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COMMENTARIES

ON THE

Laws of England.

BOOK THE THIRD.

BY

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ONE OF THE JUSTICES OF HIS MAJESTY'S

COURT OF COMMON PLEAS.

THE SIXTEENTH EDITION,

WITH THE LAST CORRECTIONS OF THE AUTHOR;

AND WITH NOTES

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COMMENTARIES

ON THE

LAWS OF ENGLAND.

BOOK THE THIRD.

OF PRIVATE WRONGS.

CHAPTER THE FIRST.

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.

[a] Introd § 2.

[b] *Sanctio justa, jubens honesta, et prohibens contraria.* Cic. 11. *Philipp.* 12. (1)

Bract. *l.* I. *c.* 3.

[c] Book I. ch. 1.

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(1) I imagine this to be a misquotation of the following passage: — Est enim lex nihil aliud, nisi recta, et à numine Deorum tracta ratio, imperans honesta, prohibens contraria *Phil* xi 12.

WRONGS are divisible into two sorts or species; *private wrongs*, and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries*: the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemesnors*. To investigate the first of these species of wrongs, with their legal remedies, will be our employment in the present book; and the other species will be reserved till the next or concluding volume.

THE more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws by which rights are defined, and wrongs prohibited. This remedy is therefore principally to be sought by application to these courts of justice; that is, by civil suit or action. For which
[3] reason our chief employment in this volume 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,

I. The *defence* of one's self, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace, which happens, is chargeable upon him only who began the affray [d]. For the law, in this case, respects the passions of the human mind (2); and (when external violence is offered to a man himself, or those to whom he bears a near connection) makes it lawful in him to do himself that immediate justice, to which he is [4]

[d] 2 Roll. Abr. 546. 1 Hawk. P.C. c.60. s.23.

(2) It is, perhaps, too much to say that the law, in these cases, "respects human passions," or permits the injured party to do himself "justice;" the "passions" prompt to revenge, and "justice" implies punishment to the aggressor, and amends to the person injured; but the law, as it is stated truly a few lines lower down, permits self-defence only, and warrants nothing farther.

prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say, to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. Self-defence, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society. In the English law, particularly, it is held an excuse for breaches of the peace, nay even for homicide itself: but care must be taken, that the resistance does not exceed the bounds of mere defence and prevention; for then the defender would himself become an aggressor.

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

e 3 Inst. 134 Hal. Anal. § 46

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.

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

IV. A FOURTH species of remedy by the mere act of the party injured, is the *abatement*, or removal of *nusances*. What nusances are, and their several species, we shall find a more proper place to inquire under some of the subsequent divisions. At present I shall only observe, that whatsoever unlawfully annoys or doth damage to another is a nusance; and such nusance 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 antient lights, which is a *private* nusance, I may enter my neighbour's land, and peaceably pull it down [h]. Or if a new gate be erected across the public highway, which is a *common* nusance, any of the king's subjects passing that way, may cut it down and destroy it [i]. And the reason why the law allows this private and summary method of doing one's self [6] 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.

[f] 2 Roll Rep. 55, 56. 208. 2 Roll. Abr. 565, 566.

[g] 5 Rep. 101. 9 Rep. 55.

[h] Salk. 459.

[i] Cro. Car. 184.

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; or, distreining another's cattle *damage-feasant*, that is, doing damage, or trespassing, upon his land. The former intended for the benefit of landlords, to prevent tenants from secreting or withdrawing their effects to his prejudice; the latter arising from the necessity of the thing itself, as it might otherwise be impossible at a future time to ascertain whose cattle they were that committed the trespass or damage.

As the law of distress 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 distreined; 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 wrong-doer 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 volume[k], that distresses were incident by the common law to every *rent-service*, and by particular reservation to *rent-charges* also; but not to *rent-seck*, till the statute 4 Geo. II. c. 28. extended the same remedy to all rents alike, and thereby in effect abolished all material distinction between them. So that now we may lay it down as an universal principle, that a distress may be taken for any kind of rent in arrear; the detaining whereof
[7] beyond the day of payment is an injury to him that is entitled to receive it. (3) 2. For neglecting to do suit to the lord's

[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.

(5) But to entitle a party to distrein, there must be rent due in the legal sense of that word. One man may be in the possession of another's house or

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 sustained. 5. Lastly, for several duties and penalties inflicted by special acts of parliament, (as for assessments made by commissioners of sewers[o], or for 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 antient distress at common law, as being repleviable and the like; but more resemble the common law process of execution, by seising 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, 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*

[l] Bro. Abr. *tit. Distress.* 15.
[m] Co. Litt 96.
[n] Brownl. 36.
[o] Stat. 7 Ann. c.10
[p] Stat. 43 Eliz. c. 2.
[q] 1 Burr, 589.
[r] Co. Litt. 47.

or land with his consent, and may be bound to render him such a sum for the use and occupation of it, as a jury shall deem to be a proper equivalent for the rent; but if there be no actual demise, nor any contract for a demise amounting to as much, and no fixed rent has been agreed on or paid, the owner cannot distrein. For in his avowry to an action of replevin for such distress, he would be bound to state an actual tenancy, and the definite terms of it, which it would be impossible to do under such a relation as above supposed. — *Hegan* v. *Johnson*, 2 Taunt. 148 *Dunk* v. *Hunter*, 5 B. & A. 322.

distreined is presumed to be the property of the wrong-doer, it will follow that such things wherein no man can have an absolute and valuable property (as dogs, cats, rabbits, and all animals *feræ naturæ*) cannot be distreined. Yet if deer
[8] (which are *feræ naturæ*) are kept in a private inclosure 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 distreined for rent-arrere; and also, if a horse, though a man be riding him, be taken *damage-feasant*, or trespassing in another's grounds, the horse (notwithstanding his rider) may be distreined and led away to the pound[t]. (4) Valuable things in the way of trade shall not be liable to distress. (5) As a horse standing

[s] Davis *v.* Powel, *C. B. Hil* 11 *Geo. II.* [t] 1 Sid. 440.

(4) In the case cited for this position, it is added, that it seems the horse shall be led to the pound *with the rider* upon him. But the whole passage is only an extra-judicial opinion of the Chief Justice Kelynge, and is directly contrary to a case cited from the Year Book 7 E 3 in Rolle's Abridgment, tit. Distres. A. pl 4., and the point being expressly brought under consideration in the case of *Storey* v. *Robinson*, 6 T R 138, it was there determined that such a distress would be illegal, as leading almost inevitably to a breach of the peace. — See the authorities on the subject collected in Mr. Hargrave's notes, 293 & 294. Co. Litt. 47. a.

(5) This expression is inaccurate, but the examples which follow show the meaning of the author, and the principle on which it rests. In Mr. Christian's Blackstone it is observed in a note that "cattle driven to a distant market, and put into land to rest for one night, cannot be distreined for rent by the owner of the land," — for which position a MS. case of *Tate* v. *Gleed* is cited. The contrary was held even in a case in which the landlord had consented to the cattle being turned in to graze for a night, *Fowkes* v. *Joyce*, 3 Lev. 260.; and the owner of the cattle was driven into a court of equity for relief. The decision in this last case would probably not now be recognised as law; and that of *Tate* v. *Gleed* is certainly for many reasons expedient to be adopted; but the two cases are very distinguishable, and, in fact, I believe there are many closes of land to be found on the main roads to the metropolis which are scarcely used in any other way than as nightly resting-places for drovers' herds. As to these the decision in *Tate* v. *Gleed* would go entirely to deprive the landlord of his best remedy for the rent.

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 common presumption not to belong to the owner of the house, but to his customers. But, generally speaking, whatever goods and chattels the landlord finds upon the premises, whether they in fact belong to a tenant or a stranger, are distreinable by him for rent: for otherwise a door would be open to infinite frauds upon the landlord; and the stranger has *his* remedy over by action on the case against the tenant, if by the tenant's default the chattels are distreined, so that he cannot render them when called upon. 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-arrere by the landlord [u]. So also if the stranger's cattle break the fences, and commit a trespass by coming on the land, they are 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 [v]. But if the lands were not sufficiently fenced so as to keep out cattle, the landlord [9
cannot distrein 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 risen up to feed; which in general is held to be one night at least: and then the law presumes, that the owner may have notice whither his cattle have strayed, and it is his own negligence not to have taken them away. (6) 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

[u] Cro. Eliz 549. [v] Co. Lit. 47.

(6) This case supposes that the duty of repairing the fences lies neither on the distreinor, nor on the owner of the cattle distreined; in this case the distreinor is not in fault, and therefore is not bound to give actual notice, nor yet is the owner of the cattle any way to blame, and therefore the law allows him that reasonable time, during which it is fair to presume that he may receive notice from some other quarter.

neglects to remove them [w]: for the law will not suffer the landlord to take advantage of his own or his tenant's wrong. 4. There are also other things privileged by the antient common law; as a man's tools and utensils of his trade, the axe of a carpenter, the books of a scholar, and the like: which are said to be privileged for the sake of the public, because the taking them away would disable the owner from serving the commonwealth in his station. So, beasts of the plough, *averia carucae*, and sheep, are privileged from distresses, at
10] common law [x] (7); while dead goods, or other sort of beasts, which Bracton calls *catalla otiosa*, may be distreined. But as beasts of the plough may be taken in execution for debt, so they may be for distresses by statute, which partake of the nature of executions [y]. And perhaps the true reason, why these and the tools of a man's trade were privileged at the common law, was because the distress was then merely intended to compel the payment of the rent, and not as a satisfaction for its non-payment: and therefore, to deprive the party of the instruments and means of paying it, would counteract the very end of the distress [z]. 5. Nothing shall be distreined for rent, which may not be rendered again in as good plight as when it was distreined: for which reason milk, fruit, and the like cannot be distreined, a distress at common law being only in the nature of a pledge or security, to be restored in the same plight when the debt is paid. So, antiently, sheaves or shocks of corn could not be distreined, 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

[w] 2 Lutw 1580.
[x] Stat. 51 Hen. III. st. 4. *de distructione scaccaria*
[y] 1 Burr. 589
[z] *Ibid.* 588.

(7) This privilege from distress, both as to utensils of trade and beasts of the plough, holds good only under two conditions. They must be in actual use at the time of the distress made, and that reduces them under a former head of privilege, the ground of which is the preservation of the public peace; and there must be other distreinable goods or chattels on the premises at the time. This was expressly determined as to utensils of trade in a modern case, 4 T. R. 565.; and as to beasts of the plough it was clear from all the old authorities. See 2 Inst. 132.; the writ of trespass given F. N. B. 90. B. Dyer, 312. a.

ricks, or otherwise, may be distreined as well as other chattels. 6. Lastly, things fixed to the freehold may not be distreined; as caldrons, windows, doors, and chimney-pieces: for they savour of the realty. 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. (8)

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 distreinor has no other power than to retain them till satisfaction is made. But distresses for rent arrere 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 antient 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.

(8) To these heads of things not distreinable may be added, all goods in the custody of the law, whether as being already distreined *damage-feasant*, or taken in execution. In this last case, however, so long as they remain on the premises, the statute 8 Ann. c. 14. gives the landlord a beneficial lien on them; for which see post. p. 417.

The words of the statute 11 G 2 c 19. are "corn, grass, hops, roots, fruits, or other product growing on the estate demised;" the court of C. P. has determined that the general word "product" does not extend beyond things of a similar nature with those before specified, to all of which the process of becoming ripe, and of being cut, gathered, made, and laid up when ripe, was incidental. It was held therefore that nursery trees and shrubs could not be distreined. *Clark* v. *Gaskarth*, 8 Taunt 431.

In the first place, then, all distresses must be made *by day*, 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 distrein within six months after the determination of the lease; provided his own title or interest, as well as the tenant's possession, continue at the time of the distress. If the lessor does not find sufficient distress on the premises, formerly he could resort 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 distrein any goods of his tenant, carried off the premises clandestinely, wherever he finds them within thirty days after, unless they have been *bona fide* sold for a valuable consideration; and all persons privy to, or assisting in, such fraudulent conveyance, forfeit double the value to the landlord. The landlord may also distrein the beasts of his tenant, feeding upon any commons or wastes, appendant or appurtenant to the demised premises. The landlord might not formerly break open a house, to make a distress, for that is a breach of the peace. But when he was in the house, it was held that he might break open an inner-door [d]: and now [e] he may, by the assistance of the peace-officer of the parish, break open in the 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. (9)

[a] Co. Litt. 142.
[b] Stat. 8 Ann. c 14
[c] Stat 8 Ann. c. 14. 11 Geo. II. c. 19.
[d] Co. Litt. 161. Comberb. 17.
[e] Stat. 11 Geo. II. c. 19.

(9) Where the goods are locked up or concealed only *on* the premises, the landlord is not within the statute, and cannot break open a house to get at them. And though the landlord's right of distress for rent extends generally over all distreinable goods, which are upon the premises at the time of distress made, whose property soever they may be, yet his right under this statute of George the Second is limited expressly by the words to the tenant's own goods, and in a plea justifying under it, it must be averred that the goods taken were the tenant's property. 5 M. & S. 38.

The

WHERE a man is entitled to distrein for an entire duty, he ought to distrein for the whole at once; and not for part at one time, and part at another [f]. But if he distreins for the whole, and there is not sufficient on the premises, or he happens to mistake in the value of the thing distreined, and so takes an insufficient distress, he may take a second distress to complete his remedy [g].

DISTRESSES must be proportioned to the thing distreined for. By the statute of Marlbridge, 52 Hen. III. c. 4. if any man takes a great or unreasonable distress, for rent-arrere, he shall be heavily amerced for the same. As if [h] the landlord distreins two oxen for twelve-pence rent; the taking of *both* is an unreasonable distress; but, if there were no other distress nearer the value to be found, he might reasonably have distreined *one* of them; but for homage, fealty, or suit and

[f] 2 Lutw 1532.
[g] Cro. Eliz 13 Stat 17 Car. II c. 7. 1 Burr. 590
[h] 2 Inst. 107.

The words of the statute are "*fraudulently or clandestinely* convey away his goods to prevent the landlord from distraining the same *for arrears of rent;*" I am not aware that these words have ever received a construction from the express decision of any court; in a case at Nisi Prius, Eyre C J. ruled that they did not extend to a case where the goods were removed openly and before the rent was in arrear, though the object was to prevent their being distreined *Watson* v *Main*, 3 Esp p 15. Lord Ellenborough in *Furneaux* v. *Fotherby*, 4 Campb 137 doubted of the latter point; and certainly as to both it may be fairly contended, that to remove goods fraudulently, though not clandestinely, and whether the rent be actually in arrear or not, is within both the letter and the spirit of the statute, if it be done to prevent the landlord from distreining them for arrears of rent.

Not only all persons privy to or assisting in such fraudulent conveyance, but the tenant himself also is liable to the forfeiture mentioned in the text. And where the goods so removed do not exceed the value of 50*l.* the statute gives the landlord a summary remedy upon complaint in writing to two justices of the same county, riding, or division, and residing near the place whence the goods were taken, or where they were found; and if the offender refuses to pay the sum adjudged by them at the time appointed, and upon due notice, they may levy the same by distress and sale of his goods, or for want of distress commit him to the house of correction, there to be kept to hard labour for six months, unless the money shall be sooner paid. This power in the justices is subject to an appeal to the quarter sessions, whose judgment is final.

service, as also for parliamentary wages, it is said that no distress can be excessive[i]. For as these distresses cannot be sold, the owner, upon making satisfaction, may have his chattels again. The remedy for excessive distresses is by a special action on the statute of Marlbridge, for an action of trespass is not maintainable upon this account, it being no injury at the common law[j].

When the distress is thus taken, the next consideration is the disposal of it. For which purpose the things distreined 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 rescue[k]. But if they be once impounded, even though taken without any cause, the owner may not break the pound and take them out; for they are then in the custody of the law[l]. (10)

A pound (*parcus*, which signifies any inclosure) is either pound-*overt*, that is, open over-head; 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 not above three miles from the place where it was taken. This is for the benefit of the tenants, that they may know where to find and replevy the distress. (11) And by statute 11 Geo. II. c. 19.

[13]

[i] Bro. *Abr. t. Assise* 290. *Prerogative*. 98.
[j] 1 Ventr. 104 Fitzgibb. 85. 1 Burr. 590.
[k] Co. Lit. 160, 161.
[l] *Ibid.* 47.

(10) It is said that if the cattle of a commoner be wrongfully taken as *damage feasant*, and impounded, and he immediately pursues them, and finds them in a pound *unlocked*, he may lawfully retake them, Co Litt 47. b; and Mr. Hargrave, in a note on the passage, cites from Lord Hale's MS. a case in which the defendant pleads that he found the cattle *sans nul maner de fermure, ne serrure, n'autre engine* The authority cited by Lord Coke from the Year Book of 3 E. 3 I have not been able to find; but the case appears to be contrary to the present recognised principle of the law.

(11) And by the same statute it is enacted, that no cattle or other goods distreined or taken by way of distress for any manner of cause at one time, shall be impounded at several places, whereby the owner or owners of such distress shall be constrained to sue several replevies for the delivery of the said distress so taken at one time.

which was made for the benefit of landlords, any person distreining 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 distreinor must give notice to the owner: and, in both these cases, the owner, and not the distreinor, is bound to provide the beasts with food and necessaries. But if they are put in a pound-covert, as in a stable or the like, the landlord or distreinor must feed and sustain them [m]. A distress of household goods, or other dead chattels, which are liable to be stolen or damaged by weather, ought to be impounded in a pound-covert, else the distreinor must answer for the consequences.

When impounded, the goods were formerly, as was before observed, only in the nature of a pledge or security to compel the performance of satisfaction; and upon this account it hath been held [n], that the distreinor is not at liberty to work or use a distreined 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 distreining, by replevying the chattels. To *replevy* (*replegiare*, that is, to take back the pledge) is, when a person distreined 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 distreinor. 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 [14
answers the same end to the distreinor as the distress itself; since the party replevying gives security to return the distress, if the right be determined against him.

This kind of distress, though it puts the owner to inconvenience, and is therefore a punishment to *him*, yet, if he continues obstinate and will make no satisfaction or payment,

[m] Co. Litt. 47. [n] Cro. Jac. 148.

is no remedy at all to the distreinor. But for a debt due to the crown, unless paid within forty days, the distress was always saleable at the common law [o]. And for an amercement imposed at a court-leet, the lord may also sell the distress [p]: partly because, being the king's court of record, its process partakes of the royal prerogative [q]; but principally because it is in the nature of an execution to levy a legal debt. And so, in the several statute-distresses before mentioned, which are also in the nature of executions, the power of sale is likewise usually given, to effectuate and complete the remedy. And, in like manner, by several acts of parliament [r], in all cases of distress for rent, if the tenant or owner do not, within five days after the distress is taken, and notice of the cause thereof given him, replevy the same with sufficient security; the distreinor, 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 arrere, by the mere act of the party himself, *viz.* by distress, the remedy given at common law, and sale consequent thereon, which is added by act of parliament.

Before I quit this article, I must observe, that the many particulars which attend the taking of a distress, used formerly to make it a hazardous kind of proceeding: for if any one irregularity was committed, it vitiated the whole, and made the distreinors trespassers *ab initio* [s]. 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; and not even that, if tender of amends is made before any action is brought.

VI. The seising of heriots, when due on the death of a tenant, is also another species of self-remedy; not much

[o] Bro. Abr. *t. Distress.* 72.
[p] 8 Rep. 41.
[q] Bro. *Ibid.* 12 Mod. 330.
[r] 2 W. & M. c. 5. 8 Ann. c. 14. 4 Geo. II. c. 28. 11 Geo. II. c. 19.
[s] 1 Ventr. 37.

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 distrein for this, as well as seise; but for heriot-custom (which sir Edward Coke says[t] lies only in *prender*, and not in *render*) the lord may seise the identical thing itself, but cannot distrein any other chattel for it.[u] (12) The like speedy and effectual remedy, of seising, 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 seise, 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 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] By several late statutes, (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

[t] Cop. § 25.
[u] 9 Rep. 79.
[w] Cro. Eliz. 590. Cro. Car 260.

For the distinction between heriot-service and heriot-custom, see ante, Vol. II. p. 422. The latter clause of the sentence in the text, which denies the lord the right of distreining for heriot-custom, seems not fully proved by the cases cited, but the law is laid down as stated in Bro. Abr. Harriots & Mortuaries, pl. 6, 7.

sufficient amends to the party injured is a bar of all whether he thinks proper to accept such amends or no.

II. Arbitration is where the parties, injuring and injured, submit all matters in dispute, concerning any personal chattels or personal wrong, to the judgment of two or more *arbitrators*; who are to decide the controversy: and if they do not agree, it is usual to add, that another person be called in as *umpire*, (*imperator* or *impar*[x],) to whose sole judgment it is then referred: or frequently there is only one arbitrator

Whart. *Angl. sacr.* i. 772. Nicols. Scot.

(13) That is, of all such actions as are mentioned in those statutes respectively; what these are in general, may be seen in Bacon's Abr. Title, Tender, P.

It would lead me far beyond the limits of a note to lay down precisely in what cases accord and satisfaction will be a good bar to an action, and in what cases not, with the reasons, often extremely subtle, in each case. The general principle is, that it is a good bar, where the party seeks pecuniary damages only, or conjointly with the restitution of a chattel real or personal, for some personal wrong, or the breach of some contract whether by parol or specialty; but that it is not a good bar, where the object is the recovery of a freehold, or where the admission of it would operate to discharge a subsisting contract under seal.

To make an accord sufficient in cases where such a plea is available, the following rules are important to be observed.

1st. It must be in full satisfaction of the injury complained of, and must leave no part uncovered; thus, in trespass for taking cattle, an accord that the plaintiff should have his cattle again would be insufficient, for mere restitution leaves uncovered the damage sustained by the removal, and intermediate loss of possession

2d. It must be complete and executed; a promise to give, and an agreement to accept something at a future day will not avail; nor will it be better, if the day be past, and the defendant at the day tendered the performance of the agreement, which the plaintiff refused to accept.

3d. It must be to give or do something which has legal value.

And 4th. That value must not upon the face of it, and of necessity be less than that of the thing, in lieu of which it is given or done; thus, if defendant has promised to deliver 100 bushels of wheat of a certain quality at a certain time and place, and failed, it would be no answer to an action to state plaintiff's acceptance of 50 bushels of the same quality, and at the same time and place in satisfaction thereof But where the inferiority is not necessary nor upon the face of the thing, no actual inferiority to be made out by evidence is a legal objection, as in the case put: a change of quality, time, or place, might make the 50 equal in value to the 100, and, consequently, a legal satisfaction for the non-delivery of them.

originally appointed. This decision, in any of these cases, is called an *award*. And thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties, or the judgment of a court of justice.[y] But the right of real property cannot thus pass by a mere award[z]: which subtilty in point of form (for it is now reduced to nothing else) had its rise from feodal principles; for, if this had been permitted, the land might have been aliened collusively without the consent of the superior. Yet doubtless an arbitrator may now award a conveyance or a release of land; and it will be a breach of the arbitration-bond to refuse compliance. For, though originally the submission to arbitration used to be by word, or by deed, yet both of these being revocable in their nature, it is now become the practice to enter into mutual bonds, with condition to stand to the award or arbitration of the arbitrators or umpire therein named.[a] 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, 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. And, in consequence of this statute, it

[y] Brownl. 55. 1 Freem. 410.
[z] 1 Roll. Abr. 242. 1 Lord Raym. 115.
[a] Append. No. III. § 6.

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. (14)

(14) For contempt of court, see Vol. IV p 285.

Excellent as the trial by jury undoubtedly is as a mode of investigating the truth, yet there are some cases to which, for various reasons, it is not applicable. Thus, when long and complicated accounts are to be examined, it can hardly be expected that twelve men placed at hazard in the jury-box should be able to determine very accurately upon the allowance of particular items, or to strike a nice balance between the contending demands Again, it will often happen that two parties lay claim to the whole of the same thing as a matter of mere right, which, under proper regulations, might very well suffice for both, and of which it might be ruinous to either to be wholly deprived. A particular instance of this is a stream of water. Yet in such case the verdict of a jury can only determine to whom the right belongs; it cannot look to the consequences, nor make a beneficial division of the use between both. For these and many other reasons it has been a practice of very early date in this country to refer disputes to arbitration. In this way the parties have the benefit of a more deliberate investigation; if the matter be of a scientific nature, or removed from the common information of men, they may select some one to decide it, whose habits have made him conversant with it, and by investing him with more or less power, they may have a decision less single and unbending than that of the law, prospective in its operations, and limiting in detail the future exercise of the disputed rights.

This submission to arbitration might always take place either before or after the commencement of an action; but convenient as it was in many respects, it laboured in early times under some disadvantages, which for a long time very much diminished its frequency. For (not to mention that the courts of law had established subtle and narrow grounds of construction upon awards, and often set them aside upon mere technical and frivolous objections,) it is obvious that in whatever way the parties had bound themselves to the performance of the award, still the arbitrator was not the judge of any court; there was no process to compel obedience, and therefore an obstinate person might still oblige the other party to resort to his action for the original matter in dispute, or to one for the breach of the agreement to perform the award.

In this case was not only all the benefit of the reference lost, but delay and expence were occasioned by it; the party's case was disclosed, and perhaps by the death or departure of some necessary witness, a serious ultimate disadvantage was sustained. On the other hand, the arbitrator might prove wrong-headed or corrupt, and yet as the parties had voluntarily put themselves upon his judgment, the courts would not permit that to be

to be assigned as an excuse for the non-performance of the award, when an action was brought to enforce it, and the party was compelled to obey, or at a great expence to seek relief in a court of equity.

Both these inconveniences have been gradually removed, partly by the enlarged application of legal principles by the courts of laws, and partly by the interference of the legislature. For in the first case, where the submission had taken place after the commencement of an action, the parties were obviously before the court, and within its jurisdiction, a cause was pending, and neither party could regularly or safely suspend the proceedings of the cause, unless by the consent and under a rule of the court. The judges then made it a part of this rule that the parties should perform the award when published, and as disobedience to a rule of the court is contempt of the court, and punished summarily, as all other contempts, by attachment of the person, the court in this case gained a double power, the one direct, the other incidental, but almost equally beneficial. On the one hand it could enforce performance of the award, without suffering the party to be driven to a second action; on the other hand, as the exercise of this power was purely discretionary, it could abstain from it whenever the conduct of the arbitrator could be successfully impeached; and therefore in order to inform its discretion, the court opened its ear to those complaints, which the rules of law prevented it from receiving in shape of a formal plea to the action: nor was this negative relief all that was afforded; for in process of time it came to be held, that as the arbitrator acquired the main sanction of his authority from the rule of court, the same rule gave the court a general superintendence over the award. And therefore though the judges wisely abstained from scrutinizing too nicely the decisions of that authority to which the parties had voluntarily submitted themselves, and refused to examine over again those questions, upon which the arbitrator had come to an honest and deliberate opinion, yet where the award upon the face of it, appeared to be illegal; or there was manifest misbehaviour or error in the arbitrator, they not only refused to enforce performance by attachment, but held themselves empowered, if the application was made within a reasonable time, to set aside the award itself And thus both inconveniences were removed, and the proceedings rendered complete by the judicious interference of the courts, in cases where the pendency of an action had given them jurisdiction

This interference of the courts is said to have commenced in the reign of Charles the second, while Sir John Kelynge presided in the Court of K. B, and it was found so beneficial, that in the reign of William the third the legislature resolved to place arbitrations entered into where no action was pending upon the same footing. Accordingly the 9th & 10th of W. 3. c. 15. was enacted, as stated in the text.

This statute gave a complete remedy to the first inconvenience, the want of a power to compel performance; as to that both classes of submission now stood on the same footing With respect to the second, the giving relief against an illegal or unjust award, the statute in terms confines the objections to the corruption or undue practices of the arbitrator, and also limits the time for making these objections to the last day of the term

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

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

[b] Viner's Abr. *t. executors. D.* 2
[c] 5 Rep 30.
[d] Litt. § 659.
[e] Co. Litt. 358. Cro. Jac. 489.

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

[f] Finch L. 194. Litt. § 683
[g] Co. Litt. 348. 350.
[h] § 661.
[i] Elem. r. 9.
[k] Co. Litt. 349.
[l] Moor. 115. 2 Ander. 286.

action have recovered his antient estate, he shall not recover it by remitter. (1)

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.

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(1) The statute of uses made some alteration in the antient law of remitter. From what Lord Hobart, in *Duncombe* v. *Wingfield*, p. 255, calls the violence of the letter of the statute, the party coming to a defeasible use must take the same estate as he had in the use, though he has both the bad freehold and the good right, without his own fault, and without a remedy by action. This, however, would only apply to the first taker of such estate his issue or next in remainder would take an estate at common law, and might be remitted; and even for the first taker, in some instances, methods are pointed out for avoiding this dilemma of the statute. See Co. Litt. 348. b. and Sanders on Uses and Trusts, vol. i. p.205. 4th edit.

CHAPTER THE THIRD.

OF COURTS IN GENERAL.

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

AND here it will not be improper to observe, that although in the several cases of redress by the act of the parties mentioned in a former chapter[a], the law allows an extrajudicial remedy, yet that does not exclude the ordinary course of justice: but it is only an additional weapon put into the hands of certain persons in particular instances, where natural equity or the peculiar circumstances of their situation require a more expeditious remedy, than the formal process of any court of judicature can furnish. Therefore, though I may defend myself, or relations, from external violence, I yet am afterwards entitled to an action of assault and battery: though I may retake my goods, if I have a fair and peaceable opportunity, this power of recaption does not debar me from my action of trover or detinue: I may either enter on the lands, on which I have a right of entry, or may demand possession by a real action: I may either abate a nuisance by my own authority, or call upon the law to do it for me: I may distrein for rent, or have an action of debt, at my own option: if I do not distrein my neighbour's cattle *damage-feasant*, I may compel him by action of trespass to make me a fair satisfaction; if a heriot, or a deodand, be withheld [23]

[a] Ch. 1.

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 positive 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 the 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
[24] the medium by which he administers the laws, are derived from the power of the crown.[c] For, whether created by act of parliament, or letters patent, or subsisting by prescription, (the only methods by which any courts of judicature[d] can exist,) the king's consent in the two former is expressly,

[b] Co. Litt. 58.
[c] See book I. ch. 7.
[d] Co. Litt. 260.

and in the latter impliedly, given. In all these courts the king is supposed in contemplation of law to be always present; but as that is in fact impossible, he is there represented by his judges, whose power is only an emanation of the royal prerogative.

For the more speedy, universal, and impartial administration of justice between subject and subject, the law hath appointed a prodigious variety of courts, some with a more limited, others with a more extensive jurisdiction; some constituted to inquire only, others to hear and determine; some to determine in the first instance, others upon appeal and by way of review. All these in their turns will be taken notice of in their respective places: and I shall therefore here only mention one distinction, that runs throughout them all; *viz.* that some of them are courts *of record*, others *not of record*. A court of record is that, where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony: which rolls are called the records of the court, and are of such high and 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] And if the existence of a record be denied, it shall be tried by nothing but itself: that is, upon bare inspection whether there be any such record or no; else there would be no end of disputes. But, if there appear any mistake of the clerk in making up such record, the court will direct him to amend it. (1) All courts of record are the king's courts, in right of his crown and royal dignity[f], and therefore no other court hath authority to fine or imprison; so that the very erection of a new jurisdiction with the power of fine or imprisonment makes it instantly a court of record.[g] (2) A court [25]

[e] Co. Litt. 260.
[f] Finch. L. 231.
[g] Salk. 200. 12 Mod. 388.

(1) Within what time the court will give this direction, and under what circumstances and provisions, see post, 407.

(2) The converse of the rule does not hold, for every court of record has not necessarily a general power of fine and imprisonment, as is the case with the court of commissioners of sewers, which is undoubtedly a court

record is the court of a private man; whom the law intrust with any discretionary power over the fortune of his fellow-subjects. Such are the courts-baron to every manor, and other inferior jurisdictions: the proceedings are not enrolled or recorded; but as 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 40*s.* 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

[h] 2 Inst. 311.

[i] Pope Boniface VIII in 6 *Decretal.* *l.* 3. *t.* 16. § 3. speaks of "*procuratoribus, qui in aliquibus partibus* attornata *nuncupantur.*"

[k] Stiernhook *de jure Goth. l.* 1 *c* 6.

court of record, and yet cannot imprison a party (no officer of the court) for a bare disobedience of its orders. 1 Sid. 145 The definition of a court not of record seems to be inadequate, for many courts, which are courts of the king, as king, are not courts of record, as the court of equity in chancery, the admiralty courts, &c. It would seem better to define it, as the converse of a court of record, as not enrolling its proceedings in parchment for a perpetual memorial, nor having *a general* authority to fine and imprison

king's letters patent.[l] This is still the law in criminal
And an idiot cannot to this day appear by attorney,
person[m], for he hath not discretion to em
a proper substitute: and upon his being
court in so defenceless a condition, the judges are [26]
take care of his interests, and they shall admit the
in his behalf that any one present can suggest.[n] But, as in the Roman law, "*cum olim in usu fuisset, alterius nomine agi* "*non posse, sed, quia hoc non minimam incommoditatem habebat,* "*coeperunt homines per procuratores litigare*[o]," so with us, upon the same principle of convenience, it is now permitted in general, by divers antient 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. (3) 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:

[l] F. N. B. 25.
[m] *Ibid* 27.
[n] Bro. Abr. *t. ideat.* 1.
[o] *Inst.* 4. *tit.* 10.

(3) The judges will exercise their summary jurisdiction over the attorneys of the several courts, not merely in cases where they have been employed in the conduct of suits, or any matter purely professional, but "wherever the employment is so connected with their professional cha- "racter, as to afford a presumption that their character formed the ground "of their employment" Thus one attorney has been compelled to give up papers and deeds, which had been placed in his hands as steward for the owner of the estates, to which they refer; and another to pay over money, which he had received when employed to collect the effects of an intestate by the administrator, although he had never been employed by him to prosecute or defend any suits in law or equity. *Hughes* v. *Mayre*, 3 T. R. 275. *In re Aitkin*, 4 B. & A. 47. *Luxmoore* v. *Lethbridge*, 5 B. & A. 898.

and by the statute 22 Geo. II. c. 46. no person shall act as an attorney at the court of quarter sessions, but such as has been regularly admitted in some superior court of record. So early as the statute 4 Hen. IV. c. 18. it was enacted, that attorneys should be examined by the judges, and none admitted but such as were virtuous, learned, and sworn to do their duty. And many subsequent statutes[p] have laid them under farther regulations.

Of advocates, or (as we generally call them) counsel, there are two species or degrees; barristers, and serjeants. The former are admitted after a considerable period of study, or at least standing, in the inns of court[q]; and are in our
[27] old books styled apprentices, *apprentici ad legem*, being looked upon as merely learners, and not qualified to execute the full office of an advocate till they were sixteen years standing; at which time, according to Fortescue[r], they might be called to the state and degree of serjeants, or *servientes ad legem*. How antient and honourable this state and degree is, with the form, splendour, and profits attending it, hath been so fully displayed by many learned writers[s], that it need not be here enlarged on. I shall only observe, that serjeants at law are bound by a solemn oath[t] to do their duty to their clients; and that by custom[u] the judges of the courts of Westminster are always admitted into this venerable order, before they are advanced to the bench; the original of which was probably to qualify the *puisnè* 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];

[p] 3 Jac. I. c. 7. 12 Geo. I. c. 29. 2 Geo. II. c. 23. 22 Geo. II. c. 46. 23 Geo. II. c. 26.

[q] See Vol. I. Introd. § 1.

[r] *de LL. 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 "Observations "touching the antiquity and dignity of "the degree of serjeant at law."

[t] 2 Inst 214.

[u] Fortesc. *c.* 50.

[w] See his letters. 256.

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; 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) may take upon them the protection and defence of any suitors, whether plaintiff or [28]

[x] See his life by Roger North. 37.

[y] *Cod.* 2. 9. 1.

[z] *Ibid* 2. 7 13

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

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

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

[b] Seld. *Tit. of Hon.* 1. 6, 7.

(4) By royal mandate, dated Dec. 14. 54 G 3, the king's attorney and solicitor-general have place and audience before the king's "two antientest serjeants," and, it may be presumed also in consequence, before the king's advocate-general The common serjeant of London by courtesy has precedence next after the recorder

defendant; who are therefore called their *clients*, like the dependants upon the antient 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 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]: as is also laid down with regard to advocates in the civil law[e], whose *honorarium* was directed by a decree of the senate not to exceed in any case ten thousand sesterces, or about 80*l.* of English money.[f] And, in
[29] order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to the unseemly licentiousness of prostitute and illiberal men, (a few of whom may sometimes insinuate themselves even into the most honourable professions,) it hath been holden that a counsel is not answerable for any matter by him spoken, relative to the cause in hand, and suggested in his client's instructions; although it should reflect upon the reputation of another, and even prove absolutely groundless: but if he mentions an untruth of his own invention, or even upon instructions if it be impertinent to the cause in hand, he is then liable to an action from the party injured[g] (5). And counsel guilty of deceit or collusion are punishable by the statute Westm. 1. 3 Edw. I. c. 29. with imprisonment for a year and a day, and perpetual silence in the courts; a punishment still sometimes inflicted for gross misdemesnors in practice[h].

[c] Davis, pref. 22. 1 Ch Rep 38.
[d] Davis, 23.
11 6. 1.
[f] Tac *ann* *l* 11. 7
[g] Cro. Jac 90
[h] Raym 376.

(5) It is important that the grounds upon which this privilege of counsel, as it is called, rests, should not be misunderstood; in a late case they were well stated, and limited, by one of the learned judges of the king's bench. It is in fact the privilege of the client speaking by his counsel, and rests on the broad principle, that no action is maintainable against the party for words spoken *bonâ fide*, and without express malice, in a course of justice. The advocate so far from being entitled to say more than his client would have been allowed to say under the same circumstances, is laid by the presumption of his superior knowledge under greater restraint. To bring an observation within the rule of being spoken "in a course of justice," it should be relevant to the matter in issue; but the client's comparative ignorance of what is or is not so relevant, will often protect him, where the advocate would not stand excused. *Hodgson* v.

CHAPTER THE FOURTH.

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 antient 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 [31] ones (1), 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 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 po-

(1) See post. p. 407. on the subject of appeals from inferior to superior courts.

licy; 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 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
[32] record have in practice obtained a concurrent original jurisdiction with these; and as there is, besides, a power of removing plaints or actions thither from all the inferior jurisdictions; upon these accounts (amongst others) it has happened that these petty tribunals have fallen into decay, and almost into oblivion; whether for the better or the worse, may be 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

[a] Mod Un. Hist xxxviii 469 [c] Exod. c 18

those of a jurisdiction merely *criminal* I shall not at present concern myself,) will be by beginning with the lowest, and those whose jurisdiction, though public and generally dispersed throughout the kingdom, is yet (with regard to each particular court) confined to very narrow limits; and so ascending gradually to those of the most extensive and transcendent power.

