) Disturbing the peace, making false inventions, propagating evil reports and calumnies, and spreading false and groundless rumours, whereby discord and disquiet may ensue amongst neighbours, may properly be ranked under the head Barrettry. 1 Inst. 368. 1 Hawk. P. C. 243. See 1 Hale, P. C. c. 27; Bac. Abr. Barrettry; 1 Russell, 205, on this subject. See also the Case of Barrettry, 8 Co. Rep. 30, b. No one can be convicted for a single act of barrettry; for every indictment for that offence must charge the defendant with being a common barretor. In a late case in the King's Bench, where an attorney, without any corrupt or unworthy motives, prepared a special case in order to take the opinion of the court upon the will of a testator, and suggested several facts which had no foundation, he was held to be guilty of a contempt, and fined 30l. In re Elsam, 5 D. and R. 389; 3 B. and C. 597.
*keeps alive strife 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 maintain the suit of a mere kineman, servant, or poor neighbour, out of charity and compassion, with impurity. 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; wherupon the champerter is to carry on the party’s suit at his own expense (a) (25). 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 (26): 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 (27). These pests of civil society, that are perpetually endeavouring 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 coeunt in alienam litem, ut quicquid ex condemnatione in rem ipsius redactum fuerit inter eos communicaretur, lege Julia de vi privata tenentur (?)”; 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 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 vendor 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. The compounding of informations upon penal statutes is an offence

(a) Stat. of conspirat. 33 Ed. I.
(b) F. 48. 10. 20.
(y) 1 Hawk. P. C. 255.
(z) Ibid. 257.

(25) In New-York it is a misdemeanour knowingly to take a conveyance of lands or tenements, or of any interest therein, from a person not in possession, while the title is controverted by suit in any court: also to buy or sell, or make or take any agreement to convey any pretended title to lands or tenements, unless the party selling or agreeing to sell, has, or he and those by whom he claims have been in possession of the same, or of the reversion or remainder, or have received the profits thereof for one year before. This, however, is not to apply to mortgages. (2 R. S. 691, § 5, &c.) As to attorneys levying claims for the purpose of suing on them, see 2 R. S. 283.

(26) See 1 Haw. P. C. c. 3, Co. Litt. 368, 1 Russell 176, on this subject. The distinction between maintenance and champerty seems to be this: where there is no agreement to divide the thing in suit, the party intermeddling is guilty of maintenance only; but, where he stipulates to receive part of the thing in suit, he is guilty of champerty. It seems that resorting to machinery and contrivances in order to make a party interested in a suit a witness on the trial, amounts to a maintenance. Bell v. Smith, 7 D. and R. 846; 5 B. and C. 188.

(27) If an attorney prosecute an action, to be paid his costs in gross, it should seem it would amount to champerty. Com. Dig. Attorney, B. 11. Hob. 117. Tidd Prac. 8 ed. 326.
of an equivalent nature in criminal causes; and is, besides, an additional misdemeanour 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 10L., shall stand two hours on the pillory (28), and shall be for ever disabled to sue on any popular or penal statute (29), (30).

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 (31); for which the party injured may

(29) By 56 Geo. III. c. 128, this punishment is removed from all offences, except perjury and subornation of perjury.

(30) See p. 133. note 22.

This statute does not apply to offences cognizable only before magistrates, 1 B. & A. 282; it applies only to common informers, and not to cases where the penalty is given to the party grieved. 1 Salk. 30. 2 Hawk. 279.

The taking the penalty is an offence within the act, though there is no action or proceeding for it. 2 Chit. & R. C. C. 44. 3 Burn J. 21 ed. 55. A notice of action required by a penal statute is no commencement of the suit, so as to subject the plaintiff, or his agent, to an attachment for attempting to compound an offence previous to the suing out of the writ, 2 Bia. Rep. 781; as to the mode of obtaining leave to compound, see Tidd's Prac. 8 ed. 604.

(31) The instance pointed out by the learned commentator is not the only one in which parties may be indicted for a conspiracy; and it may be stated as a general rule, that all confederacies wrongfully to prejudice another, are misdemeanors at common law, and indictable. See 1 Salk. 30. 2 Hawk. 279. This statute is either the attention in 11 Eliz. to injure his property, his person, or his character. See 1 Hawk. c. 72. s. 2. But no indictment lies for conspiring to commit a civil trespass on a preserve to take game, though effected in the night, and with destructive weapons. 13 East. 298.

The offence of conspiracy is not confined to the prejudicing a particular individual, it may be to injure public trade, to affect public health, to violate public policy, to insult public justice, or to do any act in itself illegal.

There are many cases in which the act itself would not be cognizable by law if done by a single person, which becomes the subject of indictment when effected by several with a joint design. 6 T. R. 636. Thus each person attending a theatre has a right to express his disapprobation of the piece acted, or a performer on the stage, but if several previously agree to condemn a play, or hiss an actor, they will be guilty of conspiring. 2 Camp. 353.

In the case of workmen refusing to proceed unless they receive an advance of wages, it is clear that any one of them might singly act on this determination, but it is criminal when it follows from a plan preconcerted by many. 6 T. R. 636. See the statute as to combinations among workmen, infra. There are other cases in which, though the act may be morally criminal, it is not illegal, except on the ground of conspiracy; thus the verbal slander of a private individual is not indictable, but it is so where several unite in a scheme to blast his character. 1 Lev. 62. 1 Vent. 304. And in every case that can be deduced of conspiracy, the offence depends on the unlawful attempt, and not on the act which follows it, the latter is but evidence of the former. 2 Burr. 993. 3 Burr. 1321.

To constitute a conspiracy, as observed in the text, there must be at least two persons implicated in it; and a husband and wife cannot be guilty of it. 1 Hawk. c. 72. s. 8. If all the persons in the indictment be acquitted except one, and the indictment do not lay the offence as committed jointly with other persons unknown, no judgment can be passed on such one. Poph. 202. 3 Burr. 1262. 12 Mod. 262. But one conspirator may be tried singly; as if the others had escaped, or died, before the trial, or the finding of the bill, he may be alone tried. 3 Burr. 1297. It is no offence to conspire to prosecute a guilty person. 1 Salk. 174.

It is not necessary to constitute the offence, that any act should be done in pursuance of the conspiracy, 2 Lord Raym. 1167. 8 Mod. 321. 1 Salk. 174. 1 Bia. Rep. 392; or that any party was actually injured. 1 Leach, 39.

Conspiration and combinations among workmen for a long time engrossed the attention of, and perplexed, the legislature. Until the passing of the 6 Geo. IV. c. 129. the common law relative to such an offence was considered defective. This act, however, repeals all the former acts on the subject of such combinations, and leaves the law undefined, without introducing any new substantive law. However, by the 3d section, if a person by force, violence, threats, or obstruction, compel any person hired or employed in any trade or business to depart from his hiring or employment, or obstruct him from returning to his work before finished, or prevent, or endeavour to prevent any person from hiring himself, or from accepting employment; or by force or threats, &c. molest another in his person or property, to induce him to be-
either have a 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 villenous 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 villenous judgment is by long *dis-
 [*137] use become obsolete; it not having been pronounced for some ages: but instead thereof the delinquents are usually sentenced 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 (32), (33).

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 wilful 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 wilfully, absolutely, and falsely, in a matter material to the issue or point in question (34). The law takes no notice of any (c) See Book III. pag. 126.
(e) 1 Hawk. P. C. 193.
(f) 2 Inst. 164.

come a member of any club or association, or to contribute to any common fund, or to pay any fine or penalty, or on account of his not belonging to any particular club or association; or not having contributed, or having refused to contribute, to any common fund, or to pay any fine or penalty; or on account of his not having complied, or of refusing to comply, with any regulations, &c. made to obtain an advance, or to reduce the rate of wages, or to lessen or alter the hours of working; or to decrease or alter the quantity of work; or to regulate the mode of carrying on any manufacture, trade, or business in the management thereof; or by violence or threats, or obstruction, force any person carrying on any business, to make any alteration in his mode of carrying on such business, or to limit his number of workmen,—such offender and his accessories may be imprisoned with or without hard labour, for not exceeding three calendar months. By sec. 4. persons may meet together for the sole purpose of consulting upon and determining the rate of wages, or hours of work, and may enter into an agreement for framing the rate of wages or hours of work. And by section 5. the masters of workmen may do the same. By sec. 6. offenders against the act may be called on to give evidence for the king, or prosecute an informer on any information exhibited under the act. Sec. 7. gives a summary proceeding before a magistrate for an offence under the act. (32) See note 27. p. 136: and p. 144.
(33) In New-York, the only conspiracies punishable criminally are the following, and they are made misdemeanors: viz: conspiracies by two or more. 1. To commit any offence, 2. False and maliciously to indict another for an offence, or to procure him to be charged or arrested therefor. 3. Falsely to move or maintain a suit. 4. To cheat or defraud another of property by criminal means. 5. To cheat and defraud another of property by means which, if executed, would amount to a cheat, or to obtain property or money by false pretences. 6. To commit any act injurious to the public health or morals, or to trade or commerce, or for the perversions or obstruction of justice, or of the due administration of the laws.

No agreement, except to commit a felony upon the person of another, or to commit arson or burglary, is a conspiracy, unless some act besides the agreement be done to effect the object. (2 R. S. 601, § 8, &c.)

If an overt act is necessary to constitute the offence, one or more must be alleged in the indictment, and the same be proved; but others not alleged may be given in evidence. (Id. 735, § 17.)

(34) In New-York perjury is a wilful and corrupt declaration to any material matter upon oath, affirmation, or declaration legally administered. 1. In any matter, cause, or proceeding, depending in any court of law or equity, or before any officer thereof. 2. In any case where an oath or affirmation is required by law, or is necessary for the prosecution or defence of any private right, or for

Vol. II. 62
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 (35). For which reason it is much to be questioned, how far any magistrate is justifiable in taking a voluntary *affidavit* in any extrajudicial 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 conscientiae*, 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*), willful, positive, and absolute (36): not upon surprise, or the like: it also must be in some point material to the question in dispute (37); for if it only be in some trifling

the ends of public justice. 3. In any matter or proceeding before any tribunal or officer created by the constitution or by law, or where any oath may be lawfully required by any judicial, executive, or administrative officer. The punishment is disqualification as a witness: and if the perjury be committed on the trial of an indictment on a capital offence or other felony, then imprisonment for a term not less than 10 years; if committed on any other trial, inquiry, or case, then for a term not more than 10 years. Subornation of perjury, where the witness is actually sworn and examined, is punished the same as perjury. The mere attempt to suborn a witness is punishable with imprisonment for 5 years. Any court of record may immediately commit to prison for trial any party or witness who, it may be reasonably presumed, has committed perjury. (2 R. S. 681, 682.)

(35) And no breach of an oath made in a mere private concern, as in entering into a contract, however malicious, is an indictable offence, but can only be redressed in an action for the individual injury; nor can any criminal proceeding be maintained by the violation of an oath, taken, however solemnly, to perform any duties in future, though the offence will be highly aggravated by the breach of an obligation so sacred. 3 Inst. 166. 11 Co. Rep. 98. And even where an oath is required by an act of parliament in an extrajudicial proceeding, the breach of that obligation does not seem to amount to perjury, unless the statute contain an express provision to that effect. And it seems an indictment for perjury is not sustainable on an oath taken before the house of commons, as they have not any power to administer an oath, unless indeed in those particular cases, in which an express power is granted to them by statute. But is indictable to swear falsely in any court of equity, 1 Leach. 50. 1 Sid. 418; any ecclesiastical court, Cro. Eliz. 609; and any other lawful court, whether it be of record or otherwise. Hawk. b. 1. c. 69. s. 3. So a false oath subjects the offender to all the penalties of perjury, though it be taken in a stage of the proceedings when it does not influence the final judgment, but only affects some subordinate step to be taken; thus, if a man offering to bail another swears his property to be greater than it is, in order to be received as a surety, it seems a substantial part of the evidence, the party will not be liable to an indictment. Hawk. b. 1. c. 69. s. 8. To swear falsely as to the character of a witness is sufficiently material. Com. Rep. 43. 1 Ld. Raym. 258. And in general it is sufficient if the matter be circumstantially material to the issue, or affect the ultimate decision. 1 Ld. Raym. 258. 2 Id. 889. 2 Roll. R. 369. Thus perjury may be committed by falsely swearing that another witness cannot give credit if such assertion conduceth to the proof of the point in issue. 1 Ld. Raym. 258. And it is certain, that there is no necessity that the false evidence should
collateral circumstance, to which no regard is paid, it is no more penal than in the voluntary extrajudicial oaths before mentioned. *Subornation* of perjury is the offence of procuring another to take such [138] a false oath, as constitutes perjury in the principal (38). 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 5 Eliz. c. 9. (if the offender be prosecuted thereon), inflicts the penalty of perpetual infamy, and a fine of 40L 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 20L, or to have both ears nailed to the pillory. But the prosecution is usually carried on for the offence at common law; especially as to the penalties before inflicted, the statute 2 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 (39). 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 they admit witnesses to be be sufficient to render the party on whose behalf it is given successful, but it will suffice if that is its evident tendency, 2 Ld. Raym. 889; or if in a civil action it has the effect of increasing or extenuating the damages, comme semble. Wood’s Inst. 435. In a late case, in an indictment for perjury, in an answer in chancery to a bill filed against the defendant for the specific performance of an agreement relating to the purchase of land, the defendant had relied on the statute of frauds (the agreement not being in writing), and had also denied having ever entered into such an agreement, and upon this denial he was indicted; but it was held that the denial of an agreement, which by the statute of frauds was not binding on the parties, was immaterial and irrelevant, and not indictable. 1 Ry. & M. 109. To constitute perjury at common law, it is not necessary that the false oath should obtain any credit, or occasion any actual injury to the party against whom the evidence is given; for the prosecution is not grounded on the inconvenience which an individual may sustain, but on the abuse and insult to public justice. 2 Leon. 211. 3 Leon. 230. 7 T. R. 315. In some cases, where a false oath has been taken, the party may be prosecuted by indictment at common law, though the offence may not amount to perjury. Thus it appears to have been held, that any person making or knowingly using any false affidavit taken abroad (though a perjury could not be assigned on it here), in order to mislead our courts of justice, is punishable as a misdemeanor; and lord Ellenborough, C. J., said, “that he had not the least doubt that any person making use of a false instrument, in order to prevent the due course of justice, was guilty of an offence punishable by indictment.” 8 East, 364. 2 Russ. 1759. (38) To render the offence of subornation of perjury complete, either at common law or on the statute, the false oath must be actually taken, and no abortive attempt to solicit will bring the offender within its penalties. 3 Mod. 122. 1 Leach, 455. notes. But the criminal solicitation to commit perjury, though unsuccessful, is a misdemeanor at common law, punishable not only by fine and imprisonment, but by corporal and infamous punishment. 2 East Rep. 17. 1 Hawk. c. 19. s. 10. 6 East, 464. (39) The statute now in force is 7 & 8 Geo. IV. c. 27. There is another circumstance which attends all convictions for perjury, though it forms no part of the judgment at common law, the incapacity of the offender to bear testimony as a witness. But when the indictment is framed at common law, a pardon under the great seal restores the competency, which the conviction destroyed. 1 Vent 349. 4 Harg. St. Tr. 682. 1 Esp. Rep. 94; but where the proceedings are grounded on the 5 Eliz. c. 9, this cannot be done without a reversal of the judgment, because it is here made a part of the punishment prescribed. 1 Salk. 289. 5 Esp. Rep. 94.
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 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, extitum; humana, dedecus (40)."

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) (41). 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 year (m): not considering the insinuating nature and gigantic progress of this vice, when once admitted. Plato [*140] therefore more wisely, in his ideal republic (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

---

(i) Britton, c. 5.
(k) De Leg. 3. 9.
(l) 1 Hawk. P. C. 168.
(m) Ff. 43. 11. 6.
(n) De Leg. 1. 13.
(o) Pott. Antiqu. b. 1, c. 23.

---

(40) See this subject further discussed in p. 196. post.
(41) It is equally a crime to give as to receive, and in many cases the attempt itself is an offence complete on the side of him who offers it. 4 Burr. 2500. 2 East. 5. Russ. & R. C. C. 107; Thus an attempt to bribe a privy counsellor to procure a reversionary patent of an office, grantable by the king under the great seal, is indictable, though it did not succeed. 4 Burr. 2495. 2 Camp. 231. An attempt to bribe at elections to parliament is criminal for the same reason. 4 Burr. 2500; and see ante, 1 book, 179. So a promise of money to a corporator to vote for a member of a corporation is criminal, 2 Lord Raym. 1377. 4 Burr. 2501; and the offence is not, as the learned commentator supposes, confined to bribing judicial officers. See 1 East, 183, 4 Burr. 2494.
brizes 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 Thorpe 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 for ever. 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 (42).

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 in-
famy, imprisonment for a year, and forfeiture of the tenfold value (43).

19. The false verdict of jurors, whether occasioned by embracery or not,
was anciently considered as criminal, and therefore exemplarily punished by
attaint in the manner formerly mentioned (s) (44).

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 noto-
torious cases will amount to a forfeiture of his office, if it be a beneficial
one (t) (45). Also the omitting to apprehend persons offering stolen *iron, lead, and other metals to sale, is a misdemeanour, and punishable by a stated fine, or imprisonment, in pursuance of the
statute 29 Geo. II. c. 30.

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 ad-
ministration and under the colour of their office. However, when prosec-
cuted, either by impeachment in parliament, or by information in the court
of 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 im-
mediate), fines, imprisonment, or other discretionary censure, regulated by
the nature and aggravations of the offence committed (46).

---

(p) 3 Inst. 147.
(q) Ibid. 146.
(r) 1 Hawk. P. C. 259.
(s) See Book III. p. 402, 403.
(t) 1 Hawk. P. C. 168.

(42) Bribery of any judicial officer and of the higher executive officers, may be punished in New-York by imprisonment not exceeding 10 years, and fine not exceeding 5,000 dollars.

(43) By the 6 Geo. IV. c. 50. s. 61. the of-

(44) The writ of attainder against jurors is no-

(45) As to the liabilities of magistrates for

(46) On motions for informations against

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 (w) (47). The punishment is fine and imprisonment, and sometimes a forfeiture of the office (48).

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 (1) persons, or more, and not dispersing upon proclamation. This was first made high treason by statute 3 & 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 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 name of the riots they were meant to suppress; as, for example, such as were set on foot with


to be strictly right, but whether it proceeded from oppressive, dishonest, or corrupt motives (under which fear and favour may generally be included), or from mistake, or error; in either of the latter cases, the court will not grant a rule. Rex v. Barron, 3 B. and A. 432. That case seems to lay down the general rule upon this subject clearly and definitively.


(48) By the statute of 3 Edw. I. c. 16. in assurance of the ancient law, it is enacted, that no sheriff, nor other king's officer, shall take any reward to do his office, but shall be paid of that which they take of the king; and that he who so doth, shall yield twice as much, and shall be punished at the king's pleasure. This act, which thus particularly names the sheriff, extends to every ministerial officer concerned in the administration or execution of justice, the common good of the subject, or the service of the king, 3 Inst. 209. Where a statute annexes a fee to an office, it will be extortion to take more than it specifies. 2 Inst. 210. And it seems that if a clerk in the crown-office demands 13s. 4d. from every defend-
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
the clergy; and *also the act indemnified the peace officers and [*143]
their assistants, if they killed any of the mob in endeavouring to
suppress such riot. This was thought a necessary security in that sanguin-
ary 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 spe-
cified what should be accounted a riot, the statute 1 Geo. I. c. 5 enacts,
generally, that if any twelve persons are unlawfully assembled to the dis-
turbance 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 pro-
clamation to disperse, if they contain his orders and continue together for
one hour afterwards, such contempt shall be felony without benefit of
clergy. And farther, if the reading of the proclamation be by force op-
posed, 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 know-
ing of such hinderance, and not dispersing, are 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 warren, not being the king's property, *by night, or [*144]
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

(2) These provisions were, by subsequent
statutes, extended to every description of
mills and the works attached to them; to build-
ings or machinery for carrying on any kind
of trade or manufacture, or for warehousing
goods or merchandise; and to houses, shops,
and buildings, with the fixtures, furniture,
and commodities whatsoever contained
therein.

And now by 7 and 8 Geo. IV. c. 30, § 8, it
is provided, that if any persons, riotously and
tumultuously assembled together, to the dis-
turbance of the public peace, shall unlawfully
and with force demolish, pull down, or destroy,
or begin to demolish, pull down, or destroy
any church or chapel, or any chapel for the
religious worship of persons dissenting from
the united church of England and Ireland,
duly registered, or recorded, or any house,
stable, coach-house, outhouse, warehouse, of-
cice, shop, mill, malt-house, hop-past, barn or
granary, or any building or erection used in
carrying on any trade or manufacture, or any
machinery, fixed or moveable, prepared for or
employed in any manufacture, or any steam
engine, or other engine for sinking, draining,
or working any mine, or any staith, building,
or erection used in conducting the business of
any mine, or any bridge, waggon-way, or
trunk for conveying minerals from any mine,
every such offender shall be guilty of felony,
and, on conviction, shall suffer death as a felon.
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. V. c. 6 (5).

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 floodgates or otherwise obstruct the navigation, is again made felony, punishable 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 (6), (7). The remaining offences against the public peace are merely misdemeanors, and no felonies; as,

(3) The 9 G. I. c. 22, and 27 G. II. c. 15, depriving parties committing these offences of benefit of clergy, were repealed by 4 Geo. IV. c. 54, § 3, which subjected the party to transportation or imprisonment at the discretion of the court; the latter Act, however, is repealed, (except as to sending letters threatening to kill or murdor, or to burn, or destroy property, and as to accessories to such offences, and as to rescues, vide infra, note 4), by 7 and 8 Geo. IV. c. 27. All the statutes relating to these offences are repealed and consolidated by 7 and 8 Geo. IV. c. 27, and c. 29: and by 7 and 8 G. IV. c. 29, § 26, stealing, or attempting to steal, the wood, deer, kept in any enclosed ground, is declared felony, and the guilty party is liable to be punished as in the case of simple larceny; and committing the same offence in unenclosed grounds is punishable summarily by fine not exceeding 50l., and repeating such offence is deemed felony, and punishable as a simple larceny.

(4) The statute now in force upon this subject is the 7 and 8 G. IV. c. 29, by § 8 of which, persons sending letters containing menacing demands, or threatening to accuse a party of any crime, punishable with death; transportation, or pillory, or of any other infamous crime, to extort money, shall be guilty of felony, and, on conviction thereof, be liable, at the discretion of the court, to transportation for life, or not less than seven years, or imprisonment for any term not exceeding four years; and, if males, to one, two, or three public whippings, in addition to such imprisonment. S. 9 defines what shall be deemed an infamous crime.

Sending a letter threatening to accuse the prosecutor of having made overtures to the prisoner to commit perjury, against him, does not threaten to charge such an infamous crime as to be within the Act. Rex v. Hickman, R. and M. C. C. 34. But see Rex v. Wagstaffe, R. and R. C. C. 398; Rex v. Paddle, Id. 484.

(5) In New-York it is considered an attempt to rob, and is punishable with imprisonment not exceeding five years. (2 R. S. 678, § 58.) There are no statutes in New-York against the two offences first mentioned in this chapter.

(6) By 7 and 8 Geo. I. V. c. 30, amending

(7) In New-York these offences are misdemeanors. (2 R. S. 695, § 30, &c.)
5. Affrays (from affraier, to terrify) are the fighting of two or more persons in some public place, to the terror of his majesty's subjects: for, if the 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 of 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 proportionally 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 neither an affray nor an offence in any other place, are penal here. For it is enacted by statute 5 & 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 ecclesiae; 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 (8), 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 excommunion (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 (9). Two persons may be guilty of an affray; but,

and consolidating all former statutes on these subjects, breaking or cutting down any sea bank or wall, or the bank or wall of any river, canal, or marsh; or destroying any lock, sluice, floodgate, or other work, on any navigable river or canal, is made felony, punishable with transportation for life, or not less than seven years, or with imprisonment for any term not exceeding four years, and to male offenders with one, two, or three public whippings. And cutting off, or removing, the piles for securing any sea bank or wall, or the bank or wall of any river, canal, or marsh, or doing any injury to obstruct the navigation thereof, is made felony, subject to transportation not seven years, or to imprisonment for any term not exceeding two years, and to males, one, two, or three public whippings: s. 12.

Vol. II. 63

---

By § 14, throwing down, or otherwise destroying any turnpike-gate, or other erection, or fence, connected with, or belonging to the same, is made punishable as a misdemeanor.

(8) See p. 59, note 14, ante.

(9) By 9 Geo. IV. c. 31, § 1, "so much of 5 and 6 Ed. VI. c. 4, entitled, An Act against quarrelling and fighting in churches and churchyards, as relates to the punishment of persons convicted of striking with any weapon, or drawing any weapon with intent to strike, as therein mentioned," is repealed.

It seems that brawling was not made an offence by 5 and 6 Ed. VI. c. 4, but was previously cognizable by the spiritual courts. Ex parte Williams, 6 D. & R. 373; 4 B. and C. 313.
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) (10). A rout is where three or more meet to do an 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 (g). A riot is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel (h): 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 (11). 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 (12). The same is the case [*147] in riots and routs by the common law; to * which the pillory in very enormous cases has been sometimes superadded (i) (13).

And by the statute 13 Hen. 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 held, that all persons, noblemen, and others, except women, clergymen, persons decretip, and infants under fifteen, are bound to attend the justices in suppress-

(f) 3 Inst. 176.
(g) Bro. Abr. t. Riot, 4, 5.
(h) 3 Inst. 176.
(i) 1 Hawk. P. C. 159.

With respect to the malicious or contumacious disturbance of a congregation, or molestation of a minister, during the celebration of divine service, see the statutes 1 M. c. 3, and 1 W. and M. c. 18, ante 64.

(10) As a private individual, are not only permitted, but enjoined to raise a number of people to suppress rioters, &c. 2 Hawk. c. 65. s. 2. The intention also with which the parties assemble, or at least act, must be unlawful, for if a sudden disturbance arise among persons met together for an innocent purpose, they will be guilty of a mere affray, though if they form parties, and engage in any violent proceedings, with promises of mutual assistance; or if they are impelled with a sudden disposition to demolish a house or other building, there can be no doubt they are rioters, and will not be excused by the propriety of their original design. 2 Hawk. c. 65. s. 3. But though there must be an evil intention, whether premeditated or otherwise, the object of the riot itself may be perfectly lawful; as to obtain entry into lands to which one of the parties has a rightful claim, for the law will not, as we have before seen, ante, 3 book, 5. n. 4. suffer private individuals to disturb the peace, by obtaining that redress by force, which the law would regularly award him. 2 Hawk. c. 65. s. 7. 9 T. R. 357. 364.

Women are punishable as rioters, but infants under the age of discretion are not. 1 Hawk. c. 65. s. 44. In a riot all are principals, and therefore if any person encourages or promotes, or takes part in a riot, whether by words, signs, or gestures, or by wearing the badge or ensign of the rioters, he is himself to be considered a rioter. 2 Camp. 370.

(12) By the 3 Geo. IV. c. 144. hard labour may be imposed.

(13) But now the pillory is abolished, by 56 Geo. III. c. 138.
ing 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 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 assises 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 exceeding 100l. and [148] three months' imprisonment (14).

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 in-

(j) 1 Hal. P. C. 495. Ibid. 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 parl-

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 in-

(l) See Book III. pag. 174. &c.
(m) 1 Hawk. P. C. 141.
(14) The bill of rights does not virtually repeal this provision. Doug. 592. See the 57 Geo. III. c. 19. s. 23. for preventing public meetings, &c. near the houses of parliament, or courts of justice in Westminster.
dictment at the general sessions. But this provision does not extend to such as endeavour to maintain possession by force, where they
[*149] *themselves, or their ancestors, have been in the peaceable enjoyment of the lands and tenements, for three years immediately preceding (n) (15).

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 5 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.

[*150] *12. Besides actual breaches of the peace, any thing that tends to 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 challenge, are punishable by fine and imprisonment according to the circumstances of the offence (r) (16), (17). 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 (18).

(a) Holding over by force, where the tenant's title was under a lease, now expired, is said to be a forcible detainer. (Cro. Jac. 196.)
(b) Pott. Antiq. b. 1, c. 26.
(p) 2 Inst. 226. 3 Inst. 198.
(q) "Habent legisnam sanctam, a quis quid de republica a finitimis rumore aut fama accerpit, ut
apud magistratulum defaret, neve cum alta communiciet; quod aequi homines temerarios atque impertos falsis rumoris terrerit, et ad facinum impeltit, et de summis rebus consilium capere cognitum est?" Cas. de bell. Gall. lib. 6, cap. 19.
(r) 1 Hawk. P. C. 135. 138.

(15) See 2 R. S. 335, § 4: and 507, &c.
(16) In New-York this offence is punishable with imprisonment not exceeding seven years, (2 R. S. 686, § 2.) and to fight a duel with a deadly weapon, though death do not ensue, is punishable with imprisonment for 10 years. (Id. § 1.) Posting, or writing, or printing any reproachful or contumacious language for not fighting a duel, is a misdemeanor. (2 R. S. 674, § 20.)
(17) The offences of fighting duels, and sending or provoking challenges, are fully considered by Mr. J. Grose, in passing sentence on Rice, convicted on a criminal information for a misdemeanor of the latter kind, 3 East, 581, where the opinions of the earlier writers are collected. It is an offence, though the provocation to fight do not succeed, 6 East, 464. 2 Smith, 550; and it is a misdemeanor merely to endeavour to provoke another to send a challenge. 6 East, 464. But mere words which, though they may produce a challenge, do not directly tend to that issue, as calling a man a liar, or knave, are not necessarily criminal, 2 Lord Raym. 1031. 6 East, 471, though it is probable they would be so if it could be shewn that they were meant to provoke a challenge. A challenge is one of those offences for which a criminal information will be granted by the court of K. B., though this will not be done where the party applying has himself first incited the proposal. 1 Burr. 316.
(18) The words of Lord Mansfield, "the
Of a nature very similar to challenges are libels, libelli famosi, which taken in their largest and most extensive sense, signify any writings, pictures, 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) (19). The direct tendency of

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, 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) (19). The direct tendency of

every trial of an indictment or information for a libel, the jury may give a general verdict of guilty, or not guilty, upon the whole matter in issue, and shall not be required or directed by the judge to find the defendant guilty, merely on the proof of the publication of the paper charged to be a libel, and of the sense ascribed to it in the record. But the statute provides, that the judge may give his opinion to the jury respecting the matter in issue, and the jury may at their discretion, as in other cases, find a special verdict, and the defendant, if convicted, may be tried, as before the statute, in arrest of judgment.

A person may be punished for a libel reflecting on the memory and character of the dead, but it must be alleged, and proved to the satisfaction of the jury, that the author intended by the publication to bring dishonour and contempt on the relations and descendants of the deceased. 4 T. R. 126.

It is not a libel to publish a correct copy of the reports or resolutions of the two houses of parliament, or a true account of the proceedings of a court of justice. "For though," as Mr. Justice Lawrence has well observed, "the publication of such proceedings may be to the advantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons, whose conduct may be the subject of such proceedings." Rex v. Wright, 5 T. R. 293.

But this will not apply to the publication of part of a trial, before it is finally concluded; for that might enable the friends of the parties to pervert the justice of the court by the fabrication of evidence, and other impure practices.

Nor ought it to extend to the publication of trials, where indecent evidence must from necessity be introduced; for it would be in vain to turn women and children out of court, if they are afterwards permitted to read what has passed in their absence.

Lord Hardwicke has declared that any publication, which shall prejudice the world with

and fact, and acquit, if the publication were true and published with good motives, and for justifiable ends. The first Amendment to the Constitution of the U. S. prevents Congress from passing any law abriding the freedom of speech or of the press.

This rule has been held not to extend to the queen consort.

(s) 1 Hawk. P. C. 193.
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 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 [*151] for himself, whatever *offence it may be against the public peace; 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 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

regard to the merits of a cause before it is heard, is a contempt of the court, in which the cause is pending; and he committed upon a summary motion only the parties who had been guilty of such a publication. 2 Atk. 472.

The reason must be much stronger for suppressing partial and premature publications upon subjects, which may be tried by a jury.

The sale of the libel by a servant in a shop, is primâ facie evidence of publication in a prosecution against the master, and is sufficient for conviction, unless contradicted by contrary evidence, shewing that he was not privy, or in any degree assisting to it. Ibid. at 5 Burr. 2686. When a person is brought to receive judgment for a libel, his conduct, subsequent to his conviction, may be taken into consideration either by way of aggravation or mitigation of the punishment. 3 T. R. 432. And when Johnson the bookseller was brought up for judgment for having published a seditious libel, the attorney-general produced an affidavit that the defendant after his conviction had published the same libel in the Analytical Review. M. T. 1798.

An information or an indictment need not state that the libel is false, or that the offence was committed by force and arms. 7 T. R. 4.

Hanging up, or burning, an effigy with intent to expose some particular person to ridicule and contempt, is an offence of the same nature as a libel, and has frequently been punished with great but proper severity.
blasphemous, immoral, reasonable, 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

[*152]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 keep poisons in his closet, but not publicly 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 shewn (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.

(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 privileges 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 1658, (Sco-
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, 7 & 8 W. III. c. 28. make the exportation of wool, sheep, or fuller's earth, liable to pecuniary penalties, and the forfeiture of the interest of the ship and cargo by the owners, if privy, and confiscation 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 years, if the penalties be not paid (1), (2).

2. Smuggling, or the offence of importing goods without paying the duties imposed thereon by the laws of the customs 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 the 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

(a) Mir. c. 1, § 3.

(1) By the constitution of the U. S. no tax or duty can be laid by Congress on articles exported from any State. Art. 1. sect. 9. § 5.
(2) By 5 Geo. IV. c. 47, § 2, all Acts and parts of Acts prohibiting the exportation of wool are repealed, and persons are now at full liberty to export this commodity, upon paying a certain duty.

By 57 Geo. III. c. 88, fuller's earth, fulling clay, and tobacco-pipe clay, may be carried coastwise, under certain restrictions contained in 32 Geo. III. c. 50, upon goods prohibited to be exported.

By 4 Geo. IV. c. 69, § 24, all prohibitions against the exportation of tobacco-pipe clay are removed, and the same is thereby declared free.
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 the 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) (3), (4).

*3. Another offence against public trade is fraudulent bankrupt-\[156\]ry; 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 nonconformity to the directions of the several statutes; his concealing or embezlling his effects to the value of 20l.; 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) (5). 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 (6). 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 100l., neglects or refuses on demand to discover and deliver up his effects for the benefit of his creditors (7), (8). And these are the only felonious offences against public trade; the residue being mere misdemeanors: as,

(b) Stat. 26 Geo. I. c. 32, 32 Geo. II. c. 18. 4 Geo. III. c. 12.
(d) See book II. pag. 481, 482.
(e) Stat. 5 Geo. II. c. 30.
(f) Beccar. ch. 34.

(3) By the 6 Geo. IV. c. 108. after reciting the customs repeal act, the 6 Geo. IV. c. 105, all the laws relative to the prevention of smuggling are consolidated; but the provisions of the act are so numerous that they cannot be comprised within the limit of a note.
(4) See Story's laws, 1926, and other acts there referred to, as to the law of the U.S.
(5) By 6 Geo. IV. c. 16, all laws relating to bankrupts are repealed, and all former provisions are reduced into this one Act. The different frauds taken notice of do not materially vary from those mentioned in the text. By § 99 it is enacted, that the bankrupt or other person assuming falsely before the commissioners shall be guilty of perjury, and suffer the pains and penalties in force against that offence. By § 112, any bankrupt neglecting to surrender and submit himself to be examined; or refusing to make discovery of his estate and

Vol. II. 64

effects; or declining to deliver up his goods, books, and writings; or concealing or embezlling any part of his effects, to the value of 10l., with intent to defraud his creditors, shall be guilty of felony, and be liable to transportation for life, or not less than seven years, or to imprisonment for any term not exceeding seven years, as the court before whom he is convicted may adjudge.
(6) The punishment of pillory is, by the 50 Geo. III. c. 138, now abolished, except in perjury and subornation thereof.
(7) By the 33 Geo. III. c. 5. the debt is enlarged to 300l.
(8) There is at present no general bankrupt law in the U.S., although Congress has power to pass one. In New-York, if an insolvent conceal his estate, books, &c. it is a misdemeanor. (2 R. S. 691, § 4: p. 23, § 35: & p. 35, § 3.)
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 10l. per cent. per annum, which the statute 13 Eliz. c. 8. confirms: and ordains that all brokers shall be guilty of a praemunire 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 totally void, [*157] but also the lender shall forfeit the *money borrowed (9).

Also, if any scrivener or broker takes more than five shillings per cent. procuration-money, or more than twelvepence for making a bond, he shall forfeit 20l. with costs, and shall suffer imprisonment for half a year. And by statute 17 Geo. III. c. 26. to take more than ten shillings per cent. for procuring any money to be advanced on any life-annuity, is made an indictable misdemeanour, 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 (10), (11).

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 dceans 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 assise of bread, or the rules laid down by the 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 measures; the standard of which fell under our consideration in a former volume (l) (12). The punishment of bakers breaking the assize, was anciently to stand in the pillory, by statute 51 Hen. III. st. 6. and for brewers (by the same act) to stand in

(k) See Book II. pag. 455, 46.

(k) See Book I. pag. 274;

(9) One half of the penalty is given by the statute to the prosecutor, the other half to the king.—It is remarkable that such was the prejudice in ancient times against lending money upon interest, that the first statute, the 37 Hen. VIII. c. 9. by which it was legalized, was afterwards repealed by 5 & 6 Edw. VI. c. 20. by which all interest was prohibited, the money lent and the interest was forfeited, and the offender was subject to fine and imprisonment.—We have before observed, that the policy of limiting the rate of interest upon a contract for the loan of money is denied in modern times, but Cato was of a different opinion. Cum ille, qui quaeserat, dixisset, Quid funerari? Turn Cato, Quid hominem, inquit, occideres? Cic. Off.

We have already considered what will constitute usury, ante, 2 book 403. That usury is an indictable offence, see 2 Burr. 799. 4 T. R. 305. 8 East, 41. 1 Chit. Crim. Law. 549.

(10) This act is repealed as to annuities granted since the 14 July, 1813, by the 53 Geo. III. c. 141, but similar provisions are re-enacted.

(11) Interest in New-York is 7 per cent., and the taking of more destroys the liability of the borrower for any part of the debt. (1 R. S. 772.) One half per cent. is allowed as a compensation to brokers. Id. 709.

(12) The principal act now in force, relative to the different weights and measures, is the 5 Geo. IV. c. 76. (continued and amended by 6 Geo. IV. c. 12.) The 35 Geo. III. c. 102. 37 Geo. III. c. 143. and 55 Geo. III. c. 43. relate to the examination of weights and measures. See 5 Burn, 24 ed. tit. Weights and Measures.
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 [*158] law, is by fine and imprisonment: though the easier and more usual 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) (13). And by the statutes 33 Hen. VIII. c. i. 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 (14), (15), (16).

(i) 3 Inst. 219.
(j) Seld. tit. of hon. b. 2, c. 5, § 3.
(k) 1 Hawk. P. C. 159.

(13) Pillory is now abolished by the 56 Geo. III. c. 139. See in general, 3 Chit. Crim. Law, 994, 995. The cases in which fraud is indictable at common law, seem confined to the use of false weights and measures, the selling of goods with counterfeit marks, playing with false dice, and frauds affecting the course of justice, and immediately injuring the interests of the public or crown: and it is settled that no mere fraud, not amounting to felony, is an indictable offence at common law, unless it affects the public. 2 Burr. 1125. 1 Bia. Rep. 273. S. C.

(14) Pillory is now abolished by the 56 Geo. III. c. 138. The general pawn-brokers' act, 39 & 40 Geo. III. c. 99. virtually repeals the 30 Geo. II. c. 24. as to the pawning of another's goods without the consent of the owner, and the offence is thereby punishable by penalties.

The provisions of Hen. VIII. & Geo. II. are extended by the 52 Geo. III. c. 64. to obtaining bonds, bills of exchange, bank notes, securities, or orders for the payment of money, or the transfer of goods, or any valuable thing whatever. By the 3 Geo. IV. c. 14. the offender may be sentenced to hard labour. See as to this offence, 3 Chit. Crim. Law, 996, &c.

These acts extend to every description of false pretences by which goods may be obtained with intent to defraud, 3 T. R. 103.

(15) Now, by 7 and 8 Geo. IV. c. 29, § 53, reciting, "that a failure of justice frequently arises from the subtle distinction between larceny and fraud," it is, "for remedy thereof," enacted, "that if any person shall, by any false pretence, obtain from any person, any chattel, money, or other valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor; and, being convicted thereof, shall be liable, at the discretion of the court, to be transported for seven years, or to suffer fine or imprisonment, or both, as the court shall award;" provided, that if upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor; and no such indictment shall be removable by certiorari; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts." In an indictment under this statute, according to the rules of construction applicable to former statutes on this subject, which seem equally applicable to this, the pretences must be set forth, and must be negatived by special averments. 3 T. R. 581; 2 M. and S. 379. The whole of the pretence charged, need not, however, be proved; proof of part of the pretence, and that the property was obtained thereby, is sufficient. Rex v. Hill, R. and R. C. C. 190. Obtaining goods by fraudulently giving in payment a check upon a banker with whom the party keeps no cash, and which he knows will not be paid, has been held an indictable offence, and would, it seems, be such within this statute. Rex v. Jackson, 3 Camp. 370. The language of the 30 Geo. II. c. 24, made the offence of obtaining money upon false pretences consist in the actually obtaining the money, and not in using a false pretence for the purpose of obtaining the money; it has been held, therefore, that, in an indictment on that statute, the venue must be laid in the county where the false pretence is used. Rex v. Buttery, cited in Pearson v. McGowran, 5 D. and R. 616; 3 B. and C. 700, per Abbott, C. J. Where the fraud practised is properly the ground for a civil action, an indictment for obtaining money by false pretences cannot be supported. Rex v. Codrington, 1 C. and P. 601. See further upon this subject, 2 East, P. C. 673, 818, 819, 829, 830; 6 T. R. 555; R. and R. C. C. 81, 127, 317, 504.

(16) In New-York the 2 R. S. 677, § 53, is as full as the 7 & 8 Geo. IV. c. 29, § 53, quoted
6. The offence of forestalling (17) 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 & 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. 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 victuals, 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 (18). And so the total engrossing of any

in Mr. Ryland's note, and the punishment may be three years' imprisonment and a fine of three times the value of the property taken: if the false token were a note of a pretended bank, the punishment may be seven years' imprisonment.

To personate another, and in that character to marry another, or to become bail or confess a judgment, or to acknowledge an instrument that may be recorded, or to do any act in a cause whereby the person personated may sustain loss, may be punished by imprisonment for 10 years. By personating another to receive property intended for that other, is punishable in the same manner as stealing such property. The producing of a pretended child of another, so as to deprive another of a distributive share of personal estate, or of an inheritance, is punishable with 10 years' imprisonment. Any one receiving an infant under six years, and substituting another to its parent or guardian, may be imprisoned for seven years. (2 R. S. 676, 677.)

(17) In New-York there is no act of the legislature against this or any of the other offences afterwards mentioned in this chapter if done without any combination: perhaps a conspiracy to commit these acts might come within the 6th class of conspiracies mentioned in 2 R. S. 601: (see note 31. p. 137, n.t.e.) as they might be deemed injurious to trade and commerce. The common law may still prevail; and there are in some cities and villages local prohibitions of such acts.

(18) By the 31 Geo. III. c. 30, corn may be bought for the purpose of storing in granaries and reselling it.

The modern law on this subject is well discussed in 1 East, 143; (and see 2 Chit. Crim. Law, 527, &c.) In that case it was decided that spreading rumours with intent to raise the price of a particular species of aliment, endeavouuring to enhance its price by persuading others to abstain from bringing it to market, and engrossing large quantities in order to resell them at the exorbitant prices occasioned by his own artifices, are offences indictable at common law, and subject the party so acting to fine and imprisonment at the discretion of the court in which he is convicted. It was also held, that hops, though not used immediately for food, fall within this rule. But, at the present day, it would probably be held that no offence is committed unless there is an intent to raise the price of provisions by the conduct of the party. For the mere transfer of a purchase in the market where it is made, the buying articles before they arrive at a public market, or the purchasing a large quantity of a particular article, can scarcely be regarded as in themselves necessarily injurious to the community, and as such, indictable offences; a party buying and selling again, does not necessarily increase the price of the commodity to the consumer, for the division of labour or occupations will in general occasion the commodity to be sold cheaper to the consumer, see Smith's Wealth of Na. vol. ii. 309, and index, title "Labour:" and many cases may occur in which a most laudable motive may exist for buying up large quantities of the same commodity. See the arguments, &c. in 14 East, 406. 15 East, 511. Indeed, in the case of the King v. Rusby, on the indictment being argued, the court were equally divided on the question, whether regrating is an indictable offence at common law, and though the defendant was convicted, no judgment was ever passed upon him. MSS. "Raising and spreading a story that wool would not be suffered to be exported in such a year, probably by some stock-jobbers in those times, whereby the value of wool was beaten down, though it did not appear the defendants reaped any particular advantage by the deceit, was, on account of its being an injury to trade, punished by indictment; and a confederacy without a further act done to impoverish the farmers of excuse, and lessen the duty, has been held an offence punishable by informa-
other commodity, with intent to sell it at an unreasonable price, [*159]
is an offence indictable and fineable at the common law *(m).
And the general penalty for these three offences by the common law (for
all the statutes concerning them were repealed by 12 Geo. III. c. 71.) is,
as in other minute misdemeanors, discretionary fine and imprisonment *(n).
Among the Romans these offences and other mal-practices to raise the
price of provisions, were punished by a pecuniary mulct. “Poena.viginti
aurorum statutur adversus eum, qui contra annumal fecerit, societatemve coe-
rit quo annona carior fiat *(o).”
9. Monopolies are much the same offence in other branches of trade,
that engrossing is in provisions: being a licence 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 tracing 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 *(g), in the begin-
ing of the reign of king James the First: but were in great measure re-
died by statute 21 Jac. I. c. 3. which declares such monopolies to be con-
trary 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 dou-
ble 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 praemunire. Combinations also among victuallers or artificers,
to raise the price of provisions, or any commodities, or the rate of la-
bour *(19), are in many cases severely punished by particular statutes;
and in general by statute 2 & 3 Edw. VI. c. 15. with the forfeiture of 10l.
or twenty days’ imprisonment, with an allowance of only bread and wa-
ter for the first offence; 20l. or the pillory, for the second; and
*40l. for the third, or else the pillory, loss of one ear, and perpetual [*160]
inamy. In the same manner, by a constitution of the emperor
Zeno *(r), all monopolies and combinations to keep up the price of merchan-

(m) Cro. Car. 232.
(n) 1 Hawk. P. C. 235.
(o) Ey. 45. 12. 2.
(p) 1 Hawk. P. C. 231.
(q) 3 Inst. 81.
(r) Cod. 4. 20. 1.
dise, provisions, or workmanship, were prohibited on pain of forfeiture of
goods and perpetual banishment.
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 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 (20).
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 100l.
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 land 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 500l. for each artificer contracted with to be sent abroad, and
imprisonment for twelve months; and for the second, 1000l. 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 (excepting woolcards to North Ame-
rica) (t), he forfeits the same and 200l., and the captain of the ship (having
knowledge thereof) 100l.; and if any captain of a king's ship; or officer
of the customs, knowingly suffers such exportation, he forfeits 100l. and
his employment; and is for ever made incapable of bearing any public of-
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
200l. (21).

CHAPTER XIII.

OF OFFENCES AGAINST THE PUBLIC HEALTH, AND
THE PUBLIC POLICE OR OECONOMY.

The fourth species of offences, more especially affecting the common-
wealth, 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 Provi-

(20) The 54 Geo. III. c. 96, § 1, repeals so
much of the 5 Eliz. c. 4, as provides that per-
sions shall not exercise any art or manual oc-
cupation, except they had served an appren-
ticeship of seven years. § 2 renders valid
certain indentures of apprenticeship which
would have been void by certain provisions
in the old Act, and repeals the part of the Act
containing such provisions. § 3 provides that
justices may determine complaints respecting
apprenticeships as heretofore. And § 4 pro-
vides, that the customs of London concerning
apprentices are not to be affected. For the
decisions upon the 5 Eliz. c. 4, respecting the
exercising of trades by unqualified persons,
see 3 Harrison's Digest, 518, title Trade.
(21) All the statutes prohibiting artificers
from going abroad are repealed by 5 Geo. IV.
c. 97; so that artists may now settle in for-
reign parts without any restrictions or liabili-
ties.

(s) See Book. I. pag. 427.
(t) Stat. 15 Geo. III. c. 5.
dence for more than a century past, incapable of being committed in this nation. For by statute 1 Jac. 1. 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 this town or vill, to keep his house, and shall venture to disobey it, he may be enforced, by the watchmen appointed on such melancholy occasions, to obey such necessary command: and, if any 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, un- cured, he then shall be guilty of felony. By the statute 26 Geo. II. c. 26. (explained and amended by 29 Geo. II. c. 8.) the *me-
thod 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).

2. A second, but much inferior species of offence against public health is the selling of unwholesome provisions (3). 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. § 11. any brewing or adulteration of wine is punished with the forfeiture of 100l. if done by the wholesale merchant; and 40l. if done by the vintner or retail trader (4). These are all the offences which may properly be said to respect the public health.

V. The last species of offences which especially affect the commonwealth, are those against the public police or oeconomy. By the public and oeconomy I mean the due regulation and domestic order of the kingdom; whereby the individuals of the state, like members of a well-

(1) By the 6 Geo. IV. c. 78. all the prior statutes relative to the quarantine laws are repealed, and other provisions are made, similar in their nature to the former: see the prior statutes and decisions thereon, Burn J. 24 ed. tit. Plague; 2 Chit. Crim. Law, 551; and 2 Chit. Commercial L. 62 to 87.

It is a misdemeanor at common law to expose a person labouring under an infectious disorder, as the small pox, in the streets or other public places. 4 M. & S. 73. 272. An indictment lies for lodging poor persons in an unhealthy place. Cold. 432.

(2) As to quarantines in New-York, see 1 R. S. 425, &c.

(3) It is a misdemeanor at common law to give any person injurious food to eat, whether the offender be excited by malice, or a desire of gain; nor is it necessary he should be a public contractor, or the injury done to the public service, to render him criminally liable. 2 East, P. C. 822. 6 East, 133 to 141. If a baker direct his servant to make bread containing a specific quantity of alum, which, when mixed with the other ingredients is innoxious, but in the execution of these orders, the agent mixes up the drug in so unskilful a way that the bread becomes unwholesome, the master will be liable to be indicted. 3 M. & S. 10. 4 Camp. 10. But an indictment will not lie against a miller for receiving good barley to grind at his mill, and delivering a mixture of oat and barley which is musty and unwholesome. 4 M. & S. 214.

(4) And by the 1 Wm. & M. st. 1. c. 34. s. 20. any person selling wine, corrupting or adulterating it, or selling it so adulterated, shall forfeit 300l. half to the king, and half to the informer, and shall be imprisoned three months.
government, 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, some of them to felony, and others to misdemeanors only. Among the former are,

[*163] *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, or public chapel wherein banns have been usually published, except by licence from the archbishop of Canterbury;—and, 2. To solemnize marriage in such church or chapel without due publication of banns, or licence 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 100l. 3. To make a false entry in a marriage register; to alter it when made; to forge, or counterfeit such entry, or a marriage licence: 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 willfully committed, subject the party to the guilt of felony without benefit of clergy (5), (6).

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, by reason of its being so great a violation of the

(a) 5 & 7 W. III. c. 6. 7 & 8 W. III. c. 35. 10 Ann. c. 19, § 176.
(b) 3 Inst. 83. 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 clericis nuda, et caeretum for se eulutaris addicts. (6 Decretal, 1. 12.) 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. 45. 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 criminal, like that of bastardy. But by stat. 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.

(5) This act is now repealed by the 4 Geo. IV. c. 76. and clergy is restored.

By the 21st section of the 4 Geo. IV. c. 76. it is felony, with transportation for life, to solemnize matrimony in any other place than in a church or chapel, wherein banns may be lawfully published, or at any other time than between eight and twelve in the morning, except by special licence from the archbishop of Canterbury; or to solemnize it without due publication of banns unless by licence, or to solemnize it according to the rites of the church of England, falsely pretending to be in holy orders; but the prosecution must take place in three months.

By the 28th section of the same act it is felony, punishable with transportation for life, to insert in the registry book any false entry of any thing relating to any marriage, or to make, alter, forge, or counterfeit any such entry, or to make, alter, forge, or counterfeit any licence of marriage, or to utter or publish, as true, any such false, &c. register as aforesaid, or a copy thereof, or any such false, &c. licence; or to destroy any such register book of marriages, or any part thereof, with intent to avoid any marriage, or to subject any person to any of the penalties of that act. But this act does not extend to marriages of Quakers or Jews. Independently of this statute, these offences were punishable at common law, and subjected the offender to severe imprisonment and fine. 2 Sid. 71.

(6) There are no such laws in New-York, marriage being left there as it was at common law. See 2 R. S. 135: & 3 id. App. p. 151. see also ante, book I. p. 433, note 1. p. 436, note 13.
PUBLIC WRONGS.

123

public decency 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 uxoriis 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 thoro) by sentence in the ecclesiastical
court (7). 4. Where the first marriage is declared absolutely void by any
such sentence, and the parties 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 voidable by the disagreement of either
party, which the second marriage very clearly amounts to. But
* if at the age of consent the parties had agreed to the marriage, [*165]
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 (8).

(c) de mor. Germ. 18.
(d) Stiernh. de jure Sueon. I. 3, c. 2.

(7) In New-York, 5 years' absence is a sufficient excuse, but the divorce a mensa merely
is no excuse: and the party whose adultery has been the cause of an absolute divorce cannot
marry. In addition to the excuses mentioned in the text, the sentence of a husband
or wife to imprisonment for life sanctions a new marriage by the other party. (2 R. S.
139, § 5, & 637, § 9.) The punishment may be imprisonment for five years. (Id. § 8.)

See also, ante, note 6, p. 163.

(8) By 9 Geo. IV. c. 31, § 22, it is enacted,
"That if any person being married, shall mar-
ry any other person during the life of the for-
mer husband or wife, whether the second
marriage shall have taken place in England
or elsewhere, every such offender, and every
person counselling, advising, or abetting such
offender, shall be guilty of felony, and, being
convicted thereof, shall be liable to be trans-
ported beyond the seas for the term of seven
years, or to be imprisoned, with or without
hard labour, in the common gaol, or House of
Correction, for any term not exceeding two
years; and any such offence may be dealt
with, inquired of, tried, determined, and pu-
ished in the county where the offender shall
be apprehended, or be in custody, as if the of-
cence had been actually committed in that
county: provided always, that nothing herein
contained shall extend to any second marriage,
contracted out of England by any other than
a subject of his majesty, or to any person
marrying a second time, whose husband or
wife shall have been continually absent from
such person for the space of seven years then
last past, and shall not have been known by such
person to be living within that time, or shall ex-
tend to any person who at the time of such se-
cond marriage shall have been divorced from
the bond of the first marriage, or to any person
whose former marriage shall have been declar-
ed void by the sentence of any court of com-
petent jurisdiction."

Three important improvements in the law relating to bigamy are introduced by this en-
cement. First, the offence is now punishable wherever committed; formerly it was not
3. A third species of felony against the good order and oeconomy 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 honourable profession (g). 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 (9).

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 impostors 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 he supposes [*166] 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 pro exacerbates (who imitated their language and complexion, and betook themselves to the same arts of chiroamancy, begging, 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 de-

(g) 3 Inst. 85.
(h) Cosmogr. I. 3.
(i) Glass. 192.
scribed 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 palmistry could tell men’s
and women’s fortunes; and so many times by craft and subtilty have de-
ceived 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 mediate linguae. And
afterwards, it is enacted by statute 1 & 2 Ph. & M. c. 4. and 5 Eliz. c. 20,
that if any such persons shall be imported into this kingdom, the importer
shall forfeit 40l. 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 (p), that at one Suffolk
assises 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 modern than [*167]
this, of carrying these laws into practice (10).

5. To descend next to offences whose punishment is short of death.
Common nuisances are a species of offence against the public order and
oeconomical 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 pri-
ivate sort, as a civil injury to individuals. I shall here only remind the
student, that common nuisances are such inconvenient and 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 damnifies him in common only with the
rest of his fellow-subjects. Of this nature are, 1. Annoyances in high-
ways (11), bridges, and public rivers, by rendering the same inconvenient
or dangerous to pass, either positively, by actual obstructions; or nega-
tively, by want of reparations. For both of these, the person so obstruct-
ing, or such individuals as are bound to repair and cleanse them, or (in de-
fault of these last) the parish at large, may be indicted, distressed to repair
and mend them, and in some cases fined. And a presentment thereof by
a judge of assise, &c. or a justice of the peace, shall be in all respects
equivalent to an indictment (o). Where there is an house erected, or an
inclosure made, upon any part of the king’s demesnes, or of an highway,

(l) 1 Hal. P. C. 671.
(m) 1 Hawk. P. C. 197.
(n) Book III. pag. 216.
(o) Stat. 7 Geo. III. c. 42.

(10) This act of 5 Eliz. c. 20. is repealed
by the 23 Geo. III. c. 51; and now by the 1
Geo. IV. c. 116. so much of the 1 & 2 P. &
M. c. 4. as inflicts capital punishment is re-
pealed. Gypsies are now only punishable
under the vagrant act. See post, 169.
(11) See also 7 & 8 Geo. IV. c. 30, § 13:
and 2 R. S. 695, § 30, &c.
or common street, or public water, or such like public things, it is properly called a *purpresse* (p) (12). 2. All those kinds of nuisances (such as offensive trades and manufactures), which when injurious to a private [*168] man are actionable, are, when detrimental to the public, *punishable by public prosecution, and subject to fine according to the quantity of the misdemeanors*: and particularly the keeping of hogs in any city or market town is indictable as a public nuisance (q) (13). All disor-

(p) Co. Litt. 577, from the French *purpresse*, an enclosure.

(q) Salk. 460.

(12) The general highway act is now the 13 Geo. III. c. 78, which repeals the 7 Geo. III. c. 42. The 3 Geo. IV. c. 126 is the general turnpike act.

With respect to nuisances in general to highways, &c. by *actual obstruction*, it is to be observed, that every unauthorized obstruction of the highway, to the annoyance of the king's subjects, is an indictable offence. 3 Camp. 227. Thus if a wagggon or coach obstructs the highway, as by leaning it against a tree, or by blocking the road with materials or obstructions, it is a much more extensive concern, constantly suffers wagggons to remain on the side of the highway on which his premises are situate, an unreasonable time, he is guilty of a nuisance. 6 East, 427. 2 Smith, 424. And if stage coaches regularly stand in a public street in London, though for the purpose of accommodating passengers, so as to obstruct the regular tract of carriages, the proprietor may be indicted. 3 Camp. 224. So a timber merchant occasionally cutting logs of wood in the street, which he could not otherwise convey into his premises, will not be excused by the necessity, which, in choosing the situation, he himself created. 3 Camp. 230. It is even said that, "if coaches on the occasion of a rout wait an unreasonable length of time in a public street, and obstruct the transit of his majesty's subjects who wish to pass through it in carriages or on foot, the persons who cause and permit such coaches so to wait, are guilty of a nuisance." 3 Camp. 226; and see 1 Russell, 463. Nor is it necessary in order to fix the responsibility on the defendant, to show that he immediately obstructed the public way, or even intended to do so; it seems to be sufficient if the inconvenience result, as an immediate consequence of any public exhibition or act; for the erection of a booth to display rope-dancing, and other attractive spectacles, near a public street in London, which draws together a concourse of people, is a nuisance, liable to be punished and abated. 1 Ventr. 169. 1 Mod. 76. 2 Keb. 816. Bac. Abr. Nuisance. And it may be collected that a mere transitory obstruction, which must necessarily occur, is excusable, if all reasonable promptness be exerted. So that the erection of a scaffolding to repair a house, the unloading a cart or wagggon, and the delivery of any large articles, as casks of liquor, if done with as little delay as possible, are lawful though if some reasonable time were employed in the operation, they would become nuisances. 3 Camp. 231. No length of time will legalize the nuisance. 7 East, 199. 3 Camp. 227. 6 East, 195. sed vid. Peake C. N. P. 91. If the party who has been indicted for a nuisance continue the same, he is again indictable for such continuance. 8 T. R. 142. Independently of any legal proceedings, it appears that any person may lawfully abate a public nuisance, at least if it be placed in the middle of a highway, and obstruct the passage of his majesty's subjects, Hawk. b. 1. c. 75. s. 12; but though a party may remove the nuisance, yet he cannot remove the materials or obstructions, or his beating them into use, Dall. c. 50; and so much of the thing only as causes the nuisance ought to be removed, as if a house be built too high, only so much of it as is too high should be pulled down. 9 Rep. 53. God. 221. 2 Stra. 656.

With respect to nuisances to water-courses by *actual obstruction*, any diversion of a public river, whereby the current is weakened and rendered incapable of carrying vessels of the same burthen as it could before, is a common nuisance. Hawk. b. 1. c. 75. s. 11. But if a ship or other vessel sink by accident in a river, although it obstruct the navigation, if the owner removes it in a reasonable time, it is not indictable as a nuisance. 2 Esp. 675. No length of time will legalize the nuisance, 6 East, 195. supra; and even a rightful existence of a weir of brushwood will not authorize the building one of stone in its room. 7 East, 199.

With respect to the *punishment* for nuisances to highways, &c. the offenders may be fined and imprisoned. 7 T. R. 144. 2 Stra. 662. 7 Geo. 3. c. 14. But no confinement or corporal punishment is now inflicted. The object of the prosecution is to remove the nuisance, and to that end alone the sentence is in general directed. It is therefore usual, when the nuisance is stated on the proceedings, as *continuus*, in addition to a fine, to order the defendant at his own costs to abate the nuisance. 2 Stra. 686. By the 1 & 2 Geo. IV. e. 41. for facilitating the abatement, &c. of nuisances from furnaces in steam-engines, costs may be awarded to the prosecutor, and an order may be made for abating the nuisance; but the punishment does not extend to furnaces for mines.

(13) It is not essential, in order to constitute such a nuisance, that the smell or other inconvenience complained of, should be unwholesome, it is sufficient if it impairs the enjoyment of life or property. 1 Burr. 333. The material increase in a neighbourhood of noisomine so strong as some smells is indictable. Peake Rep. 91. If the prosecutor be particularly affected by the nuisance, he will be entitled to costs under 5 W. & M. c. 11. s. 3. 16 East, 194.

To this class of public nuisances may be added that of making great noises in the
derly inns or ale-houses, bawdy-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) (14). 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 just and reasonable price (t). 4. By statute 10 & 11 W. III. c. 17. all lotteries are declared to be public nuisances, and all grants, patents, or licences 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 (15), (16). 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 & 10 W. III. c. 7, and therefore is punishable by fine (17). 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

(st) Sternh. de jure Sueon. I. 2, c. 9.

(14) The keeping of bawdy-houses, gaming-houses, and disorderly houses of all descriptions, together with all public gatherings, and other times there pursued, has been from time to time prohibited by various Acts of Parliament, (see them collected in Collyer's Criminal Statutes, Nuisance, 399, et seq.) imposing various punishments and penalties upon offenders: and, by the 3 Geo. IV. c. 114, such offenders are punishable by sentence of imprisonment with hard labour, for any term not exceeding the term for which the court before which they are convicted may now imprison for such offences, either in addition to or in lieu of any other punishment which might have been inflicted on such offenders by any law in force before the passing of that Act. The keeping of a cockpit is an indefensible object at common law, (as are the other offences above mentioned,) and a cockpit has been held to be a gaming-house within the 33 H. VIII. c. 9, § 11. 1 Russell, 300. Bawdy-houses and gaming-houses are clearly nuisances in the eye of the law. 1 Russell, 299. Rex v. Hugginson, 2 Burr. 1232. Rex v. Rogier, 2 D. and R. 431; 1 B. and C. 372. Playhouses are not in themselves nuisances, though by neglect or mismanagement they may be rendered so. 1 Haw. P. c. 32, § 7. But by 10 Geo. II. c. 23, all places for the exhibition of stage-entertainments must be licensed, (Rex v. Handy, 6 T. R. 296, where it was held that tumbling was not a stage-entertainment within that Act,) and, by 25 Geo. II. c. 36, all unlicensed places kept for such entertainments are to be deemed disorderly houses.

(15) The 19 Geo. III. c. 21. was repealed by the 22 Geo. III. c. 47. which was repealed by 42 Geo. III. c. 52. s. 27.

By the 42 Geo. III. c. 119. s. 1 & 2. all lotteries called little goes are declared to be public nuisances, and if any one shall keep an office or place to exercise or expose to be played any such lottery, or any lottery whatever not authorised by parliament, or shall knowingly suffer it to be exercised or played at in his house, he shall forfeit 500l. The provision as to the offender being deemed a rogue and vagabond, seems repealed by the 5 Geo. IV. c. 83. which contained a provision to that effect.

And by sec. 5. of the 42 Geo. III. c. 119. if any person shall promise to pay any money or goods on any contingency relative to such lottery, or publish any proposal respecting it, he shall forfeit 100l. State lotteries are now allowed by statute 6 Geo. IV. 16.

(16) The constitution of New-York prohibits lotteries, except such as were then authorized. (Art. 7. sect. 11.)

(17) The offender may be indicted on the statute or at common law. 4 T. R. 202. 1 Saund. 136. n. 4. Cownp. 650. 2 Burr. 863. And if any person shall make or sell any squibs, rockets, or fire-works, he shall forfeit, upon conviction before a magistrate, 5l. one half to the informer, and the other half to the poor. And if any person shall throw or fire them into any house, street, or highway, he shall forfeit 20s. in like manner. 9 & 10 W. III. c. 7.
place or vehicle; which is prohibited by statute 12 Geo. III. c. 61. under heavy penalties and forfeiture (18). 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 (t): or are indictable at the sessions, and punishable by fine and finding sureties for their good behaviour (w). 7. Lastly, a common scold, communisrixatrix (for our law-latin confines it to the feminine gender), is a public nuisance to her neigh-

[*169]*bourhood. For which offence she may be indicted (v); *and if convicted, shall (w) be sentenced to be placed in a certain engine of correction called the trebucket, castigatory, or *ducking* 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 (x).

6. Idleness in any person whatsoever is also a high offence against the public oeconomy. 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 (y), that the Athenians, knowing 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 (z): 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 customizable taverns, and ale-houses, and routs about; and no man wot from whence they come, nor 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 persons with one month's imprisonment in the house of correction; rogues and vagabonds with whipping and imprisonment not exceeding

[*170]*six *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 harbouring 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

---

(1) Kitch. of courts. 20. (s) 3 Inst. 219.  
(u) Ibid. 1 Hawk. P. C. 132. (y) Valer. Maxim. l. 2, c. 6.  
(v) 6 Mod. 21. (z) Nov. 50, c. 5.  
(w) 1 Hawk. P. C. 198, 200.  

(18) By 54 Geo. III. c. 152, so much of the 12 Geo. III. c. 61. s. 21, as enacts that no person shall carry in any land or water carriage, any other lading with gunpowder, is repealed. Erecting powder-mills, or keeping powder magazines near a town, is a nuisance at common law. See 2 Burn J. 24 ed. 758. 2 Stra. 1167.
harrowed any stranger for more than two nights; was answerable to the public for any offence that such his inmate might commit (a) (19), (20).

7. Under the head of public oeconomy 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 (b), 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 (c); 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 Ed. 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 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 honour and virtue, and too often hath ended in self-murder (21). 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 (d), unless in the time of Christmas, under pecuniary pains and imprisonment. And the same law, and also the statute 33 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 which every valuable

(a) L.L. Edu. c. 37. Bredon, l. 3, tr. 2, c. 10, §2.
(b) Sp. L. b. 7, c. 2 and 4.
(c) 3 Inst. 199.
(d) Logetting in the fields, slide thirst or shove-groat, cloyish cayles, half-bowl, and coyting.

(19) This act, and all others relating to vagrants, &c. are now repealed by the 5 Geo. IV. c. 83.
(20) See 1 R. S. 632, as to vagrants in New York.
(21) At common law, the playing at cards, dice, and other games of chance, merely for the purposes of recreation, and without any view to inordinate gain, is regarded as innocent. Bac. Ab. Gaming, A. Com. Dig. Justices of the peace, B. 42; and see the preamble to 16 Car. II. c. 7. But a common player at hazard, using false dice, is liable to be indicted at common law, 2 Rol. Ab. 78. Bac. Ab. Gaming, A.; and any persons cheating by means of cards or dice, might be fined or imprisoned in proportion to the nature of the offence. Bac. Ab. Gaming, A.; and see the 9 Ann. c. 15. s. 6.
consideration is made a sacrifice, and which we seem to have inherited from our ancestors the ancient Germans: whom Tacitus (c) 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 every thing 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 [*172] call the point of honour: *ca est in re porva pervicacia, ipsi fidem vocant." 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 honour, 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 willfully incur, and what a confidence they repose in sharper's; 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 100l. 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 loses 10l. 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; 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 farther 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 10l. he may be indicted thereupon, and shall forfeit five times the value to any person who will sue for it (22); 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. (f), all private lotteries by tickets, cards, or dice (and particularly the games of faro, bassett, ace of hearts, hazard, passage, rolly polly, and all other games with dice, except back-gammon), are prohibited under a penalty of 200l. for him that shall [*173] erect such lotteries, and 50l. a time for the players. Public *lotteries, unless 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

(c) de mar. Germ. c. 24.
(f) 12 Geo. II. c. 28. 13 Geo. II. c. 19. 18 Geo. II. c. 34.

(22) In the construction of this act it has been held, that a wager on some matter arising from the game, and collateral to it, but not on the event itself, is not an offense within it. 1 Salk. 844. Hawk. b. 1. c. 92. s. 47. 2 H. Bla. 43. In the construction of the words "at any one time or sitting," it has been adjudged, that where a sum above 10l. had been won and paid after a continuance at play, except an interruption during dinner time, it was to be considered as won at one and the same sitting. 2 Bla. R. 1226.
The statutes (g) 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 sharers 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 50l. value shall be run, upon penalty of 200l. to be paid by the owner of each horse running, and 100l. by such as advertise the plate (23). By statute 18 Geo. II. c. 24. 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 indictment of winning or losing at play, or by betting at one time 10l. or 20l. 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 (24).

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 sportmen 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 (h) upon the old principles of the forest law, * to be a [*174] trespass and offence in all persons alike, who have not authority from the crown to kill game (which is royal property), by the grant either of a free warren, or at least a manor of their own. But the laws called

(g) 10 & 11 W. III. c. 17. 9 Ann. c. 6, § 55. 10 Ann. c. 25, § 109. 8 Geo. I. c. 2, § 36, 37. 9 Geo. L.c. 13, § 4, 5. 6 Geo. II. c. 35, § 29, 30. (A) See Book II. p. 417, &c.

(23) Newmarket and Black Hambleton are excepted, where a race may be run for any sum or stake less than fifty pounds. But though such horse-races are lawful, yet it has been determined, that they are games within the statute of 9 Ann. c. 14, and that of consequence wagers above 10l. upon a lawful horse-race are illegal. 2 Bl. Rep. 705. A foot race, and a race against time, have also been held to be games within the statute of gaming. 2 Bla. 391. So a wager to travel a certain distance within a certain time, with a post-chaise and a pair of horses, has been considered of the same nature. 6 T. R. 493. A wager for less than 10l. upon an illegal horse-race is also void and illegal. 4 T. R. 1. Though the owners of horses may run them for a stake of 50l. or more at a proper place for a horse-race, yet it has been held, if they run them upon the highway, the wager is illegal. 2 B. and P. 51.

Wagers in general, by the common law, were lawful contracts, and such wagers may still be recovered in a court of justice, which are not made upon games, or which are not such as are likely to disturb the public peace, or to encourage immorality, or such as will probably affect the interests, characters, and feelings of persons not parties to the wager, or such as are contrary to sound policy, or the general interests of the community. See 3 T. R. 633, where the legality of wagers is fully discussed.

Where a person had given 100l. upon condition of receiving 300l. if peace was not concluded with France within a certain time, and he afterwards brought his action to recover the 300l., it was held, the wager was void, as being inconsistent with general policy, but he was allowed to recover back the 100l., which he had paid, under a count for so much money had and received by the defendant to his use. 7 T. R. 565. So also, a person was permitted to recover back his share of a wager against a stakeholder upon a boxing match, 5 T. R. 405, the court not considering the conduct of the parties in these instances so criminal as to deprive him of the benefit of their assistance. See 2 B. and P. 467.

(24) See 1 N. & S. 662, 673, prohibiting gaming and racing.
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 licence expressed by the grant of a franchise, are guilty of the first original offence, of encroaching on the royal prerogative (25). 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. The 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 (i), 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 statute law, are, 1. The having a freehold [*175] estate of 100l. *per annum (26); 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 years, of 150l. 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, chace, 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 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 person, 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 (27), (28).

(i) Burns' Justice, Game, § 3. (k) Burns' Justice, ut. Game.

(25) The doctrine, so frequently repeated by the learned commentator, that no person had originally, or has now, a right to kill game upon his own estate, without a licence or grant from the king, is controverted in 2 book, p. 419. n. 9.

(26) It must be a fee-simple estate of 100l. a year, or an estate for life of 150l. per annum.

(27) The present act in England is 9 Geo. IV. c. 69. In New York, the laws relative to game are only intended to prevent the destruction of them at inproper seasons of the year. See 1 R. S. 701.

(28) The ancient statutes of 12 R. II. c. 2, "that none shall obtain offices by suit, or for reward, but upon desert," which Lord Coke says is worthy to be written in letters of gold, but more worthy to be put in due execution, Co. Litt. 234; and that of 5 and 6 E. VI. c. 16,
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 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 executive power of the law, entirely resides. Thus, too, in the old Gothic constitution, there was a threefold 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 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, whatever offenders were fined, "pars multae regi vel civitati, pars ipsi qui vindicatur vel propinquus ejus, exsolvitur."

(a) Steinhoek, l. I., c. 5.
(b) de mor. Germ. c. 12.

"against buying and selling of offices," imposed only civil restrictions upon this offence, and civil disabilities upon offenders. But by the 49 Geo. III. c. 126, reciting the 3 and 6 E. VI. c. 16, and extending its provisions to Scotland and Ireland, and to all offices in the gift of the crown &c.; persons buying or selling, or receiving or paying money or reward for any such office; and persons receiving or paying money for soliciting or obtaining any such office, or any negotiation or pretended negotiation relating thereto; and persons opening or advertising houses for transacting business relating to the sale of any such office; shall be respectively deemed and adjudged guilty of a misdemeanor: and offences against this Act, committed abroad, shall be tried in the court of King's Bench at Westminster, under the 42 Geo. III. c. 85. Commissions in the East India Company's service are expressly mentioned by the statute, and several instances have occurred, one very recently, of persons convicted and punished for the sale and negotiation of such offices. In New-York, the buying or selling of an office is a misdemeanor, punishable by imprisonment for a year and fine not exceeding 250 dollars, and by forfeiture of, and disqualification for, such office.
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 [*178] at all; the 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 had 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 extrajudicially, is murder (c). For, as Bracton (d) very justly observes, "istud homicidium, si fit ex livore, vel delectatione effundendi humanum sanguinem, licet justè 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, [*179] which requisition it is that justifies the homicide. If 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 licence might oc-
casion 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 introduction of a new punishment; and in the case of felo-
ny, 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 endeavor to take him, kills him (m). This is similar to the old
Gothic constitutions, which (Stiernhook informs us) (n) “furem, si
alter capi non posset, occidere *permittunt.” 3. In case of a riot, [*180]
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 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 & 4 W. & 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 ar-
rested 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 neces-
sity, it is not justifiable (2). 6. If the champions in a trial by battle
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), (4).

In the next place, such homicide as is committed for the prevention
of any forcible and atrocious crime, is justifiable by the laws of nature (r); and

(k) 3 Inst. 52, 212.
(l) 1 Hal. P. C. 494. 1 Hawk P. C. 71.
(m) de jure Goth. I. 3. c. 5.

(1) 21 Edw. I. st. 2, is repealed by 7 and 8 Geo. IV. c. 27; and 3 and 4 W. and M. c. 10,
by 16 Geo. III. c. 30, which latter is also re-
pealed by 7 and 8 Geo. IV. c. 27.
(2) If a person commits felony, and flies, or
resists those who attempt to apprehend him,
or is indicted for felony, and flies, or is arrested
by warrant or process of law, and escapes, or
is being conveyed to prison, and escapes; in
any of these cases, if he cannot be taken
alive, and is killed in the act of resistance,
the homicide is justifiable, 1 Hale, P. C. 459;
1 East, P. C. 293. So, if an officer has a
warrant against A., by name, for felony, or if
A. is indicted for felony, or if the hue and cry
is levied against him, by name; in any of these

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 (5). 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 be found breaking up, and he be "smitten that
[181] he die, no blood shall be shed for him: but if the sun be risen
upon him, there shall blood be shed for him; for he should have
made full restitution (w)." 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 to nearly the same as is permitted by our own con-
stitutions.