I. The lowest, and at the same time the most expeditious, court of justice known to the law of England is the court of *piepoudre, curia pedis pulverizati*; so called from the dusty feet of the suitors; or, according to sir Edward Coke [d], because justice is there done as speedily as dust can fall from the foot; — upon the same principle that justice among the Jews was administered in the gate of the city [e], that the proceedings might be the more speedy, as well as public. But the etymology given us by a learned modern writer [f] is much more ingenious and satisfactory; it being derived, according to him, from *pied puldreaux*, (a pedlar, in old French,) and therefore signifying the court of such petty chapmen as resort to fairs or markets. It is a court of record, incident to every fair and market: of which the steward of him who owns or has the toll of the market, is the judge; and its jurisdiction [33 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 the fair continues longer. The court hath cognizance of all matters of contract that can possibly arise within the precinct of that fair or market; and the plaintiff must make oath that the cause of action arose there [g]. From this court a writ of error lies, in the nature of an appeal, to the courts at Westminster [h]; which are now also bound by the statute 19 Geo. III. c. 70. to issue writs of execution, in aid of it's process, after judgment, where the person or effects of the defendant are not within the limits of this inferior jurisdiction; which may possibly occasion the revival of the practice

[d] 4 Inst. 272.
[e] Ruth, c. 4.
[f] Barrington's observat. on the stat. 423. 4th ed.
[g] Stat. 17 Edw. IV. c. 2.
[h] Cro. Eliz. 773.

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 it's process, or execute it's judgments, on both, or perhaps either of the parties; and therefore unless this court had been erected, the complaint 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[1]: 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 antiently called: for that it is held before the
34] 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 freeholder's court, was composed of the lord's tenants, who were the *pares* of each other, and were bound by their feodal tenure to assist their lord in the dispensation of domestic justice. This was formerly held every three weeks; and it's 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 three marks, that bounded the jurisdiction of the antient Gothic courts, in their lowest instance, or *fierding-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

[i] Co. Litt. 58.
[k] Book 2. ch. 4. ch. 6. and ch. 22.
[l] Finch. 248.
[m] Stiernhook *de jure Goth. l.* 1. *c.* 2.

called a *tolt* [n], "*quia tollit atque eximit causam e curia ba-*
"*ronum* [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 loquelam.* (2)

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 all [35
points, except that in point of territory it is of a greater jurisdiction [s]. This is said by sir Edward Coke to have been derived out of the county-court for the ease of the people, that they might have justice done to them at their own doors, without any charge or loss of time [t]; but its institution was probably coeval with that of hundreds themselves, which were formerly observed [v] to have been introduced, though not

[n] F. N B. 3, 4 See Append. No I. § 2.
[o] 3 Rep. pref.
[p] See Append No I § 3.
[q] F. N. B 4. 70 Finch. L 444, 445.
[r] F N B. 18.
[s] Finch. L 243. 4 Inst. 267.
[t] 2 Inst. 71.
[v] Vol I. p 116.

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(2) Suits might be commenced in these inferior courts either by original writ out of Chancery, or without it, simply by lodging a plaint of the wrong complained of. The writ of *pone* was adapted to the former case, that of *accedas ad curiam* to the latter. Both are commands from the king to the sheriff to remove the plaint to the superior court, and to summon the party who sues or is sued, as the case may be, to attend there to prosecute or defend the same The delivery of either of these writs to the proper officer of the inferior court, is a bar to any further proceeding there. The writ of *pone* merely directs the sheriff to bring before the superior court the plaint and the writ whereon it is founded, because the writ is a record. See the form, F. N. B. 70 The writ of *accedas ad curiam* commands the sheriff to take with him four discreet and lawful knights of his county, and in his own proper person go to the court of the lord, and in that full court cause to be recorded the plaint which was before not of record, and then to bring the record before the superior court.

invented by Alfred, being derived from the polity of the antient Germans. The *centeni*, we may remember, were the principal inhabitants of a district composed of different villages, originally in number a *hundred*, but afterwards only called by that name [u]; and who probably gave the same denomination to the district out of which they were chosen. Cæsar speaks positively of the judicial power exercised in *their* hundred-courts and courts-baron. "*Principes regionum, atque pagorum,*" (which we may fairly construe, the lords of hundreds and manors,) "*inter suos jus dicunt, controversiasque* "*minuunt* [w]." And Tacitus, who had examined their constitution still more attentively, informs us not only of the authority of the lords, but of that of the *centeni*, the hundredors or jury; who were taken out of the common freeholders, and had themselves a share in the determination. "*Eligun-* "*tur in conciliis et principes, qui jura per pagos vicosque* "*reddunt: centeni singulis, ex plebe comites, consilium simul et* "*auctoritas, adsunt* [x]." This hundred-court was denominated *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. (3)

[u] *Centeni ex singulis pagis sunt, idque ipsum inter suos vocantur, et, quod primo numerus fuit, jam nomen et honor est* Tac. *de Mor Germ c.* 6.

[w] *de Bell. Gall l* 6 *c.*23

[x] *de Morib. German c* 13

[y] Stiernhook, *l* 1. *c.*12

(3) There is scarcely any point of legal antiquity more obscure than the history and functions of the hundred-court It seems certainly to have been originally a king's court, and to have been held by some subordinate officer of the sheriff. But as holding a court was a source of profit, it was common both for the sheriff to let his hundred-courts to farm, and for the crown to sever them from his jurisdiction either wholly or in part, and to grant them out as franchises to individuals Both these practices would naturally lead to great inconveniences; and therefore we find the 23 H. 6 c. 9. forbidding the sheriff in future to let to farm his hundreds or wapentakes; as the 14 E. 3. c. 9, enforcing the 4 E. 3 c 15. had before restrained the farm at which they were to be let in all cases, and provided for rejoining them to the counties, or seizing them into the king's hands in some others. But the learning respecting this court is now rather matter of antiquarian speculation, than practical utility

IV. The county-court 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]. [36] Over some of which causes these inferior courts have, by the express words of the statute of Gloucester [a], 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 justiciars, the plaintiff is directed to make affidavit that the cause of action does really and *bona fide* amount to 40*s*.; which affidavit is now unaccountably disused [b], except in the court of exchequer (4). The statute also 43 Eliz. c. 6. which gives the judges in many personal actions, where the jury assess less damages than 40*s*., a power to certify the same, and abridge the plaintiff of his full costs, was also meant to prevent vexation by litigious plaintiffs; who, for purposes of mere oppression, might be inclinable to institute suits in the superior courts for injuries of a trifling value. The county-court may also hold plea of many real actions, and of all personal actions to any amount, by virtue of a special writ called a *justicies*, which is a writ empowering the sheriff for the sake of dispatch to do the same justice in his county-court as might otherwise be had at Westminster [c]. The freeholders of the county are the real judges in this court, and the sheriff is the ministerial officer. The great conflux of freeholders who are supposed always to attend at the county-court, (which Spelman calls *curia plebeiae justitiae 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

[z] 4 Inst. 266
[a] 6 Edw. I. c 8.
[b] 2 Inst. 311.
[c] Finch. 318. F. N. B. 152.
[d] *Gloss. v comitatus.*

(4) Wherever it appears, however, to the superior court, either by the acknowledgment of the plaintiff, the uncontradicted affidavit of the defendant, or upon the record itself, that the sum demanded is under 40*s*, it will stay the proceedings. And in one instance this would have been done, but for an informality, even in an action on the case, where the demand was for uncertain damages, but in which the plaintiff had acknowledged the amount of the loss sustained to be under 40*s*. *Melton* v. *Garment*, 2 N. R. 84.

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
37] also the antient usage, as appears from the laws of king Edward the elder [e]; "*praepositus* (that is, the sheriff) *ad quartam* "*circiter septimanam frequentem populi concionem celebrato*: "*cuique jus dicito; litesque singulas dirimito.*" In those times the county-court was a court of great dignity and splendor, 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 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, 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 antient Saxon constitution there was only one superior court of justice in the kingdom; and that court had

[e] c. 11.
[f] *LL. Eadgari c. 5.*
[g] F. N. B. 70. Finch. 445.

cognizance both of civil and spiritual causes: *viz.* the *wittenagemote*, or general council, which assembled annually or oftener, wherever the king kept his Christmas, Easter, or Whitsuntide, as well to do private justice as to consult upon public business. At the conquest the ecclesiastical jurisdiction was diverted into another channel; and the conqueror, [38
fearing danger from these annual parliaments, contrived also to separate their ministerial power, as judges, from their deliberative, as counsellors to the crown. He therefore established a constant court in his own hall, thence called by Bracton [h], and other antient 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 mareschal, who chiefly presided in matters of honour and of arms, determining according to the law military and the law of nations. Besides these, there were the lord high steward, and lord great chamberlain; the steward of the household; the lord chancellor, whose peculiar business it was to keep the king's seal, and examine all such writs, grants, and letters, as were to pass under that authority; and the lord high treasurer, who was the principal adviser in all matters relating to the revenue. These high officers were assisted by certain persons learned in the laws, who were called the king's justiciars or justices; and by the greater barons of parliament, all of whom had a seat in the *aula regia*, and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. All these in their several departments transacted all secular business both criminal and civil, and likewise the matters of the revenue: and over all presided one special magistrate, called the chief justiciar or *capitalis justiciarius totius Angliæ*; who was also the principal minister of state, the second man in the kingdom, and by virtue of his office guardian of the realm in the king's absence. And this officer it was, who principally determined all the vast variety of causes that arose in this extensive jurisdiction; and from the plenitude of his power grew at length both obnoxious to the people, and dangerous to the government which employed him [i].

This great universal court being bound to follow the king's

[h] *l.* 3. *tr.* 1 *c.* 7.

[i] Spelm. *Gl.* 331, 2, 3. Gilb. *Hist. C. P. introd.* 17.

household in all its progresses and expeditions, the trial of
[39] common causes therein was found very burthensome to the subject. Wherefore king John, who dreaded also the power of the justiciar, very readily consented to that article which now forms the eleventh chapter of *magna carta*, and enacts, "that *communia placita non sequantur curiam nostram, 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 judges became so too, and a chief with other justices of the common pleas was thereupon appointed; with jurisdiction to hear and determine all pleas of land, and injuries merely civil between subject and subject. Which critical establishment of this principal court of common law, at that particular juncture and that particular place, gave rise to the inns of court in its 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[i]. 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
[40] under the long and troublesome reign of king Henry III. And, in farther pursuance of this example, the other several offices of the chief justiciar were under Edward the first (who new-modelled the whole frame of our judicial polity)

[i] See Vol. I. introd. § 1.
[k] Mod. Un. Hist xxiii. 396.
[l] *Ibid.* xxix. 467.

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 superintendance 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 misdemesnors, wherein the king (on behalf of the public) is the plaintiff; and *common pleas*, which include all civil actions, depending between subject and subject. The former of these were the proper object of the jurisdiction of the court of king's bench; the latter of the court of common pleas: which is a court of record, and is styled by sir Edward Coke [m] the lock and key of the common law; for herein only can real actions, that is, actions which concern the right of freehold or the realty, be originally brought; and all other, or personal, pleas between man and man are likewise here determined; though in most of *them* the king's bench has also a concurrent authority.

THE judges of this court are at present [n] four (5) in number, [41

[m] 4 Inst. 99.

[n] King James I during the greater part of his reign appointed five judges in the courts of king's bench and common pleas, for the benefit of a casting voice in case of a difference in opinion, and that the circuits might at all times be fully supplied with judges of the superior courts. And in subsequent reigns, upon the permanent indisposition of a judge, a fifth hath been sometimes appointed. Raym. 475.

(5) It is Paley I think who notices the advantage of the number four, that no judgment can be given but with the concurrence of three to one; whereas with any other number, questions might be decided by a casting vote.

given by *statute*, may be brought in the king's bench as as in the common pleas [y]. And yet this court might have held plea of any civil action (other than actions real) provided the defendant was an officer of the court; or in the custody of the marshal, or prison-keeper, of this court; for a breach of the peace or any other offence [z]. And, in process of time, it began by a fiction to hold plea of all personal actions whatsoever, and has continued to do so for ages [a]: it being surmised that the defendant is arrested for a supposed trespass, which he never has in reality committed; and, being thus in the custody of the marshal of this court, the plaintiff is at liberty to proceed against him for any other personal injury: which surmise, of being in the marshal's custody, the defendant is not at liberty to dispute [b]. And these fictions of law, though at first they may startle the student, he will find upon further consideration to be highly beneficial and useful; especially as this maxim is ever invariably observed, that no fiction shall extend to work an injury; it's 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 subsistit 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 circuity and delay of justice, by
44] allowing that suit to be originally, and in the first instance, commenced in this court, which, after a determination in another, might ultimately be brought before it on a writ of error.

For this court is likewise a court of appeal, into which may be removed by a writ of error all determinations of the court of common pleas, and of all inferior courts of record in England: and to which a writ of error lies also from the court of king's bench in Ireland. (7) Yet even this so high

[y] Carth. 234.

[z] 4 Inst. 71.

[a] *Ibid.* 72.

[b] Thus too in the civil law; *contra fictionem non admittatur probatio: quid enim efficeret probatio veritatis, ubi fictio adversus veritatum fingit? Nam fictio nihil aliud est, quam legis adversus veritatem in re possibili ex justa causa dispositio. (Gothofred, in Ff. l. 22. t. 3.)*

[c] 3 Rep. 30. 2 Roll. Rep 502.

[d] 11 Rep. 51. Co. Litt. 150.

(7) But see Vol. I. p. 104.

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.

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 it's double capacity, as a court of law and a court of equity also. It is a very antient court of record, set up by William the conqueror [e], as a part of the *aula regia* [f], though regulated and reduced to it's present order by king Edward I. [g]; and intended principally to order the revenues of the crown, and to recover the king's debts and duties. [h] It is called the exchequer *scaccharium*, from the checqued cloth, resembling a chess-board, which covers the table there; and on which, when certain of the king's accounts are made up, the sums are marked and scored with counters. It consists of two divisions: the receipt of the exchequer, which manages the royal revenue, and with which these commentaries have no concern; and the court or judicial part of it, which is again subdivided into a court of equity and a court of common law.

The court of equity is held in the exchequer chamber before the lord treasurer, the chancellor of the exchequer, the chief baron, and three *puisné* ones. These Mr. Selden conjectures [i] to have been antiently made out of such as were

[e] Lamb *Archeion* 32.
[f] Madox. hist. exch. 109. (8)
[g] Spelm. *Gul* I. *in cod. leg. vet.* *apud* Wilkins
[h] 4 Inst. 103—116. Madox. hist. exch. 109
[i] Tit. hon. 2. 5. 16.

(8) Madox does not go farther than to propose it as a conjecture which the reader may be at liberty to refuse if he does not think it sufficiently supported, that the exchequer was erected in England by one of the Anglo-Norman kings after the model of the exchequer in Normandy. (P. 122.) The first record which he cites as mentioning it is a charter by Henry the First. Spelman, in the passage referred to next, states the fact as given in the text.

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

[46] This gives original to the common law part of their jurisdiction, which was established merely for the benefit of the king's accomptants, and is exercised by the barons only of the exchequer, and not the treasurer or chancellor. The writ upon which all proceedings here are grounded is called

a *quo minus*: in which the plaintiff suggests that he is the king's farmer or debtor, and that the defendant hath done him the injury or damage complained of; *quo minus sufficiens existit*, by which he is the less able to pay the king his debt or rent. And these suits are expressly directed, by what is called the statute of Rutland [l], to be confined to such matters only, as specially concern the king or his ministers of the exchequer. And by the *articuli super cartas* [m], it is enacted, that no common pleas be thenceforth holden in the exchequer contrary to the form of the great charter. But now, by the suggestion of privilege, any person may be admitted to sue in the exchequer as well as the king's accomptant. The surmise, of being debtor to the king, is therefore become matter of form and mere words of course, and the court is open to all the nation equally. The same holds with regard to the equity side of the court: for there any person may file a bill against another upon a bare suggestion that he is the king's accomptant; but whether he is so, or not, is never controverted. In this court on the equity side, the clergy have long used to exhibit their bills for the non-payment of tithes; in which case the surmise of being the king's debtor is no fiction, they being bound to pay him their first-fruits, and annual tenths. But the chancery has of late years obtained a large share in this business. (9)

[l] 10 Edw. I. *s.* 11.

[m] 28 Edw. I. *c.* 4.

(9) By the 57 G. 3 c. 18. the chief baron, and in his absence from sickness or other unavoidable cause, any puisné baron specially appointed by warrant, is authorised to hear and determine alone all causes and matters pending in the exchequer, as a court of equity; his decrees, orders, and acts are decrees, &c. of the court, and subject to alteration only by appeal to the lords. Under this act a great proportion of the equity business of the court is now done by the chief baron alone, and probably some advantage is gained to the public by the dispatch which this division of the court is calculated to produce, although for obvious reasons it must not be taken that the dispatch is the same in a divided court as if two independent courts were sitting at the same time. But whatever may be the amount of this advantage, it may reasonably be questioned whether the same might not have been obtained by some unobjectionable modifications of the general practice of the court, which might have left its judicial constitution untouched. The suitor certainly will always feel that he has a right to have his claims discussed and decided by the collective learning and wisdom of the full court, and without the least disrespect to the other members,

[47] VIII. The high court of chancery is the only remaining, and in matters of civil property by much the most important of any, of the king's superior and original courts of justice. It has its name of chancery, *cancellaria*, from the judge who presides here, the lord chancellor or *cancellarius;* who, sir Edward Coke tells us, is so termed *a cancellando*, from cancelling the king's letters patent when granted contrary to law, which is the highest point of his jurisdiction.[n] But the office and name of chancellor (however derived) was certainly known to the courts of the Roman emperors: where it originally seems to have signified a chief scribe or secretary, who was afterwards invested with several judicial powers, and a general superintendency over the rest of the officers of the prince. From the Roman empire it passed to the Roman church, ever emulous of imperial state; and hence every bishop has to this day his chancellor, the principal judge of his consistory. And when the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved it's chancellor, with different jurisdictions and dignities, according to their different constitutions. But in all of them he seems to have had the supervision of all charters, letters, and such other public instruments of the crown, as were authenticated in the most solemn manner: and therefore when seals came in use, he had always the custody of the king's great seal. So that the office of chancellor, or lord keeper, (whose authority by statute 5 Eliz. c. 18. is

[n] 4 Inst. 88.

bers, he may retire from the hearing of his cause, not entirely satisfied with a judgment in which the chief on the one hand, or the three puisné barons on the other, have taken no part.

I shall be excused for mentioning this, when it is considered that a recent alteration, similar in its results, has been made, though it is to be hoped only temporarily, in the court of king's bench. See post. p. 278.

be exactly the same,) is with us at this day created by the mere delivery of the king's great seal into his custody[o]: whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom; and superior in point of precedency to every temporal lord.[p] He is a privy counsellor by his office[q], and according to lord chancellor Ellesmere[r], prolocutor of the house of lords by prescription. To him belongs the appointment of all justices of the peace throughout the kingdom. Being formerly usually an ecclesiastic, (for none else were then capable of an office so conversant in writings,) and presiding over the royal chapel[s], he became keeper of the king's conscience; visitor, in right of the king, of all hospitals and colleges of the king's foundation; and patron of all the king's livings under the value of twenty marks[t] *per annum* in the king's books. He is the general guardian of all infants, idiots, and lunatics; and has the general superintendance 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. (10)

THE ordinary legal court is much more antient than the court of equity. Its jurisdiction is to hold plea upon a *scire facias* to repeal and cancel the king's letters patent, when made against law, or upon untrue suggestions; and to hold

[o] Lamb. *Archeion.* 56. 1 Roll. Abr. 385.
[p] Stat. 31 Hen. VIII. c. 10.
[q] Selden. office of lord chanc. § 8.
[r] Of the office of lord chancellor, *edit.*
[s] Madox. hist. of exch. 42.
[t] 38 Edw. III. F. N. B 35. though Hobart (214.) extends this value to

(10) By the 1 W. & M. st. 1. c. 21. all the authority, jurisdiction, emoluments, and advantages of the lord chancellor or lord keeper may be exercised and had by lords commissioners, who shall have precedence next after the peers of the realm, and speaker of the house of commons; but if one of them be a peer, he shall take place according to his peerage. One of these commissioners may, in the absence of the rest, hear motions, and make orders as to the interlocutory proceedings in a cause, but no decree shall be made, nor the great seal put to any thing, but in the presence of two commissioners.

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] (11) 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.[w] It might likewise hold plea (by *scire facias*) of partitions of land in coparcenary[x], and of dower[y], 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
[49] tithes of forest land, where granted by the king, and claimed by a stranger against the grantee of the crown[z]; and of executions on statutes, or recognizances in nature thereof by the statute 23 Hen. VIII. c. 6.[a] (12) But if any cause comes to issue in this court, that is, if any fact be disputed between the parties, the chancellor cannot try it, having no power to summon a jury; but must deliver the record *propria manu* into the court of king's bench, where it shall be tried by the country, and judgment shall be there given thereon[b]. (13) And when judgment is given in chancery upon demurrer or the

[u] 4 Rep. 54
[w] 4 Inst. 80
[x] Co. Litt 171. F.N B 62.
[y] Bro. *Abr tit. dower*. 66. Moor. 565.
[z] Bro *Abr tit. dismes*. 10
[a] 2 Roll. Abr. 469 2 Saund. p 6.
[b] Cro. Jac. 12. Latch. 112

(11) See post. c. xvii. p. 254.
(12) See Vol II. p 160.
(13) It is important to confine this observation (which is not always done) to the common law side of the court of chancery Sitting as a judge at common law, and trying causes according to the rules of common law, the lord chancellor cannot decide by himself a disputed fact, and has no power of issuing process to the sheriff or other officer for summoning a jury. But on the equity side of the court, where the jurisdiction of the lord chancellor is placed entirely on other grounds than those of the common law, he is equally competent to decide on disputed facts, as on disputed law, and it is matter of discretion only when he either orders or permits the parties to submit the trial of such fact to the cognisance of a jury. For the manner in which this is done, see post 452. According to the later precedents, when a record comes into the king's bench from chancery, the chancellor does not deliver it *propriâ manu*, but sends it the clerk of the petty bag. 1 Equity Ca. Abr. 128.

like, a writ of error in nature of an appeal lies out of this ordinary court into the court of king's bench [c]: 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 [d] being actually brought, since the fourteenth year of queen Elizabeth, *A. D.* 1572.

In this ordinary, or legal, court is also kept the *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, *ex debito justitiae,* any writ that his occasions may call for. These writs (relating to the business of the subject) and the returns to them were, according to the simplicity of antient times, originally kept in a hamper, *in hanaperio;* and the others (relating to such matters wherein the crown is immediately or mediately concerned) were preserved in a little sack or bag, *in parva baga;* and thence hath arisen the distinction of the *hanaper* office, and *petty bag* office, which both belong to the common law court in chancery.

But the extraordinary court, or court of equity, is now [50] 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 [e]: and yet the difference of one from the other, when administered by the same tribunal, was perfectly familiar to the Romans [f]; the *jus praetorium,* or discretion of the praetor, being distinct from

[c] Year-book, 18 *Edward III.* 25. 17 *Ass.* 24. 29 *Ass.* 47. Dyer. 315. 1 Roll Rep. 287. 4 Inst. 80.

[d] The opinion of lord keeper North, in 1682, (1 Vern. 131. 1 Equ. Cas. abr. 129.) that no such writ of error lay, and that an injunction might be issued against it, seems not to have been well considered.

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

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

the *leges* or standing laws [g]; 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 particular cases, by the principles of equity. With us too, the *aula regia*, which was the supreme court of judicature, undoubtedly administered equal justice according to the rules of both or either, as the case might chance to require: and, when that was broken to pieces, the idea of a court of equity, as distinguished from a court of law, did not subsist in the original plan of partition. For though equity is mentioned by Bracton [h] as a thing contrasted to strict law, yet neither in that writer, nor in Glanvil or Fleta, nor yet in Britton, (composed under the auspices and in the name of Edward I., and treating particularly of courts and their several jurisdictions,) is there a syllable to be found relating to the 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
[51] assisted by his privy council; (from whence also arose the jurisdiction of the court of requests [i], which was virtually abo-
lished 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* [k],

[g] Thus Cicero "*jam illis promissis* "*non esse standum, quis non videt, quæ* "*coactus quis metu quæ deceptus dolo* "*promiserit? quæ quidem pleraque jure* "*praetorio liberantur, nonnulla legibus.*" Offic. l. i. x.

[h] *l. 2. c. 7. fol. 23.*

[i] The matters cognizable in this court, immediately before it's dissolution, were "almost all suits, that by "colour of equity, or supplication "made to the prince, might be brought "before them; properly all poor men's "suits, which were made to her majesty "by supplication; and this is called the "poor man's court, because there he "should have right, without paying any "money" (Smith's commonwealth, b 3 c. 7.)

[k] *Nemo ad regem appellet pro aliqua lite, nisi domi jure suo dignus esse, vel jus consequi non possit. Si jus nimis severum sit, allevatio deinde quaeratur apud regem. LL. Edg. c. 2.*

but also after it's dissolution, in the reign of king Edward I.[l] and perhaps during it's continuance, in that of Henry II.[m]

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 antient precedents, it is provided by statute Westm. 2. 13 Edw. I. c. 24., that "whensoever from thenceforth in "one case a writ shall be found in the chancery, and in a "like case falling under the same right and requiring like remedy no precedent of a writ can be produced, the clerks "in chancery shall 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[n], 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 [52] 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[o]. 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[p]; 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[q], and, though totally discoun-

[l] Lambard. *Archeion.* 71.

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

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

[n] A great variety of new precedents of writs, in cases before unprovided for, are given by this very statute of Westm. 2.

[o] Lamb. *Archeion.* 61.

[p] This was the opinion of Fairfax, a very learned judge in the time of Edward the fourth "*Le subpoena* (says "he) *ne serrout my cy soventement use* "*come il est ore, a nous attendomus* "*tiels actions sur les cases, et maintenomus le jurisdiction de ceo court, et* "*d'auter courts.*" (Yearb. 21 *Edw. IV.* 23.)

[q] See book II. ch. 20.

tenanced 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 [r]; and John Waltham, who was bishop of Salisbury and chancellor to king Richard II., by a strained interpretation of the above-mentioned statute of Westm. 2. devised the writ of *subpoena*, returnable in the court of chancery only, to make the feoffee to uses accountable to his *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. 6. directed to give damages to the party unjustly aggrieved. But as the clergy, so early as the reign of king Stephen, had attempted to turn their ecclesiastical courts into courts of equity, by entertaining suits *pro laesione fidei*, as a spiritual offence against conscience, in case of non-payment of debts or any breach of civil contracts [s]; till checked by the constitutions of Clarendon [t], which declared that, "*placita de debitis, quae fide* "*interposita debentur, vel absque interpositione fidei, sint in* [53] "*justitia regis* (14):" therefore probably the ecclesiastical chancellors, who then held the seal, were remiss in abridging their own new acquired jurisdiction; especially as the spiritual courts continued [u] to grasp at the same authority as before, in

[r] Spelm. *Gloss.* 106. 1 Lev 242

[s] Lord Lyttelt Hen. II b. 3. p. 361. not.

[t] 10 Hen II. c. 15. Speed. 468.

[u] 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 *circumspecte agatis*, supposed by some to have issued

(14) A transcript of the constitutions of Clarendon from the Cottonian MS. of Becket's life and epistles may be seen in the Append. No. 2 to book iii. of lord Lyttelton's Hen. II The statutes which pass by that name, from having been enacted in a parliament held at Clarendon, were merely declaratory of the common law, in restraint of the encroachments of the clergy; the preamble calls them "*recordatio vel recognitio cujusdam partis consuetudinum, et libertatum, et dignitatum antecessorum suorum, viz. regis Henrici avi sui, et aliorum, quæ observari et teneri debent in regno.*" The recognition is said in the following sentence to have been made by the archbishops, bishops, earls, barons, and the *nobles and elders of the realm.* The clause in the text, which is No. 15., Pope Alexander in consistory absolutely condemned, when the whole were laid before him by Becket. Ld. Lytt. H. 2. b. 3. vol. 4. p. 83.

suits *pro laesione fidei*, so late as the fifteenth century [w], till finally prohibited by the unanimous concurrence of all the judges. However, it appears from the parliament rolls [x] 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 subtilty of chancellor Waltham, against the form of the common law; whereby no plea could be determined, unless by examination and oath of the parties, according to the form of the law civil, and the law of holy church, in subversion of the common law. But though Henry IV., being then hardly warm in his throne, gave a palliating answer to their petitions, and actually passed the statute 4 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. [y]

But this did not extend very far; for in the antient treatise, entitled *diversité des courtes* [z], 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 [54] 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

13 Edw. 1., but more probably (3 Pryn. Rec. 336.) 9 Edw II. suits *pro laesione fidei* were allowed to the ecclesiastical courts; according to some antient copies, (Berthelet *stat. antiq.* Lond. 1531. 90. *b* 3 Pryn. Rec. 336.) and the common English translation of that statute; though in Lyndewode's copy, (*Prov. l.* 2. *t.* 2.) and in the Cotton MS (*Claud.* D. 2.) that clause is omitted.

[w] Yearb. 2 *Hen. IV.* 10. 11 *Hen. IV.* 88. 38 *Hen. VI.* 29. 20 *Edw. IV* 10.

[x] *Rot. Parl.* 4 *Hen. IV.* n° 78. & 110. 3 *Hen. V.* n° 46. cited in Prynne's abr. of Cotton's records, 410. 422. 424. 548. 4 Inst. 88. 1 Roll. Abr. 370, 371, 372.

[y] *Rot. Parl.* 14 Edw. *IV.* n° 33 (not 14 *Edw. III.* as cited 1 Roll. Abr. 370, &c)

[z] *tit. Chancery, fol.* 296. Rastell's edit. *A.D.* 1534.

and 1373 [a], to the promotion of sir Thomas More by king Henry VIII. in 1530. After which the great seal was indiscriminately committed to the custody of lawyers, or courtiers [b], or churchmen [c], 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 seal was intrusted to Dr. Williams, then dean of Westminster, but afterwards bishop of Lincoln; who had been chaplain to lord Ellesmere, when chancellor.[d]

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 *praemunire*, by questioning in a court of equity a judgment in the court of king's bench, obtained by gross fraud and imposition [e]. 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 [f], that his majesty gave judgment on 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
[55] rather to decide the question by referring it to the plenitude of his royal prerogative [g]. Sir Edward Coke submitted to the decision [h] and thereby made atonement for his error: but this struggle, together with the business of *commen-*

[a] Spelm. *Gloss.* 111 Dugd. *chron. Ser.* 50.

[b] Wriothesly, St. John, and Hatton.

[c] Goodrick, Gardiner, and Heath.

[d] *Biog. Brit.* 4278.

[e] Bacon's Works, IV. 611, 612. 682.

[f] Whitelocke of parl. ii. 390. 1 Chan. Rep. Append. 11.

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

[h] See the entry in the council book, 26 July, 1616. (*Biogr. Brit.* 1390.)

aams (in which he acted a very noble part [i]) and his controlling the commissioners of sewers [k], were the open and avowed causes, first of his suspension [l], 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 [56] thorough master and zealous defender of the laws and constitution of his country; and endued with a pervading genius, that enabled him to discover and to pursue the true spirit of justice, notwithstanding the embarrassments raised by the narrow and technical notions which then prevailed in the courts of law, and the imperfect ideas of redress which had possessed the courts of equity. The reason and necessities of mankind, arising from the great change in property by the extension of trade and the 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

[i] 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.)

[k] See that article in chap. 6.

[l] See lord Ellesmere's speech to sir Henry Montague, the new chief justice, 15 Nov. 1616. (Moor's reports 828.) 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.)

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. (15)

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 the court equity, and writs of error from a court of law: 1. That the former may be brought upon any interlocutory matter, the latter upon nothing but 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. (16) In imitation of which a second court of exchequer chamber was erected by statute 27 Eliz. c. 8., consisting

(15) Since the publication of the Commentaries the business of the court of chancery has continued increasing, insomuch that it was thought expedient by the 53 G. 3. c. 24 to empower his majesty to appoint an additional judge-assistant, called the vice-chancellor, who holds his office during good behaviour, subject to removal upon the address of both houses. His jurisdiction extends to all causes in chancery, either in law or equity, according to the chancellor's direction. His decrees are subject to the chancellor's reversal or alteration, and cannot be enrolled till signed by him. His precedence is next to that of the master of the rolls: he cannot discharge, reverse, or alter any decree or order made by the lord chancellor, lord keeper, or lords commissioners, unless authorised by them respectively so to do, nor any decree or order made by the master of the rolls. The expences of this new establishment are partly defrayed by a deduction from the fees of the great seal, and partly by the dividends of an unemployed sum taken from the suitor's fund, and secured by parliamentary provisions.

(16) See post. p. 410. *n.*

of the justices of the common pleas, and the barons of the exchequer, before whom writs of error may be brought to reverse judgments in certain suits [m] 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 [n].

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

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

Hitherto may also be referred the tribunal established by statute 14 Edw. III. c. 5. consisting (though now out of use) [58]

[m] See ch. 25. pag. 411. 4 Inst. 119. 2 Bulst. 146.

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

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

These are composed of two or more commissioners, who are twice in every year sent by the king's special commission all round the kingdom, (except London and Middlesex, where courts of *nisi prius* are holden in and after every term, before the chief or other judge of the several superior courts; and except the four northern counties, where the assises are holden only once a year,) (17) 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 assise came into use in the room of the antient justices in eyre, *justiciarii in itinere*, who were regularly established, if not first appointed, by the parliament of Northampton, *A. D.* 1176, 22 Hen. II.[o] 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
[59] in seven years for the purpose of trying causes.[p] They were

o Seld. *Jan. l.* 2 § 66. Spelm. *Cod* 399.

p Co. Litt. 293.—*Anno* 1261. *justiciarii itinerantes venerunt apud Wigorniam in octavis S. Johannis baptistae,—et totus comitatus eos admittere recusavit, quod* septem *anni nondum erant elapsi, postquam justiciarii ibidem ultimo sederunt.* (*Annal. Eccl. Wigorn. in Whart. Angl. sacr. I.* 495.)

(17) This exception of the four northern counties no longer prevails, as the judges on the northern circuit now go into these counties in the spring

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 assise 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* [q]: 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 approved man of the county. And, lastly, by statute 14 Edw. III. c. 16. inquests of *nisi prius* may be taken before any justice of either bench, (though the plea be not depending in his own court,) or before the chief baron of the exchequer, if he be a man of the law: or otherwise before the justices of assise, so that one of such justices be a judge of the king's bench or common pleas, or the king's serjeant sworn. 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 consent 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. [r] The [60
prudent jealousy of our ancestors ordained [s], that no man of law should be judge of assise in his own country, wherein he was born or doth inhabit: and a similar prohibition is found in the civil law [t], which has carried this principle so

[q] *Bract. l.* 3. *tr.* 1. *c.* 11.

[r] Instances hereof may be met with in the appendix to Spelman's original of the terms, and in Mr. Parker's Antiquities, 209.

[s] Stat. 4 Edw. III. c. 2. 8 Rich. II. c. 2. 33 Henry VIII. c. 24.

[t] *Ff.* 1. 22. 3.

far that it is equivalent to the crime of sacrilege, for a man to be governor of the province in which he was born, or has any civil connexion [u]. (18)

The judges upon their circuits now sit by virtue of five several authorities. 1. The commission of the *peace*. 2. A commission of *oyer* and *terminer*. 3. A commission of general *gaol-delivery*. The consideration of all which belongs properly to the subsequent book of these commentaries. But the fourth commission is, 4. A commission 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 commission of *assise* [w], being annexed to the office of those justices by the statute of Westm. 2. 13 Edw. I. c. 30. and it empowers them to try all questions of fact issuing out of the courts at Westminster, that are then ripe for trial by jury. These by the course of the courts [x] 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 vacations preceding each Easter and Michaelmas term, which saves much expence and trouble. These commissions

[u] *Cod.* 9. 29. 4.
[w] Salk. 454.
[x] See ch. 23. p 353.

(18) The restriction as to the commissions of oyer and terminer, and gaol delivery, was taken off by the 12 G. 2. c. 27., and as to those of assise and *nisi prius* by the 49 G. 3 c.91

The civil law seems to have carried it farther than is stated in the text. Ne quis sine sacrilegii crimine *desiderandum* intelligat gerendæ ac suscipiendæ administrationis officium intra eam provinciam in quâ provincialis, et civis habetur, nisi hoc cuiquam ultroneâ liberalitate per divinos affatus imperator indulgeat. *Provincialis* may denote either a man born, or domiciled in the province; from its being coupled here with *civis*, and from the use of the verb *habetur*, I should understand the latter signification to be intended. *Affatus* was properly a *verbal* decree of the emperor opposed to a *rescriptum*: it is however often used synonymously with it.

are constantly accompanied by writs of *association*, in pursuance of the statutes of Edward I and II. before-mentioned: whereby [59*] 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 serjeant being one) may proceed to execute the commission. (19)

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 calcu-

(19) It will be obvious from this account of the writ of *nisi prius*, that it could not apply to the same county in which the court, from which it issued, was sitting. Accordingly the trial of all issues joined in Middlesex was anciently in Westminster Hall before the whole court, and in term-time. When these became numerous, the interruption occasioned thereby to the regular business of the court was such as to require the interference of the legislature to remedy it. Accordingly by the 18 Eliz. c.12. the C. J. of the K B, the C. J. of the C. P., and the C. B. of the court of exchequer, or in their absence any two judges or barons of their respective courts, are empowered to sit in the term, or within four days after it, within Westminster Hall, as justices of *nisi prius* for Middlesex, for the trial of such issues as ought in ordinary course to be tried by an inquest of that county. The jurisdiction of the C J. of K B. extended not only to issues joined in that court, but also to those which came from the law-side of the court of chancery. The 12 G. 1. c. 31. extended the four to eight days, and empowered *one* judge or baron to sit instead of two; the 24 G. 2. c. 18. extended the eight to fourteen days, and the 1 G. 4. c. 55. made the time unlimited during the vacation next after the term. By this last statute also similar powers for two years were given to a second judge of the court of K. B at the request of the C J. to sit at *nisi prius*, so that the trials of two causes might go on at the same time; the object of the statute being to clear away a considerable arrear of causes then depending. As all the prior statutes of Eliz., G. 1 & 2. had confined these *nisi prius* sittings to Westminster Hall, the 1 G. 4. c. 21., passed previously to the late coronation, extended the place for the King's Bench sittings to "any other fit place within the city of Westminster, as to the C. J. might seem convenient."

lated for cheapness, expedition, and ease. By the constitution which they established, all trivial debts, and injuries of small consequence, were to be recovered or redressed in every man's own county, hundred, or perhaps parish. Pleas 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 misdemesnors 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
[60*] 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 hands of our forefathers, of which the great original lines are still strong and visible; and, if any of it's 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 antient plan, concerted by Alfred, and perfected by Edward I., and by attending to the spirit, without neglecting

CHAPTER THE FIFTH.

OF COURTS ECCLESIASTICAL, MILITARY, AND MARITIME.

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

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

[a] *Celeberrimo huic conventui episcopus et aldermannus inter-sunto; quorum alter jura divina, alter humana populum edoceto* LL. Eadgar. c. 5. (1)

(1) The passage in the laws of Edgar, as they are given by Wilkins, runs thus: *intersit conventui Provinciali Episcopus et senator, et postea doceant tam divinum jus quàm humanum.*

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 indefeasible right and investiture from Christ himself; and derived from the pope to all inferior tribunals. Hence the canon law lays it down as a rule, that "*sacerdotes a regibus honorandi sunt, non judicandi*[b];" and places an emphatic reliance on a fabulous tale which it tells of the emperor Constantine: that when some petitions were brought to him, imploring the aid of his authority against certain of his bishops, accused of oppression and injustice, he caused (says the holy canon) the petitions to be burnt in their presence, dismissing them with this valediction; "*ite* "*et inter vos causas vestras discutite, quia dignum non est ut* "*judicemus Deos.*"[c]

It was not however till after the Norman conquest, that this doctrine was received in England; when William I. (whose title was warmly espoused by the monasteries, which he liberally endowed, and by the foreign clergy, whom he brought over in shoals from France and Italy, and planted in the best preferments of the English church,) was at length prevailed upon to establish this fatal encroachment, and separate the ecclesiastical court from the civil: whether actuated by principles of bigotry, or by those of a more refined policy, in order to discountenance the laws of king Edward, abounding with the spirit of Saxon liberty, is not altogether certain.
[63] But the latter, if not the cause, was undoubtedly the con-

[b] *Decret. part* 2. *caus.* 11. *qu.* 1. *c.* 41. [c] *Ibid.*

sequence 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 antient 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. 1. 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 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 ju- [64]

[d] Hale Hist. C. L 102. Selden in *Eadm. p.* 6. *l.* 24. 4 Inst. 259. Wilk. *LL. Angl. Saxon.* 292.

[e] *Nullus episcopus vel archidiaconus de legibus episcopalibus amplius in hundred placita teneant, nec causam, quae ad regimen animarum pertinet, ad judicium secularium hominum adducant sed quicunque secundum episcopales leges, de quacunque causa vel culpa interpellatus fuerit, ad locum, quem ad hoc episcopus elegerit et nominaverit, veniat; ibique de causa vel culpa sua respondeat, et non secundum hundred, sed secundum canones et episcopales leges, rectum Deo et episcopo suo faciat.* Wilk. 292.

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

[g] 2 Inst. 70.

[h] *Ne episcopi saecularium placitorum officium suscipiant.* Spelm. *Cod.* 301.

risdiction[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.

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].

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
[65] the *dean of the arches*, because he antiently held his court in the church of Saint Mary *le bow*, (*sancta Maria de arcubus*,) though all the principal spiritual courts are now holden at doctors' commons. His proper jurisdiction is only over the thirteen peculiar parishes belonging to the archbishop in London; but the office of dean of the arches having been for a long time united with that of the archbishop's principal official, he now, in right of the last-mentioned office, (as doth also the

[i] Spelm. *Cod.* 310.
[k] See Vol. I. introd. § 1.
[l] For farther particulars, see Burn's *ecclesiastical law*, Wood's *institute of the common law*, and Oughton's *ordo judiciorum*.

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. [66]

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

[m] Book II. ch. 32.

granting dispensations, licences, faculties (2), and other remnants of the papal extortions,) but do not concern themselves with administering redress to any injury; and shall proceed to

6. The great court of appeal in all ecclesiastical causes, *viz.* the court of *delegates*, *judices delegati*, appointed by the king's commission under his great seal, and issuing out of chancery, to represent his royal person, and hear all appeals to him made by virtue of the before-mentioned statute of Henry VIII. This commission is frequently filled with lords, spiritual and temporal, and always with judges of the courts at Westminster, and doctors of the civil law. Appeals to Rome were always looked upon by the English nation, even in the times of popery, with an evil eye; as being contrary to the liberty of the subject, the honour of the crown, and the independence of the whole realm; and were first introduced in very turbulent times in the sixteenth year of king Stephen (*A.D.* 1151.), at the same period (sir Henry Spelman observes) that the civil and canon laws were first imported into England[n]. But, in a few years after, to obviate this growing practice, the constitutions made at Clarendon, 11 Hen. II. on account of the disturbances raised by archbishop Becket and other zealots of the holy see, expressly declare[o], that appeals in causes ecclesiastical ought to lie, from the archdeacon to the diocesan; from the diocesan to the archbishop of the province; and from the archbishop to the king; and are not to proceed any farther without special 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
67] power of the pope, who was ever vigilant to improve all opportunities of extending his jurisdiction hither, at length

[n] *Cod. vet. leg.* 315.

[o] Chap. 8.

(2) These faculties must not be confounded with those which are granted for the regulation of matters relating to church-buildings, ornaments, pews, &c. which are not matters of course, and the disputes respecting which are tried in the respective ecclesiastical courts mentioned in the text. But faculties for holding two benefices, &c. are here intended.

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 Henry VIII. was but declaratory of the antient 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. (3)

7. A COMMISSION of *review* is a commission sometimes granted, in extraordinary cases, to revise the sentence of the court of delegates; when it is apprehended they have been led into a material error. This commission the king may grant, although the statutes 24 & 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. VIII. 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.

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

[p] 4 Inst. 341. [q] *Ibid.* [r] 4 Inst. 324.

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(3) Not to all the bishops of the *realm*, but of the province, where the matter is begun; indeed, as has been correctly observed by Mr. Christian in his note on this passage, there can be no such assembly as that described in the text, for the convocation is a provincial assembly held in each province.

been exercised under the pope's authority. It was intended
[68] 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. (4) For these reasons this court was justly abolished by statute 16 Car. I. c.11. And the weak and illegal attempt that was made to revive it, during the reign of king James the second, served only to hasten that infatuated prince's ruin.

II. Next, as to the courts military. The only court of this kind known to, and established by, the permanent laws of the land, is the court of *chivalry*, formerly held before the lord high constable and earl marshal of England jointly, but since the attainder of Stafford duke of Buckingham under Henry 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].

[s] 1 Lev. 230. Show. Parl. Cas. 60. [u] 7 Mod. 127.
[t] 4 Inst. 125.

(4) As to the general legality of this court's proceeding to fine and imprisonment, see 4 Inst. 324.

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 [69 only the court of admiralty, and it's 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. It's 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 persons named in the king's commission, "like as in case of appeal from the admiral-"court." But this is also expressly declared by statute 8 Eliz. c. 5. which enacts, that upon appeal made to the chancery, the sentence definitive of the delegates appointed by commission shall be final.

Appeals from the vice-admiralty courts in America, and our other plantations and settlements, may be brought before the courts of admiralty in England, as being a branch of the admiral's jurisdiction, though they may also be brought before the king in council. But in case of prize vessels, taken in time of war, in any part of the world, and condemned in any courts of admiralty or vice-admiralty as lawful prize, the appeal lies to certain commissioners of appeals consisting chiefly of the privy council, and not to judges delegates. And this by virtue of divers treaties with foreign nations; by which particular courts are established in all the maritime countries of Europe for the decision of this question, whether lawful prize or not: for this being a question between subjects of different states, it belongs entirely to the law of nations, and not to the municipal laws of either country, to determine it. The original court, to which this question is [70

[w] *Gloss.* 13. [x] *Archeion.* 41.

permitted in England, is the court of admiralty; 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, whose masterly acquaintance with the law of nations was known and revered by every state in Europe [y]. (5)

[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 *drot de gens. l.* 2. *c.* 7. § 84)

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(5) Lord Mansfield is here alluded to. The answer to the *Exposition des Motifs*, &c. is signed by Sir G. Lee, judge of the prerogative court, Dr Paul, advocate-general, Sir D. Ryder, attorney, and Sir W. Murray, solicitor-general; but Lord M. frequently declared to his friends, that it was entirely his own composition. Holliday's *Life of Lord M.* p. 424. Montesquieu calls it *une reponse sans replique*.

CHAPTER THE SIXTH.

OF COURTS OF A SPECIAL JURISDICTION.

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 greenswerd, 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*, *woodmote*, or forty days court, is to be held before the verderors of the forest once in every forty days [a]; and is instituted to inquire into all offenders against vert and venison [b]; who may be attached by their bodies, if taken with the mainour, (or *mainoeuvre*, *a manu*,) that is, in the very act of killing venison, or stealing wood, or preparing so to do, or by fresh and immediate pursuit after the act is done [c]; else they must be attached by their goods. And in this forty days court the foresters or keepers are to bring in their attach-

[a] *Cart. de forest.* 9 *Hen. III. c.* 8.
[b] 4 Inst. 289.
[c] Carth. 79.

ments, 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. (1) 2. 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
72] pelote) of the fore-feet, to prevent them from running after deer [e]. No other dogs but mastiffs are to be thus lawed or expeditated, for none other were permitted to be kept within the precincts of the forest; it being supposed that the keeping of these, and these only, was necessary for the defence of a man's house [f]. (2) 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 sweins 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-oneratione forestari-*
"*orum, et aliorum ministrorum forestae; et de eorum oppressioni-*

[d] *Cart. de forest* c. 16.
[e] *Ibid.* c. 6.
[f] 4 Inst. 308
[g] *Cart. de forest.* c. 8.

(1) If the trespass committed be under the value of four-pence, this court of attachments may determine the complaint; the verderors assessing the fine, and causing the same to be levied to the use of the king. Manwood, title Attachment Court, pl. 10

(2) It does not appear either from the *carta de forestâ*, or Manwood, that there was any such thing as a court of regard. In every forest there were properly twelve regarders, sometimes appointed by letters patent, sometimes by the chief justice in eyre, and sometimes chosen by the sheriff, in obedience to a writ from the king: their office is pretty largely described by Manwood; it consisted principally in a minute survey of the forest every third year, not merely for ascertaining occasional offences against vert and venison, but encroachments, felling of timber, defect of fences, keeping of bows and arrows, or other implements for the destruction of game, in short, every thing of every kind which contravened the forest laws. Manwood observes, that they were first made to controul the other officers of the forest. It was at the time of the making this regard, that is every third year, that the expeditation of the mastiffs was to take place, and it was part of the regarder's duty to take care that it was not evaded. They are to make a roll of all offences, and bring it either to the court of attachments or sweinmote, and afterwards to certify it to the lord chief justice in eyre at the next general sessions of the forest. Manwood, tit.

"*bus populo regis illatis*:" and, secondly, to receive and try presentments certified from the court of attachments (3) against offences in vert and venison [h]. And this court may not only inquire, but convict also, which conviction shall be certified to the court of justice-seat under the seals of the jury; for this court cannot proceed to judgment [i]. But the principal court is, 4. The court of *justice-seat*, which is held before the chief justice in eyre, or chief itinerant judge, *capitalis justitiarius in itinere*, or his deputy; to hear and determine all trespasses within the forest, and all claims of franchises, liberties, and privileges, and all pleas and causes whatsoever therein arising [k]. It may also proceed to try presentments in the inferior courts of the 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 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 [73] king Henry II., *A. D.* 1184 [p]; and their courts were formerly very regularly held; but the last court of justice-seat of any note was that holden in the reign of Charles I., before the earl of Holland; the rigorous proceedings at which are reported by sir William Jones. After the restoration another

h Stat. 34 Edw. I. c 1:
i 4 Inst. 289.
k *Ibid.* 291.
l Stat. 1 Edw. III c. 8. 7 Ric. II c. 4
m 4 Inst. 313.
n *Ibid.* 297.
o *Ibid.* 295.
p Hoveden.

(3) Or presented by the regarders The times for holding the sweinote are specified by the *Carta de Forestâ*, to be fifteen days before Michaelmas, when the agistors of the forest met to take in the agistments; about Martinmas when they collected pannage, or the money for feeding on the mast of the trees; and fifteen days before St. John the Baptist, when they met to fawn the deer.

was held, *pro forma* only, before the earl of Oxford [q]; but since the æra of the revolution in 1688, the forest laws have fallen into total disuse, to the great advantage of the subject.

II. A second species of restricted courts is that of commissioners of *sewers*. 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 contempts [s]; 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 conservation of the sewers within their commission, either according to the laws and customs of Romney-marsh [t], or otherwise at their own discretion. They may also assess 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
[74] 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 [u]. 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

[q] North's Life of Lord Guildford, 45.

[r] F. N. B. 113.

[s] 1 Sid. 145.

[t] Romney-marsh, in the county of Kent, a tract containing 24,000 acres, is governed by certain antient and equitable laws of sewers, composed by Henry de Bathe, a venerable judge in the reign of king Henry the third; from which laws all commissioners of sewers in England may receive light and direction. (4 Inst. 276.)

[u] Cro. Jac. 336.

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 salva-"tion of the king's lands and people." But now it is clearly held, that this (as well as all other inferior jurisdictions) is subject to the discretionary coercion of his majesty's court of king's bench [x].

III. The court of *policies of assurance*, when subsisting, is erected in pursuance of the statute 43 Eliz. c. 12. which recites the immemorial usage of policies of assurance, "by "means whereof it cometh to pass, upon the loss or perishing "of any ship, there followeth not the undoing of any man, "but the loss lighteth rather easily upon many than heavy "upon few, and rather upon them that adventure not, than "upon those that do adventure; whereby all merchants, "especially those of the younger sort, are allured to venture "more willingly and more freely. and that heretofore such "assurers had used to stand so justly and precisely upon their "credits, as few or no controversies had arisen thereupon; "and if any had grown, the same had from time to time "been ended and ordered by certain grave and discreet mer-"chants 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 [75] 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

[v] Moor, 825, 826. See page 55.
[w] Milt. Parad. Lost, iv. 393.
[x] 1 Ventr. 66. Salk. 146.

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 merchandize [y], and to suits brought by the assured only, and not by the insurers [z], no such commission has of late years issued: but insurance causes are now usually determined by the verdict of a jury of merchants, and the opinion of the judges in case of any legal doubts; whereby the decision is more speedy, satisfactory, and final: though it is to be wished, that some of the parliamentary powers, invested in these commissioners, especially for the examination of witnesses, either beyond the seas or speedily going out of the kingdom [a], could at present be adopted by the courts of Westminster-hall, without requiring the consent of parties. (4)

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 marshal of the king's house, and was

[y] Styl. 166. 172.
[z] 1 Show. 396.
[a] Stat. 13 & 14 Car. II. c. 22. § 3. & 4

(4) It has been well observed (Park on Insurances, vol. 1. p. xli.), that the most severe blow to the court of policies of assurance, was a decision in the upper bench (Michaelmas 1658), which determined that a judgment for the defendant in that court was no bar to another action for the same cause at common law. *Came* v *Moy*, 2 Sid 121. The statute of Eliz speaks of the mischief of the assured being compelled to bring a separate action against each assurer; but in later times the hardship was felt in the opposite direction, the assured vexatiously choosing to bring a separate action against each. This gave rise to what is called the consolidation rule, which was first brought into common use by Lord Mansfield. By this the court will stay the proceedings in all the actions but one, on the application of the several insurers, they undertaking to be bound by the verdict in that one, to pay their several subscriptions, and the costs This rule cannot be made without the consent of the assured; if he withholds it, however, the court will grant imparlances in the several actions till the first be tried; but if he consents, it will make the assurers submit to reasonable terms to facilitate the trial, such as admitting the policy without formal proof, producing and giving copies of books, papers, &c. Park on Insurance. i. xlv. Tidd's Pract. i. 635.

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 affirmance of the common law) [e], the verge of the court in this respect extends for twelve miles round the king's place of residence [f]. And, as this tribunal was never subject to the jurisdiction of the chief justiciary, no writ of error lay from it (though a court of record) to the king's bench, but only to parliament [g], till the statutes of 5 Edw. III. c. 2. and 18 Edw. III. st. 2. c. 7. which allowed such writ of error before the king in his place. But this court being ambulatory, and obliged to follow the king in all his progresses, so that by the removal of the household, actions were frequently discontinued [h], and doubts having arisen as to the extent of it's jurisdiction [i], king Charles I. in the sixth year of his reign by his letters patent erected a new court of record, called the *curia palatii* or *palace-court*, to be held before the steward of the household and knight-marshal, and the steward of the court, or his deputy; with jurisdiction to hold plea of all manner of personal actions whatsoever, which shall arise between any parties within twelve miles of his majesty's palace at Whitehall [k]. The court is now held once a week, together with the antient court of marshalsea, in the borough of South-

[76]

[b] 1 Bulstr. 211

[c] Flet. *l.* 2. *c.* 2.

[d] *Artic sup. cart.* 28 Edw. I. c. 3. Stat. 5 Edw. III. c. 2. 10 Edw. III. st. 2. c. 2.

[e] 2 Inst. 548.

[f] By the antient Saxon constitution, the *pax regia*, or privilege of the king's palace, extended from his palace gate to the distance of three miles, three furlongs, three acres, nine feet, nine palms, and nine barley-corns, as appears from a fragment of the *textus Roffensis* cited in Dr. Hickes's *dissertat. epistol.* 114.

[g] 1 Bulstr. 211. 10 Rep. 69.

[h] F N.B. 241. 2 Inst. 548.

[i] 1 Bulstr. 208.

[k] 1 Sid. 180. Salk. 439.

wark: 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 it's first commencement, together with the custody of the defendant, either into the king's bench or common pleas, by a writ of *habeas corpus cum causa*: and the inferior business of the court hath of late years been much reduced, by the new courts of conscience erected in the environs of London; in consideration of which the four counsel belonging to these courts had salaries granted them for their lives by the statute 23 Geo. II. (5)

[77] V. A FIFTH species of private courts of a limited, though extensive, jurisdiction are those of the principality of Wales; which, upon its thorough reduction, and the settling of its polity in the reign of Henry the eighth[l], were erected all over the country: principally by the statute 34 & 35 Hen. VIII. c. 26., though much had before been done, and the way prepared by the statute of Wales, 12 Edw. I. and other statutes. By the statute of Henry the eighth before mentioned, courts-baron, hundred, and county-courts are there established as in England. A session is also to be held twice in every year in each county, by judges[m], appointed by the king, to be called

[l] See vol. i introd § 4. [m] Stat 18 Eliz c 8

(5) There are some inaccuracies in this account of the palace court. It is now held by virtue of a charter, granted by Ch. II. in the sixteenth year of his reign, and though the lord steward, the knight marshal, and steward of the marshalsea, are all named as judges, yet as the last, or his deputy, is the only person required to be "learned in the laws," he alone, or his deputy, ordinarily sits to try causes. With respect to the jurisdiction, two exceptions should have been made; the first of place, the city of London being excluded; the second of persons; for this court was not meant to interfere with the marshalsea, and, therefore, in actions of trespass *vi et armis*, if either party, and in all other personal actions, if both be of the household, the court cannot proceed The statutes which regulate the removal of causes from inferior courts, are applicable to this, and the general effect of them is that up to 5*l.* the jurisdiction cannot be disturbed, and from 5*l.* to 15*l.* the party removing must enter in a recognizance with two sureties in double the amount, for the payment of debt and costs in case judgment shall pass against him. See Tidd's Pract. 406.

In practice, causes are seldom or never removed from this court, which now sits in Scotland Yard, into the common pleas.

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 original writs of process of the king's courts at Westminster do not run into the principality of Wales [o]; though process of execution does [p]; as do also all prerogative writs, as writs of *certiorari*, *quo minus*, *mandamus*, and the like [q]. (6) And even in causes between subject and subject, to prevent injustice through family factions or prejudices, it is held lawful (in causes of freehold at least, and it is usual in all others) to bring an action in the English courts, and try the same in the next English county adjoining to that part of Wales where the cause arises [r], and wherein the venue is laid. But, on the other hand, to prevent trifling and frivolous suits, it is enacted by statute 13 Geo. III. c. 51. that in *personal* actions, *tried* in any English county, where the cause of action arose, and the defendant [at the time of service of mesne process] resides in Wales, if the plaintiff shall not recover a verdict for ten pounds, he shall be nonsuited and pay the defendant's costs, unless it be certified by the judge that the freehold or title came principally in question, or that the cause was proper to be tried in such English county. And if any *transitory* [78] action, the cause whereof arose and the defendant is resident

[n] See, for farther regulation of the practice of these courts, stat. 5 Eliz. c. 25. 8 Eliz. c 20. 8 Geo. I. c. 25. § 6 6 Geo. II. c. 14. 13 Geo. III. c. 51

[o] 2 Roll. Rep. 141.

[p] 2 Bulstr. 156 2 Saund. 193 Raym 206.

[q] Cro. Jac 484.

[r] Vaugh. 413 Hardr. 66.

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(6) According to the report in Saunders, there was no judgment given in the case referred to, but, according to Sir Thomas Raymond's report, the judgment was in favour of the position in the text. Indeed, though the point was once much disputed, and very high authorities were against the law as laid down, it is now established, and every day's practice And though original writs of process will not run directly into Wales, yet the plaintiff may, where the action is of a transitory nature, have the benefit of them indirectly; and all writs of process, such as latitats, &c. which are issued under the equitable fictions mentioned before in Chapter IV., and more fully explained in Chapter XIX will run directly into Wales. Tidd's Pract. i. 120 172 175

in Wales, shall be *brought* in any English county, and the plaintiff shall not recover a verdict for ten pounds, the plaintiff shall be nonsuited, and shall pay the defendant's costs, deducting thereout the sum recovered by the verdict. (7)

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

VII. Another species of private courts, which are of a limited local jurisdiction, and have at the same time an exclusive cognizance of pleas, in matters both of law and equity[v], are those which appertain to the counties palatine of Chester, Lancaster, and Durham, and the royal franchise of Ely[w]. In all these, as in the principality of Wales, the king's ordi-

[r] Hob 77. 2 Lev. 24.
[s] 1 Ventr. 157.
[t] 4 Inst. 206.
[u] 1 Chan. Rep. 55. Toth. 145. Hardr 171.
[v] 4 Inst 213. 218. Finch. R. 452.
[w] See vol. i. introd § 4.

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(7) Though by the provisions of this statute, no judgment is entered for the plaintiff on the verdict which he has gained, yet it is provided by the same act, that the verdict so gained shall nevertheless bar any action commenced by the plaintiff thereafter for the same cause.

The 6th, 7th, and 8th sections of the same statute provide for the striking of special juries where either party in the cause shall desire it

By the 33 G. 3 c. 68., a provision is made for giving effect to the judgments of the Welsh courts, where neither the defendant's person nor his effects can be found within their jurisdiction. In this case, any court of record at Westminster may assist the plaintiff by issuing writs of execution.

nary writs, issuing under the great seal out of chancery, do not run; that is, they are of no force. For as originally all *jura regalia* were granted to the lords of these counties palatine, they had of course the sole administration of justice, by their own judges appointed by themselves and not by the crown. It would therefore be incongruous for the king to send his writ to direct the judge of another's court in what manner to administer justice between the suitors. (8) But when the privileges of these counties palatine and franchises were abridged by statute 27 Henry VIII. c. 24. it was also enacted, that all writs and process should be made in the king's name, but should be *teste'd* or witnessed in the name of the owner of the franchise. Wherefore all writs, whereon actions are founded, and which have current authority here, must be under the seal of the respective franchises; the two former of which are now united to the crown, and the two latter under the government of their several 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 may respects[x] with the counties palatine,

[79]

[x] 1 Sid. 166.

(8) The same qualification of the text is necessary here, as in the case of Wales; all writs, which by fiction, or the practice of the court, commence the actions in those courts from which they issue, as latitats, will run into the county palatine, but then they must be addressed not directly to the sheriff (who is the officer of the palatine, not of the king), but to the bishop, chamberlain, or chancellor, as the case may be, directing him to issue his mandate to the sheriff for the purposes of the writ. When the writ is misconceived, the courts seem to have established this distinction; if it be directed immediately to the sheriff, though this is a breach of the privileges of the palatinate, the superior court will compel obedience, unless the palatine interfere and claim his privilege; but if it be directed to the proper officer, the chamberlain of Chester for example, and commands him to do that himself, which he has only authority to direct another to do; there the writ is wholly irregular, and all the proceedings under it may be quashed at the prayer of the party. *Jackson* v. *Hunter*, 6 T. R 71. *Bracebridge* v. *Johnson*, 1 Brod & Bing. 12.

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[y]. So likewise a writ of error lies from all the other jurisdictions to the same supreme court of judicature[z], as an ensign of superiority reserved to the crown at the original creation of the franchises. And all prerogative writs (as those of *habeas corpus*, prohibition, *certiorari*, and *mandamus*) may issue for the same reason to all these exempt jurisdictions[a]; 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[b].

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
[80] 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[c]. The privileges of the tinners are confirmed by a charter, 33 Edw. I., and fully expounded by a private statute[d], 50 Edw. III., which has since been explained by a public act, 16 Car. I. c. 15. What relates to our present purpose is only this: that all tinners and labourers in and about the stannaries shall, during the time of their working therein *bona fide*, be privileged from suits in other courts, and be only impleaded in the stannary court in all matters excepting pleas of land, life, and member. No writ of error lies from hence to any court in Westminster-hall; as was agreed by all the judges[e] in 4 Jac. I. But an appeal lies from the steward of the court to the under-

[y] Jenk. 71. *Diversyte des courts. t bank le roy.* 1 Sid. 356.

[z] Bro. *Abr. t. error.* 74. 101. Davis. 62. 4 Inst. 38. 214. 218

[a] 1 Sid. 92.

[b] Cro. Jac. 543.

[c] 4 Inst. 232.

[d] See this at length in 4 Inst. 232.

[e] 4 Inst. 231.

warden; and from him to the lord-warden; and thence to the privy council of the prince of Wales, as duke of Cornwall[f], when he hath had livery or investiture of the same[g]. And from thence the appeal lies to the king himself, in the last resort[h].

IX. The several courts within the city of London[i], 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 [81] 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. to give assistance to such of them as are courts of record, by issuing writs of execution, where the person or effects of the defendant are not within the inferior jurisdiction; and that the proceedings in these special courts ought to be according to the course of the common law, unless otherwise ordered by parliament; for though the king may erect new courts, yet he cannot alter the established course of law.

But there is one species of courts, constituted by act of parliament, in the city of London, and other trading and populous districts, which in their proceedings so vary from the course of the common law, that they may deserve a more

[f] 4 Inst. 230.

[g] 3 Bulstr. 183.

[h] Doderidge Hist. of Cornw. 94.

[i] The chief of those in London are the *sheriffs' courts*, holden before their steward or judge; from which a writ of error lies to the *court of hustings*, before the mayor, recorder, and sheriffs, and from thence to justices appointed by the king's commission, who used to sit in the church of St. Martin *le grand*. (F. N. B 23.) And from the judgment of those justices a writ of error lies immediately to the house of lords.

[k] Salk. 144. 263.

particular consideration. I mean the courts of requests or courts of conscience, for the recovery of small debts. The first of these was established in London so early as the reign of Henry the eighth, by an act of their common council; which however was certainly insufficient for that purpose and illegal, till confirmed by statute 3 Jac. I. c. 15., which has since been explained and amended by statute 14 Geo. II. c. 10. The constitution is this: two aldermen, and four commoners, sit twice a week to hear all causes of debt not exceeding the value of forty shillings; which they examine in a summary way, by 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. (9)

[82] The anxious desire that has been shown to obtain these several acts, proves clearly that the nation in general is truly sensible of the great inconvenience arising from the disuse of

(9) These acts have been in part repealed, and very beneficially amended by the 39 & 40 G. 3 c. civ., Public, Local, and Personal Acts. By it two aldermen, and not less than twenty inhabitant householders (including the common councilmen of the ward), are appointed for a month in rotation from the several wards; they are to sit from time to time; if only three meet on the day appointed for a sitting, their jurisdiction is limited to debts of forty shillings, if as many as seven, it is extended to those of five pounds. In their judgment also they may direct the sum recovered to be paid at once, or by such instalments as they shall deem just and reasonable. Their proceedings are to be registered, and cannot be removed into any other court. The power of imprisonment is regulated, and can never exceed one day for each shilling of the debt. It suffices also to bring a case within this statute, that the defendant "resides, or keeps a house, warehouse, shop, shed, stall, or stand, or seeks a livelihood, or trades, or deals in London or the liberties thereof," whereas under the preceding acts both plaintiff and defendant were obliged to be resident within the city. The words in this latter act are very extensive, but they have been construed to mean the settled and actual place of abode or trading, not of mere occasional occupation or plying. The cases are collected by Mr. Tidd, vol. ii.

the antient 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 [83] into their proceedings, and the power that either party has of transferring at pleasure the suit 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 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 antiently 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 40*s.* damages, the plaintiff shall recover no costs, but shall pay the defendant double costs; unless upon some special

stances, 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 it's universal reception. (10)

X. There is yet another species of private courts, which

(10) Upon reference to the statute it should seem that there need not be twelve suitors present; for in the first section the suitors and the county clerk in county court assembled, or *the major part of them so assembled*, are empowered to proceed; by the second it is enacted that the court shall be held every Thursday in the hundred of Ossulston, on the first Tuesday of every month in one of two other hundreds, and on the last Tuesday in every month in a fourth hundred; so that there are to be six courts in the whole in the month, besides the common law monthly court, which is to be held as before. By the seventh section, a list of twelve suitors for the month in each of these three divisions is to be made out, and they are to be summoned; no suitor is to have a voice in the court, except when so summoned; and none to be put upon the list more than once in the year. The probable meaning of this last provision is, that no one shall be compelled to attend more than once in the year, and if so, there will not ordinarily be more than three suitors at each of the weekly courts in Ossulston hundred. But independently of this, as the suitors can never exceed twelve, and the major part of them are allowed to proceed; it is clear that less than twelve form a competent court; and still further, as the eighth section provides, that if any suitor after summons neglects to attend, and there shall not be a sufficient number of suitors to proceed in the business of the court, such suitor shall be amerced; it should seem that mere absence is not to be punished unless the business of the court is thereby impeded, but if twelve were necessary, the absence of any one must of course, and in every case stop the proceeding of the court In practice I believe that three suitors are considered sufficient to form a court, and thus it is not easy to see how these county courts essentially differ from, or are preferable to the courts of requests; the author seems to have imagined for the moment that the twelve freeholders formed a jury, and that the causes were decided by trial by jury: but the suitors in a county court are the judges, their numbers need not amount to twelve, and they cannot be challenged by the parties.

I must not pass over in silence: *viz.* the chancellors' courts in the two universities of England. Which two learned bodies enjoy the sole jurisdiction, in exclusion of the king's courts, over all civil actions and suits whatsoever, when a [84] 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 volume [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 seen, containing this grant to the university of Oxford, was 28 Hen. III. *A.D.* 1244. And the same privileges were confirmed and enlarged by almost every succeeding prince, down to king Henry the eighth; in the fourteenth year of whose reign the largest and most extensive charter of all was granted. One similar to which was afterwards granted to Cambridge in the third year of queen Elizabeth. But yet, notwithstanding these charters, the privileges granted therein, of proceeding in a course different from the law of the land, were of so high a nature, that they were held to be invalid; for though the king might erect new courts, yet he could not alter the course of law by his letters patent. Therefore in the reign of queen Elizabeth an act of parliament was obtained [n], confirming all the charters of the two universities, and those of 14 Hen. VIII. and 3 Eliz. by name. Which *blessed act*, as sir Edward Coke entitles it [o], established this high privilege without any doubt or opposition [p]: or, as sir Matthew Hale [q] very fully expresses the sense

[l] Vol. 1 introd. § 1.
[m] *Cod.* 4. *tit* 13.
[n] 13 Eliz c 29.
[o] 4 Inst. 227.
[p] Jenk. Cent. 2. pl. 88. Cent. 3. pl. 33. Hardr. 504. Godbolt. 201.
[q] Hist. C.L. 33.

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 ac- "cording 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." (11)

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

[r] *Tit.* 21. § 19. [s] *Cod* 7. 70. 1.

(11) Though the charters in terms do not make residence a necessary qualification, yet the courts, looking to the reason of the privilege, have often determined that the person in behalf of whom the privilege is prayed to be allowed, shall be actually a resident-member of the university. See post. 298. and p. 335., and in the affidavit of the matriculation, which by the present practice accompanies the chancellor's claim and certificate, the party's residence should be stated, unless he be a servant of the university necessarily resident there. The privileges of the two universities differ materially; that of Oxford extends to all personal causes arising in any part of England, but that of Cambridge is limited to the town and its suburbs. See 2 Wilson's R. 406. Cas. Temp. Hardw. 240. 12 East's R. 12. 15 East's R. 634.

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.

[t] 2 Inst. 548.

CHAPTER THE SEVENTH.

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 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,

1. THE wrongs or injuries cognizable by the ecclesiastical courts. I mean such as are offered to private persons or individuals; which are cognizable by the ecclesiastical court, not for reformation of the offender himself or party *injuring*, (*pro salute 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 [88]

[a] See Vol. I. introd. § 1.

[b] Hal. Hist. C. L. c. 2.

Another pecuniary injury, cognizable in the spiritual courts, is the *non-payment* of other ecclesiastical *dues* to the clergy; as pensions, mortuaries, compositions, offerings, and whatsoever falls under the denomination of surplice-fees, for marriages or other ministerial offices of the church: all which injuries are redressed by a decree for their actual pay-
[90] ment. Besides which, all offerings, oblations, and obventions, not exceeding the value of 40*s.* 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 authorised by the canon, is contrary to common right: for of common right, no fee is due to the minister even for performing such branches of his duty, and it can only be supported by a special custom [l]; but no custom can support the demand of a fee without performing them at all.

For *fees* also, settled and acknowledged to be due to the officers of the ecclesiastical courts, a suit will lie therein: but not if the *right* of the fees is at all disputable; for then it must be decided by the common law [m]. It is also said, that if

[i] Stat. 7 & 8 W. III c 6.
[k] Salk. 332.
[l] *Ibid.* 334 Lord Raym. 450. 1558. Fitzg. 55.
[m] 1 Ventr 165.

But the original jurisdiction of the two magistrates is put an end to *in limine*, if the party complained against shall insist before them upon any prescription, composition, or modus, agreement or title, and deliver the same to them in writing subscribed by him, and shall then give to the party complaining security to the satisfaction of the magistrates to pay all such costs and damages, as upon a trial at law shall be given against him in case such prescription, &c. shall not be allowed.

These are provisions of the 7 & 8 W. 3. c 6.; the principle of both these statutes has been adopted and extended by the 53 G 3 c. 127., and 54 G. 3. c. 68., the first applying to England, and the latter to Ireland. By the fourth section of each act, the jurisdiction of the two justices is extended to tithes, oblations, and compositions of the value of ten pounds; and by the sixth, in respect of tithes and church-rates due from quakers to fifty pounds. In either case one justice is made competent to receive the original complaint. and to summon the defaulter before two.

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 consesideration of what he reasonably deserved in proportion to the service performed. (3)

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 [91] 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

[n] 1 Burn. eccl. law 438. [o] 1 Freem. 70.

By the 57 G. 3. c. 99., the question of salary to the curate of a non-resident clergyman is put entirely into the power of the bishop, subject to the regulations of the act He determines the amount according to a certain scale framed upon the value and population of the benefice; this amount is specified in the curate's licence, and if there is any difference respecting it, upon complaint made to the bishop, he may summarily determine it, and punish the non-payment by sequestration. By the sixty-first section, any agreement made between the curate and rector, in derogation of the provisions of the act, or by which the curate is to take less than the appointed salary, is made void to all intents and purposes; and the payment of any arrears accrued in consequence of such agreement, may be enforced with treble costs by the bishop, if the application of the curate be made within twelve months after his quitting the curacy.

the church, but gave it a vast ascendant over princes of all denominations; whose marriages were sanctified or reprobated, their issue legitimated or bastardized, and the succession to their thrones established or rendered precarious, according
[93] 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 causes 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 [v], soon became too gross for the modesty of a lay tribunal. And causes matrimonial are now so peculiarly ecclesiastical, that the temporal courts will never interfere in controversies of this kind, unless in some particular cases. As if the spiritual court do proceed to call a marriage in question after the death of either of the parties; this the courts of common law will prohibit, because it tends to bastardize and disinherit the issue; who cannot so well defend the marriage, as the parties themselves, when both of them living, might have done [u].

Of matrimonial causes, one of the first and principal is, 1. *Causa jactitationis matrimonii*, when one of the parties boasts or gives out that he or she is married to the other, whereby a common reputation of their matrimony may ensue. On this ground the party injured may libel the other in the spiritual court; and, unless the defendant undertakes and makes out a proof of the actual marriage, he or she is enjoined perpetual silence upon that head; which is the only remedy the ecclesiastical courts can give for this injury. (6) 2. Another

[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.

[u] 2 Inst. 614.

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(6) It is not enough for the maintenance of this suit, that one party falsely "boasts or gives out that he or she is married to the other;" the boasting must be malicious as well as false. In the case of *Lord Hawke*

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 enacts, that for the future no suit shall be had in any [94] ecclesiastical court, to compel a celebration of marriage *in facie ecclesiae*, for or because of any *contract* of matrimony whatsoever. (7) 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 volume [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, adultery, a perpetual disease, and the like: this unfitness or inability for the marriage state may be looked upon as an injury to the suffering party; and for this the ecclesiastical law administers the remedy of separation, or a divorce *a mensa et thoro*. But if the cause existed previous to the marriage, and was such a one as rendered the marriage unlawful *ab initio*, as consanguinity, corporal imbecility, or the like; in this case the law looks upon the marriage to have been always null and void, being contracted *in fraudem legis*, and decrees not only a separation from bed and board,

[w] Book I ch. 15

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v *Corri*, the learned judge, in stating the defences, which may be made to such a suit, says, " a third defence of more rare occurrence is that though " no marriage has passed, yet the pretension was fully authorised by the " complainant, and therefore though the representation is false, yet it is " not malicious, and cannot be complained of as such by the party who has " denounced it." In that case, such a defence having been fully made out, the court dismissed the suit 2 Haggard's Rep 280.

(7) This act is repealed, but the 4 G 4. c. 76. contains the same provision.

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 are the only remaining species belonging to the ecclesiastical jurisdiction; which, as they are certainly of a mere temporal nature[x], 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 volume[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 "*super* "*consensu regio et suorum procerum in talibus ab antiquo con-*

[x] Warburt alliance. 173.
[y] Book II. ch 32.
[z] Hickes *Disser. Epistolar. p* 8 58

"*cesso, item super consuetudine in eâ parte de scientiâ Regum* [illegible]." The same was about a century before, very openly professed in a canon of archbishop Stratford, *viz.* that the administration of intestates' goods was "*ab* "*olim*" granted to the ordinary, "*consensu regio et magnatum* "*regni Angliæ* [b]." The constitutions of cardinal Othobon also testify, that this provision "*olim a praelatis cum appro-* "*batione 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 testamenta probandi non habe-* [96] "*bant: administrationis potestatem cuique delegare non po-* "*terant.*"

At what period of time the ecclesiastical jurisdiction of testaments and intestacies began in England, is not ascertained by any antient 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 antiquity. Lindewode, we have seen, declares that it was "*ab antiquo;*" Stratford, in the reign of king Edward III., mentions it as "*ab olim ordinatum;*" and cardinal Othobon, in the 52 Hen. III., speaks of it as an antient 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 Normandy "*quod distributio rerum quae in testamento relinquuntur auto-* "*ritate ecclesiae fiet.*" And even this ordinance of king Richard was only an introduction of the same law into his

[a] *Provincial. l.* 3. *t.* 13. *fol.* 176.
[b] *Ibid. l.* 3. *t.* 28. *fol.* 263
[c] *tit.* 23.
[d] See 9 Rep. 38. 263.
[e] *l.* 5. *de exceptionibus. c.* 10.
[f] Fitz. *Abr tit. testament, pl* 4. 2 Roll. Abr. 217. 9 Rep. 37. Vaugh 207.
[g] *cap.* 27. *edit. Oxon.*
[h] *cap.* 27. *edit. Oxon.*

ducal dominions, which before prevailed in this kingdom; for in the reign of his father Henry II. Glanvil is express, that "*si quis aliquid dixerit contra testamentum, placitum illud* "*in curia christianitatis audiri debet et terminari*[i]." And the Scots book called *regiam majestatem* agrees *verbatim* with Glanvil in this point[k].