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 like-
wise justifies a woman in 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 own 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 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 na-
ture, yet the law of England, like that of every other *well-regula-
ted community, is too tender of the public peace, too careful of
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 commenda-
tion rather than blame. But that is not quite the case in excusable homi-

---

(5) Repealed by 9 Geo. IV. c. 31, § 10 of
which enacts, that no punishment or forfeiture
shall be incurred by any person who shall kill
another by misfortune, or in his own defence,
or in any other manner without felony.
cide, 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 (6).

II. Excusable homicide is of two sorts; either per infortunium, by misadventure; or se defendendo, 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 (7.) 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 emperor [*183] 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 knight 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

(d) 1 Hawk. P. C. 73, 74.  
(e) 1 Hal. P. C. 473, 474.  
(f) Col. 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.

(6) In New-York, in addition to the excuses mentioned in the text, homicide is justifiable in a public officer, and those acting under him, when committed necessarily in arresting felons fleeing from justice: or when committed by any person, 1. in resisting an attempt to murder him, or to commit any felony on him, or upon or in any dwelling-house in which such person may be, even in the daytime: 2. in the lawful defence of himself or herself, or of husband, wife, parent, child, master, mistress, or servant, when there is reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and there is imminent danger that such design may be accomplished: or, 3. when necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing a riot, or in lawfully keeping the peace. (2 R. S. 660, § 2. 3.)

(7) If a person driving a carriage happen to kill another, if he saw, or had timely notice of the mischief likely to ensue, and yet wilfully drove on, it will be murder: if he might have seen the danger, but did not look before him, it will be manslaughter; but if the accident happened in such a manner, that no want of due care could be imputed to the driver, it will be accidental death, and excusable homicide. 1 East. P. C. 263. Where, on a false alarm of thieves, the master of the house killed one of the family by mistake, who had concealed himself in a closet, this was held homicide by misfortune. Cro.Car. 533. Where an unqualified person by accident shoots another in sporting, it is no greater offence than in a qualified person. 1 East P. C. 260, 9.
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) (s). 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).

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 [*184] as, calculated to 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 or misadventure; whereas it appears by the statute 24 Hen. VIII. c. 5, and our ancient books (o), that it is properly applied to such killing as happens in self-defence upon a sudden rencontre (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 preventive 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 (9).

(i) 1 Hawk. P. C. 73. (k) ibid. 74. 1 Hal. P. C. 472. Fost. 261. (l) Stautnd. P. C. 16. (m) 1 Inst. 55. 57. Fost. 275, 276.

(9) Whenever death is the consequence of idle, dangerous, and unlawful sports, or of heedless, wanton, and indiscreet acts, without a felonious intent, the party causing the death is guilty of manslaughter. As, if a man rides an unruly horse amongst a crowd of people, 1 East, P. C. 231; or throws a stone, or shoots an arrow, over a wall, into a public and frequented street, 1 Hale, P. C. 478; or discharges his pistols in a public street upon alighting from his carriage, 1 Stret. 481; or throws a stone at a horse, which strikes a man, 1 Hale, P. C. 39; in any of these cases, though the party may be perfectly innocent of any mischievous intent, still, if death ensues, he is guilty of manslaughter. So, if the owner suffers to be at large any animal which he knows to be vicious and mischievous, and it kills a man, it has been thought by some that he may be indicted for manslaughter; but it is well agreed that he is guilty of a high misdemeanor, 2 Haw. P. C. c. 13, & 8; and, in a very recent case of that kind, Best, C. J., laid it down as law, 'that if a person thinks proper to keep an animal of this description (a bull), knowing its vicious nature, and another person is killed by it, it will be manslaughter in the owner, if nothing more; at all events it will be an aggravated species of manslaughter.' Blackman v. Simmons, 3 C. and P. 140. If workmen, in the ordinary course of their business, throw rubbish from a house in a direction in which persons are likely to pass, and any one passing is killed, this is manslaughter, 1 East, P. C. 262. Killing a person in a prize-fight is manslaughter, Ward's case, 1 East, P. C. 270. As to what are lawful sports, see Puloton, title, Riot.

(9) The general principle seems to be this. If a man is attacked in such a matter that there is no possibility of his escaping without killing his assailant, he is justified in doing so, after having done his utmost to retreat. Fost. 278; Kel. 128. But no assault, however violent, will justify killing the assailant, under
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 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 the violence of the assault, before he turns upon his assailant; and that not factiously, 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 aliis tueri se non possunt, damnari culpam dedeint, 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 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 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

the plea of necessity, unless there is a clear manifestation of a felonious intent. 1 East, P. C. 277; 1 Russell, 551. And an officer who kills one who resists him in the execution of his office, and even a private person that

kills one who feloniously assaults him in the highway, may justify the fact without retreating at all. 1 Hawk. P. C. c. 29, § 16; 1 Hale, P. C. 41, 3 Inst. 56, Crom. 23, a.

VOL. II. 67
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 preferably 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 (10).

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). And [*187] 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 if a man goeth into the wood with his neighbour to hew wood, and his hand fetcheth a stroke with the axe to cut down a tree, and the head slippeth from the helve, and lighteth upon his neighbour that he die, he shall flee unto one of these

(x) 1 Hal. P. C. 446.
(y) Elem. c. 5. See also 1 Hawk. P. C. 73.
(z) 1 Hawk. P. C. 72.

(10) In New-York homicide is excusable when committed, 1st. in doing any lawful act by lawful means with usual and ordinary caution, and without any unlawful intent. 2nd. By accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner. (2 R. S. 660, § 4.)
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, "annotatione principis;" otherwise the death of a 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; 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) (11).

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) (12).

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 (13), the pretended heroism, but real cowardice, of [189] the Stoic philosophers, who destroyed themselves to avoid those ills which they 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

(c) Cod. 9. 16. 5.
(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 illad, that when a child he was obliged to flee his country for casually killing his playfellow; "νησιον ονιχ θε- λων." (10)
(f) Stieren. de jure Goth. 1, 3, c. 4.
(g) De Morney, on the digest.
(h) 2 Inst. 148. 315.
(i) 1 Hal. P. C. 425. 1 Hawk. P. C. 75. Fost. 292, &c.
(k) Fost. 287.
(l) Ibid. 283.
(m) 2 Hawk. P. C. 301.
(n) Fost. 288.
(o) "Si quis impatienst doloris, aut saedio vitae, aut morbo, aut furore, aut pudore, more maluit, non animadvertit in sum." Ff. 49. 16. 6.
(p) Pot. Antiq. b. 1, c. 50.

(11) But now all forfeiture and punishment is removed in such cases. See 9 Geo. IV. c. 31, § 10; ante 190, note (5).
(12) Where the homicide does not amount to murder or manslaughter, it is now the universal practice to direct an acquittal.

The jury are to find a general verdict of acquittal in all cases where the homicide was justifiable or excusable. (2 R. S. 601, § 5.)
(13) This offence is not noticed in the laws of New-York.
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 un-called 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 \((q)\) \((14)\). A \textit{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 \((r)\) \((15)\). The 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 coroner's juries are apt to carry it, \textit{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 \textit{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 \textit{form} a legal excuse. And therefore if a real lunatic kills himself in a lucid interval, he is a \textit{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 \((16)\); 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

\((q)\) Keilw. 136.
\((r)\) 1 Hawk. P. C. 68. 1 Hal. P. C. 413.
\((s)\) See page 24.
\((t)\) 1 Hal. P. C. 412.

\((14)\) In New-York, the adviser is guilty of manslaughter in the first degree, and punishable with imprisonment not less than 7 years. (2 R. S. 661, § 7.)

\((15)\) He who kills another upon his desire or command, is in the judgment of the 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 \textit{felo de se}, inasmuch as his assent was merely void, being against the law of God and man. 1 Haw. P. C. c. 27, § 6; Keilw. 136; Moor, 754. And see Rex v. Sawyer, 1 Russell, 424; Rex v. Evans, id. 426.

\((16)\) But now by 4 Geo. IV. c. 52, § 1, it shall not be lawful for any coroner, or other officer having authority to hold inquests, to issue any warrant or other process directing the interment of the remains of persons, against whom a finding of \textit{felo de se} shall be had, in any public highway; but such coroner or other officer shall give directions for the private interment of the remains of such person \textit{felo de se}, without any stake being driven through the body of such person, in the churchyard or other burial-ground of the parish or place in which the remains of such person might by the laws or customs of England be interred, if the verdict of \textit{felo de se} had not been found against such person, such interment to be made within twenty-four hours from the finding of the inquisition, and to take place between the hours of nine and twelve at night. Proviso \((5)\). not to authorize the performing of any of the rites of christian burial on the interment of the remains of any such person, nor to alter the laws or usages relating to the burial of such person, except so far as the interment of such remains in such yard or burial ground at such time and in such manner.
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 (w). 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 of-
cice to execute judgment in mercy (17).

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 ar-
ticles, and principally consists in this, that manslaughter, when voluntary,
arises from the sudden heat of the passions, murder from the wickedness of
the heart.

*1. Manslaughter is therefore thus defined (v), the unlawful [*191]
killing of another without malice either express or implied: which
may be either voluntarily, upon a sudden heat; or involuntarily, but in the
commission of some unlawful act. These were called in the Gothic con-
stitutions “homicidio vulgario; quae aut casu, aut etiam sponte committuntur,
sed in subitaneo quodam iracundiae calore et impetu (w).” And hence it fol-
lows, that in manslaughter there can be no accessories before the fact; be-
cause 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 con-
tinued act of passion (x): and the law pays that regard to human frailty,
as not to put a hasty and a deliberate act upon the same footing with re-
gard 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) (18). But in this, and in every other

(w) Finch, L. 216.
(e) 1 Hal. P. C. 466.
(w) Stierh. de jure Goth. l. 3, c. 4.

(17) As to what a felo de se shall forfeit, it
seems clear, that he shall forfeit all chattels
real or personal which he has in his own right;
and also all chattels real whereof he is pos-
sessed, either jointly with his wife, or in her
right; and also all bonds and other personal
things in action, belonging solely to himself;
and also all personal things in action, and,
as some say, entire chattels in possession
unto which he was entitled jointly with an-
other, on any account, except that of mer-
chandize. But it is said that he shall forfeit
a moiety only of such joint chattels, as may
be severed, and nothing at all of what he was
possessed of, as executor or administrator.
1 Haw. P. C. c. 27, § 7. The blood of a
felo de se is not corrupted, nor his lands of in-
heritance forfeited, nor his wife barred of her
dower. 1 Haw. P. C. c. 27, § 8; Plowd. 261,
b. 262; a; 1 Hale, P. C. 413. The will of a
felo de se, therefore, becomes void as to his
personal property, but not as to his real estate.
Plowd. 261. No part of the personal estate
of a felo de se vests in the king, before the self-
murder is found by some inquisition; and,
consequently, the forfeiture thereof is saved
by a pardon of the offence before such finding.
5 Co. Rep. 110, b. 3 Inst. 54, 1 Saund. 362,
1 Sid. 150, 162. But if there be no such par-
don, the whole is forfeited immediately after
such inquisition, from the time of the act
done by which the death was caused, and all
intermediate alienations and titles are avoided.
Plowd. 260, 1 Hale, P. C. 29, 5 Co. Rep. 110,
Finch, L. 216. See also upon this subject,
Lambert v. Taylor, 6 D. and R. 198, 4 B. and
C. 138.

(18) See note 10, p. 186. In New-York, 
homicide, when not justifiable or excusable, is
murder or manslaughter: the first punished
by hanging, the last by imprisonment. Man-
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, or the procurement, or culpable negligence, of a person perpetrating or attempting to perpetrate any crime or misdemeanor not amounting to a felony, in cases where such killing would be murder at common law. 2. By assisting another to commit suicide. 3. By wilfully killing an unborn quick child, by any injury to the mother, which would be murder if it resulted in the death of the mother.

Manslaughter in the second degree is: 1. The wilful killing of a quick child of which any woman is pregnant, unless the killing was necessary to preserve the life of the mother, or was advised by two physicians as being necessary for that purpose. 2. The killing of a human being without a design to effect death, in a heat of passion, but in a cruel and unusual manner, unless it be committed under such circumstances as to amount to an attempt at suicide or justifiable homicide. 3. The unnecessary killing of another, while resisting an attempt by such other to commit any unlawful act, or after such attempt shall have failed.

Manslaughter in the third degree is: 1. The killing of another in the heat of passion, without a design to effect death, by a dangerous weapon; except in cases where a statute has made such killing justifiable or excusable. 2. The involuntary killing of another, by the act, procurement, or culpable negligence, of any person, while such person is committing or attempting to commit any trespass or other injury to private rights or property. 3. Where the owner of a mischievous animal, knowing its propensities, willingly suffers it to go at large, or keeps it without ordinary care; and the animal, while so at large or unconfined, kills any one who has taken all the precautions that circumstances may permit to avoid the animal. 4. Where any person vending any bobsleigh or sled, or vessel for gain, wilfully or negligently receives so many passengers, or so much lading, as to sink or overset the vessel, and thereby any one is drowned or otherwise killed. 5. Where any one having charge of a steamboat for passengers, or having charge of its boiler or other apparatus for the generation of steam, from ignorance or gross neglect, or to excel in speed any other boat, allows to be created such an undue quantity of steam as to burst or break the boiler, or other such apparatus, or any machinery connected with it, and any one is killed by such bursting or breaking. 6. Where a physician, while intoxicated, does any act that causes the death of his patient, though without intending to cause death.

Manslaughter in the fourth degree, is: 1. The involuntary killing of another by any weapon, or by means neutral or abnormal, in the heat of passion in cases not declared to be homicide. 2. The killing of a human being by the act, procurement, or culpable negligence of another, when such killing is not declared to be justifiable or excusable, or murder or manslaughter in a higher degree. (2 R. S. 661, 662, § 5 to 19. & 3 R. S. App. p. 158.)

Manslaughter in the first degree is punishable with imprisonment not less than seven years: in the 2d degree not less than 4, nor more than 7: in the 3d degree not less than 2, nor more than 4: in the 4th degree, not more than 2 years, and a fine of not more than 1000 dollars. (Id. § 20.)

It may be proper to subjoin here the statutory definition of murder:—it is the killing of a human being without the authority of law, when committed in the following cases, unless it be manslaughter, or excusable or justifiable homicide:—1. When perpetrated from a premeditated design to effect the death of the person killed, or of any human being. 2. When perpetrated by any act immediately dangerous to others, and evincing a depraved mind, regardless of human life, without any premeditated design to effect death of any individual. 3. When perpetrated without any design to effect death, by a person engaged in the commission of a felony.

It is also murder for any inhabitant or resident of this state, by previous appointment or engagement to fight a duel out of the state, and in so doing to inflict a wound upon his antagonist or any other person, whereof the person thus injured shall die within this state: and every second in such a duel is also a murderer. But a former conviction or acquittal in another state or country is a defence here. (2 R. S. 657, § 5, 6, 7.)

It will be seen that our statutes have materially altered the common law, and they must create many difficult questions, the solution of which must be obtained by a careful examination of one part with the other, and by reference to the former law. There is in one part a confusion of expression, which, it is but justice to say, many persons have not, or will not refer to the Revised Statutes. An essential part of the definition of murder is, that it is the commission of certain acts in cases in which they would not be manslaughter. (2 R. S. 657, § 5.) And an equally essential part of the definition of manslaughter in the fourth degree, is that it be a homicide that is not declared to be murder. (Id. 652, § 10.) So that, to know what murder, the greatest of these offences, is, we must first learn what is manslaughter: and, when we turn to the definition of manslaughter in the fourth degree, the least of these offences, we cannot discover its meaning till we learn the meaning of murder. Thus the Revisers have here been guilty of defining in a circle. The intention, however, is sufficiently plain, that manslaughter in the fourth degree is any unjustifiable or inexcusable homicide less culpable than the other degrees of manslaughter; and then the definition of murder also is freed from confusion. Murder, treason, and arson in the first degree, and those offences alone, are punished with death (2 R. S. 656, § 1.), which is inflicted by hanging. (Id. 659, § 25.)
and accordingly amounts to murder (a). 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 manslaughter (d). It is however the lowest degree of [*192] 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). 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 *intent, or in its consequences naturally tended to bloodshed, [*193] it will be murder; but, if no more was intended than a mere civil trespass, it will only amount to manslaughter (j).

(a) Post, 296.
(b) Plutarch, in vit. Solon.
(c) Sternh. de jur. Goth. 1. 3. c. 2.
(d) 1 Hal. P. C. 490.
(e) Sir T. Raym. 212.
(f) 3 Inst. 56.
(g) Kes. 48.
(h) 2 Inst. 57.
(i) Our statute law has severely animadverted upon one species of criminal negligence, whereby the death of a man is occasioned. For by statute 10 Geo. II. c. 31, 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 (19).
(j) Foster, 358. 1 Hawk. P. C. 94.

(19) Repealed, together with all other Acts for the regulation of watermen plying upon the river Thames, (vide ante, 64, note (223)) by 7 and 8 Geo. IV. c. 75; section 38 of which, after providing that no boat, &c., for carrying passengers on the river Thames, shall be used without a licence, expressing the number of persons it may be allowed to carry, and that the number and name of the owner shall be painted thereon, and imposing a penalty for infringing those provisions, enact, that in case any greater number of passengers shall be carried in any boat, &c., than is allowed, and any one or more of them shall by reason thereof be drowned, every person navigating such boat, &c., offending there- in, and being thereof lawfully convicted, shall be deemed guilty of misdemeanor, and shall be liable to such punishment as in cases of misdemeanor, at the discretion of the court; and shall be disfranchised, and not allowed thereafter to navigate any boat, &c., on the river Thames.
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 (20).

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. I. 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 the 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 first blow; and

[*194] *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 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) (21).

(k) Lord Raym. 140.
(l) Post. 299, 300.
(m) 1 Fost. 301. 1 Hawk. P. C. 77.
(o) 1 Hawk. P. C. 77.

(20) By 9 Geo. IV. c. 31, § 9, (repealing all former enactments on this subject,) every person convicted of manslaughter shall be liable, at the discretion of the court, to be transported for life, or for any term not less than seven years, or to be imprisoned with or without hard labour, for any term not exceeding four years, or to pay such fine as the court shall award.

(21) The 1 J. I. c. 8, together with the 43 G. III. c. 58, (Lord Ellenborough's Act,) and the 1 G. IV. c. 90, relating to the same subject, is repealed by 9 G. IV. c. 31; by § 11 of which it is enacted, that if any person unlawfully and maliciously shall administer, or attempt to administer to any person, or shall cause to be taken by any person, any poison or other destructive thing, or shall unlawfully and maliciously attempt to drown, suffocate, or strangle any person, or shall unlawfully and maliciously shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall unlawfully or maliciously stab, cut, or wound any person, with intent, in any of the cases aforesaid, to murder such person, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon. And by § 12, it is enacted, that if any person unlawfully and maliciously shall shoot at any person, or shall, by drawing a trigger, or, in any other manner, attempt to discharge any kind of loaded arms at any person, or shall unlawfully and maliciously stab, cut, or wound any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable such person, or to do some other grievous bodily harm to such person, or with intent to resist or prevent the lawful apprehension or detention of the party so offending, or of any of his accomplices, for any offence for which he or they may respectively be liable by law.
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 Mosaic 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 prosecution (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,* 4 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 moerda signifies in the Teutonic language) (t); and it was defined, "*homicidium quod nullo videntе, nullo sciente, clam perpetratur* (u):" for which the villain wherein it was committed, or (if that were too poor) the whole hundred was liable to a heavy *amercement;* 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 to be apprehended or detained, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon: provided, that in case it shall appear, on the trial of any person indicted for any of the offences above specified, that such acts of shooting, or of attempting to discharge loaded arms, or of stabbing, cutting, or wounding, as aforesaid, were committed under such circumstances, that if death had ensued therefrom the same would not in law have amounted to the crime of murder, in every such case the person so indicted shall be acquitted of felony. There are two novelties in this Act of Parliament; first, the provisions in section 11, respecting drowning, suffocating, and strangling; and secondly, the introduction, in both ss. 11 and 12, of the word wound, after the words stab and cut. The latter is an improvement which had long been a desideratum, many indictments under the former statute having failed merely for the want of some such general term, where the injury inflicted did not fall strictly within the definition either

Vol. II. 68

*Public Wrongs.* 147

(p) Gen. ix. 6.
(q) Numb. xxxv. 31.
(r) L. of N. b. 8, c. 3.
(s) Dial. de Scacc. l. 1, c. 10.
(t) Sterneh. de jure Svec. l. 3, c. 3. The word *murdrum* in our old statutes also signifies any kind of concealment or stilling. So in the statute of Exeter, 14 Edw. 1. "*si rians ne celebro, ne sufferai extrev cele ne murdrum;*" which is thus translated in Fleta, l. 1, c. 18, § 4. "*Nullum veritatem celabo, nec ce-

lari permitam nec murdari.*" And the words "*pur murdrum le droit,*" in the articles of that statute, are rendered in Fleta, ibid. § 8. "*pro jure alienius mur-

driendo.*"

(w) Glany. l. 14, c. 3.
(y) Sterneh. l. 3, c. 4.
(z) Glany. l. 3, tr. 2, c. 15.
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 established by statute 14 Edw. III. c. 4. we must now (as is observed by Staundforde) (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 (22) 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 shew a consciousness of doing wrong, and of course a discretion, or discernment, between good and evil (23).

Next, it happens when a person of such sound discretion unlawfully killeth. The unlawfulness arises from the killing without warrant or excuse: 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) (24). 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 circumstance, as if a wound be alleged to be given with a sword, and it proves to have arisen from a staff, an axe, or a hatchet, this difference is immaterial (e) (25). Of

---

(a) 1 Hal. P.C. 447.
(b) Bract. usi supr.
(c) 3 Inst. 47.
(d) 1 Hal. P. C. 425.
(e) 3 Inst. 319. 2 Hal. P. C. 185.

(22) See note 18, p. 191.
(23) See ante, 23. as to infants. In the case of lunacy, where there is only such a partial derangement as leaves the person free to act or to forbear, in the particular case in question, or where he is guilty of the crime during a lucid interval, he will be equally liable to punishment with those who are perfectly sane. Earl Ferrers' case, 10 Harg. St. Tr. 478. Where, however, the mind labours under such a delusion, that though it discerns some objects, it is totally deranged as to the objects of its attack, the party will be entitled to an acquittal. See Erskine's Speeches, 5 vol. 1. Ridgway's ed. 1812. How far drunkenness excuses a crime, see ante, 23, 6.

(24) As to attempts to commit crimes generally, see 2 R. S. 699, 702. Shooting, or attempting to shoot, another, or assaulting and beating him by such means as were likely to produce death, with an intent to kill, maim, ravish, or rob, or in the attempt to commit any burglary, larceny, or other felony, or in resisting legal process, is punishable with imprisonment not more than 10 years: administering poison with an intent to kill, is punishable with imprisonment not less than 10 years. Mingling poison in any food, drink, or medicine, with intent to kill, but without administering it; or poisoning any spring, reservoir, or well of water, is punishable with imprisonment not exceeding 10 years, and fine not exceeding 500 dollars. An assault with intent to commit a felony, is punishable with imprisonment not exceeding 5 years, and fine not exceeding 500 dollars, in cases where no other punishment is before provided by the act. (2 R. S. 665, 666.)

(25) See 1 East, P. C. 341, and Sharwin's case, there cited, in which it was held that an averment of an assault with a wooden staff, was satisfied by proof of an assault with a stone; the effect being the same. See Rex
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 H. VIII. c. 2, it was made treason, and a more grievous and lingering kind of death was indicted on it than the common law allowed; namely, boiling to death (26): 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 homicideam (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

(v. Dale, 13 Price, 172, 9 J. B. Moore, 19. A stroke must be expressly averred, and an

indictment stating that the prisoner murdered, or gave a mortal wound, without saying that he struck, is bad, Rex v. Long, 5 Co. Rep. 122, a; 1 East, P. C. 342. It must also be stated upon what part of the body the deceased was struck; 2 Hale, P. C. 185; and the length and width of the wound must be shewn; id. 186, Haydon’s case, 4 Co. Rep. 42, a. Where there are several wounds, the length and breadth of each need not be stated. Rex v. Mosley, R. and M. C. C. 97. And see Young’s case, 4 Co. Rep. 40, Walker’s case, id. 41, Rex v. Lorkin, 1 Bulstr. 124. 2 Hale, P. C. 184, Rex v. Dale, R. and M. C. C. 5; as to the wounds, cause of death, &c. Where the death proceeded from suffocation from the swelling up of the passage of the throat, and such swelling proceeded from wounds occasioned by forcing something into the throat; it was held sufficient to state in the indictment, that the things were forced into the throat, and the person thereby suffocated; and that the process immediately causing the suffocation, namely, the swelling, need not be stated. Rex v. Tye, R. and R. C. C. 343. The death, by the means stated, must be positively averred, and can be inferred; Ex p. Rex v. C. C. 343. and where the death is occasioned by a stroke, it must be further alleged that the prisoner gave the deceased a mortal wounding, &c. where of he died. 2 Hale, P. C. 186, Kel. 125; Lad’s case, Leach, 96. The time and place both of the wound and of the death, must be stated, in order that the deceased died within a year and a day from the cause of the death; in computing which, the day of the act done, is reckoned the first: though a precise statement of the day is immaterial, if the party is proved to have died within the limited period. 2 Inst. 318, 2 East, P. C. 314. The

word murdered is absolutely necessary in the indictment. 2 Hale, P. C. 187. The allegations, “not having the fear of God,” &c. “vitam armis,” and “being in the peace of God,” &c. are not necessary. 2 Stark. C. P. 385. Where the stroke is given in one county, and the death happens in another, the venue may be laid in either. As to laying the venue, where the stroke is given at sea, see 9 G. IV. c. 31, § 8. Where the name of the deceased is not known, he may be described as a certain person to the jurors unknown; but a bastard child cannot be described by his mother’s name, unless he has acquired that name by reputation. Rex v. Clarke, R. and R. C. C. 359: and see Rex v. Sheen, 2 C. and P. 655.

(26) This extraordinary punishment seems to have been adopted by the legislature, from the peculiar circumstances of the crime which gave rise to it; for the preamble of the statute informs us, that John Roose, a cook, had been lately convicted of throwing poison into a large pot of broth, prepared for the bishop of Rochester’s family, and for the poor of the parish; and the said John Roose was by a retrospective clause of the same statute ordered to be boiled to death. Lord Coke mentions several instances of persons suffering this horrid punishment. In 1 Inst. 48. Murder of malice prepense, was made high treason in Ireland, by 10 Hen. VII. c. 51. Irish Statutes. By the 13 Geo. III. c. 58. it is enacted, that if any person shall wilfully and maliciously administer to, or cause to be administered to, or taken by, any of his majesty’s subjects any deadly poison with intent to murder, he, his counsel- lers, sides, and abettors, shall be guilty of felony without benefit of clergy. So the attempt to murder by poison, which by the common law was only a misdemeanour, is now made a capital crime.
there is no doubt but this is equally murder in *foro conscientiae* as

["197"] 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 pu-
nished it as such (27). 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 be pri-
marily 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 for want of care and sustenance (n) (28).
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 plai ster to cure him,
which contrary to expectation kills him, this is neither murder, nor man-
slaughter, but misadventure; and he shall not be punished criminally,
however liable he might formerly been to have a civil action for neglect or
ignorance (p) (29): but it hath been holden, that if it be not a regular physi-
cian 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) (30). In order also to make the killing

(l) 1 Hawk. P. C. 78.
(m) 1 Hal. P. C. 452.
(o) Palm. 545.
(p) Ibid. 431.

(27) The guilt of him who takes away the
life of an innocent man by a false oath, is much
more atrocious than that of an assassin, who
murders by a dagger or by poison. He who
destroys by perjury, adds to the privation of
life public ignominy, the most exer ciating of
tortures to an honourable mind, and reduces an
innocent family to ruin and infamy; but
notwithstanding this is the most horrid of all
crimes, yet there is no modern authority to
induce us to think that it is murder by the law of
England: lord Coke says expressly, "it is
not holden for murder at this day." 3 Inst.
48. See also Post. 132. Such a distinction
in perjury would be more dangerous to soci-
ty, and more repugnant to principles of sound
policy, than in this instance the apparent want
of severity in the law. Few honest witness-
es would venture to give evidence against a
prisoner tried for his life, if thereby they made
themselves liable to be prosecuted as murder-
ers.

(28) Or if a master refuse his apprentice
necessary food or sustenance, or treat him
with such continued harshness and severity as
his death is occasioned thereby, the law will
imply malice, and the offence will be murder.
Leach, 127. 2 Camp. 650; and see 1 Russ.
622. If a prisoner die by the malice or ne-
lec t of the gaoler, or, in legal language, by
duress of imprisonment, the party actually of-
fending is criminal in this degree. Post. 331;
and see 2 Stra. 856. 2 Lord Raym. 1578.
Post. 332. Laying noisome and poisonous
filth at a man's door, which kills him by cor-
rupting the air which he breathes, will be mur-
der. 1 Hale, 432.

(29) Such persons are clearly still liable to
a civil action, where gross negligence or
ignorance can be proved. Slater v. Baker, 2
Wils. 359; Scar e v. Prentice, 8 East, 348;
and it would also be a good defence to an ac-
tion by an apothecary on his bill, that he had
treated his patient ignorantly or improperly.
Kannea v. M'Mullen, Peake, 59.

(30) It is not murder to work on the imagi-
nation so that death ensues, or to call the feel-
ings into so strong an exercise as to produce a
fatal malady, though such acts, if not malici-
sious, spring from a criminal thoughtlessness.
Post, 304. 1 Hale, 429. If a wound itself
be not mortal, but by improper applications
becomes so and terminates fatally, and it can be
clearly shewn that the medicine and not the
wound was the cause of the death, the party
who inflicted the wound will not be guilty of
murder. 1 Hale, 428. But where the wound
was adequate to produce death, it will not be
an excuse to shew that, had proper care been
taken, a recovery might have been effected;
1 Hale, 495.
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 (a).

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 [*198] kill an alien, a Jew, or an outlaw, who are all under the king's peace and 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 (31).

(a) 1 Hawk. P. C. 79.
(t) 3 Inst. 50. 1 Hal. P. C. 423.
(u) 3 Inst. 50. 1 Hawk. P. C. 80, but see 1 Hal.

(31) The 21 J. I. c. 27, was repealed by the 43 G. III. c. 58, which has also recently been repealed, and the law upon this subject is now as follows: By 9 Geo. IV. c. 31, § 13, if any person with intent to procure the miscarriage of any woman then being quick with child, unlawfully and maliciously shall administer to her, or cause to be taken by her, any poison or other noxious thing, or shall use any instrument or other means whatever with the like intent, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall suffer death as a felon; and if any person, with intent to procure the miscarriage of any woman not being, or not being proved to be, then quick with child, unlawfully and maliciously shall administer to her, or cause to be taken by her, any medicine or other thing, shall use any instrument or other means whatever with the like intent, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported for any term not exceeding fourteen, and not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years, and if a male, to be once, twice, or thrice publicly or privately whipped. By § 14, if any woman shall be delivered of a child, and shall, by secret burying or otherwise disposing of the dead body of the said child, endeavour to conceal the birth thereof, every such offender shall be guilty of a misdemeanour, and being convicted thereof, shall be liable to be imprisoned, with or without hard labour, for any term not exceeding two years; and it shall not be necessary to prove whether the child died before, at, or after its birth: provided, that if any woman tried for the murder of her child shall be acquitted thereof, it shall be lawful for the jury, by whose verdict she shall be acquitted, to find, in case it shall so appear in evidence, that she was delivered of a child, and that she did, by secret burying or otherwise disposing of the body of such child, endeavour to conceal the birth thereof, and thereupon the court may pass such sentence, as if she had been convicted upon an indictment for the concealment of the birth. These enactments are substantially the same as those of the 43 G. III. c. 58, upon the same subjects,
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 presuppose, malitia praecogitata, 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 à faire un male chose (x); and [*199] 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 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) (32). 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 (33). 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 de-

(w) Foster, 256.
(x) 2 Roll. Rep. 461.
(y) 1 Hal. P. C. 451.
(z) 1 Hawk. P. C. 82.

except that by section 14 of the new Act, the concealment of the birth of a child is made an indictable misdemeanor, whereas, before, the prisoner could only be found guilty of the concealment upon an indictment charging her with murder. See Rex v. Parkinson, 1 Russell, 475, n.; 1 Chetw. Burn, 334. The rules laid down with respect to indictments for these offences under the old statute, seem, in other respects, equally applicable to the new Act.

(32) 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, and cannot excuse himself by alleging that he was first struck by the deceased; or that he had often declined to meet him, and was prevailed upon to do it by his importunity; or that his only intent was to vindicate his reputation; or that he meant not to kill, but only to disarm his adversary: for, as he deliberately engaged in an act in defiance of the law, he must at his peril abide the consequences. 1 Haw. P. C. c. 31, § 21; 1 Bulstr. 88, 7; 2 Bulstr. 147; Crom. 22, 6; 1 Rol. Rep. 369; 3 Bulstr. 171; 1 Hale, P. C. 48. Therefore, if two persons quarrel over night, and appoint to fight the next day, or quarrel in the morning, and agree to fight in the afternoon, or such a considerable time after, by which, in common intention, it must be presumed that the blood was cooled, and then they meet and fight, and the other kill the other, he is guilty of murder. 1 Haw. P. C. c. 31, § 22; 3 Inst. 51; 1 Hale, P. C. 48; Kel. 56; 1 Lev. 180.

(33) See the law of duelling fully stated 3 East Rep. 591. 6 East, 464. 2 Bar. & Ald. 402.
literate act of slaughter (a) (34). Neither shall he be guilty of a less crime, who kills another *in consequence of such a wilful act, as shews 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 praecogitata, or evil intended beforehand (d) (35).

Also in many cases where no malice is expressed, the law will imply it: as where a man willfully poisons another, in such a deliberate act the law presumes malice, though no particular enmity can be proved (e). And if

(a) 1 Hal. P. C. 454, 473, 474.
(b) Lord Raym. 143.
(c) 1 Hawk. P. C. 74.
(d) Ibid. 84.
(e) 1 Hal. P. C. 455.

(34) Homicide may be and is often extenuated by the circumstance of a mutual contest arising from the spur of the occasion, where no undue advantage is either sought or taken by either of the parties. See 5 Burr. 2793, and cases cited 1 East P. C. 241 to 246. And in this case, it is of no consequence from whom the first provocation arises. 1 Hale, 456. But if one with his sword drawn makes a pass at another whose sword is undrawn, and a combat ensues, if the former be killed, it will only be manslaughter in the latter; but if the latter fall, it will be murder in the former, for by making the pass before his adversary's sword was drawn, he evinced an intention not to fight but to destroy him. Kel. 61. Hawk. c. 31. s. 33, 4. (a). And where a man upon occasion of some angry words, threw a bottle at the head of his opponent and immediately returned the bottle, stabbed him; this was held to be murder in him, because he drew previous to the first aggression. Kel. 119. 2 Id. Raym. 1499. So if two bailiffs arrest a man, and he abuse and threaten and strike them, and bring pistols, declaring that he will not be forced from his house, and on high words arising between them, and on the bailiffs being struck and provoked, they fall on him and kill him, they will be guilty of manslaughter only. 6 Hargr. St. Tr. 195. H. 292, 3, 4. And where, on an affray in a street, a soldier ran to the combatants, and in his way a woman struck him in his face with an iron patten and drew a great deal of blood, on which he rushed upon the back with the pomell of his sword; and on her running away, immediately followed and stabbed her in the back; he was held to be guilty simply of felonious homicide, H. 292. see 5 Burr. 2794; and where after mutual blows between the prisoner and the deceased, the prisoner knocked down the deceased, and after he was upon the ground stamped upon his stomach and belly with great force, it was held manslaughter only. Russ. & Ry. C. C. 166. On a quarrel between a party of keel-men and soldiers, one of the latter drew his sword to protect himself and his comrades from the assaults of the mob, and killed a person dressed like one of the former, whom he mistook for one of the keel-men; and this was held to be no more than manslaughter. Brown's case, 1 Leach, 148. If A. stands with an offensive weapon in the door-way of a room, wrongfully to prevent T. S. from leaving it, and others from entering, and C. who has a right to the room struggles with him to get his weapon from him, upon which D. a comrade of A's stabs C.; it will be murder in D. if C. dies, Russ. & Ry. C. C. 228; see a late case, where the judges entertaining doubts as to whether the prisoner who killed another in an affray was guilty of murder, recommended him to a pardon. Russ. & Ry. C. C. 43. Where, after mutual provocation, the deceased and his opponent struggled, and in the course of the contest the former received his mortal wounds from a knife which the latter had previously in his hand in use, though the jury found the prisoner guilty of murder, the judges held the conviction wrong, and recommended him for a pardon. 1 Leach, 151. But in no case will previous provocation avail, if it was sought for by the act of the slayer, to afford him a pretence for gratifying his own malice. Nor will it alter the case, that blows had previously been given, if they evidently left traces of a deadly revenge, which seeks an opportunity of indulging itself by provoking a second contest to cover and excuse a deliberate attempt on the life of its object. 1 East P. C. 239, 240.

(35) And see cases in 3 Chit. C. L. 729, 2 ed. Where in an act which is not malum in se, but malum prohibitum (it being prohibited, except to persons of a certain description), as shooting at game, an unqualified person will not be more guilty, if in shooting he accidently kills a human being, than one who is qualified. 1 Hale, 475. Fost. 299.
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 shewed 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) (36), (37). And if one intends to do another felony, *and undesignedly kills a man, this is also murder (i).

Thus 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 guilt. For all homicide is presumed to be malicious, until the contrary appeareth upon evidence (l) (38).


(36) As to what will amount to murder in killing an officer, see 1 Chit. Crim. Law, 2 ed. c. 2. 2 id. 729.

(37) It is murder to kill a constable, though he has no warrant, and does not witness the felony committed, but takes the party upon a charge only; and that, even though the charge be in itself defective to constitute a felony. Rex v. Ford, R. and R. C. C. 329.

(38) Francis Smith was indicted for murder at the Old Bailey, January 13, 1804. The neighbourhood of Hammersmith had been alarmed by what was supposed to be a ghost. The prisoner went out with a loaded gun with intent to apprehend the person who personat-

ed the ghost; he met the deceased, who was dressed in white, and immediately discharged his gun and killed him. Chief Baron MacDonald, Mr. J. Rooke, and Mr. J. Lawrence were unanimously of opinion that the facts amounted to the crime of murder. For the person who represented the ghost, was only guilty of a misdemeanour (a nuisance), and no one would have had a right to have killed him, even if he could not otherwise have been taken. The jury brought in a verdict of manslaughter, but the court said they could not receive that verdict; if the jury believed the witnesses, the prisoner was guilty of murder; if they did not believe them, they must acquit.
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 away from murderers through malice prepence, 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 judgment; and the like is still sometimes practised in the case of notorious thieves. This, being quite contrary to the express command of the Mosaic 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. 57. 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) (39), 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 (40), but in no wise 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 (41).

Upon this they found a verdict of guilty. Sentence of death was pronounced, but the prisoner was reprieved. (39) William Wyatt was convicted before Chambre, J. at Cornwall Lent assizes, 1812, upon an indictment for murder. The day of the week on which the trial took place was Thursday; but by mistake it was supposed to be Friday, and in passing sentence the execution was directed to be on the following Monday instead of Saturday. Immediately after sentence the court was adjourned till the next morning; without the intervention of any other business, and the error being discovered soon after the adjournment, the prisoner was directed to be brought up at the sitting of the court in the morning, which was accordingly done, and the sentence was given before any other business was entered upon, to be executed on the Saturday; an order was then made, pursuant to the authority given by the 4th and 7th sections of stat. 25 G. II. c. 37, to stay the execution and relax the restraints imposed by the act, in order to take the opinion of the judges upon the following questions. 1st. Whether the statute, so far as it requires the time of the execution to be expressed in pronouncing the sentence, is not to be consider-ed as directory only, without invalidating the judgment when omitted, or preventing the entry of the proper judgment and record, specifying the time of execution. 2d. Whether supposing the specification of time to be a necessary act in pronouncing sentence, the error was not legally corrected by what was done in open court the next morning, the court not having proceeded to any other business whatever in the intermediate time. The judges on conference held, that the stat. 25 G. II. c. 37, is directory only so far as it requires the time of the execution to be expressed in pronouncing the sentence, and therefore the error in this case was rightly and legally corrected by the proceedings on the following morning, no other business having intervened between the conviction and pronouncing sentence. The prisoner was accordingly executed. 2 Burn J. 24ed. 1044.

(40) The judge, if he thinks it advisable, may afterwards direct the hanging in chains, by a special order to the sheriff; but it does not form any part of the judgment. Fost. 107.

(41) The act now in force is 9 Geo. IV. c. 31.
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. 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. 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 as this, we [*203*] 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 (f).

For, though the breach of natural relation is unobserved, 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 prodition*, or *petit treason*: which however is nothing else but an aggravated degree of murder (v); although on account of the violation of private allegiance, it is stigmatized as an inferior species of treason (w). 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* (42), according to the statute 25 Edw. 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; 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 [*204*] murder in its most odious degree; except that the trial shall be 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 it should seem that two witnesses are not necessary, as in case of petit treason they are (43). Which crime is also distinguished from murder in its punishment.

---

(a) 1 Hal. P. C. 350.
(b) Foster, 107. 324. 335.
(c) See above page 78.
(d) "Omnium gravissimam censetur vitia ab incolis in patriam, subditis in regem, liberris in parentem, maritio in uxore (et vice versa), servis in dominos, aut etiam ab hominum in semet ipsum."—*Stiriuth. de jure Goth. B. I. c. 3.
(e) 1 Hawk. P. C. 89. 1 Hal. P. C. 350.
(f) 1 Hal. P. C. 381.
(g) Ibid. 106.
(h) Foster, 106. 1 Hal. P. C. 375. 2 Hal. P. C. 154.

Petit treason is abolished in England by 9 Geo. IV. c. 31, § 2; and in New-York, by 2 R. S. 657, § 8, and the offence now is treated as murder.

---

(42) Petit treason is abolished in England by 9 Geo. IV. c. 31, § 2; and in New-York, by 2 R. S. 657, § 8, and the offence now is treated as murder.

(43) A person indicted for petit treason, may upon the evidence of one witness be convicted of murder, though acquitted of the petit treason. Radbourne's case, Leach, 363.
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 treasons committed by those of the female sex (e) (44). 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 aidsers, abettors, and counsellors, by statute 23 Hen. VIII. c. 1, and 4 & 5. P. & 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 forehead, 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, or nose, or the [*206] like, are not held to be mayhems at common law; because they do not weaken but only disfigure him.

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 after-

---

(a) 1 Hal. P. C. 382. 3 Inst. 311.
(b) Common de bell. Gall. i. 6, c. 16.
(c) 3 Inst. 118.—*Mé, si la plaignte soit faite de femme qu’aura tolle a home ses membres, en tiel cas perdra la, feme le une mygn. par jugement, comme le membre desta els avera trempasse.* (Britt. c. 25.)
(d) Stithenhook de jure Sueon. l. 3, t. 3.

(44) By the 30 Geo. III. c. 48, women shall no longer be sentenced to be burnt; but in all cases of high and petit treason they shall be condemned to be drawn and hanged, and in petit treason they shall be subject besides to the same judgment with regard to dissection and the time of execution as is directed by the 25 Geo. II. c. 37, in cases of murder. Soon after the passing of the 25 Geo. II. c. 37, the majority of the judges agreed, that in the case of men convicted of petit treason, the judgment introduced by that statute should be added to the common law judgment for petit treason. Foot. 107.
wards out of use: partly because the law of retaliation, as was formerly shewn (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 aedemptione (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 37 Hen. VIII. c. 6, which directs, that if a man shall maliciously and unlawfully cut off the ear of any of the [*207] king's subjects, he shall not only forfeit treble damages to the party grieved, to be recovered by action of trespass at common law, as a civil satisfaction; but also 10l. 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 & 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 aforesaid, and by lying in wait, unlawfully cut out or disable the tongue, put out an eye, cut off a nose or lip, or cut off or disable any limb or member of any other person, with intent to maim or disfigure him; such person, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy (k) (1).

(e) See page 12.
(f) 1 Hen. IV. c. 112.
(g) Frac. fol. 134.
(h) Sir Edward Coke (3 Inst. 63.) has transcribed a record of Henry the Third's time, (Claus. 13 Hen. III. m. 9), by which it appears that 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. 69.
(j) On this statute Mr. Coke, a gentleman of Suffolk; and one Woodburn, a labourer, were indicted in 1725; Coke for hiring and abetting Woodburn, and Woodburn for the actual fact of splitting the nose of Mr. Crisp, Coke's brother-in-law. The case was somewhat singular. The murder of Crisp 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 this 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 statute was wanting for his purpose, and that he was merely guilty of an attempt to murder, 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 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 their principal intent to murder, and they were both condemned and executed. (State Trials, VI. 212.)

(1) These statutes are now all repealed. "So much of the 5 H. IV. c. 5, as relates to cutting the tongues or putting out the eyes of any of the king's liege people, and to any assault upon the servant of a knight of the shire in parliament," by the 9 Geo. IV. c. 31; i.e. 37 H. VIII. c. 6, wholly, by the 7 and 8 Geo. IV. c. 27; and the 22 and 23 "a" comprehensively by the 9 G. IV. c. 31; and the old law with respect to mayhem is now merged in the last mentioned statute, ss. 11 and 12 of which provide ample remedies for that offence. See those clauses, and the cases bearing upon them, set out in full, ante, 184, note (21). There are, however, two species of maiming not included in the 9 Geo. IV. c. 31, it having been previously found necessary to make them the subjects of distinct enactments; namely, injuries done to the persons of individuals, by means of wanton and furious dri-
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 maiming him. This, though no such evil consequence ensues, is made felony without benefit of clergy by [*208] 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 (3), (4).

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 9 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, 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 (5).

By the 1 Geo. IV. c. 4, it is enacted, that if any person whatever shall be maimed or otherwise injured by reason of the wanton and furious driving or racing, or by the wilful misconduct of any coachman or other person having the charge of any stagecoach or public carriage, such Wanton or furious driving or racing, or wilful misconduct of such coachman or other person, shall be, and the same is thereby declared to be, a misdemeanor, and punishable as such by fine or imprisonment. Proviso, not to extend to hackney coaches drawn by two horses only, and not plying for hire as stagecoaches. This, it will be observed, applies only to cases where some injury short of death is inflicted. Where death ensues from the negligence or misconduct of such persons, the offence amounts either to murder or manslaughter. See Rex v. Walker, 1 C. & P. 320, ante, 182, note (7).†

By the 7 and 8 G. IV. c. 19, § 1, it is enacted, if any person shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life, or inflict grievous bodily harm, with the intent that the same, or whereby the same, may destroy or inflict grievous bodily harm upon a trespasser, or other person coming in contact therewith, the person so setting or placing, or causing to be so set or placed, such gun, trap, or engine as aforesaid, shall be guilty of a misdemeanor (2).

(2) In New-York any one who, from premeditated design, evinced by lying in wait or otherwise or with intent to commit a felony, purposely cuts out or disables the tongue of another, or puts out his eye, or slits his lip, or slite or destroys his nose, or cuts off or disables any limb or member, is punishable with imprisonment not less than seven years. (2 R. S. 664, § 27.)

† See note 24, p. 196, ante.

(4) This statute also has been wholly repealed by the 7 and 8 Geo. IV. c. 27, and the offence alluded to in the text is now punishable under the 9 Geo. IV. c. 31, ss. 11 and 12, vide ante, 104, note (21).

(5) These statutes are both wholly repealed by the 9 Geo. IV. c. 31, by § 19 of which it is enacted, that where any woman shall have any interest, whether legal or equitable, pre-

reckless of consequences, either from mere wantonness, or from an angry feeling against the proprietor of a rival coach, but intentionally, drives one carriage against another, and thereby occasions the death of a person in either carriage, that is murder, although the driver did not contemplate so fatal an issue. Disguise it under what terms you will, whether it originates in rivalry, impatience, or mere wanton indifference to the safety of life, such furious driving manifests that atrocious wickedness of disposition which lawyers call malice prepense.
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 (l). 2. In order to shew 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 by her own consent, yet if she afterwards refuse to continue with the offender, and be forced against [*209] 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; 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 (8).


sent or future, absolute, conditional, or contingent, in any real or personal estate, or shall be an heiress presumptive, or next of kin to any one having such interest, if any person shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding four years. (6). Any person who takes a female under the age of fourteen from her father, mother, guardian, or other person having the legal charge of her person without their consent, either for the purpose of prostitution, concubinage, or marriage, may be imprisoned not more than three years, and fined not more than 1000 dollars. If any woman, though above that age, be taken by any one unlawfully, with the intent to compel her by force, menace, or duress, to marry him or another, or to be defiled; the offender may be imprisoned not less than ten years. The punishment is the same if the offence be consummated by procuring the marriage or defilement. 2 R. S. 663, 6 24, 25, 26. The woman, it will be perceived, need not be an heiress; nor is it necessary that the offence be committed for the sake of gain.

(7) But if the forcible abduction is confined to one county, and the marriage be solemnized by consent in another, the defendant cannot be indicted in either, though had the force been continued into the county where the marriage took place, no subsequent consent would have availed. Cro. Car. 488. Hob. 183. Hawk. b. 2. c. 25. s. 40. 1 Russ. 820. 1 1 East P. C. 453. Where the female is under no restraint at the time of marriage, those who are present, but who are ignorant of the previous circumstances, will not share in the guilt of the abduction. Cro. Car. 489. 493. As to accessories after the fact, see 1 East P. C. 453. 3 Chitt. Crim. L. 618.

(8) It seems to be well agreed, and indeed to be beyond all doubt, that where a woman is taken away and married by force, she is a competent witness against her husband, on an indictment for that offence. See Phil. Ev. 3d ed. 70, and the authorities there cited. But the proposition that, where she consents to the marriage, after a forcible abduction, her evidence is equally admissible, seems to admit of some doubt. In the last case of this kind, Wakefield's, both the abduction and the marriage were in fact voluntary, the lady's consent to both having been obtained by fraud; but it was held that the fraud in law amounted to force, and the lady was, upon that ground it is conceived, admitted as a witness against
An inferior degree of the same kind of offence, but not attended with force, is punished by the statutes 4 & 5 Ph. & Mar. 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 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 justices, and she shall forfeit all her lands to her next of kin, during the life of her said husband (9). So that as these stolen marriages, under the age of sixteen, were usually upon mercenary views, this act, besides punishing the seducer, wisely removed the temptation. But this latter part of the act is now rendered almost useless, by provisions of a very different kind, which make (s) the marriage totally void (s), in the statute 26 Geo. II. c. 33. (10).

III. A third offence, against the female part also of his majesty's subjects, but attended with greater aggravations 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 damsels 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 damsels'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 con-

ofs the husband. A doubt afterwards arose whether the marriage in that case was valid or not, which led to the bringing in a bill to annul it; though the prevailing opinion among the profession seemed to be, that the marriage was ipso facto void, as a marriage procured by force: in which view of the case, the admission of the wife's evidence would not be an authority upon the question one way or the other. One account of that trial states, that Hullock, B., declared, that even assuming the marriage to be valid, he would admit the wife's evidence, for there were cases in which the evidence of wives was admissible against their husbands, and he considered that to be one of them. And upon the principle that a woman may give evidence against her husband in the case of a personal wrong done to herself, it does seem that the wife would be a competent witness in a prosecution for abduc-

ion, even though the marriage was valid.

(9) This act of 4 and 5 P. & M. c. 8, is wholly repealed by the 9 Geo. IV. c. 31; section 20 of which enacts, that if any person shall unlawfully take, or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, every such offender shall be guilty of a misdemeanour, and being convicted thereof, shall be liable to suffer such punish-

ment, by fine or imprisonment, or by both, as the court shall award. This clause was framed for the purpose of meeting such a case as that of Wakefield.

(10) Such a marriage, if voluntary on the part of the female, that is, not procured by force or fraud, would not now be void; it having been her and her much doubt entwined upon the joint among the profession; (see Doe v. Price, 1 M. and R. 663,) that the 4 Geo. IV. c. 76, legalizes marriages which would otherwise have been void under the 26 Geo. II. c. 33, on account of the minority of the parties and the nonconsent of parents. See Rex v. Birmingham, 2 M. and R., 8 B. and C. 29, and the judgment of Lord Tenterden therein. The new act, however, provides, section 23, that if any valid marriage solemnized by licence shall be procured by a party to such marriage to be solemnized between persons, one or both of whom shall be under age, by means of false swearing to any matter to which such party is required personally to depose, all the property accruing from the marriage shall be forfeited, and shall be secured for the benefit of the innocent party, or the issue of the marriage. The latter words clearly shew the intention of the legislature not to render the marriage void, for the words "issue of the marriage," in an act of Parliament, must mean lawful issue, which they could not be, if the marriage was void.
fiscation 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; "stit volentibus, stit volentibus 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 poenae, ab hujusmodi facinore se temperaverint, nulli mulieri, sit e volenti, sit e nolenti, peccandì locus relinquatur; quia hoo ipsum velle mulierum, ab insidibus nequissimì hominis, qui me- [*211] ditatur rapinam inducitur. "Nisi etenim eam solicitaverit, nisi odiosis artibus circumvenerit, non faciet eam velle in tantum de- decus sese proderè." 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 till 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 (b), which require that complaint must be made within twenty-four hours: though afterwards by statue 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 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.

[*212] *In the 3 Edw. I. by the statute Westm. 1. c. 13. the punishment of rape was much mitigated; the offence itself of ravishing a damsel 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 of-

(w) Bracton, l. 3. c. 29.
(x) Stithn: de jure Saxon. l. 3: c. 2.
(y) L.L. Gull. Com. c. 19.
(z) 1 Hall. P. C. 63.
(a) Glan. l. 14. c. 6. Bract. l. 3. c. 28.
(b) Barrington, 143.
(c) Glanv. l. 14. c. 6. Bract. l. 3. c. 28.
fender 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 was 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 (11). 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 (12).

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 etatem, as has in some cases been shewn; yet, as to this particular species of felony, the law supposes an imbecility of body as well as mind (e) (13).

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 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 meretricix fuerit antea, certe tunc temporis non fuit, cum reclamando nequitiae ejus concentire noluit."

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 are to be found in such criminal treatises as discourse of these matters in detail, yet they are highly improper to be publicly discussed, except only in a court of justice (14). I shall there-

(11) In New-York these two offences are punished by imprisonment not less than ten years. The carnal knowledge of a woman above the age of ten without her consent, by administering to her any substance or liquid as will prevent effectual resistance, is punished with imprisonment not exceeding five years. (2 R. S. 663, § 22, 23.)

(12) All these statutes are repealed, by 9 Geo. IV. c. 31, which enacts, section 16, that every person convicted of the crime of rape shall suffer death as a felon.

Section 17, that if any person shall unlawfully and carnally know and abuse any girl under the age of ten years every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon; and if any person shall unlawfully and carnally know and abuse any girl, being above the age of ten years, and under the age of twelve years, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned, with or without hard labour, for such term as the court shall award.

And sect. 18 enacted that the carnal knowledge shall be complete upon proof of penetration only. See also 2 R. S. 735, § 18.

(13) But an infant under fourteen may be guilty as an abettor, if shown to possess a malicious discretion. 1 Hale, 630.

(14) See Chitty, Crim. law. 810. Stark, on Evid.

Vol. II.
fore 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 occur 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 heard, and she made [*214] no outcry; these and the *like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned (15), (16).

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 (17). Nay, though she hath not, it is thought by Sir Matthew Hale (1) 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

(15) But the rule respecting the time that elapses before the prosecutrix complains will not apply where there is a good reason for the delay, as that she was under the control, or influenced by fear of her ravisher. 1 East P. C. 444. And so all other general rules, as they are deduced from circumstances, must yield, when they appear to be unsafe guides to the discovery of truth. The state and appearance of the prosecutrix, marks of violence upon her person, and the torn and disordered state of her dress recently after the transaction, at the time of complaint, are material circumstances, which are always admissible in evidence. See 2 Stark. 241. If the prosecutrix be an infant of tender years, the whole of her account recently given seems to be admissible, for it is of the highest importance to ascertain the accuracy of her recollection, East P. C. 443. Stark, on Evidence, part iv. 1263; but in 2 Stark. Rep. 441, upon an indictment for an attempt to commit a rape upon an adult, Holroyd, J. held, that the particular of the complaint made by the prosecutrix recently after the injury were not admissible in evidence. In the case of the death of the prosecutrix, her depositions taken before a magistrate, are admissible, though not authenticated by her signature. 2 Leech, 854. 996.

(16) It has been held, by a majority of the judges, that having carnal knowledge of a married woman, under circumstances which induce her to suppose it is her husband, does not amount to the crime of rape. Rex v. Jackson, R. & R. C. 457. That decision took place in Trinity term, 1822; and though it may not hitherto have been expressly overruled, it seems very doubtful whether it would now be supported. At the Kent Winter Gaol Delivery, in the very same year, a similar case occurred, Rex v. Pearson; in which, upon the prosecutrix swearing that she believed the prisoner to be her husband, and consequently made no resistance, the editor, as counsel for the prisoner, objected that the offence was not rape, and that the indictment could not be supported. But Bragelley, J., refused to stop the prosecution, intimating his own strong opinion that such facts did amount to rape, and declaring his intention to reserve the point for the opinion of the twelve judges, if it should be necessary; which, however, was not the case, the prisoner being acquitted on the merits. The only plausible ground for contending that such an offence does not amount to rape, seems to be, the total absence of force on the part of the man, and of resistance on the part of the woman; but that does not appear to be a solid or well-founded argument; because the fraud practised would, by construction of law, be considered as force, as in Wakefield's case of abduction, ante, 269, notes (7) and (5), and in other cases that might be mentioned, and would thus support the necessary allegation of force in the indictment. (17) When the child does not sufficiently understand the nature and obligation of an oath, the judge will put off the trial, for the child to be instructed in the mean time. Bac. Ab. Evid. a. Leach, 430. n.
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. G. 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.

*"It is true, says this learned judge (k), that a rape is a most [*215] detestable crime, and, therefore, ought severely and impartially to be punished with death: but it must be remembered that it is an accusation easy to be made, 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 overhastily carried on to the conviction of the person accused thereof, by the confident testimony of sometimes false and malicious witnesses."

IV. What has been here observed, especially with regard to the manner of proof, which ought to be the 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 (18), (19). It will be more eligible to imitate in this

(18) As to the decisions, see 1 East P. C. 490, 437. Bac. Ab. Sodomy, Hawk. b. l. c. 4. 1 Hale, 669, 679. Com. Dig. Justices s. 4. Russ. & Ry. C. C. 331. If committed on a boy under fourteen, it is felony in the agent only. 1 Hale, 470. 3 Co. Inst. 59. As to sending threatening letters, charging a party with this offence, see ante, 144, note 3. As to offence of soliciting another to commit the offence, see 2 East, 5.

(19) By stat. 9 Geo. IV. c. 31, § 15, every person guilty of this offence, either with man-kind or with any animal, shall suffer death as a felon. And, by § 15, it is directed, that the proof of penetration only shall be sufficient for the purpose of conviction.

In New-York the crime is punishable by imprisonment not more than 10 years, (2 R. S. 629, § 20;) our statute, 2 R. S. 735, § 15, is similar to the 18th section of the English Act, 9 Geo. IV. c. 31; in the description of the offence, however, our Act uses the word beast, not animal. See 1 Russel, 669, as to the word beast.
respect the delicacy of our English law, which treats it, in its very indi-
ments, as a crime not fit to be named: "peccatum illud horribile, in-
[216] ter christianos non nominandum (k)." A taciturnity observed "like-
wise by the edict of Constantius and Constans (l): "ubi scelus
est id, quod non proficit scire, jubemus insurgere leges, armari jura
gladio ultore, ut exquisitis poenis subdantur infames, qui sunt, vel qui fu-
turi 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 hea-
ven; so that this is an universal, not merely a provincial precept. And
our ancient law in some degree imitated this punishment, by command-
ing 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 of-
fence (being, in the times of popery, only subject to ecclesiastical cen-
sures) 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).

These are all the felonious offences more immediately against the per-
sonal security of the subject. The inferior offences, or misdemesnors,
that fall under this head, are assaults, batteries, wounding, false impris-
sonment, and kidnapping.

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 ob-
erved in the preceding book of these Commentaries (r); when we consi-
der them as private wrongs, or civil injuries, for which a satisfaction or
remedy is given to the party aggrieved. But, taken in a public
[217] light as a *breach of the king’s peace, an affront to his govern-
ment, 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 de-
sign (s) (20). As in case of an assault with an intent to murder, or with
an intent to commit either of the crimes last spoken of (21); 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 unnat-
ural attempt, it is usual not to charge any assault; but that one of them
laid hands on the other with intent to commit, and 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 impris-
onment, it is usual to award judgment of the pillory (22).

(k) See in Ret. Parf. 50 Edw. III. n. 53, a com-
plaint, that a Lombard did commit the sin, "that
was not to be named." (12 Rep. 37.)
(l) Cod. 9. 9. 31.
(m) Levit. xx. 13. 15.
(n) Brit. c. 9.
(o) 1. 1. c. 37.
(p) Sternh. de jure Goth. 1. 3. c. 2.
(q) 3 Inst. 50.
(r) See book III. page 120.
(s) 1 Hawk. P. C. 65.

(20) See 9 Geo. IV. c. 31, § 24 to 29: pre-
scribing the punishment of particular assaults,
and the summary proceeding before two juis-
ices in case of common assaults.
(22) The punishment of pillory is now taken
away by the 56 Geo. III. c. 138. In cases of
assaults of a very aggravated nature, the pu-

Digitized by Microsoft®
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 (23), 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 praemunire (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 behaviour 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 animae, by enjoining penance, and then again for such sum of money as shall be agreed on for taking off the penance enjoined; *it being [*218] 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 animae.

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 be-

(t) 2 Inst. 492. 690.
(w) See Book III. page 137.

nishment of whipping has been inflicted in addition to that of imprisonment and finding sureties for good behaviour. I Burn J. 24th ed. 231. 1 East P. C. 406. The 3 Geo. IV. c. 114. inflicts a severer punishment on persons guilty of assaults, therein particularly described. In cases where the offence more immediately affects the individual, the defendant is sometimes permitted by the court, even after conviction, to speak with the prosecutor, before any judgment is pronounced, and a trivial punishment (generally a fine of a shilling) is inflicted, if the prosecutor declares himself satisfied, post, 363, 4. And where in a case of indictment for ill-treating a parish apprentice, a security for the fair expenses of the prosecution had been given by the defendant, after conviction, upon an understanding that the court would abate the period of his imprisonment, the security was held to be good, upon the ground that it was given with the sanction of the court, and to be considered as part of the punishment suffered by the defendant, in expiation of his offence, in addition to the imprisonment inflicted on him. 11 East. 46.

(23) This Act is repealed, so far as relates to laying violent hands on a clerk, by 9 Geo. IV. c. 31: by § 23 of which, if any person shall arrest any clergyman upon any civil process, while he shall be performing divine service, or shall with the knowledge of such person, being going to perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanour: and, being convicted thereof, shall suffer such punishment, by fine or imprisonment, or by both, as the court shall award. The 50 Edw. III. c. 5, and 1 Rich. II. c. 15, upon the same subject, are also repealed by the new Act. The arrest, if not on a Sunday, would be good in law. Wats. c. 34.

In New-York, clergymen have no such privileges as are allowed by the Act 9 Geo. IV. c. 31. above referred to.
fore (x), that the most atrocious degree of this offence, that of sending any subject of this realm a prisoner into 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 praemunire, and incapacity to hold any office, without any possibility of pardon (y). And we may also add, that by statute 43 Eliz. c. 13 (24), 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.

[*219] *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 spiritting 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 (25), (26). And also the statute 11 & 12 W. III. c. 7, (31) See page 116. (3) Statute 31 Car. II. c. 2. (3) West. Symbol, part 2, page 92. (3a) 1 Halk. P. C. 20.

(24) Repealed by 7 and 8 Geo. IV. c. 27; but see 31 Car. II. c. 2, which prohibits the sending of any British subject to any foreign prison. See also 2 R. S. 692, § 11, and id. 664, § 28, &c.
(25) Where a child is stolen for the sake of its clothes, it is the same species of felony, as if the clothes were stolen without the child. But it cannot be considered a felony, where a child is stolen and not deprived of its clothes. This crime would in general be an aggravated species of false imprisonment; but, without referring it to that class of offences, stealing a child from its parents is an act so shocking and horrid, that it would be considered the highest misdemeanor, punishable by fine and imprisonment, upon the same principle on which it was decided to be a misdemeanor to steal a dead body from a grave.
(26) Stealing children was, by 5 Geo. III. c. 101, punishable as in cases of grand larceny; but that statute is now repealed by 9 Geo. IV. c. 31; by § 21 of which, "if any person shall maliciously, either by force or fraud, lead or take away, or decoy or entice away, or detain, any child under the age of ten years, with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong; or if any person shall, with any such intent as aforesaid, receive or harbour any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away, or detained as herein before mentioned: every such offender, and every person counselling, aiding or abetting, such offender, shall be guilty of felony; and being convicted thereof, shall be liable to be transported for the term of seven years, or to be imprisoned, with or without hard labour, for any term not exceeding two years, and if a male, to be once, twice, or thrice, publicly or privately whipped, (if the court shall so think fit,) in addition to such imprisonment. Provided always, that no person who shall have claimed to be the father of an illegitimate child, or to have any right to the possession of such child, shall be liable to be prosecuted by virtue thereof, on account of his getting possession of such child, or taking such child out of the possession of the mother, or any other person having the lawful charge thereof."

In New-York, the Act (2 R. S. 665, § 34,) is nearly the same as that part of the English Act that precedes the part which notices the
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 (27). 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 (1). This is an offence of very great malignity, intent to steal clothes, the rest of the act is not in ours: the punishment may be imprisonment not exceeding 10 years, and a fine not exceeding 500 dollars.

Unlawfully and forcibly seizing and confining another, or inveigling or kidnapping him with intent to cause him to be secretly confined or imprisoned in this state against his will, or to cause him to be sent out of the state against his will, or to be sold as a slave, or in any way held to service against his will, is punishable by imprisonment of the principal for not more than 10 years; and of any accessory after the fact for not more than 6 years, and by a fine on such accessory of not more than 500 dollars. (2 R. S. 664, &c.) Selling any person of colour, who has been inveigled or kidnapped from this state to another, is punishable by imprisonment not exceeding 10 years, and a fine not exceeding 1,000 dollars. (Id. 665, § 32.) See ib. as to venue.

(27) By 9 Geo. IV. c. 31, § 30, if any master of a merchant vessel shall, during his being abroad, force any man on shore, or wilfully leave him behind in any of his majesty's colonies or elsewhere, or shall refuse to bring home with him again all such of the men whom he carried out with him as are in a condition to return when he shall be ready to proceed on his homeward-bound voyage, every such master shall be guilty of a misdemeanor, and being lawfully convicted thereof, shall be imprisoned for such term as the court shall award; and all such offences may be prosecuted by indictment or by information, at the suit of his majesty's attorney-general, in the court of King's Bench, and may be alleged in the indictment or information to have been committed at Westminster, in the county of Middlesex; and the said court is hereby authorized to issue one or more commissions, if necessa-
and much more pernicious to the public than simple theft: because, first, it is an offence against the 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 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 reason the civil law (a) punishes with death such as maliciously set fire to houses in towns, and contiguous to others; but is more merciful to such as only fire a cottage, or house, standing by itself.

[*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 out-houses that are parcel thereof, though contiguous thereto, nor 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 accounted arson (d) (2). 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 wilfully setting fire to one's own house, provided one's neighbor'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

or village, or any building in which may be deposited the papers of any public officer; or any barn, or grist mill; or any manufactury of cotton or woollen goods, or both; or paper, iron, or any other fabric; or any fulling mill, ship, or vessel.

3. The wilful burning of any building, ship, or vessel, or any goods, wares, merchandise, or other chattel, which shall be at the time insured against loss or damage by fire, with intent to prejudice the insurer, whether the same be the property of the incendiary or not.

4. Arson in the fourth degree is, the wilfully setting fire to or burning,

1. In the day time, any building, ship, or vessel, which, if committed in the night, would be arson in the third degree.

2. Either in the day or night, any saw-mill, carding machine, or building containing the

same; any stack of grain of any kind, or of hay, not being the property of the incendiary; any toll bridge or other public bridge.

Arson in the second degree is punishable with imprisonment not less than 10 years; in the third, not less than 7 nor more than 10; in the fourth, not more than 7 years. (2 R. S. 666, &c.)

2. This is declared to be arson by 7 and 8 Geo. IV. c. 30, § 17, and is made a capital offence; and the setting fire to any crops of corn, grain, or pulse, whether standing or cut down, or to any woods or heaths, is made felony, punishable with transportation for seven years, or imprisonment not exceeding two years, with whipping to male offenders in addition. See this section fully set forth, post 245, in notis.
statutes (3). However such wilful firing one's own house, in a town, is a high misdemeanour, and punishable by fine, imprisonment, pillory, and perpetual sureties for the good behaviour (f) (4). And if a landlord or reversioner sets fire to his own house, of which another is in possession under a lease from 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) (5), (6).

*2. As to what shall be said to be a burning, so to amount to [*222] arson, a bare intent, or attempt to do it, by actually setting fire to a house, unless it absolutely burns, does not fall within the description of *incendii et combusiti;* 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 (7). 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 out-houses, shall forfeit 100l. or be sent to the house of correction for eighteen months; in the same

(f) 1 Hal. P. C. 568. 1 Hawk. P. C. 106.  
(g) Post. 16.  
(h) 1 Hawk. P. C. 106.  
(i) 1 Hal. P. C. 569.
manner as the Roman law directed, "eos, qui negligenter ignes apud se habuerint, justibus vel flagellis caedi (k) (8)."

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 21 Hen. VIII. c. 1, but that statute was repealed by 1 Edw. 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 [*223] statute 4 & 5 P. & M. c. 4, *which expressly denied it to the accessory before the fact (o); though now it is expressly denied to the principal in all cases within the statute 9 Geo. I. c. 22 (9).

II. Burglary, or nocturnal housebreaking, burgi latrociniun, 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 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 shewn in a former chapter) (p), they also protect and avenge him, in case the might of the assailant is too powerful (10). And the law of England has so particular and

(8) The punishment inflicted by 6 Ann. c. 31, was again inflicted by 14 Geo. III. c. 78, § 84; which appears to be unreppealed.

(9) See post, 246, for the act.

(10) As the statute law relating to burglary and housebreaking has recently undergone considerable alterations, it is deemed advisable to set out all the enactments in the first instance; their bearings upon the text will be explained in the progress of the chapter.

The 7 and 8 Geo. IV. c. 29, § 10, enacts, that if any person shall break and enter any church or chapel, and steal therein any chattel, or, having stolen any chattel, in any church or chapel, shall break out of the same, every such offender, being convicted thereof, shall suffer death as a felon.

Section 11 enacts, that every person convicted of any person shall suffer death as a felon; and declares, that if any person shall enter any dwelling-house of another with intent to commit felony, or being in such dwelling-house shall commit any felony, and shall in either case break out of the said dwelling-house, in the night time, such person shall be deemed guilty of burglary.

Section 12 enacts, that if any person shall break and enter any dwelling-house, and steal therein any chattel, money, or valuable security to any value whatever; or shall steal any such property to any value whatever in any dwelling-house, any person therein being put in fear; or shall steal in any dwelling-house any chattel, money, or valuable security, to the value in the whole of 5l. or more; every such offender, being convicted thereof, shall suffer death as a felon.

Section 13 provides and enacts, that no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for the purposes of burglary, or for any of the purposes aforesaid, unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and enclosed passage leading from the one to the other.

Section 14 enacts, that if any person shall break and enter any building and steal therein any chattel, money, or valuable security, such building being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof, according to the provision hereinbefore mentioned, every such of-
PUBLIC WRONGS. 173

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 here-in with the sentiments of ancient Rome, as expressed in the words of Tully (q); "quid enim sanctius, quid omni religione munitius, quam domus uniuscusjusque civium?" For this reason no outward doors can in general be broken open to execute any civil process; though, in criminal causes, 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) (11).

*The definition of a burglar (12), as given us by sir Edward Coke (s), is "he that by night breaketh and entereth into a man-

(q) pro domo, 41.
(r) 1 Hat. P. C. 547.
(s) 3 Inst. 63.

fender, being convicted thereof, either upon an indictment for the same offence, or upon an indictment for burglary, housebreaking, or stealing to the value of 5l. in a dwelling-house, containing a separate count for such offence, shall be liable, at the discretion of the court, to be transported for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think) in addition to such imprisonment.

And section 15 enacts, that if any person shall break and enter any shop, warehouse, or counting-house, and steal therein any chattel, money, or valuable security, every such offender, being convicted thereof, shall be liable to any of the punishments which the court may award, as hereinbefore last mentioned.

(11) As to this, see ante, 146, note 10.

(12) In New-York, burglary is divided into three degrees. The first is, breaking into and entering in the night time the dwelling-house of another, in which there shall be at the time some human being, with intent to commit some crime therein, either: 1. By forcibly bursting or breaking the wall, or an outer door, window, or shutter of a window, of such house, or the lock or bolt of such door, or the fastening of such window or shutter. 2. By breaking in in any other manner, being armed with some dangerous weapon: or with the assistance of one or more confederates then actually present and assisting. 3. By unlocking an outer door by means of false keys, or by picking the lock thereof.

The second degree, is: 1. The commission of the above offences in the day time instead of the night. 2. The breaking into any dwelling-house in the night with intent to commit a crime, but under such circumstances as not to be burglary in the first degree. 3. The entering into the dwelling-house of another by day or night in such a manner as not to constitute any burglary before specified, but with intent to commit a crime; or the commission of a crime while in the dwelling-house of another; and breaking, in the night time any outer door, window, or shutter of a window, or any other part of the house to get out. 4. The entering the dwelling-house of another in the night time through an open outer door or window, or other aperture not made by the person entering, and then breaking any inner door of the house with intent to commit a crime. 5. The being admitted into a dwelling-house with the consent of the occupant, or being lawfully in the house, and then in the night time breaking any inner door of the house with intent to commit a crime. 6. No building is a dwelling-house or part of one within the meaning of the preceding provisions, unless it be joined to, immediately connected with, and part of, a dwelling-house.

Burglary in the third degree, is breaking and entering by day or night. 1. Any building within the curtilage of a dwelling-house, but not forming a part of it. 2. Any shop, store, booth, tent, warehouse, or other building, in which any goods, merchandise, or valuable thing, may be kept for use, sale, or deposit, with intent to steal therein or to commit any felony. 3. Breaking, and entering into, the dwelling-house of another, by day under such circumstances as would have constituted the offence of burglary in the second degree if committed in the night. The breaking out of a dwelling-house, or the breaking of an inner door, by one who is within, is not such a breaking as to constitute burglary in any case except those above particularly specified.

Burglary in the first degree is punishable by imprisonment in a state prison not less than 10 years; in the second, not less than 5 nor more than 10; in the third, not more than 5.

2 R. S. 668, article 2.

Thus by the Revised Statutes the offence may be committed by day or night; it may be in other buildings besides dwelling-houses; it may be by one who is lawfully in the house, and who breaks only an inner door. The former decisions are still necessary to understand the offence; thus they determine what is a breaking and entering, what is the dwelling-house of another, what a curtilage, when the night commences and ends, &c.
tion-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 (w). But this does not extend to moonlight; for then many midnight burglaries 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 (13), (14); for it

(t) See pag. 180, 181.

(13) The new statute does not contain the word mansion, which was formerly held to comprehend out-houses, if parcel of the dwelling-house; the consequence of which, and of the new provisions in ss. 13 and 14, is, that no building, except a dwelling-house, or a building immediately connected therewith, can now be the subject of burglary, either at common law, or under the new statute. Where the owner has never by himself, or by any of his family, slept in the house, it is not his dwelling-house, so as to be the subject of burglary. Rex v. Martin, R. and R. C. C. 108. And see Lyon’s case, Leach, 169; Thompson’s case, id. 893. Where a servant has part of a house for his occupation, and the rest is reserved by the proprietor for other purposes, the part reserved cannot be deemed part of the servant’s dwelling-house; and it will be the same if any other person has part of the house, and the rest is reserved. Rex v. Wilson, R. and R. C. C. 115. Where a servant stipulates more for the use of certain rooms in his master’s premises for himself and family, the premises may be described as the master’s dwelling-house, although the servant is the only person who inhabits them; for he shall be considered as living there as servant, not as holding as tenant. Rex v. Stock, id. 185. Where a shop was rented with some of the apartments of a house, it was held that the shop was still part of the dwelling-house, and that burglary might be committed in it, as the house of the landlord. Gibson’s case, Leach, 287. Where it must be laid in the indictment to be the dwelling-house of the landlord, if he break open the apartments of his lodgers, and steal their goods, it is not burglary, for a man cannot be guilty of burglary in his own house.