It appears that the foreign clergy were pretty early ambitious of this branch of power; but their attempts to assume
[97] it on the continent were effectually curbed by the edict of the emperor Justin[l], which restrained the insinuation or probate of testaments (as formerly) to the office of the *magister census*: for which the emperor subjoins this reason; "*absur-* "*dum etenim clericis est, immo etiam opprobriosum, si peritos* "*se velint ostendere disceptationum esse forensium.*" But afterwards by the canon law[m] it was allowed that the bishop might compel by ecclesiastical censures the performance of a bequest to *pious uses*. And therefore, as that was considered as a cause *quae secundum canones et episcopales leges ad regimen animarum pertinuit*, it fell within the jurisdiction of the spiritual courts by the express words of the charter of king William I., which separated those courts from the temporal. And afterwards, when king Henry I. by his coronation-charter directed that the goods of an intestate should be divided for the good of his soul[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 aera referred to by Stratford and Othobon, when the king, by the advice of the prelates, and with the consent of his barons, invested the church with this privilege. And accordingly in king Stephen's charter it is provided, that the goods of an intestate ecclesiastic shall be distributed *pro salute animae ejus, ecclesiae consilio*[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

. c. 8.

[k] *l.* 2. *c.* 38.

[l] *Cod.* 1. 3. 41. *cretal.* 3. 26. 17. Gilb. Rep. 5.

[n] *Si quis baronum seu hominum meorum—pecuniam suam non dederit vel dare disposuerit, uxor sua, sive liberi, aut parentes et legitimi homines ejus, eam* pro anima ejus *dividant, sicut eis melius visum fuerit. (Text. Roffens. c.* 34. *p.* 51.)

[o] Lord Lyttlet. Hen. II. vol. 1. Hearne *ad Gul. Neubr.* 711.

rudiments of christianity and ecclesiastical discipline from England about the beginning of the twelfth century) have thence also adopted the spiritual cognizance of intestacies, testaments, and legacies [p].

THIS jurisdiction, we have seen, is principally exercised with us in the consistory courts of every diocesan bishop, and [98] in the prerogative 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 merely ancillary to other inferior jurisdictions, the cause, when once brought there, receives there also its full determination. (8)

[p] Stiernhook, *de jure Sueon. l.* 3. *c.* 8

(8) No action at law can be maintained against an executor for a legacy where there is no further proof of his assent to the legacy, than what the law can infer from an acknowledgment by him of assets sufficient to pay it Convenience is much in favour of this rule, because, if the person who was

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
99] 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 antient 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 ha-

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was *legally* entitled could recover at *law*, he would do so *absolutely*, and for his own use; and though the legacy might have been intended for the benefit of another, a court of law would have no means of compelling the legatee so to apply it; as in the case of a legacy to the wife, which would become the husband's absolutely, and the court of law could not oblige him, as a court of equity now will, to make provision for his wife out of it. *Deeks* v. *Strutt*, 5 T. R. 690. But where the executor admits assets, and expressly promises to pay in the case of a pecuniary legacy, or where the legacy being specific, he assents to it, such promise and assent vest the property in the legatee, and he may maintain an action against the executor. *Atkins* v. *Hill*, Cowp. 284. *Lord Saye & Sele* v. *Guy*, 3 E. R. 120.

It is omitted to be observed in the text that causes of defamation are within the jurisdiction of the ecclesiastical court; suits of this kind are entertained for the use of words, which not importing or producing any temporal danger or loss, are not actionable in the courts of common law; and the use of them is punished by penance with or without costs, at the discretion of the court.

zard. 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 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 ardour 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. [100]

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

[q] Vol. I. introd. §1.

[r] Warb. alliance. 179.

them [s]. But, under these restrictions, their ordinary course of proceeding is, first, by *citation*, to call the party injuring before them. Then, by *libel*, *libellus*, a little book, or by articles drawn out in a formal *allegation*, to set forth the complainant's ground of complaint. To this succeeds the *defendant's answer* upon oath, when, if he denies or extenuates the charge, they proceed to *proofs* by witnesses examined, and their depositions taken down in writing, by an officer of the court. If the defendant has any circumstances to offer in his defence, he must also propound them in what is called his *defensive allegation*, to which he is entitled in his turn to the *plaintiff's answer* upon oath, and may from thence proceed to *proofs* as well as his antagonist. The canonical doctrine of *purgation*, whereby the parties were obliged to answer upon oath to any matter, however criminal, that might be objected against them, (though long ago over-ruled 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 in-
[101] terpose, 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 tender or administer to any person whatsoever, the oath usually called the oath *ex officio*, or any other oath whereby he may be compelled to confess, accuse, or purge himself of any criminal matter or thing, whereby he may be liable to any censure or punishment. When all the pleadings and 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.

[s] Roll. Abr. 300. 302.

[t] Chap. 5.

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 or profligate men, who would despise the *brutum fulmen* of mere ecclesiastical censures, especially when pronounced by a petty surrogate in the country, for railing or contumelious words, for non-payment of fees or costs, or for other trivial causes. The common law therefore compassionately steps in to the aid of the ecclesiastical jurisdiction, and kindly lends a supporting hand to an otherwise tottering authority. Imitating herein the policy of our British ancestors, among whom, according to Cæsar [x], whoever where interdicted by the Druids from their sacrifices, "*in numero impiorum ac sceleratorum habentur · iis omnes decedunt, aditum eorum sermonemque defugiunt, ne quid ex contagione incommodi accipiant: neque iis petentibus jus redditur, neque honos ullus communicatur.*" And so with us by the common law an excommunicated person is disabled to do any act, that is required to be done by one that is *probus et legalis homo.* He cannot serve upon juries, cannot be a witness in any court, and, which is the worst of all, cannot bring an action, either real or personal, to recover lands or money due to him [y]. Nor is this the whole: for if, within forty days after the sentence has been published in the church, the offender does not submit and abide by the sentence of the spiritual court, the bisho[p]

[102]

[u] Co. Litt. 133.
[w] 2 Inst. 623
[x] *De Bello Gall. l.* 6. c. 13.
[y] Litt. § 201.

certify such contempt to the king in chancery. Upon which there issues out a writ to the sheriff of the county, called, from the bishop's certificate, a *significavit*; or, from its effects, a writ *de excommunicato capiendo*: 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; upon which another writ, *de excommunicato deliberando*, issues out of chancery to deliver and release him[z]. (9) This process seems founded on the charter of separation (so often referred to) of William the Conqueror. "*Si aliquis per superbiam elatus ad justiciam epis-*
"*copalem venire noluerit, vocetur semel, secundo, et tertio:*
"*quod si nec sic ad emendationem venerit, excommunicetur, et,*
"*si opus fuerit, ad hoc vindicandum fortitudo et justitia regis sive*
"*vicecomitis adhibeatur.*" And in case of subtraction of tithes, a more summary and expeditious assistance is given by the statutes of 27 Hen. VIII. c. 20. and 32 Hen. VIII. c. 7. which enact, that upon complaint of any contempt or misbehaviour towards the ecclesiastical judge by the defendant in any suit
[103] for tithes, any privy counsellor, or any two justices of the peace, (or, in case of disobedience to a definitive sentence, any two justices of the peace,) may 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

[z] F. N. B. 62.

(9) By the same two statutes which have already been mentioned, the 53 G. 3. c. 127. for England, and 54 G. 3. c. 68 for Ireland, excommunication and the writ *de excommunicato capiendo* are prohibited as a mode of enforcing obedience to ecclesiastical process or decrees. Instead of the sentence of excommunication in these cases, the court is now to pronounce the party *contumacious*, and a writ *de contumace capiendo* is to issue from chancery upon the signification of the ecclesiastical judge, which is to have the same force as the former writ.

Excommunication, however, may still be pronounced by the court as a spiritual censure for an offence of ecclesiastical cognizance, but then it involves no civil penalty or incapacity whatever, save an imprisonment for such term, not exceeding six months, as the court shall direct; and in execution of that sentence, the writ *de excommunicato capiendo* issues in

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

II. I AM next to consider the injuries cognizable in the *court military*, or court of *chivalry*. The jurisdiction of which is declared by statute 13 Ric. II. c. 2. to be this: "that it "hath cognizance of contracts touching deeds of arms or "of war, out of the realm, and also of things which touch "war within the realm, which cannot be determined or dis-"cussed 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 [104] this court of chivalry is principally in two points; the redressing injuries of honour, and correcting encroachments in matters of coat-armour, precedency, 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 it's wrongs and injuries escape the notice of

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

105] As to the other point of its civil jurisdiction, the redressing of encroachments and usurpations in matters of heraldry and coat-armour: it is the business of this court, according to sir Matthew Hale, to adjust the right of armorial ensigns, bearings, crests, supporters, pennons, &c.; and also rights of place or precedence, where the king's patent or act of parliament (which cannot be over-ruled by this court) have not already determined it.

The proceedings in this court are by petition, in a sum-

[a] Year book, 37 Hen. VI. 21. Selden of Duels, c. 10. Hal Hist. C.L. 37.
[b] Salk. 553. 7 Mod. 125. 2 Hawk
[c] Hal Hist C.L. 37.
[d] 1 Roll. Abr. 128.

mary way; and the trial not by a jury of twelve men, but by witnesses, or by combat [e]. But as it cannot imprison, not being a court of record, and as by the resolutions of the superior courts it is now confined to so narrow and restrained a jurisdiction, it has fallen into contempt and disuse. The marshalling of coat-armour, which was formerly the pride and study of all the best families in the kingdom, is now greatly disregarded; and has fallen into the hands of certain officers and attendants upon this court, called heralds, who consider it only as a matter of lucre, and not of justice: whereby such falsity and confusion have crept into their records, (which ought to be the standing evidence of families, descents, and coat-armour,) that, though formerly some credit has been paid to their testimony, now even their common seal will not be received as evidence in any court of justice in the kingdom [f]. But their original visitation books, compiled when progresses were solemnly and regularly made into every part of the kingdom, to inquire into the state of families, and to register such marriages and descents as were verified to them upon oath, are allowed to be good evidence of pedigrees [g]. (10) And it is much to be wished that this practice of visitation at certain periods were revived; for the failure of inquisitions *post*

[e] Co. Litt. 261
[f] 2 Roll. Abr 686. 2 Jon 224.
[g] Comb 63.

(10) The visitation books contain the pedigrees and arms of the nobility and gentry of the kingdom from the twenty-first year of Henry VIII. to the latter end of the seventeenth century, during which period the two provincial kings of arms, Clarencieux and Norroy, soon after their investiture in office, usually received a commission under the great seal, authorising them to visit the several counties within their respective provinces, to "peruse and take knowledge, survey and view of all manner of arms, cognizances, crests, and other like devices, with the notes of the descents, pedigrees, and marriages of all the nobility and gentry therein throughout contained, and also to reprove, control, and make infamous by proclamation, all such as unlawfully and without just authority usurp or take any name or title of honour or dignity as esquire or gentleman, &c" The first of these commissions was issued in the twenty-first year of Henry VIII., and the last in the second year of James II. From these visitations entries were afterwards made into the books kept at the college of Heralds. First Report of the House of Commons on Public Records. Appendix, c. 8. p. 82.

mortem, by the abolition of military tenures, combined with the negligence of the heralds in omitting their usual progresses, has rendered the proof of a modern descent, for
106] the recovery of an estate or succession to a title of honour, more difficult than that of an antient. 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. These courts have jurisdiction and power to try and determine all maritime causes; or such injuries, which, though they are in their nature of common law cognizance, yet being committed on the high seas, out of the reach of our ordinary courts of justice, are therefore to be remedied in a peculiar court of their own. All admiralty causes must be therefore causes arising wholly upon the sea, and not within the precincts of any county [i]. For the statute 13 Ric. II. c.5. directs that the admiral and his deputy shall not meddle with any thing, but only things done upon the sea; and the statute 15 Ric. II. c.3. declares that the court of the admiral hath no manner of cognizance of any contract, or of any other thing, done within the body of any county, either by land or by water; nor of any wreck of the sea: for that must be cast on land before it becomes a wreck [j]. But it is otherwise of things *flotsam*, *jetsam*, and *ligan*; for over them the admiral hath jurisdiction, as they are in and upon the sea [k]. If part of any contract, or other cause of action, doth arise upon the sea, and part upon the land, the common law excludes the admiralty court from it's jurisdiction; for, part belonging properly to one cognizance and part to another,

[h] 11 May, 1767.
[i] Co. Litt. 260. Hob. 79.
[j] See book I. ch. 8. p 292.
[k] 5 Rep. 106.

the common or general law takes place of the particular [l]. Therefore, though pure maritime acquisitions, which are [107] 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 charterparty 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]. (11)

[l] Co. Litt. 261.
[m] 1 Ventr 146.
[n] Hob. 12. Hal. Hist C.L. 35.
[o] Hob 212

(11) The case referred to in the text is that of *Palmer* v *Pope*, Hobart's Rep p. 79 and p 212.; but it does not seem to warrant the position. The libel in the admiralty court there stated an agreement made *super altum mare*, that Pope should carry certain sugars, and that the agreement was after put in writing in the port of Gado on the coast of Barbary, a breach was then assigned The court resolved, " that a prohibition lay, because the " original contract, though it were made at sea, yet was changed when it " was put in writing sealed, *which being at land*, changed the jurisdiction, " but if it had been a writing only without seal, a mere remembrance of " the agreement, it had made no change " By this is to be understood that the sealed contract destroyed the original parol contract, which a mere writing would not have done, and as that new contract was made *on land*, though out of the king's dominions, still it was not within the admiralty jurisdiction. It cannot, therefore, be inferred from this case, that the admiralty court cannot hold plea of *any* contract under seal The same point, however, is undoubtedly laid down in *Opy* v *Addison and others*, 12 Mod. 38. S.C. Salk. 31. *Day* v. *Searle*, 2 Strange, 968. (which, however, was decided only on the authority of the preceding case), and *Howe* v. *Nappier*, 4 Burr, 1950. Perhaps, however, upon an examination of the authorities, it would appear that there is nothing to warrant the position that the admiralty court has not jurisdiction, where the specialty contract is made *on the sea*, and to be performed *on the sea*, or when it relates to a subject-matter, over which the court has jurisdiction. The 4 Inst. p. 135., which has been cited to support this, does not go so far; and the case of *Menetone* v. *Gibbons*, 3 T. R. 267., virtually overruled the cases on which Lord Mansfield relied in *Howe* v. *Nappier*, because there it was determined that the admiralty court *had* jurisdiction respect-

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 common 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].

[108] Where the admiral's court hath not original jurisdiction

[p] 4 Inst. 134
[q] View of the Civil Law, b.3. p 1. § 3.
[r] *Inst.* 1. *tit.* 25.
[s] *Ff.* 49. 15. 12 § 6.
[t] *Ff.* 49 15 18.

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ing an hypothecation *bond*, though executed on land and under seal, *because* it had jurisdiction over the subject-matter of the hypothecation of ships, and it was expressly negatived that the circumstance of the instrument being under seal could deprive them of their jurisdiction Now the cases alluded to were suits for mariners' wages, and it was admitted that the admiralty had jurisdiction over the subject-matter, but it was said that the special agreement and the seal took it away

It will be observed that the reasoning in this note on the case of *Palmer* v. *Pope*, proceeds farther than the text, and assumes, that, in the case of contracts, it is not necessary to bring the matter within the precincts of a county in order to oust the admiralty of jurisdiction. In that case it is expressly laid down that the jurisdiction is limited to the *seas* only, that the libel must allege the matter to have arisen *super altum mare*, and that if it arise upon any continent, port, or haven in the world out of the king's dominions, the statutes take away the jurisdiction. This must be qualified, it is conceived, by the principle laid down in *Menetone* v. *Gibbons*

of the cause, though there should arise in it a question that is proper for the cognizance of that court, yet that doth not alter nor take away the exclusive jurisdiction of the common law [u]. And so, *vice versa*, if it hath jurisdiction of the original, it hath also jurisdiction of all consequential questions, though properly determinable at common law [v]. Wherefore, among other reasons, a suit for beaconage, of a beacon standing on a rock in the sea, may be brought in the court of admiralty, the admiral having an original jurisdiction over beacons [w]. In case of prizes, also, in time of war, between our own nation and another, or between two other nations, 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]. (12)

[u] Comb 462.
[v] 13 Rep 53 2 Lev. 25. Hardr 183
[w] 1 Sid. 158.
[x] 2 Show. 232 Comb 444.

(12) The author takes no notice of what is very material, that there are in fact two courts; — the admiralty court, or, more properly, the instance court, of which he has hitherto been speaking, and which the statutes of Richard were made to restrain, but which has no jurisdiction in matters of prize, and the prize court Both courts have, indeed, the same judge; but in the former he sits by virtue of a commission under the great seal, which enumerates the objects of his jurisdiction but specifies nothing relative to prize; while in the latter, he sits by virtue of a commission which issues in every war under the great seal to the Lord High Admiral, requiring the court of admiralty, and the lieutenant and judge of the same court "to proceed upon all and all manner of captures, seisures, prizes, "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." and upon this a warrant issues to the judge. The manners of proceeding, and the systems of litigation and jurisprudence, are different in the two courts. The jurisdiction of this last court is exclusive, for it has been determined solemnly, that though for taking a ship on the high seas an action will lie at common law, yet when it is taken *as prize*, though wrongfully taken, and there were no colour for the taking, no action can be maintained Nor is the jurisdiction confined to captures *at sea;* captures in port, or on land, where the surrender has been to a naval force, or a mixed force of the army and navy, are equally and exclusively triable by the prize court The reasonableness and convenience of these determinations are beautifully enforced in the judgments of Mr J. Buller in *Le Caux* v *Eden*, and of Lord Mansfield in *Lindo* v. *Rodney and another*, Douglas's Rep 594. 620. Though the prize court proceeds under

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 judges it's 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 it's authority only to it's 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], 109] and in case of default may 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

[y] Hale, Hist. C. L. 36. Co. Litt. 11.
[z] Clerke, *prax. cur. adm.* § 13.
[a] *Ibid.* § 11. 1 Roll. Abr. 531. Raym 78. Lord Raym. 1286.
[b] 1 Roll. Abr 531. Godb. 260.
[c] 1 Ventr 1.
[d] 1 Keb 552.
[e] Bro *Abr* t. *error*, 177.

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under a commission issuing at the commencement of each war, its jurisdiction is not peremptorily terminated by the peace, but all questions of prize between the two nations, will still be tried by this court Thus, where a vessel, having been captured by an American privateer in time of war, was re-captured after the period prescribed for the cessation of hostilities by the treaty of peace, and the American commander claimed the vessel to be restored to him by suit in the prize court, the jurisdiction of the court was affirmed, and a prohibition refused. *Ex parte Lynch*, 1 Mad-

present only remark, that all possible injuries whatsoever, that do not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are for that very reason within the cognizance of the common law courts of justice. For it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury it's 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*, or of *mandamus*. A writ of *procedendo ad judicium* issues out of the court of chancery, where judges of any subordinate court do delay the parties; for that they will not give judgment, either on the one side or the other, when they ought so to do. In this case a writ of *procedendo* shall be awarded, commanding them in the king's name to proceed to judgment; but without specifying any particular judgment, for that (if erroneous) may be set aside in the course of appeal, or by writ of error or false judgment: and upon farther neglect or refusal, the [110] 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 conson-

[f] F.N.B 153, 154. 240.

to right and justice. It is a high prerogative writ, of a most extensively remedial nature; and may be issued in some cases where the injured party has also another more tedious method of redress, as in the case of admission or restitution to an office; (13) 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 it's performance. A *mandamus* therefore lies to compel the admission or restoration of the party applying to any office or franchise of a public nature, whether spiritual or temporal; to academical degrees; to the use of a meeting-house, &c.: it lies for the production, inspection, or delivery of public books and papers; for the surrender of the *regalia* of a corporation; to oblige bodies corporate to affix their common seal; to compel the holding of a court; and for an infinite number of other purposes, which it

(13) Supposing the injured party to have a complete and specific redress by suit at law, it is conceived that the circumstance of its being a more tedious method, will not be sufficient to warrant the court in granting a *mandamus*. But where the remedy is inadequate, the writ may issue; thus, where a party refuses to do some act which by law he ought to do, and the non-feasance of which is injurious to the public, though this be an indictable offence, that will not prevent the issuing of a *mandamus*, for the indictment will not directly compel the performance of the act: the offender may be fined or imprisoned, but if he be obstinate, the party injured has no complete remedy. *Rex* v. *Severn and Wye Railway Company*, 2 B. & A. 646 Neither does the instance put of an admission to an office, seem to be in point, for though a *mandamus* will undoubtedly lie for such a purpose, yet it does lie specifically, because the party without it would have no legal remedy by action It is proper also to add another qualification, if the right in dispute be strictly and wholly private, the court will not interfere; a *mandamus* is properly a writ to compel the performance of public, or, at least, official duties, and therefore the court, considering the bank of England as a mere corporation of private traders, so far as regarded its internal management of its own concerns, refused to issue a *mandamus* upon the application of a member to compel the directors to produce their accounts in order to declare a dividend of all their profits. *R* v. *Bank of England*, 2 B. & A. 620. *R.* v. *London Assurance Company*, 5 B. & A. 899.

As the writ of *mandamus* is exclusively confined to the court of K. B, and has been called one of the flowers of that court, no writ of error will lie to any other jurisdiction, if there should be any thing improper, either in the granting it, or in the proceedings under it

On the subject of *mandamus*, and the traversing the return if false in fact, in certain cases, see post, 264.

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 inforce the due exercise of those judicial or ministerial powers, with which the crown or legislature have invested them: and this not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice. A [111 *mandamus* may therefore be had to the courts of the city of London, to enter up judgment [g]; to the spiritual courts to grant an administration, to swear a church-warden, and the like. This writ is grounded on a suggestion, by the oath of the party injured, of his own right, and the denial of justice below: whereupon, in order more fully to satisfy the court that there is a probable ground for such interposition, a rule is made (except in some general cases, where the probable ground is manifest), directing the party complained of to 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 contrary; to which a return, or answer, must be made at a certain day. And if the inferior judge, and other person to whom the writ is directed, returns or signifies an insufficient reason, then there issues in the second place a *peremptory mandamus*, to do the thing absolutely; to which no other return will be admitted, but a certificate of perfect obedience and due execution of the writ. If the inferior judge or other person makes no return, or fails in his respect and obedience, he is punishable for his contempt by attachment. But, if he, at the first, returns a sufficient cause, although it should be false in fact, the court of king's bench will not try the truth of the fact upon affidavits; but will for the present believe him, and proceed no farther on the *mandamus*. But then the party injured may have an action against him for his false return, and (if found to be false by the jury) shall recover damages equivalent to the injury sustained; together with a *peremptory mandamus* to the defendant to do

[g] Raym. 214.

his duty. Thus much for the injury of neglect or refusal of justice.

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

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

[h] 1 P. Wms 476.
[i] Hob. 15.
[k] Palmer. 523
[l] Lord Raym. 1408.
[m] Finch. L. 451.
[n] Cro. Eliz. 666. Hob. 188.

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 no wise government can or ought to endure, and which is, therefore, a ground of prohibition. And [113] 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 ecclesiastical courts: from which, and from the answers to them signed by all the judges of Westminster-hall [p], much may be collected concerning the reasons of granting and methods of proceeding upon prohibitions. A short summary of the latter is as follows: The party aggrieved in the court below applies to the superior court, setting forth in a suggestion upon record the nature and cause of his complaint, in being drawn *ad aliud examen*, by a jurisdiction or manner of process disallowed by the laws of the kingdom: upon which, if the matter alleged appears to the court to be sufficient, the writ of prohibition immediately issues; commanding the judge not to hold, and the party not to prosecute, the plea. But sometimes the point may be too nice and doubtful to be decided merely upon a motion: and then, for the more solemn determination of the question, the party applying for the prohibition is directed by the court to *declare* in prohibition; that is, to prosecute an action,

[o] F. N. B. 40. [p] 2 Inst. 601—618.

by filing a declaration, against the other, upon a supposition or fiction (which is not traversable[q]) that he has proceeded in the suit below, notwithstanding the writ of prohibition. And if, upon demurrer and argument, the court shall finally be of opinion, that the matter suggested
[114] is a good and sufficient ground of prohibition in point of law, then judgment with nominal damages shall be given for the party complaining, and the defendant, and also the inferior court, shall be prohibited from proceeding any farther. On the other hand, if the superior court shall think it no competent ground for restraining the inferior jurisdiction, then judgment shall be given against him who applied for the prohibition in the court above, and a writ of *consultation* shall be awarded; so called, because, upon deliberation and consultation had, the judges find the prohibition to be ill-founded, and therefore by this writ they return the cause to it's original jurisdiction, to be there determined, in the inferior court. And even, in ordinary cases, the writ of prohibition is not absolutely final and conclusive. For though the ground be a proper one in point of *law*, for granting the prohibition, yet if the *fact* that gave rise to it be afterwards falsified, the cause shall be remanded to the prior jurisdiction. If, for instance, a custom be pleaded in the spiritual court; a prohibition ought to go, because that court has no authority to try it: but, if the fact of such a custom be brought to a competent trial, and be there found false, a writ of consultation will be granted. For this purpose the party prohibited may appear to the prohibition, and take a declaration, (which must always pursue the suggestion,) and so plead to issue upon it; denying the contempt, and traversing the custom upon which the prohibition was grounded: and, if that issue be found for the defendant, he shall then have a writ of *consultation*. The writ of *consultation* may also be, and is frequently, granted by the court without any action brought; when, after a prohibition issued, upon more mature consideration the court are of opinion that the matter suggested is not a good and sufficient ground to stop the proceedings below. Thus careful has

[q] Barn. Not. 4to. 148.

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 parliament, do properly belong to their jurisdiction.

CHAPTER THE EIGHTH.

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
[116] 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 persequendi in judicio quod alicui debetur.*

The Romans introduced, pretty early, set forms for actions and suits in their law, after the example of the Greeks; and made it a rule, that each injury should be redressed by it's proper remedy only. "*Actiones*, say the pandects, *compositae* "*sunt, quibus inter se homines disceptarent. quas actiones, ne* "*populus prout vellet instituueret, certas solennesque esse vo-* "*luerunt* [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 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

[117]

[a] See book II. ch. 29.
[b] c 2 § 1
[c] *Inst.* 4. 6. *pr.*
[d] *Ff.* 1. 2. 2. § 6.
[e] *Cic. pro Muraena.* § 11. *de orat. l.* 1. *c* 41.

no longer discernible. Or, as Cicero expresses it [f], "*sunt* "*jura, sunt formulae, de omnibus rebus constitutae, ne quis aut* "*in genere injuriae, aut ratione actionis, errare possit. Ex-* "*pressae enim sunt ex uniuscujusque damno, dolore, incommodo,* "*calamitate, injuria publicae à praetore 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*, and *mixed*.

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, nusances, 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 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

[118]

Qu. Roscio. § 8.

[g] *Sunt quaedam brevia formata super certis casibus de cursu, et de communi consilio totius regni approbata et concessa, quidem nullatenus mutari poterint absque consensu et voluntate eorum.* *de exceptionibus. c.* 17. § 2.)

[h] *Inst.* 4. 6. 15.

[i] c. 2

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 other two, wherein some real property is demanded, also personal damages for a wrong sustained. As for instance, an action of waste: which is brought by him who hath the inheritance, in remainder or reversion, against the tenant for life, who hath committed waste therein, to recover not only the land wasted, which would make it merely a *real* action; but also treble damages, in pursuance of the statute of Gloucester [k], which is a *personal* recompence; 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 comprized. 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; recounting at the same time the respective remedies, which are furnished by the law for every infraction of right. But I must first beg leave to premise, that all civil injuries are of two kinds, the one *without force* or violence, as slander or breach of contract; the other coupled *with force* and violence, as batteries or false imprisonment [l]. Which latter species savour something of the criminal kind, being always attended with some violation of the peace; for which in strictness of law a fine ought to be paid to the king, as well as a private satisfaction to the party injured [m]. And this [119] 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

[k] 6 Edw I. c. 5.
[l] Finch. L. 184.
[m] Finch. L. 198.

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 with 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.

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

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

[120] 2, 3. THE two next species of injuries affecting the limbs or 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

[n] See book I ch. 1
[o] Finch. L 202.
[p] Regist. 104. 27 *Ass.* 11. 7 *Edw. IV.* 24.

absolute violence. (1) 2. By *assault*; which is an attempt or offer to beat another, without touching him: as if one lifts up his cane, or his fist, in a threatening manner at another; or strikes at him, but misses him; this is an assault, *insultus*, which Finch [q] describes to be "an unlawful setting upon one's "person." (2) This also is an inchoate violence, amounting considerably higher than bare threats; and therefore, though no actual suffering is proved, yet the party injured may have redress by action of *trespass vi et armis*, wherein he shall recover damages as a compensation for the injury. 3. By *battery*, which is the unlawful beating of another. The least touching of another's person wilfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner. And therefore upon a similar principle the Cornelian law *de injuriis* prohibited *pulsation* as well as *verberation*; distinguishing verberation, which was accompanied with pain, from pulsation, which was attended with none [r]. But battery is, in some cases, justifiable or lawful; as where one who hath authority, a parent, or master, gives moderate correction to his child, his scholar, or his apprentice. So also on the principle of self-defence: for if one strikes me first, or even only assaults me, I may strike in my own defence; and, if sued for it, may plead *son assault demesne*, or that it was the plaintiff's own original assault that occasioned it. So likewise in [121] defence of my goods or possession, if a man endeavours to deprive me of them, I may justify laying hands upon him to

[q] Finch L. 202. [r] *Ff* 47 10. 5

(1) If the menace be not actionable alone, but only in conjunction with the injurious consequence, it seems contrary to principle that the remedy should be by trespass *vi et armis*, and not by trespass on the case. On examination, none of the authorities cited for the position satisfactorily bear it out; and in the same book of E. IV 21. one of the same judges (Choke) says, *si home fait a moy manace en ma person, come d'emprisoner, ou de maimer, jeo avera action sur mon case*

(2) To constitute an assault there must be the intention to use actual violence, coupled with the present ability; the party aimed at must be within reach of the fist, or the weapon, lifted or levelled against him. See Selw. Ni Pri. 1 27. 6th edit.

prevent him; and in case he persists with violence, I may proceed to beat him away [s]. Thus, too, in the exercise of an office, as that of churchwarden or beadle, a man may lay hands upon another to turn him out of church, and prevent his disturbing the congregation [t]. And, if sued for this or the like battery, he may set forth the whole case, and plead that he laid hands upon him gently, *molliter manus imposuit*, for this purpose. On account of these causes of justification, battery is defined to be the *unlawful* beating of another; for which the remedy is, as for assault, by action of *trespass vi et armis*: wherein the jury will give adequate damages. 4. By *wounding*, which consists in giving another some dangerous hurt, and is only an aggravated species of battery. 5. By *mayhem*; which is an injury still more atrocious, and consists in violently depriving another of the use of a member proper for his defence in fight. This is a battery, attended with this aggravating circumstance, that thereby the party injured is 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 foretooth [u], and also some others [v]. But the loss of one of the jaw-teeth, the ear, or the nose, is no mayhem at common law; as they can be of no use in fighting. The same remedial action of *trespass vi et armis* lies also to recover damages for this injury, an injury which (when wilful) no motive can justify, but necessary self-preservation. (3) If the ear be cut off, treble damages

[s] 1 Finch L 203.
[t] 1 Sid 301.
[u] Finch. L 204
[v] 1 Hawk. P.C c 55.

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(3) This is expressed with great correctness and caution; it is not intended to convey the notion that no mayhem can be justified under the plea of *son assault demesne*, except where that assault threatened the life of the party, but that no mayhem can be justified except under such circumstances, if it was wilful and deliberate In the case of *Cockroft* v. *Smith*, stated in 1 Lord Ray. 177., and reported in Salkeld, 642., and 11 Mod. 43., the plaintiff had either tilted up the form on which defendant was sitting, or run his finger towards his eye, and the defendant immediately bit off his finger; *son assault demesne* was held to be a good plea; and Lord Holt there laid down the principle thus: "If A. strike B. and B. strike again, and they close immediately and in the scuffle B. maihems A., that is *son assault;* but if upon a little blow given by A. to B., B. gives him a blow that

are given by statute 37 Hen. VIII. c. 6. (4) 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 injured, to make him a reparation in damages.

4. INJURIES, affecting a man's *health*, are where by any unwholesome practices of another a man sustains any apparent damage in his 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[x]; 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 misdemesnor 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, male quempiam secuerit, aut perperam ei medicamentum dederit.*" These are wrongs or injuries unaccompanied by force, for which there is a remedy in damages by a special action of *trespass upon the case*. This action of *trespass*, or transgression, *on the case*, is an universal remedy, given for all personal wrongs and injuries without force; so called because the plaintiff's whole case or cause of complaint is set forth at length in the original writ[a]. For although in general there are methods pre-

[w] 1 Roll. Abr 90.
[x] 9 Rep. 58 Hutt 135.
[y] Lord Raym. 214.
[z] *Inst* 4.3 6 & 7.
[a] For example "*Rex vicecomiti* "*lutem, Si A. fecerit te securum de cla-* "*more suo prosequendo, tunc pone par* "*vadium et salvos plegios B. quod sit co-*

that maihems him, that is not *son assault demesne;*" to this Powell J. agreed It seems that the party must always intend to act in self-defence, which intention is to be collected from the circumstances, in the blow which he gives to the plaintiff.

(4) And also a forfeiture of 10*l* to the king.

seribed, and forms of actions previously settled, for redressing those wrongs, which most usually occur, and in which the very act itself is immediately prejudicial or injurious to the plaintiff's person or property, as battery, non-payment of debts, detaining one's goods, or the like; yet where any special consequential damage arises, which could
[123] not be foreseen and provided for in the ordinary course of justice, the party injured is allowed, both by common law and the statute of Westm. 2. c. 24. to bring a special action on his own case, by a writ formed according to the peculiar circumstances of his own particular grievance[b]. For wherever the common law gives a right or prohibits an injury, it also gives a remedy by action[c]; and therefore, wherever a new injury is done, a new method of remedy must be pursued[d]. And it is a settled distinction[e], that where an act is done which is in itself an *immediate* injury to another's person or property, there the remedy is usually by an action of trespass *vi et armis*, but where there is no act done, but only a culpable omission; or where the act is not immediately injurious, but only by *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. (5)

"*ram justitiarus nostris apud Westmo-*
"*nasterium in octabis sancti Michaelis,*
"*ostensurus quare cum idem B. ad dex*
"*trum oculum ipsius A casualiter lae-*
"*sum bene et competenter curandum*
"*apud S. pro quadam pecuniae summa*
"*prae manibus soluta assumpsisset, idem*
"*B curam suam circa oculum praedic-*
"*tum tam negligenter et improvidè ap-*
"*posuit quod idem A in defectu ipsius*
"*B. visum oculi praedicti totaliter amisit,*
"*ad damnum ipsius A viginti libra-*
"*rum, ut dicit Et habeas ibi nomina*
"*plegiorum et hoc breve Teste meipso*
"*apud Westmonasterium, &c*" (*Registr Brev* 105)

[b] See pag 52

[c] 1 Salk 20 6 Mod 54

[d] Cro Jac 478

[e] 11 Mod. 180 Lord Raym 1402. Stra. 635.

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(5) See the author's celebrated judgment in the case of *Scott* v. *Shepherd*, 2 Bl. Rep. 892., the principle of which has been since repeatedly recognised No distinction arises from the lawfulness, or unlawfulness of the act, if one turning round suddenly were to knock another down, whom he did not see, without intending it, no doubt, said Mr J. Lawrence, the action must be trespass *vi et armis*. Neither will it vary the case, that besides the immediate injury, there is an ulterior consequential injury; for it is the former on which the action is supported, the latter is merely in aggravation of the damages. *Leame* v. *Bray*, 3 East's R. 593

5. LASTLY; injuries affecting a man's *reputation* or good name are, first, by malicious, scandalous, and slanderous *words*, tending to his damage and derogation. As if a man maliciously and falsely utter any slander or false tale of another; which may either endanger him in law, by impeaching him of some heinous crime, as to say that a man hath poisoned another, or is perjured[f]; or which may exclude him from society, as to charge him with having an infectious disease; or which may impair or hurt his trade or livelihood, as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave[g]. Words spoken in derogation of a peer, a judge, or other great officer of the realm, which are called *scandalum magnatum*, are held to be still more heinous[h]: and though they be such as would not be actionable in the case of a common person, yet when spoken in disgrace of such high and respectable characters, they amount to an atrocious injury; which is redressed by an action on the case founded on many antient statutes[i]; as well on behalf of the crown, to [124] inflict the punishment of imprisonment on the slanderer, as on behalf of the party, to recover damages for the injury sustained. 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

[f] Finch. L. 185
[g] *Ibid* 186.
[h] 1 Ventr 60
[i] Westm 1 3 Ed. I. c. 34. 2 Ric II. c 5 12 Ric. II c. 11
[k] Lord Raym. 1369.
[l] 2 Vent. 28.

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 living[m]. In like manner to slander another man's title, by spreading such injurious reports, as, if true, would deprive him of his estate, (as to call the issue in tail, or one who hath land by descent, a bastard,) is actionable, provided any special damage accrues to the proprietor thereby; as if he loses an opportunity of selling the land[n]. (6) 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 scandals, which concern matters merely spiritual, as to call a
[125] 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 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

[m] 4 Rep 17. 1 Lev. 248
[n] Cro Jac. 213 Cro Eliz. 197 4 Rep. 18.
[o] Noy 64. 1 Freem 277.
[p] Finch L 186. 1 Lev. 82 Cro. Jac. 91
[q] Pag 29
[r] Dyer, 285 Cro Jac 90.