Kel. 84.

With respect to the new provisions contained in ss. 13 and 14 of the new statute, it would seem that any building which before the passing of this statute would have been the subject of burglary, by reason of its being within the curtilage, may now be the subject of an indictment under s. 14. The main question in such cases will be, what shall be considered as being within the curtilage, which, in the Termes de la Ley, is defined to be, a garden, yard, field, or piece of void ground, lying near, and belonging to, the messuage. Such garden, &c. must be connected with the messuage by one uninterrupted fence or appurtenance of some kind, and, perhaps such fence may more properly be termed the curtilage, than the ground lying within it. An indictment under the new section must aver that the building was within the curtilage of the prosecutor’s dwelling-house, and that it was occupied therewith by the prosecutor; but it would seem that it need not aver that the building was one in which burglary could not be committed. See Rex v. Robinson, R. and R. C. C. 321. The other clauses of this statute, namely, s. 10, as to sacrilege, or burglary and stealing in a church or chapel; s. 12, as to housebreaking, and stealing in a house; and s. 15, as to robbery in a shop; will be more properly the subjects of consideration and exposition in the succeeding chapter, 17, to which the reader is referred.

(14) As to the residence; from all the cases, it appears that it must be a place of actual residence. Thus, a house under repair, in which no one lives, though the owner thereof or its appurtenant house is deposited there, is not a place in which burglary can be committed; for it cannot be
may also be committed by breaking the gates or walls of a town in the night; though that perhaps Sir Edward Coke would have called the mansion-house of the garrison or corporation. Spelman defines burglary to be, *"nocturna diruptio alienus *habitaculi, vel ecclesiae,* [**225]** etiam murorum portarum brevi ad feloniam perpetrandam." 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 (2). 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 (2).

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, until he has taken possession and began to inhabit it. 1 Leach, 185. Nor will it make any difference, if one of the workmen engaged in the repairs, sleep there, in order to protect it. 1 Leach, 186. In notis. Nor, though the house is ready for the reception of the owner, and he has sent his property into it preparatory to his own removal, will it become for this purpose, his mansion. 2 Leach, 771. And where the owner has never, by himself or by any of his family, slept in the house, it is not his dwelling-house, so as to make the breaking thereof burglary, though he has used it for his meals, and all the purposes of his business. Russ. & Ry. C. C. 133.

So, if the landlord of a house purchase the furniture of his out-going tenant, and procure a servant to sleep there, in order to guard it, but without any intention of making it his own residence, a breaking into the house will not amount to burglary. 2 Leach, 876. But if the agent of a public company reside at a warehouse belonging to his employers, this crime may be committed by breaking it, and he may be considered as the owner. 2 Leach, 931. And it seems, that if a man die in his house, and his executors put servants in it, and keep them there at board wages, burglary may be committed in breaking it, and it may be laid to the executors' property. 2 East, P. C. 499.

It seems quite settled, as above observed, that the proprietor of the house need not be actually within it, at the time the offence is committed, provided it is one of his regular places of abode. For if he leaves it animo revertendi, though no person resides there in his absence, it will still be his mansion. As, if a man has a house in town, and another in the country, and goes to the latter in the summer, the nocturnal breaking into either, with a felonious design, will be burglarious. Post. 77. And, though a man leaves his house, and never means to live in it again, yet if he uses part of it as a shop, and lets a servant and his family live and sleep in another part of it, for fear the place should be robbed, and lets the rest to lodgers, the habitation by his servant and family will be a habitation by him, and the shop may still be considered as part of his dwelling-house. 1 Burn J. 24th edit. 503. Russ. & Ry. C. C. 442, S. C. But in an indictment for larceny from a dwelling-house, where the prosecutor left his house without any intention of living in it again, and intending to use it as a warehouse only, though he had persons (not of his family) to sleep in it to guard the property, it was held, it could not be considered the prosecutor's dwelling-house, to support the charge. Russ. & Ry. C. C. 187. And if the occupier of a house removes from it with his whole family, and takes away so much of his goods as to leave nothing fit for the accommodation of inmates, and has no settled idea of returning to it, but rather intends to let it, the offence will be merely larceny. Post. 76. And the mere casual use of a tenement will not suffice; and, therefore, the circumstance of a servant sleeping in a barn, or porter in a warehouse, for particular and temporary purposes, will not so operate as to make a violent entry in the night, in order to steal, a burglary. 1 Hale, 557, 8.

(2) 1 Hal. P. C. 565. Post. 77.
(y) K. v. Garland, P. 16 G. III. by all the judges.
(z) 1 Hal. P. C. 598. 1 Hawk. P. C. 104.
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 [*226] by the lease *it is severed from the rest of the house, and therefore it 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 waggon 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 (15). 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) (16). But to come down a chimney is

(a) 1 Hal. P. C. 536.  
(b) Kel. 84. 1 Hal. P. C. 536.  
(c) Poster, 33. 90.  
(d) 1 Hal. P. C. 568.  
(e) 1 Hawk. P. C. 104.  
(f) 1 Hal. P. C. 533.  
(g) Ibid.

(15) So to push open massive doors which shut by their own weight, is burglarious, though there is no actual fastening. 2 East P. C. 487. Pulling down the sash of a window is a breaking, though it has no fastening, and is only kept in its place by the pulley weight; it is equally a breaking, although there is an outer shutter which is not put to. Russ. & Ry. C. C. 431. And where a window opens upon hinges, and is fastened by a wooden stay, so that pushing against it will open it, forcing it open by pushing against it is sufficient to constitute a breaking. Russ. & Ry. C. C. 355. But where the prisoner broke out of a cellar by lifting up a heavy flap, by which the cellar was closed on the outside next the street; the flap was not bolted, but it had bolts. Six of the learned judges were of opinion that there was a sufficient breaking to constitute burglary; the remaining six were of a contrary opinion. Russ. & Ry. C. C. 157. And it is to be observed, that even when the first entry is a mere trespass, being as per ianua aperta, if the thief afterwards breaks open any inner room, he will be guilty of burglary, 1 Hale, 553: and this may be done by a servant who sleeps in an adjacent room, unlatching his master's door, and entering his apartment, with intent to kill him. 1 Hale, 544. But lord Hale doubts whether a guest at an inn is guilty of burglary by rising in the night, opening his own door, and stealing goods from other rooms. 1 Hale, 554. And it seems certain that breaking open a chest or trunk, is not in itself burglarious, Fost. 108, 9: and according to the better opinion, the same principle applies to cupboards, presses, and other fixtures, which, though attached to the freehold, are intended only the better to supply the place of moveable depositaries. Fost. 109.

(16) It will be burglary to unlatch an inner
held a burglarious entry: for that is as much closed as the nature of things will permit (k). So 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 no actual breaking: for the law will not suf-fer 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 a window to draw out goods, or a pistol to demand one's money, are all of them burglarious entries (l) (17). The entry may be before the breaking, as well as after: for by 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 before been 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 (18).

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, (l)

---

(a) 1 Hawk. P. C. 102. 1 Hal. P. C. 532.
(b) 1 Hawk. P. C. 102.
(c) 1 Hawk. P. C. 103.
(d) 1 Hawk. P. C. 103.
(e) 1 Hal. P. C. 555. 1 Hawk. P. C. 103. Post. 108.
(f) 1 Hawk. P. C. 103.
(g) 1 Hawk. P. C. 554.
(h) 1 Hawk. P. C. 555. 1 Hawk. P. C. 103. Post. 108.
(i) 1 Hal. P. C. 555. 1 Hawk. P. C. 103. Post. 108.
(j) 1 Hal. P. C. 555. 1 Hawk. P. C. 103. Post. 108.
(k) 1 Hal. P. C. 555. 1 Hawk. P. C. 103. Post. 108.
(l) 1 Hal. P. C. 555. 1 Hawk. P. C. 103. Post. 108.

---

(a) 1 Hawk. P. C. 102. 1 Hal. P. C. 532.
(b) 1 Hawk. P. C. 102.
(c) 1 Hawk. P. C. 103.
(d) 1 Hawk. P. C. 103.
(e) 1 Hal. P. C. 555. 1 Hawk. P. C. 103. Post. 108.
(f) 1 Hawk. P. C. 554.
(g) 1 Hawk. P. C. 555. 1 Hawk. P. C. 103. Post. 108.
a rape, or any other felony, is 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) (19).

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 & 4 W. & M. c. 9, from all abettors and accessaries before the fact (p) (20). And in like manner, the law of Athens, which punished no simple theft with death, made burglary a capital crime (q).

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.

I. Larceny, or theft, by contraction for latrocinium, latrocinium, is distinguished by the law into two sorts; the one called simple larceny, or plain theft unaccompanied with any other atrocious circumstance; and mixed or compounded larceny, which also includes in it the aggravation of a taking from one's house or person (1).

(o) 1 Hawk. P. C. 105.
(p) Burglary in any house belonging to the plate gass company, with intent to steal the stock or utensils, is by statute 13 Geo. III. c. 33. declared to be single felony, and punished with transportation for seven years (21).

(19) But if a servant, intrusted by his master to sell goods, receives money to his use, conceals it in the house instead of paying it over, and after his dismissal, breaks the house and steals it, the entry is not burglarious, because there was no felony in the original taking. 1 Show. 53. And even where prisoners were proved to have broken open a house in the night, time, to recover teas seized for want of a legal permit, for the use of the person from whom they were taken, an indictment for burglary with intent to steal, was held not to be supported. 2 East P. C. 510.

(20) All repealed by 7 & 8 Geo. IV. c. 27.
(21) Re-enacted by 33 Geo. III. c. 17, § 33.

(1) By statute 7 and 8 Geo. IV. c. 29, § 2, it is enacted, "That the distinction between grand and petty larceny shall be abolished, and every larceny, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects as grand larceny was before the commencement of this Act; and every court, whose power as to the trial of larceny was before the commencement of this Act limited to petty larceny, shall have power to try every case of larceny, the punishment of which cannot exceed the punishment hereinafter mentioned for simple larceny, and also to try all accessaries to such larceny." By § 3, every person convicted of simple larceny, or of any felony thereby made punishable like simple larceny, shall (except in the cases hereinafter otherwise provided for) be liable to transportation for seven years, or imprisonment not exceeding two years; and, if a male, to one, two, or three public whippings; and by § 4, where the sentence is imprisonment, the courts have a discretionary power to award hard labour or solitary confinement in addition. This observation has been introduced here that the reader may observe, how far the present provisions of the law vary from the text, in his progress through this important chapter, and to remind him that the subtle
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 (2). 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, whenever it was, that the bounds of property, or laws of _murn_ 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 seised 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 shall 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_ (3). This implies the consent of the owner to

(a) See Book II. p. 8, 4c.

distinctions between grand and petty larceny are now entirely abolished.

By § 61, in every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable with death, or otherwise, in the same manner as the principal in the first degree; and every accessory after the fact, except only a receiver of stolen property, shall on conviction be liable to imprisonment for any term not exceeding two years; and every person aiding, abetting, counselling, or procuring the commission of any misdemeanor punishable under this Act, shall be liable to be indicted and punished as a principal offender.

As to the venue in cases of larceny, see 7 Geo. IV. c. 64, ss. 12 and 13.

(2) In New-York, the stealing, taking, and carrying away the personal property of another of the value of 25 dollars or under, is petit larceny, and punishable by imprisonment in a county jail not more than six months, and by fine not more than 100 dollars. Grand larceny is feloniously taking and carrying away personal property worth more than 25 dollars, and punishable by imprisonment in a state prison for not more than 5 years. But if grand larceny be committed in a dwelling-house, ship, or other vessel, the imprisonment may be for 8 years: if committed in the night, and from the person of another, it may be for 10 years. (2 R. S. 696; § 1: and 679, § 63, &c.)

(3) The cases upon this important requisite of the offence of larceny are so numerous, and the distinctions so subtle, that it will be necessary to go into considerable detail to give a complete view of the law upon the subject. See in general, 3 Chit. Crim. L. 2 ed. 917 to 924.

1st. When offender lawfully acquired the possession of goods, but under a bare charge, the owner still retaining his property in them, the offender will be guilty of larceny at common law in embezzenling them. Thus in addition to the instance put by the learned author, of the butler, the shepherd, and guest at an inn, if a master deliver property into the hands of a servant for a special purpose, as to leave it at the house of a friend, or to get change, or deposit with a banker, the servant will be guilty of felony in applying it to his own use, for it still remains in the constructive possession of its owner. 2 Leach, 870, 942: and see 2 East P. C. 503, sed vide East P. C. 502. R. & R. C. C. 213. 4 Taunt. 258. S. C. If a banker’s clerk is sent to the money-room to bring cash for a particular purpose, and he takes the opportunity of secreting same for his own use, 1 Leach, 341. he is guilty of larceny, and see 1 Leach, 251. Kel. 33. Cowp. 294. And if several persons play together at cards, and deposit money for that purpose, not parting with their property therein, and one

Vol. II. 72

PUBLIC WrONGS. 179
be wanting. Therefore no delivery of the goods from the owner to the offender, upon trust, can ground a larceny. As if A lends B a horse, and

sweep it all away, and take it to himself, he will be guilty of theft, if the jury find that he acted with a felonious design. 1 Leach, 270. Cold, 293. So if there be a plan to cheat a master of his property, to make a bet, and he parts with the possession only, to deposit as a stake with one of the confederates; the taking by such confederate is felonious. Russ. & Ry. C. C. 413. And if a bag of wheat be delivered to a warehouseman for safe custody, and he take the wheat out of the bag, and delivery, he is a mere marauder, to effect his purpose. 4 Taunt. 304. R. & R. C. C. 221. S. C. 2 Leach, C. C. 1083. And where one employed as a clerk, in the day-time, but not residing in the house, embezzles a bill of exchange, which he received from his master in the usual course of business, with directions to transmit it by post to a correspondent, it was held he was guilty of felony; the fraudulent obtaining the check being nothing more than a mere marauding, to effect his purpose. 4 Taunt. 304. R. & R. C. C. 221. S. C. 2 Leach, C. C. 1083.

Therefore in addition to the instances mentioned in the text, hiring a horse on pretence of taking a journey, and immediately selling it, is larceny, because the jury found the defendant acted animo furandi, in making the contract, and the parting with the possession had the effect of treating the property.

2 East P. C. 685. 1 Leach, 212; and see 2 Leach, 420. 2 East P. C. 691. So obtaining a horse by pretending another person wanted to hire it to go to B., but in truth with intent to steal it, and not going to B., but taking the horse elsewhere and selling it, is larceny. 2 East P. C. 603. It is larceny for a person hired for a special purpose to send to a fair, to convert them to his own use, having the intention so to do at the time of receiving them from the owner. 1 Ry. & M. C. C. 87. And where a man ordered a pair of candlesticks from a silversmith, to be paid for on delivery, to be sent to his lodgings, whether they were sent accordingly, with a bill of parcels, by a servant, and there pretends the contriving to send the servant back under some pretence, keeps the goods, it was held larceny, cited in 2 Leach, 420. And if a sale of goods is not completed, and the pretended purchaser absconds with them, and from the first his intention was to defraud, he is guilty of stealing, 1 Beat. 673. And to obtain another by ring-dropping, is a similar offence, if there was an original design to steal, 1 Leach, 238; 2 Leach, 572; and where the owner of goods sends them by a servant, to be delivered to A., and B. pretending to be A., obtains them from him, B. is guilty of larceny: 2 East P. C. 673. Where the prisoner pretending to be the servant of a person who had bought a chest of tea, deposited at the E. I. company's warehouse, got a request paper and permit for the chest, and took it away with the assent of a person in the company's service who had the charge of it; this was held felony. R. & Ry. C. C. 103. So to obtain a bill of exchange from an indorser, under a pretence of getting it discounted, is felony, if the jury find that the party did not intend to leave the bill in the possession of the defendant, previous to receiving the money to be obtained on his credit, and that he was not to convert it to his own use, 1 Leach, 294; and it seems, that if a person procure possession of a house with an intent to steal the lead affixed to it, he may be indicted on the 4 Geo. II. c. 32, for the statuteable larceny. 2 Leach, 850.

In all these cases the defendant's original

The learned commentator has already noticed the 21 Hen. VIII. c. 7, making the embezzlement of goods above the value of forty shillings, felony, when intrusted to a servant by his master. The act extends only to such persons who were servants to the owner of the goods, both at the time of their delivery, and when they were stolen. 1 Hawk. c. 33. s. 12. 2 East P. C. 562. To bring the case within the act, the goods must have been delivered to the servant to keep for the master, and the words "kept to the use of the master," imply that they are to be returned to the master. 2 East P. C. 562. See 1 Hawk. 33. s. 15. The act extends only to goods, the actual property of which were not in the master at the time, and therefore, it is said, that if the property be changed, as by melting the money down, or melting corn, and then it be taken away, it is not within the statute. 1 Hawk. c. 33. s. 15. 2 East P. C. 562. See 1 Hawk. 33. s. 15. The act only extends to where the owner has actually had them in his possession, and not where his servant has merely received them to his use. No wasting or consuming the goods is within the act, however wilful. Hawk. b. 1. c. 33. s. 14.
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

3dly. Where offender lawfully acquired possession and qualified property in goods, under
colour of bailment, but with intention of stealing them, and privity of the bailment has been
determined either by wrongful act of offender or by intention of parties, if he afterwards embez- 
zes such goods, or makes a use of them in such manner as to vest them in himself, as in the
first case, after the determination of the special contract by any plain and unequivocal
wrongful act of the bailee, inconsistent with that contract, the property, as against the 
bailee, reverts to the owner, although the actual possession remain in the bailee. East P. C.
691. 227. The most remarkable case of this description is that of a carrier pointed out by 
the learned commentator. So the convers-

A public wrongs. 181
design in obtaining the goods was felonious,
and the owner never parted with his property 
therein, for where either is not the case there can be no larceny, as will appear in the fol-
lowing instances:—Thus where a house was burning, and a neighbour took some of the 
goods, apparently to save them from the 
flames, and afterwards converted them to his 
own use, it was held no larceny, because the 
jury thought the original design honest. 1 
Leach, 411. notes. And it is certain, that if the 
property in effects be given voluntarily, 
whatever false pretence has been used to ob-
tain it, no larceny can be committed. 1 Hale 
P. C. 506. R. & R. C. C. 223. S. P. Thus 
 obtaining silver on pretence of sending a half 
guinea presently in exchange is no larceny. 2 
East P. C. 672. So writing a letter in the 
name of a third person to borrow money, 
which he obtains by that fraud, is only a 
 misdemeanor, 2 East P. C. 673; and it makes no 
difference in these cases that the credit was 
obtained by fraudulently using the name of 
another, to whom it was intended to be 
given, 1 Leach, 503. notes. 2 East P. C. 
673. R. & R. C. C. 45; and if the horse-
dealer delivers a horse to another on his 
promise to return immediately and pay for it, 
the party's riding off and not returning is no 
larceny. 1 Leach, 467. 2 East P. C. 669. So 
if a tradesman sells goods to a stranger as for 
ready money, and sends them to him by a serv-
ant who delivers them, and takes in payment 
for them bills which prove to be mere fabrica-
tions, this will be no larceny, though the par-
ty took his lodgings for the express purpose 
of obtaining the goods by fraud, because the 
owner parted with his property. 2 Leach, 
614. So fraudulently winning money at gam-
ing, where the injured party really intended 
to play, is no larceny, though a conspiracy to 
defraud appear in evidence. 2 Leach, 610. 
So brokers, bankers, or agents embez- 
sembling securities deposited with them for security or 
any special purpose, are not guilty of larceny, 
4 Taunt. 258. 2 Leach, 1054. R. & R. C. 
C. 215. S. C.; but this decision occasioned 
the 52 Geo. III. c. 63. to be passed, making it 
a misdemeanor in brokers, bankers, or others, 
to embez-semble securities deposited with them 
for safe custody or for any special purpose, 
in violation of good faith, and contrary to the 
special purpose for which they were deposited, 
see the act, infra. Thus in all cases where a 
voluntary delivering by the prosecutor is the 
defence to be relied on, two questions arise, 
first, whether the property was parted with by 
the owner, secondly, whether supposing it was 
not, whether the prisoner at the time he ob-
tained it conceived a felonious design. In 
the first case, no fraud or breach of trust can 
make a conversion larceny; in the second, the 
complexion of the offence must depend on the 
felonious design.

(b) 1 Hale, P. C. 504.
pack of goods, or 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;
guilty of larceny at common law. Thus where a servant or clerk had received property for the use of his master, and the master never had any other possession than such possession by his servant or clerk, it was doubted whether the latter was or was not employed to receive money, or was guilty merely of a breach of trust, 2 Leach, 835. Hale, 668. East P. C. 570, 1; and see 4 Taunt. 238. Russ. & Ry. C. C. 215. S. C. 2 Leach C. C. 1054. So a cashier of the bank could not be guilty of felony in embezzling an India bond which he had received from the court of chancery, and was in his actual as well as constructive possession. 1 Leach, 23. So if a clerk received money of a customer, and, without all putting it in the till, converted it to his own use, he was guilty only of a breach of trust, though had he once deposited it, and then taken it again, he would have been guilty of theft. 1 Leach, 389.

Servants and Clerks.—The dangers resulting from this doctrine occasioned the enactment of 39 Geo. III. c. 95, against such embezzlements by servants, or clerks, rendering the offence punishable with transportation for fourteen years. This act extends only to such servants as are employed to receive money, and to instances in which they receive money by virtue of their employment. It seems an apprentice, though under the age of eighteen, is within the act, R. & R. C. C. 80; so is a female servant. R. & R. C. C. 267. A person employed upon commission to travel for orders, and to collect debts, is a clerk within the act, though he is employed by many different houses on each journey, and pays his own expenses out of his commission on each journey, and does not live with any of his employers, nor act in any of their counting houses. R. & R. C. C. 198. So a servant in the employment of A. & B., who are partners, is the servant of each, and if he embezzles money, A. & B., may be charged under the act as the servant of that individual partner. 3 Stark. C. N. P. 70. A man is sufficiently a servant within the act, although he is only occasionally employed when he has nothing else to do; and it is sufficient if he was employed to receive the money he embezzled, though receiving money may not be in his usual employment, and although it was the only instance in which he was so employed. R. & Ry. C. C. 299. A clerk intrusted to receive money at home from out-door collectors, receives it abroad from out-door customers, it was held, that such receipt of money may be considered by virtue of his employment, within the act, though it is by means other than limits to which he is authorized to receive money from his employers. R. & Ry. C. C. 319. So if a servant generally employed by his master to receive sums of one description and at one place only, is employed by him in a particular instance to receive a sum of a different description and at a different place, this latter sum is to be considered as received by him by virtue of his employment, for he fills the character of servant, as it is by being employed as servant he receives the money. R. & Ry. C. C. 516. Where the owner of a colliery employed the prisoner as captain of one of his colliers, he stole out of coal, and paid him for his labour by allowing him two-thirds of the price for which he sold the coals, after deducting the price charged at the colliery, he was held a servant within the act, and having embezzled the price, he was guilty of larceny within the act. R. & R. C. C. 139. So a servant who received money for his master for articles made of his master's materials which he embezzled, was held within the act, though he made the articles, and was to have a given portion of the price for making 'em. Russ. & Ry. C. C. 145. The act is not confined to clerks and servants of persons in trade; it extends to the clerks and servants employed to receive money, for whatever. Therefore where the overseers of a township employed the prisoner as their accountant and treasurer, and he received and paid all the money receivable or payable on their account, he received a sum and embezzled it, he was held a clerk and servant within the act. R. & R. C. C. 271; and see N. P. 349. S. C. If a servant, immediately on receiving a sum for his master, enters a smaller in his book, and ultimately account to his master for the smaller sum only, he may be considered as embezzling the difference at the time he made the entry, and it will make no difference, though he received other sums for his master on the same day, and in paying them and the smaller sum to his master together he might give his master every piece of money or note he received at the time he made the false entry. R. & R. C. C. 463. 3 Stark. N. P. C. 67. S. C. It seems the act does not apply to cases where larceny at common law, 1 Leach, C. 1817, R. C. C. 1032; R. C. C. 1200; S. C. Peck's case. P. R., J. Staffordshire Sum. Ass. 1817, 3 Stark. Evid. 842. It is questionable, therefore, whether, if a servant receives money from his master to pay C. and does not pay it, he can be indicted for embezzlement, Russ. & Ry. C. C. 267; but as counts for larceny at common law, and for embezzlement under the statute, may be joined in the same indictment, any difficulty in this respect may be avoided. See 3 M. & S. 549, 550. Although property has been in the possession of the prisoner's masters, and they only intrust the custody of such property to a third person to try the honesty of their servant, if the servant receives it from such person and embezzles it, it is an offence within the act. R. & R. C. C. 160. 2 Leach, 1033. S. C.

Party stealing his own Goods, &c.—Besides the cases already mentioned in the text, if a man steals his own goods from his own bailee, though he has no intent to charge the bailee, but his intent is to deprive the king, yet if the bailee had an interest in the possession and

† See post. p. 231. note.
these are larcenies (c); for here the animus furandi is manifest; since in the first case he had otherwise 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 master's goods to the value of forty shillings, it is made felony; except in apprentices, and servants under eighteen years old (4), (5). But if he had not the possession, but only

(c) 3 Inst. 107.

could have withheld it from the owner, the taking is a larceny. R. & R. C. C. 470. 3 Burn J. 24th ed. 240. S. C. And a man may be accessory after the fact to a larceny committed on himself, by receiving and harbouring the thief instead of bringing him to justice, Post. 153; but a joint tenant in common of effects cannot be guilty of larceny in appropriating the whole to his own purpose, 1 Hale, 513; but if a part-owner of property steal it from the person in whose custody it is, and who is responsible for its safety, he is guilty of larceny. R. & R. C. C. 473. 3 Burn J. 24th ed. 241. S. C. Nor can a wife commit larceny of her husband's goods, because his custody is, in law, her's, and they are considered as one person. 1 Hale, 514. On the same ground no third person can be guilty of larceny by receiving the husband's goods from the wife, and if she keep the key of the place where the property is kept, her privity will be presumed, and the defendant must be acquitted. 1 Leach, 47. See 1 Hale, 45. 516. Kel. 37.

The taking must always be against the will of the owner, 1 Leach, 47; but if the owner, in order to detect a number of men in the act of stealing, directs a servant to appear to encourage the design, and lead them on till the offence is complete, so long as he did not induce the original intent, but only provided for its discovery after it was formed, the criminality of the thieves will not be destroyed. 2 Leach, 913. So if a man be suspected of an intent to steal, and another, to try him, leaves property in his way, which he takes, he is guilty of larceny. 2 Leach, 931. And if, on thieves breaking in to plunder a house, a servant, by desire of his master, show them where the plate is kept which they remove, this circumstance will not affect the crime. 2 Leach, 922.

(4) The above statutes, with others on the same subject, are repealed by the 7 and 8 Geo. IV. c. 27; and by the 7 and 8 Geo. IV. c. 29, § 46, any clerk or servant stealing any chattel, money, or valuable security belonging to, or in the possession or power of his master, is punishable with transportation for any term not exceeding fourteen years, and not less than seven, or with imprisonment for any term not exceeding three years, with whippings. S. 47 enacts, that any clerk or servant, or person employed as such, receiving or taking, by virtue of such employment, into his possession, any chattel, money, or valuable security, for, or in the name, or on the account of his master, and fraudulently embezzling the same, or any part thereof, shall be deemed to have feloniously stolen the same from his master, although such chattel, &c., was not received into the master's possession otherwise than by the actual possession of such clerk or servant, or other person so employed, and shall be liable to any of the punishments set forth in s. 45. By s. 48, "for preventing the difficulties that have been experienced in the prosecution of the last-mentioned offenders," it is enacted, "that it shall be lawful to charge in the indictment, and proceed against the offender for any number of distinct acts of embezzlement not exceeding three, which may have been committed by him against the same master, within the space of six calendar months from the first to the last of such acts; and in every such indictment, except where the offence shall relate to any chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, lue would be punished. (2 R. S. 678, § 59, &c.) The buying or receiving embezzled property knowingly, is punished in the same way. (Id. § 61.) Carriers are also punished in the same way for embezzling, &c. (Id. § 62.)
the care and oversight of the goods, as the butcher of the plate, the shepherd of 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 & 4 W. & I. c. 9, if a lodger runs away with the goods from his ready furnished lodgings (6). 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 (7); seipt et as-

(d) 1 Hal. P. C. 506.
(e) I Hawk. P. C. 90.

so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular specimen or valuable security of which such amount was composed shall not be proved; or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly. Each act of embezzlement should be set forth in a separate count, and the prosecutor cannot be compelled to elect which he will singly proceed upon. The indictment need not state from whom the money alleged to have been embezzled, was received. Rex v. Benceall, 1 C. & P. 454. The day laid is not material. By statute 5 Geo. IV. c. 20, § 10, persons employed in the post-office embezzling notes, parliamentary proceedings, or newspapers, &c., are guilty of a misdemeanor, and punished by fine and imprisonment, or the sale of the goods which the offender either committed or where committed or where the offender is apprehended.

By 7 and 8 Geo. IV. c. 29, § 49, bankers, merchants, brokers, attornies, and other agents, embezzling money intrusted to them to be applied to any special purpose, or embezzling any goods, or valuable security intrusted to them for safe custody, or for any special purpose, are guilty of a misdemeanor, and punishable in any of the modes pointed out in s. 46. S. 50 provides, that the Act shall not affect trustees or mortgagees; nor bankers, &c. receiving money due on securities, or disposing of securities on which they have the particular species of embezzling for their own use any goods, or documents relating to goods, intrusted to them for the purpose of sale, are guilty of a misdemeanor, and punishable by transportation for fourteen or seven years, or by fine and imprisonment, as the court shall award; the clause not to extend to cases where the pledge does not exceed the amount of their lien. And by s. 32 these provisions as to agents shall not lessen any remedy which the party aggrieved previously had, at law or in equity. A person intrusted as a private friend, with a bill to get it discounted, and converting it to his own use, is not an agent within the meaning of the Act. Rex v. Prince, 2 C. & P. 517.

(6) Repealed by 7 and 8 Geo. IV. c. 27; and by 7 and 8 Geo. IV. c. 29, § 45, it is enacted, that if any person shall steal any chattel or fixture let to be used by him in or with any house or lodging, he shall be guilty of felony, and be punished as for simple larceny; and the indictment was in the common form as for larceny, and as if the offender were not a tenant or lodger, and in either case the property may be laid in the owner or person letting to hire. In Healey's case, R. & M. 1, it was considered unnecessary to state by whom the lodging was let, the judges holding that the letting might be stated either according to the fact, or according to the legal operation. The statement as to the party by whom the lodging is let, would be regulated by this case under the present Act.

(7) If a thief cut a belt on which a purse is hung, and it drops to the ground where he leaves it, or if he compel a man to lay down his hand bag, or stocks, or other goods which he either committed or where committed or where the offender is apprehended. Thus, to snatch a diamond from a lady's ear, which is instantly dropped among the curls of her hair. 1 Leach, 320. 2 East, P. C. 557; to remove sheets from a bed and carry them into an adjoining room, 1 Leach, 225, in notes—to take plate from a trunk, and lay it on the floor with intent to carry it away, ibid—and to remove a package from one part of a waggon to another, with a view to steal it, 1 Leach, 236. have respectively been held to be felony.
**PUBLIC Wrongs.**

185

"portavit" 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 asporation, or carrying away. As if a man be loading 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*; [*232*] that is, done *animo furandi*: or, as the civil law expresses it, *lucrī causā* (i) (8). This requisite, besides excusing those who labour under in-

(g) 3 Inst. 108, 109.
(h) 1 Hawk, P. C. 95.
(i) Inst. 4. 1. 1.

nies, and where prisoner had lifted up a bag from the bottom of a boot of a coach, but was detected before he had got it out, it did not appear that it was entirely removed from the space it at first occupied in the boot, but the raising it from the bottom had completely removed each part of it from the space that specific part occupied, this was held a complete asporation. 1 Ry. and Moody, C. C. 14. But if the defendant merely change the position of a package from lying endways to lengthways, for the greater convenience of taking out its contents, and cuts the outside of it for that purpose, but is detected before he has taken any thing, there will be no larceny committed. Id. ibid in notes. Where it is one continuing transaction, though there be several distinct asporations in law by several persons, yet all may be indicted as principals who concur in the felony before the final carrying away of the goods from the virtual custody of the owner, 2 East P. C. 557; but two cannot be convicted upon an indictment charging a joint larceny, upon as there he evidence to satisfy a jury that they were concerned in a joint taking. 2 Stark. on Evidence, 810. If one steal another man's goods, and afterwards another stealeth from him, the owner may prosecute the first or the second felon at his choice. Dall. c. 102. There is no occasion that the carrying away be by the hand of the party accused, for if he procured an innocent agent, as a child or a lunatic, to take the property, or if he obtained it from the sheriff by a replevin, without the slightest colour of title, and with a felonious design, he will himself be a principal offender. Hawk. b. 1. c. 33. s. 12.

(8) The felonious quality consists in the intention of the prisoner to deprive the owner, and to apply the thing stolen to his own use; and it is not necessary that the taking should be done *lucrī causā*; taking with an intent to destroy will be sufficient to constitute the offence if done to serve the prisoner or another person though not in a pecuniary way. R. & R. C. C. 292. In a late singular case it was determined, that where a servant clandestinely took his master's corn, though to give it to his master's horses, he was guilty of larceny, the servant in some degree being likely to diminish his labour thereby. R. & R. C. C. 307. 3 Burn J. 24th edit. 200. (See a late case, Rus. & Ry. C. C. 118, under very particular circumstances.) It is sufficient if the prisoner intend to appropriate the value of the chattel and not the chattel itself to his own use, as where the owner of goods steals them from his own servant or bailee in order to charge him with the amount. 7 Hen. VI. f. 43. The intention must exist at the time of the taking, and no subsequent felonious intention will render the previous taking felonious.

We have seen that a taking by finding, and a subsequent conversion, will not amount to a felony. 3 Inst. 108. 1 Hawk. c. 33, s. 2. 2 Russ. 1041. But if the goods are found in the place where they are usually suffered to lie, as a horse on a common, cattle in the owner's fields, or money in a place where it clearly appears the thief knew the owner to have concealed it, 1 Hale, 507, 508. 2 East P. C. 664; or if the finder in any way know the owner, or if there be any mark on the goods by which the owner can be ascertained, see 3 Burn J. 24th edit. 213, the taking will be felonious. So if a parcel be left in a hackney coach, and the driver open it, not merely from curiosity, but with a view to appropriate part of its contents to his own use, or if the prosecutor order him to deliver the package to the servant, and he omits so to do, he will be guilty of felony. 2 East P. C. 664. 1 Leach, 413. 15, and in notes.

Where the taking exists, but without fraud, it may amount only to a trespass. This is also a point frequently depending on circumstantial evidence, and to be left for the jury's decision. Thus, where the prisoners entered another's stable at night and took out his horses, and rode them a carry two miles, and left them at an inn, and were afterwards found pursuing their journey on foot, they were held to have committed only a trespass, and not a felony. 2 East P. C. 662. It depends also on circumstances what offence it is to force a man in the possession of goods to sell them; if the defendant takes them, and throws down more than their value, it will be evidence that it was only trespass; if less were offered, it would probably be regarded as felony. 1 East Rep. 615. 636. And it seems that the taking may be only a trespass, where the original as-
capacities of mind 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 reality, larceny at the common law cannot be committed of them (9). 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 sevorage of them was, and in many things is still, merely a trespass which depended on a subtilty 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 object of theft, being absolutely fixed and immoveable (m). And if they were severed by violence, so as to be changed into moveables; and at the same time, by one and the same continued act, carried off by the person who severed them; they could never 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 personality, and takes them

(k) See page 20.  
(l) 1 Hale. P. C. 509.  
(9) See Book II. p. 16.  
(m) See Book II. p. 16.

sault was felonious. Thus, if a man searches the pockets of another for money, and finds none, and afterwards throws the saddle from his horse on the ground, and scatters bread from his packages, he will not be guilty of robbery, 2 East P. C. 662, though he might certainly have been indicted for feloniously assaulting with intent to steal, for that offence was complete.

The openness and notoriety of the taking, where possession has not been obtained by force or stratagem, is a strong circumstance to rebut the inference of a felonious intention, 1 Hale, 507. East P. C. 661, 662; but this alone will not make it the less a felony. Kel.

82. 2 Ravn. 276. 2 Vent. 94. A taking by mere accident, or in joke, or mistaking another’s property for one’s own, is neither legally nor morally a crime. 2 Hale, 507. 509.

(9) By statute 7 and 8 Geo. IV. c. 29, § 23, the stealing any description of writings relating to the title of real estates is punishable with transportation for seven years, or with fine and imprisonment at the discretion of the court; and, by § 24, these provisions are not to deprive the party aggrieved of the remedies he now has, at law or in equity. This enactment is new. See 3 Inst. 109; 1 Hale, 110. See note 1, p. 229.
away; it is larceny: and so it is, if the owner, or any one else, has severed them (a). And now by the statute 4 Geo. II. c. 42. 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 (10); and to steal, damage, or destroy underwood or hedges, and the like (11), to rob orchards or gardens of fruit growing therein (12), to steal or otherwise destroy any turnips, potatoes, cabbages, parsnips, pease, or carrots, or the roots of madder when growing, are (o) punished criminally (13), 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, [*234] or plant, by day 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 (14). Stealing ore out of mines is also no larceny, upon the same principle of adherence to the freehold; with an exception only

(a) 3 Inst. 109. 1 Hal. P. C. 510.
(o) Stat. 40 Eliz. c. 7. 15 Car. II. c. 2. 31 Geo. II. c. 35. 6 Geo. III. c. 48. 9 Geo. III. c. 41. 13 Geo. III. c. 32.

(p) Oak, beech, chestnut, walnut, ash, elm, cedar, fir, asp, lime, sycamore, birch, poplar, alder, larch, maple, and hornbeam.

(10) By statute 7 and 8 Geo. IV. c. 29, § 44, stealing, ripping, cutting, or breaking with intent to steal, any glass or woodwork belonging to any building, or any utensil or fixture made of metal or other material fixed in or to any building whatsoever, or metal fixtures in land being private property, or for a fence to any house, garden, or area, or in any square, &c. is a felony punishable as in the case of simple larceny.

(11) By statute 7 and 8 Geo. IV. c. 30, § 19, persons maliciously destroying or damaging any trees, shrubs, or underwood, growing in any park, pleasure-ground, garden, orchard, or avenue, (in case the injury exceeds the sum of £1,) shall be guilty of felony, and be punished with transportation for seven years, or imprisonment not exceeding two years, with public whipping in addition; and committing the offence on trees, &c. growing elsewhere, (where the injury exceeds 5l.) is subject to the same punishment. And by § 20, destroying such property wheresoever growing, of any value above one shilling, renders the offender liable to a fine of 5l. for the first offence; to hard labour and imprisonment not exceeding twelve months for the second offence, with whipping in addition; and to transportation or imprisonment as in the last section, as for a felony, for a third offence.

(12) By 7 and 8 Geo. IV. c. 20, § 42, stealing or destroying any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery-ground, hothouse greenhouse, or conservatory, is punishable, for a first offence, with imprisonment and hard labour, not exceeding six calendar months, or a fine not exceeding 20l., over and above the value of the articles stolen; and the second offence is felony, punishable as in the case of simple larceny.

(13) By 7 and 8 Geo. IV. c. 29, § 43, the first offence is punishable with hard labour and imprisonment not exceeding one month, or with a fine not exceeding 1l., besides the value of the articles stolen, and the second offence with whipping, and imprisonment for a term not exceeding six months. The words of the Act are stealing or destroying "any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land open or enclosed not being a garden, orchard, or nursery-ground." (14) By 7 and 8 Geo. IV. c. 29, § 38, persons stealing or destroying with intent to steal, any tree, shrub, or underwood, growing in any park, pleasure-ground, garden, or near houses, (where the injury exceeds the sum of £1) are guilty of felony, and liable to be punished as in cases of simple larceny; and stealing, or damaging with intent to steal, such property elsewhere, above the value of 5l. is declared felony, and liable to the same punishment. And, by § 39, stealing, or damaging with intent to steal, any trees, shrubs, &c., wheresoever growing, to the value of one shilling, is punishable with a fine of 5l. for the first offence; with hard labour, whipping, and imprisonment, not exceeding twelve months, for the second offence; and the third offence is felony, punishable, as in case of simple larceny. There seems to be no punishment if the property stolen or destroyed be under the value of a shilling.
PUBLIC Wrongs.

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 (15). 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).

Bonds, bills, and notes, which concern mere choses in action, were also at the common law held not to be such goods wherof 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 (16), (17). 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 (18). 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 pacquet, containing any bank note or other valuable paper particularly specified in the act, or shall [*235] 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 pacquet with which he has received money for the postage, or shall advance the rate of postage on any letter or pacquet sent by the post, and shall secrete the money received by such advancement, he shall be guilty of single felony (19). 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

(g) 1 Hal. P. C. 510. Stra. 11 37.
(r) See Book II. page 438.

(15) By 7 and 8 Geo. IV. c. 20, § 37, stealing or seveng with intent to steal, any ore, or other substance, from certain mines, is felony, and punishable as in case of simple larceny. The 25 Geo. II. c. 105, is repealed by 7 and 8 Geo. IV. c. 27.

(16) See 2 R. S. 679, § 66, &c.

(17) Repealed by 7 and 8 G. IV. c. 27; and by 7 and 8 G. IV. c. 29, § 5, persons stealing any tally, order, or other security, either public or private, relating to this country, or to any foreign state, or any debenture, deed, bond, bill, note, warrant, order, or other security for money, or any order for the delivery of goods, shall be guilty of felony, and punished as though they had stolen any chattel of equal value, according to the interest the parties have in the securities stolen: and all the 12 documents enumerated in the Act shall be deemed to be included in the words "valuable security." A check on a banker, written on unstamped paper, payable to D. P. J., and not made payable to bearer, is not a valuable security within the meaning of the Act. Rex v. Yates, Car. C. L. 273, 333.

(18) See note 5, p. 231, and the statute there referred to.

(19) See 5 Geo. III. c. 25; 42 Geo. III. c. 81; and 52 Geo. III. c. 143, with respect to these offences; by the latter of which statutes, the provisions of the former are incorporated, and accessories before the fact are ousted of clergy, and may be tried before the principal is convicted. In a case under 7 Geo. III. c. 50, where a person was indicted as charger and sorter, and was acquitted on this special count, it was held that he could not be convicted on a general count as a person employed in the post-office, on evidence that he was no otherwise employed than as a sorter. Shaw's case, 2 East, P. C. 580. A bill of exchange may be laid as a warrant for the payment of money within that statute. Willoughby's case, 2 East, P. C. 581.
(whether wreck or no wreck) is felony without benefit of clergy: in like manner, as, by the civil law (s), this inhumanity is punished in the same degree as the most atrocious theft (20).

Larceny also cannot be committed of such 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 (t). 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 (u). 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 (21). 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, purieu, or ancient walk, or in any inclosed park, paddock, wood, or other ground, *where deer are usually kept, shall forfeit the sum of 20l., or for ["236] every deer actually killed, wounded, destroyed, taken in any toil or snare, or carried away, the sum of 30l., 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 (v) 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 (22). Stealing hawks, in disobedience to the rules prescribed by the statute 37 Edw. III. c. 19, is also felony (w) (23). It is also said (x) 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

(e) Cod. 6. 2. 19.
(f) 1 Hal. P. C. 511. Fost. 366.
(g) 1 Hawk. P. C. 94. 1 Hal. P. C. 511.
(h) See stat. 22 & 23 Car. II. c. 25.
(i) 3 Inst. 95.
(j) Dall. Just. c. 156.

(20) Repealed by 7 and 8 Geo. IV. c. 27; and by 7 and 8 Geo. IV. c. 29, § 17, stealing goods or merchandise from any vessel, barge, or boat, in any port, river, or canal, or from any dock, wharf, or quay adjacent, is punishable with transportation for life, or not less than seven years, or imprisonment not exceeding four years, with whipping to male offend-

(21) Repealed by 7 and 8 Geo. IV. c. 27, vide note (3) ante, page 144.
(22) These are also repealed. See note (3), ante 144.
(23) Repealed by 7 and 8 Geo. IV. c. 27; see post, note (25).
only a trespass. But of all valuable domestic animals, as horses and other beasts of draught, and of all animals *domitae naturae*, 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 (y), larceny may be committed; and also of the flesh of such as are either *domitae* or *ferae naturae*, when killed (z) (24). 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 (a), yet they are not of such estimation, as that the crime of stealing them amounts to larceny (b). 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 (c) (25).

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 (d). 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 (e). 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 (f) (26). 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 (g).

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 (h). And in the civil law, till some very late constitutions, we never find the

---


*(a) 1 Hal. P. C. 511.*

*(b) See Book II. pag. 393.*

*(c) 1 Hal. P. C. 512.*

*(d) See the remarks in pag. 4. The statute hath now continued eighteen sessions of parliament unreppeled.*

*(e) 1 Hal. P. C. 512.*

*(f) Gravin. I. 3. § 186.*


*(h) Exod. c. xxii.*

---

(24) By statute 7 and 8 Geo. IV. c. 29, § 25, it is enacted, “That if any person shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, or shall wilfully kill any of such cattle, with intent to steal the carcass, or skin, or any part of the cattle so killed, every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon.”

(25) By statute 7 and 8 Geo. IV. c. 29, § 31, stealing any dog, beast, or bird ordinarily kept in a state of confinement, and not the subject of larceny at common law, is punishable by fine not exceeding 20l., together with the value of the dog, &c. lost, for the first offence, and imprisonment not exceeding twelve months, and whipping for the second offence. By § 32, persons being found in possession of any stolen dog, or beast, or the skin thereof, or any bird, or plumage thereof, shall restore the same to the owners by order of a justice; and persons having them in their possession knowing them to have been stolen, shall suffer the same punishments for each offence, as set forth in § 31. And § 33 makes the killing, wounding, or taking any housedove or pigeon, under such circumstances as shall not amount to larceny at common law, punishable by fine, on conviction before a justice of the peace.

(26) Ante, 64. n. (29).
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 (h); 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 stiled 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 simple theft (i). 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 (j), and the marquis Beccaria (k), 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 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 (l), together with Sir Matthew Hale (m), 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 (n). 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 twelvepence: 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 (o). 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 twelvepence were directed to be hanged; which law continues in force to this day (p). For though the inferior species of theft, or petit larceny, is only punished by imprisonment or whipping at common law (q), or 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 (r), yet the punishment of grand larceny, or the stealing atque etiam perniciosum reipublicae, furem atque homicidam ex segeo puniri, nemo est (opinor) qui nesciat. (Ibid. 30.)

(k) Petiri Lit. Attic. i. 7, tit. 5.

(l) Utop. pag. 42.

(m) Ch. 22.

(n) L. of N. b. 8, c. 3.

(o) I. Hal. P. C. 12.

(p) 3 Inst. 218.

(r) Stat. 13 Geo. III. c. 38.
above the value of twelvepence (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 (s) in the price or denomination of *money, is undoubtedly a 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 (t). 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 twelvepence, 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 (u), 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, 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 (w); theft by great and notorious thieves in Northumberland and Cumberland (x): taking woollen cloth from off the tenters (y), or linens, fustians, callicoes, or cotton goods, from the place of manufacture (z) (27); (which extends, in the last case, to aiders, assistants, procurers, buyers and receivers); feloniously driving away, or otherwise stealing one or more sheep or other cattle specified in the

[*239] *acts (28), or killing them with intent to steal the whole or any

(t) In the reign of King Henry I. the stated value, at the exchequer, of a pasture-fed ox, was one shilling (Dial. de Scacc. i. 1, § 7.), which, if we should even suppose to mean the télitus legatis mentioned by Lyndewode (Prov. i. 3, c. 13. See Book II. pag. 500), or the 73d part of a pound of gold, is only equal to 13s. 4d. of the present standard.

(u) Gloss. 350.

(w) 2 Inst. 189.

(x) Stat. 1 Edw. VI. c. 12. 2 & 3 Edw. VI. c. 32. 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 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.

(27) Clergy is restored by 4 Geo. IV. c. 53, which is now repealed by 7 and 8 Geo. IV. c. 27. And by 7 and 8 Geo. IV. c. 28, § 6, it is enacted, That benefit of clergy with respect to persons convicted of felony, shall be abolished, but that nothing herein contained, shall prevent the joiner, in any indictment, of any counts which might have been joined before the passing of this Act."

By statute 7 and 8 Geo. IV. c. 30, § 3, maliciously cutting or destroying any goods or article of silk, woolen, linen, or cotton, or of any such materials mixed, or of any frame-work-knitted piece, stocking, hose, or lace, being in any loom or frame, or on any machine or engine, rack, or tenter, or any machinery whatsoever belonging to those manufactures, or entering any manufactury, building, or place, with intent to commit such offences, is punishable with transportation for life, or not less than seven years, or imprisonment not exceeding four years, with whipping in addition to male offenders. The 4 Geo. IV. c. 46, is repealed by 7 and 8 Geo. IV. c. 29. The former statute repealed the capital felony prescribed by 22 Geo. III. on this subject.

By 7 and 8 Geo. IV. c. 29, § 16, stealing to the value of 10s. any silk, woollen, linen, or cotton, or any mixture of such materials, whilst exposed in any stage of manufacture, in any field, or building, or other place, is punishable with transportation for life, or not exceeding fourteen years, or imprisonment not exceeding four years, with private or public whipping.

(28) Repealed by 7 and 8 Geo. IV. c. 27. See the next note.
part of the carcass \((a)\), or aiding or assisting therein \((29)\); thefts on navigable rivers above the value of forty shillings \((b)\), or being present, aiding and assisting therein \((30)\); plundering vessels in distress, or that have suffered shipwreck \((c)\) \((31)\); stealing letters sent by the post \((d)\); and also stealing deer, fish, hares, and conies under the peculiar circumstances mentioned in the Waltham black act \((e)\) \((32)\). Which additional severity is owing to the great malice and mischief of the theft in some of these instances; and, in others, 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 abigei, or stealers of cattle \((f)\); and the balnearii, or such as stole the clothes of persons who were washing in the public baths \((g)\); both which constitututions seem to be borrowed from the laws of Athens \((h)\). 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 \((i)\). 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 \((j)\) to have a higher degree of guilt than simple larceny, yet it is not at all distinguished from \([\text{**240}}\) the other at common law \((k)\); 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 \((l)\), who hath shewn them to have gradually arisen from our improvements in trade and opulence), the benefit of clergy is taken from larcenies committed in an 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 \((m)\). The multiplicity of the general acts is apt to create some confusion; but upon comparing them diligently

\((a)\) Stat. 14 Geo. II. c. 6. 15 Geo. II. c. 34. See Book I. pag. 58.
\((b)\) Stat. 24 Geo. II. c. 45.
\((c)\) St. 12 Ann. st. 3, c. 18. 26 Geo. II. c. 19.
\((d)\) Stat. 7 Geo. III. c. 50.
\((e)\) Stat. 9 Geo. I. c. 22.
\((f)\) Ff. 47, t. 14.
\((g)\) Ibid. t. 17.
\((i)\) Stirneh. de jure Goth. I. 3, c. 5.
\((j)\) See page 222.
\((k)\) 1 Hawk. P. C. 98.
\((l)\) Barr. 375, &c.
\((m)\) Stat. 13 Geo. III. c. 38.

\((29)\) Vide note \((25)\), ante, 236, where the existing punishments for these offences are set forth.

\((30)\) Vide note \((20)\), ante, 235, where the present punishment is described. Clergy was allowed by statute 4 Geo. IV. c. 54, which is now repealed by 7 and 8 Geo. IV. c. 77.

\((31)\) By 7 and 8 Geo. IV. c. 20, § 18, any person plundering or stealing any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall suffer death as a felon; provided that where articles of small value shall be stranded or cast on shore, and stolen, without cruelty, outrage, or violence, the offender may be prosecuted and punished as for simple larceny: and in either case the offender may be tried in the county in which the offence is committed, or that next adjoining. The 12 Ann. st. 2, c. 18, and 26 Geo. II. c. 19, so far as they relate to the same subject, were repealed by the 7 and 8 Geo. IV. c. 27.

\((32)\) Vide note \((3)\), ante, 144, by which it will appear that the capital felony is removed.
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 (n): 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 (o): 3. By robbing a dwelling-house in the day-time (which robbing implies a breaking), any person being therein (p): 4. In a dwelling-house by day or by night, without breaking the same, any person being therein and put in fear (q); which amounts in law to a robbery: and in both these last cases the accessory before the fact is also excluded from his clergy (33). Secondly, in larcenies to the value of five shillings, committed, 1. By breaking any dwelling-house, or any out-house, shop, or warehouse thereof belonging in the day-time, although no person be therein (r); which also now extends to aiders, abettors, and accessories before the fact (s): 2. By privately stealing goods, *[241] *wares, or merchandise in any shop, warehouse (t), coach-house, or stable, by day or by night; though the same be not broken open, and though no person be therein (u) (34): 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 out-houses, 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 (v). This also extends to those who aid or assist in the commission of any such offence (36).

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. (37). But then

(n) Stat. 23 Hen. VIII. c. 1. 1 Edw. VI. c. 12.
1 Hal. P. C. 519.
(o) Stat. 5 & 6 Ed. VI. c. 9. 1 Hal. P. C. 522.
(p) Stat. 3 & 4 W. & M. c. 9.
(q) Ibid.
(r) Stat. 39 Eliz. c. 15.
(s) Stat. 3 & 4 W. & M. c. 9.
(t) See Foster, 78. Barr. 379.
(u) Stat. 16 & 11 W. III. c. 23.
(v) Stat. 12 Ann. st. 1, c. 7 (35).

(33) By 7 and 8 Geo. IV. c. 29, § 12, it is enacted, "That if any person shall break and enter any dwelling-house, and steal therein any chattel, money, or valuable security, to any value whatever; or shall steal any such property to any value whatever in any dwelling-house, any person therein being put in fear; or shall steal in any dwelling-house, any chattel, money, or valuable security, to the value, in the whole, of $5, or more; every such offender, being convicted thereof, shall suffer death as a felon." And by § 14, breaking into any building, being within the curtilage of a dwelling-house, but not part thereof; and stealing therefrom, is punishable with transportation for life, or not less than seven years, or imprisonment not exceeding four years, with private or public whipping to male offenders.

The 23 Hen. VIII. c. 1, § 3; 1 Edw. VI. c. 12, § 10; 3 and 6 Ed. VI. c. 9, §§ 4, 39 Eliz. c. 15; 3 and 4 W. and M. c. 9; 10 and 11 W. III. c. 23; 12 Ann. st. 1, c. 7, §§ 1 and 2, are all repeated by 7 and 8 Geo. IV. c. 27. Vide ante, 223, note (10) et seq.

(34) By statute 7 and 8 Geo. IV. c. 29, § 15, persons breaking and entering any shop, warehouse, or counting-house, and stealing therein any chattel, money, or valuable security, are liable to transportation for life, or not less than seven years, or imprisonment not exceeding four years, with private or public whipping for male offenders.

(35) Repealed by stat. 7 and 8 Geo. IV. c. 27. The sum mentioned in the text is now raised to five pounds; vide ante, note 33.

(36) See ante 224, note 12, and 229 note 2, as to laws of New-York.

(37) Repealed by 7 and 8 Geo. IV. c. 27, and see 7 and 8 Geo. IV. c. 28, § 6 and 7; the former enacting that benefit of clergy, with respect to persons convicted of felony, shall be abolished; and the latter, that no person convicted of felony shall suffer death, unless for some felony excluded from benefit of clergy before or on the first day of the then present session of parliament, or made punishable with death by some statute passed after that day.
it must be such a larceny as stands in need of the benefit of clergy, viz. of above the value of the equivalent; or 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 (w). 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 practised (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 corporal possession of the owner, which was an offence even in a state of nature. And therefore the saccularui, or cutpurves, were more severely punished than common thieves by the Roman and Athenian laws (z) (38).

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 (y) (39). 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 (z): but afterwards it was taken to be only a misdemeanour, 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 menace, or by other forcible or violent manner, to demand any money or goods; with a felonious intent to rob (40). If the thief, having once taken a purse, under certain circumstances, shall be felony without benefit of clergy.

(z) 1 Hawk. P. C. 99. The like observation will certainly hold in the cases of horse-stealing, (1 Hal. P. C. 531.) thefts in Northumberland and Cumberland, and stealing woollen cloth from the tenants; and possibly in such other cases where it is provided by any statute that simple larceny, the person; removal from the place where it was, if it remain throughout with the person, is not sufficient. Rex v. Thompson, 1 R. and M. C. C. 78.

(39) In New-York, robbery in the first degree, is the feloniously taking of the personal property of another from his person, or in his presence and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person: and is punishable by imprisonment not less than 10 years: in the second degree, it is such taking of such property of another in his presence or from his person, but which shall have been delivered or suffered to be taken through fear of some injury to his person or property, or to the person of any relative or member of his family, threatened to be inflicted by the robber at a different time: this last is punishable by imprisonment in the state-prison not more than 10 years. (2 R. S. 677, § 56, &c.)

Sends, delivering, or making letters threatening to accuse another of a crime, or to injure the person or property of another, with a view to extort money, &c. is an attempt to rob, and punishable by like imprisonment for not more than 5 years. (ill. § 38.)

(40) By 7 and 8 Geo. IV. c. 21, § 7, if any person shall accuse or threaten to accuse any other person of any infamous crime, as de-
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 (a). But if the taking be not either directly from his person, or in his presence, it is no robbery (b). 2. It is immaterial of what value the thing taken is: a penny as well as a pound, thus forcibly extorted, makes a robbery (c). 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 (d), "qui vi rapuit, fur improbior esse videtur." This previous violence, or putting in fear, is the criterion that distinguishes robbery [*243] 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 (e): 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 (f). And when it is laid to be done by putting in fear, this does not imply any great degree of terror or affright 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 (g). 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 felonious robbery (h). So if, under a pretence of sale, a man forcibly extorts money from another, neither shall this subterfuge avail him. But it is doubted (i), 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.

(a) 1 Hal. P. C. 533.  
(b) Comyns, 475. Stra. 1015.  
(c) 1 Hawk. P. C. 97.  
(d) F. 4, 14, § 12.  
(e) 1 Hal. P. C. 534.  

scrive in § 9, with a view or intent to extort or gain from him, and shall by intimidating him by such accusation or threat, extort or gain from him any chattel, money, or valuable security, every such offender shall be deemed guilty of robbery, and shall be indicted and punished accordingly. It is equally a robbery to extort money from a person by threatening to accuse him of an unnatural crime, whether the party so threatened has been guilty of such crime or not. Rex v. Gardner, 1 C. and P. 73.  
(41) And see R. & R. C. C. 146. 1 Leach, 139. 193, 278. 3 Chit. C. L. 803. Mr. Justice Ashurst says, "The true definition of robbery is the stealing or taking from the person of another; or in the presence of another, property of any amount, with such a degree of force or terror, as to induce the party unwillingly to part with his property; and whether terror arises from real or expected violence to the person, or from a sense of injury to the character, makes no kind of difference; for to most men the idea of losing their fame and reputation, is equally, if not more terrible, than the dread of personal injury: The principal ingredient in robbery is a man's being forced to part with his property; and the judges are unanimously of opinion, that, upon the principles of law, as well as the authority of former decisions, a threat to accuse a man of the greatest of all crimes, is a sufficient force to constitute the crime of robbery by putting in fear." 1 Leach, 280. And fear of loss of character and service upon a charge of seditious practices, is sufficient to constitute robbery, though the party has no fear of being taken into custody or of punishment. R. & R. C. C. 375. But if no actual force was used, and at the time of parting with the money, the party were under no apprehension, but gave it merely for the purpose of bringing the offenders to justice, they cannot be capi- tally convicted, though we have seen it is otherwise, where personal violence is employed. 1 East P. C. 734. R. & R. C. C. 408.
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 footpath, was not punished with death (a); but was open to the benefit of clergy, till the statute 3 & 4 W. & M. c. 9, which takes away clergy from both principals and accessories before the fact, in robbery, wheresoever committed (42).

11. 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 re-

(a) 1 Hal. P. C. 335.

And the influence exercised over the mind, where the force is merely constructive, must be of such a kind as to disable the prosecutor to make his life, or cause that is robbing him, to swear to the place of force, is an accusation of unnatural practices. 2 Leach, 730. 1. 1 Leach, 139. 2 Russ. 1009. And, it has recently been held, contrary, it seems, to the principle of some former decisions, that even, in this case, the money must be taken immediately on the threat, and not after time has been allowed to the prosecutor to deliberate and advise with friends, as to the best course to be pursued, 1 East P. C. Append. xxi.; though, as some of the judges dissented, it does not seem to be decisive. Where, on the other hand, there is as immediate threat of injury to the property, as by pulling down a house with a mob in tumult; or in both process, that is to say, where it induces a man to part with his money, this has been held to be a sufficient putting in fear to constitute robbery. 2 East P. C. 729. 731. And if a man assaults a woman with intent to commit a rape, and she, in order to prevail on him to desist, offers him money which he takes, but continues his endeavours, till prevented by the approach of a third person, he will be guilty of robbery, though his original intent was to ravish. 1 East P. C. 711. If thieves meet a person, and by menaces of death, make him swear to bring them money, and he, under the continuing influence of fear for his life, consents and is robbed by them, though it would not be so, if he had no personal fear, and acted merely from a superstitious regard to an oath so extorted. 1 East P. C. 714. In the absence of force, to constitute robbery the fear must arise before and at the time of the property being taken, it is not enough that it arise afterwards; and where the prisoner by stealth took some money out of the prosecutor's pocket, who turned round, saw the prisoner, and demanded the money, but the prisoner threatening him, he desisted through fear from making any farther demand, it was held no robbery. Roll. Rep. 154. 1 Hale, 534.

To constitute a robbery, where an actual violence is relied on, and no putting in fear can be expressed, is this, it is held by a modern judge, not to be committed, unless at least an actual injury is done to the person of the owner. 1 East P. C. 709. But compare these decisions with the statutes quoted, note 39. p. 243.

(42) These statutes are repeated by 7 and 8 G. IV. c. 27. Vide ante, 241, note (37), 242, note (39).
lation 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.

[*244] 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 (43). 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 (44). By statute 43 Eliz. c. 13. (for preventing rapine on the northern borders) to 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 & 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 (45); or to kill any horses, sheep, or other cattle, is felony; but the offender may make his election to be transported for seven years (46); and to maim or hurt such *horses, sheep, or other cattle, is a trespass for which treble damages shall be recovered (47).

By statute 4 & 5 W. & M. c. 23. to burn 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 offence, or wilfully doing any thing tending to the immediate loss of such ship, is felony without benefit of clergy (48).

(43) By 15 Car. II. c. 17. § 13. maliciously to cut down or to destroy any works for conveying the waters of the great Bedford level, is subject to the same punishment.

(44) Vide ante, 145, note (6), where it will be seen that these offences are provided for under Mr. Peel's Acts.

(45) By statute 7 and 8 Geo. IV. c. 30, § 17. maliciously setting fire to any stack of corn, grain, pulate, straw, hay, or wood, is a capital felony; and setting fire to any crops of corn, grain, or pulse, whether standing or cut down, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, wheresoever growing, is a felony punishable with transportation not exceeding seven years, or imprisonment not exceeding two years, with private or public whipping for male offenders. The 43 Eliz. c. 13; 4 W. and M. c. 23; 22 and 23 Car. II. c. 7; 1 Geo. I. st. 2, c. 49; 6 Geo. I. c. 16; 9 Geo. I. c. 22; and 28 Geo. II. c. 19, § 3, are repealed by 7 and 8 Geo. IV. c. 27.

(46) Vide ante, 236, note (24). This offence now amounts to a capital felony.

(47) By statute 7 and 8 Geo. IV. c. 30, § 16. maliciously killing, maiming, or wounding any cattle, is a felony punishable with transportation for life, or not less than seven years, or imprisonment not exceeding four years, with private or public whipping. The 22 and 23 Car. II. c. 7; 14 Geo. II. c. 6; and 15 Geo. II. c. 34, on this head, are repealed by 7 and 8 Geo. IV. c. 27. By § 25, it is provided, that malice against the owner of the property destroyed, shall not be essential to any offence under the Act.

(48) By 7 and 8 Geo. IV. c. 30, § 9, maliciously setting fire to, or in anywise destroying, any ship or vessel, whether in a finished or unfinished state, is a capital felony. And by § 10, maliciously damaging any ship otherwise than by fire, is a felony, punishable with transportation for seven years, or imprisonment not exceeding two years, with private or public whipping. And by § 11, exhibiting
ciously 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 person passing in the streets or highways, with intent so to do, is felony. This was occasioned by the insolenoe 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 privately cutting, or casting aqua fortis in the streets upon such as wore them (49).

By statute 9 Geo. I. c. 22. (50) 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 Roberddsmen, or followers of Robert Hood, that in the reign of Richard the First committed great outrages on the borders of England and Scotland) (I) ; 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 out-house (which is extended by statute 9 Geo. III. c. 29, to the malicious and wilful burning or setting fire to all kinds of mills) (51), or to any hovel, cock, mow, or stack of corn, straw, hay, or wood (52); or unlawfully and maliciously to break down the head of any fish-pond, whereby the fish shall be lost or destroyed (53); or in like manner to kill, main, or wound any cattle (54); or cut down or destroy any trees planted in an avenue, or growing in a garden, orchard, or plantation, for ornament, shelter, or profit (55); 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 (56).

In like manner by the Roman law,

false lights or signals to bring any ship or vessel into danger, or tending to its immediate destruction or destroying the same in distress, or by the loss or destruction, or any of its contents, or preventing any assistance to those on board, is made a capital felony. And by 1 and 2 Geo. IV. c. 75, § 11, injuring or concealing any buoys, ropes, or marks, belonging to any anchor or cable attached to any ship or vessel whatever, whether in distress or otherwise, is punishable with transportation for any term not exceeding seven years, or imprisonment for any number of years at the discretion of the court.

By statute 7 and 8 Geo. IV. c. 31, § 2, it is enacted, "That if any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-plant, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or branch thereof, or in any machinery, whether fixed or moveable, prepared for or employed in any manufacture or branch thereof, or any steam engine or other engine for sinking, draining, or working any mine, or any staithe, building, or erection, used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, shall be feloniously demolished, pulled down, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together, in every such case the inhabitants of the hundred, wapentake, ward, or other district in the nature of a hundred, by whatever name it shall be denominated, in which any of the said offences shall be com-
to cut down trees, and especially vines, was punished in the same degree as robbery (n). By statute 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 (57), or willfully and maliciously to set on fire, or cause to be set on fire, any mine, pit, or depth of coal (58). 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 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 (59). 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 (60). By statutes 6 Geo. III. c. 33. & 48, and 13 Geo. III. c. 33. willfully to spoil [*247] 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 (61). By statute 9 Geo. III. c. 29. willfully and maliciously to burn or destroy any engine or other machines, therein specified, belonging to any mine (62); committed, shall be liable to yield full compensa-

tion to the person or persons dammified by the offense, not only for the damage so done to any of the subjects hereinbefore enumerated, but also for any damage which may at the same time be done by any such offenders to any fixture, furniture, or goods whatever, in any such church, chapel, house, or other of the buildings or erections aforesaid."

By § 3, persons dammified by the offense, or the persons whose property was intrusted, must within seven days after the offense has been committed, go before a justice of the peace residing within the hundred, and state on oath the name of the offender if known, and submit to an examination touching the offense, and become bound to prosecute the offenders when taken. The action must be commenced within three calendar months after the offense.

By § 4, all process in the action must be served on the high constable, who within seven days must give notice thereof to two magistrates of the division, and who may defend or let judgment go by default, as advised. By § 5, any inhabitant of the hundred may be a competent witness. By § 6, if the plaintiff recovers, the writ of execution is not to be enforced, but the sheriff on receipt of it is to make his warrant to the county treasurer, who is directed to pay the amount. § 7 directs that the high constable's expenses are to be allowed by two justices, and paid by the county treasurer: the whole of such monies are to be levied on the hundred over and above their share of the county rate.

By § 8, where the injury does not exceed 30£, the parties are to give notice to the high constable of their claim for compensation, who is to exhibit the same to two magistrates in the division, and they are to appoint a special petty session between twenty and thirty days afterwards to determine the claim.

By stat. 7 and 8 Geo. IV. c. 27, all prior Acts relating to actions against the hundred are repealed; and the hundred is now no longer liable in cases of robbery, but only in cases where the damage is done by a hostile assembly.

(57) Benefit of clergy was restored by stat. 4 Geo. IV. c. 46, and transportation and imprisonment substituted. This Act is now repealed by 7 and 8 Geo. IV. c. 27, as also the Acts mentioned in the text.

(58) By statute 7 and 8 Geo. IV. c. 30, § 18, maliciously destroying any hop-binds growing on poles in plantations of hops, is a felony liable to transportation for life, or not less than seven years, or imprisonment not exceeding four years, with private or public whipping. And by § 5, setting fire to any coal-mine is a capital misdemeanor.

(59) The latter part of this Act relating to the damages to which the hundred is liable is repealed by 7 and 8 Geo. IV. c. 27; and as to the offences mentioned in the text, 9 Geo. IV. c. 31, s. 26.

(60) Repealed. Vide ante, 244, note (45).

(61) Vide ante, 233, note (11), where the existing punishments are set forth. The statutes mentioned in the text are repealed.

(62) By statute 7 and 8 Geo. IV. c. 27, the
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 (63). 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 shall wilfully and maliciously cut or destroy the same. And these are the principal punishments of malicious mischief (64).

III. Forgery (65), or the crimen falsi, is an offence, which was punished above is repealed. And by 7 and 8 Geo. IV. c. 30, § 6, maliciously causing any water to be conveyed into any mine with intent to damage it, or obstructing any air way, water way, drain, pit, level, or shaft belonging thereto, is punishable as a felony, with transportation for seven years, or imprisonment not exceeding two years, with private or public whipping. By § 7, maliciously destroying or damaging with such intent, any engine or other machines belonging to any mine, or any erections attached thereto, or any bridge, wagon-way, or truck, connected with the same, is a felony and the same punishment as in the last-recited clause.

(63) By statute 7 and 8 Geo. IV. c. 30, § 23, maliciously destroying any description of fence whatsoever, or any wall, stile, or gate, is punishable for the first offence with fine not exceeding 5l. above the value of the injury done, and with imprisonment not exceeding twelve months, with hard labour and private or public whipping for any subsequent offence. By 7 and 8 Geo. IV. c. 29, § 40, stealing, or destroying with intent to steal, any live or dead fence, wooden fence, stile, or gate, is subject to a penalty not exceeding 5l. above the value of the loss or injury sustained for the first offence, and to imprisonment not exceeding twelve months, with whipping for subsequent offences.

And by the same statute, § 41, suspected persons found with any tree, or shrub, underwood, live or dead fence, post, pale, rail, stile, or gate, of the value of two shillings, and not satisfactorily accounting for it, are liable to a penalty of 2l. above the value of the article found.

The following statutes on this head are repealed by 7 and 8 Geo. IV. c. 27; viz., 13 Ed. I. st. 1, c. 46; 6 Geo. I. c. 16; 9 Geo. III. c. 29; 16 Geo. III. c. 30.

(64) In New York there has been no need of enactments like most of those last mentioned. See, as to malicious mischief to animals, bridges, dams, monuments, opening letters, &c. 2 R. S. 695.

(65) Forgery.—We will endeavour to elucidate the nature of, and what constitutes this offence, by considering, 1st. What false making is sufficient. 2ndly. Whether the forgery must be committed; and, 3dly. How far the instrument forged must appear to be genuine. The consideration of what instruments may be the subjects of forgery will follow. See in general, 3 Chit. C. L. 2 ed. 1022 to 1044, a.

1. What false making is sufficient.—It is not necessary that the whole instrument should be fictitious. Making a fraudulent insertion, alteration, or erasure, in any material part of a true document, by which another may be defrauded; the fraudulent application of a false signature to a true instrument, or a real signature to a false one; and the alteration of a date of a bill of exchange after acceptance, by which its payment may be accelerated, are forgeries. 1 Hale, 683, 4, 5. 4 T. R. 320. Altering a bill from a lower to a higher sum is forging it; and a person may be indicted on the 7 Geo. II. c. 22, for forging such an instrument, though the statute has the word alter in it as well as for forging; in the same case it was held no ground of defence, that before the alteration it had been paid by the drawer and re-issued. R. & R. C. C. 33. 2 East P. C. 979. S. C. So altering a banker's one pound note, by substituting the word ten for the word one, is a forgery, Russ. & Ry. C. C. 101; see 2 Burn J. 24th edit. 491 and 2 East P. C. 986. If a note be made payable at a country banker's, or at their banker's in London, who fails, it is forgery to introduce a piece of paper over the names of the London bankers, who have so failed, containing the names of another banking-house in London. Russ. & Ry. C. C. 164.—2 T. R. 329. 2 Leach, 1040, S. C. and see 2 East P. C. 856. 2 Burn J. 24th edit. 492. S. C. Expunging an indorsement on a bank note with a liquor unknown, has been held to be an erasure within 8 & 9 W. III. c. 20. 3 Pr. Wins. 419. The instrument must, in itself, be false; for if a man merely pass for another, who is the maker or indorser of a true instrument, it is no forgery, though it may be within the statute of false pretences. 1 Leach, 229. The instrument counterfeited must also bear a resemblance to that for which it is put forth, but need not be perfect or complete: it is sufficient if it is calculated to impose on mankind in general, though an individual skilled in that kind of writings would detect its fallacy. Thus, if it appears that several persons have taken forged bank notes as good ones, the offender will be deemed guilty of counterfeiting them, though a person from the bank should swear that they would never impose on him, letting, in several respects, defective. 2 East P. C. 950. And it has been held that a bank note may be counterfeited, though the paper contains no water-mark, and though the word pound is omitted, that word being supplied by the figures in the margin. 1 Leach, 175. For it was said that in forgery there need not be an exact resemblance, but it is
by the civil law with deportation or banishment, and sometimes with death (o). It may with us be defined (at common law) to be, "the fra-

(o) Inst. 4. 18. 7.

sufficient if the instrument counterfeited be primi facie fitted to pass for the writing which it represents. 1 Leach, 179. As to how far the instrument should appear genuine, and the forging of fictitious names, see infra, Div. III.

II. WITH WHAT INTENT THE FORGERY MUST BE COMMITTED.—The very essence of forgery is an intent to defraud, and, therefore, the mere imitation of another's writing, the assumption of a name, or the alteration of a written instrument, where no person can be injured, does not come within the definition of the offence. Most of the statutes expressly make an intent to defraud a necessary ingredient of the instrument, if it were genuine, although, from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose on him, and although the object was general, to defraud whoever might take the instrument, and the intention of defrauding, in particular, the person who would have to pay the note, did not enter into the prisoner's contemplation. R. & Ry. C. C. 291, and see Id. 769.

III. HOW FAR THE INSTRUMENT FORGED MUST APPEAR GENUINE.—It is of no consequence whether the counterfeited instrument be such as if real would be effectual to the point in the crime; whether the offence of uttering an instrument, if genuine, did not enter into the prisoner's contemplation. 1 Leach, 179, and see Infra, Div. III.

If it were genuine, although, from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose on him, and although the object was general, to defraud whoever might take the instrument, and the intention of defrauding, in particular, the person who would have to pay the note, did not enter into the prisoner's contemplation. R. & Ry. C. C. 291, and see Id. 769.

A defect in the stamp will not avail the prisoner, 1 Leach, 237, 8, in notis. 2 East P. C. 953; and it has even been decided, that if there be no stamp at all on a counterfeited promissory note, it may still be forgery, 2 Leach, 703—though this case seems to go too far; for how can a promissory note, without the appearance of a stamp, have such a similitude to a genuine instrument as is requisite to constitute forgery? But though the validity of the instrument if real is thus immaterial, it must not appear on its face, so that no one of common understanding would give it credit. Thus, it will not be forgery to fabricate a will for land, as attested by only two witnesses. 2 East P. C. 953. Nor is it felony to counterfeit a bill of exchange for a sum more than twenty shillings and less than five pounds, without avowing the abode of the forger and being attested by a subscribing witness; as such an instrument is by 17 Geo. Ill. c. 30, absolutely void. 1 Leach, 431. These cases will sufficiently explain the law on this subject.
dulent making or alteration of a writing to the prejudice of another man's right; for which the offender may suffer fine, imprisonment, and pillory (66). And also by a variety of statutes, a more severe punishment is inflicted on the offender in many particular cases, which are so multiplied of late as almost to become general. I shall mention the principal instances.

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 grievèd of double costs and damages; by standing in the pillory, and having both his ears cut off, and his nostrils slit, and seared; by forfeiture to the crown of the profits of his 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 any personal chattels, the same forfeiture is given to the party grievèd; 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) (67); of bills of credit issued from the ex-


(66) The punishment of pillory is now taken away by 56 Geo. III. c. 138.

Besides this punishment, the defendant is held incapable of being examined as a witness till restored to competence by the king's pardon. Com. Dig. Testmoigne A. 3, 4. And by 12 Geo. I. c. 29, in case persons convicted of forgery, shall afterwards practise as attorneys, solicitors, or law agents, the court where they shall examine the matter in a summary way, and order the offender to be transported for seven years.

(67) As to the further provisions relative to this description of forgery, vide 41 Geo. III. c. 30; 45 Geo. III. c. 89; 52 Geo. III. c. 138, and 1 Geo. IV. c. 92, under which last Act relating to bank notes, by § 11, persons engraving, cutting, etching, scraping, or by other means marking upon any plate of copper, brass, steel, &c., any engraving, &c., for the purpose of producing a print or impression of all or any part of a bank note, or a blank bank note of the said governor and company without their authority, or having unlawfully in their possession any such plate, &c., or wilfully disposing of any such blank bank note, or part of such bank note as aforesaid, are liable to transportation for fourteen years.

By § 2, persons unlawfully cutting, etching, &c., or procuring, &c., or assisting in making upon any plate of copper, brass, steel, &c., any line work, as or for the groundwork of a promissory note or bill of exchange, which shall be intended to resemble the groundwork of a bank note of the governor and company, or any device, the impression from which shall contain the words "Bank of England" in white letters upon a black or dark ground, with or without white lines therein, or shall contain in any part thereof the numerical sum or amount of such note or bill in black and red register work, or shall shew the reversed contents thereof, or shall contain any words, figures; characters, or patterns intended to resemble the ornaments on such note, or any word, figure, &c. in white on a black ground, intended to resemble the amount in the margin of such note, or using such plate or other instrument intended to represent the whole or part of any such note, or knowingly having in their possession any such plate, &c., or disposing of any such paper impressions, or knowingly having such in their custody, are guilty of felony, and liable to transportation for fourteen years.

The bank having preferred one indictment for uttering a forged note, and another for having the same in possession, and having elected to proceed on the latter charge, it was held, that although facts sufficient to support the capital charge were made out in proof, an acquittal for the minor offence ought not to be directed, because the whole of the minor charge was proved, and did not merge in the larger. R. & R. C. C. 378. On an indictment for forging a bank note, the cashier who signed "for the governor and company of the bank of England," is a competent witness to prove the forgery; for he is not by such a signature personally responsible for the payment of the note; 1 Leach, C. C. 311. R. & R. C. C. 378; but he is not an essential witness, as his handwriting may be disproved by other witnesses. Rex v. Hughes, and Rex v. McGuire, 2 East, P. C. 1002; 1 Leach, C. C. 311.

What circumstances are sufficient to con-
chequer (q) (68); of South-sea bonds, &c. (r); of lottery tickets or order (s) (69); of army or navy debentures (t); of East India bonds (u); of writings under the seal of the London, or royal exchange assurance (v) (70): of the hand of the receiver of the pre-fines (x) (71); or of the accountant-general and certain other officers of the court of chancery (y) (72); of a letter of attorney or other power to receive or transfer stock or annuities; and on the personating a proprietor thereof, to receive or transfer such annuities, stock, or dividends (z) (73); 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 other forged notes, knowing them to be forged. Rex v. Whitley, 2 Leach, C. C. 983. So upon an indictment for uttering a forged note, evidence is admissible of the prisoner's having, at a former period, uttered others of a similar manufacture; and that others of similar fabrication had been discovered on the files of the bank with the prisoner's handwriting on the back of them, in order to shew the prisoner's knowledge of the note mentioned in the indictment being a forgery. Rex v. Ball, R. and R. C. C. 132. But in order to shew a guilty knowledge on an indictment for uttering forged bank notes, evidence of another uttering, subsequent to the one charged, is inadmissible, except the latter uttering was in some way connected with the principal case, or it can be shewn that the notes were of the same manufacture; for only previous, or contemporaneous acts, can shew, quo animo, a thing is done. Rex v. Taverner, Car. C. L. 195.

So, if a second uttering be made the subject of distinct indictment, it cannot be given in evidence to shew a guilty knowledge in a former uttering. Rex v. Smith, 2 C. and P. 633. The person whose name was forged was formerly held to be not a competent witness to prove the forgery. Rex v. Russell, 1 Leach, C. C. 8. But he has recently been made competent by the 9 G. IV. c. 32, s. 2.

(68) See also the 48 Geo. III. c. 1. 58 Geo. III. c. 23, s. 38. & R. & R. C. C. 67.

(69) This is now a clergyable felony, 4 Geo. IV. c. 60. s. 11.

(70) See 6 Geo. I. c. 4. 29 Geo. III. c. 83. s. 22.

(71) See the 52 Geo. III. c. 143. 2 East P. C. 911. 43 Geo. III. c. 54.

(72) Forging a writing purporting to be an office copy of a report or certificate of the accountant-general that money has been paid into the bank, or forging an office copy of a certificate or receipt of one of the cashiers of the bank, is within this act. 1 Leach, 61. 2 East P. C. 898.

(73) See also the 33 Geo. III. c. 30, further providing against forgeries and frauds in the transfer of stock.
letters of administration, in order to receive such payments (74); and the
forging or procuring to be forged, and likewise the uttering, or
publishing, as true, of any counterfeited seaman's *will or pow-
ner (a) (75): 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) (76); and the forging of any marriage-register or
license (d) (77); all which are by distinct acts of parliament made felo-
nies, without benefit of clergy. By statute 13 Geo. III. c. 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 pu-
ished with transportation for fourteen years (78). By statute 11 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. (79) on such as counterfeit the common seal

(a) Stat. 31 Geo. II. c. 10. 9 Geo. III. c. 30.
(b) Stat. 4 Geo. II. c. 18.
(c) See the several *stamp acts.
(d) Stat. 26 Geo. II. c. 35.

(74) Vide also 3 G. III. c. 16; 26 G. III. c. 23; 32 G. III. c. 33; 55 G. III. c. 60; 57 G.
III. c. 127; 4 G. IV. c. 46; and 5 G. IV. c. 107; by § 5 of which latter statute, the pu-
ishment previously due to these offences is changed to transportation for life or otherwise.
Personating a seaman who is dead is without the Act, as where a prisoner applied at the
Greenwich hospital for prize money in the name of J. B., and J. B. was dead, and sup-
posed to be so at the hospital, though the pris-
oner did not obtain the money, he was con-
victed of the offence. Rex v. Martin, R. and
R. C. C. 324. So where a prisoner personat-
ed one, "S. Cuff," who was dead, and whose
prize money had been paid to his mother, it
was held, that it did not vary the prisoner's
guilt, and that he might be convicted on the
54 G. III. c. 93, § 69. Rex v. Cramp, id. 357.
To constitute the offence of personating the
name of a seaman under the 57 G. III. c. 127,
§ 4, the person entitled, or really supposed to
be so, to prize money, must be personated;
personating a man who never had any con-
exion with the ship, is not an offence within
the Act. Rex v. Tannet, id. 351. And by 59
G. III. c. 56, § 3, persons falsely representing
themselves as the next of kin of any seaman,
&c., or any agent whose authority is revoked,
offering to receive wages, pay, prize money,
or other allowance, are guilty of a misdemeanour;
by § 15, inserting a false date in any order for
the payment of prize money is made a misde-
mener; and by § 17, persons really entitled
to prize money, &c., using false orders or
certificates to procure the same, are guilty of
a misdemeanor.

(75) See also 55 G. III. c. 60, § 31, and 59 G.
III. c. 56, by the 18th s. of which, the false-
ly personating officers, seamen, marines, su-
pernumeraries, &c., entitled to wages, or their
representatives, or forging or uttering any
letter of attorney, order, bill, ticket, or other
certificate, assignment, last will, or other
power whatsoever, in order to obtain any
prize money, &c.; or uttering any such let-
ter of attorney, order, bill, &c., knowing
the same to be forged, in order to receive
any prize money, &c.; or taking a false oath
to obtain a probate or letters of admin-
istration in order to receive prize money, &c.;
or demanding, or receiving wages, &c., know-
ing the will to be forged, or the probate or
administration to have been obtained by a
false oath with intent to defraud, is made a
capital felony. By 1 and 2 G. IV. c. 49, s. 3.
procuring persons to sign a false petition un-
der this Act, or procuring others to demand
money due, or supposed to be due, to seamen,
&c., under a certificate from the inspector
of seamen's wills, is punishable with transpor-
tation for seven years; and, by s. 4, procure-
ing others to utter any forged letter of attorney,
or other document, to obtain seamen's wages,
&c., or procuring others to demand or receive
such wages, &c., is punishable with death.
By 7 G. IV. c. 16, s. 38, the personating any
Chelsea pensioner, &c., or forging any docu-
ments, or knowingly uttering such forgeries to
obtain any pension, &c., is punishable with
transportation for life or otherwise. A bill,
drawn on the commissioners of the navy for
pay, may be a bill of exchange, and a person
may be indicted for the forgery of it as such,
although it is not in the form prescribed by 35
G. III. c. 94. Rex v. Chisholm, R. and R. C.
C. 297.

(76) By 6 G. IV. c. 106, forging or uttering
the drafts or other instruments of the receiver
general or controller general of the customs, is
a capital felony. Vide also as to stamps, 37
G. III. c. 90; 44 G. III. c. 98; 48 G. III.
c. 149; 52 G. III. c. 143; 55 G. III. c. 184, and
185; and 6 G. IV. c. 119, which makes it a
capital felony to forge or utter forged stamps
to newspapers; see, also, 9 G. IV. c. 18,
which makes it a capital felony to forge the
stamps of any cards or dice.

(77) The forgery of documents relating to
marriage registers and licences, is punishable
now only with transportation for life, 4 Geo.
IV. c. 76, s. 29.

(78) This is now a capital felony.

(79) Revived by 33 Geo. III. c. 17. s. 23.
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 sum of any accountable [\*250] 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 (80). 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 (81).

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:

\[(e) \text{ Stat.} 31 \text{ Geo. II. c. 22, § 78.} \]
\[(f) \text{ Post.} 116, \&c.\]

(80) See 45 G. III. c. 89; 49 G. III. c. 35; and 8 G. IV. c. 8, respecting widows’ pensions, remittance bills, the forging of which, or procuring others to forge them, is made a felony punishable with transportation.

(81) It has frequently been determined, that drawing, indorsing, or accepting a bill of exchange in a fictitious name is a forgery. Boland’s case, &c., Leach, 78, 159, 192; 1 Hen. Black. 588; Post. 116. It is also forgery to fabricate a will by counterfeiting the name of a pretended testator, who is still living. Cogan’s case, ibid. 355.

If a person puts his own name to an instrument, representing himself to be a different person of that name with an intent to defraud, he is guilty of forgery. 4 T. R. 28.

But where a bill of exchange is indorsed by a person in his own name, and another represents himself to be that person, he is not guilty of forgery, but it is a misdemeanour. Heyev’s case, Leach, 268.

A bill or note may be produced in evidence against a prisoner prosecuted for the forgery of it; and he may be convicted upon the usual evidence of the forgery, though it has never been stamped pursuant to the Stamp Acts. Hawkewood’s and Reculist’s cases, Leach, 292, and 811. For the forgery in such a case is committed with an intent to defraud; and the legislature meant only to prevent their being given in evidence, when they were proceeded upon to recover the value of the money thereby secured. But Lord Kenyon has declared that he did not approve of the decision of the majority of the judges in these cases. Peake, 168. It has been declared that the forgery of a bill of exchange in a form which rendered it void under the 17 Geo. III. c. 30, (see 2 book, 467,) was not a capital offence, because if real, it was not valid or negotiable. Moffat’s case, Leach, 483.

Every indictment for forgery must set out the forged instrument in words and figures. Mason’s case, 1 East, 182.

But it is sufficient to set forth the receipt at the bottom of an account, without setting out the account itself. Testick’s case, ibid. 181. The word purport, in an indictment for forgery, signifies the substance of an instrument, as it appears on the face of it; tenor means an exact copy of it. Ibid. 180. Leach, 733.

The most effectual statute for the prevention of the forgery of bank notes, is the 41 Geo. III. c. 41. which enacts, that if any one shall knowingly have in his possession, or in his house, any forged bank notes, knowing the same to be forged, without lawful excuse, he shall be guilty of felony, and shall be transported for fourteen years.

And if any person shall make any plate or instrument for forging bank notes, or any part of a bank note, or shall knowingly have them in his possession without authority in writing from the governor and company of the bank of England, he shall be guilty of felony, and shall be transported for seven years.

But before this statute this must have been an indictable offence as a misdemeanor. See ante, 99, note (7).

By the 45 Geo. III. c. 89, the statutes for the punishment of forgery are extended to every part of Great Britain.
against the king or supreme magistrate, the father and protector of that community; against 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 these several heads comprehend the whole circle of crimes and misdemeanors, with the punishment annexed to each, that are cognizable by the laws of England (82), (83).

(89) See a complete collection of the Acts of Parliament relating to the crime of forgery, (too numerous even to abstract here,) in Collyer's Crim. Sta. 142, et seq., with the notes thereon.

(83) In New-York, the Revised Statutes contain the following provisions as to forgery.

Falsely altering or counterfeiting the inspection bill or receipt for duties of an inspector of salt, with intent to defraud the state; or falsely altering or counterfeiting his brand, or by imprisonment in the state-prison for not less than 3 nor more than 6 years. (1 R. S. 271, § 115.) Forging the name of a manufacturer on any barrel or cask of salt, subjects the offender to a fine of 25 dollars, and damages to the party aggrieved. (Id. 273, § 128.) Altering or counterfeiting brands on a flour barrel, causes a forfeiture of 100 dollars for every cask so branded: (Id. 539, § 21.) branding casks of beef or pork without authority, is punishable by a fine of 15 dollars per cask: (Id. 546, § 57.) counterfeiting the brand of an inspector of pot and pearl ashes, is punishable by a fine of 500 dollars. (Id. 549, § 78.) Counterfeiting the brand of an inspector of fish oil, is punishable by a fine of 25 dollars. (Id. 555, § 108.) Forging, altering, or counterfeiting any marks, or numbers, or weight-note of an inspector of tobacco, is a misdemeanor. (Id. 569, § 181.) Counterfeiting or fraudulently altering or defacing the brands or other marks of any vessel, or causing to be punished, by fine not exceeding 2000 dollars, and imprisonment not exceeding 3 years. Counterfeiting or fraudulently altering or defacing the marks put by the owner on a hogshead, barrel, or half-barrel, of flour, meal, beef, pork, pot or pearl ashes, fish, fish oil, liver oil, or distilled spirits, is punishable by fine not exceeding 500 dollars, or imprisonment not exceeding one year. (Id. 572, § 193, 194.) Falsely making, altering, forging, or counterfeiting, any lottery ticket, or aiding therein, or uttering the same with intent to defraud, subjects the offender to imprisonment. (Id. 671, § 53.) Forging, &c. any ill of real or personal property, or any instrument purporting to affect real estate, or any certificate of acknowledgment or proof of any instrument which may be recorded; or any certificate purporting to be issued by the state for the payment of money, or to acknowledge the receipt of property; or any certificate of any interest in a public stock created by any law of the state, or any other evidence of any liability of the state, purporting to be issued by a public officer; or any indorsement or other instrument purporting to transfer the right of any holder of such certificate, with intent to defraud, is forgery in the first degree. (2 R. S. 670, § 22, 23.)

Forgery in the second degree, is the forging, &c. of the great or privy seal, or the seal of any public office authorized by law, or any court of record, or of any company incorporated by this state, or the impression of any such seal. 2. The altering, destroying, corrupting, or falsifying, with intent to defraud, any record that is evidence, or any record of any judgment or enrollment of a decree, or the return of any officer, court, &c. to any process of any court. 3. The falsely making, forging, or altering any entry in any book of records, or any instrument purporting to be any record or return specified in the last section. 4. Willfully and falsely certifying, by an officer authorized to take the proof or acknowledgment of any instrument that may be recorded, that the same was by him authorized to be recorded. (Id. 671, § 24, &c.) 5. Counterfeiting any gold or silver coins current by custom or usage within this state. (2 R. S. 671, § 24, &c.) 6. Making or engraving, or causing to be made or engraved, any plate in the form of any evidence of debt, &c. issued by any bank incorporated by any state of this, or any other country, without the authority of such bank. 7. Having any such plate, or impression from it, without the authority of such bank, with the intent of having any impression made and passed off, or of having the impression filled up to be passed off. 8. Making, or causing to be made, or having, any plate upon which are engraved any figures or words, which may be used to falsely alter any evidence of debt issued by such bank, with intent so to use the same. (2 R. S. 672, § 20.) 9. Selling, &c. offering or receiving, for any consideration, any forged evidence of debt, knowingly, and with intent to have the same passed. (Id. 32.) 10. Having any forged evidence of debt of any such bank as above specified, with intent to utter the same and to defraud. (Id. 36.)

Forgery in the third degree is,

1. Counterfeiting the gold and silver coin of a foreign government, with intent to export it and defraud the foreign government or its subjects. (Id. § 29.)

II. Forging, &c. with intent to defraud, and so that any one may be injured in his person or property: 1st. Any instrument purporting to be any process, or any certificate, order, or allowance of any competent court or officer; or to be any pleading or proceeding filed or entered in any court; or to be any license or authority authorized by any statute. 2. Any instrument purporting to be the act of another, by which any pecuniary demand or rights of property may be affected, and for which a punishment is not before provided.

III. Making a false entry, or falsely altering an entry, with intent to defraud, in any book of accounts kept in the office of the comptroller, or of the treasurer or surveyor general of the state, or of any county treasurer, by which any demand, right, or claim may be affected; or in any book of accounts kept
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 a repetition of the offence, than any immediate pain or punishment. And indeed, if we consider all human punishments in a 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 conduct to one and the same end, of preventing future crimes, whether that

(a) Beccar. ch. 41.

by any monetied corporation within the state, or kept by such corporation or its officers, and delivered, or intended to be delivered, to any one dealing with such corporation, and by which any pecuniary claim may be affected. (Id. 34, 35.)

Forgery in the fourth degree, is: 1. Having any forged or counterfeited instrument, the forgery of which is above (i.e. in 2 R. S. 670, &c.) declared to be punishable, (except those enumerated in the 30th section,) or having any counterfeit of any gold or silver coin current in this state, knowing the forgery or counterfeiting, and intending to defraud any one and pass the same. (Id. § 37, 38.) The uttering as true a forged instrument or counterfeit coin, the forgery or counterfeiting of which is above (2 R. S. 270, &c.) made an offence, is punishable as such forgery is, unless, 2. The utterer received the instrument or coin in good faith, and for a valuable consideration without circumstances of suspicion, and then it is forgery in the fourth degree. (Id. § 39, 40.) Making an instrument in one's own name, and passing it as the act of another of the same name, with intent to create, discharge, affect, &c. any right or property, is the same offence as forging the name of a person of a different name. (Id. § 41.)

Forgery may also be committed by the total erasure or obliteration of an instrument, or by putting together parts of several genuine instruments so as to produce one. And it may be committed though all the instrument but the signature be printed, or by falsely making any evidence of debt purporting to be issued by any corporation having authority for that purpose, and affixing a pretended signature of any person as an agent or officer of such corporation, though such person was not such officer, or was not in existence.

Forgery in the first degree, is punished by imprisonment in the state-prison for not less than 10 years: in the second degree, for not less than 5 nor more than 10: in the third degree, for not more than 5: in the fourth degree, by like imprisonment for not more than 2 years, or by imprisonment in a county jail for not more than 1 year. (2 R. S. 675, § 42.)
can be effected by amendment, disability, or example. But the caution, which 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 freemen 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): "trdat 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.

1. 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 to be indebted to the crown in the sum required (for instance 100l.), with condition to be void and of none effect, if the party shall appear in court 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 (2), 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) (3), may demand such security according to their own discretion; or it may be granted at the request of any subject, upon due cause shewn, provided such demandant be under the king's protection; for which reason it has been formerly doubted, whether Jews, pagans, or persons convict of a praemunire were entitled thereto (f). Or, if the justice is

(c) See Book I. page 114.  
(d) See Book I. page 350.  
(f) I. Hawk. P. C. 126.

(1) It is now settled that a justice of the peace is authorized to require surety to keep the peace for a limited time, as two years, according to his discretion, and that he need not bind the party over to the next sessions only, 2 B. & A. 278; but if a recognizance to appear at the sessions be taken, and an order of court for finding sureties applied for, articles of the peace must be exhibited. 5 Burn J. 24 ed. 304. 1 T. R. 696.

(2) But by 1 and 2 Ph. & M. c. 13. in cases of felony, the recognizances are to be certified to the general gaol delivery.

(3) A secretary of state or privy-councilor cannot bind to keep the peace or good behaviour. 11 St. Tri. 317.
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 [*254] cannot be bound over in any other place than the courts of *king’s bench or chancery* (4): though a justice of the peace has a power to require sureties of any other person, being comos 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 coverts, 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.

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, assises, 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 expressed 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 shew for what cause such a recognizance, with sureties for the *peace*, is grantable; and then, how it may be forfeited.

1. Any justice (5) 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 [*255] about with unusual weapons, *or* attendance, to the terror of the people; and all such as he 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 shew that he has just cause to be so, by reason of the other’s menaces, attempts, or having lain in wait for him; and

---

(g) F. N. B. 80. 2 P. Wms. 202.  (k) 1 Hawk. P. C. 129.
(h) 1 Hawk. P. C. 127.  (l) Ibid. 126.
(i) Stra. 1207.

(4) A peeress may demand surety of the peace against her husband. Post. 359. 2  (5) See note 29. p. 350, book 1, as to law of

will also farther swear, that he does not require such surety out of malice, or for mere vexation (m) (6). 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 willful 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 unmeaning 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 them that be not of good fame, wherever they be found; to the intent that the people be not troubled or endangered, 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 (7). 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 statutes, as persons not of good fame: an expression, it must be owned, of so great a latitude, as leaves much to be determined by the discretion of the magistratc himself. But if he commits a man for want of

(m) 1 Hawk. P. C. 127.
(n) Ibid. 128.
(o) (p) Ibid. 131.

(6) The surety of the peace will not be granted but where there is a fear of some present or future danger, and not merely for a battery or trespass, or for any breach of the peace that is past. Dalt. c. 11.

The articles to entitle a party to have sureties of the peace must be verified by the oath of the exhibitor. 1 Stra. 527. 12 Mod. 243. The truth of the allegations therein cannot be controverted by the defendant, and if no objections arise to the articles exhibited, the court or justice will order securities to be taken immediately. 2 Stra. 1292. 13 East. 171, n. If the articles manifestly appear to contain perjury, the court will refuse the application, and even commit the exhibitor. 2 Bttt. 806. 3 Bttt. 1092. The articles will not be received if the parties live at a distance in the county, unless they have previously made application to a justice in the neighbourhood. 2 Bttt. 780; unless the defendant be very old, &c. 2 Stra. 633. 2 Bttt. 1099.

(7) See note (1), ante, 253.
sureties, he must express the cause thereof with convenient certainty; and take care that such cause be a good one (q).

[*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 the proof of any actual crime, to punish them by a forfeiture of their recognizance (s).

CHAPTER XIX.

OF COURTS OF A CRIMINAL JURISDICTION (t).

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 reform-

(q) 1 Hawk. P. C. 132. (r) Ibid. 133.

(8) See 7 Geo. IV. c. 64, § 31, and 3 Geo. IV. c. 46, § 37; also 1 R. S. 632.
(1) In New-York, the lowest criminal court is the special sessions, which consists of three justices of the peace, or a judge of the county and two justices; and has cognizance of all cases of petit larceny charged as a first offence, and of other smaller offences. (See 2 R. S. 711, § 1.) The trial is by jury. In the city of New-York, the court consists of any three of the judges of the common pleas, of whom the first judge, the mayor, or recorder must be one; and there is no jury: but the accused may, when sentence is pronounced, appeal, and then the sentence is void. There is also a court of general sessions in each county, which has cognizance of all offences not punishable with death or imprisonment in the state-prison for life, and of other matters. (See 2 R. S. 203, § 4.) In each county twice every year the court of oyer and terminer sits, and has cognizance of the greatest offences. (2 R. S. 201, § 4, and 205, § 30.) Bills of exceptions may be taken to the decisions of these courts and carried to the supreme court. (Id. 736, § 21, &c.) Writs of error also lie on their judgments, (Id. 740, § 14,) but proceedings are not stayed of course. (Id. 736, § 29; 740, § 16, &c.)
ing 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. 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; vis.

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 (2). 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 (3), (4). And they usually (in case of an impeachment of a peer

(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 Bereford, 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 this 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 of the notoriety and heinousness of his crimes, to receive the charge, and to 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 said judgment 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. Parli. 4 Edw. III. s. 2 & 6. 2 Brad. Hist. 190. Selden, judic. in parl. ch. 1.)

(2) The house of representatives of the U. S. has the sole power of impeachment; (Const. Art. 1, sect. 2, § 5.) the senate the sole power of trying impeachments, and two thirds of the members must concur. (Id: sect. 3, § 6.) The like provision exists in New-York, as to the impeachment of the civil officers of the state. (Const. New-York, Art. 6, sect. 1, 2.) A judgment on impeachment in either case does not extend further than to removal and disqualification from offices; but this does not prevent an indictment for the same crime.

(3) For misdemeanors, as libels, riots, &c. peers are to be tried, like commoners, by a jury, for "at the common law, in these four cases only, a peer shall be tried by his peers, viz. in treason, felony, misprision of treason, and misprision of felony; and the statute law which gives such trial, hath reference unto these, or to other offences made treason or felony; his trial by his peers shall be as before; and to this effect are all these statutes, viz: 32 H. VIII. c. 4, Rastall 401, pl. 10; 33 H. VIII. c. 12, Rastall 415; 35 H. VIII. c. 2, Rastall 416; and in all these express mention is made of trial by peers. But in this case of a praemunire, the same being only in effect but a contempt, no trial shall be here in this of a peer by his peers." Per Fleming, C. J., assented to by the whole court, in Rex v. Lord Vaux, 1 Bulstr. 197.

(4) But according to the last resolution of
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 a 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 misdeemssors 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 not or cannot punish. Of these the representatives of the people, or house of commons, cannot properly judge; because their constituents are the 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,

(c) 1 Hal. P. C. 330.
(e) Tacit. de mor. Germ. 12.
(f) See Book IL pag. 269.
(g) Montesq. Sp. L. xi. 6.

the house of lords, a commoner may be impeached for a capital offence.—On the 26th of March, 1680, Edward Fitzharris, a commoner, was impeached by the commons of high treason. Upon which the attorney-general acquainted the peers that he had an order from the king to prosecute Fitzharris by indictment, and a question thereupon was put whether he should be proceeded against according to the course of the common law or by way of impeachment, and it was resolved against proceeding in the impeachment. 13 Lords' Journ. p. 755. Fitzharris was afterwards prosecuted by indictment, and he pleaded in abatement that there was an impeachment pending against him for the same offence; but this plea was over-ruled, and he was convicted and executed. But on the 26th of June, 1689, sir Adam Blair and four other commoners were impeached for high treason, in having published a proclamation of James the Second. On the 24th of July a long report of precedents was produced, and a question was put to the judges whether the record 4 Edw. III. No. 6, was a statute. They answered, as it appeared to them by the copy, they believed it to be a statute; but if they saw the roll itself, they could be more positive. It was then moved to ask the judges, but the motion was negatived, whether by this record the lords were barred from trying a commoner for a capital crime upon an impeachment of the commons. And they immediately resolved to proceed in this impeachment, notwithstanding the parties were commoners and charged with high treason. 14 Lords' Journ. p. 260. But the impeachment was not prosecuted with effect, on account of an intervening dissolution of parliament.
which was insisted on by the house of commons in the case of the earl of Danby in the reign of Charles II. (a); and it is now enacted by statute 12 & 13 W. 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) (5).

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 [*262] parliament, else he is incapable 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 Angliae. 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 the 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 (6): 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 predominant party should most approve of. And accordingly, when the earl of Clarendon fell into disgrace with Charles II., *there was a design [*263] 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 in

(a) Com. Journ. 5 May, 1679.

(i) See ch. 31.

(k) 4 Inst. 58. 2 Hawk. P. C. 5. 421. 2 Jan. 54.

(l) 1 Bulstr. 109.

(m) Prym. on 4 Inst. 46.

(n) Quand un seigneur de parlement serva arcein de treason ou felony, le roy par ses lettres patens

(5) So also the president of the U. S. can pardon all crimes, except in cases of impeachments. (Const. Art. 2, sect. 2, § 1) and the governor of New-York, all except treason and cases of impeachment. (Const. Art. 3, sect. 5.) The vice-president is presiding officer of the senate of U. S. The lieutenant-governor presides over the senate of New-York.

(6) The decision is by a majority, but a majority cannot convict, unless it consists of twelve or more. See ante, book 3. p. 376. note.

A peer cannot have the benefit of a challenge like a commoner. 1 Harg. St. Trials, 199. 399.
duced to fall in with the views of the court (p). But now by statute 7 W. III. c. 3. upon all trials of peers for 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.

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 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 attainer 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.

[*264]* 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 lortes,” 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 caeteri barones, debent interesse judicis cum baronibus, quousque 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 Daub’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

(p) Carte’s Life of Ormonde, Vol. II.
(q) Fost. 141.
(s) Fost. 139.
(t) Lords’ Journ. 15 May, 1679.
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 \(^{[265]}\) in that court, as well as in the court of parliament, yet it never intended 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 \((u)\); 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 trial of popish lords, of 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 \((7)\).

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 misdemeanour or breach of the peace \((8)\), \((9)\). 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 \((10)\). The judges of this court are the supreme coroners of the kingdom. And the court itself is the principal

\(^{(w)}\) Post. 348.
\(^{(x)}\) Beau. Abr. t. Trial, 142.
\(^{(y)}\) See Book III. pag. 41.

\(^{(7)}\) But peeresses by marriage cannot be said to be ennobled by blood; for after the death of their husbands they have even a less estate in their nobility than bishops, it being only \textit{durante viduitate}. See the editor's conjecture how the notion was originally introduced that bishops were not entitled to a trial by the peers in parliament. Book I. p. 401, note. Since that note was written, the editor has been happy in finding what he suggested only as a conjecture drawn from general principles, confirmed by the more extensive learning of the late Vinerian professor Mr. Woodes, who not only has adopted the same opinion, but has adduced in confirmation of it several instances of bishops, who, being arraigned before a jury, demanded the privileges of the church, and disclaimed the authority of all secular jurisdictions. 2 Wood. 593.

\(^{(8)}\) This power in New-York is vested in the court of oyer and terminer. (2 R. S. 203, § 29. See note (1) p. 258 ante.

\(^{(9)}\) Without such statute for that purpose, offences committed out of England are not cognizable by this court.↑ 1 Esp. Rep. 62. 1 Sess. Cas. 245. If, however, any part of an offence be committed in Middlesex, though the rest were committed abroad, an indictment

\(^{\dagger}\) In New-York, stealing in another state and bringing the property here, is punishable in the same way as if the theft were committed there. 2 R. S. 698, § 4, 5.
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 commissioners of oyer and terminer, and general gaol delivery, are at once absorbed and deter-

[*266]* motto: *in the same manner as by the old Gothic and Saxon constitutions, "jure tuto obtinuit, quievisse omnia inferiord judicia, dicente jus rege (z) (11)."

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 stellatâ (c):* which was a court of very original (b), but new-modelled 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 legally over riots, perjury, misbehaviour of sheriffs, and other notorious *misdemens ors, contrary to the laws of the land. Yet, this was afterwards (as lord Clarendon informs us) (c) stretched "to the asserting of all proclamations, and orders of state: to the vindicating of illegal commissions, and grants of monopoloies; 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 proclamation enjoining to the people that which was not enjoined by the laws, and prohibiting that which was not prohibited; and the star-chamber, which con-

(c) Stiernebook, t. 1, c. 2.

(e) This is said (Lamb. Arch. 154) to have been so called, either from the Saxon word *recopan to steer or govern;* or from its punishing the *crimen stellionatus,* or censure: 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. 60. accedes) because *happly the roof thereof was at the first garnished with gilded stars.* As all these are merely conjectures (for no stars are now in the room) this is 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 *stara or starrs,* from a corruption of the Hebrew word *shetar,* a covenant. (Tovey's Angl. judic. 32. Selten, lit. of hon. ii. 34. Uxor Elorice. i. 14.) These stars, by an ordinance of Richard the First, preserved by Howden, 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 star was allowed to be valid unless it were found in some of the said repositories. (Memorandum in Scacc. P. & 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 stars were kept, was probably called *the star-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 star-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 in la chambre des estelles pris en secept at Westminster.—Claw. 41. Edw. III. m. 18.) For in process of time, when the meaning of the Jewish *starrs* was forgotten, the word *star-chamber* was naturally rendered in law-french, la chambre des estelles, and in law-latin camera stellata; which continued to be the style in Latin till the dissolution of that court (12).

(b) Lamb. Arch. 156.

(h) Hist. of Engl. book 1 and 3.

(11) But by the 25 Geo. III. c. 18, it is enacted, that the session of oyer and terminer, and gaol delivery of the gaol of Newgate for the county of Middlesex, shall not be discontinued on account of the commencement of the term, and the sitting of the court of king's bench at Westminster, but may be continued till the business is concluded. And the 32 Geo. III. c. 48, was passed to continue in like manner the sessions of the peace, and of oyer and terminer, held before the justices of the peace for the county of Middlesex.

(12) In one of the statutes of the university of Cambridge, the antiquity of which is not known, the word *starrum* is twice used for a schedule of names. The statute is entitled *De computate in procuratorate,* and it directs that in fine computi flat stirrums per modum dividendae, in quo posentur omnia remanentia in communi cista tam magnas quam pecunias, ac etiam arraecia et debita, ita quod omnibus constare potest evident, in quo statutum universitas fuerit quoad bona, etc. Stat. Acad. Cant. p. 32. Such inventories would be made at the king's exchequer, and the room where they were deposited would probably be called the *star-chamber.*
sisted 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 reason it was finally abolished by statute 16 Car. I. c. 10. to the general joy of the whole nation (d).

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 [*265] as civil part of its authority, 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, stiled 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 16 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 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 *a [*269]

(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 Dyre, Coke, Coke, and other reporters of that age, and some in manuscripts, 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 (Harr. MSS. Vol. I. N° 1226) 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 (13); and a short account of the same, with copies of all its process, may also be found in 18 Rym. Foss. 192, &c.


(f) See Book III. pag. 83.

(g) Duck. de authoris, jur. civ.

(h) 4 Inst. 134. 147.

(13) Hudson's Treatise of the Court of Star-chamber is now published at the beginning of the 2d vol. of Collectanea Juridica.
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 (14), (15).

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 uni-

(14) In the U. S., the admiralty courts are the district and circuit courts of the U. S., which have jurisdiction, exclusive of the state courts, of all offences committed at sea. Story's laws, p. 56, § 9. 11.) The trial, except in civil causes of admiralty and maritime jurisdiction, is by a jury composed of twelve men. The jurisdiction of the commissioners appointed under the 28 Hen. VIII. c. 15. was confined by that statute to treasons, felonies, robberies, murders, and confederacies; and therefore the 39 Geo. III. c. 15. declares, that it is expedient that other offences committed on the seas should be tried in the like manner; and it enacts that every offence committed upon the high seas shall be subject to the same punishment, as if it had been committed upon the shore, and shall be tried in the same manner as the crimes enumerated in the 28 Hen. VIII. c. 15. are directed to be tried. And as persons tried for murder under that statute could not be found guilty of manslaughter, and where the crime was only manslaughter, the offender was acquitted, the 39 Geo. III. c. 15. expressly enacted, that when persons tried for murder or manslaughter committed on the high seas are found guilty of manslaughter only, they shall be subject to the same punishment as if they had committed such manslaughter upon the land. The 46 Geo. III. c. 54. enables the king to issue a similar commission for trying such offences in the same manner in any of his majesty's islands, plantations, colonies, dominions, forts, or factories. The 43 Geo. III. c. 113. s. 2 & 3. provides that any person willfully casting away or destroying a ship or bank, or doing anything tending to the wilful destruction of a ship on the high seas, were not triable by the admiralty jurisdiction under 11 Geo. I. c. 29. s. 7. 2 Leach, 947. East P. C. Addenda, 26. Russ. & Ry. 37. S. C. But now, this is provided for by the statute 43 Geo. III. c. 113. which repeals the statutes 4 Geo. I. c. 12. s. 3. and 11 Geo. I. c. 29. ss. 5, 6, and 7.

The 28 Hen. VIII. c. 15. merely altered the mode of trial in the admiralty court, and its jurisdiction still continues to rest on the same foundations as it did before that statute. Com. Dig. Admiralty, E. 5. It is regulated by the civil law at present, and by statutes, and is subject to the civil law of nations, which may possibly give to that court a jurisdiction with which our common law is not able to invest it. Per Mansfield, C. J. 1 Taunt. 29. The statutes 28 H. VIII. c. 15. and 39 Geo. III. c. 37. do not, however, take away any jurisdiction as to the trial of offences, which might before have been tried in a court of common law; and, therefore, an indictment for a conspiracy on the high seas is triable at common law, on proof of an overt act on shore, in the county where the venue is laid. 4 East, 164. If a pistol be fired on shore, which kills a man at sea, the offence is properly triable at the admiralty sessions, because the murder is, in law, committed both on land and sea, and punished in the admiralty in the same manner as if committed on land. 1 East P. C. 365. 6. And, it is being doubtful whether it could be tried at common law, the statute 2 Geo. II. c. 21. provides that the offender may be indicted in the county where the party died. So the courts of common law have concurrent jurisdiction with the admiralty, in murders committed in Milford Haven, and in all others where the death occurs in this realm. 2 Leach, 1093. 1 East P. C. 363. R. & R. C. C. 243. S. C. Piratically stealing a ship's anchor and cable is a capital offence by the marine laws, and punishable under the 28 Hen. VIII. c. 15.; the 39 Geo. III. c. 57. not extending to this case. R. & R. C. C. 123. The 1 Geo. IV. c. 91. s. 1. provides that the crimes and offences mentioned in 43 Geo. III. c. 58. which shall be committed on the high seas, out of the body of any county, shall be liable to the same punishment as if committed on land in England or Ireland, and shall be inquired of, &c. as treasons, &c. are by 28 Hen. VIII. R. & R. C. C. 286.
versally 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** (s) : 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 in the four northern ones, where they are held only once, and London and Middlesex, wherein they are held eight times (16). 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 **assise** 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 the *com-* mission of the **peace**, was also treated 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, wherein the assises 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 assises; 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 were 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 (17). Sometimes also, upon urgent occasions, the king issues a

---

(i) 4 Inst. 102, 103. Hal. P. C. 22, 32. 2 Hawk. P. C. 14, 23.
(k) See Book III. pag. 60.
(m) See Book I. pag. 351.
(n) See Appendix, § 1.
(o) Ibid.
(p) 2 Inst. 43.

(16) See 2 R. S. 201, § 4, &c.
(17) The 3 Geo. IV. c. 10. enables in certain cases the opening and reading of commissions under which the judges sit upon their circuit, after the day appointed for holding assizes.

Every description of offence, even high treason, is cognizable under this commission, 2 Hale, 35. Hawk. b. 2. c. 6. s. 4. Bac. Ab. Court of Justices of Oyer, &c. B.; and the justices may proceed upon any indictment of felony or trespass found before other justices, 2 Hale, 53. Hawk. b. 2. c. 6. s. 2. Bac. Ab. Court of Justices of Oyer, &c. B. Cro. C. G. C. 2; or may take an indictment originally before themselves, Hawk. b. 2. c. 6. s. 2. 2 Hale, 24; and they have power to discharge, not only prisoners acquitted, but also such against whom, upon proclamation made, no parties shall appear to indict them, which can-
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 proceedings is much the same, as upon general and ordinary commissions (18). Formerly it was [*271] held, in *pursuance of the statutes 8 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 assise 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 (19). It is held before two or more justices of the peace, one of which must be of the quorum. 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 assise. And therefore murders, and other capital felonies, are usually remitted for a more solemn trial to the assises. They cannot also try 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

(q) 4 Inst. 170. 2 Hal. P. C. 42. 2 Hawk. P. C.
(r) 4 Mod. 379. Salk. 406. Lord Raym. 1144.

not be done either by justices of oyer and terminer, or of the peace. Hawk. b. 2. c. 6. s. 6. 2 Hale, 34. It is not imperative on a commissioner of gaol delivery to discharge all the prisoners in the gaol who are not indicted; but it is discretionary in him to continue on their commitments such prisoners as appear to him committed for trial, but the witnesses against whom did not appear, having been bound over to the sessions. Russ. & R. C. C. 173. But it seems clear from the words of the commission, that these justices cannot try any persons, except in some special cases, who are not in actual or constructive custody of the prison specifically named in the commission. Hawk. b. 2. c. 6. s. 5. Bac. Ab. Court of Justices of Oyer, &c. B. But it is not necessary that the party should be always in actual custody, for if a person be admitted to bail, yet he is in law, in prison, and his bail are his keepers, and justices of gaol delivery may take an indictment against him, as well as if he were actually in prison. 2 Hale, 34, 35. The commissions of gaol delivery are the same on all the circuits. Unlike the commission of oyer and terminer, in which the same authority suffices for every county, there is a distinct commission to deliver each particular gaol of the prisoners under the care of its keeper.

The court of general gaol delivery has jurisdiction to order, that the proceedings on a trial from day to day shall not be published till all the trials against different prisoners shall be concluded, and the violation of such orders is a contempt of court, punishable by fine or imprisonment, and if the party refuse to attend, he may be fined in his absence. 4 B. & A. 218. 11 Price, 65.

(18) In New-York, the governor, and in some cases the circuit judges, may issue commissions of oyer and terminer, and gaol delivery. (2 R. S. 204, § 32, and 205, § 35.)

(19) The Michaelmas quarter sessions must now be held in the first week after the 11th Oct. 54 Geo. III. c. 84. If the feast-day fall on Sunday, the sessions are to be held in the week following. 2 Hale, 49.
statutes belong properly to this jurisdiction, and ought to be prosecuted in this court: as, the *smaller misdemeanors against the [*272] public or commonwealth, not amounting to felony; and especially offences relating to the game, highways, alehouses, bastard children, the settlement and provision of 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 statute 8 & 9 W. 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 alehouses, passing the accounts of the parish officers, and the like.

*9. The sheriff's town (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 the 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 freemen 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

---

(*) See Lambard eirenarcha and Burn's Justice. 55.
(†) Stat. 37 Hen. VIII. c. 1. 1 W. & M. st. 1, c. 21.
(v) 4 Inst. 299. 2 Hal. P. C. 60. 2 Hawk. P. C.
(w) Mirr. c. 1, § 13, and 16.
(y) Mirror, c. 1, § 10.
(t) See Book III. pag. 113.
consists in usually lying there: a regulation, which owes its origin to
the laws of king Canute (a). But persons under twelve and 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
[*274] 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 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 misdemesnors, 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
haereda, 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 statute 1
Edw. IV. c. 2.

11. The court of the coroners (c) (20) 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 (21). 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.

[*275] *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 of pie poudre is, to determine all disputes relating to private or
civil property. The object of this jurisdiction (f) is principally the recog-
nizance 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

(a) part 2, c. 19.
(b) Stiernh. de jur. Goth. I. 1, c. 2.
(c) 4 Inst. 271. 2 Hal. P. C. 53. 2 Hawk. P. C.
(d) See Book I. pag. 349.
(e) 4 Inst. 275.
(f) See st. 17 Car. II. c. 19. 22 Car. II. c. 8. 23
Car. II. c. 12.

(20) See 2 R. S. 742.
(21) The finding of such inquest is equivalent to the finding of a grand jury; and a wo-
man tried on the coroner's inquest for the murder of her bastard child, may be found
guilty under 43 Geo. III. c. 58. s. 4. of endeavouring to conceal its birth; there being no
distinction in this respect between the coro-
ner's inquisition, and a bill of indictment re-
turned by the grand jury, 2 Leach. 1095. 3
but, in order to found an indictment on a coro-
ner's inquest, the jurors, and not merely the
coroners, must have subscribed it. Imp. Cor.
65.
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 aediles.

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.

I speak not here of ecclesiastical courts; which punish spiritual sins, rather than temporal crimes, by penance, contrition, and excommunication, pro salute animae; or, which is looked upon as equivalent to all the rest, by a sum of *money to the officers of the court by way of [*276] 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 sober and discreet persons of the king's household.

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 a 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 in and about such execution are *described; from the sergeant of the wood-yard, who fur- [*277]
nishes the chopping-block, to the sergeant-farrier, who brings hot irons to
sear the stump (22).

3. As in the preceding book (l) we mentioned the courts of the two uni-
versities, or their chancellors' 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 chancel-
lor's court of Oxford (with which university the author hath been chiefly
conversant, though probably that of Cambridge hath also a similar juris-
diction) hath authority to determine all causes of property, wherein a privi-
leged 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 con-
tinues: but the trial of treason, felony, and mayhem, by a particular char-
ter, is committed to the university-jurisdiction in another court, namely, the
court of the Lord High Steward of the university.

For the charter of 7 Jun. 2 Hen. IV. (confirmed, among the rest, by
the statute 13 Eliz. c. 29.) cognizance is granted to the university of Ox-
ford 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 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 indict-
ment 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 assise: 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 re-
turns a panel of eighteen freeholders; and another precept to the bedels of
the university, who thereupon return a panel of eighteen matriculated lay-

(22) The 3 H. VII. c. 14, is wholly repeal-
ed by the 9 G. IV. c. 31, as is also the 33 H.
VIII. c. 12, part of s. 6 to s. 18, relating to
this subject. The two courts mentioned in

the text may now, therefore, be considered as
no longer existing. They had for many years
been utterly disused.
men, "laicos privilegio universitatis gaudentes:" and by a jury formed de mediately, 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, [*279] as there has happily been no occasion to reduce them into practice for more than a century past; nor will it perhaps ever 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 assises, and afterwards tried before the high steward by jury. The commissions under the great seal, the sheriffs' 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.

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 shall 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 (2). 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 harassing the freeholders with frequent and troublesome attendances to try every minute offence. But it has of late been so far extended, as, if a check be [*281]
not timely given, to threaten the disuse of our admirable and truly English trial by jury, unless only in capital cases (3). For,

I. Of this summary nature are all trials of offenses 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 offenses; 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 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 exten-

(a) See Book I. p. 319, &c.  
(b) Lambard and Burn.

(3) See observations, Burn J. tit. Convictions; 1 East, 649. Hence it has been a doctrine, that a different rule of evidence, as to the strictness of proof, should be required in the case of proceedings on a summary information, than in an action, see 1 East, 649; but that doctrine now seems to have been properly overruled, 1 East, 655. 1 M. & S. 206; for if the legislature has thought fit to intrust magistrates or other inferior jurisdictions, with the decision in certain matters, their proceedings ought to be governed by the same rules of evidence as affect superior courts.
sive 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 (4).

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); though the justices long struggled the point; forgetting that rule of natural reason expressed by Seneca,

"Qui statuit aliquid, parte inaudita altera, Aequum licet statuerit, haud aequus fuit:"

(c) Salk. 181. 2 Lord Raym. 1405.

(4) Unless a power of appeal be expressly given by the legislature, there is no appeal, 6 East, 514. Wightw. 25. 4 M. & S. 421, as in proceedings against unqualified persons in the game laws, 5 T. R. 218, note 6: but the party has in general a right to a certiorari, to remove the conviction into the court of king's bench, unless that right be expressly taken away. 8 Term. Rep. 542. But though it seems to be a principle, that an appeal ought to be preserved in cases where the certiorari is taken away, yet in many cases although there be no appeal, yet the certiorari is expressly taken away. Per Lord Mansfield, Doug. 552. If a statute, authorizing a summary conviction before a magistrate, give an appeal to the sessions, who are directed to hear and finally determine the matter, this does not take away the certiorari, even after such an appeal made and determined; and Lord Kenyon said, "The certiorari being a beneficial writ for the subject, could not be taken away without express words, and he thought it was much to be lamented in a variety of cases, that it was taken away at all." 8 T. R. 542. Where an appeal is given, the magistrates should make known to the convicted party his right to appeal, but if he decline appealing they need not go on to inform him of the necessary steps to be taken in order to appeal. 3 M. & S. 493. Upon an appeal the magistrates are bound to receive any fresh evidence, although not tendered on the former hearing. 3 M. & S. 153.

Upon a certiorari the conviction of the magistrate is removed into the superior court, but there is not (as upon an appeal) any re-hearing of the evidence or merits; and the court can only look to the form of the conviction, and see from that whether or not the party has been legally convicted, and the certiorari therefore operates in the nature of a writ of error, and no extrinsic objection to the proceedings can be taken. 6 T. R. 376. 8 T. R. 590. If therefore the magistrate, in order to sustain his conviction, should misstate the evidence or other proceeding before him, the remedy is by motion founded on affidavits to the court of K. B. for a rule to shew cause why a mandamus should not issue, requiring the magistrate to state the whole of the evidence adduced before him correctly in his conviction, pursuant to 3 Geo. IV. c. 23. 4 Dowl. & R. 352. If a magistrate willfully misstate material evidence, he will be subject to a criminal information or indictment. 1 East, 185.

(5) "He who decides a case without hearing both parties, though his decision may be just, is himself unjust;" which is adopted as a principle of law by Lord Coke, in 11 Co. Rep. 99. A summons is indispensably required in all penal proceedings of a summary nature by justices of peace. Rex v. Dyer, 1 Salk. 181; 6 Mod. 41; and see the cases collected in 9 Mod. 154, note (a). It is declared by Lord Kenyon to be an invariable rule of law, Rex v. Benn, 6 T. R. 198; and it is stated by Mr. Serj. Hawkins to be implied in the construction of all penal statutes. 1 Haw. P. C. 420. So jealous is the law to enforce this equitable rule, that the neglect of it by a justice in proceeding summarily without a previous summons to the party, has been treated as a misdemeanor, proper for the interference of the court of King's Bench by information; Rex v. Venables, 2 Ld. Ray. 1407; Rex v. Simpson, 1 Str. 46; Rex v. Allington, id. 678; which has been granted upon affidavits of the fact. Rex v. Harwood, 2 Str. 1089; 3 Burr. 1716, 1763; Rex v. Constable, 7 D. & R. 669, 3 M. C. 498. As this is a privilege of common right, which requires no special provision to entitle the defendant to the advantage of it, so it cannot be taken away by any custom. Rex v. Cambridge (University), 8 Mod. 163. Upon a sufficient information properly laid, the magistrates are bound to issue a summons, and proceed to a hearing; and if they refuse to do so, will be compelled
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 (6); and then make his conviction of the offender, by mandamus. Rex v. Benn, 6 T. R. 195. The summons should be directed to the party against whom the charge is laid; and should in general be signed by the justice himself by whom it is issued. Rex v. Stevenson, 2 East, 365. Where a particular form of notice is prescribed by the Act, that must be strictly pursued. Rex v. Croke, Cowp. 30. The intention of the summons being to afford the person, accused the means of making his defence, it should contain the substance of the charge, and fix a day and place for his appearance; allowing a sufficient time for the attendance of himself and his witnesses. Rex v. Johnson, 1 Str. 260. A summons to appear personally to examine witnesses not theretofore been thought sufficient in one case. 2 Burr. 681. In another, an objection made to the summons that it was to appear on the same day, was only removed by the fact of the defendant having actually appeared, and so waved any irregularity in the notice. Rex v. Johnson, 2 Burr. 125. It is evident that it should be to appear at a place certain: otherwise the party commits no default by not appearing; and the magistrate cannot proceed in the defendant's absence upon a summons defective in these particulars, without making himself liable to an information. Rex v. Simpson, 1 Str. 46. It has been made a question whether the service of the summons must be personal. It seems in general necessary that it should be so, unless where personal service is expressly dispensed with by statute. Parker, C. J., was of that opinion. 10 Mod. 345. And the provisions specially introduced into many Acts of Parliaments, to make a service at the dwelling-house sufficient, seems to justify the inference, that the law in other cases is understood to require a service upon the person. Where personal service is not necessary, leaving a copy at the house is sufficient; Rex v. Chandler, 14 East, 268; and the delivery may be to a person on the premises, apparently residing there as a servant. Id. ibid. These rules imply, however, only to those cases where the defendant does not in fact appear; for if he actually appears and pleads, there is no longer any question upon the sufficiency or regularity of the summons. 1 Str. 261. Paley on Convictions, 2 ed. by Downes, 21, 22. (6) The magistrate has, in general, no authority to compel the attendance of witnesses for the purpose of a summary trial; unless where it is specially given by Act of Parliament. This, in many cases, has been done; and in sundry Acts the provision is accompanied with a penalty on refusal to attend for the purpose of being examined. It seems agreed that the examination of witnesses must be upon oath, and that no legal conviction can be founded upon any testimony not so taken. There is a difference in the manner in which the Acts are worded, in regard to the mode of examination to be pursued; for, while some Acts expressly mention the testimony of witnesses on oath, others, in general terms, authorize the magistrate to hear and determine, or to convict or give judgment on the examination of witnesses, without noticing the oath. But such general expressions seem, in legal construction, necessarily to refer to the only kind of testimony known to the law, namely, that upon oath. "For," says Dalton, "in all cases, wheresoever any man is authorized to examine witnesses by a commission, that are taken and construed to be as the law will, i. e. upon oath," Dalt. c. 6, § 6; and see id. c. 115, c. 164; Plowd. 12, a; Lamb. 517; ex parte Aldridge, 4 D. and R. 83; 2 M. C. 120; Rex v. Glossop, 4 B. and A. 616; Paley, 33, 34. Although no mode of examination be pointed out by the statute, it seems that, by a summary mode of inquiry, intended to substitute a more expeditious process for the common law method of trial, it could not design to dispense with the rules of justice, as far as they are compatible with the method adopted. Indeed, it may be useful upon this occasion to notice the general maxim, which has been laid down as a guide to the conduct of magistrates in regulating all their summary proceedings, namely, that "Acts of Parliament, in what they are silent, are best expounded according to the use and reason of the common law." Rex v. Simpson, 1 Str. 45. Unless, therefore, the defendant forfeits this advantage by his wilful absence, he ought to be called upon to plead before any evidence is given. 1 T. R. 320. And the witnesses must be sworn and examined in his presence. Rex v. Vipont, 2 Burr. 1163. Or, if the evidence has been taken down in his absence, and is read over to him afterwards, the witness must at the same time, unless the defendant upon hearing the evidence should confess the fact, Rex. v. Hall, 1 T. R. 320, be re sworn in his presence, and not merely called upon to assert the truth of his former testimony. Rex v. Crowther, 1 T. R. 125. For the intent of the rule is, that the witness should be subjected to the examination of the defendant upon his oath. 2 Burr. 1163; and see Rex v. Kid-
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.

The contempts, that are thus punished, are either direct, which openly insult or resist the powers of the courts, or the persons of the judges who preside there; or else are consequential, which (without such gross indolence or direct opposition) *plainerly tend to create an universal [*284] disregard of their authority. 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 courts 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, goalers, 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 (7). 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 (8). 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 relating to the discharge of their office: such as making default, when summoned; refusing to be sworn, or to give any ver-

(dy, 4 D. and R. 734; 2 M. C. 564. This rule is confirmed, rather than contradicted, by those cases wherein convictions have been sustained without expressly alleging the evidence to have been taken in the presence of the defendant. Rex v. Baker, 2 Stra. 1240; Rex v. Aiken, 3 Burr. 1786; Rex v. Kempson, Cowp. 241. For it will be found that in all those cases the judgment proceeded upon a presumption collected from the whole conviction, that the defendant was in fact present, and did hear the evidence given, which was always admitted to be necessary to the regularity of the magistrate’s proceedings. Rex v. Vipont, 2 Burr. 1163; and see Rex v. Lovat, 7 T. R. 152; Rex v. Thompson, 2 T. R. 18; Rex v. Swallow, 3 T. R. 284; Paley, 39, 40. (7) See Tidd, 8 edit. 308, 9. 312, 3. 251. (8) It is not, however, usual for the court to interfere in a summary way against an attorney for a mere breach of promise, where there is nothing criminal, 2 Wils. 371, and see 2 Moore, 665. 1 Bing. 102, 5; or on account of negligence or unskilfulness, 4 Burr. 2060. 2 Bla. Rep. 780. 1 Chit. Rep. 651; except it be very gross, Say. 50, 169; nor for the misconduct of an attorney independently of his profession. But see 4 B. & A. 47. 5 B. & A. 589. 9 Chit. Rep. 58. 1 Hugl. 91. 7 Moore, 424, 437. Tidd. 5 ed. 81.
dict; eating or drinking without the leave of the court, and especially at
the cost of either party; and other misbehaviour or irregularities of a
similar kind: but not in mere exercise of their judicial capacities, as by giv-
ing 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 par-
ties to any suit, or proceeding before the court: as by disobedience
[*285] 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 en-
tered into a rule for submitting to such determination (e). Indeed the at-
tachment for most of this species of contempts, and especially for non-pay-
ment 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 (9). 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 parlia-
ment 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 preroga-
tive writs of prohibition, habeas corpus (g), and the rest (10). Some of these
contempts may arise in the face of the court; as by rude and contumel-
ious 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 judicial 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 de-
monstrates 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 (11).

[*286] *The process of attachment, for these and the like contempts,
must necessarily be as ancient as the laws themselves. For laws,
without a competent authority to secure their administration from disobe-
dience and contempt, would be vain and nugatory. A power therefore in the
supreme courts of justice to suppress such contempts, by an immediate at-
tachment of the offender, results from the first principles of judicial esta-
blishments, and must be an inseparable attendant upon every superior tri-

(e) See Book III. pag. 17.
(g) 4 Burr. 632. Lords' Journ. 7 Feb. 8 Jun.
Salk. 566.

(9) By the insolvent acts persons committed
to prison upon an attachment for non-pay-
ment of money, awarded to be paid upon a
submission to an arbitration, which has been
made a rule of court, or upon an attachment
for not paying costs, may have the benefit of
that statute as insolvent debtors.

(10) But a peer cannot be attached for non-
payment of money, pursuant to an order of
nisi prius, which has been made a rule of
court. 7 T. R. 171. 448.

(11) See 2 R. S. 278, § 10, and p. 554, § 1,
&e. regulating the subject of contempts of
court.
bunal. 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 courts be resisted by the power of any great man, the sheriff shall chastise the resisters by imprisonment, ”a qua non deliberentur sine speciali praecepto domini regis;” and if the sheriff himself be resisted, he shall certify to the courts the names of the principal offenders, their aiders, consenters, 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 a part of the law of the land: and, as such, is confirmed by the statute of magna charta.

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 shew 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 cause be shewn to discharge, [*287] 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 (12): 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

---

(h) Gilb. Hist. C. P. ch. 3.
(i) Stund. C. 73. 3.
(j) Styl. 777.
(k) Walk. 84. Str. 185, 564.
(l) 6 Mod. 73.
(m) Str. 444.
(n) 6 Mod. 73.
(o) Cro. Car. 140.
(p) The King v. Elkins, M. 8 Geo. III. B. R.

(12) Although the defendant acknowledges all the facts charged against him, yet it is the practice of the court to compel him to answer interrogatories, unless they are waived by the prosecutor, 5 T. R. 562.
making 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 proceeds 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 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 issue; 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 (1); 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 a warrant: 4. By an hue and cry.

[*290] **1. A warrant may be granted in extraordinary cases by the privy council, or secretaries of state (a)(2); but ordinarily by justices

(q) See Book III. p. 100, 101. (r) Yearb. 30 Hen. VI. c. 37. 22 Edw. IV. c. 29. pl. 5. (s) Stat. 42 Eliz. c. 6. § 3. 13 Car. II. st. 2. c. 2. (a) 1 Lord Raym. 65. § 4. 9 & 10 W. III. c. 15. 13 Ann. st. 2. c. 15. § 5. (2) Or by the speaker of the house of com-

(1) As to arrests in criminal cases in general, sec 1 Chit. C. L. 2 ed. 11 to 71, Burn. (2) J. tit. Arrest.
of the peace (3).—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 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 (4); and also to all such offences as they have power to punish by statute (5). 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 combated it with invincible authority and strength of reason: maintaining, 1. That a justice of peace hath power to issue a warrant to apprehend a person accused of felony, though not yet indicted (e) (6); 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 (7), should set forth the time and

1. B. & B. 458. Gow. 84. Fortes. 37. 358. 140. 11 St. Tr. 305. 316. 2 Wils. 159. 160. and 680. 1 Geo. II. c. 36. 3. 4. 6. or obtaining money under false pretences. 30 Geo. II. c. 24. In modern practice, however, it is not usual for a justice out of session to issue a warrant for a libel on a private individual, or for perjury; though where an illegal publication is manifestly dangerous in its tendency to the public interests, they will exercise that discretion with which that practice has invested them. 4 J. B. Moore, 195. 1 B. & B. 548. Gow. 84. This, also, they will always do on the commission of any misdemeanor, which involves an attempt to perpetrate a felony. And when assembled in session, they may issue a warrant against a party suspected of perjury, even though he has not been indicted. 169.

(5) Where a statute gives a justice jurisdiction over an offence, it impliedly gives him power to apprehend any person charged with such offence; and especially after party has neglected a summons. 2 Bing. 63. Hawk. b. 2. c. 13. s. 15. 12 Rep. 181. b. 10 Mod. 548.

(6) See accordingly, 2 R. 8. 706. s 5.

(7) But it seems sufficient if it be in writ-
place of making, and the cause for which it is made, and should be
[*291] directed to the constable or other peace-officer (or, it may be, to
any private person by name) (g) (8), requiring him to bring the
party either generally (9) 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 (10). 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 in-
demnify 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 tested, or dated, England; not Oxfordshire, Berks, or other
particular county. But the warrant of a justice of the peace in one county,
as Yorkshire, must be backed, that is, signed by a justice of the

[*292] *peace in another, as Middlesex, before it can be executed
there (11). Formerly, regularly speaking, there ought to have
been a fresh warrant in every fresh county: but the practice of backing
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

(8) Salk. 176.
(9) 2 Hawk. P. C. 65.
(10) 1 Hal. P. C. 359. 2 Hawk. P. C. 62.

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

ing and signed by him, unless a seal is expressly
required by a particular act of parliament.
In New-York a seal is not required, (2 R. S. 706, § 3) : and the warrant is to be returned before the officer who issued it. Id.

(8) It has recently been decided, that war-
mants may be directed to officers either by their
particular names or by the description of their office; and that, in the first case, the officer may execute the warrant anywhere within the jurisdiction of the magistrate who issued it; in the latter case, not beyond the precints of his office. And where a warrant of a
magistrate was directed "To the constables of
W. and to all other his majesty's officers," it
was held that the constables of W. (their names not being inserted in the warrant) could not execute it out of the district. 1 Bar. & Cres. 288. 2 D. & R. 444. If an act of parliament direct that a justice shall grant a
warrant, and do not state to whom it shall be

directed, it must be directed to the constable,
and not to the sheriff, unless such power be
given by the act. 2 Ld. Raym. 1192. 2 Salk.
381. see vid. 1 H. Bla. 15, notes. These
distinctions are now rendered immaterial by the 5 Geo. IV. c. 18. s. 6, whereby the consta-
ble, or any other peace-officer of any parish
or place, may execute any warrant within the
magistrate's jurisdiction, whether the warrant
be addressed to him by name or not; or wheth-
er he be a constable or peace-officer, &c. of
the place in which he executes the warrant.

(9) The warrant need not state the time
when the party is to be brought before the
magistrate for examination. Port. 143. 8
T. R. 110.

(10) General warrants to take up loose, idle,
and disorderly people, 3 Burr. 1766. and search
warrants, Hawk. b. 2. c. 13. s. 17. n. 6, are the
only exceptions to this rule.

(11) So in New-York. (2 R. S. 707, § 5.)
13 Geo. III. c. 31. any warrant for apprehending an English offender, who may have escaped into Scotland, and vice versa, may be endorsed and executed by the local magistrates, and the offender conveyed back to that part of the united kingdoms, in which such offence was committed (12).

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 (l). 2. The sheriff (13), 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 (14); and for that purpose is authorized (as upon

to or returning from the same on any day. Bac. Ab. Trespass, D. 3. And if a person having committed a felony in a foreign country comes into England, he may be arrested here, and conveyed and given up to the magistrates of the country, against the laws of which the offence was committed. 4 Taunt. 34.)

(12) And now by the 44 Geo. III. c. 92, if any offender has escaped from Ireland into England or Scotland, or vice versa, he may be apprehended by a warrant endorsed by a justice of the peace of the county or jurisdiction within which the offender shall be found; and he may be conveyed to that part of the united kingdom, in which the warrant shall be issued, and the offence is charged to have been committed.

By the 54 Geo. III. c. 186, all warrants issued in England, Scotland, or Ireland, may be executed in any part of the United Kingdom, Independently of this the secretary of state for Ireland may, by his warrant, remove a prisoner there to be tried in England, for an offence committed in the latter, 3 Esp. Rep. 178; and an English justice may commit a person here who has committed an offence in Ireland, preparatory to sending him thither for trial. 2 Stra. 848. 4 Taunt. 34.

With respect to the time of arresting a person—A person may be arrested in the night as well as the day, 9 Co. 66; and though the statute 29 Car. II. c. 7. s. 6. prohibits arrests on Sundays, it excepts the cases of treasons, felonies, and breaches of the peace: in these cases, therefore, an arrest may be made on that day. Cald. 291. 1 T. R. 265. Willes, 459.

As to the place in which a party may be arrested. Since the privileges of sanctuary and abjuration were abolished, by 21 Jac. I. c. 28, no place affords protection to offenders against the criminal law. And even the clergy may, on a criminal charge, be arrested whilst in their churches, Cro. Jac. 321, though it is illegal to arrest them in any civil case, whilst in the church to perform divine service, or going

† It seems extremely doubtful whether this decision should be followed in the U.S. without a treaty for that purpose; see the case of Carrara, alias Polari, in the New-York American Journals, vol. 2, 1831, decided by Mr. Recorder Riker, according to the case in Taunt, and in favour of the constitutionality of the law of New-York authorizing the surrender of criminals flying from foreign countries. See the cases there referred to; 4


(m) See Book I. pag. 355.
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 (a). 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 virtu officii arrest all offenders, and particularly night-walkers, and commit them to custody till the morning (o) (15).

3. Any private person (and a fortiori a peace-officer) that is [*293] present when any felony is committed, is bound by the law to arrest the felon, on pain of fine and imprisonment, if he escapes through the negligence of the standers-by (p). And they may justly break 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) (16). But he cannot justly break open doors to do it:

(a) 2 Hal. P. C. 83, 89.
(b) Ibid. 93.
(c) 2 Hawk. P. C. 74.

guilty. 4 Esp. Rep. 89. Holt C. N. P. 478. Hawk. b. 2. 12. s. 16. 2 Hale, 92. 89. n. f. Cald. 291; and a constable is not justified in apprehending and imprisoning a person on suspicion of having received stolen goods, on the mere assertion of one of the principal felons. 2 Stark. 167. There are, however, authorities in favour of an exception to this rule in the case of night-walkers, and persons reasonably suspected of felony, in the night. 3 Taunt. 14. 1 East P. C. 303. Hawk. b. 2. c. 12. s. 20. 2 Hale, 89. 5 Edw. 3. c. 14. 2 Inst. 52. Bac. Ab. tit. Constable, &c. And, by a modern act of parliament, an express power is given to constables and other peace-officers, when on duty, to apprehend every person who may reasonably be suspected of having, or carrying, or by any ways conveying, at any time, after sun-setting and before sun-rising, goods suspected to be stolen. 22 Geo. III. c. 58. s. 3. 54 Geo. III. c. 57. s. 16, 17, 18. And other statutes, 32 Geo. III. c. 53. s. 17. 51 Geo. III. c. 119. s. 18 and 54, authorize constables and other peace-officers to apprehend evil-disposed and suspected persons and reputed thieves. Thus, by the 32 Geo. III. c. 55. s. 17, constables, headboroughs, patrolies, and watchmen, are empowered to apprehend reputed thieves frequenting the streets, highways, as constables for Middlesex, and county, Essex, Kent, and Westminster, and enable the persons so sworn to apprehend offenders against the peace, both by night and by day, with all the powers which other constables possess.

(15) But at common law, no peace-officer is justified in taking up a night-walker, unless he has committed some disorderly or suspicious act. Bac. Ab. Trespass, D. 3. 2 Lord Raym. 1301.

(16) Where a felony has been actually committed, a private person acting with a good intention, and upon such information as amounts to a reasonable and probable ground of suspicion, is justified in apprehending without a warrant the suspected person in order to carry him before a magistrate. Cald. 291. 4 Taunt. 54. 5. Price, 525. But where a private person had delivered another into the custody of a constable, upon a suspicion which appeared afterwards to be unfounded, it was held that the person so arrested might maintain an action of trespass for an assault and false imprisonment against such private person, although a felony had been actually committed. 6 T. R. 315.

With respect to interference, and arrests in order to prevent the commission of a crime, any person may lawfully lay hold of a lunatic about to commit any mischief, which, if committed by a sane person, would constitute a criminal offence; or any other person whom he shall see on the point of committing a treason or felony, or doing any act which will manifestly endanger the life or person of another, and may detain him until it may be reasonably presumed that the escape would not be prevented but where he interferes to prevent others from fighting, he should first notify his intention to prevent the breach of the peace. Hawk. b. 2. c. 12. s. 19. 1 Hale, 589. 2 Rol. Ab. 559. E. pl. 3. n. 8. Selw. 3d ed. 850. Com. Dig. Pleader. 3 M. 22. Bac. Abr. Trespass, D. 3. 1 East P. C. 244. This charge may arise from breaking and entering a party's house and imprisoning him, to prevent him from murdering his wife, who cries out for assistance. 2 B. & P. 260. Selw. 3d ed. 850. Bac. Abr. Trespass, D. 3. And the riding in a body to quell a riot is lawful, and no information will be granted for small irregularities in the pursuit.
and if either party kill the other in the attempt, it is manslaughter, 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 *huer*, to shout, and *cry*), *hustemum 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. *de officio coronatoris*. But the principal statute, relative to this matter, is that of Winchester, 13 Edw. I. c. 1. and 4. which directs, that from thenceforth every country 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 bound by the same statute, cap. 3, to answer for all robberies therein 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. 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 5l.: and the whole 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 *(17)*. 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 officer 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 thereafter 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)*.

---

*(s)* 2 Hal. P. C. 89, 83.
*(t)* Bracton, I. 3. tr. 2. c. 1. § 1. Mirr. c. 2. § 6.
*(w)* See Book III. pag. 161.
*(u)* Mod. Un. Hist. vi. 383. vili. 156.
*(x)* 2 Hal. P. C. 100—104.
*(y)* 1 Hawk. P. C. 75.

---

of such a design. 1 Bla. Rep. 47. 1 B. & P. 264. n. a. 1 East P. C. 304. If a man be found attempting to commit a felony in the night, any one may apprehend and detain him till he be carried before a magistrate. 1 R. & M. C. C. 93.

*(17)* These acts are all repealed by 7 and 8 Geo. IV. c. 27.
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 & 5 W. & M. c. 8, enacts, that such as apprehend a highwayman, and prosecute him to conviction, shall receive a reward of 40l. 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 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 10l. to be paid by the hundred indemnified by such taking. By statutes 6 & 7 W. 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 & 11 W. 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 5s. 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 40l. (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 (18).

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 shew, under the second head, of commitment and bail.

(z) The statutes 4 & 5 W. & M. c. 8. 6 & 7 W. 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.

(18) The above acts are repealed by 7 and 8 Geo. IV. c. 22. 27. 64. and 58 Geo. III. c. 70.; and costs are allowed to prosecutors in certain cases.

(1) In a late case, where it was stated the party behaved improperly in a church, it was held that though a constable might be justified in removing him from the church, and detaining him till the service was over, yet he could not legally detain him afterwards to take him before a magistrate; 2 B. & C. 699. A watchman should deliver the supposed of-
The justice before whom such prisoner is brought, is bound immediately to examine the circumstances of the crime alleged (2): and to this end by statute 2 & 3 Ph. & M. c. 10, he is to take in writing the examination of such prisoner, and the information of those who bring him (3): 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 tenetur prodere seipsum: and his fault was not to be wrung out of himself, but rather to be discovered by other means and other men. If upon this inquiry it manifestly appears, 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 (4). This commitment therefore fender over to a constable, or take him before a magistrate. Dalh. 1. c. 104.

A private person may do the same as a watchman. In a late case, it was held that a private person when he took a party endeavouring to commit a felony, might detain him, in order to take him before a magistrate. 1 R. & M. C. C. 93.

While arresting a man on suspicion of felony, is bound to take him before a magistrate as soon as he reasonably can: and he has no right to detain a prisoner three days without taking him before a magistrate, in order that evidence may be collected in support of a felony with which he is charged. Wright v. Court, 6 D. and R. 629. And see 2 Haw. P. C. 117.

It is the duty of the magistrate to take and complete the examination of all concerned, and to discharge or commit the individual suspected, as soon as the nature of the case will admit. Post. 142, 3. But he is allowed a reasonable time for this purpose, before he may take a decision to have been formerly considered, that the law intends three days to be sufficient, and that a magistrate cannot justify the detainer of a party eighteen days under examination. Scavage v. Tateham, Cro. Eliz. 829; 1 Hale, P. C. 585, 6; 2 id. 120, 1; 2 Haw. P. C. c. 16, s. 15; 1 Chit. Cr. L. 72. This point was considered in a very recent case, Davis v. Capper, K. B., sitting in banc before Easter term, 1829. That was an action against a magistrate for false imprisonment. The plaintiff had been brought before the defendant upon suspicion of felony, and was committed by him for further examination for fourteen days. The court, without giving judgment upon the whole case, which comprehended other questions, expressed a strong opinion that fourteen days was not a reasonable period for commitment for re-examination, and that a warrant for such commitment was bad for not setting forth full and satisfactory reasons for committing for so long a period: and they referred to the case of Scavage v. Tateham, Cro. Eliz. 829, as justifying that opinion. Ed. MS.

(3) The prisoner’s examination must not be upon oath; that of the witnesses must be. 2 Hale, P. C. 52; 1 id. 585; 1 Phil. Ev. 106. Where magistrates first took the examination of witnesses, not on oath, in support of a conviction, and afterwards on the truth of their evidence, the court of King’s Bench expressed their disapprobation of the practice. Rex v. Kiddy, 4 D. and R. 734.† The prisoner has no right to the assistance of an attorney, when under examination on a charge of felony; the privilege, when allowed, is entirely a matter of discretion in the magistrate. Cox v. Coleridge, 2 D. and R. 86; 1 B. and C. 37; 1 M. C. 142. See, however, an elaborate note on this important subject, Paley on Convictions, 2d ed, by Dowling, 25 et seq., where the propriety of that decision is considered.

(4) Recognizance to Prosecute.—Besides this commitment to bail, the magistrate should take the recognizance of the prosecutor, to appear and prefer an indictment and give evidence at the next sessions of the peace, or general gaol delivery, as the case may require, and in case of refusal may commit him to gaol. 1 Hale, 566. 2 Hale, 92. 121. 3 M. & S. 1. See further, Burn J. Recognizance; Williams J. Recognizance; 1 Chit. C. L. 90.

Recognizance to give Evidence.—When it appears that a person brought before the magistrate as a witness, may probably be able to give material evidence against the prisoner, he has, in the cases of manslaughter and felony, by the express provisions of the statutes 1 & 2 Ph. & M. c. 13, s. 5, and 2 & 3 Ph. & M. c. 10, s. 2, authority to bind such witness by recognizance or obligation to appear at the next general gaol delivery, to give evidence against the party indicted; and infants and married women, who cannot legally bind any question: be may also produce his own witnesses, who are to be examined. If there be “no probable cause for charging” him, he is to be discharged. (Id. 20.)
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 felony, &c. oncies, and other offences of a capital nature, 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 reasonable practices (b). What the nature of bail is, hath been shewn in the preceding book (c), viz: a delivery of a man, on his 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 (5).

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. I. 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 a bail to a greater amount than the nature of the case demands, it is expressly declared by statute 1 W. & M. st. 2. c. 1. 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) (6). Bail may be taken either in court, or in some particular cases themselves, must procure others to be bound for them. And if the witness refuse to give such recognizance, the magistrate has power to commit him, this being virtually included in his commission, and by necessary consequence upon the above-mentioned statutes. 3 M. & S. 1. 1 Hali, 586. This doctrine was confirmed in a late case, where a married woman refused to enter into a recognizance for her appearance at sessions, to give evidence against a felon, and the magistrate committed her, and the court of king's bench held that the commitment was legal. 3 M. & S. 1. But a justice of the peace is not authorized by law to commit a witness willing to enter into a recognizance for his appearance to give evidence against an offender, merely because such witness is unable to find a surety to join him in such recognizance, nor ought the justice to require such surety; the party's own recognizance (at the peril of commitment) is all that ought to be required; per Graham, B. Rom. Sum. Ass. 1817, 1 Burn J. 24 ed. 1013.

See accordingly, 2 R. S. 709, § 21, &c.