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(6) This should be stated with this qualification, that the slander which affects the title is not a claim of right in the party himself who spreads the report, for no action will lie where the slanderer prevents the sale of the land by asserting a claim in himself, even though the claim be unfounded. If, however, the claim be knowingly bottomed in fraud, as upon an instrument which the claimant knows to be forged, and the knowledge is averred in the declaration, and proved on the trial, the action is maintainable. *Gerard* v. *Dickenson*, 4 Rep. 18.

lie[s], even though special damage hath ensued; for then it is no slander or false tale. As if I can prove the tradesman a bankrupt, the physician a quack, the lawyer a knave, and the divine a heretic, this will destroy their respective actions: for though there may be damage sufficient accruing from it, yet, if the fact be true, it is *damnum absque injuria*; and where there is no injury, the law gives no remedy. And this is agreeable to the reasoning of the civil law[t]: "*eum qui nocentem infamat, non est aequum et bonum ob eam rem condemnari; delicta enim nocentium nota esse oportet et expedit.*" (7)

A SECOND way of affecting a man's reputation is by printed or written libels, pictures, signs, and the like; which set him in an odious or ridiculous[u] light, and thereby diminish his reputation. With regard to libels in general, there are, as in many other cases, two remedies; one by indictment and another by action. The former for the *public*

[s] 4 Rep. 13

[t] *Ff* 47 10 18

[u] 2 Show. 314. 11 Mod 99

(7) In the Earl of Northampton's case, 12 Rep 134, it is said to have been resolved that if I S publish that he hath heard I. N. say that I G. was a traitor or thief, in an action on the case, if the truth be such (*i. e* that he did hear I N say so), he may justify This resolution was recently brought under the consideration of the court of K B. by an unsuccessful attempt to extend the doctrine to the case of written slander or libel. In the course of that consideration, Mr. J. Holroyd, after observing that the 12th part of the Reports is not so accurate as the rest, having been published after Lord Coke's death from his notes only, said that this resolution must be taken with some qualification, for in a preceding resolution in the same case, instances are put in which it is held to be unlawful to repeat slander with the addition of the author's name. That it should be understood that the repetition was "*on a fair and justifiable occasion*" Indeed without this qualification, he continued, the rule would be productive of mischief, for the person slandered could then bring no action against the malicious repeater, and perhaps, if he prosecuted the author, he might have no other testimony but that of the very person who had so maliciously repeated it Mr. J Bayley observed also, that though the name of the author was given, that would not secure the repeater, if the name did not sufficiently identify him; in such a case it would be necessary to give an additional description; the injured party was not to be put to the expence and trouble of ascertaining by inquiry, who the ginal slanderer was *Lewis* v. *Walter*, 4 B. & A. 612. 615.

offence; for every libel has a tendency to the breach of the peace, by provoking the person libelled to break it: which
[126] 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]. 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: (8) but as to signs or pictures, it seems necessary always to shew, by proper *innuendos* and averments of the defendant's meaning, the import and application of the scandal, and that some special damage has followed; (9) otherwise it cannot appear, that such libel by picture was understood to be 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

[w] 5 Rep 125 [x] Hob 253 11 Mod 99

(8) It is now determined that there is a distinction between oral and written slander, and that many things are actionable when written, which are not so when merely spoken In the case of *Thorley* v *Lord Kerry*, 4 Taunt. 355. 366, thesubject was brought under the consideration of the Exchequer Chamber on error from the K. B, and Sir J Mansfield, in delivering the judgment, stated that he was not satisfied with the reasons on which the distinction was grounded, but that the court bowed to the authority of Lord Hale, Lord Holt, and Lord Hardwicke, who had established or recognised it. It will be enough now to render written words actionable, that they tend to render the object of them ridiculous, or to lower him in the world's esteem; and it is conceived that signs and pictures fall within the same rule *Villars* v *Monsley*, 2 Wils R. 403 *Du Bost* v. *Beresford*, 2 Camp. 511.

(9) 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 I conceive there is no ground for this opinion, and that a picture intending to make any one ridiculous is equally actionable as if the same effect had been produced by any other mode of publication, though no can be proved *Christian's Note*

him; which, under the mask of justice and public spirit, are sometimes made the engines of private spite and enmity. For this however the law has given a very adequate remedy in damages, either by an action of *conspiracy* [y], which cannot be brought but against two at the least; or, which is the more usual way, by a special action on the case for a false and malicious prosecution [z]. In order to carry on the former (which gives a recompence for the danger to which the party has been exposed) it is necessary that the plaintiff should obtain a copy of the record of his indictment and acquittal: but, in prosecutions for felony, it is usual to deny a copy of the indictment, where there is any, the least, probable cause to found such prosecution upon [a]. (10) For it would be a very great discouragement to the public justice of the kingdom, if prosecutors, who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictments miscarried. But an action on the case for a malicious prosecution [127] may be founded upon an indictment, whereon no acquittal can be had; as, if it be rejected by the grand jury, or be *coram non judice*, or be insufficiently drawn. For it is not

[y] Finch L. 305.
[z] F.N.B. 116.
[a] Carth. 421. Lord Raym. 253.

(10) Whether the remedy pursued be by writ of conspiracy or action on the case, a copy of the indictment at least would be equally necessary; and, in cases of felony, the rule is as laid down in the text: but the grounds, on which it rests, may be questioned. At the Old Bailey, the practice is founded upon an order of five judges, made in 16 C. 2 and republished in 1739; criminal courts in general have adopted the practice from motives, probably, of policy, and it has received the sanction of high authorities. But, on the other hand, there is a statute 46 E. 3. which may be found at large in the preface to the third part of the Reports, and also in the trial of Sir R. Grahme and others, 12 Howell's St Tr. 661, which directs, that all records which *may be evidence for parties* shall be open to their search and exemplification. This is the construction of the statute given in that trial by Pollexfen and Holt, the two chief justices. Accordingly in *R.* v *Brangan*, 1 Leach Cr 27, Ld C. J. Willes refused an application for a copy, although the prosecution appeared to have been brought for purposes of vexation, because he said it was not necessary for him to grant it; that by the laws of this realm, every prisoner on his acquittal had an undoubted right to a copy of the record of such acquittal for any use he might think fit to make of it, and that after a demand of it had been made, the proper officer might be punished for refusing to make it out. This was at the Old Bailey in 1742, about three years after the republication of the order above-mentioned.

the danger of the plaintiff, but the scandal, vexation, and expense, upon which this action is founded[b]. However, any probable cause for preferring it is sufficient to justify the defendant. (11)

II. We are next to consider the violation of the right of personal liberty. This is effected by the injury of false imprisonment, for which the law has not only decreed a punishment, as a heinous public crime, but has also given a private reparation to the party; as well by removing the actual confinement for the present, as, after it is over, by subjecting the wrongdoer 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,

[b] 10 Mod. 219, 220. Stra. 691.
[c] 2 Inst. 589.
[d] 2 Inst. 52. 591.
[e] Stat. 13 Geo III. c. 78. §60.

(11) Perhaps the true reason for the distinction between the action of conspiracy, and the action on the case for a false and malicious prosecution, is a more strictly technical one than that which is here assigned. The action of conspiracy is founded on an old writ in the register, the allegations of which it follows; and one of those is, that the plaintiff was "acquitted according to the law and custom of the realm." This is construed to mean such an acquittal as will entitle the party to plead *autrefois* acquit to a second indictment on the same charge.

But

as on a Sunday[f]; for the statute hath declared, that such service or process shall be void. (12) This is the injury. Let us next see the remedy: which is of two sorts; the one *removing* the injury, the other *making satisfaction* for it.

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

1. THE writ of *mainprize*, *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 *mainpernors*, and to set him at large[g]. Mainpernors differ from bail, in that a man's bail may imprison or surrender him up before the stipulated day of appearance; mainpernors can do neither, but are barely sureties for his appearance at the day: bail are only sureties, that the party be answerable for the special matter for which they stipulate; mainpernors are bound to produce him to answer all charges whatsoever[h].

2. The writ *de odio et atia* was antiently 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

[f] Stat. 29 Car. II. c.7. Salk. 78. 5 Mod 95.

[g] F N.B. 250. 1 Hal. P.C. 141. Coke on bail and mainp. ch.10.

[h] Coke on bail and mainp. ch. 3. 4 Inst. 179

[i] *l.3. tr 2. c.8.*

But the action on the case is moulded according to the particular circumstances, and it is enough for the plaintiff to state and prove malice in the defendant, want of probable cause, and an injury sustained. See Register, 134. Selwyn, Ni. Pri. 2. 1048. 6th edit.

(12) "Except in cases of treason, felony, or breach of the peace."

denied to any man, it being expressly ordered to be made out *gratis*, without any denial, by *magna carta*, c.26. and statute
[129] West. 2. 13 Edw.I, c.29. But the statute of Gloucester, 6 Edw.I. c.9. restrained it in the case of killing by misadventure or self-defence, and the statute 28 Edw.III. c.9. abolished it in all cases whatsoever: but as the statute 42 Edw.III. c.1. repealed all statutes then in being, contrary to the great charter, sir Edward Coke is of opinion [k] that the writ *de odio et atia* was thereby revived.

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

4. The writ of *habeas corpus*, the most celebrated writ in the English law. Of this there are various kinds made use of by the courts at Westminster, for removing prisoners from one court into another for the more easy administration of justice. Such is the *habeas corpus ad respondendum*, when a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner, and charge him with this new action in the court

[k] 2 Inst. 43. 55 315.

[l] F. N. B. 66.

[m] 474.

[n] *captus est per speciale præceptum, vel capitalis nostri, vel pro morte hominis, vel pro foresta nostra, vel pro aliquo alio retto, quare secundum consuetudinem Angliæ*

above [o]. Such is that *ad satisfaciendum*, when a prisoner hath had judgment against him 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*, *deliberandum*, *&c.*; which issue when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed. (13) 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 [130] no *habeas corpus* shall issue to remove any prisoner out of any gaol, unless signed by some judge of the court out of which it is awarded. And to avoid vexatious delays by removal of frivolous causes, it is enacted by statute 21 Jac. I. c. 23. that, where the judge of an inferior court of record is a barrister of three years' standing, no cause shall be removed from thence by *habeas corpus* or other writ, after issue or demurrer deliberately joined: that no cause, if once remanded to the inferior court

[o] 2 Mod. 198. [p] 2 Lilly, prac. reg 4 [q] 2 Mod 306.

(13) The *habeas corpus ad testificandum* has been made more effectual by two recent statutes, the 43 G. 3. c 140, and the 44 G 3. c. 102. By the first, any one of the twelve judges at his discretion, may award the writ for the purpose of bringing up a prisoner from any gaol in England or Ireland, to appear as a witness before any court martial, commissioners of bankrupt, or for auditing public accounts, or other commissioners acting under authority of any commission or warrant from his Majesty; (the same statute applies also in the same way to the *habeas corpus ad deliberandum*). By the second, any one of the judges of either of the three superior courts in England and Ireland, or any justice of Oyer and Terminer or gaol delivery, being such judge, may award the writ for bringing up any prisoner as a witness before any of the said courts, or any sitting of *Nisi Prius*, or any other court of record in England or Ireland.

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 therefore enacted by
[131] statute 12 Geo.I. *c.*29. that the inferior court may proceed in such actions as are under the value of five pounds, notwithstanding other actions may be brought against the same defendant to a greater amount. And by statute 19 Geo.III. c.70. no cause, under the value of ten pounds, shall be removed by *habeas corpus*, or otherwise, into any superior court, unless the defendant so removing the same, shall give special bail for payment of the debt and costs. (14)

But the great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*; directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf[s]. This is a high prerogative writ, and therefore by the common law issuing out of the court of king's bench not only in term-time, but also during the vacation[t], by a *fiat* from the chief justice

[r] Bohun. *instit. legal.* 85. *edit* 1708.

[s] St. Trials, viii. 142.

[t] The *plures habeas corpus* directed to Berwick in 43Eliz. (cited 2 Burr 856.) was *teste'd die Jovis prox' post quinden' Sancti Martini.* It appears by referring to the dominical letter of that year, that this *quindena* (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.

(14) The statute of James applies equally if the judge of the inferior court has an assessor, a barrister of three years' standing, but it does not apply to any removal after judgment, nor where the issue or demurrer have been joined within six weeks after the defendant's arrest or appearance, nor in any cause concerning freehold, inheritance, or title to lands, lease or rent, nor where any foreign plea is pleaded, which the inferior court is unable to determine; nor in any case where the barrister, whether judge or assessor, is not actually present at the trial. *Fairley* v. *M'Connell,*

The rule as to 10*l* under the 19 G.3. c.70. is extended to 15*l*. by the 1 G 3 c 124.

or any other of the judges, and running into all parts of the king's dominions: for the king is at all times entitled to have an account, why the liberty of any of his subjects is restrained [u], wherever that restraint may be inflicted. If it issues in vacation, it is usually returnable before the judge himself who awarded it, and he proceeds by himself thereon [v]; unless the term should intervene, and then it may be returned in court [w]. Indeed if the party were privileged in the courts of common pleas and exchequer, as being (or supposed to be) an officer or suitor of the court, an *habeas corpus ad subjiciendum* might also by common law have been awarded from thence [x]; and, if the cause of imprisonment were palpably illegal, they might have discharged him [y]: but, if he were committed for any criminal [132] 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 bench and common pleas, as co-ordinate in this jurisdiction, by statute 16 Car. I. c. 10. it hath been holden, that every subject of the kingdom is equally entitled to the benefit of the common law writ, in either of those courts, at his option [a]. It hath 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. (15)

[u] Cro. Jac 543
[v] 1 Burr 606
[w] *Ibid.* 460. 542. 606
[x] 2 Inst 55. 4 Inst. 290. 2 Hal. P.C 144 2 Ventr. 24.
[y] Vaugh. 156.
[z] Carter 221. 2 Jon. 13.
[a] 2 Mod. 198 Wood's Case. C. B. Hill. 11 Geo. III.
[b] 4 Inst. 182. 2 Hal. P.C. 147
[c] Lord Nott. MSS. Rep. July 1676.

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(15) In Crowley's case, an application was made to the court of chancery in vacation time, for a *habeas corpus* at common law, and this passage was relied on as an answer to the application. The subject was most accurately investigated by lord Eldon, and after a full consideration of all the authorities, he over-ruled the decision in Jenks's case, and granted the writ. It appears from his investigation, that lord Nottingham refused the writ not merely because no precedent could be found for the granting it, but upon a great deal of legal reasoning which he has left behind in his

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, be-"cause 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 tempo-
133] rary 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 by the court of admiralty for piracy; there appearing, upon his

[d] 2 Mod 306. 1 Lev 1
[e] Bushel's case. 2 Jon 13
[f] Cro. Jac. 543.

MSS It appears also questionable, from the same investigation, whether the account of Jenks's final discharge given at p 135. is strictly correct. The general result of the argument would lead one to infer, 1st, that at common law the court of chancery had the power of issuing the writ both in term time and vacation, though in practice the king's bench was more commonly applied to in term time, because the chancery, having no criminal jurisdiction, had a difficulty in proceeding where the return was good, but it appeared that the prisoner stood charged with a bailable offence. 2dly, That the court of king's bench certainly had the power in term time, but not so certainly the individual judges of that court in vacation. 3dly, That it was more doubtful whether the court of common pleas, or the individual judges, had the power in term, or vacation, except in the case of privileged persons; and that the inference drawn from the expression in the statute 16 C.1. c.10. is rather attributable to a desire to favour the liberty of the subject, than to be supported in sound reasoning. The whole case is exceedingly interesting and valuable. Crowley's case, 2 Swanst. R. 1.

own shewing, sufficient grounds to confine him[g]. On the 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]." (16)

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*,

[g] 3 Bulstr 27 See also 2 Roll. Rep 138.
[h] 2 Inst 615.
[i] Com Journ. 1 Apr. 1628.
[k] Book I chap. 1.

(16) In the case of Mr Hobhouse, a *habeas corpus* at common law was moved for, and it was contended that the court had no discretion as to the granting or refusing it. It was granted; but after the prisoner had been brought up and remanded, the court said it was quite clear that the writ though of right, was not of course, that if upon the party's own application it appeared that when brought up, he could only be remanded, it could not be necessary to grant the writ, and that accordingly it had been refused in the case of the *King* v. *Schiever*, 2 Burr. 765, and in that of the Spanish sailors, 2 Sir W. Black. 1324. where it appeared by the affidavits of the applicants, that they were prisoners of war, or alien enemies The court doubted much, whether even under the 31 C. 2 c. 2. the *habeas corpus* was a writ of course; for by that statute the party applying must lay before the judge a copy of the warrant, or an affidavit of the refusal of it; if the copy is refused indeed, the judge is bound to presume every thing against its legality; but if the copy is produced, he must exercise *some* discretion upon it, to see that it is not within any of the exceptions of the statute. 3 B. & A. 420.

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 imprison-
[134] ment of the subject may be lawful. This it is, which induces the absolute necessity of expressing upon every commitment the reason for which it is made: that the court upon an *habeas corpus* may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.

And yet, early in the reign of Charles I. the court of king's bench, 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 parliamenty 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 sedi-"tion 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 re-"manded for that cause, perhaps the court would not after-"wards grant a *habeas corpus*, being already made acquainted "with the cause of the imprisonment." But this was heard with indignation and astonishment by every lawyer present; according to Mr. Selden's own[n] account of the matter, whose

[l] State Tr. vii. 136.

[m] *Ibid.* 240.

[n] "*Etiam judicum tunc primarius, "nisi illud faceremus, rescripta illius fo-*

resentment was not cooled at the distance of four-and-twenty years.

THESE pitiful evasions gave rise to the statute 16 Car.I. c.10. §8. whereby it is enacted, that if any person be committed by the king himself in person, 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

qui libertatis personalis omnis-
" modæ vindex legitimus est fere solus,
" usum omnimodum palam pronuntiavit
" (sui semper similis) nobis perpetuo in
" posterum denegandum. Quod, ut odio-
" sissimum juris prodigium,
" hic universus censutum." (*Vindic. Mar.*
" claus. c. 8. edit. A.D. 1653.)

[o] Pag. 132.

[p] State Tr. vii. 471.

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.

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* for such prisoner returnable immediately before himself or any other of the judges; and upon the return made shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature. 2. That such writs shall be indorsed, as granted in pursuance of this act, and signed by the person awarding them. 3. That the writ shall be returned and the prisoner brought up, within a limited time, according to the distance, not exceeding in any case twenty days. 4. That officers and keepers neglecting to make due returns, or not delivering to the prisoner or his agent within six hours after demand a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another, without sufficient reason or authority, (specified in the act,) shall for the first offence forfeit 100*l.* and for the second offence 200*l.* to the party grieved, and be disabled to hold his office. 5. That no person once delivered by *habeas corpus*, shall be recommitted for the same offence, on penalty of 500*l.* 6. That every person committed for treason or felony shall, if he requires it the first week of the next term, or the first day of the next session
[137] of *oyer* and *terminer*, be indicted in that term or session, or else admitted to bail: unless the king's witnesses cannot be

[q] See book I. ch. 1.

produced at that time: and if acquitted, or if not indicted and tried in the second term, or session, he shall be discharged from his imprisonment for such imputed offence: but that no person, after the assizes shall be open for the county in which he is detained, shall be removed by *habeas corpus*, till after the assizes are ended; but 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 500*l*. 8. That this writ of *habeas corpus* shall run into the counties palatine, cinque ports, and other privileged places, and the islands of Jersey and Guernsey. 9. That no inhabitant of England (except persons contracting, or convicts praying to be transported; or having committed some capital offenee in the place to which they are sent) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the king's dominions; on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party aggrieved a sum not less than 500*l*. to be recovered with treble costs: shall be disabled to bear any office of trust or profit; shall incur the penalties of *præmunire*, and shall be incapable of the king's pardon.

THIS is the substance of that great and important statute: which extends (we may observe) only to the case of commitments for such criminal charge, as can produce no inconvenience to public justice by a temporary enlargement of the prisoner: all other cases of unjust imprisonment being left to the *habeas corpus* at common law. But even upon writs at the common law it is now expected by the court, agreeable to antient 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 [138] 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, be-

[r] 1 Burr. 633

cause 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 [a] of the statute) that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten. (17)

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

[a] See Vol. I pag. 136

(17) As the 31 C. 2. c. 2. extends only to cases of commitment, or detainer for criminal or supposed criminal matter, it has been thought expedient to extend the remedies it gives to all other miscellaneous causes of confinement. By the 56 G. 3. c. 100., any one of the judges in England or Ireland may in vacation-time award the writ, if, upon affidavit, or affirmation (in cases, where, by law, an affirmation is allowed), probable and reasonable ground for it shall appear. The writ is to be returnable immediately before the judge who awards it or any other judge of the same court; or if issued so late in the vacation as to make it not conveniently returnable in the same vacation, it may be then made returnable in court on a certain day in the next term. Although the return upon the face of it be good and sufficient, the truth of it may be questioned, and the facts examined on affidavit or affirmation The courts may award this writ also in term time, returnable if convenient in the next vacation before any judge of the respective court; and in all these cases disobedience to the writ may be punished as a contempt of court. The last section extends the provisions of this act as to the return of the writ, and the punishment for disobedience, to all writs issued under the 31 C. 2. c. 2

See Crowley's case before referred to, 2 Swanst. R. p. 60. n. (*a*), from which it appears that in 1758, a bill similar to this passed the commons, and was thrown out in the house of lords, that the judges were then directed to prepare a bill for the same purpose, and that such bill was prepared, and was probably the original of the present statute. See New Parl. Hist. xv. p. 871. 874. Sir John Wilmot's notes, p. 77. Dodson's Life of Sir M. Foster, p. 49. 72.

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

We are next to contemplate those which affect their *relative* rights; or such as are incident to persons considered as members of society, and connected to each other by various ties and relations; and, in particular, such injuries as may [139
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: *abduction*, or taking away a man's wife; *adultery*, or criminal conversation with her; and *beating* or otherwise abusing her. 1. As to the first sort, *abduction*, or taking her away, this may either be by fraud and persuasion, or open violence: though the law in both cases supposes force and constraint, the wife having no power to consent; and therefore gives a remedy by writ of *ravishment*, or action of *trespass vi et armis, de uxore rapta et abducta* [t]. This action lay at the common law; and thereby the husband shall recover, not the possession [u] of his wife, but damages for taking her away: and by statute Westm.1. 3Edw.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 [w]; and the husband is also entitled to recover damages in an action on the case against such as persuade and entice the wife to live separate from him

[t] F.N.B. 89. [u] 2 Inst. 434. [w]

without a sufficient cause [x]. The old law was so strict in this point, that if one's wife missed her way upon the road, it was not lawful for another man to take her into his house, unless she was benighted and in danger of being lost or drowned [y]; but a stranger might carry her behind him on horseback to market to a justice of the peace for a warrant against her husband, or to the spiritual court to sue for a divorce [z]. 2. *Adultery*, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury, (and surely there can be no greater,) the law gives a satisfaction to the husband for it by action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usu-
[140] ally 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 connection 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, whom 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] (18) The

[x] Law of *nisi prius* 78
[y] *Bro. Abr. t trespass* 213.
[z] *Ibid* 207 440
[a] Law of *nisi prius* 26.
[b] 4 Burr 2057

(18) The author has noticed in the text some of those circumstances which will go to reduce the damages, but which leave the action maintainable There are, however, circumstances in the conduct of the husband, which may do away entirely with his right of action It is not easy to draw the precise line between the misbehaviour which will only reduce the damages, and that which will destroy the action, for there has been some difference of opinion among the judges on the subject; but thus far it may be safe to adopt the language of a modern text writer, that, "if the husband has consented to, or provided means for the adul-
"terous intercourse of his wife with the defendant, the ground of the
"action is removed, and the defendant will be entitled to a verdict, for
"*volenti non fit injuria.*" Selwyn's Ni. Pri. 5 edit. p.12 Another question of perhaps greater difficulty arises where the acts of adultery are only proved after the husband and wife have separated by consent. It is said that the legal foundation of the action is the loss of the society, comfort, and assistance of the wife, and therefore that no action can be maintained

third injury is that of *beating* a man's wife, or otherwise ill-using her; for which, if it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages, by action of trespass *vi et armis*, which must be brought in the names of the husband and wife *jointly*: but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a *separate* remedy by an action of trespass, in nature of an action upon the case, for this ill-usage, *per quod consortium amisit*; in which he shall recover a satisfaction in damages [c].

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

[c] Cro Jac 501. 538

for that loss, when the plaintiff has voluntarily renounced them before; upon this principle, the case of *Weedon* v *Timbrell*, 5 T. R. 357. was decided. It should be observed that if the action is in form *necessarily* trespass *vi et armis*, which perhaps is not quite settled, the legal foundation of it will not be the consequential damage just stated; but independently of this, upon grounds of policy and morality, the decision may seem questionable, a voluntary separation may sometimes take place under circumstances which still leave the husband both comfort and assistance from the wife, so long as her character remains unimpeached, (as for example, in the care and education of their children,) but which her adultery will deprive him of. Besides, it seems a dangerously easy step in the argument to say, that if the husband can maintain no action, where he has consented to the separation, he can maintain none even where he has not consented to it, against the person who finds the wife in that state of separation, and then seduces her, because that person does not occasion the loss of which he complains. From the case of *Chambers* v. *Caulfield*, 6 East's R 244, it may be inferred, that the decision now under consideration is not to be extended in any way; that the renunciation must be absolute and entire, and that a separation even voluntary, if it was specifically only for a time, or if it left the husband rights in his wife, and claims on her comfort and assistance, would not be a bar to the action.

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
[141] 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 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. (19)

III. Of a similar nature to the last is the relation of *guardian* and *ward*, and the like actions *mutatis mutandis*, as are given to fathers, the guardian also has for recovery of damages, when his ward is stolen or ravished away from him [f]. And though guardianship in chivalry is now totally abolished, which was the only beneficial kind of guardianship to the guardian, yet the guardian in socage was always [g] and is still entitled to an action of *ravishment*, if his ward or pupil be taken from him: but then he must account to his pupil for the damages which he so recovers [h]. And, as guardian in socage was also entitled at common law to a writ of *right of ward*, *de custodia 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 writ. But a more speedy and summary method of redressing all complaints relative to wards and guardians hath of late obtained by an

[c] F.N.B. 90.
[f] F.N.B. 139.
[g] F N.B 139
[h] Hale on F N B. 139.
[i] F.N.B. 139.

referred to in F.N B. adds, "*hærede*" to *filio* and the form in the register is the same.

application to the court of chancery; which is the supreme guardian, and has the superintendant jurisdiction of all the infants in the kingdom. And it is expressly provided by statute 12 Car. II. c. 24. that testamentary guardians may maintain an action of ravishment or trespass, for recovery of any of their wards, and also for damages to be applied to the use and benefit of the infants [k].

IV. To the relation between *master* and *servant*, and the rights accruing therefrom, there are two species of injuries incident. The one is, retaining a man's hired servant before his time is expired; the other is beating or confining him in such a manner that he is not able to perform his work. As 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 a special action on the case: and he may also have an action against the servant for the non-performance of his agreement. [l] But, if the new master was not 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 recompence for *his* immediate loss, may maintain an action of trespass *vi et armis*, in which he must allege and prove the special damage he has sustained by the beating of his servant, *per quod servitium amisit* [n]: and then the jury will make him a proportionable pecuniary satisfaction. A similar practice to which, we find also to have obtained among the Athenians;

[k] 2 P Wms. 108.

[m] F.N.B. 168. Winch. 51.

[n] 9

where masters were entitled to an action against such as beat or ill-treated their servants [o]. (20)

[143] 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, (21) 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*, and which will be considered in the next book. And so the servant, whose master is disabled, does not thereby lose his maintenance or wages. He had no property in his master; and, if he receives his part of the stipulated contract, he suffers no injury, and is therefore entitled to no action, for any battery or imprisonment which such master may happen to endure.

[o] Pott. Antiq. b 1 c. 26.

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(20) It is indirectly in this form of action that the law gives a satisfaction to a parent for the seduction of his daughter. In order, therefore, to maintain it, some evidence, however slight, that the daughter was in the habit of performing acts of service for her father is indispensably necessary, and when these are proved, the age of the daughter or her residence are immaterial; but though the injury may have been committed while the daughter was a minor, yet, if she then formed no part of her father's family, and had left it without any intention of returning, the action is not maintainable. When the legal foundation is once laid by proof of the service, the damages are not to be measured by the loss of that service, but by all the circumstances of the case. It seems hardly necessary to observe that the action may be maintained by any one who fills the situation of master, though he may not be the father of the female seduced; the loss of service being the legal principle on which it rests, and therefore it has been extended even to the case of one suing for the seduction of his adopted child. *Irwin* v. *Dearman*, 11 East, 23.

CHAPTER THE NINTH.

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 it's 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].

1. THE rights of personal property in *possession* are liable to two species of injuries: the amotion or deprivation of that possession; and the abuse or damage of the chattels,

[a] See Book II. ch. 2. [b] Book II. c. 25.

while the possession continues in the legal owner. The former, or deprivation of possession, is also divisible into two branches; the unjust and unlawful *taking* them away; and the unjust *detaining* them, though the original taking might be lawful.

1. And first of an unlawful *taking*. The right of property in all external things being solely acquired by occupancy, as has been formerly stated, and preserved and transferred by grants, deeds, and wills, which are a continuation of that occupancy; it follows as a necessary consequence, that when I once have gained a rightful possession of any goods or chattels, either by a just occupancy or by 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 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
[146] damages for the loss sustained by such unjust invasion; which is effected by action of *replevin*, an institution, which the mirror[c] ascribes to Glanvil, chief justice to king Henry the second. This obtains only in one instance of an unlawful taking, that of a wrongful distress; and this and the action of *detinue* (of which I shall presently say more) are almost the only actions, in which the actual specific possession of the identical personal chattel is restored to the proper owner. For things personal are looked upon by the law as of a and perishable, that it is for the most part

[c] c. 2 § 26.

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 impossibilia,*" it therefore 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 parco fracto*, or *pound-breach*[e], in case they were actually impounded. He may also at his option bring an action on the case for this injury: and shall therein, if the distress were taken for rent, recover treble damages[f]. The term *rescous* is likewise applied to the forcible delivery of a defendant, when arrested, from the officer who is carrying him to prison. In which circumstances the plaintiff has a similar remedy by action on the case, or of *rescous*[g]. or, if the sheriff makes a return of such *rescous* to the court out of which the process issued, the res- [147
cuer will be punished by attachment[h]. (1)

[d] F N B 101
[e] *Ibid* 100
[f] Stat. 2 W & M. Sess 1. c.5
[g] 6 Mod 211.
[h] Cro. Jac. 419 Salk 586.

(1) The sheriff can only return a *rescous* on mesne process, except it has been made by the king's enemies; if the *rescous* has taken place on final process, or by prison breach, the sheriff is liable, in the first case, because he has authority to call out the *posse comitatus*, and is bound to do so if he apprehends force, in the second, because it is at his peril to see that his prison is strong enough to keep the prisoner. A reason is given for the distinction in the case of *May* v. *Proby and another*, Cro. Jac. 419., which seems not satisfactory, it is said that the party may renew his process, if mesne, and therefore by the rescue, only loses the benefit of one writ, which is so small a loss, that the law will not punish the sheriff for it; whereas, when final process is once executed, the party is deemed to have satisfaction in the eye of the law, and can have no new process. It seems, however,

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; or 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 distreinor 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 [o]. 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

[i] See pag. 13.
[k] Co. Litt. 145.
[l] 8 Rep. 147.
[m] F. N B. 68
[n] 2 Inst. 139
[o] 52 Hen. III. c 21.

however, settled that in this case the party may have a new writ, which it will not lie in the mouth of the rescued person to object to; and it would be hard indeed if he could not. *Mounson* v. *Alyton*, Cro. Car. 240 255 A more satisfactory reason is assigned in Bac Ab. tit. Rescue, E 1., arising from the different situation in which the person stands on mesne and on final process: in the first case the party has been guilty of no contempt, and has falsified no bail, there is no ground, therefore, for presuming any intention to escape from the custody of the law; but after judgment, the party ought to have paid the condemnation money, or surrendered his person; both he and his bail are in default; it may be presumed, therefore, that he will not be forthcoming, and the sheriff ought to have come prepared, with a sufficient force to meet resistance, or attempts at rescue

Upon the return of a rescue, the plaintiff may proceed against the rescuers not only by attachment, but also by action on the case, or by indictment. Com. Dig. Rescous, D. 2, 3

one of his said deputies, security is to be given, in pursuance of the statute of Westm.2. 13Edw.I. c.2. 1. That the party replevying will pursue his action against the distreinor, for which purpose he puts in *plegios de prosequendo*, or pledges to prosecute; (2) 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 [148
discretionary and at the peril of the sheriff, the statute 11Geo.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 [upon] in the name of the assignee. 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. (3) 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 upon; unless the

(2) Lord Coke says, that the *plegii de prosequendo* were by the law, Co Litt 145 b, and there is nothing in the words of the statute of Westm 2 which contradicts this

(3) The statute further enacts that the "court wherein such action is "brought, may by a rule give such relief to the parties on such bond as "may be agreeable to justice, and such rule shall be in the nature of a "defeazance to such bond." The object of the statute being to give the defendant in replevin a benefit collateral to, and besides any remedy which was in his reach, either at common law or under the statute 17C. 2 c.7., for which, see post p 150, it was seen that cases of hardship might arise by his pursuing two remedies, when one had been complete; as where a plaintiff should have neglected to prosecute his suit with effect, the replevin-bond under the statute of G 2. would be forfeited, and yet the defendant might still by the writ of inquiry under the statute of Charles have obtained the value of the goods and his damages. To meet such a case as this, the statute gives this equitable power to the court. See *Turnor* v. *Turner*, 2 Brod & Bingh. 107

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 regained possession; being a kind of personal *remitter* [o]. If therefore the distreinor claims any such property, the party replevying must sue out a writ *de proprietate probanda*, in which the sheriff is to try, by an inquest, in whom the property previous to the distress subsisted [p]. And if it be found to be in the 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 adviseable, and there finally determined [q].

But if no claim of property be put in, or if (upon trial) the sheriff's inquest determines it against the distreinor; then the sheriff is to replevy the goods (making use of even force,
[149] 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 replevying shall have a writ of *capias in withernam*, *in vetito* (or, more properly, *repetito*) *namio*, a term which signifies a second or reciprocal distress [s], in lieu of the first which was eloigned. It is therefore a command to the sheriff to take other goods of the 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 replevied, till the original distress is forthcoming [v].

[o] See pag. 19.

[p] Finch. L. 316. Co. Litt. 145. b.

[q] Co. Litt. 145. Finch L. 450.

[r] 2 Inst. 193.

[s] Smith's Commonw. b. 3. c. 10. 2 Inst. 141. Hickes's *Thesaur.* 164.

[t] F. N. B. 69. 73.

[u] In the old northern languages the word *withernam* is used as equivalent to *reprisals*. (Stiernhook, *de jure Sueon.* *l.* 1. *c.* 10.

[v] Raym. 475. F. N. B. 73. 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

But, in common cases, the goods are delivered back to the party replevying, who is then bound to bring his action of replevin; which may be prosecuted in the county court, be the distress of what value it may[w]. But either party may remove it to the superior courts of king's bench or common-pleas, by writ of *recordari* or *pone*[x]; the plaintiff at pleasure, the defendant upon reasonable cause[y]; and also, if in the course of proceeding any right of freehold comes in question, the sheriff can proceed no farther[z]; so that it is usual to carry it up in the first instance to the courts of Westminster-hall. Upon this action brought, and declaration delivered, the distreinor, who is now the defendant, makes *avowry*; that is, he *avows* taking the distress in his own right, or the right of his wife[a]; and sets forth the reason of it, as for rent arrere, 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 distrein; 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 distreined and then replevied) are returned again into his custody; to be sold, or otherwise disposed of, as if no replevin had been made. And at the common law, the plaintiff might have brought another replevin, and so *in infinitum* to the intolerable vexation of the defendant. Wherefore the statute of Westm.2. c.2. restrains the plaintiff, when nonsuited, from suing out any fresh replevin; but allows him a *judicial* writ,

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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 quolibet ente* Upon which Mr More sent him this question, "*utrum* "*averia carucae, capta in vetito namio,* '*sint irreple gibilia*," whether beasts of the plough, taken in *withernam*, are incapable of being replevied. (Hoddesd. c 5)

[w] 2 Inst. 139

[x] *Ibid* 23

[y] F N B 69, 70

[z] Finch L. 317.

[a] 2 Saund. 195.

[b] F. N B 69.

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 arrere, the writ of second deliverance is in effect[d] taken away by statute 17Car.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
[151] 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 distreined for, the defendant may take a farther distress or distresses[e]. (4) But otherwise, if, pending a replevin for a former distress, a man distreins again for the same rent or service, then the party is not driven to his action of replevin, but shall have a writ of *recaption*[f], and recover damages for the defendant the 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 transgression, for which an action of *trespass vi et armis* will lie;

[c] 2 Inst. 340
[d] 1 Ventr. 64
[e] Stat 17 Car.II. c 7.
[f] F N.B. 71.

(4) See the mode of proceeding, under this statute, in the notes of the learned editors to 1 Saund. R. 195. *Mounson* v. *Redshaw*; and 2 Saund. R. 286. *Poole* v. *Longueuill.*

wherein the plaintiff shall not recover the thing itself, but only damages for the loss of it. (5) 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. As if I distrein 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 [15
I lend a man a horse, and he afterwards refuses to restore it, this injury consists in the detaining, and not in the original taking, and the regular method for me to recover possession is by action of *detinue*[h]. In this action of *detinue*, it is necessary to ascertain the thing detained, in such a 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 [in them]; 3. That the goods themselves be of some value; and 4. That they be ascertained in point of identity.

[g] F N B. 69. 3 Rep. 147. [i] Co. Litt 286
[h] F.N B 138.

(5) To entitle a man to maintain this action, it is not necessary, as against a wrong doer, that he should be the lawful owner of the thing taken, but he must "*at the time* when the act complained of was done either have "the *actual possession*, or else he must have a *constructive* possession in "respect of the right of possession being actually vested in him." As for example, the lord, *before seizure*, may bring an action of trespass against a stranger who should carry off an estray: For the *right* is in him, and a constructive possession in virtue of that right, the thing being within his manor. Per Ashhurst J., *Smith* v. *Milles*, 1 T. R. 480.

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, that is, to exculpate himself by oath [l], (6) and thereby defeat the plaintiff of his remedy: which privilege is grounded on the confidence originally reposed in the bailee by the bailor, in the borrower by the lender, and the like; from whence arose a strong presumptive evidence, that in the plaintiff's own opinion the defendant was worthy of credit. But for this reason the action itself is of late much disused, and has given place to the action of trover.

This action of *trover* and *conversion* was in it's original an action of trespass upon the case, for recovery of damages against such person as had *found* another's goods, and refused to deliver them on demand, but *converted* them to his own
[153] 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 [m], 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 [n]: and therefore he must not convert them to his own use, which the law presumes him to do, if he refuses to restore them to the owner: for which rea-

[k] Co Entr. 170. Cro. Jac 682.
[l] Co. Litt. 295.
[m] Salk. 654.
[n] See book I. ch. 8. book II. ch. 1. and 26.

(6) See post. 341.

son such refusal alone is, *prima facie*, sufficient evidence of a conversion [o]. 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, (7) and that the defendant had them in his possession, it is sufficient. But a conversion must be fully proved: and then in this action the plaintiff shall recover damages, equal to the value of the thing converted, but not the thing itself; which nothing will recover but an action of *detinue* or *replevin*.

As to the damage that may be offered to things personal, while in the possession of the owner, as hunting a man's deer, shooting his dogs, poisoning his cattle, or in anywise taking from the value of any of his chattels, or making them in a worse condition than before, these are injuries too obvious to need explication. I have only therefore to mention the remedies given by the law to redress them, which are in two shapes; by action of *trespass vi et armis*, where the act is in itself *immediately* injurious to another's property, and therefore necessa- [154
rily accompanied with some degree of force; and by special action *on the case*, where the act is in itself indifferent, and the injury only *consequential*, and therefore arising without any breach of the peace. In both of which suits the plaintiff shall recover damages, in proportion to the injury which he proves that his property has sustained. And it is not material whether the damage be done by the defendant himself, or his servants by his direction; for the action will lie against the master as well as the servant [p]. And, if a man keeps a dog or other brute animal, used to do mischief, as by worrying sheep, or the

[o] 10 Rep 56 [p] Noy's Max c.44.