(5) In New-York, any one accused of any offence not punishable with death or imprisonment in the state-prison, may be discharged by a justice of the county where he is arrested on giving bail. (2 R. S. 707, § 8.) The chancellor, the judges of the supreme court, circuit judges, and supreme court commissioners may let to bail in all cases; judges of the county courts may in cases triable before the general sessions: a justice of the peace, or alderman of a city; and in the city of New York, a special justice or assistant justice may in all cases of misdemeanor, and cases of felony where the imprisonment in the state-prison cannot exceed five years. (2 R. S. 710, § 29.) So also the court of oyer and terminer may let to bail any one committed before indictment found upon any charge whatever; and the court of general sessions has the like power as to offenses triable in that court. (Id. § 30, 31.) Persons already indicted, if entitled to bail, can be let to bail only by the court having jurisdiction to try the offense; or if it be not sitting, then by the chancellor, a supreme court judge or commissioner, or a circuit judge; or, if the offense may be tried in a court of general sessions, then by a judge of the county court. (Id. 728, § 56.)

(6) And even if the criminal does appear,
by the sheriff (7), coroner, or other magistrate (8): but most usually by the justices of the peace (9). Regularly, in all offences either against the common law or act of parliament, that are below [*298] felony, the offender ought to be admitted to bail, unless it be pro-
hibited 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 se-
curity 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. 1. 3 Edw. I. 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 & 2 Ph. & Mar. c. 13. give farther regulations in this matter (10); and upon the whole we may collect (k), that no justice

yet, if the bail were taken corruptly, the mag-
istrate would continue liable to an informa-
tion or indictment. 2 T. R. 190.

(7) Sed quere si a sheriff has this power? it seems not. See 4 T. R. 505. 2 H. Bla. 418. Lamb. 16.

(8) The court of king’s bench, or any judge thereof, in vacation, may at their discretion admit persons to bail in all cases whatever: see 3 East. 163. 5 T. R. 169; but none can claim this benefit de jure. 2 Hale, 129. As to when this court will bail, see 1 Chit. C. L. 2 ed. 98, 9.

(9) The 24 Geo. II. c. 55, enacts, that where a warrant has been backed, and the party accused has been taken out of the coun-
ty where the supposed offence has been com-
mitted, any justice of the county where he was taken, may, if the offence be bailable; take bail; and the same provision is extended to Ireland, by 44 Geo. III. c. 92. s. 1; and the 45 Geo. III. c. 92, and the 48 Geo. III. c. 58. s. 2, enact, that where the offender escapes from one part of the United Kingdom to the other, he may be bailed by any judge or jus-
tice of that part of the United Kingdom where he was apprehended, unless the judge who granted the warrant has written the words "not bailable" on the back of the process.

See, as to New-York, 2 R. S. 707, § 5, &c.

(10) These statutes are all repeated by the 7 G. IV. c. 64; by s. 1 of which it is enacted, that where any person shall be taken on a charge of felony, or suspicion of felony, be-
fore one or more justice or justices of the peace, and the charge shall be supported by positive and credible evidence of the fact, or by such evidence as, if not explained or con-
tradicted, shall, in the opinion of the justice or justices, raise a strong presumption of the guilt of the person charged, such person shall be committed to prison by such justice or jus-
tices, in the manner thereinafter mentioned; but if there shall be only one justice present, and the whole evidence given before him shall be such as neither to raise a strong presump-
tion of guilt, nor to warrant the dismissal of the charge, such justice shall order the person charged to be detained in custody, until he or she shall be taken before two justices at the least; and where any person so taken, or any person in the first instance taken before two justices, shall be charged with felony, or on suspicion of felony, and the evidence given in support of the charge shall, in their opinion, not be such as to raise a strong presumption of the guilt of the person charged, and to re-
quire his or her committal, or such evidence shall be adduced on behalf of the person charged, as shall in their opinion weaken the pre-
sumption of his or her guilt, but there shall notwithstanding appear to them, in either of such cases, to be sufficient ground for judicial inquiry into his or her guilt, the person charged shall be admitted to bail, by such two jus-
tices in the manner thereinafter mentioned;

(1) In omnibus placitis de felonio solet accusa-

(2) 2 Inst. 139.

(3) 2 Inst. 169.

(4) 2 Hal. P. C. 127.

(5) c. 2, § 24.

(6) c. 5, § 29.
of the peace can bail. 1. Upon an accusation of treason: 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 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. Accessaries 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 of vacation) may bail for any crime whatsoever, be it treason (n), murder (o), or any other offence, according to the circumstance 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 house of parliament, so long as the

[*299] *session lasts; or such as are committed for contempt 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) (11). But

(p) 2 Inst. 189. Latch. 12. Vaugh. 157. Comb. 111. 293. 1 Comyns Dig. 495.

(q) In omni bus placitis de felony solet accusatua per pleauci dimitti. praetertum in placito domicide. (Glan. t. 14. c. 1.) Scendam tamen quod, in hoc placeio. non solut accuratus per plenarios dimitt, nisi ex regina potestatis benefici. (Ibid.)

(r) 2 Hal. P. C. 132.

provided always that nothing therein contained shall be construed to require any such justice or justices to hear evidence on behalf of any person so charged, unless it shall appear to him or them to be meet and conducive to the ends of justice to hear the same."

As to the law of New-York, see note † to note 3, p. 296, ante.

(11) This is not the form where the offence is bailable and the party cannot find bail; in that case it is to keep the prisoner in custody "for want of sureties, or until he shall be discharged by due course of law."

And where the commitment is in the nature of punishment, the time of imprisonment must be stated, and if it be until the party be discharged by due course of law it will be bad, 5 B. & A. 895; but where in other respects the time of imprisonment is sufficiently stated, the unnecessary addition of the words "until he be discharged by due course of law," will not vitiate. 3 M. & S. 283. And as to the form of the mittimus in general, see 1 Chit. C. L. 109 to 116. 2d ed.
this imprisonment, as has been said, is only for safe custody, and not for punishment: therefore in his dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, or 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: this being the humane language of our ancient lawgivers, "custodies poenam sibi commissorum non augeant, nec cos torqueant; sed omni saevitia 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 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

(1) It may here be useful briefly to consider the time when the prosecution should be commenced. The habeas corpus act provides, that a person committed for treason or felony must be indicted in the ensuing term or sessions, or the party must be bailed, unless it be shewn upon oath, that the witnesses for the prosecution could not be produced at the preceding session. 31 Car. II. c. 2. s. 7. (See accordingly, 2 R. S. 737, § 23, &c.)

This regulation applies, however, only to persons actually confined upon suspicion, and is solely intended to prevent the protracting of arbitrary imprisonment; so that it does not preclude the crown from preferring an indictment at any distance of time from the actual perpetration of the offence, unless some particular statute limits the time of prosecuting.

There is no general statute of limitations applicable to criminal proceedings. 2 Hale, 158. Lieutenant-colonel Wall was tried and executed, for a murder committed 20 years before. And it has been repeatedly held, that no length of time can legalize a public nuisance, although it may afford an answer to an action of a private individual, 7 East, 199, ante, 167, note (12).

In New-York, indictments for murder may be found at any time; in all other cases, indictments must be found and filed in the proper office, within three years after the commission of the offence; but the time during which the defendant has not been an inhabitant of the state, or usually resident in it, is not to be computed part of the time. (2 R. S. 726, § 37.)
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* (2); of flight in persons accused of felony (2); of deodands, and the like (2); and presentments of petty offences in the sheriff’s tourn or court-leet, whereupon the presiding officer may set a fine. 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 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 misdemeanour, 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) (4). They ought to be freeholders, but to what amount is uncertain (e): which seems to be *casus omisissus*, 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 (5). 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). “*Excant seniores duodecim thanes, et praefectus cuum eis, et jurent super sanctuarium quod eis in manus datur, quod nolint ullum innocentem accusare, nec aliquem noxiam celeare.*” In the time of

---

(c) See Appendix, § 1.
(d) 2 Hal. P. C. 154.
(e) Ibid. 155.
(f) Wilk. LL. Angl. Sax. 117.

(2) But such an inquisition is now considered traversable. 1 Saund. 363. note I. Impey’s Off. Cor. 437.
(3) Upon this inquisition the party accused may be tried without the intervention of the grand jury, 2 Hale. 61. 3 Camp. 371. 2 Leach. 1035. Russ. & R. C. C. 240. S. C.; and if an indictment be found for the same offence, and the defendant be acquitted on the one, he must be arraigned on the other, to which he may, however, effectually plead his former acquittal. 2 Hale. 61.

*Verdict in an Action.*—There is also a mode in which a party may be put on his trial without any written accusation, viz. the verdict of a jury in a civil case. 3 Hal. 150. 4 T. R. 293. 3 Esp. 134. Thus in an action for taking away goods, if the jury found that they were taken feloniously, the verdict served also as an indictment. 2 Hale. 151. Hawk. b. 2. c. 15. s. 6. Com. Dig. Indictment. C. Bac. Ab. Indictment, B. 5. And, at the present day, in an action for slander, in which the plaintiff is charged with a criminal offence, and the defendant justifies; if the jury find that the justification is true, the plaintiff may be immediately put upon his trial for the crime alleged against him, without the intervention of a grand jury. 5 T. R. 293. But the verdict must be found in some court, which has competent jurisdiction over criminal matters, or otherwise it seems to have but little force. 2 Hale, 151. Hawk. b. 2. c. 25. s. 6. An *affidavit* taken at nisi prius on a trial, may also be received by the court of king’s bench, as the foundation of a criminal information against another. 4 T. R. 285.
(4) As to the mode of summoning and proving the attendance of the grand jury, see 1 Chit. C. L. 310, 1.; and as to the time of summoning, id. 311. 6 Geo. IV. c. 50. s. 26.
As to the law of New-York, see 2 R. S. 720, &c.; and id. 411.
(5) The qualifications and exemptions of grand jurors are now pointed out by the 6 Geo. IV. c. 50. s. 1. 2. As to how many times they may be called on to serve, see 1 Chit. C. L. 308. b. c. 2 ed. 6 Geo. IV. c. 50. s. 62.
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. This number was probably *found too large and [*303] 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 comilatus*; 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 either, because no complete act of felony was done in any one of them: but by statute 2 & 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* (6). 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 & 6 Edw. VI. c. 11. And counterfeiters, washers, or 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 & 35 Hen. VIII. c. 27. § 75, 76) 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 Hertford 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 in 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 sta-

(6) See accordingly, 2 R. S. 727, § 47, 48.
tute 10 & 11 W. 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 of 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 prosecuted 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 [*305] destroying the king’s ships, *magazines, or stores, may be statute 12 Geo. III. c. 24. be inquired of and tried in any county of England, or in the place where the offence is committed. By statute 13 Geo. III. c. 63. misdemeans committed in India may be tried upon informations or indictments 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) (7). 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 any 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 (8). 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 1691 (q) (9).

(i) So held by all the judges, H. 11 Geo. III. in the case of Richard Morris, on a case referred from the Old Bailey.

(m) See page 245.

(n) At Shrewsbury summer sessions, 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 Half. P. C. 507.


(q) Stat. 23 Hen. VIII. c. 3. 3 W. & M. c. 9.

(7) See accordingly, 2 R. S. 727, § 59.

(8) Contra in New-York; see 2 R. S. 727, § 50.

(9) The law respecting venue in criminal prosecutions has been recently revised and simplified, and is now as follows: —

As to murder. By 9 Geo. IV. c. 31, § 7, if any British subject shall be charged in England with any murder or manslaughter, or with being accessory before the fact to any murder or manslaughter, committed on land out of the united kingdom, whether within the king's dominions or without, any justice of the county or place where the person so charged shall be, may take cognizance of the charge, and proceed therein as if it had been committed within the limits of his ordinary jurisdiction; and if any person so charged shall be committed for trial, or admitted to bail, a commission shall be directed to such persons and into such county or place as shall be appointed by the lord chancellor, for the speedy trial of any
PUBLIC WRONGS. 249

When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to indorse 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 further

such offender; and such persons shall have power to hear and determine all such offences, within the county or place limited in their commission by a jury of such county or place, in the same manner as if the offences had been actually committed in such county or place: and by § 8, where any person being feloniously struck, poisoned, or hurt, upon the sea, or at any place out of England, shall die of such stroke, &c. in England, or vice versa, every offence committed in respect of any such case, whether the same shall amount to the offence of murder, or manslaughter, or being accessory before the fact to murder, or after the fact to murder or manslaughter, may be tried and punished in the county or place in England in which such death, stroke, &c. shall begin in one county and completed in another, every such felony or manslaughter may be tried and punished in any of the said counties, in the same manner as if it had been actually and wholly committed therein.†

As to offences committed on the borders of counties. By 7 Geo. IV. c. 64, § 12, where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within 500 yards thereof, or shall have begun in one county and completed in another, every such felony or misdemeanor may be tried and punished in any of the said counties, in the same manner as if it had been actually and wholly committed therein.†

As to offences committed on persons, or property in coaches or vessels.† By 7 Geo. IV. c. 64, § 13, when any felony or misdemeanor shall be committed on any person, or on or in respect of any property in or upon any coach, waggon, cart, or other carriage whatever, employed in any journey, or on board any vessel whatever employed on any voyage upon any inland navigation, such felony or misdemeanor may be tried and punished in any county through any part whereof such coach, &c., or vessel, shall have passed in the course of the journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county; and where any part of any highway or navigation shall constitute the boundary of any two counties, such felony or misdemeanor may be tried and punished in either of the said counties through or, adjoining to, or by the boundary of any part whereof such coach, &c., or vessel, shall have passed, in the course of the journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county.

As to larceny generally. By the Larceny Act, 7 and 8 Geo. IV. c. 29, § 76, if any person having feloniously taken any property in any one part of the united kingdom, shall afterwards have it in his possession in any other part, he may be indicted for larceny in that part where he shall so have such property in his possession, as if he had actually stolen it there; and if any person having knowingly received, in any one part of the united kingdom, any stolen property, which shall have been stolen in any other part, he may be indicted for such offence in that part where he shall so receive such property, as if it had been originally stolen in that part.§

As to accessories. By 7 Geo. IV. c. 64, § 9, accessories before the fact in any felony, may be tried in any court that has jurisdiction to try the principal offender, though the offence of such accessories may be committed on the high seas, or on land, within or without the king's dominions: and if the principals' offence is committed in one county, and the other offence in another such accessories may be tried in either; and by § 10, a similar provision is made with respect to accessories after the fact to felony.

As to treasons. By 35 H. VIII. c. 2, (which is not repealed by 1 and 2 P. and M. c. 10, see 1 East, P. C. 103,) all treasons or misprisions of treasons committed out of the realm, may be tried in the court of King's Bench, by a jury of the county in which the court sits, or by a special commission in any county of England. See 1 Chit. Cr. L. 188.

An indictment for bigamy may, by 9 Geo. IV. c. 31, § 22, be tried in the county where the offender is apprehended, or is in custody, the same as if the offence had been actually committed there.

In an indictment for a libel the venue must be laid in the county where the publication took place.

Indictments for offences against the customs and excise may be tried in any county of England. See 6 Geo. IV. c. 108, ss. 74 and 78; and 7 and 8 Geo. IV. c. 53, § 43.

Offences committed in a county of a city or town, may be tried in the county at large. See 38 Geo. III. c. 52; 51 Geo. III. c. 100; 60 Geo. III. c. 4; 1 Geo. IV. c. 4. If the indictment states the felony to have been committed in the county at large, and it was committed in the county of a city or town, this is bad. Rex v. Dobb, R. and R. § 444. But if the offence be properly laid in the county of a town, and the indictment is preferred in the county at large, it need not be averred that that is the next adjoining county to the county of the town. Rex v. Groff, id. 179. The 26 H. VIII. c. 6, § 6, which makes felonies in Wales triable in the next English county, extends to felonies created since that statute. Rex v. Wyndham, id. 197.

1 2 R. S. 727, § 45.
† The act 2 R. S. 727, § 44. applies only to

§ 2 R. S. 727, § 45, 50.

travelling by water.
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 indorse upon it, "a true bill;" 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.

Indictments must have a precise and sufficient certainty (10). By sta-

(10) The following general rules, as to the form of the indictment, may be found useful. The indictment must state the facts of the crime with as much certainty as the nature of the case will admit. Com. 682. 5 T. R. 611-623. Therefore, an indictment charging the defendant with obtaining money by false pretences, without stating what were the particular pretences, is insufficient. 3 T. R. 581. The cases of indictment for being a common scold or barrator, or for keeping a disorderly house, or for conspiracy, may be considered as exceptions to the general rule. 2 T. R. 586. 1 T. R. 754. 2 B. & A. 205. And an indictment for endeavouring to incite a soldier to commit an act of mutiny, or a servant to rob his master, without stating the particular means adopted, may also be considered as an exception. 1 B. & P. 180.

The indictment ought to be certain to every intent, and without any intendment to the contrary. Cro. Eliz. 490. Cro. Jac. 20. But this strictness does not so far prevail, as to render an indictment invalid in consequence of the omission of a letter, which does not change the word into another of different signification, as understood for understood, and received for received, 1 Leach, 134, 145; and if the sense be clear, nice objections ought not to be regarded, 5 East, 259; and in stating mere matter of inducement, not so much certainty is required as in stating the offence itself. 1 Ventr. 170. Com. Dig. Indictment, G. The charge must be sufficiently explicit to support itself; for no latitude of intention can be allowed to include any thing more than is expressed. 2 Burr. 1137. 3 M. & S. 381. And every crime must appear on the face of the record with a scrupulous certainty, Cald. 187, so that it may be understood by every one, alleging all the requisites that constitute the offence; and that every averment must be so stated, that the party accused may know the general nature of the crime of which he is accused, and who the accusers are, whom he will be called upon to answer. 1 T. R. 69; and as a branch of this rule it is to be observed, that in describing some crimes, technical phrases and expressions are required to be used, to express the precise idea which the law entertains of the offence; see the instances in the text. The offence must be positively charged, and not stated by way of recital, so that the words "that whereas" prefixed, will render it invalid. 2 Str. 900. n. 1. 2 Lord Ray. 1568. Stating an offence in the disjunctive is bad. 2 Str. 901. 200. and see further, 1 Chit. C. L. 2 ed. 236. Repugnancy, in a material matter, may be fatal to the indictment. 5 East, 254. But though the indictment must in all respects be certain, yet the introduction of averments altogether superfluous and immaterial will seldom prejudice. For if the indictment can be supported without the words which are bad, they may on arrest of judgment be rejected as surplusage. 1 T. R. 322. 1 Leach, 474. 3 Stark. 26; and see further as to repugnancy and surplusage, 1 Chit. C. L. 2 ed. 332. 258. &c.

Presumptions of law need not be stated, 4 M. & S. 105. 2 Wils. 147; neither need facts of which the court will ex officio take notice. See ante, 3 book, 293, note (1). It is not necessary to state a conclusion of law resulting from the facts of a case, it suffices to state the facts and leave the court to draw the inference. 2 Leach, 941. Neither is it necessary to state mere matter of evidence, which the prosecutor proposes to adduce, unless it alters the offence; for if so, it would make the indictment as long as the evidence. 1 Str. 139. 140. Forst. 194. 4 B. & A. 205. In general, all matters of defence must come from the defendant, and need not be anticipated or stated by the prosecutor. 5 T. R. 84. 2 Leach, 580. 2 Hert. 19. And it is never necessary to negative all the exceptions which, by some other statute than that which creates the offence, might render it legal, for these must be shown by defendant for his own justification. 2 Burr. 1038. 1 Bla. Rep. 230. Facts which lie more particularly within the defendant’s than the prosecutor’s knowledge, need not be shown with more than a certainty to a common intent. 5 T. R. 607. Hawk. b. 2. c. 25. s. 112. If notice be necessary to raise the duty which the defendant is alleged to have broken, it should be averred; but where knowledge must be presumed, and the event
tute 1 Hen. V. c. 5. all indictments must set forth the christian name, sir-name, and addition of the state, and degree, mystery, town or place, and the county of the offender: and all this to identify his person (11). 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 part of the description of the fact (s) (12). But sometimes the time may be very material, where there is any situation in point of time assigned for the prosecution of offenders: as by the statute 7 Will. III. c. 3. which enacts, that no prosecution shall be had for any of the treasons or misprisins 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 (t): and in case of murder, the time of the death

lies alike in the knowledge of all men, it is never necessary, either to state or prove it. 5 T. R. 651. If a request or demand is necessary to complete the offence, it must be stated in the indictment. 8 East, 52, 3. 1 T. R. 316. Cald. 554. Where an evil intent accompanying an act is necessary to constitute such an act a crime, the intent must be alleged in the indictment and proved. 2 Stark. 243. R. & R. C. C. 365. 1 Hale. 361. 2 East, P. C. 514, 5. 2 R. & R. C. C. S. 117. Indictments must be in English. 4 Geo. II. c. 26. 6 Geo. II. c. 6. But if any document in a foreign language, as a libel, be necessarily introduced, it should be set out in the original tongue, and then translated, showing its application. 6 T. R. 162. 7 Moore, 1. but it has been said to be both needless and dangerous to translate it. 1 Saund. 242. n. 1. By the same acts, statutes 4 Geo. II. c. 36, and 6 Geo. II. c. 14, all indictments must be in words at length, and therefore no abbreviations can be admitted. 2 Hale, 170, n. g. Nor can any figures be allowed in indictments, but all numbers must be expressed in words at length; but to this rule there is an exception, in case of forgery, and threatening letters, when a fac simile of the instrument forged must be given in the indictment. 2 Hale, 170, 146.

As to the insertion of several counts in an indictment, see 1 Chit. C. L. 248 to 250; and as to when part of a count may be found, id. 250 to 252. As to the joinder of several offences, id. 253 to 256. As to variances, id. 2 ed. 293, 294. As to the amendment of indictments, id. 297 to 308; and when an indictment may be quashed, id. 299 to 304. As to the power of a court of equity to stay indictment, id. 2 ed. 304. As to when an action as well as an indictment may be brought, see ante, 6.

(11) In New York, these and other defects of form not tending to the prejudice of the defendant, do not affect an indictment. (2 R. S. 728, § 52.)

(12) By 7 Geo. IV. c. 64, § 20, "no judgment upon any indictment or information, for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved; nor for the omission of the words, 'as appears by the record,' or, 'with force and arms;' or, 'against the peace;' nor for the insertion of the words, 'against the form of the statute;' instead of, 'against the form of the statutes;' or vice versa; nor for that any person or persons mentioned in the indictment or information, is or are designated by a name of office, or other descriptive appellation, instead of his, her, or their proper name or names; nor for omitting to state the time at which the offence was committed, in any case where time is not the essence of the offence; nor for stating the time imperfectly; nor for stating the offence to have been committed on a day subsequent to the finding of the indictment or exhibiting the information, or on an impossible day, or on a day that never happened; nor for want of a proper or perfect venue, where the court shall appear by the indictment or information to have had jurisdiction over the offence." The objections enumerated in this clause are no longer available, either in arrest of judgment, or by writ of error, because it enacts that judgment shall not be stayed, which applies to motions in arrest of judgment; or reversed, which applies to writs of error. But, it seems, that any of these objections will still be available on demurrer, where the prisoner prays judgment in his favour, and if his demurrer is allowed, judgment is neither stayed nor reversed, but given in his favour. See further on this subject, Car. Cr. L. 46, et seq., and the cases there cited. If the name of a prisoner is unknown, and he refuses to disclose it, an indictment against him as a person whose name is to the jurors unknown, but who is personally brought, before the jurors by the keeper of the prison, will be sufficient. Rex v. —. R. and R. C. C. 489. But an indictment against him as a person to the jurors unknown, without something to ascertain whom the grand jury meant to designate, is insufficient. Id. ibid.
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 [*307] of the *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 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, "burglariously," 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 (e). 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 (13); in homicide of all sorts it is necessary; as the weapon with which it is committed is forfeited to the king as a deodand.

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, ar[*308] raigned, and tried, without indictment: as by the *Danish law

(u) See Book III. page 321.  
(e) 5 Rep. 122.

(13) There are some recent enactments, respecting indictments for larceny, which it seems important to notice here. By 7 Geo. IV. c. 64, § 14, "to remove the difficulty of stating the names of all the owners of property in the case of partners and other joint owners," the property of partners may be laid in any one partner by name, and another, or others.† By § 15. property belonging to counties, &c., may be laid in the inhabitants, without naming them. By § 16, property ordered for the use of the poor of parishes, &c., may be laid in the overseers, without naming them; and materials, &c., for repairing highways, may be laid to be the property of the surveyor, or without naming him. By § 17, property of turnpike trustees may be laid in the trustees, without naming them. And by § 18, property under commissioners of sewers may be laid in the commissioners, without naming them. By 7 and 8 Geo. IV. c. 29, § 21, in indictments for stealing records, &c., it is unnecessary to allege either that the article is the property of any person, or that it is of any value.† By § 22 a similar provision is made respecting wills. By § 44, where the materials therein enumerated are fixed in any square, street, or other like place, it is unnecessary to allege them to be the property of any person. And by § 46, in indictments against tenants and lodgers for stealing property from houses or apartments let to them, the property may be laid either in the owner or person letting to hire. For the cases bearing upon this subject, see Car. Cr. L. 25, et seq.; Col. Crim. Stat. 329: and see a full and able summary of the law of larceny, id. 329. 343.

† See 2 R. S. 727, § 46.  
‡ 2 R. S. 680, § 69.
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 (14).

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 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 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 (15). And when an information is filed, either


(14) And see further as to for what causes the court will grant this information, 1 Chit. C. L. 2 ed. 849 to 856. The court will always take into consideration the whole of the circumstances of the charge before they lend their sanction to this extraordinary mode of prosecution. They will observe the time of
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 the king’s bench by a *suggestion on record, and to carry on the prosecution in his majesty’s name. But these informations (of every kind) are confined by the constitutional law to mere misdemeanors only: for, whenever 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

(b) 1 Show. 118.

making the application, and whether a long interval has elapsed since the injury, and to what cause it may be fairly ascribed; also the evidence on which the charge is founded, and weigh the probabilities which it seems to offer: they will also examine the character and motives of the applicant, at least his share in the matter before them; and they will look forward to the consequences of the measure they are requested to grant, in the peculiar situation of the defendant. 1 Bla. Rep. 542. In applications of this nature for libels, the applicant must, unless the charge be general, shew his innocence of the matter imputed to him. See Doug. 284, 387, 568. 1 Burr. 402. 6 T. R. 294. 4 id. 285. 5 B. & A. 595. 1 D. & R. 137. 2 Chit. Rep. 163. In applications against magistrates, the applicant must directly impute corrupt motives for the misconduct complained of. 3 B. & A. 432.

(16) If an information, or an indictment for a misdemeanor removed into the court of king’s bench by certiorari, be not of such importance as to be tried at the bar of the court, it is sent down by writ of nisi prius into the county where the crime is charged to have been committed, and is there tried by a common or special jury, like a record in a civil action; and if the defendant is found guilty, he must afterwards receive judgment from the court of king’s bench. But where an indictment for treason or felony is removed by certiorari, the law upon the subject will be found fully stated by lord Hale in 2 P. C. 41.

If the treason of felony is to be tried at nisi prius under the 14 Hen. VI. c. 1., then the court sends a transcript of the record, and not the record itself. 2 Hal. P. C. 3. 4 Co. 74.
mode of prosecution, with other oppressive devices (c) continually 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 vigour, and daily increasing its authority, for more than a century longer; till finally abolished by statute 16 Car. I. c. 10.

Upon this dissolution of 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 revived in practice (e). And it is observable, [*311] 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. & 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 costs, unless *the information shall be tried within a year after issue joined. [*312]

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 shewn, 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 (17), (18).

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 volume.

This private process, for the punishment of public crimes, had probably its original in those times when a private pecuniary satisfaction, called a *wergild*, 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 (m), from our ancestors, the ancient Germans; among whom, according to Tacitus (o), "luitur homicidium certo armentorum ac pecorum numero; recipitque 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 *eriach* (q). And thus we find in our Saxon laws (particularly those of king Athelstan) (r) the several wergilds 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 wergild, and what were not so (u). As therefore during the continuance of this cus-
tom, a process was certainly given, for recovering the wergild by the party to whom it was due; it seems that, when *these of-\[\text{[*314.]}\]fences by degrees grew no 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.

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 confirmed, by an ordinance of king Henry the First, to the four nearest degrees of blood (z). 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 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 "proscriptio annalis, que currit adversus actorem, si de homicidae non constet intravmnum a cede facta, nec quenquam interea arguad et accusat (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

---

\[\text{[*314.]}\]

*Lady M. W. Montague, hist. 44.}

\[\text{(a) Brit. c. 22.}]

\[\text{(x) By Donald lord Ren against David Damery.}

\[\text{(a) Stierah. de jure Goth. I. 3. c. 4.}]

\[\text{(e) Brit. c. 22.}]

\[\text{(z) By Donald lord Ren against David Damery.}

\[\text{(a) Stierah. de jure Goth. I. 3. c. 4.}]

\[\text{(z) By Donald lord Ren against David Damery.}

\[\text{(a) Stierah. de jure Goth. I. 3. c. 4.}]

\[\text{(z) By Donald lord Ren against David Damery.}

\[\text{(a) Stierah. de jure Goth. I. 3. c. 4.}]

---
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 after-
wards be appealed; for it is a maxim in law, that "nemo bis punitur pro
codem 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 appeller (by virtue of the sta-
tute of Westm. 213 Edw. I. c. 12.) shall suffer one year’s im-
prisonment, 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 appellee 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 this remarkable difference;
that on an indictment, which is at the suit of the king, the king may par-
don 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, than he can remit the damages recovered on an action of
battery (e). In like manner as, while the wergild 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 execu-
tion (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 inhabi-
tants 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 indict-
ment, so the appellant by his release may *discharge an appeal (i); "nam quilibet postem renunciare juri pro se introducto (20)."

(b) Sterm. de jure Goth. l.1, c.5.
(c) See page 335.
(d) l.1, c.34, §48.
(e) 2 Hawk. F. C. 392.

(20) These appeals had become nearly ob-
solete, but the right still existing was claimed,
and in part was 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 mur-
der of his sister. Thornton had been tried at
the Warwick Summer assizes, 1817, for the
muder, and acquitted, though under circum-
stances of strong suspicion. The appellee,
when called upon to plead, pleaded "not guil-
ty, 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 singu-
lar case, in the Report of it, under the name of
Ashford v. Thornton, 1 B. and A. 405. It
These are the several methods 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.

CHAPTER XXIV.

OF PROCESS UPON AN INDICTMENT.

We are next, in the fourth place, to inquire into the manner of issuing process (1), 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 secludes himself, in capital cases; or hath not, in smaller misdemeanors, been bound over to appear at the assises 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 26 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 (2).

The proper process on an indictment for any petit misdemeanors, 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 is- [*319] sue, which commands the sheriff to take his body, and have him

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 shew his innocence, as, an alibi, and his former acquittal of the same offence on an indictment. But it was doubted whether, when 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, 6 Burr. 2793; Smith v. Taylor, id. ibid.; 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 treason, felony, or other offences, together with wagers of battle, by the passing of the statute 59 G. III. c. 46. (1) As to process in general, see Dalt. J. c. 193; Com. Dig. Process, A. 1; Burn J. Process; Williams J. Process; 1 Chit. C. L. 2 ed. 337 to 370. (2) In New-York, the defendant must be personally present at a trial for felony. On trials for other offences, he may appear in person or by attorney. (2 R. S. 734, § 13.) His appearance is compelled by a warrant for his arrest, (id. 728, § 55) or by proceeding against his bail. (Id. 729 & 709.)

VOL. II.
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 plurias 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. 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 (3). 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 quintus 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 (4).

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, exigas 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 (d) (5). His life is however still under the [*320] protection of the law, as hath formerly been *observed (e): so that though anciently an outlawed felon was said to have capitulum, and might be knocked on the head 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 utlagatum, 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.

(a) See Append. § 1.
(b) 2 Hal. P. C. 193.
(c) See Book III. pag. 293, 294.
(d) 2 Hal. P. C. 265.
(e) See page 178.
(f) Mrr. c. 4. Co. Litt. 128.
(g) 1 Hal. P. C. 497.
(h) Bracton, sect. 125.

(3) Now, by the 43 Geo. III. c. 58., when any person is charged with an offence below the degree of felony, one of the judges may, on an affidavit thereof, or on the production of an indictment, or an information filed, issue his warrant for apprehending and holding him to bail; and if he neglects or refuses to become so bound, he may be committed to gaol until he conforms, or is discharged.

(4) Outlawry is abolished in New-York, except in cases of treason. (2 R. S. 745, § 20.)

(5) In most cases now in which a person convicted by a verdict is deprived of clericy, a person outlawed will also be ousted of clericy; yet some few instances may perhaps still remain where a person outlawed will have clericy, though if he had been tried for the same offence, he would not have been entitled to that privilege. See Foster, 358. 2 Leach, Hawk. 481. 4 T. R. 543.
Thus much for process to bring in the offender after indictment found; during which stage of the prosecution it is, that writs of certiorari sues (6) are usually had, though they may be had at any time before trial (7), 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 (8); 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 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 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.

(6) As to this writ in general, see Fitz. K. B. 245, n; Bac. Ab. Certiorari, A.; Com. Dig. Certiorari, A. 1; Burn J. Certiorari; Williams J. Certiorari; 1 Chit. C. L. 2 ed. 371 to 402.

(7) In New-York, no certiorari lies to remove an indictment from the general sessions to the supreme court or oyer and terminer before trial: nor does it lie to remove an indictment from the oyer and terminer to the supreme court before trial, unless allowed by a justice of the supreme court or a circuit judge. (2 R. S. 732, § 81, &c.)

(8) For the definition and history of the writ of certiorari, see Fitz. N. B. 554. As the court of King's Bench has a general superintendence over all other courts of criminal jurisdiction, so it may award a certiorari to remove proceedings from them, unless they are expressly exempted from such superintendence by the statutes creating them. 2 Haw. P. C. 286; Rex v. Young, 2 T. R. 473; Rex v. Jukes, 8 T. R. 542. But certiorari cannot be taken away by any general, but only by express, negative words. Rex v. Reeve, 1 W. Bl. 231; and a statute, taking away certiorari, does not take it from the crown, unless expressly mentioned. Rex v. ———, 2 Chit. R. 136; and see Rex v. Tindal, 15 East, 339. n. Certiorari lies from the court of King's Bench to justices, even in cases which they are empowered finally to hear and determine. 2 Haw. P. C. 286; Rex v. Morely, 2 Burr. 1040; Harley v. Hooker, Cwmp. 554.
CHAPTER XXV.

OF ARRAIGNMENT AND ITS INCIDENTS (1).

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 (2), 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) (3). 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 Laver'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) (4).

[*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 contumptuously refuses to hold up his hand, but confesses he is the person named, it is fully sufficient (e) (5).

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, and stood mute, had challenged above thirty-five jurors peremptorily, had claimed the benefit of clergy, had obtained a pardon, or had died before attainer, the accessory in any of these

(a) 2 Hal. P. C. 216.
(c) State Trials, VI. 230.
(d) 2 Hal. P. C. 219.
(e) Raym. 406.

(1) See further as to arraignment and its incidents, 1 Chit. C. L. 414 to 431; Burn's J. Arraignment; Williams J. Arraignment.
(2) This word in Latin (lord Hale says) is no other than ad rationem ponerent, and in French, ad resen, or abbreviated a resen. 2 Hal. P. C. 216.
(3) As to obtaining a copy of the indictment, assigning counsel, appearing and defending by attorney, and defending in forma pauperis, see 1 Chit. C. L. 2 ed. 403 to 414, post, 351.
(4) And it has since been held, that the court has no authority to order the irons to be taken off, till the prisoner has pleaded, and the jury are charged to try him. Wait's case, Lecch. 34.
(5) It is not usual to require a peer to hold up his hand. 2 Hale, 219. n. a. Hawk. b. 2, c. 28. s. 2.
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 remains liable to be tried hereafter. But by statute *1 Ann. c. 9. (6) 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 (7).

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 (8). 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 impanel 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) (9). But whether

(6) See also the 22 Geo. III. c. 53. 29 Geo. II. c. 30; and as to New-York, see 2 R. S. 727, § 49; allowing any accessory to be tried, though the principal has been pardoned or otherwise discharged after conviction.

(7) See the 7 G. IV. c. 64, by s. 9 of which accessories before the fact, whether in cases of felony at common law, or by virtue of any statute or statutes made or to be made, may be tried as such, or as for substantive felonies, by any court having jurisdiction over the principal felons, although the offences be committed on the sea or abroad; and, if the offences be committed in different counties, may be tried in either.

By s. 10, accessories after the fact may be tried by any court having jurisdiction over the principal felons, as in the preceding s.; and, by s. 11, in order that all accessories may be convicted and punished, in cases where the principal felon is not attainted, it is enacted, that accessories may be prosecuted after the conviction of the principal felon, though the principal felon be not attainted. See further as to arraignment, 1 Curw. Haw. P. C. 434; 1 Chit. Cr. L. 414. The statute mentioned in the text is repealed by the statute 7 Geo. IV. c. 64.

(8) In New-York, the defendant, when arraigned, is asked if he demands a trial, and if he does not confess himself guilty, a plea of not guilty is entered. (2 R. S. 730, § 70.) Thus the law as to standing mute is abolished.

(9) By 7 and 8 G. IV. c. 28, s. 1, where the prisoner pleads "not guilty," without more, he shall be put on his trial by jury: and by s. 2, if he refuses to plead, the court may order a plea of "Not Guilty" to be entered, and proceed as in other cases. But the latter is discretionary; and where there is any real
[*325] judgment of death can be given against such a *prisoner who hath never pleaded, and can say nothing in arrest of 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 or indictments for other felonies, 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 prisone) 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 (10).

(s) 2 Hal. P. C. 317.  
(k) 3 Inst. 178.  
(l) 1 Hawk. P. C. 329. 1 Hal. P. C. 317.  
(m) Ibid. 321. 2 Hawk. P. C. 332.

doubt whether the refusal to plead arises from obstinacy or inability, or the court may, and will, impale a jury to try that question. In case of insanity, this is specially provided for by the unrepealed statuto of 39 and 40 G. III. c. 94, s. 1 of which enacts, that the jury, in case of any person charged with treason, &c., proving upon the trial to be insane, shall declare whether he was acquitted by them on account of insanity, and the court shall order him to be kept in custody till his majesty's pleasure be known, and his majesty may give an order for the safe custody of such insane person; and s. 2 enacts, that insane persons, indited for any offence, and found to be insane by a jury, to be impaneled on their arraignment, shall be ordered by the court to be kept in custody till his majesty's pleasure be known. The latter section has been held to extend to cases of misdemeanor. Rex v. Little, R. and R. C. C. 430. In Rex v. Roberts, Car. Cr. L. 57, a prisoner would not plead, and a jury being 'impaneled to try whether he stood mute by the visitation of God, his counsel claimed a right to address the jury, as this was an issue with the affirmative on the prisoner. This was allowed by Park and Abbot, Js. The prisoner's counsel addressed the jury, and called witnesses to prove he was insane. The jury found that he was so, and Park, J., directed that he should be detained until his majesty's pleasure should be known.

As to the law of New-York, see preceding note: no insane person can be tried, sentenced, or punished. (2 R. S. 697, § 1.)

(10) Aulus Gellius with more truth has made the same observation upon the cruel law of the Twelve Tables, De iuto debito secundo, "Eo consilio tanta immanitas penna denunciata est, ne ad eam unquam perveniretur?" for he adds, "dissectum esse antiquitatem neminem equidem neque legi neque audiet," lib. 20, c. 1. But with respect to the horrid judgment of the peine forte et dure, the prosecutor and the court could exercise no discretion, or show no favour to a prisoner who stood obstinately mute. And in the legal history of this country there are numerous instances of persons, who have had resolution and patience to undergo so terrible a death in order to benefit their heirs by preventing a forfeiture of their estates, which would have been the consequence of a conviction by a verdict. There is a memorable story of an ancestor of an ancient family in the north of England. In a fit of jealousy he killed his wife; and put to death his children who were at home, by throwing them from the battlements of his castle; and proceeding with an intent to destroy his only remaining child, an infant nursed at a farm-house at some distance, he was intercepted by a storm of thunder and
The rack, or question, to extort a confession from criminals, is a practice of 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 IV. 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 proceedings 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 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 quaesitor, flectit libitum, corruчит spat, infirmat metus, ut in tot verum angustiis nihil verilati 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

---

notes:

(o) 3 Inst. 35.
(p) Barr. 92, 496.
(q) Rushworth. Coll. I. 639.
(r) Col. L. 9, t. 41, l. 6, & t. 47, l. 16. Fortesc. de L. Ang. c. 21.
(s) The marquis Beccaria (ch. 16.), in an exquisite piece of raillery, 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."
(t) Pro Sulla, 23.
(v) Britton, c. 4, & 22. Plut. t. 1, l. 34, § 33.
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 other 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).

[*328] This statute of Edward I. directs such persons *"as 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 forte 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 strict 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 [*329] still innocently remained, *as a monument of the 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 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 and 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 (11). And thus much for the demesnor 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 approvment. And that is when a *person, indicted of treason or [*330] felony, and arraigned for the same, doth confess the fact before plea pleaded; and appeals or accuses others, his accomplices, in 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 approvment 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 justitiae. 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 conviction of some other person, and therefore his conviction remains absolute.

But it is purely in the discretion of the court to permit the approved 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

(e) 2 Hawk. P. C. 331.
(f) 2 Hal. P. C. 235.
(g) 2 Hal. P. C. ch. 29. 2 Hawk. P.C. ch. 24.

(11) Two instances have occurred since the passing of this statute, of persons who refused to plead, and who in consequence were condemned and executed. One was at the Old Bailey, for murder, in 1777; the other was for burglary, at the summer assizes at Wells, in 1792. It might perhaps have been a greater improvement of the law, if the prisoner's silence had been considered a plea of not guilty, rather than a confession. For it would operate more powerfully as an example, and be more satisfactory to the minds of the public, if the prisoner should suffer death after a public manifestation of his guilt by evidence, than that he should be ordered for execution only from the presumption which arises from his obstinate silence. See note 8, p. 324, as to law of New-York.
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, *331] stables, and coach-houses, by statutes 4 & 5 W. & M. c. 6. *6 & 7 W. III. c. 17, 10 & 11 W. III. c. 23, and 5 Ann. c. 31, 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 40l. 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 (b). 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 (12). It hath also been usual for the justice of the peace, by whom any persons charged with felony are committed to gaol, to admit some 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) (13).

(b) The pardon for discovering offences against the coining 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. 1775.

(12) These acts are now repealed; see notes 17 and 18, p. 294, 295, ante.

(13) In the case of Mrs. Rudd, in which this subject is clearly and ably explained by lord Mansfield, and again by Mr. J. Aston, in delivering the opinion of all the judges, (Cowp. 331.) it is laid down that no authority is given to a justice of peace to pardon an offender, and to tell him he shall be a witness at all events against others. But where the evidence appears insufficient to convict two or more without the testimony of one of them, the magistrate may encourage a hope that he, who will behave fairly and disclose the whole truth, and bring the others to justice, shall himself escape punishment. But this discretionary power exercised by the justices of peace is founded in practice only and cannot control the authority of the court of gaol-delivery, and exempt at all events the accomplice from being prosecuted. A motion is always made to the judge for leave to admit an accomplice to be a witness, and unless he should see some peculiar reason for a contrary conduct, he will prefer the one to whom this encouragement has been given by the justice of peace. This admission to be a witness amounts to a promise of a recommendation to mercy, upon condition that the accomplice make a full and fair disclosure of all the circumstances of the crime, for which the other prisoners are tried, and in which he has been concerned in concert with them. Upon failure on his part with this condition, he forfeits all claim to protection. And upon a trial some years ago at York, before Mr. J. Buller, the accomplice, who was admitted a witness, denied in his evidence all that he had before confessed, upon which the prisoner was acquitted; but the judge ordered an indictment to be preferred against this accomplice for the same crime, and upon his previous confession, and other circumstances, he was convicted and executed. And if the jury were satisfied with his guilt, there can be no question with regard both to the law and justice of the case.

The learned commentator says, that the accomplice thus admitted a witness, shall not afterwards be prosecuted for that or any other previous offence of the same degree. Mrs. Rundd's case does not warrant the extent of that position, for the decision of that case, and what is advanced by Mr. J. Aston (Cowp. 341.), and as the editor conceives the reason and principles of this doctrine, will not extend the claim of the witness to mercy beyond those offences in which he has been connected with the prisoners, and concerning which he has previously undergone an examination. And with regard to these crimes he may be cross-examined by the counsel for the prisoner, but of course he may refuse to crimate himself
CHAPTER XXVI.

OF PLEA, AND ISSUE (1).

We are now to consider the plea of the 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 sacrifice, 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

of other charges, against which that prosecution affords him no protection. The evidence and information of an accomplice taken according to the statutes 1 & 2 Ph. & M. c. 13, and 2 and 3 Ph. & M. c. 10. may be read against a prisoner, upon proof of the death of the accomplice; but it can have no effect, unless it is corroborated in the same manner as his living testimony. Westbeem's case, Leach, 14. See further, as to the evidence of an accomplice, 1 Chitty's Crim. L. 603, and Stark, on Evid. part IV. 17.

It has now been absolutely decided that an accomplice admitted as king's evidence, and performing the condition on which he is admitted as a witness, is not entitled, as matter of right, to be exempted from prosecution for other offences with which he is charged, but that it will be matter in the discretion of the judge whether he will recommend him for a pardon or not. Rex v. Lee, R. and R. C. C, 361; Rex v. Brunton, id. 454. Even the equitable claim of an accomplice to a pardon, on condition of his making a full and fair confession, does not extend to prosecutions for other offences in which he was not concerned with the prisoner; with respect to such offences, therefore, he is not bound to answer on cross-examination. Lee's, Ducet's, and West's cases, 1 Phil. Ev. 37. But the judges will not, in general, admit an accomplice as king's evidence, although applied to for that purpose by the counsel for the prosecution, if it appear that he is charged with any other felony than that on the trial of which he is to be a witness. 2 C. and P. 411; Car. Cr. L. 68. Where an accomplice is confirmed in his evidence against one prisoner, but not with respect to another, both may be convicted, if the jury think the accomplice deserving of credit, Rex v. Dawber and others, 2 Stark. N. P. C. 34; Car. Cr. L. 67, 2d ed. And see Rex v. Dawber, 3 Stark. 34-5, n. where it is said, that if the testimony of an accomplice be confirmed so far as it relates to one prisoner, but not as to another, the one may be convicted on the testimony of the accomplice, if the jury deem him worthy of credit. An accomplice does not require confirmation as to the person charged, provided he is confirmed in the particulars of his story. Rex v. Birkett and Brady, R and R. C. C. 251. And the corroboration of his evidence need not be on every material point, but he must be so confirmed as to convince the jury that his statement is correct and true. Rex v. Barnard, 1 C. and P. 88. A person indicted for a misdemeanor may be legally convicted upon the uncorroborated evidence of an accomplice, Rex v. Jones, 2 Camp. 132. So may a person indicted for a capital offence. Jordeaine v. Lashbrook, 7 T. R. 609. But the testimony of accomplices alone is seldom of sufficient weight with a jury to convict the offenders; the temptation to commit perjury being so great, where the witness by accusing another may escape himself. The practice, therefore, is to advise the jury to regard the evidence of an accomplice, only so far as he may be confirmed, in some part of his testimony, by unimpeachable testimony, Phil. Ev. 34, 3d ed. And see id. c. 4, § 2, and the several authorities there cited and considered.

(1) As to pleas in general, in original proceedings, see 1 Chit. C. L. 2 ed. 432 to 475.
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 sea-side, 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 (2).

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) (3).

II. A demurrer to the indictment. This is incident to criminal [*334] cases, as well as civil, when the fact alleged is *allowed to be true, but the prisoner joins issue upon some point of law in the indictment, by which he insists that the fact, as stated, is no felony, treason, or whatever the crime is alleged to be. Thus, for instance, if a man were 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 (4). Which appears the more reasonable, because it is clear, that if the prisoner freely discovers the

(a) Murr. c. 1, § 12. 2 Hawk. P. C. 335.
(b) 2 Hawk. P. C. 52.
(c) 2 Hal. P. C. 236.
(d) Ibid. 256.
(e) 2 Hal. P. C. 257.
(f) 2 Hawk. P. C. 334.

(2) Benefit of clergy is abolished in all cases of felony by 7 and 8 Geo. IV. c. 28. § 6.
(3) An affidavit of the truth of the plea must be made.
In some cases the defendant may take advantage of the want of jurisdiction, under the plea of not guilty; as where a statute directs the offence shall be tried only within a certain boundary, or by certain magistrates, 1 East, 352; or where the objection proves, that no court in England can try the indictment, 6 East, 583; and an objection to the jurisdiction, apparent on the face of the proceedings, may be taken advantage of on demurrer. 1 T. R. 316.
(4) This rule holds good in indictments for felonies, but not for misdemeanors. 8 East, 112.
fact in court, and refers it to the opinion of the court, whether it be felony or no; and upon the fact thus shewn 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 in 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 (5) is principally for a misnomer, a wrong name, or 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 writs or declarations may be in civil actions; of which we spoke at large in the preceding book (h) (6). 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 shew 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 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 (7), 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 (8). There-

(g) 2 Hal. P. C. 225.
(5) An affidavit of the truth of the plea must be filed, 4 & 5 Ann. c. 16. s. 11. See also 2 R. S. 731, § 71.
(6) These defects are cured in England by 7 Geo. IV. c. 64, § 19; and in New-York, by 2 R. S. 728, § 52.
(7) As to this plea in general, see 1 Chit. C. L. 2 ed. 452 to 461. 2 Hale, 240 to 250. Hawk. b. 2. c. 35. Com. Dig. Indictment, L. Burn J. Indictment, XI. 4 to 45, and see the notes on the precedents of this plea, in 4 Chit. Cr. L. 2 ed. 335.
(8) But such a plea must be strictly regular both in form and substance; for, in cases of misdemeanor, if it is held bad on demurrer final judgment may be entered up against the defendant. Rex v. Taylor, 5 D. and R. 422; 3 B. and C. 502. And if it is irregularly pleaded, and the acquittal which it sets forth appears to have been obtained by collusion, the court will strike the plea off the file. Rex v. Taylor, 5 D. and R. 521; 3 B. and C. 612. A plea of autrefois acquit cannot be pleaded unless the facts charged in the second indictment, would, if true, have sustained the first. Rex v. Vandercomb, 2 East, P. C. 519. If, in a plea of autrefois acquit, the prisoner were to insist on two distinct records of acquittal, his plea would be bad for duplicity. But sensible, that if he insisted upon the wrong, the court would, in a capital case, take care that he did not suffer by it. Rex v. Sheen, 2 C. and P. 635. And if the prisoner could have been legally convicted on the first indictment
fore 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 inconvenience, the statute [*336] 3 Hen. VII. c. 1. enacts, that "indications 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 autrefoits acquit on an indictment, shall be no bar to the prosecuting of any appeal.

2. Secondly, the plea of autrefoits convict (9), 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 autrefoits acquit and autrefoits 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 autrefoits attaint, or a former attainer; which is a good plea in bar, whether it be for the same or any other felony. For wherever 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 attainer 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 attainer, 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,

[*337] 1. Where the former attainer is reversed for error, for then it *is the same as if it had never been. And the same reason holds, where the attainer is reversed by parliament, or the judgment vacated by the king's pardon, with regard to felonies committed afterwards. 2. Where the attainer was upon indictment, such attainer 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

(k) 2 Hawk. P. C. 373.
(l) 2 Hawk. P. C. 377.
(m) Ibid. 373.

upon any evidence that might have been adduced, his acquittal on that indictment may be successfully pleaded to a second indictment; and it is immaterial whether the proper evidence was adduced at the trial of the first indictment or not. Id. ibid. A prisoner indicted for felony may plead not guilty after his special plea of autrefoits acquit has been found against him. Rex v. Welch, Car. Cr. L. 56.

(9) As to this plea in general, see 1 Chit. C. L. 462. 3. 2 Hale, 251 to 255. Hawk. b. 2. c. 36. s. 10 to 17. Burn J. Indictment, XI.
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) (10).

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 proceedings; and they have their respective force and efficacy, as well after as before conviction, outlawry, or *attainder; I shall there- [*338]fore reserve the more minute considerations of 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 action of debt, the defendant pleads a general release, and no such release can be proved, he cannot afterwards plead the general issue, **nil debel**, 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 reipublicae ut sit finis litium*: yet in criminal prosecutions *in favorem vitae*, 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 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 (11). It remains therefore that I consider,

V. The general issue, or plea of not guilty (q), upon which plea alone

(a) Poph. 107.
(b) Staun. P. C. 107.
(p) 2 Hal. P. C. 239.
(q) See Append. § 1.

(10) By the 7 and 8 G. IV., c. 28, s. 4, it is enacted that no plea setting forth any attainder, shall be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment; by which enactment the plea of autrefois attainder seems to be at an end.

In New-York there is no attainder.

(11) But this is confined to cases of felony; a defendant having pleaded in bar in all cases of misdemeanor, is precluded from the benefit of the plea of not guilty, if the plea of bar should be found insufficient, 8 East, 107. 1 M. & S. 184. 3 B. & C. 502. 2 B. & C. 512, unless on demurrer. Trem. P. C. 189. 6 East, 583. 602. See ante, 335, note 8.
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 [*339] facts in treason are *laid to be done prodilior et contra ligeantiae suae debitum, and, in felony, that the killing was done felonice; these charges, of a treasonous 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) (12).

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 assise, or the 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 praesto 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 (o), 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 [*340] in point of fact: which is evidently the case here, in the plea of 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

(r) 2 Hal. P. C. 393.
(s) North's life of Guildford, 93.
(t) See book III. pag. 312.

(12) In cases of indictments or informations for misdemeanors, the above rule, as to pleading the general issue, does not apply with the same degree of strictness; for there are some cases where a special plea is not only allowable, but even requisite. Thus, if the defendant fall within any exception or proviso, which is not contained in the purview of the statute creating the offence, he may, by pleading, show that he is entitled to the benefit of that exception, or proviso; and there are many pleas of this description in the ancient entries. 2 Leach, 606. But the principal, and indeed almost the only cases, in which special pleas to the merits are necessary, are in the case of indictments for neglecting to repair highways and bridges. As to these, see in general, 1 Chit. C. L. 473 to 477.
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 afterwards the ignorance of succeeding clerks adopted for the very words to be by them spoken (v).

But however it may have arisen, the joining of issue (which though now usually entered on the record (v), 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 "culprit, 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 (13). This form has at present reference to appeals and approvals only wherein the appellee has his choice, either to try the *ac- [*341] cusation by battel or by jury. But upon indictments, since the abolition of ordeal, there can be no other trial but by jury, per paiz, or by the county: 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 the country (z), if a commoner; and, if a peer, by God and his peers (a); the indictment, if in treason, is taken pro confessio; 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 (14).

(u) 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 a jury are all sworn, the officer bids the greater number them, for which the word in law-french is "couter;" but we now hear it pronounced in very good English, "count these."

(w) See Appendix, § 1.
(x) 9 Hawk. P. C. 399.
(y) 2 Hal. P. C. 238.
(z) A learned author, who is very seldom mista-

(13) Mr. Christian has the following note on this explanation:—The learned judge's explanation of prit from praesto sum, or paratus verificare, however ingenious, is certainly inconsistent both with the principles and practice of special pleading. After the general issue, or the plea of not guilty, there could be no replication; or the words paratus verificare could not possibly have been used. This plea in Latin was entered thus upon the record:

Non inde est culpabilis et pro bono et malo posuit se super patriam; after this the attorney-general, the king's coroner, or clerk of assize, could only join issue by facit similiitum, or he doth the like. (See App. p. 3, at the end of this book.) If then I might be allowed to indulge a conjecture of my own, I should think that prit was an easy corruption of put, written for posuit by the clerk, as a minute that issue was joined, or posuit se super patriam; or put se might be converted into prit or prest, as it is sometimes written. Cut was probably intended to denote the plea, and prit the issue:

and these syllables being pronounced aloud by the clerk to give the court and prisoner an opportunity of hearing the accuracy of the minute, and being immediately followed by the question, How wilt thou be tried? naturally induced the ignorant part of the audience to suppose that culprit was an appellation given to the prisoner. As a confirmation of the conjecture that prit is a corruption for put, the clerk of the arraigns at this day, immediately after the arraignment, writes upon the indictment, over the name of the prisoner, pnts. And Roger North informs us, that in ancient times, when pleadings in the courts were ore tenus, "if a serjeant in the common pleas said judgment, that was a demurrer; if prit, that was an issue to the country."—Life of Lord Keeper North, 98.

(14) By 7 and 8 G. IV. c. 28. s. 1, it is enacted, that if any person, not having privilege of peerage, being arraigned upon any indictment for treason, felony, or piracy, shall plead thereto a plea of "not guilty," he shall, by such plea, without any further form, be deem-
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; 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 pain, for hire, or perhaps [*343] for friendship (e). Fire-ordeal was performed either by taking up to 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 unequal 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 (/).

Water-ordeal was performed, either by plunging the bare arm up to the...

\*(\*343)\]

ed to have put himself upon the country for trial, and the court shall, in the usual manner, order a jury for the trial of such person accordingly. In consequence of this wise enactment, the absurd ceremony of asking a prisoner how he will be tried, has been wholly discontinued. By s. 2 of the same statute it is enacted, that if any person being arraigned upon, or charged with any indictment for treason, felony, piracy, or misdemeanor, shall stand mute, or will not answer directly, to the indictment or information, in every such case it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of “not guilty” on behalf of such person; and the plea so entered shall have the same force and effect, as if such person had actually pleaded the same. Vide ante 324, note (9), the law in England; note 8, the law in New-York.
elbow in boiling water, and escaping unhurt thereby: 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 practised 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 ancient Greeks: for in the *Antigone* of Sophocles [*344*] (h), a person, suspected by Creon of a misdemesnor, declares himself ready "to handle hot iron, and to walk over fire," in order to manifest his innocence; which, the scholiast tell us, was then a very usual purgation. And Grotius (i) gives us many instances of water-ordeal in Bithynia, 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 tyger let loose for that purpose; and, if the beast spare 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, aquae, 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 Stierhouth (m) gives the reason; "*non defuit illis operae et laboris pretium; semper enim ab ejusmodi judicio aliquid lucr acestodibus 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 sil contra praeceptum Dominii, non tentabis Dominum Deum tuum* (n)."

Upon this authority, though the canons *themselves* were of [*345*] no validity in England, it was thought proper (as 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

---

(g) Sp. I. b. 12, c. 5.
(h) v. 270.
(i) On Numb. v. 17.
(k) Mod. Univ. Hist. vii. 366.
(m) De jure Sucorum, l. 1, c. 8.
(n) Decret. pars 2, caus. 2, qu. 5, dist. 7. Decretal. lib. 3, tit. 50, c. 9, & Gloss. ibid.
(p) 9 Rep. 32.
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: as the water of jealousy among the Jews 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: 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 bucellam deglutandum 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 (w).

[*346] *However, we cannot but remark, that though in European countries this custom most probably arose from an abuse of revealed religion, yet 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 subsists 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 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

---

(1) This species of trial is now entirely abolished by the 59 Geo. III. c. 46. See 1 B. & A. 405; ante 318, note 20.

(r) Spelm. Gl. 430.
(s) Numb. ch. v.
(t) L.L. Canut. c. 6.
(u) Ingulph.
(v) As, "I will take the sacrament upon it; may this morsel be my last;" and the like.
(w) This mod. Univ. Hist. vii. 129.
(x) Ibid. xv. 464.
(y) See Book III. pag. 337.
must fight in their proper persons. And therefore if the *ap-

[347]pellant 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 wa-

gger 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 the 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 re-

plies that he is ready to make good the appeal, body for body. And there-

upon 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 per-

jured, because that thou feloniously didst murder my *father, Wil-

liam 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 can-

not or will not fight any longer, he shall be adjudged to be hanged imme-

diately; 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 attained,
But if he kills the appellant, or can maintain the fight from sunrising till
the stars appear in the evening, he shall be acquitted. So also if the app-

ellant 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 for ever quit, not only of the appeal, but of
all indictments likewise for the same offence (2).

(a) 2 Hawk. P. C. 457.

(b) Plot. l. 1, c. 34. 2 Hawk. P. C. 436.

(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
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) (3). 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 proceedings, 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 [*349] 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 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 exuet, aut aliquo alio modo desistruat, nisi per legale judicium parium suorum, vel per legem terrae."

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 twofold 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

the combat was prorogued to a further day, before which the king revoked the commission. See an account of the proceedings, 11 Harg. St. Tr. 124. See also 3 book, 337.

(3) The nobility are tried by their peers for treason and felony, and misprision of these; but in all other criminal prosecutions they are tried like commoners by a jury. 3 Inst. 30.

* See Book III. page 379.

[280]

PUBLIC WRONGS.
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, are the most clear and perspicuous way of treating it.

When therefore a prisoner on his arraignment (4) 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 vicinito; that is, freeholders, without just exception, and of the v inset or neighbourhood; which is interpreted to be of the county where the fact is committed (j) (5). If the proceedings are before the court of king’s bench, there is time allowed, between the assignment and the trial, for a jury to be *impanelled by a writ of venire [*351] facias to the sheriff, as in civil causes: and the trial in case of a misdeemeanor 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 (6), (7). 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 (8).

(f) 2 Hal. P. C. 294. 2 Hawk. P. C. 403.

(4) As to jury process in general, see 1 Chit. C. L. 2 ed. 506 to 517.

(5) Now by the 6 Geo. IV. c. 50, s. 13, the jury are to come from the body of the county, and the want of hundreds is no longer a cause of challenge.

The qualifications of petty jurors on the trial are now clearly pointed out by the 6 Geo. IV. c. 50, s. 1.

By the 5 Geo. IV. c. 50, s. 15, the panel must be returned annexed to the venire facias.

(6) See how indictments for capital offences may be tried at nisi prius, p. 309. notes, ante. When offences may be tried at bar, see 1 Chit. C. L. 497, 8.

(7) In New-York the trial is before the court of oyer and terminer for capital offences, unless removed by certiorari to the supreme court, and then the record is carried down for trial at the circuit, not at bar. (2 R. S. 732, § 82, 84.) As to the time of trial, see id. 737, § 28, &c.: and ante p. 301. note (1).

(8) Now, by the 60 Geo. III. and 1 Geo. IV. c. 4, s. 3, if the defendant has been committed to custody, or held to bail for a misdemeanor, twenty days before the session of the peace, session of oyer and terminer, great session, or session of gaol-delivery, at which the indictment was found, the defendant shall plead, and the trial shall take place at such session, unless a writ of certiorari be awarded. And by section 5, where a defendant, im-
PUBLIC WRONGS.

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 W. 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 (9): 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 *thereof, shall have not only a copy of the indictment, but a list of all the witnesses to be produced, and of the jurors impanelled, 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) (10). 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).

(k) Fost. 229, Append. i.
(l) Ibid. 230.
(m) Fost. 250.
(n) 9 Hawk. P. C. 410.

*352*

dicted for a misdemeanour at any session of the peace, session of oyer and terminer, great session, or session of gaol-delivery, not having been committed to custody, or held to-bail to appear to answer for such offence, twenty days before the session at which the indictment, or which shall have been committed to custody, or held to bail to appear to answer for such offence at some subsequent session, or shall have received notice of such indictment having been found, twenty days before such subsequent session, he shall plead at such subsequent session, and trial shall take place at such session, unless a certiorari be awarded before the jury be sworn for such trial. But on sufficient cause shown, the court may allow further time for trial. Id. s. 7.

In cases of indictments for obtaining goods, &c. by false pretences, and sending threatening letters, with intent to extort money, &c. and other misdemeanors punishable under the 30 Geo. II. c. 24, it is enacted by that act, s. 17, that every such offender, bound over to the general quarter sessions of the peace, or sessions of oyer and terminer, and gaol-delivery, of the county where the offence was committed, shall be tried at such general quarter sessions of the peace, or sessions of oyer and terminer, and gaol-delivery, of the county where the offence committed, shall be tried at such general quarter sessions of the peace, or sessions of oyer and terminer, and gaol-delivery, of the county where the offence was committed, shall be held next after his apprehension, unless the court shall think fit to put off the trial, on just cause made out to them. So also by the 39 & 40 Geo. III. c. 87. s. 22, persons indicted for a misdemeanor, in receiving stolen goods, under the 2 Geo. III. c. 28, are to be tried immediately, without being allowed the delay of a traverse. 2 East. P. C. 754. As to traverses in petit or terminal proceedings, see 1 Chit. C. L. 486.

(9) This limitation as to the time of finding an indictment applies in New-York, to all offences except murder, and in all cases the defendant may have a copy of the indictment (2 R. S. 728, § 57, id. 728, § 53,) and of the list of the jurors: (id. 414, § 31,) he may also have gratuitously summoned jurors to come the attendance of witnesses. (Id. 729, § 59.)

(10) By 39 and 40 Geo. III. c. 93, in all cases of high treason, in compassing or imagining the death of the king; and of misprision of such treason, where the overt act alleged in the indictment is the assassination of the king, or a direct attempt against his life or person, the party accused shall be indicted and tried in the same manner and upon the like evidence as if charged with murder. But the judgment and execution shall remain the same as in other cases of high treason. And by 6 Geo. IV. c. 60, § 21, when any person is indicted for high treason or misprision of treason, in any court except K. B., a list of the petty jury, with their names, professions, and
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 (11).

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 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 (12); (which does not indeed hold in treasons (p), aliens being very improper judges of the breach of allegiance (13); nor yet in the case of Egyptians (14) under

---

(c) See Book III. pag. 350.

(p) 2 Hawk. F. C. 420. 2 Hal P. C. 271.

places of abode, shall be given at the same time that the copy of the indictment is delivered to the party indicted, which shall be ten days before arraignment, and in the presence of two or more credible witnesses; and when any person is so indicted in K. B., a copy of the indictment shall be delivered, as before mentioned, but the list of the petty jury, made out as before mentioned, may be delivered to the party indicted, after arraignment, so that it be ten days before trial. Proviso, not to extend to interfere with the provisions of 39 and 40 Geo. III. c. 93, nor to cases of treason relating to the coin.

Where the jury panel is incorrect, a motion may be made on the part of the crown, in the court of gaol delivery, for leave to the sheriff to amend the panel. 1 East, P. C. 113.

(11) By 6 Geo. IV. c. 50, § 27, if any man shall be returned as a juror for the trial of any issue, in any of the courts in the Act mentioned, who shall not be qualified according to the Act, the want of such qualification shall be good cause of challenge, and he shall be discharged upon such challenge, if the court shall be satisfied of the fact; and if any man returned as a juror for the trial of any such issue shall be qualified in other respects according to the Act, the want of freehold shall not on such trial, in any case, civil or criminal, be accepted as good cause of challenge, either by the crown or the party, nor as cause for discharging the man so returned upon his own application. Proviso, not to extend to any special juror.

By § 28, no challenge shall be taken to any panel of jurors for want of a knight being returned in such panel, nor any array quashed by reason of any such challenge.

By § 29, in all inquests to be taken before any of the courts in the Act mentioned, wherein the king is a party, howsoever it be, notwithstanding it be alleged by them that sue for the king, that the jurors of those inquests, or some or them, be not indifferent for the king; yet such inquests shall not remain untaken for that cause; but if they that sue for the king will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the court; and it shall be proceeded to the taking of the same inquisition, as it shall be found, if the challenges be true or not, after the discretion of the court; and no person arraigned for murder or felony, shall be admitted to any peremptory challenge above the number of twenty.

And by 7 and 8 Geo. IV. c. 28, § 3, if any person indicted for any treason, felony, or piracy, shall challenge peremptorily a greater number of the men returned to be of the jury than such person is entitled by law so to challenge, in any of the said cases, every peremptory challenge, beyond the number allowed by law in any of the said cases, shall be entirely void, and the trial of such person shall proceed as if no such challenge had been made.

(12) The 6 Geo. IV. c. 50, § 47, provides, that nothing in that Act contained shall extend or be construed to extend to deprive any alien indicted or impeached of any felony or misdemeanor of the right of being tried by a jury de medietate lingue; but that, on the prayer of every alien so indicted or impeached, the sheriff, or other proper minister, shall, by command of the court, return for one half of the jury a competent number of aliens, if so many there be in the town or place where the trial is had, and if not, then so many aliens as shall be found in the same town or place, if any: and that no such alien juror shall be liable to be challenged for want of freehold, or of any other qualification required by the Act; but every such alien may be challenged for any other cause, in like manner as if he were qualified by the Act.

(13) The privilege is taken away from persons indicted of high treason by the 1 and 2 P. and M. c. 10, which directs that all trials for that offence shall take place as at common law.

(14) The 28 E. III. c. 13, on which this right of aliens was founded, was repealed as to Egyptians by the 1 and 2 P. and M. c. 4, § 3, and the 5 Eliz. c. 20, which enacted that they should be tried by the inhabitants of the county where they were arrested, and not per

challenge for cause. (2 R. S. 734, § 9, 10, 11.)

† In New-York, on every indictment for an offence punishable with death, or imprisonment in a state-prison for ten years or more, the defendant may challenge peremptorily 20 and no more; the district attorney can only

† In New-York, no alien can claim a jury partly of aliens on an indictment, (2 R. S. 734, § 7.) nor in any suit whatever. (Id. 412, § 53.)

VOL. II.

85
the statute 22 Hen. VIII. c. 10,) that on every panel there should be a competent number of hundredors (15); 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 (16).

[*353] Challenges upon any of the foregoing accounts are styled challenges for cause; which may be without stint in both criminal and civil trials. But in criminal cases, or at least in capital ones, there is, in favorem vitae, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without shewing 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 (17). 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 judge, 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 shewn, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifferency 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.

This 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 (18). 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 shew the cause: otherwise the juror shall be sworn (q) (19).

The peremptory challenges of the prisoner must however have [*354] 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; 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 inten-

(q) 3 Hawk. P. C. 413. 2 Hal. P. C. 271.

medietatem linguæ; but that provision was repealed by the 23 G. III. c. 51, and Egyptians are now dealt with under the Vagrant Acts as rogues and vagabonds. Vide ante, 167, n. 10. (15) The right to challenge for want of hundredors is now taken away by the 6 Geo. IV. c. 50. s. 13. (16) As to qualifications of jurors in New-York, see 2 R. S. 411. (17) A peremptory challenge is not allowed in the trial of collateral issues. Post. 42. Nor in any trial for a misdemeanor, 2 Harg. St. Tr. 508, and 4 H. St. Tr. 1. As to law of New-York, see note (f) p. 352, ante.

(18) And see a similar provision in 6 Geo. IV. c. 50. s. 29. (19) And the practice is the same both in trials for misdemeanors and for capital offences. 3 Harg. St. Tr. 519. Where there is a challenge for cause, two persons in court not of the jury are sworn to try whether the jurymen challenged will try the prisoner indifferently. Evidence is then produced to support the challenge, and according to the verdict of the two tryers, the jurymen is admitted or rejected. A jurymen was thus set aside in O’Coigly’s trial for treason, because, upon looking at the prisoners, he had uttered the words, “damned rascals.” See O’Coigly’s trial.
tion to be tried at all. And therefore it 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 & 2 Ph. & Mar. 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 the 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 doth 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 arc, "that he be not admitted to challenge more than twenty;" the evident construction of which is, that any farther challenge shall 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 (20).

If, by reason of challenges or the default of the jurors, a sufficient number cannot be had of the original panel, a tales *may be [*355] 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 their evidence."7

When the jury is sworn, if it be a cause of any consequence, the indictment is usually opened, and the evidences marshalled, 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) (21). 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 mirrour (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

---

(r) 2 Hal. P. C. 298.
(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 good delivery, no tales can be awarded; though the court may are tenus order a new panel to be returned instanter. (4 Inst. 66. 4 St. Tr. 728. Cooke's Case.)
(w) 2 Hawk. P. C. 400.
(x) Sir Edw. 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. 736.) it was the only good reason that could be given for it.
(y) c. 3, §1.

---

(20) See note (1) p. 352 ante, and id. note 11.
(21) Counsel are allowed in all cases in New-York. (2 R. S. 165, 1 R. S. 93.)
subjoins; "and more necessary are they for defence upon indictments and appeals of felony, than upon other venial causes (z) (22)." 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 [856] ask 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 W. 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 (23) (24).

(z) Father Parsons the jesuit, and after him bishop Ellys, (of English liberty, ii. 66.) have imagined, that the benefit of counsel to plead for them was first denied to prisoners by a 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 quaerat consilium; quin implicatius statum pernecet, sine omni petitione consilii."—In this consentium, I conceive, signifies only an importance, and the petitio consilii is craving leave to impari; (See Book III. page 225.)

(22) The prisoner is not allowed counsel to plead his cause before the jury in any felony, whether it is capital, or within the benefit of clergy; nor in a case of petty larceny. But in misdemeanors the prisoner or defendant is allowed counsel as in civil actions, but even here the defendant cannot have the assistance of counsel to examine the witnesses, and reserve to himself the right of addressing the jury.

1 RY. & M. C. C. 166. 3 Camp. 98.

The maxim that the judge is counsel for the prisoner, signifies nothing more than that the judge shall take care that the prisoner does not suffer from the want of counsel. The judge is counsel only for public justice, and to promote that object alone all his inquiries and attention ought to be directed. Upon a trial for the murder of a male child, the counsel for the prosecution concluded his case without asking the sex of the child, and the judge would not permit him afterwards to call a witness to prove it, but, in consequence of the omission, he directed the jury to acquit the prisoner. But to the honour of that judge, it ought to be stated, that he declared afterwards in private his regret for his conduct. This case is well remembered, but it ought never to be cited but with reprobation.

(23) And see further as to the allowance and assigning of counsel, 1 Chit. C. L. 2 ed. 407 to 411. Upon the trial of issues which often turn upon the question of guilty or not guilty, but upon collateral facts, prisoners under a capital charge, whether for treason or felony, always were entitled to the full assistance of counsel. Post. 232. 42.

It is very extraordinary that the law of England should have denied the assistance of counsel when it is wanted most, viz. to defend the life, the honour, and all the property of an individual. It is the extension of that maxim of natural equity, that every one shall be heard in his own cause, that warrants the admission of hired advocates in courts of justice; for there is much greater inequality in the powers of explanation and persuasion in the natural state of things more of the human mind, than when it is improved by education and experience. Amongst professional men of established character, the difference in their skill and management is generally so inconsiderable, that the decision of the cause depends only upon the superiority of the justice in the respective cases of the litigating parties. Hence the practice of an advocate is absolutely necessary to the administration of substantial justice. An honourable barrister will never mis-state either law or facts within his own knowledge, but he is justified in urging any argument, whatever may be his own opinion of the solidity or justness of it, which he may think will promote the interests of his client; for reasoning in courts of justice and in the ordinary affairs of life seldom admits of geometrical demonstration; but it happens not unfrequently that the same argument, which appears sophistry to one, is sound logic in the mind of another, and every day's experience proves that the opinions of a judge and an advocate are often diametrically oppo-

(24) The law restricting the aid of counsel on indictments still prevails in England. It has generally been repealed in the U.S., and, as is believed, much to the benefit of the community, and without the evils apprehended in England.
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 (25). By statute 1 & 2 Ph. & Mar. c. 10. a farther exception is made to treasons in counterfeiting the king's seals or signatures, and treason concerning coin current within this realm: and more particularly by c. 11. the offences of importing counterfeit foreign money current in this kingdom, and impairing, counterfeiting, or forging any current coin. The statutes 8 & 9 W. III. c. 25, and 15 & *16 Geo. II. c. 28. in their subsequent extensions of this species of [*357] 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 W. III. c. 3. in prosecutions for those treasons to which that act extends, the same rule (of requiring two witnesses) is again enforced; with this addition, that the confession of the prisoner, which shall counteract the necessity of such proof, must be in open court. In the construction of which act it hath been helden (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;

Hence, in all criminal prosecutions, especially where the prisoner can have no counsel to plead for him, a barrister is as much bound to disclose all those circumstances to the jury, and to reason upon them as fully, which are favourable to the prisoner, as those which are likely to support the prosecution.

When this note was written, the editor (Mr. Christian) observes, that he was not aware that the general observations contained in it were sanctioned by so great authorities as Cicero and Panetius. Cicero makes the distinction that it is the duty of the judge to pursue the truth; but it is permitted to an advocate to urge what has only the semblance of it. He says he would not have ventured himself to have advanced this (especially when he was writing upon philosophy), if it had not also been the opinion of the gravest of the stoics, Panetius. "Judicus est semper in causa verum sequi: patrosum nonnumquam verisimile, etiam si minus sit verum, defendere: quod scribere (praesertim cum de philosophi scribendo) non auderem, nisi idem placeret gravissimo stoicorum Panetius." Cic. de Off. lib. 2. c. 14.

(25) See ante 332, note 10, and 2 R. S. 735, § 15.
seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence (26). By the same statute 7 W. III. it is declared, 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 (27). 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 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 indictments for perjury, this doctrine is better founded; and there our law adopts it: for one witness is not allowed to convict a man 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 hand-writing in two papers shewn 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 in question to have been written by him, is evidence to be left to a jury (j) (28).

(b) See St. Tr. II. 144. Foster, 235.
(c) Stat. 5 W. III. c. 4.
(d) St. Tr. V. 40.
(e) Sp. L. b. 12, c. 3.
(f) Beccar. c. 13.
(g) 10 Mod. 104.
(h) St. Tr. VIII. 472.
(i) 2 Hawk. P. C. 431.

(26) it seems to be now clearly established, that a free and voluntary confession by a person accused of an offence, whether made before his apprehension or after, whether on a judicial examination or after commitment, whether reduced into writing or not, in short, that any voluntary confession, made by a prisoner to any person, at any time or place, is strong evidence against him; and, if satisfactorily proved, sufficient to convict without any corroborating circumstance. But the confession must be voluntary, not obtained by improper influence, nor drawn from the prisoner by means of a threat or promise: for however slight the promise or threat may have been, a confession so obtained cannot be received in evidence, on account of the uncertainty and doubt whether it was not made rather from a motive of fear or of interest, than from a sense of guilt. Phil. Ev. 86. The prisoner's statement must not be taken upon oath, and if he has been sworn, it cannot be received in evidence. A confession is evidence only against the person confessing, not against others, although they are proved to be his accomplices. See Phil. Ev. c. 3. s. 5, and the authorities there collected on this subject.

(27) See accordingly, 2. R. S. 735, § 15, &c.

(28) But the proof of hand-writing is not
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) (29).

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 [*359] particular (l) lays down 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 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.

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 injoined 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 could 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 31 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 *gradually 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 evidence in high treason, unless the papers are found in the custody of the prisoner. l Burr. 644. And see further as to this evidence, Phil. on Evid. index, Hand-writing.

(29) Repealed by 45 G. III. c. 58, which is also repealed by 9 G. IV. c. 31. See s. 16 of the latter statute, ante 198, note 31.
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 (w), "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 W. 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 (30).

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 (31); 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 with touches life or member, give a privy verdict (y). But the judges may adjourn while the jury are withdrawn to confer, and return to receive the verdict in open court (z). And such public or open verdict may be either general, guilty, or not [*361] 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, if it be murder, manslaughter, or no crime at all. This is where they doubt the matter of law, and therefore clause 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 attaint at the suit of the king; but not at the suit of the prisoner (a) (32). 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

(30) See note 9, p. 352, law of New-York.
(g) 2 Hal. P. C. 300. 2 Hawk. P. C. 439.

(31) It is now settled, that when a criminal trial runs to such a length as it cannot be concluded in one day, the court, by its own authority, may adjourn till the next morning; but the jury must be somewhere kept together, that they may have no communication but with each other. 6 T. R. 527. See further as to this, 1 Chit. C. L. 2 ed. 632.

(32) As to the liability of jurors to punishment, see 1 Chit. C. L. 527 to 531. Quere, if an attaint could in any case be maintained against a jury. Hawk. P. C. b. 1. c. 72. s. 5. id. b. 2. c. 22. s. 20. 23. Vaughan, 164; and see 6 Geo. IV. c. 50. s. 60, which abolishes the writ of attaint.

It is abolished also in New-York. 2 R. S 421, § 69.
hath been mercifully set aside, and a new trial granted by the court of
ing'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) (33).

If the jury therefore find the prisoner not guilty, he is then for ever quit
and discharged of the accusation (d), except he be appealed of felony within
the time limited by law. And upon such his acquittal, or discharge
for want of *prosecution, he shall be immediately set at large with-

(33) No new trial can be granted in cases of felony, or treason. Rex. v. Mawbey, 6 T. R. 638; and see 13 East. 416, n. (b). But in
cases of misdemeanor, it is entirely discretionary in the court whether they will grant
or refuse a new trial. Id. ibid. A new trial
is not, in general, granted on the part of the
prosecutor, after the defendant has been acquitted, even though the verdict appears to
be against evidence. But it seems to be the
better opinion, that where the verdict was ob-
tained by the fraud of the defendant, or in conse-
quence of irregularity in his proceedings,
as by keeping back the prosecutor’s witnes-
ses, or neglecting to give due notice of trial,
a new trial may be granted. 1 Chit. Cr. L. 657.

(f) In the Roman republic, when the prisoner
was convicted of any capital offence by his judges,
the form of pronouncing that conviction was some-
thing peculiarly delicate: not that he was guilty, but
that he had not been enough upon his guard:
parum convivit iterum.” (Pestus, 325.)

Vol. II.
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 (g). 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 in larceny. For instance: as formerly upon appeals (h), [*363] so now upon indictments of larceny, this writ of restitution *shall reach the goods so stolen, notwithstanding the property (i) of them is endeavoured to be altered by sale in market overt (k). 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 (l), 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 (m): and also reciprocation 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 (n) (36).

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 (37). This is done, to reimburse the prosecutor his expenses, and make him some private amends, without the trouble and circuity of a civil action. But

(g) 3 Inst. 343.
(h) Bracton, de Coron. c. 33.
(i) See book II. page 450.
(k) 1 Hal. P. C. 543.
(m) 1 Hal. P. C. 546.
(n) See page 133.

new, and the enacting part of it makes some very important alterations in the law, as the former Act of Parliament extended only to causes of prosecutions of thieves, and not receivers, and did not include property lost by false pretences, or by other misdemeanors.

In New-York, stolen property is returned to the owner on his paying to the officers reasonable expenses, (2 R. S. 746, § 31); and as there is no market overt, even a bona fide purchaser is not protected from the real owner, (see 1 John R.) though the owner should not prosecute the thief. (38) See ante 183, notes.

(37) See the law of compounding misdemeanors, &c. in New-York, ante p. 193, note 22, and 2 R. S. 730, § 66, &c.
it surely is a dangerous practice: *and, though it may be in-*[*364]* trusted 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 this 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 this 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, ought not in true policy to intercept the stroke of justice. "This," says an elegant writer (o), who pleads with equal strength for the certainty 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 (1).

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 (2): 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

---

(o) Becc. ch. 46.

(1) Benefit of Clergy does not exist in New-York nor in England. See last note to this chapter.

(2) As to this subject in general, See 2 Hale, 329 to 391; index, Clergy; Post. C. L. index,
by the favour of the civil government, they now claimed as their in-
herent right: and as a right of the highest nature, indefeasible, and 
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 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 declaratory plea; or, after conviction, by way of arresting judgment. This latter way is most usually practised, 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 habitum 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.

(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." (Keilw. 181.)
(b) See Book III. page 69.
(c) Keilw. 180.
(d) 2 Hal. P. C. 377.
1. and 32 Hen. VIII. c. 3. 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-robbing, horse-stealing, and robbing of churches (3).

*After this burning the laity, and before it the real clergy, were [*365] 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 or perjury, in this solemn farce of a mock trial; the witnesses, 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 very heinous and *notorious circumstan- [*369] ces 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


(3) Upon the conviction of the duchess of Kingston for bigamy, it was argued by the attorney-general Thirlow, that peersesses were not entitled by 1 Edw. VI. c. 12. like peers to the privilege of peerage: but it was the unanimous opinion of the judges, that a peeress convicted of a clergyable felony ought to be immediately discharged without being burnt in the hand, or without being liable to any imprisonment. 11 H. St. Tr. 294. If the duchess had been admitted, like a commoner, only to the benefit of clergy, burning in the hand at that time could not have been dispensed with. The argument was, that the privilege of peerage was only an extension of the benefit of clergy, and therefore granted only to those who were or might be entitled to that benefit: but as no female, peeress or commoner, at that time was entitled to the benefit of clergy, so it was not the intention of the legislature to grant to any female the privilege of peerage. And in my opinion the argument of the attorney-general is much more convincing and satisfactory, as a legal demonstration, than the arguments of the counsel on the other side, or the reasons stated for the opinions of the judges.
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 (4), stocked, or imprisoned for any time not exceeding a year. And a similar indulgence, by the statutes 3 & 4 W. & M. c. 9. and 4 & 5 W. & 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 burned 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 & 11 W. 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 all male commoners who could read, were dis[*370] charged 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 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 (5). And ex-

(4) Whipping of women is abolished by 1 Geo. IV. c. 57.

(5) The statute enacts, that if a person convicted of a clergyable offence shall pray the benefit of this act, he shall not be required to read, but shall be taken to be, and punished as, a clerk convict. Hence persons convicted of manslaughters, bigamies, and simple grand larcenies, &c. are still asked what they have to say why judgment of death should not be pronounced upon them? And they, are then told to kneel down, and pray the benefit of the statute. It would have perhaps been more consistent with the dignity of a court of justice to have granted the benefit of clergy without requiring an unnecessary form, the meaning of which very few comprehend. And if the prisoner should obstinately refuse to pray
perience having shown that so very universal 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 the 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, 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 (6). 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 re-taken, 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 the benefit of the statute, it seems to be an unavoidable consequence that the judge must pronounce sentence of death upon him.
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 [*372] has been observed 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 clericales, 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 larceny and capital felonies: which for the most part became legally entitled to this indulgence by the statute de clero, 25 Edw. III. st. 3. c. 4. which [*373] provides that clergymen convicted for treasons or felonies, touching other persons than the king himself or his royal 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 was exerted before the privilegium clericales was at all indulged; and which it still exerts upon a second offence in almost all kinds of felonies, unless committed by clergymen 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 common 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 clerical if committed by land, the constant course is to acquit and discharge the prisoner (o) (7). 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, burglary, robbery, rape, and burglary,) a principal in the second degree being present, aiding and abetting the crime, is as well *excluded from his clergy as he that is principal [*374] 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

---

(7) But now by 39 Geo. III. c. 37, offences committed on the high seas are to be considered and treated in the same manner as if committed on shore; and see the 43 Geo III. c. 113, s. 6, 58 Geo. III. c. 27. s. 9.
aider 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 for ever 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 statute, 8 Eliz. c. 4, and 18 Eliz. c. 7. 4. That by burning, or its substitute, or the pardon of it, he is restored to all capacities and credits, and the possession of his lands, as if he had never been convicted (w). 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 (w) (8), (9).


(8) The various statutes mentioned in the course of this chapter, as relating to benefit of clergy, have been either expressly repealed, or rendered inoperative, by the passing of the recent statute, 7 and 8 Geo. IV. c. 28; § 6 of which enacts, that benefit of clergy, with respect to persons convicted of felony, shall be abolished; but that nothing therein contained shall prevent the joinder in any indictment of any counts which might have been joined before the passing of the Act.

Section 7 of the same statute enacts, that no person convicted of felony shall suffer death, unless it be for some felony which was excluded from the benefit of clergy before, or on the first day of the (then) present session of parliament, for which he has been, or shall be made punishable with death by some statute passed after that day.

The 6 Geo. IV. c. 25, entitled "An Act for defining the rights of capital convicts who receive pardon, and of convicts after having been punished for clergiable felonies; for placing clerks in orders on the same footing with other persons as to felonies; and for limiting the effect of the benefit of clergy," had previously enacted, by section 1, that in case of free pardons, the prisoner’s discharge, and in case of conditional pardons, the performance of the condition, should have the effect of a pardon under the great seal; by section 2, that offenders convicted of clergiable felonies enduring the punishment adjudged, such punishment should have the effect of burning in the hand; by section 3, that clerks should be liable to punishment, as if not in orders; and by section 4, that the allowance of the benefit of clergy to any person who should, after the passing of that Act, be convicted of any felony, should not render the person to whom such benefit was allowed, dispensable for any other felony, by him or her committed before the time of such allowance, any law, custom, or usage, to the contrary, notwithstanding.

(9) In New-York there are two state-prisons, and there is in each county a county jail; in the last, persons convicted of the smaller offences are confined. The principle adopted in all is that of "social silent labour:" the prisoners labouring together, but never speaking to any one without the permission of their keepers. (2 R. S. 755, § 11, &c.) In these prisons are confined all persons guilty of any offences below murder, treason, or arson in the first degree; which alone are punishable with death. (2 R. S. 656, § 1, &c.) The principle of absolute silence was not introduced till recently into any prison but that at Auburn; reasonable hopes are entertained that it will prove beneficial.
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 any thing 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 (1). 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). And we may take notice, 1. That none of the statutes of jœfails (b), for amendment of errors, extend to indictments or proceedings in criminal cases; *and [*376] therefore a defective indictment is not aided by a verdict, as defective pleadings in civil cases are. 2. That, in favour of life, 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) 4 Rep. 45.
(b) See Book III. p. 407.
(c) 2 Hal. P. C. 193.

(1.) Outlawry is abolished in New-York, except on convictions for treason. (2 R. S. 745, § 20.)
(2.) The law upon this subject has been materially altered by the statute 7 Geo. I. V. c. 64. § 20, which see, set out, ante, 306, note (12), and by § 21 of the same statute, which enacts, that no judgment after verdict upon any indictment or information of any felony or misdemeanor, shall be stayed, or reversed, for want of a similit; nor by reason that the jury process has been awarded to a wrong officer upon an insufficient suggestion; nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors; nor because any person has served upon the jury who has not been returned as a juror by the sheriff or other officer; and that where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute. As to amendments of indictments, &c. vide ante, 306, note 12. See id. note 11, law of New-York.
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, 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 distress, grace, 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, embowelling alive, beheading, and quartering (3); and in murder, a public dissection. And, in case of any treason committed by a female, the judgment is to be burned alive (3). But the humanity of the English nation has authorised, by a tacit consent, an almost general mitigation of such parts of these judgments, as savours 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 adjudication of the realm, or transportation: others in loss of liberty, by perpetual or temporary imprisonment. Some extend to confiscation, by forfeiture of lands, or moveables, 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 indiscretion, or render even oppulence 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; [*378] 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

(3) See ante, p. 93, & p. 204, these punish of inflicting the punishment of death is by means altered. In New-York, the only mode hanging. (2 R. S. 659, § 25.)
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 exemption 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 it 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; which is fully sufficient, when we consider, that however unlimited the power [*379] 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 amerce-ments 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 contentemento suo; et mercatores codem modo, salvo mercandisa sua; et villanus codem modo amercietur, salvo wainagio suo." 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 contentenent (4), or land; to the trader his merchandise; and to the countryman his wainage, or team and instruments of husbandry. In order to ascertain which, the great charter also di-

(d) Stat. 1 W. & M. st. 2 c. 2.
(e) 2 Inst. 48.
(f) Clavn. l. 9. e. 8. & 11.

(4) Lord Coke says, that "contentenent signifies his countenance, as the armour of a soldier is his countenance, the books of a scholar his countenance, and the like." 2 Inst. 28. He also adds, that "the wainagium is the countenance of the villain, and it was great reason to save his wainage, for otherwise the miserable creature was to carry the burden on his back." Ibid.
rects, 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 neighbourhood. 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 neighbourhood, under the equity of the statute Westm. 1. c. 18; and then the judges estreated them into the exchequer (g).

But in the court-leet and court-baron it is still performed by [*380] *affeerors, or suitors sworn to affeer, 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 regis dare valeat per annum, salva sustentatione sua, et axoris, 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 penalty 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 held that the ransom shall be treble to the fine at least (l).

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 attainit, 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.

[*381] 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. 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

---

(g) F. N. B. 76.
(h) The affeeror's oath is conceived in the very terms of magna charta. Fitzh. Survey, ch. 11.
(i) 8 Rep. 40.
(j) Gilb. Exch. c. 5.
(k) MIRR. c. 5, § 3. Lamb. Eirenarch. 575.
(m) 3 Inst. 213.

(5) This must be taken with some qualification; for the person of an attainted felon is still under the protection of the law, and to kill him without warrant would be murder. Fost. 73. See note 6, p. 395, post.
once pronounced, both law and fact conspire to prove him completely guilty; and there is not the remotest possibility left of any thing 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 attained.

The consequences of attainder are forfeiture and corruption of blood.

I. Forfeiture is twofold; 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 for ever 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 forfeited by the express provision of statute 5 & 6 [382*] Edw. VI. c. 11. And yet the husband shall be tenant by the courtesy 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 treason 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 (q). 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 (s), 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 connexions 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 dependant and relation he has, to keep him from offending: according to that beautiful sentiment of Cicero (t), “nee vero me fugit quam sit acerbum, parentum scelera filiorum poenis his: sed hoc praecclare legibus comparatum est, ut caritas liberorum amici ores parentes reipublicae redderet.” And therefore Aulus Casecellius, a Roman lawyer in the time of the triumvirate, used to boast that he had two reasons for despising the power of the tyrants; his old [*383]*

---

(a) Co. Litt. 392. 3 Inst. 319. 1 Hal. P. C. 240.
(b) 2 Hawk. P. C. 415.
(c) 3 Inst. 311.
(d) 1 Hal. P. C. 359.
age and his want of children: for children are pledges to the prince of the father's obedience (t). 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 expresses 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 non est," and ordered that "peccata suos te neant auctores, nec ullerus 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 (w): 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 (x) (copied almost verbatim from Justinian's code) (y), 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 for ever 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 feodal policy (as has been already observed) (z), but was antecedent to the establishment of that system in this island; *being transmitted from our Saxon ancestors (c), and forming a part of the ancient Scandinavian constitution (b). But in certain treasons relating to the coin (which, as we formerly observed, seem rather a species of the crimen falsi, than the crimen laesae majestatis), it is provided by some of the modern statutes (c) 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 (d). 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 consequence 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 on the same footing in both parts of the united kingdoms. In new-modelling 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 Brittain (e): the lords artfully proposing this temporary clause, in *hopes (it is said) (f) that the prudence of [*385] succeeding parliaments would make it perpetual (g). 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 further suspended till the death of the sons of the pretender (h) (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 (i). Formerly the king had only 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 praerogativa regis seems to suppose, that the king shall have his year, day, and waste; and not the *year and day instead of waste. [*386] Which sir Edward Coke (and the author of the Mirror, before him) very justly 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 have naturally descended to the heir

(e) Burnet's Hist. A. D. 1709.
(f) Considerations on the law of forfeiture, 6.
(g) See Post. 250.
(h) The justices 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. pag. 244.)
(i) 2 Inst. 37.
(k) ch. iii. v. 29.
(l) ch. vi. v. 11.
(m) Mirr. c. 4, § 16. Flot. i. 1, c. 25.
(n) 9 Hen. iii. c. 22.
(o) Mirr. c. 5, § 3. 2 Inst. 37.

(6) By the 39 Geo. III. c. 93. the clause in the 7 Ann. c. 21. and that in the 17 Geo. II. c. 39. limiting the periods when forfeiture for treason should be abolished, are repealed. So that the law of forfeiture in cases of high treason, is now the same as it was by the common law, or as it stood prior to the seventh year of the reign of queen Anne. Also by 54 Geo. III. c. 145. no attainer for felony, except in high treason, petit treason, murder, or abetting, &c. the same, shall extend to the disinherit any heir, nor to the prejudice of the right or title of any person, except the offender during his life only, and every person to whom the right or interest of any lands or tenements should or might after the death of such offender have appertained, if no such attainer had been may enter thereon.
(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 attainer; and therefore a felo de se forfeits
no land 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 convey-
ances. 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 praemunire 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 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-men-
tioned 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 endeavour to elude 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 attainer, and not
before: goods and chattels are forfeited by conviction. Because in many
of the cases where goods are forfeited, there never is any attainer; 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 quintu
exactus, or finally outlawed; for the secreting himself so long from justice,
is construed a flight in law (t). The forfeiture of lands has relation to the

(p) 3 Inst. 55.
(q) Ibid. 318.
(r) Ibid. 141.
(s) Staunf. P. C. 183. b.
(t) 3 Inst. 232.

(7) By 7 and 8 G. IV. c. 28, s. 5, it is enacted, "that where any person shall be indicted
for treason or felony, the jury impaneled to try such person shall not be charged to inquire
concerning his lands, tenements, or goods, nor whether he fled for such treason or felony." The practice had been wholly discontinued for some years.
time of the fact committed, so as to avoid all subsequent sales and incum-
brances; but the forfeiture of goods and chattels has no relation back-
wards; so that those only which a man has at the time of conviction shall
be forfeited. Therefore a traitor or felon may bonâ fide sell any of his
chattels, real or personal, for the sustenance of himself and family be-
tween the fact and conviction (u); for personal property is of
so fluctuating a nature, that it passes through many hands in a [*388]
short time; and no buyer could be safe; if he were liable to return
the goods which he had fairly bought, provided any of the prior vendors
had committed a treason or felony. Yet if they be collusively and not
bonâ fide parted with, merely to defraud the crown, the law (and particu-
larly 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 attaint is the corruption of blood,
both upwards and downwards; so that an attainted person can neither in-
herit 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 (r).

This is one of those notions which our laws have adopted from the feo-
dal 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 im-
pediment of descents, ensues; and, on judgment of mere felony, no escheat
accrues to the lord. And therefore as every other oppressive mark of feodal
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 twen-
tieth 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. [*389]
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 atro-
cious 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 afore-mentioned 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 attainer for
treason will extend to the disinheriting any heir, nor the prejudice of any

(u) 2 Hawk. P. C. 454.
(w) See Book II. pag. 231.
(x) Stat. 3 Eliz. c. 1.
(z) Stat. 5 Eliz. c. 11. 18 Eliz. c. 1. 8 & 9 W. III. c. 26. 15 & 16 Geo. II. c. 25.
person, other than the offender himself; which virtually abolishes all cor-
ruption of blood for treason, though (unless the legislature should interpose) it will still continue for many sorts of felony (8).

CHAPTER XXX.

OF REVERSAL OF JUDGMENT.

We are next to consider how judgments, with their several connected consequences, of attaintder, 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 shewing the special matter without writ of error. As, where a commission issues to A. and B., and twelve others, or any of them, of which A. or B. shall be one, to take and try indictments; and any of the other twelve proceed without the interposition or pre-

[*391] sence *of either A. or B.: in this case all proceedings, trials, convic-
tions, 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); 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 felo-

ny 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 attain-
der 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).

(a) 2 Hawk. P. C. 450.  (b) 3 Inst. 231.  1 Hal. P. C. 361.

(8) In New-York, no forfeiture is caused by any offence except upon an outlawry for treason, (2 R. S. 701 § 22:) and on such out-
lawry his goods are all forfeited absolutely, and his lands during his life. (Id. 666, § 3.)
Secondly, a judgment may be reversed by writ of error (1): 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 held; for laying an offence committed in the time of the late king, to be done *against the peace of [*392] the present; and for other similar causes, which (though allowed out of tenderness to life and liberty) are not much to the credit or advancement of the national justice (2). These writs of error, to reverse judgments in cases of misdemeanors, are not to be allowed of course, but on sufficient probable cause shewn to the attorney-general; and then they are understood to be granted of common right, and ex debito justitiae. 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 attainer 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 attainer without casting any reflections upon the justice of the preceding sentence (3).

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 [*393] pronounced upon conviction, 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 may 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

---

(c) 1 Vern. 170. 175.  
(d) 2 Hawk. P. C. 402.  
(1) See the history and nature of writs of error in criminal cases stated by lord Mansfield with great ability and clearness, in 4 Burr. 2550, 1, 2; as to the mode and practice of obtaining the writ, see 1 Chit. C. L. 2 ed. 749 to 761.  
(2) See ante 306, 376, these informalities now cured. As to writs of error in New-York, see 2 R. S. 739, &c.  
(3) This was done with respect to the forfeited estates in Scotland, by statute 24 Geo. III. c. 57.
to another prosecution for the same offence; for the first being erroneous, he never was in jeopardy thereby.

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 (1), 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 (2); either before or after judgment; as, where the judgment 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 capitaly 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.

[*395] This is a 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 by-standers, 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 praegnantis mulieris damnatae poena differatur, quod 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

(a) 2 Hal. P. C. 412. (b) Fox, Acts and Mon. (c) 6 R. S. 638, § 15, &c. (d) Flet. L. 1, c. 38.

(1) As to reprieves in general, see 1 Hale, 368 to 370. 2 Hale 412 to 412. Hawk. b. 2, c. 51, s. 8, 9, 10. Williams, J. Execution and Reprieve. 1 Chit. C. L. 757 to 762.

In addition to the reprieves mentioned by the learned commentator is that ex mandatio regis, or from the mere pleasure of the crown, expressed in any way to the court by whom the execution is to be awarded. 2 Hale, 412. 1 Hale, 368. Hawk. b. 2, c. 51, s. 8.

(2) In New-York none but the governor can grant a reprieve, (not even the judges); but the sheriff, with the concurrence of the circuit judge, or, in his absence, with the concurrence of any judge of the court which tried the convict, may summon a jury to try whether a convict sentenced to the punishment of death is insane; or, in case of a woman, whether or not she be quick with child; and if the jury find in the affirmative, execution of sentence will be suspended. (2 R. S. 638, § 15, &c.)
child, unless it be alive in the womb, is not sufficient) execution shall be staid 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 (3).

Another cause of regular reprieve is, if the offender becomes non comos, between the judgment and the award of execution (f); for regularly, as was formerly (g) observed, though a man be comos when he commits a capital crime, yet if he becomes non comos after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he *shall [*396] not be ordered for execution: for, "furosusus solo furare 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 him: and if he appears to be insane, the judge in his discretion may and ought to reprieve him (4). 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 attained and the like. In this last case a jury shall be impanelled 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 shall be instanter (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 attained (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

(c) 1 Hal. P. C. 360.
(f) Ibid. 370.
(g) See page 24.
(h) 1 Sid. 132. See Append. § 3.
(i) Fost. 42.
(j) 1 Lev. 61. Fost. 42. 46.
(l) Law of Forfeiture. 99.

(3) It is usual for the clerk of assize to ask women, who receive sentence of death, if they have any thing to say, why execution shall not be awarded according to the judgment. As the execution of the law in the first instance is resorted not from a regard for the mother, but from tenderness towards the innocent infant; if then it should happen that she become quick of a second child, this surely is as much an object of compassion and humanity as the first.

(4) See ante, 25, n, as to the trial of an insane person.

By the 56 Geo. III. c. 117, provision is made for convicted criminals who become insane. See also the 55 Geo. III. c. 46, and 5 Geo. IV. c. 71.
[*397] 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 suae dignitatis: that it is declared in parliament, by stat. 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 (5), however, this point 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 of pardoning to centre in one and the same person. 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 were discharged by his innocence, [ *398] or obtained a pardon through favour. In *Holland therefore, if there be no stadholder, there is no power of pardoning lodged in any other member of the 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 legislation, 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

(m) L. L. Educ. Conf. c. 18. (o) Becar. ch. 46. (n) 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) Ibid. ch. 4. (q) Sp. L. b 6. c. 5.

(5) In New-York, and in the states generally, this power is vested in the governor of the state: in the U. S. it is the prerogative of the President. See the Constitutions. They can pardon all offences except on impeachments, and may grant conditional pardons, See 2 R. S. 745, § 21.
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 (v)." 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 (x). 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 private* in- [§399] jury to each individual in the neighbourhood, 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 (v).

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 (w), "that there was no precedent that ever any pardon was granted to any persons 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 & 13 W. 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 been solemnly heard and determined, it is not understood that the king's royal grace is farther restrained: [*400] for, after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king's most gracious pardon (6).

---

(6) Mr. Christian has the following note: The following remarkable record, in which it is both acknowledged by the commons and asserted by the king, proves that the king's prerogative to pardon delinquents convicted in impeachments, is as ancient as the constitution itself.

* Item, ne la commune a nostre dit sieur le roi que nul pardon soit grante a nule personne, petit ne grande, qu'on est de son conseil et ser-
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 (c) (7). 2. Next, it is a general rule, that, wherever it may reasonably be 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 attainer of felony (for it is presumed the king knew not of these proceedings), but the conviction or attainer must be particularly mentioned (c); and a pardon of felonies 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.

venez en cas semblables, pur profit du roi et du royaume.

Responsio.—Le roi est fra sa volonté, comme il le sentira. Rot. Parl. 50 Ed. III. n. 188.

After the lords have delivered their sentence of guilty, the commons have the power of pardoning the impeached convict, by refusing to demand judgment against him, for no judgment can be pronounced by the lords till it is demanded by the commons. Lord Macclesfield was found guilty without a dissenting voice in the house of lords; but when the question was afterwards proposed in the house of commons, that this house will demand judgment of the lords against Thomas earl of Macclesfield, it occasioned a warm debate, but (the previous question of the first thing) it was carried in the affirmative by a majority of 136 voices against 65. Com. Journ. 27 May, 1725. 6 H. St. Tr. 762. In lord Strafford's trial, the commons sent the following message to the lords: "That this house hold it necessary and fit, that all the members of the house may be present at the trial; to the end every one may satisfy his own conscience in the giving of their vote to demand judgment." Commons' Journals, 11th of March, 1640.

In the impeachment of Warren Hastings, esq. it was decided, after much serious and learned investigation and discussion, by a very great majority in each house of parliament, that the warrant was not abated by a dissolution of the parliament, though almost all the legal characters of each house voted in the minorities.

(7) By 7 and 8 Geo. IV. c. 28, § 13, it is enacted, "that where the king's majesty's will be pleased to extend his royal mercy to any offender convicted of felony, punishable with death or otherwise, and by warrant under his royal sign manual, countersigned by one of his principal secretaries of state, shall grant to such offender either a free or conditional pardon; the discharge of such offender out of custody in the case of a free pardon, and the performance of the condition of the conditional pardon, shall have the effect of a pardon under the great seal for such offender, as to the felony for which such pardon shall be so granted. Provided, always, that no free pardon, nor any such discharge in consequence thereof, nor any conditional pardon, nor the performance of the condition thereof in any of the cases aforesaid, shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction, for any felony committed after the granting of any such pardon." This section is in substance a re-enactment of § 1 of the unrepealed statute 6 Geo. IV. c. 25, with the exception of the proviso, which is new.

By 39 Geo. III. c. 47, the king may authorize the governor of any place to which convicts are transported, to remit, either absolutely or conditionally, the whole, or any part of their term of transportation; which remission shall be of the same effect as if his majesty had signified his intention of mercy under the sign manual; and the names of such convicts are to be inserted in the next general pardon which shall pass the great seal.

And by § 26 of the 5 Geo. IV. c. 84, it is enacted, that a felon under sentence or order of transportation, receiving a remission of the sentence or order, may be authorized to grant the same, while such felon shall reside in a place where he may lawfully reside, under such sentence, order, or remission, may sue for the recovery of any property acquired by him since his conviction, or for any damage or injury sustained by him. This enactment was introduced shortly after the decision of the court of K. B. in the case of Bullock v. Dodds, 2 B. and A. 258.
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 [*401] happens se defendendo or per infortunium: to which two 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 obstante's 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 imprisonment and transportation rendered more easy and effectual by statutes 8 Geo. III. c. 15. and 19 Geo. III. c. 74. (8)

3. With regard to the manner of allowing pardons: we may observe, that a pardon by act of parliament is more *beneficial [*402] 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 first inflicted as a punishment by statute 39 Eliz. c.4.

(e) 3 Inst. 236.
(f) Salk. 499.
(g) 2 Hawk. P. C. 394.
(h) Transportation is said(Bar. 332) to have been
(8) The 8 Geo. III. c. 15. is repealed by the 5 Geo. IV. c. 84. and the 19 Geo. III. c. 74. by the 7 and 8 Geo. IV. c. 27. And by 9 Geo. IV. c. 32. § 3. reciting, that it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital, who have undergone the punishment to which they were adjudged; it is enacted, that where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effects and consequences as a pardon under the great seal as to the felony whereof the offender was so convicted: provided always, that nothing therein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony.

(i) 2 Hawk. P. C. 397.
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 & 6 W. & 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) (9).

CHAPTER XXXII.

OF EXECUTION (1).

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 and abbreviation (d), "sus. per col." for "sus-pendatur per collum." And this is the only warrant that the sheriff has for so material an act as taking away the life of another (e). It may certainly

---

(1) Hawk. P. C. 306.  
(2) Salk. 490.  
(3) See Append. 6.5.  
(4) Finch, L. 478.  
(6) 5 Mod. 23.  

(9) A son born after the attainder may inherit if he has no elder brother living born before the attainder, otherwise the land will escheat pro defectu haeredis. 1 H. P. C. 358.  
(1) As to this in general, see 1 Chit. C. L. 2 ed. 779 to 811.
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 [*404] man, the most important and terrible task of any, should depend upon a marginal note (2) (3).

The sheriff, upon receipt of his warrant, is to do execution within a convenient time; which in the country is also left at large (4), (5). 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). 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). But, otherwise, the time and place of execution are by law no part of the judgment (k) (6). 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 a 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

(2) Though it be true that a marginal note of a calendar, signed by the judge, is the only warrant that the sheriff has for the execution of a convicr, yet it is made with more caution and solemnity than is represented by the learned commentator. At the end of the assizes the clerk of assize makes out in writing four lists of all the prisoners, with separate columns, containing their crimes, verdicts, and sentences, leaving a blank column, in which, if the judge has reason to vary the course of the law, he writes opposite the names of the capital convicts, to be reprieved, respedted, transported, &c. These four calendars, being first carefully compared together, by the judge and the clerk of assize, are signed by them, and one is given to the sheriff, one to the gaoler, and the judge and the clerk of assize each keep another. If the sheriff receives afterwards no special order from the judge, he executes the judgment of the law in the usual manner, agreeable to the directions of his calendar. In every county this important subject is settled with great deliberation by the judge and the clerk of assize, before the judge leaves the assize-town; but probably in different counties, with some slight variations, as in Lancashire, no calendar is left with the gaoler, but one is sent to the secretary of state.

If the judge thinks it proper to reprieve a capital convict, he sends a memorial or certificate to the king’s most excellent majesty, directed to the secretary of state’s office, stating that, from favourable circumstances appearing at the trial, he recommends him to his majesty’s mercy, and to a pardon upon condition of transportation or some slight punishment.—This recommendation is always attended to.

(3) In New-York the judgment is entered fully on the minutes of the clerk (2 R. S. 738, § 5.), and the defendant may procure a record to be made up. Id. § 4.

(4) In New-York, the time for executing the sentence of death is not less than four nor more than eight weeks. (5 R. S. 655, § 11.)

(5) In general the court do not appoint the time of execution. 3 Burr. 1812.

(6) See 3 Burr. 1812. And even the above statute is only directory as to awarding the day of execution, and does not render it an essential requisite. Russ. & R. C. C. 230.
death for another, without being guilty of felony himself, as has [*405] been formerly said (m). It is held also *by sir Edward Coke (n) and sir Matthew Hale (o), that even the king cannot change the punishment of the law, by altering the hanging or burning (7) 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 Russel) 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. That house took two days to consider of it; and then (t) suddenly 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 Russel was condemned for high treason upon indictment, the king, while he remitted [*406] the ignominious part of 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 (w)." One can hardly determine (at this distance from those turbulent times) which most to disapprove of, the indelent 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 (w). 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).

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

---

(m) See page 179.
(n) 3 Inst. 59.
(o) 2 Hal. P. C. 412.
(p) Post. 270. F. N. B. 244. h. 10 Rym. Fbed.
(q) 2 Hum. Hist. of G. B. 328.
(r) Lords' Journ. 21 Dec. 1680.
(s) Com. Journ. 21 Dec. 1690.
(t) Ibid. 23 Dec. 1690.
(u) 2 Hume. 360.
(v) 2 Hal. P. C. 412. 2 Hawk. P. C. 463.
(x) See page 326.
(y) Fitz. Abr. t. coron. 33. Finch, L. 467.

(7) Now abolished, see ante, 376. note (3).
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 our 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: 3. From thence to the reformation: 4. From the reformation to the *restoration of king Charles the Second: 5. From [*408] thence to the revolution 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 Caesar'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), we may 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 particle 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 Caesar'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 [*409] and destroyed both the British inhabitants and *constitution, the Romans, the Picts, 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 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). Thirdly, [*410] 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 mosaical, but also of the imperial and pontifical laws, blended and adopted into our own system.

(a) Hat. Hist. C. L. 62.  (b) Ibid. 57.  (c) Hat. Hist. C. L. 59.

(1) But this is now altered by 9 Geo. IV. c. 31. See ante, page 204.
A further 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 subdivi-
sion 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 any 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 and necessary work, which he is said to have executed
in as *masterly a manner: no less than to new-model the con-
stitutio; 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 connect-
ed 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, col-
clected 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 judiciailes. This he compiled for the use of the court-
baron, hundred, and county-court, the court-leet, and sheriff's tourn; tri-
burgals, 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 house-
hold 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 cus-
toms, 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 [*412]
Vol. II.
Alfred was called the West-Saxon-Lage; and the local constitutions of the ancient kingdom of Mercia, which obtained in the countries 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 witenagenote, or commune consilium of the ancient Germans, which was not yet reduced to the [*418] forms and *distinctions of 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 heretocbs, their sheriffs, their conservators of the peace, their coroners, their portreeves (since changed into mayors and bailiffs), and even their tything-men and borsholders at the feet, 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 feodal 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 feodal 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 Ro-
man law, and continued among the Saxons till the Norman
*conquest: though really inconvenient, and more especially de-
structive to ancient families; which are in monarchies necessa-
ry 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 jus-
tice 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 Alonso 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 mo-
dern ones, in that the ecclesiastical and civil jurisdiction were blended to-
gether, 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 an-
tiquity. 9. Trials, among a people who had a very strong tincture of su-
perstition, were permitted to be by ordeal, by the corsmed, or morSEL of ex-
ercation, 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 impor-
tant guardian both of public and private liberty, we owe to our Saxon an-
cestors. Thus stood the general frame of our polity at the time of the
Norman invasion; when the second period of our legal history com-
mences.

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 [*415]
any right of conquest, yet that consent seems to have been partly
extorted by fear, and partly given without any apprehension of the con-
sequences 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 countries, 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 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 licence from the king by a grant of a chase or free-warren: and those 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 [416] by degrees grown entirely obsolete, yet from this root has 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 100l. 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 [417] rooted thereby, and which this caution of *king Edward came too late to eradicate. Instead of the plain and easy method of deter-

(2) See this controverted, ante, 2 book, p. 419. n. 9.
OF THE LAWS OF ENGLAND.

mining 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 era of refinement and subtily. There is an active principle in the human soul, that will ever be exerting its faculties to the 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 Saxons. And, to say the truth, these *scholastic reformers have transmitted their diælect 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 circuituies, 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 Burgundians; 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 mili-
tary polity, was the engraving 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, mediatly or immediately, of the crown.

The nation at this period seems to have groaned under as absolute slavery, as was in the power of a warlike, an *ambitious, and a politic prince to create. The consciences of men were enslaved by four 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, and 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, tallages, aids, and fines, were arbitrarily extracted from the pillaged landholders, in pursuance of the new system of tenure. And, to crown all, as a consequence of the tenure by knight-service, the king has 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 Edgar 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 [*420] *points of their ancient freedom. All the rest were villeins or bondbmen.

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 endeavoured 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 ex-
tended 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 feodal 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 descent of lands: [*421] which being by the Saxon laws equally to all the sons, by the feodal 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 temporalities 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, 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 with the code of Henry the First, *it carries a manifest superiority (g). Throughout his [*422] 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 assise 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 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 battel. 4. To this time must also be referred the introduction of escuage, or pecuniary commutation for personal military 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 feodal 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 foresata. Of these the latter was well calculated to redress many grievances, and encroachments of the crown, in the exertion of forest-law: and the former confirmed many liberties of the church, and redressed many
OF THE LAWS OF ENGLAND.

331

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 [*424] 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 his progresses; and at the same time brought the trial of issues home to the very doors of the freeholders, by directing assises 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 battel; directed the regular awarding of inquest for life or member; prohibiting 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 [*425] 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 (h). Nor must it be forgotten, that the first traces which remain of the separation of the greater barons from the less, in the constitutions of parliaments, are found in the great charter of king John; though omitted in that of Henry III.;

(3) The following is the celebrated 29th chapter of magna carta, the foundation of the liberty of Englishmen:

"Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur de libero tenemento suo vel libertatis vel liberis consuetudinibus suis, aut utulatetur, aut exulet, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittamus, nisi per legale judicium parium suorum vel per legem terrae. Nulli vendemus, nulli negabimus, aut damavemus rectum vel justiziam."

Vol. II. 91
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.

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 (*), 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 pleas and exchequer; so as [*426] *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 tallages, levied without 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 in itself was of Saxon original. 8. He first established a repository for the public records of the kingdom; few of which are ancienier 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 feodal 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 gulph, 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 in-[*427] vention of uses. *14. He established a new limitation of pro-

OF THE LAWS OF ENGLAND.

perty 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 humour or necessity of subsequent times hath occasioned. 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 [*428] the peace, were taken 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 attentive 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 praemunire, 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 en-

dowment 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 [*429] disputed titles to the crown gave no leisure for farther juridical improvement; "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 king Henry the Seventh, his ministers (not to say the king himself) were more industrious in hunting out prosecution upon old and forgotten penal laws, in order to extort money from the subject, than in framing any new 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 alienate. The benefit of clergy (which so often intervened to stop attainers 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.

[*430] In short, there is hardly a statute in this reign *introductive 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 for ever routed and destroyed, all his connections with that 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,
OF THE LAWS OF ENGLAND.                           335

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 benefi-
cial effect. And thence the courts of equity assumed a jurisdiction, dic-
tated by common justice and common sense: which, however arbitrarily
exercised or productive of jealousies in its infancy, has at length been ma-
tured 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 by feof-
ment 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 continu-
ally created in mortgages *and family settlements, which may be [*431]
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 little more than the conditional fees at the common
law, before the passing of the statute de donis; the establishment of re-
cognizances 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 unfortu-
nate, 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 era
in the annals of juridical 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 es-
lished by law, under the sanction of those pusillanimous parliaments,
one of which, to its eternal disgrace, passed a statute, whereby it was en-
acted that the king's proclamations should have the force of acts of parlia-
ment; 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 (l). 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 and . [*432]
popular laws, in civil matters, were made under her administra-
tion; perhaps the better to reconcile the people to the bloody measures
which she was induced to pursue, for the re-establishment of religious sla-
very: the well-concerted schemes for effecting which, were (through the pro-
vidence of God) defeated by the seasonable accession of queen Elizabeth.

(l) See page 86.
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 alienations 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 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.

[*433] *However, considering the reign of queen Elizabeth in a great and political view, we have no reason to regret many subsequent alterations 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 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 shew, 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 sometimes the king himself. [*434] 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 lands 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 rivalled 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 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 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.

[*436] *On the accession of king James I., no new degree of royal power 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 [*437] *misguided prince's reign; which, though the noon of it began a little to brighten, 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 unreasonably revived. The legal jurisdiction of the star-chamber and high commission courts was extremely great; though their usurped authority was 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 in-
difference, 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 knightng 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 befal 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 this condescension was merely temporary. Flushed therefore with the success they had gained, fired with resentment for past oppressions, *and dreading the consequences if* the king [*438] should regain his power, the popular leaders (who in all ages have called themselves the people) began to grow insolent and un governable: 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 perhaps in copyhold tenure; and [*439]
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 shall 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 pre-emption; 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 haeretico 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 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 declused 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

---

(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.
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 par-
liament; and have (by the like desire) made the judges completely inde-
pendent of the king, his ministers, and his successors. Yet,
though these provisions have, in appearance and *nominally, re-
duced the strength of the executive power to a much lower ebb
than in the preceding period; if on the other hand we throw into the oppo-
site scale (what perhaps the inmoderate reduction of the ancient preroga-
tive may have rendered in some degree necessary) the vast acquisition of
force, arising from the riot-act, and the annual expenditure 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 minutiae) in the administration of private justice during this period, are
the solemn recognition of the law of nations with respect to the rights of
embassadors: 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 war-
ranto: the regulations of trials by jury, and the admitting witnesses for
prisoners upon oath: the farther restraints upon alienation of lands in mort-
main: the annihiliation 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 in-
dorsements upon bills and notes, which have shewn 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 founda-
tions have been laid, by clearly *developing the principles on

[*442] 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 impowered 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 reme-
died by any other process. And these, I think, are all the material altera-
tions 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 era of the happy revolution. Of a [*443] constitution, so wisely contrived, 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.

THE END OF THE FOURTH BOOK.
APPENDIX.

Sect. I. Record of an Indictment and Conviction of Murder, at the Assizes.

Warwickshire, \{ Be it remembered, that at the general session of the to wit, \} 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 all treasons, misprisions of treasons, insurrections, rebellions, counterfeitings, clippings, washings, false coinings, and other falsities of the monies 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, negligences, concealments, maintenances, oppressions, champarties, 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 divers felonies, trespasses, and other misdemeanors committed within the county aforesaid, by the oath of sir James Thomson, baronet, Charles Roper, Henry Dawes, Peter Wilson, Samuel Rogers, John Dawson, James Phillips, John Mayo, Richard Savage, William Bell, James Morris, Laurence 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 fifth 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 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 oath aforesaid, do say, that the said Peter Hunt him the said Samuel Collins, in manner and form aforesaid, feloniously, willfully, and of his malice aforethought, did kill and murder, against the peace of the said lord the now king, his crown, and dignity. 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. Whereupon 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 honourable 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 do deliver here in court of Record in form of the law to be determined. 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 recognise 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 judgment and execution against him: who nothing further saith, unless as he before had 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

(1) This averment is now rendered unnecessary. See 7 and 8 Geo. IV. c. 28, § 5; ante, p. 387, n. (7).

APPENDIX.
APPENDIX.

county of Warwick from whence he came, and from thence to the place of execution on Monday 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.

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 anything 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 (3).

Sect. 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
Thomas Rogers. } in custody of the sheriff of the county of Sussex, by
| 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 pronounced: and this he is ready to verify and prove, &c. To which said plea the honourable Charles Yorke, esquire, attorney general of our present sovereign lord the king, who for our said lord the king in this behalf prosecute, 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 record of attainer named, and against whom judgment was pronounced as aforesaid; and this he prayeth may be inquired into by the court; and the said prisoner 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 prosecute, as the said prisoner at the bar, have put themselves in this behalf upon the said jury. And immediately ereupon the said jury come here into court: and being elected, tried, and sworn to speak the truth touching and concerning 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

Verdict: not guilty of murder; guilty of manslaughter.

Clergy prayed.

Judgment to be burned in the hand, and delivered.

Habeas corpus.

Record of attainer 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.

Verdict awarded instanter.

Jury sworn.

Verdict: that he is the same.

(2) See preceding note.

IV. c. 25, and 8 Geo. IV. c. 28, ante, p.

(3) Benefit of clergy and burning in 374, n. (9), this form will require alteration the hand being now abolished, see 6 Geo.
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 attorn
ey 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 attaint. 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 judgment, 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 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.

SECT. 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
and the county of Middlesex: and to the keeper of his majesty's
Middlesex gaol 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 respec
tive offences in their several indictments mentioned; Now it is hereby or
dered, 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 respite, until his majesty's
pleasure touching them be further 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 Tam-
worth, 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 par-
liament, 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 ana
tomized, 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 to his deputy directed, we have commanded) into your custody
you then and there 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
ourselves at Westminster the second day of May, in the thirty-third year of
our reign.

Yorke and Yorke.
INDEX,

The small numerals denote the Books; the ciphers the Pages of the Commentaries.

Abatement of freehold, iii 108
indictment, iv 334 and notes
nuisance, i 5 and n
written, count, or suit, iii 302
plea in, iii 302 iv 334
Abbey-lands, ii 32 iv 116
molesing their possessors, iv 116
Abbotts, i 155
Abbreviations, iii 323
Abdication, i 211 iv 78
Abduction of child, iii 140 and n
heires, iv 208
ward, iii 141
wife, iii 139 and n
women, i 443 and n
or kidnapping, iv 219 and n
Abearance, good, security for, iv 251 256
Abeyance, ii 107
when freehold cannot be put in, ii 107 n
remainders, &c. when not in, ii 107 n
Abgesi, iv 239
Abjuration, oath of, i 363
of the realm, iv 56 124 332 377
Absolute power of the crown, i 250
property, ii 369
rights and duties, i 123
Abstract of a fine, iii 351 app 4
Accedas ad curiam, iii 34
Acceptance of bills, ii 468, 469
Accession, property by, ii 404
Accessories, iv 35 and n
after the fact, iv 37 and n
before the fact, iv 36 and n
when to be tried, iv 323
Accident, when relieved against, iii 431
taking goods by, no larceny, iv 232 n
Accomplices, discovery of, iv 330 331
Accord, iii 15 and n
Account books, when evidence, iii 368
cognizable in equity, iii 437
writ of, iii 162
Accroaching royal power, iv 76
Ac etiam, iv 288 app 18
Act of bankruptcy, ii 477 and n
grace, how passed, i 184
when pleaded, iv 396
parliament, i 85
disobedience to, iv 12
endeavouring to repeal, is treason, iv 82 n
how made, i 181
its ancient form, i 182
power, i 195
private, iii 341 and n 345 n
public, i 85
when binding on the crown, i 261
Action at law, iii 116
chose in, ii 397
ex contractu, iii 117
delicto, iii 117

Action at law, iii 117
mixed, iii 118
personal, iii 117
plea to, iii 303
property in, iii 396
real, iii 117 and n
for debt below 40s. in superior court, iii 36 a
in case of death from battery, iii 119 n
when lies after criminal prosecution, ib
when right of, merged in public offence, iv 6 notes
Actual right of possession, ii 106
Additions, i 407 iii 302 iv 306 334
Adherence to the king's enemies, iv 82
Adjoining county, trial in, iii 383
Adjournment of parliament, i 187
Admeasurement of dower, ii 136 iii 183
pasture, ii 238
Administration, ii 489
cum testamento anero, ii 504
de bonis non, ii 506
durante absentia, ii 503
durante minore actate, ii 503 n
limited or special, ii 506
granted to creditor when executor out of country, iii 505 n
Administrator, ii 496 iv 428
when privileged from arrest, iii 289 n
when pay costs, iii 400 n
Admiralty causes, iii 106
court of, iii 69 iv 263
no appeal from, to privy council, i 230 n
droits of, i 250 n
letters of the marque granted by, ib
Admission of a clerk, i 390
to copyholds, ii 370
Admittendum clericum, writ ad, iii 250
Ad quod damnum, writ of, ii 271
Advertising for stolen goods, iv 134
Adultery, iv 64 191
rights, &c. of wife guilty of, i 441
action, &c. for, iii 139 and n
Advocate, iii 26, see Counsel
canon law fords clerks becoming, i 20 n
Advocatus fisci, iii 27
Adworsion, iv 436
in general, ii 21
cannot pass without deed, ii 22 n
is saleable, ii 22 n
tenant by curtesy of, ii 127 n
purchase of, not simoniacal, ii 279 n
Aequitas sequitur legem, ii 330
Affectum, challenge propter, iii 363 iv 352
Afferors of amercements, iv 390
Affidavit, in general, iii 304
to hold to bail in action, ii 287
in pleas in abatement, iii 302
Affinity, i 431
Affirmance of judgments, iii 411

VOL. II.
INDEX.

Affray, iv 145 and n
Age, action suspended by, iii 300
of consent to marriage, i 436
persons how reckoned, i 463 iv 23
Agent, see Master and Servant
not entitled to salary if acting improperly,
i 428 n
contracts by, i 420 n
when liable, i 431 n
Aggregate corporation, i 469
fund, i 331
Agistment, ii 452
Agnoti, ii 235
Agnum Dei, &c., iv 115
Agreement, see Contract
Agriculture, its original, ii 7
Aid-prayer, iii 300
Aids, feudal, ii 63 96
parliamentary, i 308
Air, right to, ii 14
Albinatus jus, i 372 374.
Alderman, i 116
Alderney, island of, i 106
Alehouses, iv 64 168
Alfred, his dome-book, i 64 iv 411
Atlas writ, ii 283 app 15 iv 319
Alienation, in general, ii 287
fine for, ii 71 iv 418
forfeiture by, ii 268 274 n
Alien priories, i 386 iv 113
Alliures, ii 249 274 293 iv 111
duty, i 314 316 372 374
who are, i 366 n
rights, &c. of, in general, i 366 371 n ii 293 n
naturalization and denization, 1374 and n
duty on, i 314 316 372 374
petty custom, duty on, abolished, i 316 n
women entitled to dower, ii 131 n
as to descent, ii 249
alienation by, ii 274
may be granted in a deed, but cannot hold, ii 274 n
purchase by, ii 293
may hold house or shop by agreement, ii 293 n
when contracts by, suspended by war, ii 401 n
when privileged from arrest, iii 290 n
premature, iv 110
Alimony, i 441 iii 94
Alleged, iii 100
Allegiance, i 366 iv 74
local, i 370
natural, i 369
oath of, i 367 iv 274
refusing it, i 116
withdrawing from, iv 87
Allodial property, ii 47 60
Abduction, i 105
Allowance of franchise, iii 263
pardons, iv 401, 402
writs of error, iv 392
to bankrupts, ii 483
Alluvion, i 261 and n
Almanac, its authority, iii 333
selling unstamped, ii 490 n
Alteration of decrees, ii 308
Ambassador, king’s prerogative as to, i 253
inviolability of, considered, i 254 n
cannot arrest servant of, ii 256 n
arrest of, and servants, i 256 n iii 289 n
violation of privileges, iv 70 441
Amended bill in equity, iii 448
Amendment at law, iii 407 iv 439
Amercement, ii app 5 iii 376 app 25, 26 iv 379 423
action for, iii 159
American colonies, i 107
transportation to, iv 401
Ancestor, ii 209
Ancestors, how numerous, ii 203
Ancestral acti ves, iii 186
Anchors, injuries, &c. to, iv 245 n
Ancient lights, ii 402
demesne, i 286 ii 99
Animals, see Cattle, Game
property in, ii 5
monkey and parrot, property in, ii 391 n
rooks, disturbing them, ii 393 n
what protected by statutes, ib
dogs, law relating to, ii 393 n
mischief by tame, iii 153 n
larceny of, iv 235 ii 393 n
maining of, iv 244 246
Animus furandi, iv 230 232
revertendi, ii 392
Annual parliaments, i 153
Annuities, what, ii 40
for lives, ii 461
when a fee conditional, ii 113 n
law relative to, ib 401 n
Annulment et baccomm, investiture per, i 376
Annus luctus, i 457
Answer in chancery, iii 446
Answer upon oath, iii 100
APOStacy, iv 43 and n
Apparel, see Clothes, excess in, iv 170
Apprentice, heir, ii 208
right of possession, ii 196
Appeal by approvers, iv 330
how differing from writ of error, iii 55
of arson, iv 314
death, iv 314 425
felony, iv 314
larceny, iv 314
mayhem, iv 314
rape, iv 314
in convictions, iv 282 n
prosecution by, iv 312
to parliament, iii 454
Rome, iv 115 421
Appearance as to actions, iii 287 n 290
to mesne process, iii 287 n
day of the term, or return, iii 278
Appellee on approvalment, iv 330
Appellant, adwoson, ii 22
common, ii 33
Appointment to charitable uses, ii 376, see Officers
Apprentice-fee, duty on, i 324
Apprentices, law respecting, i 426 and n
acts relating to parish, ib
to whom may be bound, i 426 n
master entitled to earnings of, i 429 n
enticing away or harbouring, ib
embezzlement by, iv 230 n
exercising trade without having been, offence
of, iv 160 and n
Apprentices’ licenses, ii 27
Appropriations, i 384
Approval in felony and treason, iv 329
of commons, ii 34 iii 240
Approovers, iv 330
compelling prisoners to become, iv 128
Apprentent common, ii 33
Appurtenances, meaning and effect of the word,
i 17 n
INDEX.

Arbitrary consecrations of tithes, i 119 ii 26
Arbitration in general, iii 16
choosing umpire, ib n
title to land referred, ib n
terms of reference to, ib n
how revoked, ib
Archbishop, i 155 377 and n
Archdeacon, i 383
his court, iii 64
Archdeaconry, i 111
Arches court, iii 64
dean of, iii 65
Areopagus, court of, iii 365 iv 169 348
Aristocracy, i 49
Armed, being unusually, iv 149
Armies, see Soldiers, i 282
standing, i 414 iv 419 441
Armorial ensigns, i 429 iii 105
Armour, &c. emblezzing the king's, iv 101
statutes of, i 411
Arms and ammunition, exporting them, i 265
right of having, i 143
going armed, iv 149
Arraignment, iv 322 app 1
incidents to, iv 324 and n
Array, challenge to, iii 359 iv 352
commission of, i 411
Arrest of judgment, iii 393 app 11 iv 375
Arrest, see False imprisonment
persons in civil cases, iii 288
for what cause of action, iii 387 n
how made, iii 288 n
persons privileged from, iii 289 n
on border of county, iii 290 n
remedy for malicious, iii 136
of persons in criminal cases, iv 289
by warrant, and who may grant it, and for
what, iv 290 and n
form of warrant, ib and n
backing warrant, ib 291 and n
place of, ib
by officers without warrant, ib 292 and n
by private persons without warrant, ib 293
and n
by hue and cry, iv 293
Arson, see Fire
in general, iv 220 373
what a house to constitute offence, iv 221
where house must be burnt, iv 221
what a burning, ib 222
malice, ib
punishment, ib

Articles of the navy, 420, 421
war, i 415
Artificers, their station in the state, i 407
combination laws, iv 136 n
leaving kingdom, i 269 n iv 160
seducing, iv 160
emblezzements by, iv 230 n
As, Roman divisions of, ii 462
Ascendants excluded from inheriting, ii 210
Aspersion, iv 231
Assault, what constitutes, i 120 and n
remedy for, i 120
when justifiable, ib 3—5 and n
if death ensues, no civil remedy, iii 110 n
civil action after acquittal of, ib
offence in general, iv 216 217 and n
to raise price of wages, iv 136 n
in churchyard, iv 145
on king's chancellor, &c. iv 84
in king's palace, iv 125
Assault, in courts, iv 125
on constables, iv 159
in rescue, iv 131
on revenue officers, iv 155
to stop progress of grain, &c. iv 246
to rob, iv 217 n
unnatural crime, ib
costs in action for, iii 400
Assembly of estates, i 147
riotous or unlawful, iv 146 and n
Auenus patris, dover ex, ii 133
Assessments, i 312
Assets, ii 510
by descent, or real, ii 244 302 340
personal, ii 510
real estates devise liable to debts, ii 378 n
legal and equitable, in testator's estate, ii
512 n
Assignees of bankrupt, ii 489
Assignment of bankrupt's effects, ii 485
dower, ii 135
estate, ii 326
reversions, iii 157
of choses in action, ii 442 290 n
of lease, how far assignee bound by covenants, ii 327 n
of wife's chose in action by husband, ii
433 n
of personal property, requisites of, ii 440 n
Assigns, ii 289
Assise, certificate of, iii 389
commission of, iii 59 iv 269 424
court of, iii 57
general, i 149
grand, iii 341 iv 422
justices of, iii 59 iv 269
killing them, iv 84
of arms, i 411 ii 66
bread breaking, iv 157
rent of, ii 42
turned into a jury, iii 403
writ of, iii 184 iv 422
Association, writ of, iii 59
Assumpsit, express, iii 158
implied, iii 159
Assurances, common, ii 294
covenant for farther, ii app 2
Atheling, i 198
Attachment against witnesses, iii 369
for contempts, iv 233 and n
in chancery, iii 443, 444
with proclamations, iii 444
writ of, iii 280 app 13.
Attachments, court of, iii 71
Attainder, act of, iii 259
forfeiture of real property in treason, iv 381
ii 251 n 253 n
in petit treason and felony, iv 385
forfeiture of real property by praemunire,
&c. ib 386
forfeiture of personal property, ib 387 and n
difference between forfeiture of lands and
goods, ib 387
Attain, grand jury in, iii 351
writ of, iii 402
Attainted persons, ii 290 iv 280
Attempt to rob, iv 242 and n
to steal fish, iv 235 and n
to commit crime, iv 100 n 131 n 140 n
Attestation of deeds, ii 307
devises, ii 376
Attorney at law, iii 25 and n
action against, iii 166 and n
INDEX.

Attorney at law, may appear for defendant in misdemeanors, iii 25 n
not right to be present at examination of client for felony, iii 25 n
Attorney, privileges of, iii 26 n
amenable to his court, ib n
who may be admitted, ib 26
how far responsible for errors, &c. ib
original writ against, iii 274 n
when privileged from arrest, iii 298 n
undertaking to appear for defendant, iii 396 n
not to disclose client’s secrets on trial, iii 370 n
summary proceedings against, iv 284 n
Attorney-general, i 27
information by, iii 261 427 iv 308
Attorney, warrant of, to confess judgment, iii 397
Attornment
when made, and use of, ii 290 n
Aubaine, droit de, i 372
Auctioneer, see Agent, Master and Servant, Stakeholder,
when not entitled to compensation, i 428 n
Audita querela, writ of, iii 405 406 n
Auditors in account, i 163
Averium, ii 424
Averment, iii 309 313 iv 340
Augmentation of vicarages and curacies, i 388
Aula regia, or regis, iii 38 iv 416 422
Aulhager, ii 275
Avowry, ii 149
Aurum regiae, i 220
Auster droit, i 177
Austerfois acquit, iv 335 and n
attains, iv 336 and n
contact, ii
Auster vie, tenant pur, ii 120
Authorities in law, i 72
Award, iii 16
Ayle, writ of, iii 186
Bachelor, knight, i 404
Baking warrants, iv 291
Bail above, iii 290
below, iii 291
common, iii 287
excepting to, iii 191
excessive, i 135 iv 297
in error, iii 410
justifying or perfecting, iii 291
refusing, iv 297
special, ii 287
taking insufficient, iv 297
to the action, iii 290
to sheriff, ii 290 and n
affidavit to hold to, iii 287 n
when protected from arrest, iii 280 n
depositing money instead of, iii 290 n
surrender of defendant, ib 292
agreement with bailiff to put in, iii 290 n
in criminal cases, iv 296 and n
what offences bailable, ib 298
what to be done if offence not bailable, ib 300
personating of, iv 128 n
Bailable or not, who, iv 297, 298, 299
Ball-piece, iii 291 app 20
Bailiffs, see Constable, i 345 427
of hundreds, i 115 345
making arrest, when wrongful, iii 289 n
may take deposit instead of bail, iii 290 n
agreement with, to put in bail, iii 290 n
Bailwiek, i 344 ii 38
Bailment, law of, ii 451 n
1. depositum, or deposits, ib
2. Mandatum, to do without recompense ib
3. Commodatum, loan for use, ib
4. Pignori acceptum, pawns, ib
5. locatum, hiring, ib
Ball-piece, iii 291 app 20
Baking, regulations as to baking, &c. of bread, iv 157 and n 162 n
selling bad bread, iv 162 and n
Ballot for jurors, iii 358
Balnearii, iv 239
Banishment, i 137 iv 377 401
Bank, i 327
misbehaviour of its officers, iv 231
embarrassment by, iv 230 n
notes, forgery of, iv 248 and n
Bankers, embarrassment by, iv 230 n
forging their plates, iv 250 n
Banks of rivers, &c. destroying, iv 244 and n
Bankrupt, ii 471 iv 431 436
embarrassment, &c. of, iv 156 n
Bankruptcy, ii 285 471
cognizance of, iii 428
fraudulent, iv 156
principles and objects of law, ii 471 n
statutes repealed, ib
who may become bankrupt, ib
acts of bankruptcy, ib
free from arrest, iii 289 n
fraudulent bankruptcy, iv 156 n
Bannier, knight, i 403
Banns, i 439
Bar of dower, i 136
plea in, iii 306 iv 335 396
trial at, iii 352 iv 351
Bargain and sale of lands, ii 333 app 2
Bargemaster, action against, iii 164
Baron, ii 398
and wife, i 433, see Husband and Wife
Baronet, i 403
Baronies, ii 82 90
of bishops, ii 150
Barratt, iv 134
Barristers, see Advocate
hints to, i 23
their station in society, i 406 n
their office, &c. in courts, ii 26 and n
may be made serjeant in vacation, iii 27 n
king’s counsel cannot plead for prisoner, &c.
without licence, iii 27 n,
attorney and solicitor-general precedence of
premier serjeant, iii 28 n
may lead at nisi prius in common pleas, iii 28 n
when silenced, iii 29
liabilities and privileges of, iii 28 n
action against, iii 185
when free from arrest, iii 298 n
not to disclose confidential communications,
iii 370 n
Base fees, ii 109
services, ii 61
tenants, ii 149
Bastard, i 454
administration to, ii 505
concealment of its death, iv 198 and n 358
eigné, ii 248
incapacity of, i 459
maintenance of, i 458
punishment for having, iv 65
Bath, knight of the, i 403
INDEX.

Britons, ancient, their laws, i 63
Britton, i 72 iii 408 iv 437
Brokers, see Agent, Factor, Master, and Servant
embezzlement by, iv 230 n
Brooke, i 72
Brothels, frequenting, iv 64
keeping, iv 29 64 168 and n
Bubbles, iv 117
Buckery, iv 215
Bulles, papal, iv 110
Buoyes, destroying, iv 246 n
Burgage, tenure in, ii 82 iv 419
Burgesses in parliament, their election, i 174
Burglary, what, iv 223
as to time, ib 224 and n
as to place, ib and n
as to the residence, ib
as to mode of committing, ib 226
there must be a breaking, ib and n
also an entry, ib 227 n
as to intent, ib 227
punishment, ib 238
Burial charges, ii 509
Burial, in the ground, iv 100
Burial, in the church, iv 269 377
in the hand, iv 367 369 370 372 377
malicious, iv 244 245 246
the king’s ships, &c. iv 102
to death, iv 93 204 216 223 377 408
Butcher, trading on Sunday, iv 63
Butlerage, i 315
By-laws, i 475
action on, iii 150
Calais, captain of, his certificate, iii 334
Calico stealing, iv 238 and n
Calendar of prisoners, iv 403
Calling the plaintiff, iii 376
Canal, destroying works of, iv 244 n
Cancelling deeds, ii 369
letters patent, iii 47
wills, ii 502
Canonical obedience, iv 106 112 203
purgation, iii 342 iv 368
Canon law, i 14 19 79 82 83 iv 421 422
Canons of a church, i 383
inheritance, ii 208
of, ii 49
Capacity of a person, iv 20
Capacity of guilt, iv 20
to purchase or convey, ii 290
Copias ad audiendum judicium, iv 375
respondendum, iii 281 414 app 14 iv 318 429
app 1
satisfacendum, iii 414 app 26
in withernam, i 129 148 413
pro fine, iii 398 app 12
ululogatum, iii 284 app 17 iv 230
Capitatur, judgment quod, iii 398 app 11
Capita, distribution per, ii 517
succession per, ii 218
Capital punishment, iv 9 18 237 376 413 441
Capite, tenants in, ii 60
Capon of, indictment, iv 351 app 1
Captives, ii 402
Captives at sea, ii 401
Caput lupinum, iv 320
Carnal knowledge of infants, iv 212
Carrier, law relative to, ii 451 n
action against, iii 164
travelling on Sunday, iv 64 n
larceny by, iv 230 n
Cart-bote, ii 35
Case, action on, iii 53 122 iv 442
Case, reserved at nisi prius, iii 378
stated out of chancery, iii 433
Castrigatory for soilds, iv 109
Castration, iv 206
Casu consimili, writ in, iii 51
proviso, writ of entry in, iii 183
Casual ejctor, iii 202 app 7
Catholic, see Church, Roman Catholic
Cattle, see Animals, Levant and Couchant, Distress
malicious killing or maiming, iv 244, 5 and n
owner answerable for, i 153 311 iv 197
distained, dying in pound, whose loss, iii 13 n
sale of, taken damage-feasant, iii 14 n
ill-treatment of, iv 245 n
Caveat, iii 98 246
Cause matrimonii praecociti, writ of entry, iii 183
Cause, challenge for, iv 353
Causes of demurrer, iii 315 app 24
Centenarius, i 116
Centeni, i 116 iii 315
Centumuiri, iii 315
Cepi Corpus, ii 288 app 15
Certificate for costs, iii 214
into chancery, iii 453
of assize, iii 389
bankrupt, ii 492
poor, i 365
to kill game, iv 174 n
trial by, iii 333
Certiorari facias, iv 262 265 272 320 321
Cessavit, writ of, iii 232
Cessio bonorum, ii 473 483
Cession of a benefice, i 392
Cestui que trust, iii 329
que vie, i 123
que use, iii 328
Chains,ighting in, iv 202
Challenge of jury, iii 359 iv 352 to fight, iv 150
Chamberlain, lord great, iii 38
Chambers, iv 135
Champions in trial by battel, iii 339 app 4
Chance, iv 26
Chancellor, see Court, Equity
his name and office, iii 47
lord, iii 47
vice, iii 55 n
killing him, iv 84 and n
of a diocese, i 382
the duchy of Lancaster, iii 78
exchequer, i 44
university, his court, iii 83
Chance-medley, iv 184
Chancery, court of, i 46 iv 436
Chapters, i 382
Character, see Evidence—Witness
of witness in rape, iv 214 n
Charge to grand jury, iv 303
Charitable uses, ii 273 376
commission of, ii 429
Charities, cognizance of, iii 427
informations for, ib
Charter, ii 95
of the king, ii 346
Governments in America, i 109
land, ii 90
Chase, ii 38 416 iv 415
beasts of, ii 38 415
Chastity, see Adultery, Seduction, homicide in defence of, iv 181
Chattels, ii 387
INDEX.

Chattels, personal, ii 386
real, ii 386
Chaud-medley, iv 184
Chast, action against, iii 166
Cheating, offence of, iv 158 and n, at play, iv 173
Check, burning in, iv 99 360 377
Chester, county palatine of, i 117
courts of, iii 79
Chevisance, ii 474
Chichele, archbishop, vindicated, iv 114
Chief baron of the exchequer, iii 44
justices, iii 40 41
justiciary of England, iii 38 iv 416
rents, ii 42
tenants in, ii 60
Children, see Infants—Bastards
duties of, iv 453
evidence of, iv 214
Child-stealing, iv 219 n
Chirograph, ii 296
of a fine, ii app 4
Chivalry, court of, iii 68 iv 267
its jurisdiction, iii 103 iv 267
guardian in, i 402
tenure in, ii 62
Chose in action, ii 397
how assigned, ii 443 iv 441
possession, ii 389
stealing, iv 234
Christian courts, iii 64
evidence of, iv 44
Christianity, offences against, iv 44
part of the Law of England, iv 60
Church, burglary in, iv 223 n
larceny in, iv 240
stealing lead from, iv 233 n
marriage in, i 439
offences against, iv 50 54 n
or church-yard, affrays in, iv 146
rate, i 385 iii 91 n
repairs of, ii 22
Churchwardens, see Overseers—Poor, i 394
and n
rights, duties, &c. in general, i 394 395 n
who are exempt from serving as, i 394 n
how chosen, i 394 n
they are overseers of poor, ib
Cinque ports, courts of, iii 79
Circuits, iii 59 iv 422 424
Circumstantial evidence, iii 371
Citation, iii 100
Citizens in parliament, their electors, i 174
City, i 114
Civil corporations, i 470
death, ii 121
injuries, iii 2
law, i 14 19 68 74 n 79 81 83 iv 421 422
its study forbidden, i 19
liberty, i 6 125 251
list, i 332 n iv 440
state, i 396
subjection, iv 28
Churchmen, constitutions of, iv 422
Clasuam fremit, iii 209
Clearing contemplations in chancery, iii 445
Clementine constitutions, ii 82
Clergy, see Archbishops—Bishops—Deaneries—
Archdeaneries—Vicar—Curate
averse to common law, i 19 20
ineligible to sit in parliament, i 175 n
Convocation, elected by, i 290 n
privileges of, i 377 n
not bound to serve in war, i 376 n
Clergy, how far protected from arrest, &c. i 377
cannot farm above 80 acres without leave of
bishop, i 377 n
subject to penalty for trading, i 377 n
rights in general, i 377
right of to tithes, ii 25 n
statute of mortmain relaxed in favour of, ii 272
simony, ii 278 iv 62
bonds to resign livings, &c. illegal, ii 279 n
agreement to surrender claim to tithes, ilegal,
ii 290 n
simoniacal presentation, when not evidence,
ii 290 n
leases by, when binding on successor, ii 322 n
letting residences of, ii 322 n
archbishop Abbot's deer-shooting, ii 413 n
writ de cleroceo admittendo, iii 412 n
benefit of, iv 333 365 413 429 441
plea of, iv 333
prayer of, iv app sec 2
Clergymen, beating them, iv 217
Clerical habit and tonsure, iv 367
Clerico admittendo, writ de, iii 413
Clerk in office, i 17
orders, i 389 iv 367
of the market, his court, iv 275
of the peace, iv 272
parish, appointment and duties, i 395 n
embezlement by, &c. iv 230 n
Clients, iii 28
Clipping the coin, iv 90
Cloaths, malicious destroying of, iv 245
Close, meaning and use of word, ii 17 n
breach of, iii 209
rolls, ii 346
writ, ib
Cloths, stealing from tenters, iv 240 n
Coal-mines, setting fire to, &c. iv 247 n
Coals, see Coal-mines—Colliers
combinations to raise price of, iv 160 n
Coat-armour, iii 306 iii 105
Code of Justinian, i 81
Code of Theodosius, i 81
Codical, ii 500
may be annexed to will constructively, ii 500 n
rules respecting, ib
Coffin, no mandamus to bury in iron, iii 265 n
Cognati, ii 235
Cognizance, claim of, iii 298 iv 278
de droit, come cee, &c. fine sur, ii 352
tantum, fine sur, ii 353
in replevin, iii 150
of pleas, ii 37
wrongs, iii 86
Cognizee of a fine, iii 351 iii 156
recognition, iii 341
Cognizor of a fine, iii 350 iii 156
recognition, iii 341
Cognovit actionem, iii 304 397
Coin, falsifying, &c. iv 19 30 39 90 99 120
felonies and misdemeanors relating to, iv 98
trespasses relating to, iv 84 88 90
counterfeiting, high treason when, iv 81 and n
Coinage, instruments of, treason relative to, iv 90
right of, i 277
Coke, sir Edward, i 72 73
Collateral consanguinity, ii 204
descant, ii 220
issue, iv 304
warranty, ii 301
INDEX.

Collatio bonorum, ii 517
Collation to a benefice, i 391
Collative advowsons, ii 22
Collecting the goods of the deceased, ii 510
Colleges, i 471
their visitors, i 482 484 n
part of statute of mortmain repealed in fa-
vour of, ii 273 n
Collegia in the civil law, i 469
Collies, destroying engines, &c. in, iv 143 n
injuries to, iv 247 and n
Colligendum, letters ad, ii 505
Colonnies, i 107 ii 7
not excluded by statute when not named, i 102
107 n
transportation to, iv 401 and n
Colour in pleading, iii 309
Combinations, see Conspiracy
among workmen, iv 136 n 159 n
as to coals, bricks, &c. ib 160 n
Commutatio dominorum, iv 373
Commenda, i 303 iv 107
Commerc, king the arbiter of, i 273
Commission of array, i 411
bankrupt, ii 480
of lunacy, i 305
the peace, i 351 iv 270
to examine witnesses, iii 363 438 449
take answers in equity, iii 447
Commissioners of paving, when not liable to
action, i 139 n
Commitment of bankrupt, ii 481
persons accused, iv 296
Committee of council, i 232
parliament, i 182
peers out of parliament, iii 58
lunatic, i 305
Common, rights of, ii 32 and n iii 239 n
of estovers, ii 35
pasture, ii 32
piscary, ii 94
turbary, ib
rights of, appendant, ii 34 n
appurtenant, ib n
by vicinage, ii 33 n
in gross, ii 34, and 33 n
cattle gates, ib
prescription for, iii 238 n
who may approve, ii 34 n iii 241 n
remedy for injuries to, iii 237 and n
bull, iii 287
barreter, iv 134
bench, court of, iii 37
justices of, killing them, iv 84
estate in, ii 191 399
farrier, &c. action against, iii 164
form, proof of will in, ii 508
informers, iii 161
jury, iii 358
law, i 63 67 iv 411 412
corporation by, i 472
dower by, ii 132
guardian by, i 461
nuisance, iii 257
pleas, ii 40
court of, iii 37
court of, fixed at Westminster, i 23 iii 39
iv 424
prayer-book, reviling of, iv 50
recovery, iii 182 193 iv 429
sans nombre, ii 529
scold, iv 169
seal, i 475
Common, tenant in, of lands, ii 191 app 2
chattels personal, ii 399
vouchee, ii 359 app 5
utterer of false money, iv 100
ways, ii 35
Commonwealth, iii 403
Commons, members of house of, i 158 and see
Parliament
privilege from arrest, i 165 n
how liable to bankrupt law, i 166
attorney general not a, formerly, i 168 n
wages of, and present number, i 174 n
petition against return of, i 175 n
who may not be elected, i 175 n 176 n
clergy declared ineligible, i 175 n
how may vacate seat, i 176 n
qualification of, i 176 n
depth of, new election thereon, i 177 n
treating bills not recoverable against, i 179 n
must swear to qualification before return, if
required, i 180 n
franking letters by, i 323 n
Scottish and Irish lords in, lose privilege of
peers, i 401 n
Commonwealth, offences against, iv 127
Commorancy, iv 273
Commen legem, writ of entry ad, iii 183
Communio of goods, ii 3
Communion of penance, iv 106 217 276
Compact, i 45. See Contract—Conspiracy
Compassing the death of the king, &c. iv 76
Compensatio, iii 305
Competent witnesses, iii 370
Composition, real, for tithes, ii 28
with creditors, i 484
Compound larceny, iv 230. See Larceny
Compounding felony, iv 133 and n
other prosecutions, iv 136 and n
Compulsion, iv 27 28 and n
Compurgators, iii 342 343 iv 368 414
Concealment from the crown, iv 436
of bastardy’s death, iv 198 358 and n
Concesse fine sur, ii 353
Conclusion of deeds, iii 304 app 1, 2, 3
pleas, iii 303
Concord in a fine, ii 350 app 4 iii 156
Condemnation of goods in exchequer, final, iii
262 n
Condition, ii 299 app 2, 3
breach of, ii 281
estate on, ii 152
in deed, ii 155
law, ii 154 155
of a bond, ii 340 app 3 iii app 22
Conditional fees, ii 110
pardon, iv 401
Confess and avoid, iii 310
Confession by prisoners, iv 357
of action, iii 303 397
of indictment, iv 329
Confessio, bill taken pro, iii 444 445
Confinement to the realm, ii 265
Confirmation of bishops, i 379 380 iv 235
lands, ii 265
Confiscation, ii 299 iv 377
Confusion, property by, ii 405
Conge d’ estre, i 379 382 iv 421
Congregations, religious disturbance of, iv 54 n
Conies, taking, killing, or stealing, iv 235 239
Conjugal rights, see Husband and Wife
restitution of, iii 94
subtraction of, ib
Conjuration, iv 60 436
INDEX.