(7) This property may be either absolute and exclusive, or only special, that is, temporary, and subject to the rights of others, as in the case of a factor to whom goods have been consigned by the owner. Property of either kind without actual possession suffices for the maintenance of the action. 7 T R. p.12 1 B. & P. p 47 But if there be no actual possession, there must be a right of immediate possession, and, therefore, where a man had leased his house and furniture for a term, before the expiration of which, the furniture was taken in execution by the sheriff for a debt of the tenant, it was held that he could not maintain trover, because, during the lease, he had no right of possession. *Gordon* v. *Harper*, 7 T. R. 9.

like, the owner must answer for the consequences, if he knows of such evil habit [q].

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 [r]. 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 acceptation 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
[155] is by action of *debt* [s], to compel the performance of the contract and recover the specifical sum due [t]. 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 un-

[q] Cro. Car. 254. 487.
[r] See book II. ch. 30.
[s] F. N. B. 119.
[t] See Appendix, No. III. § 1.

der 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 [s]. (8) Secondly, in an action of debt the plaintiff must prove the whole debt he claims, or recover nothing at all. For the debt is one single cause of action, fixed and determined; and which, therefore, if the proof varies from the claim, cannot be looked upon as the same contract whereof the performance is sued for. If, therefore, I bring an action of debt for 30*l.* I am not at liberty to prove a debt of 20*l.* and recover a verdict thereon [t]; 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. (9) But in an action on the case, on what is called an *indebitatus assumpsit*, which is not brought to compel a specific performance of the contract, but to recover damages for it's 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 [156
sum demanded, the law will raise a promise *pro tanto*, and the damages will of course be proportioned to the actual debt. So that I may declare that the defendant, *being indebted* to me in 30*l.*, *undertook* or promised to pay it, but failed; and lay my damages arising from such failure at what sum I please: and the jury will, according to the nature of my proof, allow me

[s] 4 Rep. 94.

[t] Bro *Ley gager*. 93 Dyer. 219. 2 Roll. Abr 706. 1 Show 215.

(8) See post. pp 341. 348.

(9) But it is now settled (and it occurs in every day's practice), that the plaintiff in an action of debt, may prove and recover less than the sum demanded This, and the circumstance that the judgment is final in the first instance, as well as that the wager of law has grown into almost entire disuse, have made the action of debt on simple contract, as well as specialty, of very frequent use. Indeed it is now often brought for the recovery of sums, which, from the nature of the debt, are uncertain in their amount; but in such cases, the courts compel the plaintiff, after a judgment by default, to execute a writ of inquiry, and take his judgment only for the real damage sustained. See post 398.

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 [u].

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*; and is followed by the very same judgment [x].

2. A covenant also, contained in a deed, to do a direct act or to omit one, is another species of express contracts, the violation or breach of which is a civil injury. As, if a man covenants to be at York by such a day, or not to exercise a trade in a particular place, and is not at York at the time appointed, or
[157] 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

[u] 1 Roll. Rep. 257. Salk. 664. [x] Rast. Entr 174.

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 that is a covenant *real*, to convey or dispose of lands, which seems to be partly of a personal and partly of a real nature [z]. 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 lands are usually levied at common law [a], the plaintiff, or person to whom the fine is levied, bringing a writ of covenant, in which he suggests some agreement to have been made between him and the deforciant, touching those particular lands, for the completion of which he brings this action. And, for the end of this supposed difference, the fine or *finalis concordia* is made, whereby the deforciant (now called the cognizor) acknowledges the tenements to be the right of the plaintiff, now called the cognizee. And moreover, as leases for years were formerly considered only as [b] contracts or covenants for the enjoyment of the rents and profits, and not as the conveyance of any real interest in the land, the antient remedy for the lessee, if ejected, was by a writ of [158
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 se-

[z] Hal. on F. N. B. 146.
[a] See book II. ch 21.
[b] See book II. ch 9.
[c] Bro. *Abr. t. covenant.* 33. F. N. B. 145.

cure 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. (10)

[d] Co. Litt. 215 Moor. 876 Cro Jac 476.

(10) The words of the statute are as general as the analysis of them in the text; they embrace two rights in the original grantor or lessor, the right of re-entry reserved on conditions not performed, and the right of action for covenants broken, and in terms they transfer these two rights entire to the assignee. But in construction they have been narrowed in both cases to such covenants and such conditions, as, to use the technical expression, run with the land, and are not merely collateral to it. A covenant, or a condition, is said to run with the land, when the thing which is to be done or forborne under it, is something which is to benefit or injure the land, or which can be only beneficial or injurious to him who *has* the reversion, and not to him who has assigned it over. Thus, a covenant to pay rent, or a condition for re-entry in case the rent is not paid, a covenant to make the fences, or a condition for re-entry in case they are not made, all run with the lands, and the assignee shall have the benefit of them, because rent can only be paid to him who *has* the reversion, and the making the fences can only be beneficial to him. It is reasonable, therefore, to give him the benefit of those covenants and conditions by which the performance of those things is to be enforced; and it would be idle or unjust to leave them in that person (the assignor) to whom the performance of those acts has become either impossible or useless. But a covenant to build a house on land other than that demised, and a condition for re-entry in case a gross sum of money is not paid to the grantor on such a day, are collateral to the land: it is obvious that the things to be done have no necessary connection with the reversion; the assignee will not have the house, if built, or the money, if paid; he has not, therefore, transferred to him by the statute, the means of enforcing the performance of them. Co. Litt. 215 b. *Webb* v. *Russell*, 3 T. R. 403. With regard to the exception from the liabilities of the assignee, the words of the statute are, "all benefits of recoveries in value by "reason of any warranty in deed or in law, by voucher or otherwise, ex-"cepted." The reason of this may not appear at first sight: more than one may be assigned for it; but as the question could only arise where the grantee or lessee was turned out by some person with title prior to that of the assignee, it is obvious that the same blow would deprive him

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

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of the reversion; it would be therefore most unreasonable to bind him to give a recompense in value for that which is lost by no default of his, and when at the very same time he has lost that which formed the only connection between himself and the lessee, and in respect of which alone any liability could be fastened on him

The case of the devisee of land is included under that of the assignee, and therefore falls under the statute, but, independently of the statute, it is material to consider, who are such privies to a covenant as to be able to maintain an action for the breach of it The heir represents the person of his ancestor as to covenants which concern the realty, and if the covenant be one which runs with the land, so that the benefit of it, if performed, would have descended with the land to the heir, he is entitled, even though not named, to sue for a breach committed after the death of the testator. *Lougher* v *Williams*, 2 Lev 92 As, if A, the lessee, covenants with B, the landlord, to repair, and after B.'s death suffers the premises to be out of repair, B 's heir may sue for damages for that breach of the covenant. On the other hand, whether the covenant concern the realty or the personalty, if the breach was in the life-time of the covenantee, and the personal estate was thereby injured, the executor or administrator may sue upon the covenant *Lucy* v *Levington*, 2 Lev. 26. Shep. Touch 175. *Kingdon* v *Nottle*, 1 M. & S. 355.

The next point to consider will be, who may be bound by covenants, though not parties to the deed containing them, the persons as to whom this question can arise, are heirs, executors or administrators, and assigns. The heir will be liable on the covenant of his ancestor to the extent of the land descended to him in almost every case where he is expressly named, and scarcely in any, where he is not so named. Shep. Touch 178 The liability of the executor or administrator does not depend upon his being expressly named; whether named or not, he will be bound in every case, except where the covenant is such as in its nature must be performed personally by the testator, and determines by his death *Hyde* v. *Dean and Canons of Windsor*, Cro. Eliz. 553

The liability of the assignees depends upon no one common principle, in some cases they are bound, though not named in the covenant, in some they are only bound if named, and in some they are not bound although named. Where the covenant runs with the land, the assignee who has the land, takes the obligation with it, as annexed to it and inherent in it, according to the maxim *transit terra cum onere*. But where the covenant extends to something not in being at the time of the demise made, as to build a new house within a given time on the premises, here, in legal reasoning, it is impossible to consider that as annexed and appurtenant to the land, which at the time of the demise made, related only to something not in being, and therefore merely as the assignee and holder of the land, and not named in the covenant, the law raises no obligation in him to perform it; but, at the same time, as it is to be done upon the land, and to

act, it is an express contract, as much as any covenant; and the breach of it is an equal injury. The remedy indeed is not exactly the same: since, instead of an action of covenant, there only lies an action upon the case, for what is called the *assumpsit* or undertaking of the defendant; the failure of performing which is the wrong or injury done to the plaintiff, the damages whereof a jury are to estimate and settle. As, if a builder promises, undertakes, or assumes to Caius, that he will build and cover his house within a time limited, and fails to do it; Caius has an action on the case against the builder, for this breach of his express promise, undertaking, or *assumpsit*, and shall recover a pecuniary satisfaction for the injury sustained by such delay. (11) So also in the case before-mentioned, of

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benefit the land of which he is the assignee, there is no injustice or incongruity in making him liable, if he be named And this is the rule as to such covenants. But if the thing thus to be done at a future time has no reference to the land demised, but is to be done elsewhere, as to build a house on other premises, here the circumstance which in the last case admitted of the assignee's liability where named, is wanting; here, there is no connection at all between the thing to be done, and that which alone makes the assignee liable to any covenants, *viz* the enjoyment of the land, and therefore, he is not bound even though named Lastly, if the covenant relates merely to personal goods, the assignee, though named, is not bound by it; as if a man lets a flock of sheep to another who covenants for himself and his assigns to restore them at the end of the term in as good a plight, or to pay such a price for them; and afterwards he assigns them over; the whole contract here is entirely personal between the first contracting parties; the money annually paid for the sheep may be called rent, but in fact it does not possess any of the legal qualities of rent; the expectancy which the owner has at the end of the term may be called his reversion, but it has none of the essential qualities of a reversion; the possession of the sheep creates no connection between the assignee and the owner, and, therefore, there is nothing upon which to fasten his liability to the covenant. Shep. Touch. 178. 5 Co 16 *Vernon* v. *Smith*, 5 B.

There is yet another case in which a liability may attach upon a party, to perform a covenant which he has never sealed, in respect of his acceptance of the estate to which those covenants are annexed. As if A leases to B. & C., and C. does not seal the deed, but takes the benefit of the lease, it is said that he is as much bound to the performance of all the covenants, which run with the land, as if he had sealed. Co. Lit. 231.*a* Shep. Touch. 177.

(11) The author has inadvertently omitted to state, both in his definition and his example, the indispensable ingredient of every valid promise, a good legal consideration; but he has fully entered into that point in the 2d Vol. p.442. There is also some looseness in the wording of other parts of this paragraph, "the solemnity of *writing* and sealing" can never make a

a debt by simple contract, if the debtor promises to pay it and does not, this breach of promise entitles the creditor to his action on the case, instead of being driven to an action of debt [e]. Thus likewise a promissory note, or note of hand not under seal, to pay money at a day certain, is an express *assumpsit*, and the payee at common law, or by custom and act of parliament the indorsee [f], may recover the value of the note in damages, if it remains unpaid. Some agreements indeed, though never so expressly made, are deemed of so important a nature, that they ought not to rest on 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 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 (12) 1. Where an executor or admi-

[e] 4 Rep. 94 [f] See book II. ch 30.

promise " absolutely a *verbal* covenant," nor does a contract necessarily become express, because it is to do an " explicit act," there may be an implied contract to do an explicit act. The distinction, however, is correctly taken in the 2d Vol. p 442.

(12) " Or some other person thereunto by him lawfully authorised." It is impossible here to do more than lay down a few general rules, to be collected from the numerous cases which have been decided upon this section of the statute, without attempting to notice the distinctions to which they have led. The first rule is, that though the statute imposes the necessity of writing, it does not thereby waive any of the prior requisites to make a valid promise, and, therefore, whatever would have made a verbal promise ineffectual before the statute, as for example, the want of a sufficient consideration, will make a written promise equally so, since the statute 2d The statute requires " the agreement, or some memo- " randum, or note thereof" to be put in writing, this means, not merely what in a loose sense would be called the *promise*, but the contract and consideration, and, therefore, if the writing contains merely what is to be done, and the consideration is not stated, nor can be implied, the statute will not have been complied with. *Saunders* v. *Wakefield*, 4 B & A. 595. 3d. The statute does not, in the language of the text, make the verbal contract in cases to which it applies " void," but takes away the remedy for enforcing it, so that the parties cannot treat it as a nullity, though unwritten, if they have executed it wholly or in part. 4th. To make a writing necessary under the second clause, it is necessary that there should be a liability in the third person, as well as that which is attempted to be fixed on the party sued. If A orders B., a tradesman,

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 trangressing the provisions therein enacted. The party offending is here bound by the fundamental contract of society to obey the directions of the legislature, and pay the forfeiture incurred to such persons as the law requires. The usual application of this forfeiture is either to the party aggrieved, or else to any of the king's subjects in general. Of the 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. 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 in-
[162] former 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

[h] Law of *Nisi Prius*, 167
[i] 5 Rep. 64 Hob. 209
[k] 13 Edw. I. c. 1
[l] 27 Eliz c. 13. 29 Car. II c. 7 8 Geo. II c. 16 22 Geo II. c. 24.
[m] See book II. ch 29.

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*. (14) A provision, that seems borrowed from the rule of the Roman law, that if a person was acquitted of any accusation, merely by the prevarication of the accuser, a new prosecution might be commenced against him[o].

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

1. IF I employ a person to transact any business for me, or perform any work, the law implies that I undertook or assumed to pay him so much as his labour deserved. And if I neglect to make him amends, he has a remedy for this injury by bringing his action on the case upon this implied *assumpsit*, wherein he is at liberty to suggest that I promised to pay him so much as he reasonably deserved, and then to aver that his [163
trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trou-

[n] 2 Hawk. P.C. c. 26. s 64. [o] *Ff* 47 15. 3.

(14) And if in the second action it be found that the recovery in the first was obtained by collusion, the defendant is liable to two years' imprisonment. § 2.

ble 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 real value of the goods should be paid; and an action on the case may be brought accordingly, if the vendee refuses to pay that value.

3. A third species of implied *assumpsits* is when one has had and 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].

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].

[164] 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 im-

[p] 4 Burr. 1012. [q] Carth 446. 2 Keb. 99.

plication it is frequent for actions on the case to be brought, declaring that the plaintiff and defendant had settled their accounts together, *insimul computassent*, (which gives name to this species of *assumpsit*,) and that the defendant engaged to pay the plaintiff the balance, but has since neglected to do it. But if no account has been made up, then the legal remedy is by bringing a writ of *account de computo*[r]; commanding the defendant to render a just account to the plaintiff, 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. (15) 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. But, however, it is found by experience, that the most ready and effectual way to settle these matters of account is by bill in a court of equity, where a discovery may be had on the defendant's oath, without relying merely on the evidence which the plaintiff may be able to produce. Wherefore actions of account to compel a man to bring in and settle his accounts, are now very seldom used; though, when an account is once stated, nothing is more common than an action upon the implied *assumpsit* to pay the balance.

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, con- [165

[r] F.N B 116. [s] Co Litt 90.

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(15) Except in case of the king, who, by prerogative, had an action of account against an executor. Litt. s. 125, 11Rep 90. And where two merchants had traded jointly, the executor of one dying first, had by the common law the action against the survivor. F.N.B. 117. The action of account is given *to* executors by 13E.1. c 23., *to* executors of executors by 25E.3. st. 5. c. 5., and to administrators by 31E.3. c.11.

with a common farrier, that he shoes a horse well, without laming him; with a common tailor, or other workman, that he performs his business in a workmanlike manner; in which, if they fail, an action on the case lies to recover damages for
[166] such breach of their general undertaking[y]. But if I employ

[y] 11 Rep 54. 1 Saund. 312.

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or by the king's enemies That he has been robbed of the goods by an overwhelming force is no excuse for him, "for fear it may give room for collusion, that the carrier may contrive to be robbed on purpose, and share the spoil" This great responsibility has induced them almost universally to refuse to carry goods beyond a specified value, unless the owner will pay them a proportionate premium, and the manner in which they announce such determination is by notices, which turn the general and implied contract into a special contract, and limit their responsibility according to the terms of them These notices are clearly legal, but as they are in restraint of a common law liability, they are watched by the courts with a jealous eye, and it is therefore absolutely necessary to bring a knowledge of the notice home to the party who delivers the goods to the carrier, thus, where the notice is in the office, and the goods are sent for and taken up at the individual's house, or the notice is in offices at each end of the whole journey, but the goods are taken up at some intermediate stage, unless knowledge of the terms can be brought home to the consignor of the goods, the carrier takes them upon his general responsibility And even where the consignor of the goods is clearly fixed with a knowledge of the notice, and does not pay the increased rate of premium, still the carrier will be liable for any loss resulting from his own gross negligence or positive misconduct. The question, however, of gross negligence, will depend in some measure on the value of the parcel, and this circumstance may sometimes let the carrier into a defence quite independent of his notice; for it has been held on general principles, that where the consignor unfairly conceals the value of the goods, by which he disarms as it were the vigilance of the carrier, he can maintain no action for the loss

It is obvious that on legal principles it can make no difference whether the carriage is by land or water, but independently of that protection which a party may afford himself by notice, the legislature has interfered to limit the liability of water-carriers by sea By stat.7 G.2. c.15. and 26 G 3 c 86. it is in substance enacted that the owner of the vessel shall not be liable beyond the value of the vessel and the freight of the voyage, where the loss is occasioned either by the fraud of the master or mariners, or of any other person without the owner's privity, and if there are several freighters, and the value of the goods stolen exceeds that of the ship and freight, they are to receive a rateable compensation. But the owner will not be liable for any robbery of gold, silver, diamonds, watches, jewels, or precious stones committed without his privity, unless the shipper at the time of shipping discloses their quality and value to the owner of the vessel; neither will he be liable for any loss by fire These statutes leave the water-carrier's liability for misconduct or negligence of his own, untouched.

a person to transact any of these concerns, whose common profession and business it is not, the law implies no such *general* undertaking; but, in order to charge him with damages, a *special* agreement is required. Also, if an inn-keeper, or other victualler, hangs out a sign and opens his house for travellers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he, without good reason, refuses to admit a traveller [z]. (20) 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 lies also against him for damages, upon the contract which the law always implies, that every transaction is fair and honest [a]. In contracts likewise for sales, it is constantly understood that the seller undertakes that the commodity he sells is his own; and if it proves 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 selleth 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 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. (21) But if the vendor knew the goods

[z] 1 Vent 333
[a] 10 Rep 56.
[b] F N B 94.
[c] Finch L. 189

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(20) It has been ruled, that this undertaking does not extend to the furnishing travellers with post-horses, though the innkeeper has a licence, and has horses at liberty in his stables *Dicas* v *Hides*, 1 Holt, N. P. 207. per Le Blanc J.

(21) This position is taken from Finch, who cites for it the Year Book, 11E 4 6., where a *dictum* of Choke J. will be found to that effect with

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].

[d] 2 Roll. Rep 5 [e] Finch L 189 [f] Salk 211

an instance less to the purpose than that given in the text, that a warranty that a horse will carry me thirty leagues in a day is void, which in common sense seems rather a warranty of a *present* capability, than of a future event In the case of *Eden* v *Parkison*, Dougl 732 Lord Mansfield, after the passage in the text had been cited, said, " there is no doubt " but you may warrant a future event " It is not however difficult to reconcile the authorities: the old mode of proceeding for a breach of a warranty was by an action for deceit; and, therefore, if the seller affirmed that which could not deceive the buyer, as he did when he undertook for something future, it must be taken that the buyer received no damage, that is, was not induced to buy thereby, and therefore no action was maintainable Thus, in the same case, Brian J. says, if a man sell me seed, and warrants it to be good, and it is bad, or that it is seed of such a country, if it be not so, I shall have an action of deceit, for I could not know, but he that sells to me, could, but if he warrants me that the seeds shall grow, such warranty is void, for it is not in him to warrant that, but in God only. Upon the same principle may be founded the decisions that warranties are void, which regard the plain objects of our senses. No man is induced by a warranty to believe that a horse has a tail, if he sees him without one But the modern remedy is by an action of *assumpsit* on the *promise*, in which the deceit of the seller is immaterial, and to such a case Lord Mansfield referred, the effect of the undertaking now is not so much that the thing is so and so, but to pay a compensation if it is not, and therefore the knowledge of the insurer, and the contingency of the event, become immaterial. The case of *Williamson* v *Allison*, 2 East, 449 does not contradict this distinction.

BESIDES the special action on the case, there is also a peculiar remedy, intitled 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]. 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 antient demesne, [166* to reverse a fine or recovery had in the king's courts of lands lying within his jurisdiction; which would otherwise be thereby turned into frank fee. And this may be brought by the lord against the parties and *cestuy que use* of such fine or recovery: and thereby he shall obtain judgment not only for damages (which are usually remitted), but also to recover his court, and jurisdiction over the lands, and to annul the former proceedings[n].

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

[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.
[l] Booth, 253 Co. Entr. 8.
[m] 3 Lev. 419.
[n] Rast. Entr. 100. *b* 3 Lev. 415. Lutw. 711. 749.

CHAPTER THE TENTH.

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

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

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

OUSTER, or dispossession, is a wrong or injury that carries with it the amotion of possession: for thereby the 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
[168] 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 [a]. It is to be observed that this expression, of *abating*, which is derived from the

[a] Finch. L. 195.

French, and signifies to quash, beat down, or destroy, is used by our law in three senses. The first, which seems to be the primitive sense, is that of abating or beating down a nuisance, of which we spoke in the beginning of this book[b]; and in a like sense it is used in statute Westm.1. 3 Edw.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 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 [169
the heir or devisee out of possession, is one of the highest injuries to the rights of real property.

2. THE second species of injury by ouster, or amotion of possession from the freehold, is by *intrusion*; which is the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion. And it hap-

[b] Pag 5.

pens 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*. 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, nor dispossession; but it depends on their respective natures, and

[c] Co. Litt 277. F. N. B. 203, 204
[d] Co. Litt. 277.
[e] Co. Litt. 181

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 antient law-books[f] mentioned five methods of working a disseisin thereof: 1. By *enclosure*, where the tenant so encloseth the house or land, that the lord cannot come to distrein thereon, or demand it: 2. By *forestaller*, or lying in wait; when the tenant besetteth the way with force and arms, or by menaces of bodily hurt affrights the lessor from coming: 3. By *rescous*, that is, either by violently retaking a distress taken, or by preventing the lord with force and arms from taking any at all: 4. By *replevin*, when the tenant replevies the distress at such time when his rent is really due: 5. By *denial*, which is when the rent being lawfully demanded is not paid. All, or any of these circumstances amount to a disseisin of rent; that is, they wrongfully put the owner out of the only possession of which the subject matter is capable, namely, the receipt of it. (1) But all these disseisins, of hereditaments incorporeal, are only so at the election and choice of the party injured; if, for the sake of more easily trying the right, he is pleased to suppose himself disseised[g]. Otherwise, as there can be no actual dispossession, he cannot be compulsively disseised of any incorporeal hereditament.

And so too, even in corporeal hereditaments, a man may frequently suppose himself to be disseised, when he is not so in fact, for the sake of entitling himself to the more easy and commodious remedy of an assise of *novel disseisin*, (which will be explained in the sequel of this chapter,) instead of being driven to the more tedious process of a writ of entry[h]. The [171
true injury of compulsive disseisin seems to be that of dispossessing the tenant, and substituting one's self 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

[f] Finch L. 195, 196. Litt. § 237, &c.
[g] Litt. § 588, 589
[h] *Hengh parv.* c. 7. 1 Burr. 110.

(1) The old law books make a distinction, which since the 4 G. 2 c. 28 (see ante, p. 6.) is no longer necessary, that *rescous* and *replevin* could be no disseisins of a rent-seck, as there was no right to distrein for it.

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 alienee. And when the remedy by assise was introduced under Henry II. to redress such disseisins as had been committed within a few years next preceding, the facility of that remedy induced others who were wrongfully kept out of the freehold, to feign or allow themselves to be disseised, merely for the sake of the remedy.

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

4. Such is, fourthly, the injury of *discontinuance*, which happens when he who hath an estate-tail, maketh a larger estate of the land than by law he is entitled to do[1]. in which case the estate is good, so far as his power extends who made it, but no farther. (2) As if tenant in tail makes a feoffment in

[1] Finch L 190

(2) Bacon, New Abr tit. Discontinuance, defines it to be "such an "alienation of the possession, whereby he who has a right to the inherit- "ance cannot enter, but is driven to his action" The question whether any particular act has this effect, depends not so much on the quantity of estate which the wrong-doer has, as upon the mode of conveyance, by which he has done it For example, by the old law the disseisor, who has but a naked possession, might, by feoffment, and livery of seisin to a third person, discontinue the lawful estate of the disseissee, that is, take from him his right to re-vest it by mere entry; on the other hand, the tenant in tail, who has all but the fee-simple, may by lease and release profess to convey the inheritance in fee to one and his heirs, and yet discontinue no estate, the form of the instrument operating to pass only whatever he lawfully can grant

fee-simple, or for the life of the feoffee, or in tail; all which are beyond his power to make, for that by the common law ex- [172
tends 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 antient 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. 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[k]. 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 it's 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[l]. So that this includes as well an abate-

[k] F N. B 194. [l] Co Litt 277

In order to effect a *general* discontinuance, the alienation must be made with livery of seisin, or what is equivalent to it, though the estates of particular persons may be discontinued by other modes, in order to avoid circuity; as lease and release by tenant in tail, with *warranty*, will displace the estate of the issue on whom the warranty descends. See ante, Vol. II. p 301. Litt § 592 Co. Litt. 325 *a* n. 278, &c.

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
[175] part of it in the same county, declaring it to be in the name of the whole [w]: 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 feoffees, entry must be made on *both* [x] for as their seisin is distinct, so also must be the act which divests that seisin. If the claimant be deterred from entering by menaces or bodily fear, he may make *claim*, as near to the estate as he can, with the like forms and solemnities: which claim is in force for only a year and a day [y]. And this claim, if it be repeated once in the space of every year and day, (which is called *continual claim*,) has the same effect with, and in all respects amounts to, a legal entry [z]. Such an entry gives a man seisin [a], or puts into immediate possession him that hath right of entry on the estate, and thereby makes him complete owner, and capable of conveying it from himself by either descent or purchase. (3)

This remedy by entry takes place in three only of the five species of ouster, *viz.* abatement, intrusion, and disseisin [b]; for, as in these the original entry of the wrong-doer was unlawful, they may therefore be remedied by the mere entry of him who hath right. But, upon a discontinuance or deforcement, the owner of the estate cannot enter, but is driven to his action: for herein the original entry being lawful, and thereby an apparent right of possession being gained, the law will not suffer that right to be overthrown by the mere act or entry of the claimant. Yet a man may enter [c] on his tenant by sufferance: for such tenant hath no freehold, but only a bare possession;

[v] See Book II. ch 14. pag. 209.
[w] Litt § 417.
[x] Co Litt. 252.
[y] Litt. § 422
[z] *Ibid.* § 419. 423.
[a] Co. Litt. 15.
[b] *Ibid* 237, 238.
[c] See Book II. pag. 150.

See ante, Book II. p 312.

which may be defeated, like a tenancy at will, by the mere entry of the owner. But if the owner thinks it more expedient to suppose or admit [d] such tenant to have gained a tortious freehold, he is then remediable by writ of entry, *ad terminum qui præterıit.* [176

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. Descents, which take away entries [e], are 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 [f]. Thirdly, this was admirably adapted to the military spirit of the feodal 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. (4)

For, in every complete title [g] to lands, there are two things necessary; the possession or seisin, and the right or property therein [h]: or, as it is expressed in Fleta, *juris et seisinae con-*

[d] Co. Litt. 57.
[e] Litt. § 385—413.
[f] Co. Litt. 237.
[g] See Book II ch 13.
[h] Mirror c 2 § 27

(4) See Com. Dig., tit. Discent, D. for many distinctions as to what descents toll entry, and what not.

junctio[i]. Now if the possession be severed from the property, if A has the *jus proprietatis*, and B by some unlawful means has gained possession of the lands, this is an injury to A; for
[177] 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 some exceptions[k] 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[l]. 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[m]:

[i] *l* 3 *c* 15. § 5.

[k] See the particular cases mentioned by Littleton, b 3 ch. 6. the principles of which are well explained in *Gilbert's law of tenures*

[l] Co Litt 246

[m] *Ibid.* 256.

because such a one by the genuine feodal constitutions always came into the tenure solemnly and with the lord's concurrence, [178 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. (5) And by statute 4&5Ann. 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[n]. For, as in the former cases, the law will not suppose, without proof, that the ancestor of him in possession acquired the estate by wrong; and therefore, after five years' peaceable possession, and a descent cast, will not suffer the possession of the heir to be disturbed by mere entry without action; so here the law will not suppose the discontinuor to have aliened the estate without power so to do, and therefore leaves the heir in tail to his action at law, and permits not his entry to be lawful. Besides, the alienee, who came into possession by a lawful conveyance, which was at least good for the life of the alienor, hath not

[n] Co Litt 325

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(5) This limitation is subject to the same exceptions as have been enumerated above, of infancy, coverture, insanity, imprisonment, and absence beyond seas, in which case, the party entitled, or his heir, as the case may be, may make his entry within ten years after the disability removed. That is, as the clause has been well explained by Lawrence J, the statute gives to the party to whom a right of entry accrues, and who is under a disability at the time, ten years after the disability removed, 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. *Doe* v *Jesson*, 6 East, 85. In both cases the disability must exist at the moment of the right accruing, for if the twenty years under the statute once begin to run, no subsequent disability will prevent their progress and operation. *Doe* v *Jones*, 4 T. R 310

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 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.

In case of deforcement also, where the deforciant had originally a lawful possession of the land, but now detains it wrongfully, he still continues to have the presumptive *prima*
[179] *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 antient possessor *in statu quo* the criminal injury, or public wrong by breach of the king's peace, is punished by fine to the king. (6) 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 peacable 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

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(6) As to the punishment for the criminal injury, see Vol. IV. p. 148 The civil injury is remediable also by action on the statutes of R. 2 and H. 6 Com. Dig., Forceable Entry, C Pleader, 2 S. 20; in which the plaintiff, he recovers, will have treble damages But I conceive that he will not recover in an action, if he has no title, and the defendant is the lawful owner, on the same principle that it has been determined that a tenant who holds over after the expiration of his term, and notice to quit, cannot maintain an action of trespass against his landlord who forcibly enters, or distrein the cattle which he puts in by way of taking possession. See *Turner* v. *Meymett*, 1 Bingh 158 *Taunton* v *Costar*, 7 T. R. 431.

possessor of his right, (which is likewise declared to be absolutely void,) the offender shall forfeit, for the force found, treble damages to the party grieved, and make fine and ransom to the king. But this does not extend to such as endeavour to keep possession *manu forti*, after three years peaceable enjoyment of either themselves, their ancestors, or those under whom they claim; by a subsequent clause of the same statute, enforced by statute 31 Eliz. c. 11.

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

THESE remedies are either by a *writ of entry*, 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 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 antient seisin, than to reside in one who had no such evidence in his favour.

[n] Mir. c. 4.

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, *praecipe quod reddat*) to the demandant "the land in question, which he claims to be his right and in- "heritance; 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 ap- "pear in court on such a day, to shew wherefore he hath not "done it[p]." This is the original process, the *praecipe* upon which all the rest of the suit is grounded; wherein it appears, that the tenant is required, either to deliver seisin of the
[181] lands, or to shew cause why he will not. This cause may be either a denial of the fact, of having entered by or under such means as are suggested, or a justification of his entry by reason of title in himself or in those under whom he makes claim: whereupon the possession of the land is awarded to him who produces the clearest right to possess it.

our antient 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 in-* "*gressum 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

[o] Finch. L. 261.

[p] See Vol. II. Append No. V. § 1.

[q] Finch. L. 262. 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.

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 alienee, *to* whom the intruder demised it; "*non habuit ingressum nisi* per *Ricardum*, cui *Gulielmus illud dimisit, qui se in illud intrusit*[s]." These degrees thus state the original wrong, and the title of the tenant who claims under such wrong. If more than two degrees (that is, two alienations or descents) were past, there lay no writ of entry at the common law. For as it was provided, for the quietness of men's [inheritances, that no one, even though he had the true right of possession, should enter upon him who had the apparent right by descent or otherwise, but he was driven to his *writ of entry* to gain possession; so, after more than two descents or two conveyances were passed, the demandant, even though he had the right both of possession and property, was not allowed this *possessory* action; but was driven to his *writ of right*, a long and final remedy, to punish his neglect in not sooner putting in his claim, while the degrees subsisted, and for the ending of suits, and quieting of all controversies[t]. But by the statute of Marlbridge, 52 Hen. III. c. 29. it was provided, that when the number of alienations or descents exceeded the usual degrees, a new writ should be allowed without any mention of degrees at all. And accordingly a new writ has been framed, called a writ of entry in the *post*, which only alleges the injury of the wrongdoer, without deducing all the intermediate title from him to the tenant: stating it in this manner; that the tenant had not entry unless *after*, or subsequent to, the ouster or injury done by the original dispossessor; "*non habuit ingressum nisi* post *intrusionem* "*quam Gulielmus in illud fecit*," and rightly concluding, that if the original title was wrongful, all claims derived from thence must participate of the same wrong. Upon the latter of these writs it is (the writ of entry *sur disseisin* in the *post*) that the form of our common recoveries of landed

[r] Booth. 181.
[s] Finch. L. 263. F. N. B. 203, 204.
[t] 2 Inst. 153.

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 *praecipe*, or writ of entry,) in which by collusion the demandant recovers the land.

THIS remedial instrument, of writ of entry, is applicable to all the cases of ouster before-mentioned, except that of discontinuance by tenant in tail, and some peculiar species of deforcements. Such is that of deforcement of dower, by not assigning any *dower* to the widow within the time limited by
[183] 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 plainly and clearly chalked out in that

[v] See Book II Append. No. V.

[u] Book II. ch. 21.

[w] F N B. 147.

[x] *Ibid.* 8.

[y] F. N B. 148. Finch. L. 314. Strat. Westm. 2. 13 Ed. I. c 7.

[z] See Bracton. *l.* 4. *tr.* 7. *c.* 6. § 4 Britton. c. 114. fol. 263. The most usual were, 1. The writs of entry *sur disseisin*, and of *intrusion* (F. N. B. 191. 203) which are brought to remedy either of those species of ouster. 2. The writs of *dum fuit infra aetatem*, and *dum fuit non compos mentis* (*Ibid.* 192. 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, (7) or for the heirs of such alienor. 3. The writs of *cui in vita*, and *cui ante divortium* · (*Ibid* 193. 204.) for a woman, when a widow or divorced, whose husband during the coverture (*cui in vita sua, vel cui ante divortium, 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

most antient and highly venerable collection of legal forms, the *registrum omnium brevium*, or register of such writs as are suable out of the king's courts, upon which Fitzherbert's *natura brevium* is a comment; and in which every man who is [18 injured will be sure to find a method of relief, exactly adapted 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 provisions of the statute Westm.2. 13 Edw.I. c.24. for framing new writs when wanted, is almost rendered useless by the very great perfection of the antient forms. And indeed I know not whether it is a greater credit to our laws, to have such a provision contained in them, or not to have occasion, or at least very rarely, to use it.

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

for life. 5. The writs *in casu proviso* and *in consimili casu*, (*Ibid.* 205. 206.) which lay not *ad communem legem*, but are given by stat. Gloc. 6 Edw.I. 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 qui praeterit*. (*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 praelocuti* (*Ibid.* 205.) 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.

tablish 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.

[187] 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 statute of wills, 32 Hen.VIII. c.1. made all socage lands devisable, 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. (10)

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 commit-

[n] F.N.B. 197. Finch.L.293.
[o] Hale on F.N.B. 221.
[p] Fitzh. Abr. *tit. cosinage*. 15.
[q] Bracton, *l* 4. *de assis mortis antecessoris*. *c*.13. § 3. F.N.B. 196.
[r] See 1 Leon.267

(10) In *Launder* v. *Brooks and others*, Cro. Car. 562. the court of K B. "resolved that an assise of *mort-d'auncestor*, lies of lands devisable; but if "the defendant plead that the land is by custom devisable, *and was devised* "*to him*, it is a good bar of the action." This seems more sensible than to deny generally a form of action to the heir, because in a particular case there may be a good bar to his right.

ted, 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 *nul tort*, *nul disseisin*, or any special plea. And if, upon the general issue, the recognitors find an actual seisin in the demandant, and his subsequent disseisin by the present tenant; he shall have judgment to recover his seisin, and damages for the 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 [1
and damages were annexed to many other possessory actions by the statutes of Marlberge, 52 Hen. III. c.16. and of Glocester, 6 Edw.I. c.1. And to prevent frequent and vexatious disseisins, it is enacted by the statute of Merton, 20 Hen.III. c.3., that if a person disseised recover seisin of the land again by 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 superadded 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 quidem qui ita*

[s] Booth 211. Bract.4.1.19.§ 7.
[t] F N B 177
[u] Bract.187. Stat Marlbr. c.16.
[w] 2 Inst. 83, 84
[x] *l.4. tr.1. c.49*

er delinquit contra regem: quia facit
"*disseisinam et roberiam contra pacem suam; et etiam ausu*
"*temerario irrita facit ea, quae in curia domini regis rite acta*
"*sunt: et propter duplex delictum merito sustinere debet poenam*
"*duplicatam.*"

In all these possessory actions there is a time of limitation settled, beyond which no man shall avail himself of the possession of himself or his ancestors, or take advantage of the wrongful possession of his adversary. For, if he be negligent for a long and unreasonable time, the law refuses afterwards to lend him any assistance, to recover the possession merely: both to punish his neglect (*nam leges vigilantibus, non dormientibus, subveniunt,*) and also because it is presumed that the supposed wrongdoer has in such a length of time procured a legal title, otherwise
[189] he would sooner have been sued. This time of limitation by the statute of Merton, 20 Hen. III. c. 8. and Westm. 1. 3 Edw. I. c. 39. was successively dated from particular æras, *viz.* from the return of king John from Ireland, and from the coronation, &c. of king Henry 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

[y] 32 Hen. VIII. c. 2.

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

[a] 8 Rep.

once in the lord's or tenant's life; as fealty, and the like.[b] (11) And all writs, grounded upon the possession of the demandant himself, are directed to be sued out within thirty years after the disseisin complained of; for if it be of an older date, it can with no propriety be called a fresh, recent, or *novel disseisin*; which name sir Edward Coke informs 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 [19
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 antient 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 antient law determined nothing in vain. As the tenant's pos-

[b] Co. Litt. 115.
[c] 1 Inst. 153. Booth. 210.
[d] See pag. 184.

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(11) The principle is not the common possibility of the service becoming due once only in the life of the lord or the tenant, but of its not becoming due at all within a period of time exceeding that allowed by any of the statutory limitations Lord Coke's expression is, "any other service which "by common possibility may not happen or become due within sixty "years, as to cover the hall of the lord, or to attend on his lord when he "goeth to warre, or the like." Co. Litt. 115.

session was gained by a defective title, it was liable to be overturned by 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 *jus, et seisinam* separate; a good right, but a bad possession: now, by the remitter, he hath the most perfect of all titles, *juris et seisinae 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.

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This happens principally in four cases: 1. Upon discontinuance by the alienation of tenant in tail: whereby he who had the right of possession, hath transferred it to the alienee; and therefore his issue, or those in remainder or reversion, shall not be allowed to recover by virtue of that possession, which the tenant hath so voluntarily transferred. 2, 3. In case of judgment given against either party, whether by his own default, or upon trial of the merits, in any possessory action: for such judgment, if obtained by him who hath not the true ownership, is held to be a species of deforcement; which however binds the right of possession, and suffers it not to be ever again disputed, unless the right of property be also proved. 4. In case the demandant, who claims the right, is barred from these possessory actions by length of time and the statute of limitations before-mentioned: for an undisturbed possession for fifty years ought not to be devested by any thing, but a very clear

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

1. And first, upon an alienation by tenant in tail, whereby the estate-tail is discontinued, and the remainder or reversion is by failure of the particular estate displaced, and turned into a mere right, the remedy is by action of *formedon* (*secundum formam doni*,) which is in the nature of a writ of right [e], and is the highest action that tenant in tail can have [f]. For he cannot have an absolute writ of right, which is confined only to such as claim in fee-simple: and for that reason this writ of *formedon* was granted him by the statute *de donis* or Westm. 2. 13 Edw. I. c. 1., which is therefore emphatically called *his* writ of right [g]. This writ is distinguished into three species: a *formedon* in the *descender*, in the *remainder*, and in the *reverter*. A writ of *formedon* in the *descender* lieth, where a gift in tail is made, and the tenant in tail alienes the lands entailed, or is disseised of them, and dies; in this case the heir in tail shall have this writ of *formedon* in the *descender*, to recover these lands so given in tail, against him who is then the actual tenant of the freehold [h]. In which action the demandant is bound to state the manner and form of the gift in tail, and to prove himself heir *secundum formam doni*. A *formedon* in the *remainder* lieth, where a man giveth lands to another for life or in tail, with remainder to a third person in tail or in fee; and he who hath the particular estate dieth, without issue inheritable, and a stranger intrudes upon him in remainder and keeps him out of possession [i]. In this case the remainder-man shall have his writ of *formedon* in the *remainder*, wherein the whole form of the gift is stated, and the happening of the event upon which the remainder depended. This writ is not given in express words by the statute *de donis*, but is founded upon the equity of the statute, and upon this maxim in law, that if any one hath a right to the land, he ought also to have an action to recover it. A *formedon* in the *reverter* lieth, where there is a gift in tail, and afterwards by the death of the donee or his heirs without issue of his body the reversion

[e] Finch L. 267.
[f] Co. Litt. 326.
[g] F. N. B. 255
[h] *Ibid.* 211, 212.

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]. (12) 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*
[193] by statute 21 Jac. I. c. 16. is twenty years; within which space of time after his title accrues, the demandant must bring his action, or else he is for ever barred. (13)

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

[k] F N.B. 219. 8 Rep. 88. [l] Finch L. 268.

(12) It is obvious that, in a *formedon* in the remainder, a fee simple is often, and in the reverter always, claimed; but there are many reasons why such forms of action are necessary, and why the party, if left to his mere writ of right, would be without a proper remedy. The fee-simple is claimed in them after the expiration of a tenancy in tail, which may have endured an indefinite time; but the demandant in a writ of right must allege a seisin in his ancestor within a definite time *before the writ sued out;* though he might make claim, therefore, the moment that his title accrued, he might be barred by lapse of time. Whereas in *formedons* the limitation runs from the time of the title accruing, and the demandant can only be barred by his own laches.

It will follow from this, that though the highest writ may be lost, and the mere *right* by itself become incontestable by uninterrupted possession for sixty years (see post. 196), yet there may be cases in which, at any indefinite time after sixty years, not merely the inferior remedies of the writ of entry and *formedon* may be available, but even bare entry itself may be sufficient for the recovery of property. See Resolut. 3d. Bevil's case, 4 R. 11. b.

(13) It might seem, and has been contended, that a fresh title accrues to the issue in tail of a person, who has been barred by the lapse of time, and therefore that such issue would have another twenty years in which to bring his *formedon*. But if this construction prevailed at all, it is obvious that it would equally prevail through any number of descents, and would virtually repeal the statute in the most pernicious manner. In the case of *Tolson* v. *Kaye*, 3 Brod. & Bing. 217. the court of C.P. therefore determined that the *first* descent of the title, within twenty years after which the statute requires the *formedon* to be sued out, is the descent upon that claimant, who, being free from any disability, suffers twenty years to elapse without asserting his right, and consequently that the bar which operates upon him equally concludes all claiming as his heirs.

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. 1. c. 4. gives a new writ for such persons, after their lands have been so recovered against them by default, called a *quod ei deforceat*; which, though not strictly a writ of right, so far partakes of the nature of one, as that it will restore the right to him, who has been thus unwarily deforced by his own default [m]. But in case the recovery were not had by his own default, but upon defence in the inferior possessory action, this still remains final with regard to these particular estates, as at the common law: and hence it is, that a common recovery (on a writ of entry in the *post*) had, not by default of the tenant himself, but (after his defence made and voucher of a third person to warranty) by default of such vouchee, is now the usual bar to cut off an estate-tail [n].

3, 4. THIRDLY, in case the right of possession be barred by a recovery upon the merits in a possessory action, or lastly by the statute of limitations, a claimant in fee-simple may have a *mere writ of right*, which is in it's 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 be brought, where the demandant is entitled [194
to the possession, yet it rarely is advisseable 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

[m] F.N.B. 155.
[n] See Book II. ch. 21.
[o] F.N.B. 1.
[p] F.N.B. 1. 5.

is of so forcible a nature, that it overcomes all obstacles, and clears all objections that may have arisen to cloud and obscure the title. And, after issue once joined in a writ of right, the judgment is absolutely final; so that a recovery had in this action may be pleaded in bar of any other claim or demand.[q]

THE pure, proper, or mere writ of right lies only, we have said, to recover lands in fee-simple, unjustly withheld from the true proprietor. But there are also some other writs which are said to be *in the nature of* a writ of right, because their process and proceeding do mostly (though not entirely) agree with the writ of right: but in some of them the fee-simple is not demanded; and in others not land, but some incorporeal hereditament. Some of these have been already mentioned, as the writ of *right of dower*, *of formedon*, *&c.* and the others will hereafter be taken notice of under their proper divisions. Nor is the mere writ of right alone, or always, applicable to every case of a claim of lands in fee-simple: for if the lord's tenant in fee-simple dies without heir, whereby an escheat accrues, the lord shall have a writ of *escheat*[r], which is in the nature of a writ of right[s]. And if one of two or more coparceners deforces the other, by usurping the sole possession, the party aggrieved shall have a writ of right, *de rationabili parte*[t]: which may be grounded on the seisin of the ancestor at any time during his life (14); whereas in a *nuper obiit* (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.

[195]

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

[q] F.N.B.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.

(14) As this writ lies only between privies in blood claiming under the same ancestor, it is obviously unimportant whether the ancestor died seised or no The tenant's entry is in virtue of *some* right in the ancestor, and though he may shew in answer to the writ, that the right was not such as the demandant alleges, but some other, the proof of which will abate the writ, yet both are agreed in claiming from him.

or *patent*: but if he holds no court, or hath waived his right *remisit curiam suam*, it may be brought in the king's courts by writ of *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 court, 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 antient 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 *tolt* [f], and from thence into the king's courts by writ of *pone* [g] or *recordari facias*, at the suggestion of either party that there is a delay or defect of justice [h].

In the progress of this action [i] the demandant must allege some seisin of the lands and tenements in himself, or else in some person under whom he claims, and then derive the right from the person so seised to himself; 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 dis-

[x] F N.B.2. Finch.L.313.
[y] Booth, 91.
[z] Append. No.I. § 4.
[a] *c.* 24.
[b] F.N.B. 5.
[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.*13. § 9. Old Tenur. *t. tenir en socage.* Old N.B. *t. garde. & t. de recto claus,* F.N.B. 11.
[f] Append. No.I. § 2.
[g] *Ibid.* § 3.
[h] F.N.B. 3, 4.
[i] Append. No.I. § 5.

tance of time. For by the antient law no seisin could be alleged by the demandant, but from the time of Henry the first[k]; by the statute of Merton, 20 Hen. III. c.8. from the time of Henry the second; by the statute of Westm.1. 3 Edward I. c.39. from the time of Richard the first; and now, by statute 32 Henry VIII. c.2. seisin in a writ of right shall be within sixty years. So that the possession of lands in fee-simple uninterruptedly, for threescore years, is at present a sufficient title against all the world; and cannot be impeached by any dormant claim whatsoever. (15)

I HAVE now gone through the several species of injury by ouster and dispossession of the freehold, with the remedies applicable to each. In considering which I have been unavoidably led to touch upon much obsolete and abstruse learning, as it lies intermixed with, and alone can explain the reason of those parts of the law which are now more generally in use. For, without contemplating the whole fabric together, it is impossible to form any clear idea of the meaning and connection of those disjointed parts which still form a considerable branch of the modern law; such as the doctrine of entries and remitter, the levying of fines, and the suffering of common recoveries. Neither indeed is any considerable part of that, which I have selected in this chapter from among the venerable monuments of our ancestors, so
[197] absolutely antiquated as to be out of *force*, though the whole is certainly out of *use*. there being but a very few instances for more than a century past of prosecuting any real action for land by writ of *entry*, *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.

[k] Glanv. *l.*2. *c.*3. Co. Litt. 114.

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(15) See ante, p.191. n.12.

CHAPTER THE ELEVENTH.

OF DISPOSSESSION, OR OUSTER, OF CHATTELS REAL.

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

I. OUSTER, or amotion of possession, from estates held by statute, recognizance, or *elegit*, is only liable to happen by a species of disseisin, or turning out of the legal proprietor, before his estate is determined by raising the sum for which it is given him in pledge. And for such ouster, though the estate be merely a chattel interest, the owner shall have the same remedy as for an injury to a freehold; *viz.* by assize of *novel disseisin*[a]. But this depends upon the several statutes, which create these respective interests[b], and which expressly pro- [19
vide 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 be paid: because by the statutes they

[a] F.N.B. 178.

[b] Stat. Westm. 2. 13 Edw. I. c. 18. Stat. *de mercatoribus*, 27 Edw. III. c. 9. Stat. 23 Hen. VIII. c. 6. § 9.

[c] 1 Inst. 48.

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

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

[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 minuteness, it's history, the manner of it's 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 antiently the only specific remedy for recovering against the lessor a

[d] See book II. ch. 10.
[e] F. N. B. 220
[f] See Appendix, No. II. § 1.
[g] See pag. 157.

term from which he had ejected his lessee, together with damages for the ouster. But if the lessee was ejected by a stranger, claiming under a title superior [h] to that of the lessor, or by a grantee of the reversion, (who might at any time by a common recovery have destroyed the term [i],) though the lessee might still maintain an action of covenant against the lessor, for non-performance of his contract or lease, yet he could not by any means recover the term itself. If the ouster was committed by a mere stranger, without any title to the land, the lessor might indeed by a real action recover possession of the freehold, but the lessee had no other remedy against the ejector but in damages, by a writ of *ejectione 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, 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 it's present principal use, that of trying the title to the land. [20

THE better to apprehend the contrivance, whereby this end is effected, we must recollect that the remedy by eject-

[h] F N B. 145.

[i] See book II ch 9.

[k] *P.* 6 *Rac. II Ejectione firmae n'est que un action de trespass en son nature, et le plaintiff ne recovera son terme que est a venir, nient plus que en trespass home recovera damages pur trespass nient fait, mes a feser, mes il convient a suer par action de covenant al comen law a recoverer son terme quod tota curia concessit. Et per* Belknap, *la comen ley est, lou home est ouste de son terme par estranger, il avera ejectione firmae versus cesty que luy ouste, et sil soit ouste par son lessor, briefe de covenant, et si par lessée ou grantée de reversion briefe de covenant versus son lessor, et countera especial count, &c* (*Fitz. abr. t. eject. firm.* 2.) See Bract. *l.* 4. *tr.* 1. *c* 36.

[l] See Append. No. II. § 4. *prope fin.*

[m] 7 *Edw IV* 6. *Per* Fairfax; *si home port ejectione firmae, le plaintiff recovera son terme qui est arere, si bien come in quare ejecit infra terminam; et, si nul soit arrere, donques tout in damages.* (Bro. *Abr. t. quare ejecit in terminum,* 6)

[n] F.N.B. 220.

ment is in it's original an action brought by one who hath a lease for years, to repair the injury done him by dispossession. In order therefore to convert it into a method of trying titles to the freehold, it is first necessary that the claimant do take possession of the lands, to empower him to constitute a lessee for years, that may be capable of receiving this injury of dispossession. For it would be an offence, called in our law *maintenance*, (of which in the next book,) to convey a title to another, when the grantor is not in possession of the land; and indeed it was doubted at first, whether this occasional possession, taken merely for the purpose of conveying the title, excused the lessor from the legal guilt of maintenance °. 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 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 beforehand) comes upon the land, and turns him
[202] 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 seised or possessed by

° 1 Ch. Rep. Append. 39.

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. (1) 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 [203
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. 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,

[p] Styl. Pract. Reg. 108. (*edit.* 1657.)

[q] See Append. No. II. § 1, 2.

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(1) The reason for this will appear in the following page. It is there stated that the real tenant in possession is always served with a copy of the declaration, and an affidavit of that service is always made before the courts will allow judgment to be signed against the casual ejector. Where there is *no* tenant in possession, this condition cannot be complied with, and therefore the form of proceeding which requires it cannot be adopted. Where the action is brought in any inferior court the regular method must also be adopted, because such a court has no authority to frame a consent-rule, or compel the performance of it. Adams on Eject. 175. 295.

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] (2); it is also stated that Smith the lessee entered; and that the defendant William Stiles, who is called the *casual ejector*, ousted him; for which ouster he brings this action. As soon as this action is brought, and the complaint fully stated in the declaration [s], Stiles, the casual ejector, or defendant, sends a written notice to the tenant in possession of the lands, as George Saunders, informing him of the action brought by Richard Smith, and transmitting him a copy of the declaration: withal assuring him that he, Stiles the defendant, has no title at all to the premises, and shall make no defence; and therefore advising the tenant to appear in court and defend his own title: otherwise he, the casual ejector, will suffer judgment to be had against him; and thereby the actual tenant Saunders will inevitably be turned out of possession [t]. On receipt of this friendly caution, if the tenant in possession does not within a limited time apply to the court to be admitted a defendant in the stead of Stiles, he is supposed to have no right at all; and, upon judgment being had against Stiles the casual ejector, Saunders the real tenant will be turned out of possession by the sheriff.

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

[r] 6 Mod. 309.
[s] Append. No. II. § 2.
[t] Append. No. II. § 2.
[u] Append. No. II. § 3.

(2) This is now the almost invariable practice, and there seems to be some convenience in it, and no solid objection to it. It was reprobated in the case cited above, because it was said that thereby the defendant might lose his costs, if the result of the suit was in his favour, there being no person responsible on the record. But it is now always a part of the consent-rule, that in such case the lessor of the plaintiff will pay the costs, and the courts will enforce a performance of that undertaking by attachment, of the person where no privilege intervenes, and of the goods and chattels, where the party's person is protected. Adams on Eject. 230, 233.

the plaintiff, and his *ouster* by Saunders himself, now made the defendant instead of Stiles: which requisites being wholly fictitious, should the defendant put the plaintiff to prove them, he must of course be nonsuited for want of evidence; but by such stipulated confession of *lease*, *entry*, and *ouster*, the trial will now stand upon the merits of the *title* only. (3) This done, the declaration is altered by inserting the name of George

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(3) The defendant is now also obliged to confess his own possession of the premises at the time of the service of the declaration. Unless he was at that time the tenant in possession, the action was brought against the wrong person, and therefore it was a necessary step in the plaintiff's proof, but as it was a point totally unconnected with the title, the requiring such proof, (which in many cases, where land was sought to be recovered with no dwelling house on it, was difficult to be given), was contrary to the true intent and meaning of the consent-rule. See Reg Gen. K. B. 4 B. & A. 196 and C P 2 Brod & Bing. 470. In one case, the plaintiff is by a recent statute, 1 Geo.IV. c.87., entitled to call upon the tenant for a still further undertaking before the court can admit him to defend. As the writ of possession follows the judgment, and the judgment cannot be entered up till the term following the trial, a great temptation was held out to fraudulent tenants to apply to be made defendants, since time was gained to carry off the crops, and the landlord was left to an unprofitable action for the mesne profits By this statute, therefore, where the tenant has held under a lease or agreement in writing, and his interest having expired or been lawfully determined, holds over after lawful demand in writing of the possession, he may be compelled to undertake in case of a verdict for the plaintiff to give him a judgment as of the term next preceding the trial; and also to enter into a recognizance by himself and two sufficient sureties in a reasonable sum, conditioned to pay the costs and damages recovered by the plaintiff in the action. The court has power to impose one or both of these conditions on him; but unless he complies with the rule as modified by the court, he will not be admitted defendant, and the plaintiff will at once obtain judgment against the casual ejector To prevent, however, any injustice which might follow in a case where the tenant gave the required undertaking, if the judgment thus antedated should be immediately executed on an erroneous verdict in favour of the landlord, the 3d sect. provides, that if it appears 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 in all cases he is required to make this order at the request of the defendant, in case he shall forthwith undertake to find, and within four days actually find security in a reasonable sum directed by the judge, conditioned not to commit any waste, or act in nature thereof, or other wilful damage, and not to sell or carry off any standing crops, hay, straw, or manure from the day of the verdict to the day of its being set aside, or execution made on the judgment. And by § 6. if the result of the trial is against the landlord proceeding under this act, and compelling the tenant to find the bail specified in § 1., the tenant shall have judgment with double costs.

Saunders instead of William Stiles, and the cause goes down to trial under the name of Smith, (the plaintiff,) on the demise of Rogers, (the lessor,) against Saunders, the new defendant. And therein the lessor of the plaintiff is bound to make out a clear title, otherwise his fictitious lessee cannot obtain judgment to have possession of the land for the term supposed to be granted. But, if the lessor makes out his title in a satisfactory manner, then judgment and a writ of possession shall go for Richard Smith the nominal plaintiff, who by this trial has proved the right of John Rogers, his supposed lessor. Yet, to prevent fraudulent recoveries of the possession, by collusion with the tenant of the land, all tenants are obliged by statute 11 G. II. c. 19. on pain of forfeiting three years' rent, to give notice to their landlords, when served with any declaration in ejectment: and any landlord may by leave of the court be made a co-defendant to the action, in case the tenant himself appears to it: or if he makes default, though judgment must be then signed against the casual ejector, yet execution shall be stayed, in case the landlord applies to be made a defendant, and enters into the common rule; a right, which indeed the landlord had, long before the provision of this statute [w]; in like manner as (previous to the statute of Westm. 2. c. 3.) if in a real action the tenant of the freehold made default, the remainder-man or reversioner had a right to come in and defend the possession; lest, if judgment were had against the tenant, the estate of those behind should be turned to a naked right [x]. 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
[205] 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 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

[w] Styl. Pract. Reg 108. 111. 265. 7 Mod. 70. Salk. 257. Burr 1301.

[x] Bracton. *l.* 5. *tr.* 4. *c.* 10. § 14.

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. (4)

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. 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. (5)

[x] 4 Burr. 668.

(4) There is still one case in which even under the "new method" the plaintiff is compelled to make an actual entry, and can only date his right to recover from such entry. This is, where the defendant has strengthened his title by levying a fine with proclamations according to the statute of fines, 4 H 7. c 24. (See book II. p. 352) Such a fine by the words of the statute can only be avoided "by way of action or lawful entry" pursued within a certain time. Ejectment was not a form of action in use at the time of passing this statute, and therefore has been held not to be comprised within the words "by way of action." An actual entry must therefore be made for the purpose *Doe* v. *Watts*, 9 East, 17

(5) In order to obviate the delay and expense of a second action for the mesne profits, it is enacted by the 1 Geo. 4 c 87. § 2 that in all ejectments between landlord and tenant, where the latter has had due notice of trial, the former shall not be nonsuited for default of the defendant's appearance, but the consent-rule shall be sufficient evidence of the facts stated in it; and as well in such case as in that of his due appearance and confession, the plaintiff may go on after proving his right to recover, to give evidence of the mesne profits, and the jury shall give their verdict on the whole matter, both as to the title and mesne profits.

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Such is the modern way of obliquely bringing in question the title to lands and tenement, 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,
[206] as being infinitely more convenient for attaining the end of justice: because the form of the proceeding being entirely fictitious, it is wholly in the power of the court to direct the application of that fiction, so as to prevent fraud and chicane, and eviscerate the very truth of the title. The writ of ejectment and it's nominal parties (as was resolved by all the judges [y]) are "judicially to be considered as the fictitious form of an "action, really brought by the lessor of the plaintiff against the "tenant in possession: invented, under the controul 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 intangled in the nicety of pleadings on either "side."

But a writ of ejectment is not an adequate mean to try the title of all estates; for on those things, whereon an entry cannot in fact be made, no entry shall be supposed by any fiction of the parties. Therefore an ejectment will not lie of an advowson, a rent, a common, or other incorporeal hereditament [z]: except for tithes in the hands of lay impropriators, by the express purview of statute 32 Hen. VIII. c. 7. which doctrine hath

[y] Mich. 32 Geo. II. 4 Burr. 668. [z] Brownl 129. Cro. Car. 492. Stra. 54.

The judgment is conclusive only as to such facts as were necessarily proved or admitted in order to obtain it: it does not, therefore, as stated in the text, conclude the defendant for all profits which have accrued since the *date of the demise*, because the defendant is only liable to account for the profits from the time at which he came into possession, and this may have been long subsequent to the date of the demise, it being only necessary to the judgment, that he should have been in possession when the declaration was served on him. The plaintiff, therefore, must prove the defendant's possession for any period prior to the service of the declaration, for which he seeks to make him accountable, and he must prove the *value* of the profits entirely; as to that the judgment raises no inference. The defendant also may plead the statute of limitations, and protect himself from any demand farther back than the last six years

since been extended by analogy to tithes in the hands of the clergy[a]: nor will it lie in such cases, where the entry of him that hath right is taken away by descent, discontinuance, twenty years' dispossession, or otherwise.

THIS action of ejectment is however rendered a very e and expeditious remedy to landlords whose tenants are in arrere, 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 nonpayment 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. (6)

2. THE writ of *quare ejecit infra terminum* lieth, by the an- [207]
tient 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 feoffment in fee, or for life, of the same lands to a stranger: now the lessee cannot bring a writ of *ejectione firmae* or ejectment against the foeffee; 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

[a] Cro. Car. 301. 2 Lord Raym 789.

(6) A third benefit is given by this statute, which, according to the case of *Roe* v. *Davis*, 7 East, 363, is available to the landlord even when a sufficient distress is to be had. Before its enactment, the court exercised a discretionary power of staying the landlord's proceedings *at any stage of them*, upon payment of the rent in arrear with costs. By the fourth section, this discretion is taken away; the court cannot do it *after* trial, and must do it if the application is properly made before.

By the second section, the right of any mortgagee of the term not in possession is preserved upon payment of the rent, and all costs and damages to the landlord within six months after execution levied.

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*." But the law of England, justly considering that much inconvenience may happen to the owner, before he has an opportunity to forbid the entry, has carried the point much farther, and has treated every entry upon another's lands (unless by the owner's leave, or in some very particular cases,) as an injury or wrong, for satisfaction of which an action of trespass will lie; but determines the *quantum* of that satisfaction, by considering how far the offence was wilful or inadvertent, and by estimating the value of the actual damage sustained.

Every unwarrantable entry on another's soil the law entitles a trespass *by breaking his close*: the words of the writ of trespass commanding the defendant to shew cause *quare clausum querentis fregit*. For every man's land is in the eye of the law inclosed 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, existing
[210] only in the contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other; for, if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, *viz.* the treading down and bruising his herbage [c].

One must have a property (either absolute or temporary)

[b] *Inst.* 2. 1. 12.

[c] F. N. B. 87, 88.

in the soil, and actual possession by entry, to be able to maintain an action of trespass; (1) or, at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land [d]. Thus if a meadow be divided annually among the parishioners by lot, then after each person's several portion is allotted, they may be respectively capable of maintaining an action for the breach of their several closes [e]: for they have an exclusive interest and freehold therein for the time. But before entry and actual possession, one cannot maintain an action of trespass, though he hath the freehold in law [f]. And therefore an heir before entry cannot have this action against an abator; though a disseisee might have it against the disseisor, for the injury done by the disseisin itself, at which time the plaintiff was 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 postliminii*, supposes the freehold to have all along continued in him [g]. Neither, by the common law, in case of an intrusion or deforcement, 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 [express] consent of the person entitled thereto, they are adjudged to be trespassers; and any [211

[d] Dyer. 285. 2 Roll. Abr 549.
[e] Cro. Eliz. 421.
[f] 2 Roll. Abr. 553.
[g] 11 Rep. 5.

(1) By the terms "property either absolute or temporary," the student might be led to suppose, that this action is only maintainable by one who is lawful owner, or lawfully in possession. But the action is founded on possession, not on title; in his original complaint, the plaintiff relies only on his possession, and discloses no title: nor will he be bound to prove any, unless the defendant destroys the presumption arising from his possession by shewing a title *primâ facie* good in himself. Even if it should appear clearly that the plaintiff's possession was wrongful, he will recover damages in case the defendant is also a wrongdoer, and has no title to rely on. *Graham* v. *Peat*, 1 East, 244. *Catteris* v. *Cowper*, 4 Taunt. 547.

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. (2) And by the statutes of 4 Geo. II. c.28. and 11 Geo. II. c.19. in case, after the determination of any term for life, lives, or years, any person shall wilfully hold over the same, the lessor or reversioner is entitled to recover by action of debt, either at the rate of double the annual value of the premises, in case he himself hath demanded and given notice in writing to the tenant to deliver the possession; or else double the usual rent, in case the notice of quitting proceeds from the tenant himself, having power to determine his lease, and he afterwards neglects to carry that notice into due execution. (3)

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 distrein the cattle thus *damage-feasant*, or doing damage, till the owner shall make him satisfaction: or else by leaving him to the common remedy *in foro contentioso*, by action. And the action that lies in either of these cases of trespass committed upon another's land, either by a man himself or his cattle, is the action of trespass *vi et armis*; whereby a man is called upon to answer, *quare vi et armis clausum ipsius A. apud B. fregit, et blada ipsius A. ad valentiam centum solidorum ibidem nuper crescentia cum quibusdam averiis depastus fuit, conculcavit, et consumpsit, &c.* [h], for the law always couples the idea of force with that of intrusion upon the property of another.
[212] And herein, if any unwarrantable act of the defendant or his

h *Registr.* 94.

(2) But if it afterwards should appear on proof in any action that the *cestuy que vie* was really alive, the party entitled may re-enter, and maintain an action for the mesne profits. § 3.
Book II. c.9. p.151.

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.

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]. (4)

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

[i] 2 Roll. Abr. 545. Lord Raym. 240. [k] Salk. 638, 639. Lord Raym 823. 7 Mod. 152.

(4) The form of declaring with a *continuando* is now out of use: the plaintiff, according to the present practice, states that defendant on such a day, and on divers other days (without specifying them) between that day, and the day of the commencement of the suit, committed several trespasses of a continuable nature, as the case may be. Under such a statement as this the plaintiff may prove any number of such trespasses committed within the limits of time specified, and thus the object of the *continuando* is answered. In general, the proof of trespasses need not correspond in point of time with the date assigned to them in the declaration, and therefore the plaintiff may give in evidence an act committed before the earliest day laid in the declaration; but if he avails himself of the continuing clause to prove more than one act, they must [illegible] have been committed within the limits of time assigned by the declaration. *Hume* v. *Oldacre*, 1 Starkie's N.P.R. 351 per Lord Ellenborough. Under the modern form of declaring, it would be still wrong to state that the defendant had committed an act which terminated in itself, (made an assault, for instance,) on divers day and times. *English* v. *Purser*, 6 East, 395.

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 distrein 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
213] upon another's ground after the harvest, without being guilty of trespass [m]: which humane provision seems borrowed from the Mosaical law [n]. (5) 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 [o]. But in cases where a man misdemeans himself, or makes an ill use of the authority with which the law entrusts him, he shall be accounted a trespasser *ab initio* [p]: as if one comes into a tavern and will not go out in a reasonable time, but tarries there all night contrary to the inclinations of the owner; this wrongful act shall affect and have relation back even to his first entry, and make the whole a trespass [q]. But a bare nonfeasance, as not paying for the wine he calls for, will not make him a trespasser: for this is only a breach of contract, for which the taverner shall have an action of debt or *assumpsit* against him [r]. So if a landlord distreined 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 [where the distress shall be made for any kind of rent justly due] shall make his first entry a trespass; but the party injured shall have a special action of tres-

Trials *per pais.* ch. 15. pag. 438.

[l] Cro. Jac. 321.

[m] Levit. c. 19. v. 9., & c. 23. v. 22. Deut. c. 24. v. 19. &c.

[o] Cro. Jac. 321.

[p] Finch. L. 47. Cro. Jac. 148.

[q] 2 Roll. Abr. 561.

[r] 8 Rep. 147.

[s] Finch. L. 47.

(5) The contrary has been decided by three judges against one, in the case of *Steel* v. *Houghton & Ux.*, and *Worlledge* v. *Manning*, 1 H. Bl. 51.

pass 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. (6) [214]

A MAN may also justify in an action of trespass, on account of the freehold and right of entry being in himself; (7) and this defence brings the title of the estate in question. This is, therefore one of the ways devised, since the disuse of real actions, to try the property of estates; though it is not so usual as that by ejectment, because that, being now a mixed action, not only gives damages for the ejection, but also possession of the land: whereas in trespass, which is merely a personal suit, the right can be only ascertained, but no possession delivered; nothing being recovered but damages for the wrong committed.

IN order to prevent trifling and vexatious actions of trespass, as well as other personal actions, it is (*inter alia*) enacted by statutes 43 Eliz. c. 6. and 22 & 23 Car. II. c. 9. § 136. that where

[t] 8 Rep. 146 [u] Cro Jac 321.

(6) The instances here given are cases of the abuse of an authority given by law, in which the law determines by the *subsequent* act *quo animo* the party did the first, which was ambiguous in itself, innocent or wrongful, according to the intent. But if the authority proceeds from an individual, he cannot for any subsequent abuse punish that which he himself has permitted to be done. "As if he to whom I have lent my horse to ride to York, should ride beyond York, I shall have my action on the case for the excess, but not a general action of trespass." Brian J. Year Book, 12 E. 4. p. 8. pl. 20. 8 Rep. 147. Six Carpenters' case.

(7) Or in a third person, by whose command he entered.

the jury, who try an action of trespass, give less damages than forty shillings, the plaintiff shall be allowed no more costs than damages, unless the judge shall certify under his hand that the freehold or title of the land came chiefly in question. (8) 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 trespass was wilful and malicious, and it be so certified by the judge, the plaintiff shall recover full costs. Every trespass is *wilful*, where the defendant has notice, and is especially forewarned not to come on the land; as every trespass is *malicious*, though the damage may not amount to forty shillings, where the intent of
[215] the defendant plainly appears to be to harass and distress the plaintiff. (9) 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 convicted of a trespass in hawking, hunting, fishing, or fowling, upon another's land. Upon this statute it has been adjudged, that if a person be an inferior tradesman, as a clothier for instance, it matters not what qualification he may have in point of estate; but, if he be guilty of such trespass, he shall be liable to pay full costs[w].

[w] Lord Raym. 149.

(8) Or that fact should appear upon the pleadings, which is tantamount to the judge's certificate, *Asser* v *Finch*, 2 Lev. 234 : or there is a special plea of justification to the whole declaration found against the defendant, in which case it must appear upon the record, either that the freehold cannot come in question, and if so, the statute does not apply; or that it does, and then a certificate is unnecessrry. *Redridge* v. *Palmer*, 2 H. Bl. 2. *Comer* v. *Baker*, ibid. 341. *Peddell* v. *Kiddle*, 7 T. R. 659. See *Greene* v *Jones*, 1 Williams' Saunder's R. 300. n. f 5th edit. Respecting these statutes see post p. 401 n.

(9) It had been decided that if the trespass was committed after notice, the judge was by the statute bound to certify; but in *Good* v. *Watkins*, 3 East, 495., it was determined that he had a full discretion upon all the circumstances of each case.

CHAPTER THE THIRTEENTH.

OF NUSANCE.

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 nusances are of two kinds: *public* or *common* nusances, which affect the public, and are an annoyance to *all* the king's subjects: for which reason we must refer them to the class of public wrongs, or crimes and misdemesnors: and *private* nusances, 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 hereditaments of another [a]. We will, therefore, first, mark out the several kinds of nusances, and then their respective remedies.

I. In discussing the several kinds of nusances, we will consider, first, such nusances 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 nusance, for which an action will lie [b]. Likewise to erect a house or other building so near to mine, that it obstructs my antient lights and windows, is a nusance of a similar nature [c]. But [217] in this latter case it is necessary that the windows be *antient*, that is, have subsisted there a long time without interruption; otherwise there is no injury done. For he hath as much

[a] Finch. L. 188 [b] F. N. B. 184. [c] 9 Rep 58.

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]. 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, this is an injurious nusance, 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 exercised in remote places; for the rule is, "*sic utere tuo, ut alienum non laedas:*" this, therefore, is an actionable nusance [f]. So that the nusances 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* (1) 2. Stopping antient lights: and, 3. Corrupting the air with noisome smells: for light and air are two indispensable requisites to every dwelling. 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 nusance [g]. (2)

[d] Cro. Eliz. 118 Salk. 459
[e] 9 Rep 58.
[f] Cro. Car. 510.
[g] 9 Rep 58

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(1) In a case where the act of trespass was the nailing a board on the defendant's own wall, which overhung the plaintiff's garden, and this doctrine and maxim were urged in support of the form of action, Lord Ellenborough said, that "he did not think it was a trespass to interfere with the column of air superincumbent on the close," that if it was, it would follow that an aeronaut was liable to an action of trespass, qu. cl. fr. at the suit of the occupier of every field over which his balloon passed in the course of his voyage. If any damage arises from the object which overhangs the close, the remedy he said was by action on the case. *Pickering* v. *Rudd*, 4 Campb. 219.

(2) An uninterrupted possession of an easement for twenty years, with the acquiescence of him who is seised of an estate of inheritance in the tenements affected by the easement, is now held to be sufficient to ground an action on the case for the disturbance of it. It will be no answer to shew that the easement did not, nor could have subsisted previously, for the principle is, that such long uninterrupted possession is evidence of a grant

As to nusance 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 nusance [h]. And by consequence it follows, that if one does any other act, in itself lawful, which yet, being done in that place, necessarily tends to the damage of another's property, it is a nusance: for it is incumbent on him to find some other place to do that act, where it [218] 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 nusance [i].

With regard to *other* corporeal hereditaments: it is a nusance to stop or divert water that uses to run to another's meadow 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

[h] 1 Roll. Abr. 89
[i] Hale on F.N.B. 427.
[k] F N B. 184
[l] 9 Rep 59. 2 Roll Abr. 141.

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grant. The only way to meet it, therefore, is to shew that it has been limited in the use, or commenced fraudulently, or that the owner of the inheritance has never acquiesced The acquiescence of the tenant for life or years for any length of time will not of itself bind the remainder-man or reversioner when he comes into possession; for their power is only commensurate with their interest. And, therefore, in a late case it was determined that the owner of a house adjoining to glebe land could not maintain an action for the obstruction of windows more than twenty years old by a building on the glebe land; for if a licence for the enjoyment of the windows were presumed, it must have been granted by a tenant for life, (the then rector,) who had no power to bind his successor. *Barker* v *Richardson,* 4 B. & A. 579. It must be obvious that a right thus acquired must be limited in degree by the use made of it: a party by the use of a portion of a stream for twenty years does not thereby acquire a right to the use of the whole, or any quantity larger than that portion; or by the enjoyment of light and air through a small window to the same enjoyment through one of larger size. *Bealy* v. *Shaw,* 6 East, 208. *Martin* v. *Goble,* 1 Campb. 320. Still he is protected in the use of his *specific* limited right, so that in the case of the enlarged window, that part of it which was occupied by the antient smaller window cannot in strictness be obstructed, though upon the whole as much light and air may enter as before through what is left open. *Chandler* v. *Thompson,* 3 Campb. 80.

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 nusance: 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 nusance to the freehold which I have in my market or fair [n]. But in order to make this out to be a nusance, it is necessary, 1. That my market or fair be the elder, otherwise the nusance lies at my own door. 2. That the market be erected within the third part of twenty miles from mine. For Sir Matthew Hale [o] construes the *dieta*, or reasonable day's journey mentioned by Bracton [p], to be twenty miles; as indeed it is usually understood, not only in our own law [q], but also in the civil [r], from which we probably borrowed it. So that if the new market be not within seven miles of the old one, it is
[219] no nusance: for it is held reasonable that every man should have a market within one third of a day's journey from his own home; that, the day being divided into three parts, he may spend one part in going, another 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 nusance 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 nusance; 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 antient ferry as to draw away it's custom, it is a nusance to the owner of the old one. For where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness, for the ease of all the king's subjects; otherwise he may be grie-

[m] 2 Roll. Abr. 140.
[n] F. N. B. 184. 2 Roll. Abr. 140.
[o] Hale on F. N. B. 184.
[p] *l.* 4. *tr.* 1. *c.* 46.
[q] 2 Inst. 567.
[r] *Ff.* 2. 11. 1.

vously 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 nusance to erect a mill so near mine as to draw away the custom, unless the miller also intercepts the water. Neither is it a nusance to set up any trade, or a school, in neighbourhood or rivalship with another: for by such emulation the public are like to be gainers; and, if the new mill or school occasion a damage to the old one, it is *damnum absque injuria* [t].

II. Let us next attend to the remedies which the law has given for this injury of nusance. 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 nusance, 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 nusance, or punish it; but only the king in his public capacity of supreme governor, and *pater-familias* of the king- [220
dom [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 nusance; 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 nusance, 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]. (3) Also if a man hath abated, or removed, a nusance 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

[s] 2 Roll. Abr. 140.
[t] Hale on F. N. B. 184.
[u] Vaugh. 341, 342
[w] Co. Litt. 56. 5 Rep. 73

(3) The special damage must be the direct consequence of the nuisance. Carthew. 194.; and there must have been no want of ordinary care or skill in the plaintiff to prevent the mischief. *Butterfield* v. *Forrester*, 11 East, 60. *Flower* v. *Adam*, 2 Taunt. 314.

he is entitled to no action [x]. For he had choice of two remedies; either without suit, by abating it himself, by his own mere act and authority; or by suit, in which he may both recover damages, and remove it by the aid of the law: but, having made his election of one remedy, he is totally precluded from the other.