Conquest, Norman, i 190 iv 413 414
or acquisition, ii 48 343
victory, i 103 107
Consanguineus frater, ii 232
Consanguinity, i 434 ii 202
table of, ii 254
Consciencet, causes of, iii 81 iv 441
Consummation of bishops, i 390 iv 115
Consequential damages, action for, ii 153 and n
Conservators of the peace, i 350 iv 413
true and safe-conducts, iv 69
Conservatory, robbery of, iv 233 n
Consideration of contracts, when essential, ii 445 n
must be legal, ib
when moral obligation sufficient, ii 445 n
when must be proved, ib
of deeds, ii 296 app 2
Consideratrum est per curiam, iii 306
Consitium, or imparlance, iv 356
Consimili caso, writ of entry in, iii 183
Consistory court, iii 64
Consort, queen, ii 218
Conspiracy, law of, in general, iv 136 and n
action of, iii 126
Constable, i 355 411 iv 292
high, i 115
lord high, i 355 iii 37 iv 268
his court, iii 68 iv 267
his duties, i 354 n
special constables, ii 355
when may arrest without warrant, i 356 n
liabilities, and protection of, ib
should know the limits of their power, i 356 n
his duty, on arrest in criminal cases, iv 296
and n
Constitution, English, i 30 127 144 154 160
213 217 233 237 iii 60 iv 438
balance of powers in, i 155 n
how far parliament may alter, i 163 n 211 n
disparity between the theory and practice of,
174 n
corrupt borough disfranchised, i 174 n
language of Scotch covenanters to James
2nd, ii 211 n
Salic law denied, i 219 n
theory of, stated on Hardy’s trial, i 237 n
Construction of deeds and wills, ii 378
statutes, i 87
Constructive treason, iv 75 85
Consuetudinibus et servituis, writ de, iii 232
Consultation, writ of, iii 114
Consul, offences to his person, iv 71 n
Consummator, tenant by curtesy, ii 129
Contempt against the king, iv 122
in courts of equity, iii 443
law, iv 283
Contencium, iv 379
Contentious jurisdiction, iii 66
Contestatio litis, iii 297
Contingent legacy, ii 513
remainder, ii 169 and n
trustees to support, ii 171 app 2
uses, ii 334
Continual claim, ii 316 iii 175
Continuance, iii 316 app 4
with clause of nisi pruna, iii 353
Continuando in trespass, ii 212
Contract, title to property by, in general, ii 442
different kinds of, as parol, specialty, record,
i 464 n
simple, ii 465
special, ib
Vol. II.

Contract, express, iii 154
implied, ib 158
consideration of, ii 445 and n
must be legal, ib
fraud in, ii 444 n
of marriage, i 439 iii 92
action on, iii 117
original, between king and people, i 233
Contractu, action ex, iii 117
Conventio of estates, i 151 152
parliaments, i 152
Conventional estates for life, ii 120
Conversion, iii 152
Conveyances, ii 9 293 309 iv 430
by bargain and sale, ii 335 n
when statute annexes the possession, ii 340 n
when void against subsequent purchasers, i
434 n
to give vote at election, i 173 n
Conviction, in general, iv 290
in frauds against revenue laws, ib 281
before justices, for disorderly offences, in
general, ib
in game cases, ib 174 n
of the necessity for a summons, ib 282
appeal, ib 282 n
Convicts, transportation of, iv 401
rescue of, offence, iv 131 n
Convocation, i 279
court of bishops in, iii 67
Coparceners, ii 187
in general, ii 187 n
admitted to copyhold as one heir, ii 188 n
may convey to each other, ii 189 n
partitions, how made, ib
of title of honour, king determines which
shall bear it, ii 216
Copper coin, counterfeiting, iv 100
Copper, stealing, iv 233 n
Copy of indictment, iv 351
record of indictment, iii 126
Copyhold, in general, i 147 95
doubtful whether sprung out of villenage, ii
95 n
lord, by custom, may grant waste to hold as,
ii 97 n
for life, ii 97
death of tenant, admittance of heir, ii 97 n
lord may by custom be guardian of heir, ii 98 n
fines on alienation, and descent, ii 99 n
base tenure, ii 99 n
frank tenure, ii 309
into frank fee, ib
trustees to preserve contingent remainders,
not necessary, ii 171 n
coparceners admitted as one heir to, ii 188 n
cannot make partition without consent of
lord, ii 189 n
when liable to testators’ debts, ii 244 n
not liable to seizin, ii 419
prescribing by a, ii 284 n
forfeiture of, ii 284
fine of, no bar, ii 356 n
see further title, “Fines.”
surrender of, by attorney, ii 365 n
surrender, by whom and where taken, ii 365 n
death of surrendorer before admittance of
surrenderees, ii 366 n
admittance of femme-covert and infants, ii
366 n
genre to surrender to, uses of will aided, ii
369 n
effect of admittance, ii 369 n
INDEX.

Copyhold, mandamus to admit, i 371 n
seizure of, pro defectu tenentis, ib n
fine upon admission, ib

Copyright, law of, in general, ii 407
of books, ib n
what an infringement of, ib
of prints, &c. ib

Corn, grain, meal, &c. destroying, iv 246
Corn rents, ii 322
Cornage, tenure by, ii 74
Cornody, i 283 ii 40
Coronation oath, ancient, i 236
modern, i 235
Coronator eligendo, writ de, i 347
exonerando, writ de, i 348

Coroner, i 346 iv 292 413
his court, iv 274
how appointed, and duties of, i 347 n
allowance on inquisition, i 348 n
duty on taking inquest, ib n
must see the body, ib n
apprehending felon, iv 292
Saxon laws as to, iv 413
inquest of, equivalent to finding of grand jury when, iv 274 and n

Corporate counties, i 120
name, i 474

Corporation, law as to, in general, i 467 et seq.
act, iv 59 439
each university is a civil corporation, i 471 n
king may grant charter to trading company, i 473
as to necessity for a name, i 475 n
law respecting election of members, &c. see the several titles, i 475 n
incidents and powers, i 477
actions by, and against, i 475 n
cannot hold lands without licence, i 475 n
acting with common seal, ib n
making bye laws, i 476 n
when should act by attorney, ib n
negative vote given to head of, i 478 n
visitor of college, i 484 n
resignation and removal of officers, i 484 n
dissent of, i 485
effects of, as to lands, i 484 ii 256
grounds of forfeiture of charter, i 485 n
taking of by succession, ii 430
grants to, ii 106
effect of "heir" in grant to, ii 109 n
prescribing under a, ii 265 n
Corporal hereditaments, i 17

Corps, see Dead Bodies
Corpus juris canonici, i 92
civilis, i 81

Correction, house of, iv 370 371 377
of apprentices, i 429 iv 189
children, i 432 iv 182
scholars, iv 182
servants, i 428 iv 183
wife, i 444

Corruption of blood, ii 251 iv 388 413 438 440

Cosepresent, i 425

Corsned, trial by, iv 315 414

Costs, ii 430 iii 187 399 466 app 12 24
in equity, iii 452
on not going to trial, iii 357
in assault and battery, iii 121 n
to defendant in ejectment, iii 203 n
certifying in trespass, iii 214 n
inferior tradesmen sporting, &c. iii 401
recovered where statute gives damages, iii 390 n

Costs, when king receives, iii 400 n
when executors and administrators pay, iii 400 n
what pauper may recover as, ib n
when no more than damages, ib n
in criminal cases, iv 362 and n

Covenant, in general, iii 156 157
in a deed, iii 304 527 529
the word not necessary to validity of, iii 304 n
vendor's covenant, to what extends, ib n
real covenants, iii 156

covenants running with the land, iii 304 n
457 n
executors and administrators bound without being named, ib
in lease, when binding an assignee, iii 327 n
to stand seised to uses, ii 338 n
to use straw, &c. on land, binding against sale by sheriff, ii 404 n
write of, i 350 app 4 ii 157

Covert baron, i 442
Coverture, i 442. See husband and wife

Councils of the king, i 227
privy, disclaim jurisdiction in admiralty causes, i 231 n
court of, its jurisdiction, i 232 n

Counsel, see Barrister

Court, i 116 298
in declaration, iii 293 295
in indictment, iv 306 n

Counterfeiting the king's coin, iv 84 88
the king's seals, iv 83 89

Court of Requests, i 296
County, trial by, the, iii 349 iv 349
County, i 116
division into, i 113 n
court, i 178 iii 35 iv 411 414 416 420 423 424
of Middlesex, iii 82
palatine, i 116 iv 431
cities and towns, which are, i 114 n

Courts, power to erect, i 267 iii 24
profits of, i 269
meetings in Westminster, iv 148 n
assaults in, iv 125

in general, i 267 iii 23 iv 258 414
admiralty, iii 69 and n
assizes, iii 69
baron, iii 33 34 90
chancery, iii 46 and n
christian iii 34
common pleas, iii 37 40 i 22 23
county, see County Court
ecclesiastical, iii 67 88 and n; 94 n
public meeting near, iv 148 n
exchequer, iii 44 and n
king's bench, iii 40 and n
lect, iv 273 411 424
martial, i 415
nisi prius, iii 57 n
prize, iii 69
requests, iii 81 and n
sewers, iii 73 and n
university, iii 83 and n

CRIMINAL,
of general public jurisdiction of parliament, iv 259
of lord high steward, ib 261
of king's bench, ib 265
of chivalry, ib 267
of admiralty, ib 268
of oyer and terminer, ib 269
commission of assize and nisi prius, ib of the peace, ib 270
INDEX.

Crimes, 139 and n, law, iv 2
Cross bills, iii 449
Crown, descent of, i 191 iv 413
Cucking-stool, iv 160
Curate, 393, see Clergy
Curate, his salary, iii 90 iv 394 n

Custom, general, i 68 73
what time will make it valid, ii 31 n
particular, i 74
how allowed, i 78
when legal, i 75
to take wood in a chase, &c. bad, i 78 n
immemorial what, i 77 n
cannot prevail against a statute, i 8 n
title by, in general, ii 263 422
assurances by, ii 365
heriot, ii 422
dower by, ii 126
of London, how tried, iii 334
how certified, i 76 n
of Kent, as to dower, ii 136 n
Customary freehold, ii 100 149
tenant, ii 147

Customs on merchandise, i 313 314 315 n 316
Custumia antiqua sine magno, i 314 315
omo et nova, i 314
Custos rotulorum, i 349 iv 272
Damage to things personal, i 153
Damage-feasant, iii 6
Damage, title acquired by, ii 438
in assize of novel disseisin, i 187

Damages, where act gives, costs also recoverable, iii 400 n
in what cases no more costs than, iii 401 n
against two, levied upon one, iii 417 n
Danelage, i 64 iv 412
Darrien presentment, as ease of, iii 245
Date of a deed, ii 304 app 1 2 3
Day in bank, iii 277
court, iii 316
of grace, iii 278
De bene esse, iii 383
De la plus belle, dower, ii 132
Deacon, i 389 and n
Dead man's part, ii 518
Deadly feud, iv 244
Deaf, dumb, and blind, i 304 ii 497
Dean and Chapter, i 382
Dean, rural, i 383
Deanery, rural, i 111
Death, appeal of, iv 314 424
of party before entering judgment, iii 399 n
execution of, iv 403
civil, what, i 133 n
of king, parliament meets, i 150 n 187 n
deodand upon, by violence, i 304 n
unnatural, township give notice to coroner, i 348 n
Dead bodies, offence of selling, iv 64 n
stealing, iv 429 n
digging up, ib, iv 64 n
arresting, iv 64 n
stealing them, indelictable offence, iv 429 n
Debet et detinet, action in, iii 155
Debt, its meaning, &c. iii 155
of title by, ii 464
action of, iii 154 app 13
action of, on amercement, iii 161
by law, iii 161
escape, iii 164
judgment, ii 150 421
execution in, iii 414 n
penal statutes, i 160
information of, iii 261
national, and charge thereof, i 326 327 n iv
n a loss of so much property, i 338
objections to, considered, i 329 n
reduction of by sinking fund, i 330 n
payment of soldiers' and seamen's, regulat ed, i 417 n
Debtee executor, iii 18
Debtor, refusing to discover effects, iv 156
Debts, priority of, ii 511
Decree, action for, iii 165
of, iii 106 405
on the case, in nature of, iii 106 405
Decennary, i 114 iv 252
Deception in his grants, i 246
Decisive oath, iii 342
Declaration, iii 233 and n app 7 10
Declarratory, part of law, i 54
statutes, i 261
Declinatory plea, iv 333 335
Decree in equity, iii 451 n
Decretals, i 82
Decretum Gratiani, i 82
Declinatus potestatem, ii 351 iii 447
Deed, alienation by, ii 295
in general, what, ii 296 n
indenture, what, ii 296 and n
deed-poll, what, ii 296
voluntary, or upon consideration, ii 297 n
signatures to, may be printed, ii 297 n
INDEX.

**Deed,** technicalities, and manifest verbal errors
immaterial in, ii 298 n

date of, not essential, ii 304 n

scaling must be averred in pleading, ii 305 n

signing, when necessary, ii 305 n

delivery absolutely necessary, ii 306 n

execution, manner of, ii 307 n

not perfect till executed by all, ib n

defacing seal, effect of, ii 308 n

cancelling when not suffice, ii 309 n

proof of old, iii 367 n

when void as against subsequent purchasers, i 343 n

to settle chattels, real or personal, in remain-
der, ii 397 n

custody of title deeds, descends with estate, ii 428 n

**Deed-pol** , ii 296

Deeds, stealing of, of, iv 234

Deed sealing, iv 235 239

hunting, killing, &c. in general, iv 174

in disguise, iv 144

Default, judgment by, iii 296 396

Defence, deed of, of, ii 327 342

**Defectum,** challenge proper, iii 362 iv 352

Defence, ii app 5 in 296 app 3 5 10

Defendant, i 25

Defensive allegation, iii 100

Defenstrance, ii 372

Deforciant, iii 350 iv 174

Definitive sentence, iii 101

Degradation of peers, i 402

Degrees, conferred by the archbishop, i 381

in writs of entry, iii 181

of consanguinity, ii 206

how reckoned, ii 206 207 224

of guilt, iv 34

**Dehors,** matter, iii 317 iv 390

Delay of the law, ii 423

Delegates, court of, of, iii 66

in academical causes, iii 85

**Delictum,** challenge proper, iii 363 iv 352

Deliverance, second writ of, of, iii 150

Delivery of a deed, ii 360 app 11

Demand of lands, iii app 5

Demandant and tenant, ib

De mesnes lands, ii 90

De mesnes of the crown, i 286

Demise of the crown, i 188 249

Demi-vills, i 115

Democracy, i 49

Demolishing churches, houses, &c. iv 143 and n

Demurrer, iii 314 app 23

book, iii 317

in equity, iii 446

to evidence, iii 372

indictment, iv 333

Denial of rent, i 170

Denizen, i 374 ii 249

Deced, i 300

Departure in pleading, iii 310

**Depopulatio agrorum,** iv 373

Depositions, iii 383

in chancery, iii 449

ecclesiastical courts, iii 100

Deprivation, i 393

Derelict lands, ii 261

Dereliction of property, ii 9

Derivative conveyances, ii 324

**Descender,** writ of foredom in, iii 192

Descent of lands, iv 413 421

of title by, in general, ii 201

descent cast, when, ii 176 n

Descent, of crown, i 193 iv 413

collateral, i 194

lineal, i 193

rules of, ii 205

table of, ii 297

distinction between purchase, &c. ii 201 n

entry and seisin when necessary, ii 201 n

collateral consanguinity, ii 204 n

collateral relations multiplied, ii 206 n

demolishing in civil, and canon law, ii 207 n

duchy of Cornwall, out of the rule of, ii 208 n

how father may inherit to son, ii 210 n

daughters by different venturers, may jointly

inherit, ii 214 n

representative proximity preferred, ii 219 n

doctrine of representation, ii 220 n

when collateral descent takes place, ii 220 n

rules applicable to descents, ii 220 n

who are of the same blood, ii 220 n

new kind of inheritance, ii 222 n

union of legal and equitable estate, ii 222 n

when in separate estates meet in one heir, ii 222 n

what necessary to good title, ii 223 n

doctrine of consanguinity, ii 223 n

sister of whole, preferred to brother of half

blood, ii 227 n

exclusion of half blood, ii 233 n

classes of kindred, male stocks preferred, ii

235 n

preference of cl. 11 to cl. 10 disputed, ii 240 n

device when a nullity, ii 242 n

rule in Shelley's case, ii 242 n

papists may now inherit by, ii 257 n

estate pur attur vici, ii 260 n

limitations of estate, pur attur vici, ii 260 n

Desertion, i 415 iv 102 and n

Detainer, forcible, iii 179 iv 148

unlawful, iii 151 n

Determinable freehold, i 121

Determination of will, ii 146

**Diet,** action of debt in, iii 155

Dintime, action of, iii 152

Devastation, i 508

Devise, iv 430

title by, in general, u 373

when a nullity, ii 242 n

what devisable, ii 290 n

lands devised, subject to debts, ii 378 n

where lands acquired subsequent to, pass by

will, ii 379 n

death of devisee before testator, effect of, ii

379 n

estate twice devised in same will, ii 381 n

intention of testator governs construction, ii

381 n

heir disinherited only by plain intention, ii

381 n

cross remainders in, ii 381 n

of chattels real and personal in remainder, ii

398 n

in joint tenancy, and tenancy in common, ii

399 n

votes not to be multiplied by, i 174 n

Devises, liable to debts of devisor, ii 378

**Diet est sine,** iii 316 399

Diet, excess in, iv 170

Diets, i 147

Digests, i 81

Dignity of the king, i 241

Dignities, ii 37 and n

Dilapidations, iii 91

Dilatory pleas, iii 301 and n
INDEX.

359

Diminishing the coin, iv 90 and n
Diminution of record, iv 390
Diocese, i 111
Westminster, when a, i 115 n
Direct prerogatives, i 239
Directory part of a law, i 55
Disabilities, iv 377
Disability, plea to, iii 302
Disabling a man’s limbs or members, iv 205
206 207
statutes of leases, ii 320
Disclaimor of tenure, ii 275 iii 233
Discontinuance of action, iii 296
estate, iii 171
when act of husband alone, discontinues
wife’s estate, iii 20 n
what works a, iii 171 n
Discovery by bankrupt, ii 493
of accomplices, iv 330 331
on oath, iii 382 437
Discretionary fines and imprisonment, iv 378
Disfiguring, iv 207 and n
Disguise, iv 144 and n
Dismembering, punishment by, iv 377
Disseisin, iv 225
Dismembering, punishment by, iv 377
Disorderly houses, iv 168 and n
persons, iv 169—See Vagrant
Disparagement, ii 70
Dispensation from the pope, iv 115
Dispensing power of the king, i 142 186 342
iv 436 440
Dispossession, iii 167 198
Disseisin, ii 195 iii 169 and n
at the party’s election, iii 170 171
warranty commencing by, ii 302
writ of entry sur, iii 133
Dissenters, protestant, iv 50 n 53
Disolution of parliament, i 187
Dissuading witnesses, offence of, iv 126
Distress, law relative to, iii 6 n
right to things by, ii 41 42 43
of goods in custody of law, iii 7 n
after bankruptcy, ib
of tools and goods, iii 8 n 9 n
of cattle sent to agist, &c., liable to, iii 8 n
so goods of lodgers, &c., ib
of cattle levant and couchant, iii 9 n
sale of corn, under, iii 10 n
of trees, shrubs, &c., ib n
of unripe products, ib
when may be made, iii 11 n
after end of term, &c., ib n
removal of goods, to avoid, ib n
pursuit to distrain cattle, iii 12 n
how to enter for, ib n
seizing part in name of all, ib n
cattle dying in bound, ib
distraintor cannot tie up cattle, iii 13 n
sale of, iii 14
sale of cattle taken damage feasant, iii 14 n
selling goods taken by, ib n
illegal for crown debts, iv 423
excessive, iii 12
infinite, iii 231 280 iv 255 318
second, iii 12
Distribution of intestate’s effects, ii 515 iv 408
424 439
Distraining in chancery, iii 445
determination, iii 413
juratores, iii 354
to compel appearance, iii 280 app 13
Disturbance, iii 236

Disturbance, of common, iii 237
franchises, iii 236
patronage, iv 242
religious assemblies, iv 54
tenure, iv 242
ways, iii 241
Disturbor, ii 278
Diversity of person, plea of, iv 396
Dividend of bankrupt’s effects, ii 487
Divine law, i 42
right of kings, i 191 iv 436
tithes, ii 25
service, tenure by, ii 102
Divorce, i 440 iii 94
Sir W. Scott’s expositions of the law, iii 94 n
Do, ut des, ii 444
ut facias, ii 445
Docquet of judgment, ii 511 iii 397
Doctrines, illegal, asserting or publishing, iv 91 116 123
Domebook of Alfred, i 64 iv 411
Domesday-book, ii 49 99 iii 331
Dominion, ii 1
Donatio mortis causa, ii 514 and n
Donative advowsons, ii 23
Done grant et render, fine sur, ii 353
Donis, statute de, ii 112
Double fine, ii 353
plea, iii 308
voucher, ii 5 app 5
Dove-cote, not a common nuisance, iv 108 n
Dowager, princess, iv 81
queen, i 223 iv 81
Dower, title by, in general, ii 129 iv 424
quantity of, in customary estates, ii 129 n
distinction between free bench and, ii 129 n
alien women entitled to, ii 131 n
quantity of, generally, ii 131 n
alienation by tenant in, ii 136 n
settlement before marriage, a bar of, ii 138 n
barred by attendant of husband, ii 253 n
how barred by fine, &c., ii 351 n
ad ostium ecclesie, ii 132
assignment of, ii 135
bar of, ii 136
by common law, ii 132
custom, ib
ex aestus potiro, ii 133
unde nihilo habet, writ of, iii 183
write of right of, iii 183 194
Draught for money, ii 467
Drawbacks, i 315
Drawing to-the-gallows, iv 92 337
Driving, furious, offence of, iv 207 n
Droit droit, ii 109
Druids, their customs, i 63 iv 408
Drunkenness, public or private, i 124 n
how far it excuses crime, iv 25
punishment, &c., for, iv 64 and n
Duchy court of Lancaster, iii 78
Ducking stool, iv 109 377
Duel, iv 145 185 199
Dues, ecclesiastical, non-payment of, iii 88 89
Dukes, i 397 409
Duum fuit intra actatem, writ of, iii 183
non compos mentis, writ of, ib

Digitized by Microsoft
INDEX.

Duodecima manus, iii 343
Duples querela, ii 247
Duplicity in pleading, ii 308 311
Damnatioambiens, administration, ii 503
minore aetate, administration, ib
Duress, ii 392
of imprisonment, i 131 136
per minas, i 131 iv 30
Durham, county palatine of, i 116
courts of, iii 76
Duties of persons, i 123
of the king, i 223
of monied butlerage abolished, i 314
customs and excise system improved, i 315
aliens' duty abolished, i 316 n
on salt, English and foreign, i 321 n
stamp duties, i 323 n
Dwelling-house, iv 224 and n
Ealdormen, i 398
Ear, loss of, iv 146 156 160 206 247 377
Earl, i 116 398
Earl marshal, his court, iii 66 iv 267
Earnest, ii 447
Eat inde sine die, iii 316 399
Eaves-droppers, iv 168
Ecclesiastical corporations, i 470
courts, i 61
their cognizance, iii 87 iv 275 425
when separated from the civil, iii 02 iv 415 421
court, process, and power to punish, iii 100 n
limitation of prosecutions in, iii 103 n
mode of burying, determined by, iii 265 n
Education of children, i 450
Edgar, king, his laws, i 66 iv 412
Edward the Confessor, his laws, i 66 iv 412
490
Egyptians, iv 165
Ejectione firmae, writ of, i 199
Ejectment, action of, i 199 app 7 iv 441
descent cast, no bar to, iii 176 n
action of, iii 199
action of, for what it will lie, i 199 n
in inferior court, iii 202 n
on a vacant possession, 203 n
plaintiff must recover on his own title, i 196 n
legal right of entry necessary in, iii 204 n
presumption of surrender of term, ib
as to specifying the premises, ib n
proceeding, when on defence at trial, iii 205 n
bail in, as tenant holding over, ib n
for non-payment of rent, iii 206 n
by king's lessee, iii 256 n
by his lessee, ii 326 n
costs to defendant succeeding, iii 203 n
Election of bishops, iv 115 421
magistrates, i 340 iv 413 427
Scots peers, i 169 iv 117
to Parliament
voters' qualification, i 172 n 174 n
counsel to give vote, i 173 n
debt, i 174 n
vote by annuity or rent-charge, i 173 n
voters multiplied by devise, void, ib n
if voter dies, heir may vote, at same, ib
vote by assessment to land-tax, ib n
disqualifications to vote, 174 n
aliens may become qualified, ib
vote by residence in borough, ib n
who may not be elected, ib n 176 n
clergy declared ineligible, i 175 n
qualification of member, ib n
on death of member, i 177 n
notice of time and place of election, i 178 n
undue influence at, illegal, ib n
Election to parliament—
treating before ordering writs, not illegal, i 179 n
treating vacates the election, ib n
treating at, what, ib
innkeeper cannot recover for treating by
order of candidate, ib
penalty for bribery at, ib n
bribery, what, and how punishable, ib n
candidate must swear to qualification, if
required, i 180 n
electors take oaths before they vote, ib n
Grenville's act, ib n
proceedings on a false return, ib
soldiers must remove during, i 415 n
to corporations, see tit. "Corporations."

Elective monarchy, i 192 iv 413
Eleemosynary corporations, i 471
Elegit, estate by, ii 161
write of, iii 415 iv 426
Eliborists, iii 355
Eloignment, iii 129 148
Elope, i 443 ii 130
Ely, courts of, i 119 n iii 79
isle of, i 120
destroying poudikes in, iv 244
Embargo, i 271
Embassadors, see Ambassador
Emblements, ii 122 143 403
what, and who shall have them, ii 122 n
right to dower does not entitle to, ii 131 n
Embouwelling alive, iv 93 377
Embracery, iv 140 and n
Emperor, his authority, i 242
Emphyseesis, ii 232
Emson and Dudley, iv 310

Enabling statute of leases, ii 319
Enclosure, disseisin by, i 170
act, destroying works, &c. iv 245 n
Endowment of vicarages, i 387
widows, ii 135
Enemies, ii 257
goods, ii 401
adhering to, &c. offence of, iv 82 and n
England, i 110
divided into counties, &c. before Alfred, i 114 n

Engleschire, iv 195
English, law proceedings in, iii 322 iv 441
Engrossing, iv 158
Enlarger l'estatte, ii 324
Enlarging statute, iv 87
Enquiry, writ of, iii 398
Enseint, ii 160
Entails, ii 113 iv 431
Entries, books of, iii 271
Entry, redress by, iii 5
wrongs by, i 174
forcible, iii 179 iv 148
on lands, iii 312
tolled by descent, iii 176 177
writ of, ii app 5 iii 180

Equity, accident and mistake, iii 426 n
bonds, &c. ib
boundaries, &c. ib
mistakes, ib
fraud, iii 426
trustees, ib
attorney and client, ib
heirs, sailors, &c. ib
Guardian, iii 427
injunctions, ib
bills of peace, ib
INDEX.

Equity, bills of interpleader, iii 427
bills or writs of certiorari, ib
bills to perpetuate testimony, ib
bills to discover evidence, ib i 433 n
bills of quiet tietm, iii 426 n
bills of delivery up of deeds, ib
other bills, ib n
infants, ib
wards of court, ib
specific performance of agreements, ib n
realty, ib n
personalty, ib
restraining waste, ii 123 n
trusts, ii 426 n
curtsey of trusts are estates in, ii 127 n
lunatics, iii 426 n
commission of lunacy, ib
lunatics' committee, iii 427 n
charities, iii 426 n
executors, ib n
marshalling assets, ib
bankruptcy, ib
may order devisee to purchase lands to be
entailed, when, &c. ii 364 n
practice, iii 427 n
subpoena, iii 441
answer, iii 427 n
demurrer, iii 446
pro confesso, iii 445
impertinence, iii 442 n
contempt, iii 443
attachment, ib
writ of rebellion, iii 444
serjeant at arms, ib
sequestration, ib
distraint, n
master of rolls may send case for judg-
ment of court of law, iii 453 n
how law of arises, i 61
compendium of law of, iii 426 n
united with law, i 62
equitable maxims, iii 426 n
of redemption, ii 159
of statutes, iii 431
reserved, iii 453
courts of, in general, iii 50 45
history of, iii 50 iv 430
courts of, distinguished from law, iii 429
430 iv 442
jurisdiction of, in general, in cases of acci-
dent, &c. iii 426 n
writ of ne exeat regno, when granted, i 266 n
peers answer in, i 12 n 401 n
Eriarch, iv 313
Error, costs in, iii 400 410 app 24
writ of, iii 406 app 21 iv 390
where prosecuted, iii 410 411
does not lie from cinque parts or stannaries,
iii 44 n
alteration of law relative to, iii 272 n 411 n
writ of, to reverse outlawry, ii 285 n
for what writ of, lies, iii 406 n
from Ireland to house of lords, iii 410 n
court of, in exchequer chamber, iii 44
Escate, iii 390 415
action for, i 165
assisting in, iv 131
offence of, iv 129 and n
vagrants, iv 170 n
Escheat, iii 303 ii 11 72 89 244 iv 398 413 418
writ of, iii 194
Escrew, iii 307
Esquage, ii 74 iv 422

Esplees, ii app 5 iii app 3
Esquire, rank in state, i 406
ancient mode of creation disabled, ib n
what servants of the crown are, ib n
barrister is, ib n
son of, entitled to kill game, when, iv 175
Essoigns, iii 278
day of the term, iii 278
Estate, in lands, ii 103
term defined, ib n
freehold, what, ii 104 n
fee conditional out of personal property, ii
113 n
of freehold in futuro, ii 144 n 166 n
divested by subsequent birth of heir, ii 208 n
by purchase or descent, ii 209 n
per aiter vie, its nature, ii 259 n
execution by statute of trust, ii 335 n
assurance of, by private statute, ii 344 n
repairs and improvements of, private acts for,
ii 345 n
fine of estate less than freehold, no bar, ii
356 n
possession not necessary to levy fine, ii 357 n
See further, title Fine,
though not so devised, subject to debts, ii
378 n
when pass by will, though acquired after
execution of, ii 378 n
Estates of the kingdom, i 156
Estoppel, iii 308
Estoverite habendum, writ de, i 441
Estovers, of a wife, ib
common of, ii 35
Estrays, i 297 ii 14
Estreat of recognizance, &c. iv 253 296 n
Estrepenement, writ of, iii 225
Evidence, in general, iii 367
of old deeds and wills, iii 367 n
secondary, iii 368 n
declarations and hearsay, iii 368 n
book entries, when admitted, iii 369 n
presumptive, iii 371 n
notice to produce papers, &c. iii 382 n
by interrogatories, iii 383 n
difference of, in equity and law, iii 437 n
in criminal cases, iv 356
recognizance to give, iv 296 n
stiling, offence of, iv 126 n
Ex afficio informations, iv 308
Ex post facto laws, i 46
Examination in chancery, iii 449
of prisoners, iv 296
witnesses, ii 372
trial by, ii 431
Exceptio, iii 310
Exceptions, bill of, iii 372
to answer in chancery, iii 448
Exchange, bill of, iii 466
deed of, ii 324
of goods and chattels, ii 446
lands, iii 323
Exchequer chamber, court of, iii 56
court of, ii 44
receipt of, ib
Excise, i 319
hereditary, i 283
offences against, how tried, iv 291
Exclusion bill, i 210
Excommunication, iii 101
when may be decreed, iii 100 n
Excommunicato capiendo, writ de, iii 102
deliberando, writ de, ib
INDEX.

Execusable homicide, iv 182
Executed contract, ii 443
estate, ii 163
fine, ii 353
remains, ii 168
Execution, civil, iii 412 app 25
who may be taken in, iii 414 n
by imprisonment, satisfaction of debt, iii 415 n
upon one of two defendants, iii 417 n
landlord’s demand of rent, ib n
when lands cannot be taken up, iii 410 n
possessed, delivered in eligi, ib n
under an extent, iii 420 n
de clerico admittendo, iii 412 n
criminal, iv 403
award of, iv 263 app 3
plea in bar of, iv 396
precedent of, iv 403
rule for, iv 404
varying from judgment, iv 179 404
warrant of, iv 405 app 4
write of, iv 403 app 5
of devises, ii 376
uses, ii 333
process of, iii 279 app 7
Executive power, i 190
Executor, ii 503
de son tert, ii 507
of executor, ii 506
his own wrong, ii 507
right to testaments as against heir, ii 281 n
bound by covenants without being named, ii 304 n
administration granted to guardian when infant sole, ii 503 n
if out of country, administration granted to creditor, ii 505 n
what may be done before probate, ii 507 n
what may expend in funeral, &c. ii 508
proof of will per testes, what, ib n
money in hands of deceased overseer repaid in full, ii 511 n
voluntary bonds postponed, ib n
debtors made executor when discharges debt, ii 515 n
giving preference to one over other creditors, ib n
legal and equitable assets, what, ib
action against, for specific legacy, ib n
his relation to residue, ib
when liable to costs, iii 401 n
Executory contract, ii 443
devises, ii 173 334
estate, ii 163
remainder, ii 169
Exemplification, ii app 5
Exemptions from tithes, ii 28
Exchequer, debt found due to crown, how
levied in Ireland, iii 262 n
condemnation of goods conclusive, ib n
process in, law relative to, ib 287 n
court of error in, ib 410 n
Exigent, writ of, iii 283 iv 319
Excipi facias, writ of, iii 283 app 16 iv 319
Exile, i 137
not civil death, i 133 n
when first a punishment, i 137 n
Expectancy, estates in, ii 163
Expenses, see Costs
of prosecution, iv 362
witnesses, iii 369 iv 362
Exportation of wool, &c. iv 154 428
Exposing person, offence of, iv 64 n
selling wife, ib
disordered persons, iv 162 n
Express condition, ii 154
contract, ii 443 iii 154
malice, iv 198
warranty, iii 301
Extendi facias, iii 420
Extent, writ of, ib
law relative to, iii 420 n
in aid, ib
Extinguishment of estates, ii 325
Exortion, iv 141
Extra-parochial places, i 114 284
ptithes, i 284
Extravagants, i 82
Eye, putting out, iv 205 206
Eyre, chief justice in, iii 72
justices in, iii 57 iv 422 423
killing them, iv 84
Facto ut des, ii 445
factae, i 444
Facto, king do, i 204 371 iv 77
Factor, i 427, see Agent, Master and Servant
Fair, i 274 iii 218
False imprisonment, iii 127 iv 218
action of, iii 138
judgment, writ of, iii 84 406
return, action for, iii 111 163
verdict, iii 405 iv 140
weights and measures, iv 157
pretences, offence, &c. of, iv 158 and n
vagrants, when, iv 170 n
rumours, when indictable, ib 149 158 n
False crimen, iv 89 133 156 247
Falsifying attainer, iv 390
coin, iv 84 85 80 99
judgment, iv 390
Fame, good or ill, iv 256 299
Farm, ii 318
signification of, ii 17 n
Farrier, common action against, iii 164
Favour, challenge to, iii 363
Fealty, i 367
oath of, ii 45 53 86
Fear, putting in, iv 242
Fee, ii 46 105 106
after a fee, ii 334
ecclesiastical, ii 90
farm rent, ii 43 n
simple, ii 104 app
what words in will pass a, ii 108 n 109 n
in grant to corporation, ii 109 n
tail, ii 112 app
Fees to counsel, iii 28
Feigned issue, iii 452
Felo de se, ii 499 iv 189
Felon, ii 499
Felony, ii 284
definition of, iv 94
appeal of, iv 314
compounding of, iv 333
misprision of, iv 121
punishment of, iv 98 216 222
when trespass merged in, iii 6 n
Feme-covert, ii 442 ii 299 497. See Husband and Wife
Fencing, iv 192
Feodal actions, ii 117
tenures, ii 44 425 431
among the Saxons, iv 413
INDEX. 363

Feudal tenures, when received in England, ii 48 iv 413 419
Feoffment, ii 310 app l
Feorn, ii 318
Ferae naturae, animals, ii 390
Ferrets, stealing of, iv 236 n ii 391 n
Ferry, iii 219
Fetter, iv 300 322
Feud, ii 345
Feudal system, knowledge of, essential, ii 44 n when first reduced to writing, ii 48 n
villenage opprobrious, ii 53 n
wardship of the lord, ii 67 n
lord's rights on marriage of ward, ii 70 n
value of wardships and marriages, ii 71 n
tenure by cornage, ii 74 n
escuage, what, ib
socage tenure explained, ii 81 n
by petit serjeanty still exists, ii 82 n
tenure in gavelkind, how preserved, ii 84 n
lands in gavelkind may escheat, ib n
vilein not protected by magna charta, ii 93 n
lord seized damages, recovered for maining vilein, ii 94 n
last claim of villenage, ii 96 n
Feudatory, ii 53
Feudum antiquum, ii 212 221
apertum, ii 245
honorarium, ii 56 215
improprium, ii 59
individuum, ii 215
maternaum, ii 212 243
nunciam, ii 212 221
held ut antiquum, ib
paternum, ii 243
proprium, ii 58
Fiction in law, iii 43 107
Fictitious plaintiff, iv 134
bail, iii 291 n
Fidei commissum, iii 327
Fidejussors, iii 105 291
Fief, ii 45
d'haubert, ii 62
Fieri facias, writ of, iii 417 app 27
feci, iii app 27
Fifteenth, i 309
Fighting, offence of, iv 183 and n
Fidial portion, ii 519
Final decree, iii 452
judgment, iii 398
Finding of indictments, iv 305
things personal, ii 9
property, owner not obliged to pay expenses of, i 209 n
property, to whom belongs, no owner appearing, i 209 n
Fine for alienation, ii 71 89
endowment, i 135
in copyhold, ii 98
of lands, ii 118 318 iii 157 174 iv 429
executed, iii 353
reversal of, when levied of copyholds, ii 369
vi 166
sur done, grant et rendr, iii 333
cognizance de droit, come ceo, &c. ii 352 353
app 5
conceit, ib
Cognizance de droit tautum, ii 333
Concessit, ib
Fines and Forfeitures, when grantable, iii 259
iv 379
in alienation and descent of copyhold, ii 98 n
how and where acknowledged, ib 351 n
Vol. II.

Fines, proceedings when land lies in different counties, ii 352 n
proclamations in, use of, ib n
running of, against infants, &c. ib 350 n
entry to avoid, ib
of estate less than frehold, no bar, ib n
possession not necessary, to levy, ib 357 n
money devised to purchase lands to be entailed, paid to party who might levy fine, ib 361 n
and see Title, Recovery
of lands in ancient demesne, in what court levied, ib 368 n
for misdemeanors, iv 377 378
Finger, disabling, ib 205
Fire, see Arson, negligence in, i 431 iv 222
tenants' liability to landlord in case of, iii 228 n
Fire-bote, ii 35
Fire-ordeal, iv 342
Fire-works, ib 168 and n
First-fruits, i 294 ii 67 iv 107
Fish, royal, i 290
stealing in disguise, iv 235
or attempting to steal, iv 236
Fishery, common of, ii 34
free, ii 39 410 417
several, ii 39
Fishpond, destroying, iv 246
Fitzherbert, i 72 iii 183
Fixtures, what are, and right to between heir and executor, ii 281 n
between landlord and tenant, ib
Fleets, i 262 iv 419
Fleta, i 73 iv 427
Flight, iv 387
Floodgates, destroying, iv 144, 5 246
FLOTSAM, i 292 293 iii 106
Forasus nauticum, ii 453
Folk land, ii 90 92
Food, offence of selling short weight, iv 158 n
forestalling, regaling, engrossing, &c. ib 159 and n
supplying unwholesome, ib 162 and n i 122 n
stinting apprentices in, iv 197 n
Foot of a fine, ii 351 app 4
Force, injuries with and without, iii 118
when repellable by death, iv 181
Forcible abduction and marriage, iv 208
to regain land, iii 5 n 179 n
entry and detainer, iii 179 iv 149
Forclosure, ii 159
Foreign bill of exchange, ib 467
forgery, iv 250 n
coin, forging it, ib 89 99 120
county, indictment in, iv 303
dominions, ii 110
prince, pension from, iv 122
service, ib 101
Forest, i 289 ii 14 38 414
courts, ii 71
laws, ii 416 iii 73 iv 415 420 421 423 432 437
Forest, carta de, iv 423
Forestalling, iv 158
Foretooth, striking out, ib 205
Forfeiture, i 299 ii 153 267
for crimes, iv 377 391
of copyholds, ii 284
of goods and chattels, ib 420 421 iv 386
of lands, ii 267 iv 381
upon disclaimer of tenant, ii 275 n
INDEX.

 Forgery, iv 247
 what false making sufficient, ib n
 with what intent forgery must be committed, ib
 how far instrument forged must appear genu-
 ine, ib
 what instruments are subjects of, ib
deeds, court rolls, ib
 bills, &c. iv 248
 bank notes, &c. ib
 exchequer bills, south sea bonds, &c. ib
 seamen's wills, &c. iv 249 and n
 wills, ib 249
 Mediterranean paper, ib
 stamps, ib and n
 marriage, &c. registers, ib and n
 plate stamps, &c. ib 249
 corporation seals, ib
 private deeds, iv 250 n
 wills, ib n
 bills, ib
 notes, ib
 receipts, ib
 orders, ib n
 Forgiveness by the prosecutor, iv 364
 Forma pauperis, iii 400
 Formedon, writ of, ib 191
 Forms of law, unalterable, i 142
 Forfeiture of, 64
 Fortune-tellers, iv 62
 Forty days' courts, iii 71
 Founder of a corporation, i 480
 Foundling hospitals, ib 131
 Fox-hunting, trespass in, iii 213 n
 Frames, breaking of, &c. iv 247 n.
 Franchise, ii 37
 allowance of, ib 263
 disturbance of, ib 236
 royal, i 302
 Frankalmoign, ib 101
 Franked letters, i 323
 Frank-fee, ib 368 iii 166
 Frank-marriage, ii 115
 Frank-pledge, i 114 iv 252
 view of, iv 273
 Frank-tenement, i 104
 Frank-tenure, ii 61
 Frater consanguineus, ib 232
 uterus, ib
 Fraud, civil, where cognizable, iii 431 437 439
criminal, iv 158
 what vacates contracts, ii 444 n
 Frauds and perjuries, statute of, ii 160 297
 337 342 364 376 450 466 500 501 515 iii
 158 iv 439
 Fraudulent deeds, ii 296
 devises, ib 378
 Frank-feme, ib 80
 Free Bench, ib 122
 distinction between dower, &c. ii 129 n
 Free fishery, ib 390 410 417
 services, ib 60
 socage, ib 79
 warren, ib 38 417 iv 415
 Freehold, of title in, ii 104
 estate of, what, ib n
 what cannot be put in abeyance, ib 107 n
 how granted in futuro, ib 144 n 166 n
 fine of estate less than, no bar, ib 357 n
 possession of, not necessary to levy fine, ib
 357 n
 see further, Title, Fines
 ascs, ib 120 318
 Fresh suit, i 297
 Fruit, stealing of, iv 233
 Full age, i 463
 Fumage, ib 324
 Funds, public, ib 331
 Funeral expenses, ii 508
 Furandi annus, iv 230 232
 Furious driving, iv 207 n
 Fustians, stealing, ib 238
 Futuro, freehold, ii 144 166
 Gage, iii 280 app 4
 estates in, iii 157
 Game, property of the king, denied, ii 419
 unqualified person shooting another, in pur-
suit of, liable same as qualified, iv 27 n
 killing of, in general, ib 174 and n
 what persons qualified for, ib 174 ii 418 n
 gamekeepers, &c. ii 418 n
 laws, particularly affecting unqualified per-
sons, iv 174
 buying, selling, ib
 Gaming, iv 171
 in public houses, ib 171 n
 in other places, ib
 in general, ib n
 Gaming houses, ib 168 and n 171
 Gaol delivery, iv 270
 distemper, i 346
 regulations in, general, ib n
 Gaolers, appointment of, &c. i 346 and n iv 300
 compelling prisoners to be approvers, &c. iv
 198
 when guilty of murder in cruelty, ib 197 n
 Gardens, robbing of, ib 233
 Garter, knight of, i 403
 Gate, stealing of, iv 233
 Gavel-kind, i 74 ii 84 iii 400 413
 General, demurrer, iii 315
 fund, i 339
 imparlance, iii 301
 issue, ib 305 iv 338
 legacy, ii 512
 occupancy, ib 258
 sessions, iv 271
 statute, i 85
 tail, ii 113
 verdict, iii 378 iv 354
 warrant, iv 291
 Gentleman, i 405 406
 Gift of chattels, personal, ii 441 and n
 Gift of chattels, real, ii 440
 lands and tenements, ii 317
 Gilda mercatoria, i 473
 Glanvil, i 72 iv 421
 Cleaning, ii 212
 God and religion, offences against
 apostasy, iv 43
 heresy, ib 44
 against church ib 50
 reviling ordinances of, ib
 nonconformity, ib 51
 absenting church, ib 52
 mistaken zeal, ib
 protestant dissenters, ib 53
 papists, ib 55
 popery ib
 popish recusants, ib 56
 priests, ib 57
 observations on laws against popery
 iv 57
 other regulations, ib 58
 blasphemy, ib 59
 swearing, &c. ib
God and religion, offences against
witchcraft, sorcery, &c. iv 60
impostors, ib 62
simony, ib
sabbath-breaking, ib 63
drunkenness, ib 64
lasciviousness, &c. ib
bastard children, ib 65
Good behaviour, security for, ib 251 256
consideration, ii 297
Government, contempt against, iv 123
its original, i 48
Grain, see Corn
Grand assize, iii 341 351 iv 422
counsel of Normandy, i 106
juror, disclosing evidence, iv 126
jury, ib 302
in attainment, iii 351 404
larceny, iv 220
serjeants, ii 73
Grants, of title by, ii 9
of chattels, personal, ib 441 and n
real, ib 440
of lands and tenements, ii 317
the king, ib 346 and n
Great council, i 147
seal of the king, ii 346 iii 47
counterfeiting it, iv 83
tithes, i 388
Gregorian code, ib 81
Greenhouse, robbery of, iv 233 n
Gross, advowson in, ii 22
common in, ib 34
villain in, ib 93
Guardian ad litem, iii 427
and ward, i 460
at common law, ib 461
by custom, ib 462
nature, ib 461
statute, ib 462
for nurture, ib 461
in chivalry, ib 462 ii 67
society, ii 98
testamentary, i 462
who may appoint guardian, ib 461 n 462 n
widow guardian in socage, ib 461 n
king universal guardian of infants, ib 462 n
king delegated, this guardianship to lord
chancellor, ib n
guardian's power and duty, i 463 n
testamentary guardians, ib n
marrying ward of chancery, ib n
when child of age, ib n
infant must appear, and defend by guardian,
tb 464 n
Guernsey, island of, ib 106
Gunpowder, hindering its importation, iv 116
keeping or carrying it illegally, iv 168 and n
Gypsies, ib 165 and n
Habeas corpora juratorum, iii 354
corpus, i 135 and n
act, ib 128 iii 135 iv 438
ad deliciendarum, iii 130
faciendum et recipiendum, ib
prosequendum, ib
respondendum, ib 129
satisfaciendum, ib 130
subiectandum, ib 131
testiﬁcandum, ib 130 and n
cum causa, ib 77
Habendum of a deed, ii 298 app 1 2
Habere, facias possessionem, iii 412
aequisam, ib
Habitation, offences against, iv 220, property
in, ii 4
Hackney coaches and chairs, i 227 and n
Hereditas jacentis, ii 259
Hereticos commutendos, writ de, iv 46 439
Half blood, i 194 ii 227
Hame secken, iv 223
Hamlet, i 115
Hamper office, iii 49
Hand, burning in, iv 367 369 371 377
disabling, iv 205
holding up, ib 323
loss of, ib 125 154 276 377
sale, ii 448
writing, similitude of, iv 358
Hanging, ib 376
Hanover, i 110
Harbours, notice of erecting pier, &c. near, i
264 n
injuries to, iv 144
Hard-labour, punishment of, ib 377
Hares, stealing them, ib 239
Havens, i 264
Hawks, stealing of, iv 236
Hay-bote, i 35
Head of the church, i 279
Headborough, i 114
Health, iii 124
injuries to, iii 122 and n
offences against public, iv 161
Hearing in equity, iii 451
Hearsay evidence in, ib 369
Hearth money, i 324
Hedge-bote, i 35
Heir, see "Descents."
law inclines in favour of, i 450 n
law of descents, &c. ii 201
when lord may be guardian of copyhold heir,
bib 98 n
when "heirs" not necessary in grant of fee
simple, ib 108 n
in wills, fee may pass without words of li-
mitation to, ib n
in grant to corporation, effect of "heir," ib
109 n
apparent, and presumptive, ib 208
estate devested by subsequent birth of, ib n
nature of heirship, in ancestor, affects, ib 209 n
when father may inherit to son, ib 210 n
daughters by different venters may inherit to-
gether to common parent, ib 214 n
representative proximity preferred, ib 219 n
document of representation discussed, ib 220 n
when collateral descent takes place, ib n
rules applicable to descendts, ib n
who are of same blood, ib n
new kind of inheritance not allowed, ib 222 n
union of legal and equitable estate, ib n
when several estates meet in one, and then
descend to several heirs, ib n
what necessary to constitute good title, ib
224 n
document of consanguinity discussed, ib 225 n
sister of whole, preferred to brother of half,
blood, ib 227 n
exclusive of half blood, cruel, ib 233 n
classes of kindred, male stocks preferred, ib
235 n
preference of class 11 to class 10 disputed, ib
240 n
devise a nullity, of same estate as would take
as heir, ib 242 n
rule in Shelley's case, ib n
INDEX

Heir, in what cases attainted shall not prejudice, ii 251 n
estates per auer vie, ib 259 n
right to fixture, as against executor, ib 281 n
mandamus to admit to copyhold, ib 369 n
tender of himself for admittance, ib 371 n
disinherited only by plain intention, ib 381 n
Heirs, stealing of, iv 209
Heirlooms, ib 427
pictures, books, &c. devised as, ib 428 n
Helping to stolen goods for reward, iv 132
Hengham, i 72 iii 409 iv 427
Henry, i, his laws, iv 420
Heptarchy, iv 326
Henry, i
books, ib
Heraldic, ib
Hereditaments, ib
Hermogenian code, i 81
High commission court, iii 67 iv 433
contable, i 355
of England, i 355 iv 268
his court, i 38 iv 267
misdemesors, iv 121
steward of Great Britain, his court, iv 261
438
in parliament, iv 260 263
Oxford, his court, iv 277
treason, iv 75
trials in, iv 351 440
Highways, surveyors of, i 357
rights of, i 35
annoyances in, iv 167
robbery in or near, iv 243
how, and by whom created, ii 35 n
surveyors of duties, &c. i 357
rights to, i 35
annoyances, &c. in, iv 167
nuisance in, who may abate, iii 5 n
Highways, robbery in or near, iv 243
Hiring, ii 453
History of the law, iv 407
Hogs, keeping them in towns, iv 168
Holding over, ii 151 iii 210 211
Homage, ii 53
ancestral, ib 300
by bishops, i 284 379 iv 421
liege, i 367
simple, ib
Homicide, iv 176
justifiable, iv 178
of necessity, ib
by permission, ib 179
for advancement of justice, ib
to prevent crime, ib 180
in defence of chastity, &c. ib 181
excusable, ib 182
by misadventure, ib
in self defence, ib 183
felonious.
self-murder, ib 189
manslaughter, ib 191
involuntary, ib 192
murder, ib 194 et seq
Homine replegiando, writ de, iii 129
Honorary foids, ii 56 215
Honoris respectum, challenge propter, iv 352
Honour, court of, iii 104
of a peer, ib 402
or dignity, ib 271
seignory, ii 19
Hop-binds, destroying, iv 246
Horse-races, ib 173
Horse-stealing, ib 328
Horses, sale of, ii 450
warrants of, ii 165 n
ill-treatment of, iv 246 n
Hospitals, i 471 474
their visitors, ib 482
Hotch-potch, iii 190 517
Hot-house, robbery of, iv 233
House, immunities of, iv 223
larceny from, iv 240
House-bote, ii 35
House-breaking, see Burglary.
House-tax, i 325
Hue and cry, iv 293
Hundred, i 116 iv 411
action against, for robbery, &c. iii 160 iv
246 294
court, iv 411
Hundreders, challenge for defect of, iii 359 iv
352
Hunger, iv 31
Hunting, see Game, iii 213
by inferior tradesmen, ib 215 401
night, or in disguise, iv 143 144
Hurdle, ib 92 377
Husband and wife, of requisites of marriage,
and consequences in general, i 433 to 445
law as to separation, iii 94 and n
may agree to live separate, i iv 411 n
adultery, recrimination bars divorce, ib n
divorce in parliament, ib n
decreeing alimony, ib n
cannot in law make gifts to each other, ib 442 n
when may in equity, ib n
marriage, how far vacates bonds and agree-
ments, ib n
contracts by wife, when bind husband, ib n
when husband liable to wife's debts after
her death, ib 443 n
of actions by, ib n
against, ib
where may or must sue, or be sued alone, ib
when not to be witnesses for each other, ib
444 n
equity will, in some cases, allow suits be-
tween, ib n
admittance to copyhold of wife, ii 366 n
appointment, as by will, of her lands, ib 375 n
assignment by husband of wife's estate, ib
433 n
husband administrator to wife, ib 435 n
husband may dispose of paraphernalia of, ib
436 n
profits and savings in housekeeping, separate
estate of, ib
take as one only in joint tenancy, ib 182 n
join in fine, &c. to bar dower, &c. ib 351 n
as to property of wife before marriage, ib 434 n
injuries to, iii 139
assault by, in defence of, ib 3 n
how far liable for each other's crimes, iv 28
i 444 n
public sale of wife, iv 65 n
deserting wife, vagrancy, ib 170 n
surety of peace, ib 254
INDEX.

367

Hustings, court of, in London, iii 80
Hyde, i 310
Hypothea, i 159
Jactitation of marriage, iii 93
Identity of person, iv 396
Idiot, i 303 ii 301
wills by, ii 497
cognizance of, iii 427
inspection of, ib 332
marriage of, i 438
Idiota inquirendo, writ de, i 303
Idleness, iv 169 and n
Inefficacies, iii 407 iv 375 439
Jersey, island of, i 106
Jews, i 375 iv 376
children of, i 449
Ignominious punishments, iv 377
Ignoramus, ib 305
Ignorance, when it excuses crime, ib 27
Illegal conditions, ii 156
Imagining the king's death, iv 76
Imbrazing king's armour or stores, iv 101
public money, ib 122
records, ib 128
in general, see Larceny
Immediate descent, ii 226
Immoral, public offence of, iv 65 n
Imparlance, ii 299 301
Impartial, in parliament, iv 259
not affected by prerogative or dissolution of
parliament, i 186 n
of waste, ii 283 app 5
Imperial chamber, iii 39
constitutions, i 81
crown and dignity, ib 242
Impediments of marriage, ib 434
Implication, ii 391
Implied condition, ib 152
contract, ib 443 iii 159
malice, iv 200
warranty, ii 300
Importing anus dei, crosses, &c. iv 115
counterfeit money, ib 81 89
Impossible condition, ii 156
Impostures, religious, iv 62
Impotency, i 434
Impotentiae, property, ratione, ii 394
Impressing seamen, i 420
Imprisonment, i 134 136 iv 377 436
beyond sea, i 137 iv 116
false, see False Imprisonment
of debtor, by court of requests, iii 82 n
on mesne process, ib 290 n
execution by, satisfaction of debt, ib 415 n
Improper feuds, ii 58
Impropriations, i 386
Incendiaries, iv 220, see Arson
Incest, ib 64
Inchantment, ib 60
Incidental prerogatives, i 240
Inclosures, destroying, iv 247
Incomplete judgments, iii 397
Incorporation, power of, i 473 474
Incorporeal hereditaments, ii 20
Incorrigible roguesy, iv 169, see Vagrants
Incumbent, i 392
Incumbences, covenant against, ii app
Indebito assumpt, i 154
Indecency, public offence of, iv 65 n
vagrants, iv 170 n
Indefeasible right to the throne, i 195
Indentures, ii 295
Indenrures, of a fine, ii 351 app 4
India, misdemeanours in, iv 305
Indictavit, writ of, iii 91
Indictable, what, iv 218
Indemnity, ib 302 app 1
form of, ib 306 and n
copy of, iii 126 iv 331
locality of, iv 302
Individuals, offences against, ib 176
Indorsement
of, ib 306 and n
of, iii 375
Indiscreet, etc.
Indulgences, iii 148
Indulgence, ii 391
Infamous
Infractions, of, iv 212
cognizance of, iii 427
evidence by, iv 214
in ventre sa mere, i 130 ii 169
rights, &c. of parent and child in general, i
446 et seq
rights, &c. of guardian and ward, ib 463 et seq
when must appear and defend by guardian
ib 464 n
contracts by, void, ib 466 n
may bind himself for necessaries, ib n
their ability to convey or purchase, ii 291
wills by, ii 497
admittance to copyphold of, ib 366 n
when liable for crimes, iv 22 24 n
instigating children to crimes, ib 40 n
stinting, &c. in food, &c. ib 217 n
child stealing, ib 219 n
Inferodations of tithes, ii 27
Influence on elections to parliament, i 178
Information, compounding of, iv 136
criminal, ib 308 429 436
ex officio, ii 427 iv 309
jurisdiction, ii 391
in crown office, iv 308
exchequer, i 261
nature of, quo warranto, iv 312 441
rem, ii 262
of superstitious uses, ib 428
Informer, common, iv 437 iii 160 iv 308
Infortunium, homicide per, iv 192
Inheritance, ib 246
Inheritance, ib 11 201
canons of, ib 208
estates of, ib 104
Initiate, tenant by curtesy, ib 127
Injunction in equity, iii 443 and n
Injuries, civil, ib 2
with and without force, ib 118
Inland bill of exchange, ii 467
Inn of court and chancery, i 23 25
call members to the bar, ib 25 n
Innkeeper, cannot recover treating bills at elec-
tion, i 179 n
action against, iii 164
answerable for property of guest, i 430 n
hotel keeper is liable as, ib
Inns, disorderly, iv 165
Insano, i 126
Inoficious testament, i 448 ii 502
Inquest of office, iii 259 iv 301
prosecutions on, iv 301 302 274 and n
Inquisitio post mortem, ii 68 iii 258
Insanum computassent, i 162
Insolvency, act of, ii 494
Insolvent debtors, ib 494 ii 416
when privileged from arrest, iii 298 n
relief under lords' act, ib 416 n
who may compel surrender of effects, ib n
INDEX.

Inspection, trial by, iii 331
Instanter, trial, iv 396
Institutes, of Justinian, i 81
Institution to a benefice, i 390 ii 23 iv 107
Insurance, i 458 460 461 and n iii 74 iv 441
Interdictum, i 442
Intent, see Malice
in larceny material, iv 232 n
Interest on bankrupt's debts, iii 498
legacies, ib 514
or no interest, insurance, ib 459 460
of money, in general, ib 454
usurious law relative to, ib 463 n
on bond for purchase of foreign estate usurious, ib 464 n
is due on pecuniary legacy, when, ib 513 n
Interested witness, iii 370
Interlineation in a deed, ii 308
Interlocutory decree in ecclesiastical courts, iii 101
Chancery, ib 452
judgment, ib 448
Interpleader, bill of, ib
Interpretation of laws, i 58
Interregnum, ib 196 249
Interrogatories, examination on, iii 383 438 iv 287
in chancery, iii 449
Intestacy, ii 194
Intestates, their debts and effects, iv 425 428
Intrusion, information of, iii 261
on freehold, iii 169
writ of, iii 183
Inventory of deceased's effects, ii 510
Investiture, ii 209
of benefices, ii 23
feuds, ii 53
lands, ii 311
Involuntary manslaughter, iv 192
John, king, his resignation of the crown to the pope, iv 108 111
Joinder in demurrer, iii 315 app 26
of battel, ib app 4
issue, ib 315 app 10 iv 340
Joint-tenancy in lands, ii 180
how created, and distinguished from tenancy in common, ib n
tenancy, where interest respectively conditional, ii 181 n
where interest commences at different periods, ib n
husband and wife take as one only, in, ii 182 n
demise by joint-tenants, ii 183 n
account and partition, how obtained, ib 184 n
185 n
where conveyance by one severs, ii 186 n
where must sever first, then may convey, ib n
in things personal, ii 399
Joint-tenant, king cannot be, ii 409
Jointure, ii 137 180 app
estate durante viduâtate, is a good, ib 138 n
bar of dower by equitable, ib 137 n
Ireland, i 99
union with England, i 97
members added to parliament for, i 155 n
acts regulating elections, i 180 n
rank of nobility guarded by 31 Hen. VIII. i 272 n
Irish peers privileged from arrest, iii 289
Iron, stealing, iv 233
receiving stolen, iv 133
Irons, to secure prisoners, iv 300 322
Islands, ii 261
Isle of Man, purchased from duke of Athol, i 106 n
of Ely, see Ely
Issuable terms, iii 353
Issue at law, iii 313 314
collateral, iv 396
feigned, ib 452
in equity, ii 448
joinder of, iii 315 app 10 iv 340
tender of, iii 313
Issues on a distringâs, iii 280
Itinerant courts, iv 411 422
justices, iii 59 iv 422
Judges, i 267 iii 24 iv 440
their discretionary power, i 62 n
number of, at different periods, iii 40 n
assaulting them, iv 125
how council for prisoners, iv 355
killing them, iv 84
their commissions, i 267
threatening or reproaching them, iv 126
how construe statutes, i 87 n 88 n
seats not vacated by demise of crown, i 268 n
may amend record, &c. at assizes, iii 59 n
may now hold assize where born, ib n
may open commission after day appointed, ib n
party judge in own cause, iii 298 n
Judgment, ii app, iii 305 460 461 468
action on, iii 160 421
property by, ii 436
relied against in equity, iii 437
when affected by fraud, remedy against, iii 24 n
binds lands, as against purchasers, ib
action on, iii 160 n
of non pros, ii 296 n
motion in arrest of, iii 303 n
when may be arrested, iii 395 n
by default—writ of inquiry, iii 397 n
death of party before, iii 399 n
in criminal cases, iv 375 n
Judices ordinarii, iii 315
Judicial power, i 267 269
writs, ii 292
decisions binding in subsequent cases, i 62 n
63 n
Judicium Dei, iv 341 342
ferri, aquae, et ignis, iv 344
parium, iii 350
Jure divino, right to the throne, i 191
tithes, ii 25
king de, i 204 iv 77
Juris utrinque, writ of, iii 252
Jurisdiction, encroachment of, iii 111
of courts, settled by Edw. I. iv 425 426
plea to, iii 301 iv 333
Jurors, fining or imprisoning, iv 361
incompetency of, i 5 n
Jury, trial by, in general, iii 349 414 441
abused when, i 5 n
of court of sewers, iii 73 n
law relative, consolidated, iii 356 n
qualifications, ib
jury lists, ib n
returns, ib n
jurors' book, ib n
panel, ib
summons, ib
view, iv 357 n
ballot, ib
challenges, ib
special juries, ib
INDEX.

Jury, high treason, iii 357 n
tales de circumstantiis, ib
juries de mediate, ib n
fines, ib
penalties, ib n
legal proceedings, ib
venue, ib n
writ of attaint, ib
saving and repealing clauses, ib
adjournment pending trial, iii 375 n
antiquity of trial by, ib n
effect of withdrawing juror, iii 376 n
in criminal cases—of the grand jury, &c. iv 302 to 306

Justicies, writ of, iii 36
Justifiable homicide, iv 178
Justification, special, iii 306
Justifying bail, iii 291
Keeper, lord, iii 47
Kidnapping, iv 210 and n
Killing, what amounts to homicide, iv 191 and n
Kindred, how numerous, ii 205
King, i 190
can do no wrong, i 246 iii 254 iv 32
compassing or imagining his death, iv 76

King, his councils, i 227
counsel, iii 27
courts, contempts against, iv 124
dignity, i 241
duties, i 227
enemies, adhering to, iv 82
government, contempts against, iv 123
grants, ii 346
money, counterfeiting, iv 84
palaces, contempts against, iv 124
perfection, i 246
perpetuity, i 249
person, contempts against, iv 123
pleasure, how understood, iv 121
power, i 250
prerogative, i 237
contempts against, iv 122
 felonies against, iv 98
his prerogative in debts, judgments, and executions, iii 420
revenue, extraordinary, i 306
ordinary, i 281 306
royal family, i 219 225
seals, iii 346 347 iv 47
counterfeiting, iv 83 89
silver, ii 350
sovereignty, i 241
title, i 190
contempts against, iv 123
ubiquity, i 270
injuries to or by, iii 254
levying war against, iv 81
refusal to advise or assist him, iv 122
parliament meets on death of, i 150 n
refusal of assent to bills, i 184 n
assent to bills endorsed thereon, i 185 n
ordered mode of promulging statutes, ib n
Charles II's reign dated from death of Charles
1st, i 196
cabinet council of, i 229 n
privy council, i 230 n
is governed by law, i 234 n
must subscribe declarations against popery, i 235 n
rights and powers of, for benefit of people, i 237 n
exceptions to rule nullum tempus occurrat regi, i 247 n
prerogative to pardon, i 268 n
cannot disturb the order of precedence, i 272 n
civil list, i 332 n
number of his chaplains unlimited, i 392 n
power over naval and military sentences, 417 n
King's bench, court of, iii 41 iv 265
justices of, killing them, iv 84
Knight bachelor, i 401
banneret, i 403
of the bath, ib
garter, ib
shire, his electors, i 172
to be returned on a lord's jury, iii 359
King's fee, i 410 ii 62
Knighthood, i 404 ii 69 iv 437
Knight-service, ii 62
Labour, foundation of property, ii 5
hard, iv 370 371 377
Labourers, i 407 426
Laches, i 247
of infant, i 465
Laeae majestatis crimen, iv 75 89
Lasisone fidei, suit pro, iii 52
INDEX.

Laity, i 396
Lancaster, county palatine of, i 117
its courts, iii 79
duchy of, its courts, iii 78
Lands, ii 10 17
property in, ii 7
force to recover possession, &c. iii 5 n
real actions for recovery of, iii 167 n
disseisin, what, i 169 n
Landlord and tenant, see Rent, Lodger
what are, and right to, fixtures, ii 281 n
and tenant, when tenant to pay rent though
premises burnt down, ii 281 n
coventants to use straw, &c. on land, binding
against sale by sheriff, ii 404 n
land-tax, by whom payable, i 311
distress for rent. See Distress, iii 6 n
produce not saleable under execution, iii 7 n
forebear entry, on tenant holding over, iii 179
bail in ejectment, tenant holding over, iii 205 n
non-payment of rent, iii 206 n
desertion of premises, ib
parish houses, ib
double rent and double value, iii 211 n
accidents by fire, which liable, iii 228 n
Land-tax, i 309 iv 423
its amount, and by whom payable, i 311
Lapse, ii 476 iv 107
Lapsed legacy, ii 513
Larceny, iv 229
appeal of, iv 314
simple, iv 229 n
there must be a taking, 230 n
general rules, ib
servants, ib
clerks, iv 230 n 231 n
agents, bankers, iv 230 n 231 n
manufacturers, ib
officers of bank of England, iv 234 and n
public officers in general, ib
servants, &c. in post-office, ib n
of South-sea company, ib
lodgers, iv 221
party stealing his own goods, iv 230 n
taking must be against owner's consent, ib
there must be a carrying away, iv 231 n
also a felonious intention, iv 232 n
and the stealing must be personal, iv 232
lead, &c. fixed, iv 233 n
underwood, turnips, fruit, &c. iv 233 and n
trees, roots, shrubs, &c. ib
ore from mines, iv 234
writings relative to estate, ib
bonds, bills, choses in action, iv 234 and n
letters, ib n
wrecks, &c. iv 235
animals, ib
deer, conies, &c. ib n 236 n
fish, iv 236 n
hawks, ib
swans, ib
domestic animals, ib
larceny where owner unknown, iv 236
punishment, iv 236 237
offence aggravated by circumstances, &c.
estealing, iv 239 240 and n
compound,
from the house, iv 240
above 12d. in churches, ib
in booths or tents at fairs, ib
by house-breaking in day-time, person being in it, ib
Larceny, compound,
above 12d. in house without breaking, person being in it, and put in fear, iv 240 n
above 5s. in breaking house in day-time, no
person being in it, ib
privately stealing in house, though no
breaking, or no person in it, iv 241
to value of 40s. though house not broken,
or no person in it, ib and n
from the person,
by privately stealing, iv 241
by robbery, iv 243. See Robbery
Latches, i 116
Lattia, writ of, iii 286
Law, i 38
study of, i 28 37 n
amendment of, statute for, iv 441
how controlled when unjust, i 37 n
and equity united, i 56 61 n
and equity, courts of, how distinguished, iii 429
canon, i 14 19 79 82 83
civil, i 80
and canon, authority of, i 4 19 79 83 iv 421 422
rejected by the English nobility, i 19
common, i 60 n 63 64 67
prior doctrines of, binding, i 63 n
divine or revealed, i 42
offences against, iv 41
feodal, i 44 iv 418
French, iii 317 iv 428
Greek, iii 321
history of, iv 407
Latin, iii 319 iv 428
martial, i 413 iv 436
merchants, i 70 76 273
municipal, i 41 44 45 n
of nations, i 43 254 n
offences against, iv 66
nature, i 39
parliament, i 163
side of the chancery, iii 46
exchequer, iii 45
statute, i 85
unwritten, i 63 iv 408
wages of, iii 341 iv 414 424
written, i 85
words in, how expounded, i 54 60 n
sanguinary punishments of, i 133 n
duties on proceedings abolished, i 323 n
Laying of mastiffs, iii 72
Laying corporations, i 470
investiture of bishops, i 378
Lazarets, escaping from, iv 162
Lead, stealing, iv 233 and n
receiving it stolen, iv 133
Leading interrogatories, iii 449
Leap-year, ii 141
Lease, ii 317 app 2
and release, ii 339 app 2
entry, and ouster, rule to confess, iii 204
in writing, must be signed, ii 306 n
power under statutes and settlements to
make, ii 319 n
concurrent leases, law of, ii 320 n
of lives, &c. must be confirmed by ordinary,
i 321 n
when not binding on successor, ib
surrender of, in law, ii 326 n
how far assignee bound by covenants of, ii 327 n
fine of leasehold, no bar, ii 356 n
INDEX

Lease, covenant to use straw, &c. on the land, binding against sale by sheriff, ii 401 n
Legacies, ii 513
subtraction of, iii 98
action for, not maintainable, ii 512 n
when lapsed, goes to representatives, ii 513 n
distinctions in legacies payable in futuro, ib n
contingent as to time and person, ib n
out of land, in futuro, if legatee die, ib n
pecunary, carries interest, when, ib n
estates for life, ii 124 126 129
Legislature, ii 82
Legislative power, i 147
Legislature, how far controllable, i 161
sole right to make and repeal laws, i 37 n
See Parliament
Legitimate child, i 446
Lending, i 451
Letter, demanding money, &c. iv 144
mussive, for electing a bishop, i 379
franking, see Commons
threatening, iv 137 141 n
stealing of, iv 234
Letters patent, ii 346
Levent and cohecant, iii 9 239
— cattle when distrainable, iii 9 n
Levent facias, writ of, iii 417
Levitical decrees, i 433
Levying money without consent of parliament, i 140
— war against the king, iv 81
Lewdness, iv 64
Lec manifesta, iii 341
Lalione, iv 12
mercatoria, its nature and extent, i 76 n
Libel, in ecclesiastical courts, iii 100
— fatal to liberty, i 136 n
— published parliamentary speeches punishable as, i 164 n
— lords resolved that not a breach of peace, i 167 n
— when action lies for, &c. see Slander, iii 123 n
— what kind indictable, iv 150 n
— blasphemous, ib 59 n
— on king or government, ib iv 123 n
— on judges, &c. iv 150 n
— how far thing imputed must be criminal, ib
— on dead persons, iv 150 n
— truth not material, iv 150
— malice how far essential, ib
— by what mode of expression it may be conveyed, ib
— what publication necessary, ib
— modes of prosecution, ib
— mode of trial, ib
— judgment and punishment, ib
Liberam legem, i 340 104 iv 348
Libertas or franchises, i 37
Liberty, civil, i 6 125
— definition of, i 3 6 n
— natural, i 125
— nature of English, 237 n
— of the press, iv 151
— personal, i 134
— crimes against, iv 219
— personal injury at to, i 127
— political, i 125
— lords fatal to, i 126 n
— subordination of the bond of society, i 407 n

Liberty, popular equality repugnant to, i 407 n
Liberality of increasing seamen, i 410 n
Licence for marriage, i 439
— from the pope, iv 115
— of alienation, ii 72
— of mortmain, ii 260
— to agree in a fine, ii 350
— Licensed errante, i 394
— Licensing of books, iv 152
— Libera concordandi, i 350 444. Ap. loquendi, iii 299
— Liege, i 367
— Lieutenant, lord, i 412 iv 272
— Life, i 129
— unammties, ii 461
— crimes against, iv 177
— estates for, ii 120 npp
— Ligan, i 452 iii 106
— Ligeance, i 366
— Light, ii 14
— houses, i 264
— presumption, iii 371
— Limbs, i 130
— Limitation of entries, actions, and indictments, i 178 188 192 196 250 iv 306 308 315
— 351 436
— estate, ii 155
— fee may pass in will without words of, ii 108 n
— of estates pur ater vie, ii 260 n
— of entry to avoid fine, ii 356 n
— statutes of, iii 306. See Statute of
— of criminal prosecutions, iv 301 n
— of real actions, i 178 n
— of quo warranto informations, iii 364 n
— Limited administration, ii 506
— fee, i 109
— property, i 391
— Lineal consanguinity, i 203
— descent, i 210
— of the crown, i 192 194
— warranty, ii 301
— Linen stealing from place of manufacture, iv 238 n
— Lip, cutting of, iv 207
— Literary property, i 405. See Copyright
— Lishtous church, iv 243 240
— Littleton, i 72 73
— Liturgy, reviling of, iv 50
— Livery in chivalry, ii 69
— in deed, ii 315
— in law, ii 316
— in serfdom, iii 314
— Loan, compulsive, i 140. See Borrowing, Interest
— Local actions, ii 294. See Venue
— Locality of trial, iii 381 iv 303. See Venue
— Locks on rivers, destroying, i 144 n
— Lodgers and lodgings, notice to quit, ii 147 n
— goods of, liable to distress, in 7 8
— larceny from, iv 231 n
— Logic, its effects upon law and theology, i 33
— iii 58 iv 417
— Lollardy, iv 47
— London, courts of, in 81
— customs of, i 70 75 76 n 518
— franchises of, not forfeitable, iii 261 iv 424
— mayor and aldermen of, their certificate, iii 334
— temples not out of county of, i 114 n
— unforeseeable, not exempt from imprisonment, i 419 n
— Lord and vassal, ii 53
— focoi, i 6
INDEX.

Mal-administration, i 155

Malice, express, iv 199

Malicious destroying, &c. powder in feus of Norfolk

Malicious destroying ships, &c. iv 245

Malicious mischief to 5l. in general, i b 247 and n

Malicious prosecutions, iii 126

Mali, underwood, wood, &c. iv 246

trees, &c. i b

clothes, &c. iv 245

mine engines, &c. i b 246 247

framework, &c. i b 247 n

buildings for manufactures, i b

Black Act, i b

burning houses, i b

corn, wood, &c. i b

breaking down fish-ponds, iv 246 n

injury, &c. cattle, i b and n

trees, i b and n

cutting banks, i b 246

hop bines, &c. i b 247 and n

firing coal mines, &c. i b 247

stopping grain, i b 246

breaking into house to steal plate glass,

&c. i b 247

ill-treatment of cattle, i b 246 n

Malt-tax, i 313

Man, island of, i 106

Mandamus, writ of, iii 110 264 iv 441

in what cases granted, iii 265 n

where it does not lie, i b n

to appoint overseers, i 360 n

Mandates, royal, to the judges in private

causes, i 142 iv 426

Manhood, ii 54

Mans, i b 90

by reputation may retain some privileges,

i b 90 n

Mansion-house, iv 224

Manslaughter, i b 191 and n

conviction of, i b app sect. 2

Manstealing, i b 219

Manufacturers, seducing them abroad, i b 160

embezzlement by, i b 250 n see Artificers

Manufacturers, encouragement of, i b 426

Manufactures, rioters destroying engines in,

i b 143 n

injuries to, i b 247 and n

stealing from, i b 240 and n

Manumission of villeins, ii 94 347

Marchers, lords, i 398

Marches, i b

Mareschal, lord, iii 38

his courts, iii 68

Marine felonies, how clergymen, iv 373 and n

how triable, i b 269 and n

Mariners, wandering, i b 165 and n, see Va-

grants

Mariners, i 418, see Scamen

Maritagem, ii 70

Mariage, i b 71

Maritime causes, iii 106 and n

courts, i b 69 and n

statute, i 419

Mark, subscribed to deeds, ii 305

Market, i 274 iii 218

clerk of, his court, iv 275

overt, ii 449 and n

town, i 114

Marque and reprisal, i b 258

Marquesses, i b 397

Marriage, rights of husband and wife in ge-

neral, see Husband and Wife, i 433

clandestine or irregular, i 439 iv 163

forcible, iv 208

to secege, ii 88

Lords' committees for courts of justice, iii 57

house of, its attendants, i 168

may kill the king's deer, i 167

spiritual, i 155

temporal, i 157

Lotteries, iv 169 and n

Lunatics, i 304 ii 291 iv 24 395

jurisdiction of chancery over, i 303 n iii 427

certificate and licence of keepers of asylums,

for, i 305 n

next of kin to, his committee, i b n

marriage of, i 438 n

consent to marriage by, i 438

lunacy may be given in evidence, for defend-

ant, ii 291 n

witness to, may prove testator insane at ex-

ecution of will, ii 378 n

will made in lucid interval valid, ii 497 n

wills by, i 497

conveyance, &c. purchase by, i 291

when liable for crimes, iv 24 and n 195 n

custody, &c. of criminal lunatics, iv 25 n

and addenda

Luxury, iv 170

Madder roots, stealing them, i b 233

Magistrates, their rights, duties, &c. in gene-

ral, i 146

oppression of, iv 141

subordinate, i 338

supreme, i b

Magna assisa eligenda, writ de, iii 351

carta, iv 423 424

its contents, i b

Mainour, iii 71 iv 307

Mainporners, iii 128

Mainprise, writ of, i b

Maintenance of bastards, i 458

children, i b 447

parents, i b 454

suits, i b 429 iv 134

wife, i 443

Making law, iii 343

Mala in se, i 54

prohibita, i 57

Mal-administration of government, iv 121

Male preferred to female in descents, i 194 ii 212

line preferred to female, i 194

stock preferred to female, ii 234

Malice, express, iv 199

implied, i b 200

prepense, i b 198 206

in general, iii 123 125

in slander, i b

in libels, i b and iv 125 150

in malicious prosecutions, iii 126 n

in murder, iv 108

in arson, i b 222 n

under Black Act, i b 246 n

intent to injure inferred from wrongful act,

i b 222 n

Malicious prosecutions, iii 126

destroying, &c. powder in feus of Norfolk

and Ely, iv 244

works in Bedford level, i b n

sea and river, &c. banks, bridges, &c. i b

locks and turnpikes, &c. i b 144 145

canals, &c. i b 244 n

corn, &c. in north, i b 244

corn-barns, &c. in night, i b

destroying horses, cattle, &c. iv 245 n

waste health, fern, &c. iv 245 246

...
INDEX.

Marriage, licences and registers long ing or destroying, iv 163 249 and n
of royal family, i 236 iv 117
proof of, iii 140
property by, ii 433
settlement, ii 364
its antiquity, ib 138
when good, i 440
dower barred by agreement to settlement, before, ii 138 n
son of subsequent, preferred to daughters of prior, ib 213 n
will revoked by, ib 376 n 503 n
effect of, upon wife's previous property, ib 434 n
husband administrator to wife's estate, ib 435 n
contract suit for, iii 93
action for breach of promise of, i 433 n
such promise not within statute of frauds, ib
bill in equity lies to compel disclosure of promote, ib
but not to compel marriage, ib
contracts in restraint of, illegal, ib
incestuous—punishment, i 434 n
who may not intermarry, ib n
when second marriage void to all intents, ib 436 n
when marriage of minor may be annulled, ib n
when void from youth of parties, ib n
breach of promise by minor not actionable, i 437 n
if party to consent be incapable, &c., what done, ib n
marriage of lunatics, ib 438 n
abstract of present act, ib 440 n
Scotch and foreign marriages, ib
annulling for impotency, ib n
divorce may be repealed, ib n
ill-temper not sufficient to divorce, ib 441 n
adultery, ground of divorce, ib n
divorce in parliament, ib n
decreeing alimony, ib n
when marriage vacates, previous bonds, &c.
ib 445 n
in what case contracts by wife bind husband, ib n
marrying ward of chancery, ib 463 n
against consent of parents, not indictable, iv 209 n
conspiring to marry, ib

Marshall of the king's bench, iii 42
custody of, ib 43 285
of the king's host, certificate of, ib 334

Marshalsea, court of, ib 76 iv 276

Martial courts, i 415
law, ib 412

Massbooks, iv 115

Master in chancery, iii 442
of the rolls, ib
his judicial authority, ib 450

Master and Servant, rights and liabilities of,
in general, i 422 to 432
slave when can demand wages for service in England, ib 126 n 425 n
relative duties of, ib 425 n
as to apprentices, ib 426 n, see Apprentice runaway servant how treated, ib 428 n
penalty for giving false characters, ib 428 n
action by servant for false character, ib 428 n
contracts for wages construed, ib

Master, when master bound by contracts of servants, i 429 n 430 n
master entitled to earnings of servant, ib
seducing or enticing away, &c., servants, ib
action for, i 140 n 442 n
employing servant of another, ib 141 n
master when liable for torts of servant, i 431 n
not liable for crimes of servant, ib n
assault by, in defence of, iiii 3 n
offences of servant, i 428 n
embezzlement by, iv 230 231
servant pawning or selling materials, &c., i
428 n

Matras prima, iiii 322

Materni maternis, ii 236

Matrimonial causes, iii 92

Matrons, jury of, ib 302 iv 395

Maxims, i 68

Mayhem, ib 130 iii 121
appeal of, iv 314
inspection of, iiii 332
offence of, i 205

there must be a maiming, ib 207 n
a laying in wait, ib
an intent to disfigure, ib
malicious shooting at another, ib and n

Mayors, iv 413

Measures, i 274 iv 275 424
false, iv 157

Mediate, jury de, iiii 246 360 iv 128 166 278 352

Mediterranean passes, counterfeiting of, iv 249

Meetings, see Riot, Conspiracy to petition, restrained, i 142 n
for military training, forbidden, ib 143 n
public, near the courts, iv 148 n

Members of parliament, i 143, see Commons,

Members of

Memes, iiii 120 and n

Menial servants, i 425, see Master and Servant

Menso et thor o, divorce a, i 410 iiii 94

Mercen-lage, i 65 iv 412

Merchants, custom of, i 75
foreign, ib 260 iv 424
embezzlement by, iv 230 n

Mergents, ii 83

Mere right, ib 197
not assignable, ib 290

Merger, ib 178

Mesne lords, ib 59

process, iiii 279 415

profits, actions of trespass for, ib 205

write of, ib 234

Metal, stealing, iv 233 n

Metaphysics, their effects upon law and theology, ii 58 iv 417

Michel-gemote, i 147

Michel-synoth, ib

Middlesex, bill of, iiii 285 app 18

Migation, i 7

Military causes, iiii 103
courts, ib 68
feuds, ii 57

offences, i 415 iv 101

power of the crown, i 262

state, ib 408

tenures, i 287

tenures under feudal system abolished, ib 410 n

its jurisprudence improved, ib 412 n 416 n
Military, standing army, i 414
  rights and duties of, same as other citizens, ib n
  must remove during elections, ib 415 n
courts martial, their nature and jurisdiction, ib 416 n
  when action lies against superior officer, ib
privileges of, as to trade, &c. ib 417 n
  when exempt from arrest, ib
t heir pay not assignable, ib
  legality of impressing seamen, ib 419 n
Militia, ib 410 412 413
Milk, may be sold on Sunday, iv 64
Mines, ib 234
  destroying their works, &c. iv 247 and n
  stealing ore out of, ib 234
Ministers of state, their responsibility enforced, i 250
Minority, none in the king, i 248
Minors, see Infant Children, not to sit in parliament, ib 162
Misadventure, homicide by, iv 182
Mischief, malicious, iv 244
Misdemeanor, ib 1 5
Mise, iii app 5
Misfortune, iv 26
Mispnomer, iii 302 iv 334
Mispreading, when cured by verdict, iii 304
Mispriison, against king and government
  negative
  of treason, iv 119
  of felony, ib 121
  concealing treasure-trove, ib
positive
  mal-administration of justice, ib
  contempt against prerogative, ib 122
  against king's person and government, ib 123
title not treason, ib
  palaces, courts, &c. ib 124
  violence, &c. ib 123, 6
  dissuading witnesses, &c. ib 126
Mistake, ib 27
Misuser, ib 153
Mitter le droit, ib 325
The estate, ib 324
Mittimus, iv 300
Mixed actions, iii 118
Larceny, iv 239
Tithe, ib 24
Modus decimandi, ib 29
Morgan, ib 194
Mollitur manae imposuit, iii 121
Monarchy, i 49
Money, bills, ib 170 184
  counterfeiting, iv 84 88
  expended for another, action for, iii 162
  received to another's use, action for, ib
  in general, i 276
  difference in value of, ib 276 n
  silver, tender in, ib 277 n
  deposit of in lieu of bail, iii 290 n
  paying into court, ib 304 n
  effect of, ib n
tender of. See Tender
Monk, i 132
Monopolies, iv 159 436
  stay of suits therein, ib 116
Monsters, ib 246
Monstrans de droit, iii 256
Month, ib 21 and n
Monuments, ib 438
Mort d'ancestors, assise of, iii 185
Mortgage, ii 157 iii 435
  how considered in equity, iii 435
  limitation of redemption, ib 158 n
  concealment of prior upon a subsequent, ib 159 n
  tenant must pay rent, &c. to mortgagee, ib 159 n
  priority among several mortgagees, ib 160 n
Mortmain, i 479 ii 208 iv 108 424 426 441
  meaning of "charitable" in statute of, ib 274 n
  bequests not barred by, ib
  subsequent statutes, ib 273 n
  colleges relieved against by statute, ib 274 n
Mortuaries, ib 425
Mother-church, i 112
Motion in court, iii 304
Moveables, ii 384
Property in, ib 5 385
Mountebanks, iv 163
Mulie puissant, i 45
Multiplicity of laws, its original, iii 325
Municipal law, i 44
Muder, definition of, iv 194
  offenders must be of sound memory, &c. ib 195
  must be an unlawful killing, ib
  by perjury, iv 138 196
  person killed must be reasonable creature, in king's peace, ib 197
  there must be malice aforethought, ib 198
  indictment of, iv app
  conviction of, iv app
  punishment, iv 201
  when pardonable, ib 193 400
Mudrum, iii 921 iv 195
Muta canum, ib 427
Mute, standing, iv 324
  advising it, ib 126
Mutilation, i 130 ii 121 iv 207
  punishment by, iv 377
Mutiury-act, i 415
Mutual debts, iii 305
National debt, ii 327 iv 441
Nations, law of, i 43 44 n iv 66
  offences against law of
  general observations, iv 66
  violation of safe-conducts, ib 68
  offences against ambassadors, iv 70
  piracy, ib 71
Nativi, i 94
Natural liberty, i 125
  life, i 132 ii 121
  persons, i 123
Natural-born subjects, ib 366 371
  who are, &c. ib 366 n
  cannot transfer their allegiance, ib 369 370
Naturalization, i 374 ii 250
Necire, crime against, ib 415
  guardian by, ib 461
  law of, ib 36 39 41 n
Navigation acts, ib 418 iv 439
Navigations, destroying, iv 244 and n
  hard labour for the benefit of, iv 371 and n
Navy, articles of, i 420, see Military
Ne admissas, writ of, iii 248
  reat regnum, i 137 266 iv 122
  injuste vexes, writ of, iii 234
Necessity, when it excuses crime, iv 27 to 31
  homicide by, ib 178
Negative in corporations, i 478
  of the king, ib 184
Neglect of duty, action for, i 133
INDEX.

Negligence of officers, iv 110, see Carrier
Negligent escape, iii 415 iv 130
Negro, i 127 425 ii 402
Neale, ii 94
Nembda, iii 349
New assignment, ib 311
trial, ib 387 iv 361
News, false, iv 149
Next of kin, ii 224

when executor considered as trustee for, ib 514 n
who shall take as, under statute, ib 516 n
how far representation per stirpes, ib 517 n
Nient culpable, plea of, iv 339
Night, in burglary, want, ib 224
Nightwalkers, ib 292
Nihil debet, judgment by, iii 296 397
return of, to writs, ib 232 app
Nihil debet, plea of, ib 305
Nisi prae, courts of, ib 58
justices of, iii 59 iv 269
trial at, iii 353 iv 331
writ of, iii 334
Nobility, i 366
its uses, ib 157 see Peers
new order of, introduced, i 397 n
their degrees at, quest, ib 399 n
creation of, and introduction to peers, i 400 n
penalty may be gained for life, ib 401 n
when tried by peers, ib n
when tried and liable to process as commoners, ib
privilege of, not extended to foreign, ib
wife gives no rank to husband, ib n
copartners of title, which shall bear it, ii 316 n
Nocturnal crimes, how prevented or resisted, iv 180 181
Non assumpit, iii 305
infra sex annos, ib 308
compos mentis, i 304 ii 497 iv 24 395
cul, iv 339
culpabilis, plea of, iii 305 iv 339
decemundos, prescription de, ii 31
est factum, plea of, ib 305
est inventus, return of, ib 283 app 14 15 18
obstante, i 342 ii 273 iv 401
prosequitur, iii 296
sum informatus, judgment by, ib 397
Non-clain in fines, ii 354
of infants, i 465
Nonconformity, iv 51 432
Nonjuror, iv 124
Non-payment of ecclesiastical dues, iii 89
Non-residence, ii 322
Non satis, iii 296 316 376
judgment as in case of, ib 357
leave given to move for, ib 376 n
Non user, ii 153
Norfolk, destroying powdikes in, iv 244
Northern borders, rapine on, ib 244
Northumberland, theft in, ib 238
Norman conquest, iv 414 415 isles, i 107
Noose, cutting off or slitting, iv 207 247 377
Not guilty, plea of, iii 305 app 10 iv 338 app 1
Note of a fine, ii 351 app 4
hand, ib 467
Notice in ejectment, iii 203 463
of trial, ib 357
Novel disessio, assise of, ib 187
Novels in the civil law, i 81
Nudum pactum, ii 445

Nul disessio, plea of, i 305 ii 535
Nul tiet record, iii 331
tort, plea of, ib 305
Nuncupative wills, ii 500
Nursery grounds, see " Distress."
robbing of, iv 223 n
Nurture, guardian for, i 461
Nusance, abatement of, iii 5
assise of, ib 220
of omission and commission, ib 5 n
private, as against health, ib 122 n
by offensive smells, ib 217 n
by fear of danger, ib n
by vibration of steam-engine, ib n
private injury by public, ib 219 n
to window lights, iv 402 n
to watercourse, ib 403 n
public
to highways, bridges, rivers, &c. iv 167
and n
offensive trades, ib and n
disorderly houses, &c. iv 168 and n
lotteries, &c. ib and n
fire-works, ib and n
eaves-droppers, ib
common scolds, ib
Oath, ex officio, iii 101 447
of the party, ib 382 437
to the government, refusal or neglect to take them, i 369 iv 116 117 123
who must take oath
candidates, if required, as to their qualifica-
tion, i 190 n
electors, of supremacy and allegiance, be-
fore vote, ib n
of witnesses, iii 369 n
of one witness insufficient in equity, ib 371 n
when nature of not understood, trial put off,
iv 214 n
conviction must be on, ib
voluntary and extrajudicial, ib 137
Obedience to parents, i 452
Objects of the laws of England, ib 121
Obligation of human laws, ib 57
or bond, ii 340 app 3 iii app 20
Obstructing of process, iv 129 and n
Occupancy, ii 3 258 400
Odio et alia, writ de, i 128
Economy, public, offences against, iv 162
Offences, see Crimes
when rule, nolum tempus occurrat regi, ap-
pplies to, ib 247 n
king’s prerogative to pardon, ib 269 n
Office found, iii 259
inquest of, ib 258
buying or selling illegal, ii 37 n
Officers, see respective titles
arrest by, iv 292
killing them in executing their office, iv 200
of courts, their certificates, iii 336
refusal to admit, ib 264
removal of, ib
non-commissioned, free from civil arrest, iii 289 n
of revenue, assault on, iv 155
constable, assault on, ib 129
public, embezlements by, ib 230 n
Offices, i 272 ii 36
and pensions, duty on, i 326
Officio, oath ex, ii 101 447
Oleron, laws of, i 419 iv 423
Opening council, iii 366
Oppression of crown, how remedied, i 243
INDEX.

Oppression of magistrates, iv 141
Option of the archbishop, i 381
Optional writs, iii 274
Orchards, robbing of, iv 233 and n
Ordeal, trial by, &b 342 414 425
Order of sessions, &b 272
for money, &c. forgery of, &b 250 n
Orders, holy, i 388
Ore, stealing, iv 234
Original contract of king and people, i 211 233
society, &b 47
conveyances, &b 310
of a deed, &b 296
process, iii 279
writ, &b 273 app 6 13
Orphanage, ii 519

Ostium ecclesiae, dower ad, &b 132
Overseers, see Poor
of the poor, iii 360
their rights, duties, and liabilities in general, i 350
may bind apprentices out of parish, &b 426 n
Overt acts of treason, iv 79 86 357
market, i 449
pound, iii 12
Ouster of chattels real, &b 198
freehold, &b 167
Ousteremain, ii 63
Outlawtry, i 143 iii 284
against one of several defendants, iii 284 n
special capias utlagatum, &b n
writ of error to reverse, &b n
in criminal cases, iv 319
Owling, &b 154
Oyer, iii 199 app 22
and termerin, commission of, iv 269 app 1
of justices of, killing them, &b 84
Oyez, &b 340
Pains and penalties, act to inflict, iv 259
Pais, matter in, ii 294
trial per, iii 349 iv 349
Palace court, iii 76
assault in, iv 125
Palatine counties, i 116 iv 431
their courts, iii 79
Panel of jurors, iii 354 iv 302 350
Papal encroachments, iv 104
process, obedience to, &b 115
Paper book, iii 317 407
credit, i 330 ii 466 iv 441
Paperian code, i 81
Papists, children of, &b 440 451
incapacities of, &b 257 293
laws against, iv 55 87 425
may now purchase and inherit lands, ii 257 n
Paramount, lord, &b 59 91
Paraphernalia, &b 435
Paravail, tenant, &b 60
Parceils in a conveyance, &b app 2
Parceiners, &b 157
Parco Freto, writ de, iii 146
Pardon, iv 316 337 376 396
for discovering accomplices or receivers, &b 331
not pleadable to impeachment, i 334 iv 261 338 440
king's prerogative to, i 269 n iv 397
Parent and child, i 446
injuries to, iii 140
rights, liabilities, and duties in general, i 446
liability of parent to support child, &b 418 n
law favours claims of heirs, &b 449 n
Parent, so bequests to children, i 449
equity may control father's custody of child,
&b 452 n
allowance out of child's property for mainte-
nance, &b 453 n
child, a necessary party in indenture of appren-
ticeship, &b n
child bound to support indigent parent, &b 454 n
period of gestation, i 456 n
when child born in wedlock, illegitimate, &b 457 n
putative father's liability, &b 458 n
appeals against bastardy orders, &b 459
how far bastard subject to some rules of law
as legitimate child, &b 459 notes
when child of age, &b 463 n
infant's father, prochein any, &b 464 n
injuries to, iii 140
assault by, in defence of, iii 3 n
action for seduction, &b 140 n
ground of action loss of service, &b 142 notes
Parental powers, &b 452
Parents, &c. their consent to marriage, i 437

Pares curtis, ii 54
trial per iii 349
Parish, ii 112
Parish-clerk, &b 395
Park, ii 35 410
Parliament, see also Statutes
i 141 147 iv 412 425 428
court of, the king in, iv 259 263
disuse of, &b 437
of France, i 147
power of, &b 160
rolls, &b 181
proceedings, stealing sent by post, iv 128 n
summons of, i 150
has sole right to legislate, i 163 n
peers pledge their honour in deciding judi-
cially, &b 9 12 n
Welsh members, &b 95 n
Scotch representatives, &b 97 n
acts of, generally extend to Scotland, &b 93 99 n
Irish union, &b 155 n 150 n
assembling of, on death of king, &b 150 n 187 n
Drake, impeached by, &b 151 n
duration of, &b 153 n
spiritual peers, in, &b 156 n 157 n
omnipotence of, &b 161 n 163 n
privileges of, indefinite, &b 164 n
slanders spoken in, privileged, &b n
privileges of members from arrest, &c. &b 165 n
members, how liable to bankrupt law, &b 166 n
attorney-general not a member formerly, &b 169 n
proxies in house of lords, &b n
protests, &b n
money bills, though private, not altered by
lords, &b 170 n
voter's qualification, &c. in election, &b 172 n 174 n
wages of members, &b 174 n
present number of members, &b
petition against return, &b 175 n
vote by residence in borough, &b n
who may not be elected to, &b 175 n 176 notes
clergy declared ineligible to set in, &b 175 n
how members may vacate seat, &b 176 n
INDEX.

Parliament, qualification of member, ib notes election on death of member, ib 177 n fraud obtained at elections illegal, ib 175 n petition to, under Grenville’s act, ib 190 n speaker, his salary, ib 181 n speaker’s speech on his election, ib n speaker, a mere member, when house in committee, ib n speaker of commons votes only when numbers equal, ib speaker of lords has no casting vote, ib standing orders as to bills, &c. ib 181 n commons’ humility in former times, ib n statutes ordered to be in English by Richard III, ib 184 n king’s rejection of bills, ib n royal assent endorsed on bills by clerk of, ib 185 n pronouncement of statutes, ib n orders, &c. determine by prorogation of, ib 186 n impeachment not affected by prorogation or dissolution, ib announcement of meeting of, i 187 n may be summoned on fourteen days’ notice, ib 188 n be dissolved by proclamation, ib n triennial act, ib 189 n additional councils made only by, ib 267 franking, &c. by members, ib 323 n house of, public meetings near, iv 148 n Parliamum inductum, i 177 Parol conveyances, ii 297 dement of, ii 300 evidence, ib 360 or pleadings, ib 293 Parricide, iv 202 Parson, i 384. See Vicar, Curate imparsone, i 391 Particular estate, ii 165 tenants, alienation by, ib 274 Parties to a deed, ib 299 app 2 fine, ib 355 Partition, ib 189 deed of, ib 323 writ of, ib 189 iii 302 Partner, cognizable in equity, iii 437 Partners, see Coparceners no survivorship among, ii 399 n Passports, i 260 violation of, iv 68 Pasture, common of, ii 32 Patents, ib 346 for new inventions, iv 159 of peerage, i 400 precedence, iii 28 law respecting, ii 407 n injunction against infringement of, ib Patent rolls, ib 346 writs, ib 347 Paterna, paternis, ib 236 n Patriam, trial per, iii 349 iv 349 Patronage, ii 21 disturbance of, iii 242 Pauper, see Overseer, Poor, Vagrant what costs may recover, iii 401 n causes, ib 400 Pawn, ib 452 see Bailment Pawns, laws relative to, ib 452 Payment of deceased’s debts, ib 511 money in court, in 304 Peace and war, right of making, i 257 Peace, breach of, iv 142 clerk of, iv 272 commission of, i 351 iv 270 conservation of, i 349 justices of, i 349 iv 270 282 290 292 428 conviction by, iv 281 security for, ib 251 254 the king’s, i 118 263 320 offences against felonious, riotous assembling, iv 142 meeting in night, ib 143 threatening letters, ib 144 and n destroying flood-gates, &c. ib 144 not felonious, affrays, ib 145 riots and unlawful assemblies, ib 146 tumultuous petitioning, ib 147 forcible entries, ib 148 going armed with weapons, ib 149 spreading false news, ib false prophesying, ib challenges to fight, ib 150 libels, ib Peculiate, iv 122 Peculiar cur, court of, iii 65 Pecuniary causes in ecclesiastical courts, iii 88 legacies, ii 512 Peersesses, i 401 Peers, great council of, i 227 228 hereditary counsellors of crown, i 227 house of, i 156 iii 57 pedigrees of, iii 106 privileges of, i 401 iii 359 iv 233 273 367 answer on their honour in equity, i 9 12 n so when voted judicially in parliament, ib Irish and Scotch, their privileges, ib 97 n 401 notes foreign peers, ib 401 n spiritual, not a separate estate, ib 157 n number of spiritual in parliament, ib 156 n authority of spiritual and temporal peers, same, ib 157 n privilege from arrest, ib 165 n proxies, ib 168 and n protests, ib n and n cannot alter private bills which raise money, ib 170 n interfering at election, breach of privilege of commons, ib 178 n their precedence determined, ib 272 n franking letters, ib 323 n number of their chaplains, ib 392 n peerage may be gained for life, ib 401 n peerage only transferred with consent of parliament, ib 401 n trial of, i 401 n trial by, i 401 iv 260 348 if witness in court of parliament, must be sworn, ib 402 n words against, actionable, ib n Peine forte et dure, iv 325 Penal statutes, i 88 iv 429 construed strictly, i 82 n Penalty of a bond, iii 435 Penance, commutation of, iv 217 276 for standing mute, ib 323 in ecclesiastical courts, ib 375 Pendente lite, administration, ii 503 Penitentiary houses, iv 371 Pension, ecclesiastical, i 282 ii 40 from the crown, i 176 duty on, ib 326 from foreign princes, iv 122
INDEX.

Pensioners excluded from the house of commons, i 175
People, ib 366
Per et cui, writ of entry in, iii 181
my et per tout, seisin, ii 182
quod, iii 124
writ of entry in, ib 181
Peremptory, challenge, iv 353 396
mandamus, iii 111 265
writ, ib 274
Perfection of the king, i 246
Perjury, iv 137 and notes
in capital cases, iv 138 196
Permissive waste, ii 281 and n
Pernancy of profits, ib 163
Perpetual curate, i 394
Perpetuating the testimony of witnesses, iii 450
Perpetuity of the king, i 249
Persecution, religious, iv 46 428 432
Person, injuries, to, iii 119 120
larceny, from, iv 241
offences against, ib 177
Personal actions, ii 117
where they die with the person, ib 302
assents, ib 301
chattels, ib 387
security, i 129
tithes, ii 24
property in general, ib 384
annuity to a man, and heirs of his body, out of, ib 113 n
if changed in form, owner may still seize, ib 404 n
chattel given to a man, and heirs of body, ib 428 n
Personating others in courts, &c. iv 128
proprietor of stocks, ib 248
seamen, ib 249 n
bail, ib 128 n
Persons, artificial, i 123 467
natural, ib 123
rights of, ib 192
Peter-pence, iv 107
Petition of appeal, iii 454
bankruptcy, ib 480
right, i 128 iii 356 iv 437
signatures admitted, i 143 n
meetings to, restrained, ib
under Grenville’s act, against false return, ib 180 n
Petitioning, right of, ib 143 iv 147
tumultuous, i 143 iv 147
Petty bag office, iii 49
constables, i 355
jury, iii 351
larceny, iv 229
serjeanty, ii 81
session, iv 272
treason, iv 75 203
Pews, ii 429 and n
Physicians, &c. iii 122 iv 197
Pierpoudre, court of, iii 32
Pigms, ii 159
Pillory, iv 377
Piracy, ii 71 and n
Piscary, common of, ii 34 40
Placemen excluded from the house of commons, i 175 iv 440
Plagiaris, iv 219
Plague, irregularity during, ib 161
 Plaintiff, iii 273
Plaintiff, ib 35 289 n

Plantations, i 107
destroying of, iv 246
Plants, destroying of, ib 427 and n
stealing of, ib 233 and n
Plays, and players, licensing of, iv 168
Plea, at law, ii 535 iii 301 app 10 24
in bar of execution, iv 396 app
equality, iii app 10
to indictment, iv 332 app
Pleadings, and see Pleas
in general, in civil action, iii 294 n
law relative to, iii 293 n
facts to be stated, ib n
mode of stating facts, ib n
declaration, requisites of, ib 223 n
irregularity in declaring, ib 294 n
venue, ib n
change of venue, ib n
variations in courts, ib 295 n
conclusion of declaration, ib n
pleads when not to be stated, ib n
judgment of non pros, ib 206 n
pleas, ib 301 to 310 in notes
replication, general qualities of, ib 310
demurrer, nature of, ib 314 n
wager of battel, ib 337 n
wager of law, ib 341 n
Pleas, and see Pleading
dilatory, not favoured, iii 301
to jurisdiction, ib
in abatement, ib
chant, iii 302
of tender, ib 303
of set off, ib 305
of statute of limitations, ib 306
in bar, ib 308
puis darrein continuance, ib 316 n
of the crown, iii 40 iv 2 424
Pleasure of the king, how understood, iv 121
Pledge, see Pawnbroker, ii 452
estates in, ii 157
Pledges of appearance, iii 280
battel, ib app 4
prosecution, ii 4 111 275
Plead egis de prosequendo, in replevin, iii 147
reterro habendo, ib 147
Plena probatio, ib 370
Plenum dominium, ii 312
Plough-bote, ib 35
Plures habent corpus, iii 135
writ, ib 283 iv 319 app 15
Pocket-sheriffs, i 312
Poisoning, iv 196 and n
administering poison to woman with child, ib 198 n
Police, offences against, ib 162 and n
Policies of insurance, ii 458 iv 441, see Insurance
   court of, iii 74
Political liberty, i 125
Poll deed, ii 296
Pools, challenge to, iii 361 iv 352
Polygamy, i 436 iv 163 and n
Pone, writ of, iii 34 37 195 280 app 2
Poor, i 359
see Overseers
overseers of, how appointed, ib 360 n
mandamus to appoint, ib
indictment lies to compel appointee to act, ib
certificate of settlement, ib 362 n
children follow settlement of parents, ib 363 n
widow takes her maiden settlement, ib n
statutes relating to settlements, ib n
INDEX.

379

Premier servant, iii 27
Premises of a deed, ii 299
Prerogative, i 141 237 232 iv 431 132
causes of its increase and decline, iv 433
comparative review of, i 336 iv 440
as to duchy of Cornwall, ii 209 n
contempts against, iv 122
copyrights, ii 410
court, ii 500 iii 66
property by, ii 408 409 n
offences relating to coin and treason, iv 98
90 notes
against king's counsel, ib 100
in serving foreign state, ib 101
in embezzling stores, ib
desertion, ib 102
contempts against, ib 122
Prescription, corporations by, i 473 ii 264 n
time of, ii 31
title by, ii 263
unity of seisin destroys way by, ib 35 n
prescribing in a quae estate, what, ib 264 n
by copyholder, ib
for common of pasture, iii 238 n
general rules for, ii 263 265 n
Presentation to benefices, i 389 ii 23
to church must be gratuitous, ii 22 n
cannot destroy a donative, ib 23 n
prerogative presentation, ib
purchase of, anticipating vacancy invalid, ib
278 n
simoniacal, when not evidence, ii 280 n
Presentative advowsons, ii 22
Presentment of copyhold surrender, ib 369
offences, iv 301
President of the council, i 230
Press, liberty of, iv 151
Pressing of seamen, i 419
to death, iv 389
Presumptions, ii 271
Presumptive heir, ii 208
Pretended titles, selling or buying, iv 136
Pretender and his sons, treasons relating to, ib
91
Prevention of crimes, ib 251
homicide for, ib 180
Price, ii 447 454
Primaec pretices, ib 381
Primary conveyances, ii 300
Prime fine, ib 350
seisin, ib 66 iv 418
Primogeniture, ii 214 iv 421
Prince of Wales, i 223
Princes of the blood royal, ib
Princess of Wales, violating her, ib 223 iv 81
royal, i 223
violating her, ib 223 iv 81
Principal
challenge, iii 363
Principal and accessory, iv 34
accessories, ib 35
what offences admit of, ib
accessories before the fact, ib 36
after the fact, ib 37
punishment of, ib 39
Priority of debts, ii 511
Privage, i 314
Prison, see Gaol, breach of, iv 130 n
Prisoners, see Convicts
regulations for their comfort, &c., i 346 n iv
400 n
Priv, iv 339
Private act of parliament, i 96 ii 344
...
INDEX.

Private nuisance, iii 216
persons, arrest by, iv 292
wrongs, iii 2
ways, ii 35
Privately stealing from the person, iv 242
Privies to a fine, ii 355
Privilege, i 272
bill of, iii 289
from arrests, ib
of parliament, i 164
writ of, ib 166
Privileged places, iv 120
villenage, ii 98
Privilegia, iv 46
Privilegium clericale, iv 365
property proper, ii 394
Privy council, i 229

counsellor, killing, or attempting to kill, ib
232 iv 101
purse, i 332
seal, iii 347
signet, ib
forging them, iv 89
rithes, i 388
verdict, iii 31
Prize, ship taken as, i 259 n
Probable presumption, iii 371
Probate of will, ii 506
Procedendo, writ of, i 353 iii 109
Process, civil, i 279 and app 26
into county palatine, iii 79 n
special original, ib 272 notes
return days at term, ib 277 n
essign, ib 278 n
of attachment or lone in C. P., ib 280
teste of capias, ib 282 n
against defendant's keeping out of way, ib
283 n
special capias utlagatum, ib 284 n
alias and pluries capias, &c. ib 286 n
served on border of county, ib n
defects in notice to appear to, iii 287 n
affidavit of debt, ib n
arrest wrongfully made, ib 288 notes
attorney privileged from arrest, ib n
arrest on border of county, ib 290 n
subpœna, ib 369 n
of execution against whom, ib 414 n
Prochein amy, i 464
Proclamations by the king, ib 270 iv 43
of a fine, ii 352 app 4
evraies, i 296
on attachment in chancery, iii 44
exigent, ib 284 app 16 iv 319
the riot act, iv 143
writ of, iii 284 app 16
Proctor, iii 25
Procuration money, iv 157
Prodigals, i 305
Profaneness, iv 59
Profet in curia, iii app 22
Professor of the laws, his duty, i 35
Professorship, Dowling, established, i 28 n
Profits of courts, i 289
Progress, royal, iv 411
Prohibition, declaration in, iii 113
writ of, ib 112
grounds of, ib n
Promises, see Contract, iii 158
Promissory note, ii 467
Promulgation of laws, i 45
Proofs, see Evidence, iii 367
in ecclesiastical courts, ib 100

Proper feuds, ii 58
Property, i 138 ii 12
erimes against, iv 229
injuries to personal, iii 144
real, ib 167
right of, ii 197 iii 190
Prophecies, pretended, iv 149
Proprietary governments in America, i 109
Propriate probanda, writ de, iii 148
Prorogation of parliament, i 187
Prosecution of the king, ib 205
expenses of, iv 362
malicious, iii 126
of offenders, iv 301
Protection by children, i 450
embassadors, ib 254
writ of, iii 289
Protactor, i 243
Protest of bill and notes, ii 468 469
lords in parliament, i 168
Protestant dissenters, iv 53
succession, i 216 217
treason against, iv 91
Protestation, iii 311 and 23
Province, i 111
Provincial constitutions, ib 82
governments in America, ib 109
Proving will in chancery, iii 450
Provisions, papal, i 10 iv 107
selling, unwholesome, iv 162
forestalling, &c. ib 158 9 n
Procise, trial by, iii 357
Provisors, writs against, iv 111, &c.
Proxies in the house of lords, i 168
Puberty, age of, iv 22
Public act of parliament, iv 85
verdict, iii 377 iv 360
wrongs, iv 1
Publication of deposition, iii 450
Purcella, ii 24
Puis darrein contention, plea, iii 317
Puisne barons of the exchequer, iii 44
justices, ii 40 41
Pulling down churches, houses, &c. iv 143
Pulscation, iii 120
Punishment, iv 7
capital, ib 9 18 236 n
certainty of, ib 377
end of, ib 11 252
infliction of, ib 258
measure of, ib 12
power of, ib 7
severity of, ib 16
transportation when first a, i 137 n

Pur aiter vie, tenant to, ii 120
Purchase, i 215 ii 241
title by, ii 241
in real property, what, ii 201 n
ancestor's seisin by descent or, ib 208 n
rule in Shelley's case, ib 242 n
Purchasor, first, ib 220
Purgatorio vulgaris, iv 342
Purgation monstrans, iii 342 iv 366
oath of, iii 100 447
Purpurer, iv 167
Purpurer, iv 301
Pursuit of remedies, iii 270
Purveyance, ii 287
Quadriplacito, iii 310
Qualification for killing game, ii 417 iv 175
of electors to parliament, i 171
jurors, iii 362
of justices of peace, i 352
of members of parliament, ii 175
INDEX.

Qualified fees, ii 109
property, ì 391
Quare clausum frigint, iii 281
execut infra terminum, writ of, ìb 207
impedite, ìb 246 251 n
incumbavit, ìb 248
non admittit, writ of, ìb 250
Quarantine, ìi 135
irregularity in, iv 161
Quarrelling in church or church-yard, ìb 146
Quartering of soldiers, ìi 414 415
traitors, iv 93 377
Quarter-sessions, court of, ìb 271
Quarto die post, ìi 278
Quashing, ì 205
Quays, ì 264
Que estate, ìi 264
Queen, ì 219
Anne's bounty, ìb 286
comparing or imagining her death, ìb 222 iv 76
consort, ì 219
dowager, ìb 223
gold, ìb 219 220 221
her attorney and solicitor, ìi 28
revenue, ì 220 221 222
regnant, ìb 218
her husband, ìb 223
violating her, ìb 223 4v 81
Catharine Howard's attain'd, ìi 224 n
Anne Boleyn, Catharine Parr, Henrietta, ìb 222 n
must subscribe declaration against popery, ì 235 n
Question or torture, iv 325
Quia tamen actions, ìi 160 iv 308
Quia dominus remisit curiam, writ of right, ìi 195
Quia emporii, statute of, ìi 91 iv 420
Quick with child, iv 395
Quiet enjoyment, covenant for, ìi 11
Quinto ex actis, ìi 283 app 16 iv 319
Quit-rents, ì 42
Quo minus, writ of, ìi 45 286 471
Quo warranto, information in nature of, ì 485
ìi 263 iv 312 441
Quo, writ of, ìi 262 264 n
Quod et deforciat, writ of, ìb 193
Quorum clause, in commissions, ìi 351
Racing, iv 173 and n
Rack, ìb 325
Rack-rent, ìi 43
Rail, stealing of, iv 233
Ransom, iv 67 n 380
Rape, appeal of, ìb 314
in counties, ìi 117
of women, iv 210
evidence in, ìb 213 n
assault to commit, ìb 217 n
Rasure in a deed, ìi 308
Rationabiliter parte bonorum, writ de, ìb 492
write of right de, ìi 194
Rationabilis donum, ìi 134
Ravishment, see Rape of Children, ìi 141
ward, ìb
wife, ìb 139
Reading of deeds, ìi 304
on claim of clergy, iv 367 441
Real actions, ìi 417
assets, ìi 244 302
chattels, ìb 366
composition for tithes, ìb 29
Real things, ìi 16
Reason of the law, ìi 70
Reasonable part, ii 492 516
Re-assurance, ìi 460
Recall of subjects from abroad, ìi 255 iv 122 160
Recovery, ìi 4 iv 363
write of, ìi 150
Receipts, forgery of, iv 250 n
Receiving stolen goods, iv 132
offence of, in general, ìb
lead, &c. ìb 123
plate, &c. ìb
Recognizance,
for the peace or good behaviour, iv 252
in nature of statute staple, ìi 160 iv 431
to prosecute, iv 296 n
to give evidence, ìb
Recompense in value, ìi 359
Reconciliation to the pope, &c. iv 87
Record, ìi 60 ìi 24 iv 426
assurance by, ì 344
court of, ìi 24
debt of, ìb 465
embezzling, &c. of, iv 128
of actions, ìi 317
forcible entry or detainer, iv 148
riot, ìb 147
trial by, ìi 330
vacating of, iv 128
Recordari facias loqueat, ìi 34 195
Recovery, see Fine, common, ìi 116 271 357
app iv 429
in value, ìi 359 app 5
revisal of, when suffered of copyhold, ìb 368
roll, ìi 358 app 5
by tenant in tail, ex parte materna, ìb 362 n
when and how passed, ìb n
amendments of, ìb
Recreant, ìi 340 iv 343
Rector of a church, ìi 364
Rectorial tithes, ìb 386
Receivers, popish, iv 56
Relatio judicis, ìi 361
Redendum of a deed, ìi 299 app 1
Re-disseisin, writ of, ìi 188
Redress of injuries, ìb 3
Reference to masters in chancery, ìb 453
Refusal of a clerk, ì 399
Regalitatem, writ of, ìb 341
Regard, court of, ìi 72
Regardant, villeins, ìi 93
Register of deeds, ìi 343
of marriages, iv 163
rent charge, &c. must be registered to entitle
to vote at election, ì 173 n
of seamen, ìi 419
of British shipping, ìb 418 n
Registrum omnium brevium, ìi 183
Regnant, queen, ìi 218
Rejoinder, ìi 310
Rehearing, ìb 453
Relation back in bankruptcy, ìi 486
forfeiture, iv 381 386 387
judgments, ìi 420 421
Relations, private, ìi 422
public, ìb 146
Relative rights and duties, ìb 123 146
Relator, in informations, ìi 264 427
Release of lands, ìi 324 app 2
Relief, ìb 56 65 87 iv 418 420 421
Religion, offences against, see God and Reli-
gion, iv 41
Religious impostures, iv 61
INDEX.

Rem, information in, iii 262
Remainder in chattels personal, ii 398
writ of foredom in, iii 192
of lands, ii 104
not subject to abeyance, ib 107 notes
how affected by surrender, ib 368 n
cross remainders among devisees, ib 391 n
Remedial part of laws, i 55
statute, ib 56
Remission, see Pardon
Remit, iii 18 19 190
Removal of poor, i 364
Rent, ii 41 42 290
charge, ib 42
remedy for, iii 6 206 231
seck, ib 42
service, ib
subtraction of, iii 230
when due to executor or heir, ii 43 n 123 n
feudal sovereigns in grants of land reserved,
ib 59 n
apportionment on death of tenant for life, ib
123 n
of mortgaged estate, to whom paid, ib 159 n
when payable, though premises burnt down,
ib 281 n
distress for, iii 6 n see Distress
ejection for non-payment of, ib 206 n
double rent and double value, ib 211 n
Repleader, ib 395
Replevin, ib 13 170
action of, ib 146
bond, ib 147
Replication, ib 310
Replication at law, ib 309 app 23 24
in criminal cases, iv 339 app
equity, ib app
Reports by the master in chancery, iii 453
of adjudged cases, i 71
their fidelity, i 66 72 n
Representation in descents, ii 217
of the crown, i 194 201
distribution, ii 517
parliament, i 159
Reprisal of goods, ii 4
Reprisals on foreigners, i 258
Republication of will, ii 502
Repugnant conditions, ii 156
Reputation, i 134
injuries to, iii 123
Reputed thieves, vagrants when, iv 169
Requests, court of, iii 81
for small debts, ib
Rere fiefs, ii 57
Rescripts of the emperor, i 58
Rescous, writ of, iii 146
Rescue, ii 12 170 iv 125 131 and n
Residence, i 390 392
Residuum of intestates' effects, ii 514
Resignation, i 382 393
Resistance, i 251 iv 436 440
Respite of jury, iii 354 app 10
Respondent auster, iii 303 396 iv 338
Respondentia, ii 435
Responsa pudenda, iii 130
Restitution in blood, Sc. iv 402
of conjugal rights, ii 94
stolen goods, iv 302
temporaries, i 390 iv 421
writ of, iv 303
Restoration, A. D. 1660, i 210 iv 438
Restraining statute, i 57 ii 320
of leases, ii 320 iv 432
Resulting use, ii 335
Retainer, of debts, ii 511 iii 18
of servants by another, iii 142
Retaliation, iv 12
Retorno habendo, plegii de, iii 147
writ de, iii 149 143
Retractit, ib 296 395
Return, false or double, i 180
action for, iii 111 372
irrepelesible, writ of, ib 150
of writs, ib 273
form of, ib app
Return day of writs, iii 275
Returns of the term, iii 277
Revealed law, i 42
Revenue causes, cognizance of, iii 428
of things, iv 281
extraordinary, i 307
ordinary, ib 291
of house and windows, ib 325 n
on servants, ib n
hackney coaches, ib n
greatest amount raised, ib 326 n
number of officers to collect it, i 332 re
officers, assault on, iv 155
Reversal of attaint, ib 392
judgment, iii 411 iv 390
outlawry, iii 284 iv 320 392
Reversion, ii 175
its incidents, ib 176
assignee, entitled to what remedies, iii 157
Revertendi animus, ii 392
Revertur, writ of foredom in, iii 192
Review, bill of, ib 454
commission of, ib 67
Reviling church ordinances, iv 50
Revival of persons hanged, ib 406
Revivor, bill of, iii 448
Revocation of devises, ii 376
uses, ib 335 339 app
will, ib 502
Revolution, A. D. 1688, i 211 iv 440
Reward, taking of, to help to stolen goods, iv 152
and n
Rewards, for apprehending offenders, iv 294
295 and n
discovering accomplices, ib 331
Right close, writ of, ii 99 iii 195
securandum consuetudinem maneri, writ of, iii 195
de rationabilis parte, writ of, ib 194
mere writ of, ib 193
of advowson, writ of, ib 243 250
dower, writ of, ib 183
of possession, ii 196
property, ib 197
ward, writ of, iii 141
petition of, i 128 iii 227 iv 437
quia dominus remerit curiam, writ of, iii 195
app
sur disclaimer, writ of, iii 233
Rights, i 122
bill of, ib 128 iv 440
of persons, i 122
things, ii 1
Riot, iv 125 142 146 and n
Riot-act, ib 142 143 441
Riotous assemblies, felonious, iv 142
Rivers, annoyances in, ib 167 and n
banks of, destroying, ib 244 246 and n
sluices on, destroying, ib 144
thefts on navigable, ib 239 and n
Roads, see Highway
INDEX. 338

Seal, privy, 437
Sealing of deeds, 405
Seals, their antiquity, 405
Sea-marks, 464
destroying, 424
Second delivery, writ of, 150
Securities for money, their true constructions, 439
Security for good behaviour, 251 256
peace, 251 254
of person, 129 129
Seduction of child or servant, 140 n
action for, 142 notes
of women and children, 209 212
of soldiers and sailors, 102 n
of artificers, 160 and n
Seisins, 209
for an instant, 131
livery of, 311 app
writ of, 415 ii 359 app 5
Seisings of heriots, &c. iii 15
Selecti judices, 366
Self-defence, 3
homicide in, 130 iv 183
Self-murder, iv 189
Semiplena probatio, iii 370
Senatus consulti, 156
decreta, 86
Septennial elections, 189 433
Sequestration in chancery, 444
of a benefice, 418
Serjeant, ancient, 28
at arms in chancery, 444
at law, 24 iii 27
premier, iii 58
Serjeanty, grand, 73
petit, 81
Servants, see Master and Servant, 423
battery of, 412
embezzling their master's goods, 230 231
firing houses by negligence, 434 iv 222
larceny by, 230
master when answerable for, 430 431 iii 153
retainer of, 425
tax on, 425
of ambassador protected from arrest, 256
of peers, are liable to arrest, 401 n
domestic, how far entitled to warning, &c.
425 n
in husbandry, discharged for misconduct, 425 n
a relative duties of master and servant, 425 a
Service, feudal, 54
heriot, 422
Session, great, of Wales, 77
of gaol-delivery, iv app
ofoyer and termener, 425 app
**INDEX.**

Single bond, ii 340
combat, iv 346
voucher, ii app 5
Sinking fund, i 331
Si non omnes, iii 59
Six clerks in chancery, ib 443
Sixpenny deduction from pensions, &c. i 326
Skins, exporting of, iv 154 n
Slander, see Libel, iii 123
jurisdiction of ecclesiastical court in, ib 87 n
law relative to, in general, ib 123 n
nature of the accusation, ib n
false of the imputation, ib n
the publication, ib n
the occasion, ib n
the malice or motive, ib n
written slander, ib
slander, of title, ib
scandalum magnatum, ib 124 n
Slavery, i 418 423
when slave may demand wages in England, i 127 n 425 n
escaping to where slavery abolished, ib 424 n
slave brought to England is free, ib 425 n
Slave, i 127 n
Sledge, iv 92 377
Sluices on rivers, destroying, ib 144
Small debts, courts for, iii 51
barriers, i 388
Smoke-farthings, i 324
Smuggling, ib 319
offence of, iv 155 and n
Socage, ii 79
free and common, ii 78
guardian, i 461
willein, ii 98
Society, its nature, i 47
Sodomy, offence of, iv 215
sending letters charging party with, ib 144
n 215 n
soliciting to commit, ib 215 n
assault to the body, ib 217 n
Sodor and Man, bishopric of, i 106
Sokeman's, i 100
Soldiers, i 408
wandering, iv 165
Sole corporations, i 409
Solicitor, iii 26
general, ib 23 and n
Son assault demense, ib 120 306
Sophia, princess, heirs of her body, i 217
Sorcery, iv 60
Sovereignty, i 49
of the king, i 241
Soul-scot, ii 425
South-sea company, misbehaviour of its officers, iv 234
Speaker of each house of parliament, i 181
Speaking with prosecutor, iv 363
Special administration, ii 506
bail, iii 287 app 19
bailiff, i 345
bastardy, ib 454
case, iii 372 7
demurrer, ib 315
impairment, ib 301
jury, ib 357
matter in evidence, ib 306
occupant, ii 259
plea, iii 305
property, ii 391
session, iv 272
statute, i 86

Shire, i 116
Shooting at another, iv 207
Shop-books, iii 368 369
Shrubs, destroying of, iv 246 and n
stealing of, ib 233 and n
Shroud, stealing of, ii 424 236
& fecerit te securum, iii 374 app 7
Signet, privy, ii 347
Signing of deeds, ii 305 app
Sign-manual, ib 347
forging it, iv 89
Simony, i 389 ii 278
how far punishable as a crime, &c. iv 62 notes
Simple contract, debt by, ii 465
larceny, iv 299
Sicurex, i 386

Session, of parliament, i 186 187
quarter, iv 271
Set-off, iii 304 iv 442
Settlement, act of, i 128 iv 440
Settlements of the poor, i 369
Several fishery, i 396
Severalty, estates in, ib 179
Severance of jointure, ib 186
Severity of punishment, iv 16
Sewers, commissions of, iii 73
law, relative to, ib 73 n
when court of, may imprison, ib 305
Sheep, &c. stealing or killing with intent to
steal, iv 239
Shepway, court of, iii 79
Sheriff, see Officer, i 116 339 iv 292 413
office, &c. of, in general, i 399
cannot be elected to represent own county,
who may be, ib 339 n
Scottish sheriffs, ib n
of Westmoreland, ib 340 n
of London, ib n
mode of nominating, ib 341 n
entering and quitting office, ib 342 n
must abide in and not farm county, ib n
may imprison person resisting him in his
duty, ib 343 n
must execute writs at his peril, ib 344 n
under-sheriff, appointment and duties, ib 345 n
bailiffs of, their duty, ib n'
special bailiff, ib n
gaolers appointed by, ib 346 n
selling crops under execution, iii 7 n 417 n
payment of rent under, ib
escapes, liable for, ib 290 n
seizing lands under eligit, ib 419 n
delivery of possession in eligit, ib n
extents, ib 450 notes
Sheriff's court in London, ib 61
shilling, iv 237 411 424
Shilling use, ii 335
Ship-money, iv 437
Ships, see Seamen
seized as prize, remedy for, ii 401 n iii 69
notes
property in, when captured, ii 401 n
assistance of, ib 460 n
privileges of British built, i 410 n
navigation acts, system improved, ib n
legality of impressing seamen, ib 420 n
naval courts-martial, ib 421 n
plundering in distress, i 294 iv 239
destroying, &c. iv 245 and n i 293
king's ships, iv 102 245
Shire, i 116
Shooting at another, iv 207
Shop-books, iii 368 369
Shrubs, destroying of, iv 246 and n
stealing of, ib 233 and n
Shroud, stealing of, ii 424 236
& fecerit te securum, iii 374 app 7
Signet, privy, ii 347
Signing of deeds, ii 305 app
Sign-manual, ib 347
forging it, iv 89
Simony, i 389 ii 278
how far punishable as a crime, &c. iv 62 notes
Simple contract, debt by, ii 465
larceny, iv 299
Sicurex, i 386
INDEX.

Special tail, ii 113
verdict, iii 377
warrant, iv 291
Speciality, debt by, ii 465
Special legacies, ii 512
relief in equity, iii 438
Spiriting away men and children, iv 219
Spiritual corporations, i 470
court, iii 61
in general, ib 61
clerical persons not admitted as advocates
in, i 50 n
judge of, liable to action, when, ib 84 n
incestuous marriage, punished by, ib 433 n
when will annul marriage of minor, ib 436 n
Spiritualities, guardian of, i 390
Spoliation, iii 90
Sponsor judicatae, ib 452
Springing uses, ii 334
Squibs, iv 168
Stabbing, ib 193
Stage plays, ib 168 and n
Stakeholders, see Agent, Bailments
Stamp duties, i 323
duties consolidated, ib 323 n
wills of soldiers and sailors exempt from, ib 417 n
duties, of deeds, &c. ii 297
forgery of, iv 249 n
when material in forgery, &c. ib 247 148 n
Standard of coin, i 278
weights and measures, i 274 275 iv 275
Stannary courts, iii 80
Staple commodities, i 315
Starchamber, court of, i 231 iii 445 iv 266 310
329 432 437
Stars, iv 266
Stated damages, i 345 and n
Statham, i 72
Statutes, see Act of Parliament
in general, i 85
words in, how expounded, ib 60 n
enactment not restrained by preamble, ib 480 n
in pari materia, construction of, ib 60 n
public and private distinction between, ib 86 n
restraining and enlarging, ib 87 n
words of, must prevail, ib 88 n
remedial and penal construed, ib 89 notes
extend generally to Scotland, ib 93 99 n
extend not to colonies, ib 107 n
American war caused by, ib 109 n
when ordered to be in English, ib 184 n
promotion of, ib 185 n
first called 12th Car. II. why, ib 196 n
guardian by, i 462
rolls, i 162

Statute of frauds, in general, ii 448 n

Statute of limitations, law relative to, iii 306 n
to what cases statute extends, ib
when begins to take effect, ib
commencement of action to take case out of, iii 306 n
what revives the claim, ib
exceptions as to feme-covert, infants, &c.
iii 307 n
in case of penal statutes, ib n
other statutes of limitations, iii 308 n

Statute merchant, ii 160 iv 426
Statute staple, ii 160 iv 426
recognization in nature of, ii 342 iv 431
Statutes of a corporation, i 476
Staunforde, i 72
Stealing, see Larceny
an heireas, iv 209
Sterling, i 278
Steward, i 427
lord high, iii 38
his court, iv 261
in parliament, iv 260 263
of the university, his court, iv 277
of the household, iii 38
his court, iii 76 iv 276
Stint, common without, ii 34 iii 239
Stipulation, iii 291 n
Stipulation in the admiralty court, iii 108
Stirpes, succession in, ii 217
Stocks for punishment, iv 377
of descent, male and female, ii 234
Stolen goods, receiving, &c. iv 132 238. See Receiving
taking reward to help to, ib 131
owner of, suing for, ii 450 n
marriages, iv 209
Stoppage, iii 305
in transitu, law of, ii 448 n
Stores, embrazing the king's, iv 101
receiving stolen, iv 133 n
Strangers to a fine, ii 350
Striking in the king's palace or courts of justice,
v 125 276
Study of the law, its discouragements, iii 317 n
uses, i 6
restrained in London, i 24
why neglected in the universities, i 16
general note on, i 37 n
Subject, civil, iv 28
Subinfestation, ii 91
Subornation of perjury, iv 137 and n
Subpona ad testificandum, iii 369
duces tecum, ib 382
in equity, ib 445
its origin, ib 52
Subscription of witnesses, ii 379
Subscriptions, unlawful, iv 117
Subsequent conditions, ii 154
evidence, iii 403 454 455
Subsidies, ecclesiastical, iii 312
lay, i 308 411
on exports and imports, i 316
Subtraction of conjugal rights, iii 94
legacies, ib 96
rents and services, ib 230
tithe, ib 88 102
Succession ab intestato. See Descent, ii 516
to goods and chattels, ib 430
to the crown, i 197 iv 440
Suffrance, estate at, ii 150
Suffrage, who entitled to, ib 171
Suggestion for prohibition, iii 113
prosecution by, iv 309
Suicide, ib 189 and n
assisting another in, is murder when, ib 200 n
Suit and service, ii 54
at law, ii 116. See Action
in equity, ib 443
witnesses, ib 295
Summary convictions, iv 290
Summoners, iii 279
Summons, iii app
INDEX.

Summons, before conviction, iv 281
to parliament, i 149 150 187 n 188 n
Sumptuary laws, iv 170
Sunday, process not serviceable on, iv 64 n
hundred when liable for persons robbed on,
ib n
killing game on, ib n
carrier, &c. travelling on, ib n
selling goods on, ib
meat &c. iv 64
watermen plying on, ib n

Supersedes, writ of, i 353
Superseding commissions of bankrupt, ii 488
Supplemental bill in equity, iii 448
Suppository oath, ib 370

Suppiricavit, iv 253
Supplies, i 307
Supremacy, iv 430
oath of, i 368
refusing it, iv 115

Supreme magistrates, i 146
power, i 45 146

Surcharge of common, iii 237
Surplus of intestates' effects, ii 514

Sur-rebutter, iii 310

Sur-rejoinder, ib
Surrender, of bankrupt, ii 481
title by, ib 326
def of, ib
of term, ib
of copyhold, ib 365
death of surrenderor before admittance of
surrenderee, ib 366 n 369 n
neglect of, to uses of will added, ii 368 n
effect of, on contingent remainders, &c. ib
368 n
effect of admittance upon, ib 369 n

Surveyors of highways, i 357
how chosen, i 358
duties, &c. of, ib 359 n
of turnpike roads, ib n

Survivorship, ii 183 app 11
of things personal, i 399
Suspension of habeas corpus act, i 136
Swan, per col. iv 403
Swans, stealing of, ii 392 iv 236
Swearing, profane, iv 60
the peace, ib 255
Sweinmote, court of, iii 72
Sycophants, iv 236
Synod, i 379

Tail after possibility of issue extinct, ii 124
female, ib 114
general, ib 113
male, ib 114
special, ib 113
tenant in, ib 112
Tailor, common action against, iii 164
Taking, felonious, iv 230 232
unlawful, iii 145

Tale, or count, ib 293
Tales de circumstantibus, ib 365 iv 354
write of, iii 364
Talisman les, iv 12
Tallage, i 311 iv 419 426
Taxes, ii 313
Taxation by the house of commons, i 169
Taxes, i 308 iv 426 430
their annual amount, i 328 333

Technical words in indictments, iv 306 307
Temporalities, their restitution, i 380 iv 421

Tenancy, notice to quit, ii 147 n
of mortgaged estate, rent to whom paid, ib 159 n
by agreement for three months certain, is
within statute, ib 140 n
from year to year, ib 147 n
under demise of joint tenants, ib 183 notes
by sufferance, ib 150 n
holding over, ib 151 n

Tenant, ii 59
to the praecipe, ib 359 362
for life, committing waste of timber, ib 282 n
without impeachment of waste, power of, ib 283 n
in common, how created and distinguished
from joint tenancy, ib 180 n
account and partition how obtained, ib 186
adverse possession by one against the other,
ib 194 n
of suing jointly or severally, ib n
by curtesy, meaning and origin of, ib 126 n
of trusts, &c. are estates in equity, ib 127 n
when entry necessary to seizin, ib n
of gavelkind lands, ib 129 n
when second husband shall be, ib 128 n

Tender of amends, iii 16
of issue, ib 313
oaths, i 368 iv 124
money in general, iii 303 i 277
what is a good tender, iii 304 n
when may be made with effect, ib 304 n
advantage acquired by, ib 304 n
paying money into court, ib 304 n
effect of, ib 304 n
plea of, ib 302
Tenement, ii 10 16 n
entailable, ib 113
Tenemental lands, ib 90
Tenendum of a deed, ib 298

Tenents, ecclesiastical, i 284
temporal, ib 300

Tenure, disturbance of, iii 242
disturbance by, ib 74 n
capital, serjeant's address, ib 77 n
in socage, its derivation, ib 80 n
by petit serjeancy, still exists, ib 82 n
in gavelkind, how preserved, ib 84 n
gavelkind lands subject to escheat, ib n
gavelkind and borough english not pleaded,
ib 85 n
copyhold of base tenure, ib 99 n

Tenures, ancient, ii 59
modern, ib 78

Term in law, essign of, &c. iii 278 and n
first day of, ib 278
original of, ib 275
returns of, ib 277
of years, ii 143 app 2

Termor, ii 142

Terre-tenant, ib 91 328

Text-act, iv 59

Testament, ii 12 373 489 499 iv 424

Testamentary causes, iii 95
guardian, i 462 ii 88
jurisdiction in equity, iii 437
spiritual courts, ib 57 iv 421

Testamento annulo, administration cum, ii 504
Testamentum capias, ii 283 app 14

Teste of writs, i 179 iii 274

Testes, proof of will per, ii 508

trial per, iii 336

Theft, iv 229, sec Larceny
INDEX. 387

Trade, offences against, seducing artists, iv 160
Trademen, i 407
actions against, iii 165
Traitors, iv 499 iv 75
Transitory actions, ii 294
Transportation, i 137 iv 371 377 401 and n
offence of returning from, iv 132 and n 371
Traverse of indictment, iv 351

offices, ii 260
plea, ib 313

Treason, appeal of, iv 314
misprision of, ib 120
petty, iv 75 203
trials in, iv 351 440
high, compressing, &c. death of king, &c.
iv 76

how far words treasonable, ib 80
violating king's companion, &c. ib 81
levying war, ib
adhering to enemies, ib 82
counterfeiting king's seal, ib 83
money, ib 84
slaying chancellor or judge, ib
treasons, since 1 Mary, c. 1, ib 87
as to papists, ib
to coin, and royal signatures, ib 88
punishment of, ib 92, 3
Treasurers, lord high, iii 38 44 56
killing him, iv 84
Treasure-trove, i 295
concealment of, ib 297 iv 121
Treaties, leagues, and alliances, ib 257
Trebuchet, iv 169
Trees, destroying, ib 246 and n 247
stealing, ib 233
Tresayle, iii 186
Trespass, costs in, ib 401

on lands, ib 208 209
the case, action of, ib 122
ut et armet, action of, ib 120 121 123
action of, for taking goods, ib 151 n
after notice, ib 210 n 214 n
damages increased by insult, ib 210 n
possession, and title, ib n
declaring for several, ib 212 n
against gleaners, ib 213 n
in fox hunting, ib n
by inferior tradesmen hunting, sporting, &c.
ib 214
to right of common, ib 237 n
malicious offence of, ib 247 n

Trespassers, ab initio, iii 15

Trial, ib 330 iv 342 411
new, iii 387 iv 361

notice of, in London and Middlesex, iii 357 n
countermand of, ib n
notice of, after 4 terms delay, ib n
adjournement of jury pending, ib 375 n
antiquity of trial by jury, ib 376 n
withdrawing juror, ib 377 n
leave to move for nonsuit, ib
notice to produce papers, &c. iii 382 n
postea, practice relative to, ib 396

Triennial elections, i 189 483
parliaments, ib 153

Trinity, denial of, iv 50

Trinomia necessitas, i 263 357 ii 102

Triors lords, iv 203

Triplicatio, ib 310

Trithing, i 116

Triverbal days, iii 424

Trower and conversion, action of, ib 152
Truce, breakers of, iv 69

Vol. II. 98
INDEX.

Truce, conservators of, iv 69
Trusts,
  where cognizable, iii 431
  courtesy of, &c. are estates in equity, ii 127 n
  wife not entitled to dower, out of estate, ib 132 n
  to preserve contingent remainders in copy
hold, unnecessary, ib 171 n
Trustee, in default of heirs to estui quae quare
deceased holds for own benefit, ib 246 n
execution by statute, of uses of estates in, ib 353 n
devises in trust, ib
how statute for execution of, evaded, ib 336 n
use executed by the statute, ib n
when trust, merged in legal estate, ib 337 n
of chattels real or personal in remainder, ib 398 n
Tub-man, in the exchequer, iii 28
Tumultuous petitioning, i 143 iv 147
Turbarv, common of, ii 34
Turnips, stealing, iv 233
Turnpikes, see Road, destroying of, iv 145
Tutor, i 460
Twelve tables, laws of, i 80
Two witnesses, when necessary, iii 370 iv 356
Tyranny, i 126 133
Ubiquity of the king, i 270
Umpire, i 16
Unanimity of juries, iii 376 iv 414
Uncertainty of the law, iii 326
Uncore prist, ib 303
Under-sheriff, i 345
Underwood, stealing, iv 233
Union, articles of, i 96
of Great Britain, i 96 iv 427 440
United States of America, their separation from
England, i 109 n
Units of joint estates, ii 180
Universities, i 469
University, i 471
burgesses of, i 174
chancellor of, his certificate, iii 335
courts of, iii 83 iv 277
right of, to poolish advowsons, iii 250
study of the law in, i 26
Unknown persons, larceny from, iv 236 359
Uses, ii 137 271 327 iii 52 iv 427 429 430
  covenant to stand seized to, ii 338
  deeds to lead or declare, ii 330 363
  statute of, ii 332 iv 430
Usurpation of advowson, ii 242
franchises or offices, ii 262
Usura maritima, i 458
Usury, i 454
  laws relative to, ib 463 n
bind securing purchase-money of foreign
estate, ib 464 n
  offence of, iv 116 156
Usus fructus, ii 327
Uterius frater, ii 232
Uttering false money, iv 89 90
  forged notes what, iv 248 n 250 n
Vacancy of the throne, i 211 213 214
Vacarius, Roger, i 8
Vesting records, ii 128
Vacations, iii 376
Vadium mortuum, ii 157
  vivum, ib 157
Vagabonds, iv 160
Vagrants, iv 170 n
  idol and disorderly persons, ib
rogues and vagabonds, ib
Vagrants, incorrigible rogues, iv 176
  harbouring, ib
Valor beneficiarum, ii 285
  maritagi, ii 70 n
Valuable considerations, ii 297
Valvators, i 403
Vassal, ii 53
  its etymology, ii 53 n
  not protected by magna charta, ib 93 n
  lord seized damages, recovered by, ib 94 n
  last claim of villemente, ib 96 n
Venire facias, writ of, iii 353 app 611 iv 318
  app 3
Ventre inspiciendo, writ de, i 456
  sa mere, children in, ib 130
Venue, iii 294
  when changed, ib 294 384
  local in action against magistrate, i 354 n
in criminal cases, iv 303, 4
  where offence commenced or con
summated, ib 305 n
  in county, where defendant arrested,
  ib n
  in adjacent county, ib n
  in any county, ib n
  when offence on boundaries of coun
ties, ib n
  when offence on high seas, ib n
  when offence beyond seas, ib n
Verberation, iii 120
Verderors, ib 71 72
Verdict, ib 377 450 iv 360 app
  false, iii 402 iv 140
  in action, indictment on, iv 302 n
Verge of the court, iii 76
Vert, venison, and covert, injuries to, iii 71
Vested legacy, ii 513
  remainder, ii 169
Vicar, i 387 see Clergy
  his power and duty, i 387 n
  rights, &c. in general, ib 387
vicarages, when established, i 387 iv 428
  when presentation to parsonage dissolves vi
carage, i 386 n
  of rector and vicar to same benefice, ib 386 n
  vicarage derived out of parsonage, ib 387 n
  vicarages, date of their establishment, ib n
  no vicar where benefices not appropriated,
  ib 388 n
  age, &c. required for admission to deacon's
  orders, ib n
abstract of acts enforcing residence of cler
gy, ib 392 n
raising funds to build or repair, &c. parson-
age-house; ib n
chaplains, manner the king and each noble-
man may have, ib n
cession and lapse by institution to second
  living, ib n
commendations to bishops, ib 393 n
  maritagi, i 70 n
when bishop may refuse to accept resigna
  tion, ib n
Vicarial tithes, i 388
Vice-admiralty courts, iii 69
Vicinage, common because of, ii 33
Vicothel, writs, iii 238
Vidames, i 403
View by jurors, iii 358
Vill, i 114
Villeine, ii 92 93
  in gross, ib 93
  regardant, ib
  services, ib 61
INDEX.

Villein socage, ii 61 98
Villenage, ib 89 92
privileged, ib 98
pure, ib 61 90
Villenous judgment, iv 136
Vinco matrimonii, divorce a, iii 94
Viner, Mr., his institution, i 27
Violating the queen, &c. i 223 iv 81, see Rape
Violent presumption, iii 371
Virge, tenant by, ii 148
Viscount, i 398
Vistation, books of heralds, iii 105
Visitor, i 480
of civil corporations, ib 481
colleges, ib 482
hospitals, ib
Visme, iii 294 iv 350
Vivo radiis, estate in, ii 157
Voir dire, oath of, iii 333
Voluntary escape, ib 415 iv 130
jurisdiction, iii 66
manslaughter, iv 191
oaths, ib 137
waste, ii 281
Voucher, in recoveries, ii 358 359 app 5
Voucher, in recoveries, ii 355 app 5
Vulgaris purgatio, iv 342
Wager of battel, iii 337 339 app 3 iv 346 424
law, iii 341 iv 414 424
on races when void, &c. ib 173 and Wagering policies, ii 460
Wages of members of parliament, i 174
of servants, ib 428
Waifs, ib 297
Wainage, iv 379
Wales, i 93 iv 427 431
courts of, iii 77
part of England, i 99
prince of, ib 223
compassing and imagining his death, ib 223 iv 76
princess of, i 223
violating her, ib 223 iv 81
venue in criminal cases in, iv 304
Wandering soldiers and mariners, iv 165
Want, iv 31
War and peace, right of making, i 257
articles of, i 415
levying against the king, iv 81 -
Warlike stores, embazement of, iv 101 and n
Ward by constables, &c. i 356 iv 292 426
Wards and liveries, court of, iii 258
Wardship in chivalry, ii 67 iv 418
copyholds, i 97
socage, ii 87
Warehousemen, law relative to, ib 451 n
Warrant, i 137 iv 290
of attorney, to confess judgment, iii 397
Warrantia Chartae, ib 300
Warranty of chattels personal, ii 451
goods sold, iii 166
lands, iii 300 app
Warren, beasts and fowls of, ii 38
robbery of, iv 236
Waste, by disguise, iv 144
Waste, see Landlord and Tenant, ii 281 iii 223
how prevented in equity, iii 438
impeachment of, ii 283
lands, ib 14 90
who may commit, iii 223 n
who may bring action of, ib 224 n
Waste, modern form of action for, iii 226 n
writ of, ib 227
by fire, ib 228 n
lord may by custom grant to hold as copyhold, ib 19 n
equity will restrain malicious waste, ib 123 n
by tenant for life cutting timber, ib 282 n
power of, ib 283 n
Watch, i 356 iv 292 420
Watchman, his duty on arrest, iv 206 n
Water, ii 14
Watercourse, right to, ib 19 n 403 n
action for injuries to, iii 218
offences as to, iv 167
Watermen overloading their boats, iv 192
plying on Sunday, ib 64 n
Water-ordal, ib 342
Ways, ii 35
and means, committee of, i 307
disturbance of, iii 241
in what right claimed, &c. ii 35 n
mode of using way by grant, ib n
way by custom, ib n
by necessity, ib n
by express reservation, ib n
Weights and measures, i 274 iv 275 278 424
false, iv 157
Weregild, ii 188 313 413
Wells, property in, ii 5
West-Saxon-lage, iv 65 iv 412
Wharits, i 364
Wharfingers, laws relative to, ii 451 n
Whipping, iv 372 377
White rents, ii 42
Whole blood, ib 227
Widow's chamber, ib 518
Wife, i 433
Livery of, iii 140
Will, defect of, ib 20
estates ai, ii 145
of the lord, ib 95 147
vicious, iv 21
Wills and testaments, ii 11 12 373 489 490 iv 430
and testaments, of title by, in general, ii 373
489 499
at what age party may make, ib 497 n
by idiots, &c. ii 497
fraud on testator, ib
by femce-covert, ib 375 497, 8
what words in, pass fee simple, ib 109 n
neglect of surrender to uses, aided, ib 369 n
execution of, according to statute, ib 376 n
attestation of, ib 377 n
witness having interest, how admitted to prove, ib n
witness to, may prove testator insane, ib 378 n
estates, though not so devised, chargeable with debts, ib n
when lands acquired subsequent to, pass by, ib n
death of devisee before testator, effect of, ib 379 n
effect to be given to intention of testator, ib n
same estate twice devised in same, ib 381 n
heir disinherited only by plain intention, &c n
cross remainders in, ib n
rule as to implications in, ib 382 n
bequest of chattels real or personal in remainder, ib 397 n
bequests in joint-tenancy and tenancy in common, ib 309 n
codicil annexed to will or not, ib 500 n
INDEX.

Wills, incomplete writing, when may be valid will, ii 501 n
cancellation by testator, ib 502 n
revocation of, ib 376 n 378
by posterior will, ib 502 n
infant sole executor, ib 503 n
proof of per testes, what, ib n
of soldiers and seamen exempt from stamp-duty, i 417 n
ecclesiastical jurisdiction in, iii 95 n
jurisdiction of, equity in, ib
old wills, proof of, iii 367 n
forgery of, iv 248 249 n
Winchester measure, i 374
Window tax, ib 325
Windows, see ancient Lights, Nuisance
obstruction of, legal or illegal, ii 402
Wine, adulteration of, iv 162 and n
licences, i 288
Witchcraft, iv 60 436
Withdrawing from allegiance, ib 87
Withernam, i 129 146 413
Witnesses, ib 369
for prisoners, iv 359 441
tampering with, ib 126
their expenses, iii 369 iv 362
to deeds, ii 307
wills, ib 501 376 377 n
trial by, iii 336
two, where necessary, ib 370 iv 350
must answer, though it subject them to action, i 87 n
when husband and wife, not to be for each other, ib 443 n
when free from arrest, iii 289 n
number in one subpoena, ib 309 n
oath of, ib n
who are competent to be, ib n
answering questions disgracing them, ib 370 n
bound to disclose secrets, ib n
in equity one insufficient, ib 371 n
examined on interrogatories, ib 383 n
commission to examine, ib 439 n
recognizance to give evidence, iv 296 n

Wittena-gemote, i 148 iv 412
Women, appeals by, iv 424
children, stealing or seduction of, ib 209
jury of, iii 362 iv 305
punishment of, for high treason, ib 93 n
liable as rioters, ib 146 n
Woodmote, court of, iii 71
Wood-stealing, iv 233
Wool, &c. transporting, ib 128 154 and n
Words, action for, iii 123, see Slander
costs in actions for, iii 400
treasonable, iv 79
in law, how expounded, i 59 n
of statutes must prevail, i 81 88 n
Workhouse, iv 371
Wounding, iii 121 iv 216
Wreck, i 291 iii 106
Wrecks, plundering, iv 239 304
Writ, iii 272
close, i 346
of election to parliament, i 177
peerage, i 400
patent, ii 346
Writs, forms of, iii 51 183 273 iv 427
Writing of a deed, ii 297
treason by, iv 80
Writings, stealing of, ib 234
Written conveyances, ii 297
evidence, iii 368
Wrongs, i 122
private, iii 2
public, iv 1
Year, see Time, ii 140
and day, in appeals of death, iv 315 335
continual claim, iii 175
copyhold forfeiture, ii 294
catrays, i 297
fines, i 354
murder, iv 197 306
wrecks, i 292
day and waste, ii 252 iv 385
Year Books, i 72
Years, estates for, ii 140
Yeomen, i 406
York, custom of the province of, ii 518

END OF VOL. II.