The remedies by suit are, 1. By action *on the case* for damages; in which the party injured shall only recover a satisfaction for the injury sustained; but cannot thereby remove the nusance. Indeed every continuance of a nusance 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 nusance*, and the writ of *quod permittat prosternere* which not only give the plaintiff satisfaction for his injury past, but also strike at the root and remove the cause itself, the nusance that occasioned the injury. These two actions, however, can only be brought by the tenant of the freehold; so that a lessee for years is confined to his action upon the case [z]. (4)

[221] 2. An *assise of nusance* is a writ: wherein it is stated that the party injured complains of some particular fact done, *ad nocumentum liberi tenementi sui*, and therefore commanding the sheriff to summon an assise, that is a jury, and view the premises,

[x] 9 Rep. 55.
[y] 2 Leon. pl. 129. Cro. Eliz 402.
[z] Finch. L. 289

(4) The action upon the case for a nuisance has the benefit of being almost universal in its application: the occupier of the land may bring it for the immediate injury to his possession, the reversioner for the injury to his inheritance: they may bring it against him who first occasioned the nuisance, or against him who continues it; and as the continuance is a fresh injury, it lets in of course the devisee or alienee of him who was first affected, to sue the continuer. As to the subject-matter, too, it is more general than an assize of nuisance, which will not lie, it is said, for a mere

Year Book, 11 H. 4. p. 83.

and have them [the jurors] 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 nusance abated; and, 2. To recover damages [b]. Formerly an assise of nusance only lay against the very wrongdoer himself who levied, or did the nusance; and did not lie against any person to whom he had alienated the tenements, whereon the nusance 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 domini regis, pro eo quod tenementum transfertur de* "*uno in alium*," and then gives the form of a new writ in this case: which only differs from the old one in this, that, where the assise is brought against the very person only who levied the nusance, it is said, "*quod A.* (the wrongdoer) *injuste* "*levavit tale nocumentum;*" but, where the lands are aliened to another person, the complaint is against both; "*quod A.* "(the wrongdoer) *et B.* (the alienee) *levaverunt* [c]." For every continuation, as was before said, is a fresh nusance; 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 nusance was set up, was driven to his *quod permittat prosternere;* which is in the nature of a writ of right, and therefore subject to greater delays [d]. This is a writ commanding the defendant to permit the plaintiff to abate, *quod permittat prosternere*, the nusance complained of; and, unless he so permits, to summon him to appear 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]. (5) And the plaintiff shall have judgment herein

[a] 9 Rep. 55.

[b] 2 Inst. 405.

[c] F. N. B. 124.

[d] 5 Rep. 100, 101.

(5) It lies against the alienee only after *request* made to him to the nusance, 5 Rep. 101. Penruddock's case.

to abate the nusance, and to recover damages against the defendant.

Both these actions, of *assise of nusance*, and of *quod permittat prosternere*, are now out of use, and have given way to the action on the case; in which, as was before observed, no judgment can be had to abate the nusance, 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 possession only, against another that hath like possession, the process is therefore easier: and the effect will be much the same, unless a man has a very obstinate as well as an ill-natured neighbour: who had rather continue to pay damages than remove his nusance. 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.

CHAPTER THE FOURTEENTH.

OF WASTE.

THE fourth species of injury, that may be offered to one's real property, is by *waste*, or destruction in lands and tenements. What shall be called waste was considered at large in a former volume [a], as it was a means of forfeiture, and thereby of transferring the property of real estates. I shall, therefore, here only beg leave to remind the student, that waste is a spoil and destruction of the estate, either in houses, woods, or lands; by demolishing not the temporary profits only, but the very substance of the thing; thereby rendering it wild and desolate; which the common law expresses very significantly by the word *vastum:* and that this *vastum*, or waste, is either voluntary, or permissive; the one by an actual and designed demolition of the lands, woods, and houses; the other arising from mere negligence, and want of sufficient care in reparations, fences, and the like. So that my only business is at present to 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, without any incumbrance or charge on the premises, 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 viventis;* no man is certain of succeeding him, as well on account of the uncertainty which shall die first, as also because he has it in his own power to constitute what heir he pleases, according

[a] See vol II. ch 18.

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 aliene or devise his estate to whomever he thinks proper, and by such alienation or devise may disinherit his heir at law. Into whose hands soever, therefore, the estate wasted comes, after a tenant in fee-simple, though the waste is undoubtedly *damnum*, it is *damnum absque injuria*.

One species of interest, which is injured by waste, is that of a person who has a right of common in the place wasted; especially if it be common of *estovers*, or a right of cutting and carrying away wood for house-bote, plough-bote, &c. Here, if the owner of the wood demolishes the whole wood, and thereby destroys all possibility of taking estovers, this is an injury to the commoner, amounting to no less than a disseisin of his common of estovers, if he chooses so to consider it; for which he has his remedy to recover possession and damages by 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
[225] or years, who was first made liable by the statutes of Marlbridge [d] and of Glocester [e]) if the particular tenant, I say, commits or suffers any waste, it is a manifest injury to him that has the inheritance, as it tends to mangle and dismember it of it's most desirable incidents and ornaments, among which timber and houses may justly be reckoned the principal. To him therefore in remainder or reversion, to whom the *inheritance* appertains in expectancy [f], the law hath given an

[b] F.N.B. 59. 9 Rep. 112.
[c] 2 Inst. 299.
[d] 52 Hen. III. c. 23.
[e] 6 Edw. I. c 5.
[f] Co. Litt. 53.

adequate remedy. (1) For, he, who hath the remainder *for life* only, is not entitled to sue for waste; since his interest may never perhaps come into possession, and then he hath suffered no injury. Yet, a parson, vicar, 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 *estrepement*, the latter by that of *waste*.

1. Estrepement is an old French word, signifying the same as waste or extirpation: and the writ of *estrepement* lay at the common law, *after* judgment obtained in any action real [h], and before possession was delivered by the 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 *estrepement*

[g] Co. Litt. 341. [h] 2 *Inst.* 328.

(1) The action of waste is maintainable only by him who has the inheritance immediately expectant on the estate of him who commits the waste; see post, p 227.: an interposed freehold estate, so long as it is in existence, will destroy the remedy. And even where the inheritance is immediately expectant, if any alteration or conveyance of it is made after the waste committed, and before the action brought, the remedy is gone, and this although the conveyance make no actual alteration in the reversioner's interest; as if he should grant the reversion to the use of himself and his heirs, (the effect of which is to give the reversioner in fee precisely the same estate which he had before,) still he could bring no action for waste committed before the conveyance Co. Litt. 53. b.

But cases such as this are not left remediless; in some the waste is punishable by an action on the case for damages; in others, in which no action can be maintained, a court of equity will interpose preventively by way of injunction; which it will also do in some instances, in which an action will lie, by way of more speedy and effectual relief. See Vol. II. p. 283. n.

pending the suit, well knowing the weakness of his title, therefore the statute of Glocester [i] gave another writ of *es-*
[226] *trepement pendente placito*, commanding the sheriff firmly to inhibit the tenant "*ne faciat vastum vel estrepamentum pen-*"*dente placito dicto indiscusso* [k]." And, by virtue of either of these writs the sheriff may resist them that do, or offer to do waste; and, if otherwise he cannot prevent them, he may lawfully imprison the wasters, or make a warrant to others to imprison them: or, if necessity require, he may take the *posse comitatus* to his assistance. So odious in the sight of the law is waste and destruction [l]. In suing out these two writs this difference was formerly observed; that in actions merely possessory, where no damages are recovered, a writ of *estrepement* might be had at any time *pendente lite*, nay, even at the time of suing out the original writ, or first process: but, in an action where damages were recovered, the demandant could only have a writ of *estrepement*, if he was apprehensive of waste after verdict had [m]; for, with regard to waste done before the verdict was given, it was presumed the jury would consider that in assessing the *quantum* of damages. But now it seems to be held, by an equitable construction of the statute of Glocester, and in advancement of the remedy, that a writ of *estrepement*, to prevent waste, may be had in every stage, as well of such actions wherein damages are recovered, as of those wherein only possession is had of the lands; for peradventure, saith the law, the tenant may not be of ability to satisfy the demandant his full damages [n]. And therefore now, in an action of waste itself, to recover the place wasted and also damages, a writ of *estrepement* will lie, as well before as after judgment. For the plaintiff cannot recover damages for more waste than is contained in his original complaint: neither is he at liberty to assign or give in evidence any waste made after the suing out of the writ: it is therefore reasonable that he should have this writ of *preventive* justice, since he is in his present suit debarred of any farther *remedial* [o]. If a writ of *estrepement*, forbidding waste, be directed and delivered to the tenant himself, as it may be, and he afterwards

[i] 6 Edw. I. c. 13.
[k] *Registr.* 77.
[l] 2 Inst. 329.
[m] F. N. B. 60, 61.
[n] *Ibid.* 61.
[o] 5 Rep. 115.

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 vastum contra prohibitionem:* and, if upon verdict it be found that he did, the plaintiff may recover costs and damages [p], or the party may proceed to punish the defendant for the contempt: for if, after the writ directed and delivered to the tenant or his servants, they proceed to commit waste, the court will imprison them for this contempt of the writ [q]. But not so, if it be directed to the sheriff, for then it is incumbent upon him to prevent the *estrepement* absolutely, even by raising the *posse comitatus*, if it can be done no other way. (2)

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* 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 remainder, against the tenant for life, tenant in dower, tenant by the curtesy, or tenant for years. This action is also maintainable in pursuance of statute [s] Westm. 2. by one tenant in common of the inheritance (3) against another, who makes waste in the estate holden

[p] Moor. 100.
[q] Hob. 85.
[r] 6 Ed. I. c. 5.
[s] 13 Ed. I. c 22.

(2) Besides as the writ is not directed immediately to the parties, their disobedience is not an immediate contempt.

The author has omitted to mention another general method of preventive redress at common law, which was by the writ of prohibition. This lay in cases where there was no contention between the parties as to the title or possession, but where the heir was fearful that the tenant in dower, by curtesy, or the guardian, might commit waste, he then sued out this writ directed to the sheriff, who proceeded under it exactly as has been described with regard to the writ of *estrepement*. 2 Inst. 299.

(3) He need not be tenant of the inheritance, it is enough for him to have the freehold; but the statute does not extend to waste committed in

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
[228] 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]. (4)

This action of waste is a mixed action; partly real, so far as it recovers land; and partly personal, so far as it recovers damages. For it is brought for both those purposes; and, if the waste be proved, the plaintiff shall recover the thing or place wasted, and also treble damages, by the statute of 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].

[t] 2 Inst. 403, 404.
[u] Finch. L. 29.
[w] F. N. B. 55.
[x] Poph. 24.

les, houses, or other places for the habitation of man, because at the common law that was remediable by the writ *de reparatione faciendâ*. 2 Inst. 405. F. N. B. 127.

(4) See *Harrow School* v. *Alderton*. 2 B. & P. 86., in which an action of waste was brought for ploughing up three meadows, and converting them into garden ground; such a change of the cultivation of land being a species of waste. (See Vol. II. p. 282.) The jury gave the plaintiffs a farthing as damages for each meadow, and the court allowed the judgment to be entered up for the defendant.

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]. (5) But it is no defence to say, that a stranger did the waste, for against him the plaintiff hath no remedy: though the defendant is entitled to sue such stranger in an action of trespass *vi et armis*, and shall recover the damages he has suffered in consequence of such unlawful act [a].

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

[y] Cro. Eliz. 18. 290.
[z] Co. Litt. 53.
[a] Law of *nisi prius*, 120.

(5) The case of accidental fire was provided for by the 6 Ann c. 31.; that statute is now repealed by the 14 Geo 3. c. 78, which by § 86. enacts that no action shall be prosecuted against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall accidentally begin. It provides, however, that no contract or agreement made between landlord and tenant shall be thereby defeated. Since the passing of this act it has been determined that it affords no protection to a tenant who has covenanted generally to repair; if the premises are burned down by accident, he must still rebuild them under his covenant; *Bullock* v. *Dommitt*, 6 T.R. 650.; and whether he has so covenanted or not, he must continue to pay the rent during the whole term *Belfour* v. *Weston*, 1 T. R. *Baker* v. *Holbzaffel*, 4 Taunt. 45. 18 Ves. 115 S.C.

plaintiff shall recover the place wasted (6); 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; 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. (7)

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(6) The whole place if the waste be general, or the thing indivisible; but if the waste be committed only in one part, that may be conveniently divided from the rest, that part only shall be recovered. Co Litt. 54. a. 2 Inst 304.

(7) There are some cases of particular tenancies, in which upon different grounds waste is dispunishable; thus, as waste in tenant for life or years is only punishable by statutes which do not mention the king expressly, the king holding a lease for life or years is not liable to any suit for waste done. Again, the death of a person actually committing the waste will in general put an end to the remedy, on the ordinary principle of personal actions for wrongs not surviving the person. Again, the liability of the party to another less severe account will in some cases exempt him from answering for waste immediately and specifically, as in the instance of the guardian in socage, who at the expiration of his trust was bound to render an account to the ward Lastly, the nature of the waste is material, for if it be only permissive, it seems that no action on the case for it can be maintained against the tenant for years, or at will. 5 Co. 13. *Gibson* v. *Wells*, 1 N.R. 290. *Herne* v. *Benbow*, 4 Taunt. 764. *Jones* v. *Hill*, 7 Taunt.

CHAPTER THE FIFTEENTH.

OF SUBTRACTION.

SUBTRACTION, which is the fifth species of injuries affecting a man's real property, happens when any person who owes any suit, duty, custom, or service to another, withdraws or neglects to perform it. It differs from a disseisin, in that *this* is committed without any denial of the right, consisting merely 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 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 tenuræ*, being the conditions upon which the antient 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 misdemesnors 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 *reditus*, return, or rent. And the subtraction or non-observance of any of [23]

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 distreined 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; 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 it's 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
[232] 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

[a] pag. 6. 148.
[b] Finch. L. 285.
[c] 1 Roll. Abr. 595.

brought at any time to recover such freehold rents. 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 rent, being in the nature of writs of right, and therefore more dilatory in their progress, are entirely disused, though not formally abolished by law. Of this species however, is, 3. The writ *de consuetudinibus et servitiis*, which lies for the lord against his tenant, who withholds from him the rents and services due by custom, or tenure, for his land [e]. This compels a specific payment or performance of the rent or service; and there are also others, whereby the lord shall recover the land itself in lieu of the duty withheld. As, 4. The writ of *cessavit*, which lies by the statutes of Glocester, 6 Edward I. c. 4. and of Westm. 2. 13 Edw. I. c. 21. and 41. when a man who holds lands of a lord by rent or other services, neglects or *ceases* to perform his services for two years together; or where a religious house hath lands given it, on condition of performing some certain spiritual service, as reading prayers or giving alms, and neglects it; in either of which cases, if the *cesser* or neglect have continued for two years, the lord or donor and his heirs shall have a writ of *cessavit* to recover the land itself, *eo quod tenens in faciendis servitiis per biennium jam cessavit* [f]. In like manner, by the civil law, if a tenant who held lands upon payment of rent or services, or "*jure emphyteutico*," neglected to pay or perform them *per totum triennium*, he might be ejected from such emphyteutic lands [g]. But by the statute of Glocester, the *cessavit* does not lie for lands let upon fee-farm rents, unless they have lain fresh and uncultivated for two years, and there be not sufficient [233
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 Glocester has provided farther, that upon tender of

[d] F.N.B.195.
[e] *Ibid.*151.
[f] *Ibid.*208.
[g] *Cod* 4.66.2
[h] F.N.B.209. 2 Inst.296.

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 antient 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. 2. c. 19. §16., which enacts that where any tenant at rack-rent [or at a rent full three-fourths of the yearly value] shall be one year's rent in arrear, and shall desert the demised premises, leaving the same uncultivated or unoccupied, so that no sufficient distress can be had: two justices of the peace (after notice affixed on the premises for fourteen days without effect) may give the landlord possession thereof, and thenceforth the lease shall be void. (1) 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 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 feodal principles, so it is expressly to be met with in the feodal constitutions [m]: "*vasallus, qui abnegavit feudum ejusve conditionem, exspoli-*

[i] 2 Inst. 401. 460.
[k] See pag. 206.
[l] Finch. L. 270, 271.
[m] *Feud. l* 2. *t.* 26.

(1) By the 57 Geo. 3. c. 52., the provisions of this section are extended to cases where only half a year's rent is in arrear, and where the premises are held under any demise or agreement, either written or verbal, and with or without reservation of a right of re-entry in case of non-payment of rent

And, as on the one hand the antient 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 antient writ founded on that chapter [o] of *magna carta*, which prohibits distresses for greater services than are really due to the lord; (2) being itself of the prohibitory kind, and yet in the nature of a writ of right [p]. It lies, where the tenant in fee-simple and his ancestors have held of the lord by certain services; and the lord hath obtained seisin of more or greater services, by the inadvertent payment or performance of them by the tenant himself. Here the tenant cannot in an avowry avoid the lord's possessory right, because of the seisin given by his own 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 [q]. (3) 2. The writ of *mesne, de medio*; which is also in the nature of a writ of right [r], and lies, when upon a subinfeudation the *mesne*, or middle lord [s], suffers his under-tenant, or tenant *paravail*, to be distreined 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 mesnalty, and the tenant shall hold immediately of the lord paramount himself [u]. (4)

[n] F.N.B 10
[o] *c.* 10.
[p] Booth. 126.
[q] F.N.B. 11. 2 Inst. 21.
[r] Booth 136.
[s] See book II. ch. 5. pag. 59, 60.
[t] F N B 135.
[u] 2 Inst. 374.

(2) Ld. Coke (2 Inst. p. 21.) expressly denies this, and cites the writ from Glanville, and says it is mentioned in the Mirror.

(3) But he will still be bound by his own payment during his own life in an avowry, he must therefore seek his remedy by an action on c 10. of Magna Carta above cited 2 Inst 21.

(4) "By the same services as the mesne holdeth by." 2 Inst. 374.

II. Thus far of the remedies for subtraction of rents or other services due by *tenure*. There are also other services due by antient *custom* and *prescription* only. Such is that of doing suit to another's mill (5): 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 antient 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 malthouse; 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. And thus much for the injury of subtraction.

[w] F. N. B. 123. [x] Co. Entr. 641.

(5) The *secta ad molendinum*, &c. may be due by tenure, as well as custom. *Drake* v. *Wiglesworth*, Willes. Rep. 656.; and where that is the case, the lord may distrein as in other cases of subtraction, Registr. 153.

CHAPTER THE SIXTEENTH.

OF DISTURBANCE.

THE sixth and last species of real injuries is that of *disturbance*; which is usually a wrong done to some incorporeal hereditament, by hindering or disquieting the owners in their regular and lawful enjoyment of it[a]. I shall consider five sorts of this injury; *viz.* 1. Disturbance of *franchises*. 2. Disturbance of *common*. 3. Disturbance of *ways*. 4. Disturbance of *tenure*. 5. Disturbance of *patronage*.

I. DISTURBANCE of *franchises* happens when a man has the franchise of holding a court-leet, of keeping a fair or market, of free-warren, of taking toll, of seizing waifs or estrays, or (in short) any other species of franchise whatsoever; and he is disturbed or incommoded in the lawful exercise thereof. As if another, by distress, menaces, or persuasions, prevails upon the suitors not to appear at my court; or obstructs the passage to my fair or market; or hunts in my free-warren; or refuses to pay me the accustomed toll; or hinders me from seizing the waif or estray, whereby it escapes or is carried out of my liberty; in every case of this kind, all which it is impossible here to recite or suggest, there is an injury done to the legal owner; his property is damnified; and the profits arising from such his franchise are diminished. To remedy which, as the law has given no other writ, he is therefore entitled to sue for damages by a special action *on the case*: or, in case of toll, may take a distress if he pleases[b]. [237]

II. THE disturbance of *common* comes next to be considered; where any act is done, by which the right of another to his common is incommoded or diminished. This may

[a] Finch. L. 187. [b] Cro. Eliz. 558.

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 distrein 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]. (1)

[c] 1 Roll. Abr. 396.
[d] Co. Litt. 122.
[e] Cro. Eliz 876. Cro. Jac. 195 Lutw 108.
[f] 9 Rep. 112
[g] *Ibid.*

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(1) The passage referred to in the Reports is this:—"If the trespass be so small that the commoner has not any loss, but sufficient in ample manner remains for him, no action lies for it" Mr. Serjeant Williams observes that this must be understood with some restriction. 'Undoubtedly if cattle escape into the common, and are driven out by the owner as soon as he has notice, though the lord may have an action of trespass for the injury to his soil, the commoner cannot bring an action upon the case, for this seems to fall directly within the rule. But if cattle are permitted to depasture the common, whether they are a stranger's, or the supernumerary cattle of a commoner, whether they are driven or escape there, a commoner may have an action upon the case, in which it does not seem necessary for him to prove any *specific injury* sustained. The consumption of the grass by the other cattle, is of itself a diminution of the right and profit of the commoner, and considered as a sufficient proof of the damage alleged in the declaration, for if the other cattle had not there, the commoner's cattle might have eaten every blade of grass was consumed by the other. Besides the law considers that the

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 by surcharging can, [238] 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. (2)

THE usual remedies, for surcharging the common, are either by distreining so many of the beasts as are above the number allowed, or else by an action of trespass, both which may be had by the lord: or lastly, by a special action on the case for damages; in which any commoner may be plaintiff [j]. But the antient 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,

[h] See book II ch 3.
[i] 1 Roll. Abr. 399.
[j] 1 Freem. 273.

right of the commoner is injured by such an act, and therefore allows him to bring an action for it to prevent the wrongdoer from gaining a right by repeated acts of encroachment. For wherever any act injures another's right, and would also be evidence in favour of the wrong-doer, claiming the right on any future occasion, an action may be maintained for such act without proof of any specific injury. *Mellor* v. *Spateman*, 1 Saund. Rep. 346 *a*. n. 2. citing *Wells* v. *Watling*, 2 Bl. Rep. 1233. *Hobson* v. *Todd*, 4 T.R. 71.

(2) This seems to be too generally expressed, for the lord's right may be narrowed down to any thing short of absolute exclusion for the whole year. He may, together with the commoners, be entirely excluded for a part of the year; his right may be narrowed to the feeding of a limited number for a part of the year, or the commoners may have the pasture entirely to his exclusion for a part of the year. *Potter* v. *North*, 1 Saund. Rep. 353.

the quantity of which common has never yet been ascertained. In either of these cases, as well the lord (3) 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
[239] men, who are upon their oaths to ascertain, under the superintendance 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 antient 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 erroneously, occasioned this unmeasured right of common to be called a common *without stint* or *sans nombre*[n]; a thing which, though possible in law[o], does in fact very rarely exist.

If, after the admeasurement has thus ascertained the right, the same defendant surcharges the common again, the plaintiff may have a writ of *second surcharge*, *de secunda superoneratione*, which is given by the statute Westm.2. 13 Edw.I.

[k] 2 Inst.369, Finch L.314

[l].125.

[m] t. *prescription*. 28.

[n] Hardr 117.

[o] Lord Raym.407.

(3) Finch, in the passage cited, expressly says that "the lord cannot have the writ of admeasurement against his tenants surcharging, for he may distrein the surplusage for damage-feasant." And Fitz. N. B. 125 D. is an authority to the same effect. Lord Hale, citing several cases from the year-books, is of a different opinion. But all three seem agreed that the commoner cannot have it against the lord.

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.

THERE is yet another disturbance of common, when the [240] owner 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]. This kind of disturbance does indeed amount to a disseisin, and if the commoner chuses 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

[p] F. N. B. 126. 2 Inst 870
[q] Cro. Eliz. 198.
[r] Cro. Jac 195
[s] F. N. B. 179.

his common as he ought [t]. But if the commoner does not chuse 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 approvement,) any waste grounds, woods, or pastures, in which his tenants have common *appendant* to their estates; provided he leaves sufficient common to his tenants, according to the proportion [241] of their land. (4) 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. (5) And lastly by statute c. 36. and 31 Geo. II. c. 41. it is particularly enacted,

[t] F. N. B. 123 [u] 2 Inst. 476.

(4) See Vol. II. p. 34.

(5) The cultivation and management of the common arable and pasture lands in the kingdom are provided for by 13 G. 3. c. 81.; and the 41 G. 3. c. 109. lays down certain general regulations for the inclosures of commons act of parliament which are incorporated into all special inclosure acts.

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.

III. The third species of disturbance, that of *ways*, is very similar in it's nature to the last: it principally happening when a person, who hath a right to a way over another's grounds, by grant or prescription, is obstructed by enclosures, or other obstacles, or by ploughing across it; by which means he cannot enjoy his right of way, or at least not in so commodious a manner as he might have done. If this be a way annexed to his estate, and the obstruction is made by the tenant of the land, this brings it to another species of injury; for it is then a *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 [242] 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 nocumentum liberi tenementi* [y], and the obstruction of it by a stranger can never tend to put the *right* of way in dispute: the remedy therefore for these disturbances is not by assise or any real action, but by the universal remedy of action on the case to recover damages [z].

IV. The fourth species of disturbance is that of disturbance of *tenure*, or breaking that connexion which subsists between the lord and his tenant, and to which the law pays so high a regard, that it will not suffer it to be wantonly dissolved by the act of a third person. To have an estate well tenanted is an advantage that every landlord must be very sensible of; and therefore the driving away of a tenant from off his estate is an injury of no small consequence. So that if there be a tenant at will of any lands or tenements, and a stranger, either by menaces and threats, or by unlawful distresses, or by fraud

[x] Ch. 13. p 218
[y] F N. B. 183.
[z] Hale on F. N. B. 185

and circumvention, or other means, contrives to drive him away, or inveigles him to leave his tenancy, this the law very justly construes to be a wrong and injury to the lord [a], and gives him a reparation in damages against the offender by a special action on the case.

V. The fifth and last species of disturbance, but by far the most considerable, is that of disturbance of *patronage;* which is an hindrance or obstruction of a patron to present his clerk to a benefice.

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
[243] 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. (6) And the patron also lost the inheritance of his advowson, unless he recovered it in a writ of right, because by such usurpation he was put out of possession of his advowson, as much as when by actual entry and ouster he is disseised of lands or houses; since the only pos-

[a] Hal. Anal. c. 40. 1 Roll. Abr. 108.
[b] Co. Litt. 277.
[c] 6 Rep. 49.

(6) Upon this principle there was no saving of the right by reason of the infancy, coverture, or other disability of the true patron at the time of the usurpation made. The common law presumed that the bishops would be tender of the rights of patronage, and inform themselves by a *jus patronatûs*, (for which see post, p 246.) in whom the right resided. It must be observed, as some explanation of this seeming harshness of the common law, that it never regarded the right of patronage as a thing of *value* to

session, of which an advowson is capable, is by actual presentation and admission of one's clerk. As, therefore, when the clerk was once instituted (except in the case of the king, where he must also be inducted [d]) the church became absolutely *full*; so the usurper by such plenarty, arising from his own presentation, became in fact *seised* of the advowson: which seisin it was impossible for the true patron to remove by any possessory action, or other means, during the plenarty or 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 by 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 fulness of the church, conveys no manner of possession for the present, [244] 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 antient 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 usurp-

[d] 6 Rep. 49.
[e] F.N.B. 30.
[f] F.N.B. 36.
[g] 2 Inst. 357

ation shall displace the estate or interest of the patron, or turn it to a mere right; but that the true patron may present upon the next avoidance, as if no such usurpation had happened. So that the title of usurpation is now much narrowed, and the law stands upon this reasonable foundation: that if a stranger usurps my presentation, and I do not pursue my right within six months, I shall lose that turn without remedy, for the peace of the church, and as a punishment for my own negligence; but that turn is the only one I shall lose thereby. Usurpation now gains no right to the usurper, with regard to any future avoidance, but only to the present vacancy: it cannot indeed be remedied after six months are past; but, during those six months, it is only a species of disturbance.

DISTURBERS of a right of advowson may therefore be these three persons; the pseudo-patron, his clerk, and the ordinary; the pretended patron, by presenting to a church to which he has no right, and thereby making it litigious or disputable; the clerk, by demanding or obtaining institution,

[245] which tends to and promotes the same inconvenience; and the ordinary, by refusing to admit the real patron's clerk, or admitting the clerk of the 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 [h] directed to the

[h] F.N.B 31

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 impedit*, 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 a 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].

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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

[i] 2 Inst. 355. F. N. B. 32.
[k] See Boswell's case, 6 Rep. 48
[l] See book II. ch. 18.
[m] See book I. ch. 11.

prevent his institution of his antagonist's clerk. An institution after a *caveat* entered is void by the ecclesiastical law [n]; but this the temporal courts pay no regard to, and look upon a *caveat* as a mere nullity [o]. But if two presentations be offered to the bishop upon the same avoidance, the church is then said to become *litigious*; and, if nothing farther be done, the bishop may suspend the admission of either, and suffer a lapse to incur. Yet if the patron or clerk on either side request him to award a *jus patronatûs*, he is bound to do it. A *jus patronatûs* is a commission from the bishop, directed usually to his chancellor and others of competent learning; who are to summon a jury of six clergymen and six laymen, to inquire into and
[247] 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

[n] 1 Burn 23
[o] 1 Roll. Rep. 191.
[p] 1 Burn. 25.
[q] *Ibid.*

only. But it is most advisable to bring it against all three: for if the bishop be left out, and the suit be not determined till the six months are past, the bishop is entitled to present by lapse; for he is not party to the suit [r]: but, if he be named, no lapse can possibly accrue, till the right is determined. If the patron be left out, and the writ be brought only against the bishop and the clerk, the suit is of no effect, and the writ shall abate [s]; for the right of the patron is the principal question in the cause [t]. If the clerk be left out, and has received institu- [248] tion 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.

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 *jus patronatûs*, 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

[r] Cro. Jac 93.
[s] Hob. 316.
[t] 7 Rep. 25
[u] F. N B. 32.
[w] *Ibid* 37.
[x] 1 Sid. 93.

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
[249] upon him. The patron is therefore left to his *quare impedit* merely: which, as was before observed, now lies (since the statute of West. 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 plenarty upon an usurpation, whether six calendar [b] months have passed between the avoidance and the time of bringing the action: for then it would not be within the statute, which permits an usurpation to be divested by a *quare impedit*, brought *infra tempus semestre*. So that plenarty is still a sufficient bar in an action of *quare impedit*, brought above six months after the vacancy happens; as it was universally by the common law, however early the action was commenced.

If it be found that the plaintiff hath the right, and hath commenced his action in due time, then he shall have judgment to

[y] F.N.B. 48
[z] Vaugh. 7, 8.
[a] Hob. 199.
[b] 2 Inst 361.

recover the presentation; and, if the church be full by institution of any clerk, to remove him: unless it were filled *pendente lite* by lapse to the ordinary, he not being party to the suit; in which case the plaintiff loses his presentation *pro hac vice*, but shall recover two years' full value of the church from the defendant the pretended patron, as a satisfaction for the turn lost by his disturbance; or, in case of insolvency, the defendant shall be imprisoned for two years [c]. But if the church remains still void at the end of the suit, then whichever party the presentation is found to belong to, whether plaintiff or defendant, shall have a writ directed to the bishop *ad admittendum clericum* [d], reciting the judgment of the court, and ordering him to admit and institute the clerk of the prevailing party; and, if upon this order he does not admit him, the patron may sue the bishop in a writ of *quare non admisit* [e], and recover ample satisfaction in damages.

BESIDES these possessory actions, there may be also had (as hath before been 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, *quare impedit*, or assize of *darrein presentment* or *jus patronatûs*. 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 churches, that had been incumbent there above fifty years; nor are instances wanting wherein two successive incumbents have continued for upwards of a [251]

[c] Stat Westm. 2. 13 Ed. I. c. 5. § 3
[d] F. N. B. 38
[e] F. N. B. 47.
[f] 1 Inst. 115

hundred years [g]. Had therefore the last of these incumbents been the clerk of a usurper, or 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.

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 was 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. § 4. a new method of proceeding is provided; *viz.* that, besides the writs of *quare impedit*, which
252] 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 to such livings, and disturbing their right of patronage, or his *cestuy que trust*, or any other person whom they

[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.

[h] Stat 3 Jac. I. c. 5 1 W. & M. c. 26. 12 Ann. st. 2. c. 14. 11 Geo. II. c. 17.

have cause to suspect [to be able to make discovery]; 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 easily sought for by any serious clergyman; and therefore will not permit him to contend openly at law for a charge and trust, which it presumes he undertakes with diffidence.

But when the clerk is in full possession of the benefice, the law gives him the same possessory remedies to recover his glebe, his rents, his tithes, and other ecclesiastical dues, by writ of entry, 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 stiled the parson's writ of right [k], being the highest writ which he can have [l]. This lies for a parson [253]
or a 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

[i] F.N B. 49 [k] Booth. 221 [l] F.N B. 48

to the church of the demandant, or else the lay fee of the tenant[m]. And thereby the demandant may recover lands and tenements, belonging to the church, which were alienated by the predecessor; or of which he was disseised; or which were recovered against him by verdict, confession, or default, without praying in aid of the patron and ordinary; or on which any person has intruded since the predecessor's death[n]. But since the restraining statute of 13 Eliz. c. 10. whereby the alienation of the predecessor, or a recovery suffered by him of the lands of the church, is declared to be absolutely void, this remedy is of very little use, unless where the parson himself has been deforced for more than twenty years[o]; for the successor, at any competent time after his accession to the benefice, may enter, or bring an ejectment.

[m] Registr. 32. [n] F. N. B. 48, 49. [o] Booth 221.

CHAPTER THE SEVENTEENTH.

OF INJURIES PROCEEDING FROM, OR AFFECTING THE CROWN.

HAVING in the nine preceding chapters considered the injuries, or private wrongs, that may be offered by one subject to another, all of which are redressed by the command and authority of the king, signified by his original writs returnable in the several courts of justice, which thence derive a jurisdiction of examining and determining the complaint: I proceed now to inquire into the mode of redressing those injuries to which the crown itself is a party: which injuries are either where the crown is the aggressor, and which therefore cannot without a solecism admit of the same kind of remedy[a]; or else is the sufferer, and which then are usually remedied by peculiar forms of process, appropriated to the royal prerogative. In treating therefore of these, we will consider, first, the manner of redressing those wrongs or injuries which a subject may suffer from the crown, and then of redressing those which the crown may receive from a subject.

I. THAT the king can do no wrong, is a necessary and fundamental principle of the English constitution: meaning only, as has formerly been observed[b], that in the first place, whatever may be amiss in the conduct of public affairs is not chargeable personally on the king; nor is he, but his ministers, accountable for it to the people: and, secondly, that the prerogative of the crown extends not to do any injury; for being created for the benefit of the people, it cannot be exerted to their prejudice[c]. Whenever therefore it happens, that, by misinformation, or inadvertence, the crown hath been induced to invade the private rights of any of its subjects, [255

[a] Bro. *Abr. t. petition.* 12. *prerogative.* 2.
[b] Book I. ch. 7. pag. 243—246.
[c] Plowd. 487.

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 the subjects is such, that it rarely can happen that any *personal* injury can immediately and directly proceed from the prince to any private man; and, as it can so seldom happen, the law in decency supposes that it never will or can happen at all; because it feels itself incapable of furnishing any adequate remedy, without infringing the dignity and destroying the sovereignty of the royal person, by setting up some superior power with authority to call him to account. The inconveniency therefore of a mischief that is barely possible, is (as Mr. Locke has observed[f]) well recompensed by the peace of the public and security of the government, in the person of the chief magistrate being set out of the reach of coercion. But injuries to the rights of *property* can scarcely be committed by the crown without the intervention of its officers; for whom the law in matters of right entertains no respect or delicacy, but furnishes various methods of detecting the errors or misconduct of those agents by whom the king has been deceived, and induced to do a temporary injustice.

[256] THE common law methods of obtaining possession or restitution from the crown, of either real or personal property, are, 1. By *petition de droit*, or petition of right: which is said to owe its original to king Edward the first[g]. 2. By *monstrans de droit*, manifestation or plea of right: both of which may be preferred or prosecuted either in the chancery or exchequer[h]. The former is of use, where the king is in full possession of any hereditaments or chattels, and the petitioner

[d] Jenkins. 78.
[e] Finch. L. 83.
[f] 2 § 205.
[g] Bro. *Abr. t. prerog.* 2 Fitz. *Abr t. error* 8.
[h] Skin. 609

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 otherwise the petition shall abate[l]: and then, upon 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 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 common law[m]. But as this seldom happens, and the remedy by *petition* was extremely tedious and expensive, that [257
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 petenti, salvo jure domini regis*[o]; which last

L. 256.

[j] Stat. Tr. vis. 134.

[k] Skin. 608. Rast. Entr. 461.

[l] Bro. *Abr. t. petition.* 20. 4 Rep. 58.

[m] 4 Rep. 55.

[n] Skin 608.

[o] 2 Inst. 695. Rast. Entr. 463.

clause is always added to judgments against the king [p], to whom no *laches* is ever imputed, and whose right (till some late statutes [q]) was never defeated by any limitation or length of time. And by such judgment the crown is instantly out of possession [r]; so that there needs not the indecent interposition of his own officers to transfer the seisin from the king to the party aggrieved.

II. The methods of redressing such injuries as the crown may receive from the subject are,

1. By such usual common law actions, as are consistent with the royal prerogative and dignity. As therefore the king, by reason of his legal ubiquity, cannot be disseised or dispossessed of any real property which is once vested in him, he can maintain no action which supposes a dispossession of the plaintiff; such as an assise or an ejectment [s] (1): 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 usual (though in strictness maintainable) for breaking his close, or other injury done upon his soil or possession [w]. It would be
[258] equally tedious and difficult, to run through every minute distinction that might be gleaned from our antient 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.

[p] Finch. L. 460.
[q] 21 Jac. I. c. 2. 9 Geo. III. c. 16.
[r] Finch. L. 459.
[s] Br[illegible]r. *t. prerogative.* 89.
[t] F. N. B. 32.
[u] *Dyversyte des courtes.* c. *bank le roy*
[w] Bro. *Abr. t. prerog* 130. F. N B. 90. Year-book 4 Hen. IV 4

(1) There seems to be no objection in principle to the king's being the lessor of the plaintiff in a modern action of ejectment, in which not he, but the nominal plaintiff, is supposed to be dispossessed. See Adams on Eject p. 79

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. 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 [259
remain in force, and are taken upon proper occasions; being extended not only to lands, but also to goods and chattels personal, as in the case of wreck, treasure-trove, and the like; and especially as to forfeitures for offences. For every jury which tries a man for treason or felony, every coroner's inquest that sits upon a *felo de se*, or one killed by chance-medley, is, not only with regard to chattels, but also as to

[x] Finch L. 323, 4, 5

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 mean 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 seise any man's possessions upon bare surmises without the intervention of a jury [z]. It is, however, particularly enacted by the statute 33 Hen. VIII. c.20. that, in case of attainder for high treason, the king shall have the forfeiture instantly, without any inquisition of office. And, as the king hath (in general) no title at all to any property of this sort before office found, therefore by the statute 18 Hen. VI. c.6. it was enacted, that all letters patent or grants of lands and tenements before office found, or returned into the exchequer, shall be void. And, by the bill of rights at the revolution, 1 W.&M. st.2. c.2. it is declared, that all grants and promises of fines and forfeitures of particular persons before conviction (which is here the inquest of office) are illegal and void; which indeed was the law of the land in the reign of Edward the third [a]. (2)

[y] Finch. L. 82.
[z] Gilb. Hist. Exch. 133. Hob. 347.
[a] 2 Inst. 48.

(2) Lord Coke considers this to have been the law of the land from the time of Magna Charta, and expressed in the celebrated clause, c. 29., Nullus liber homo capiatur, &c. aut *aliquo modo destruatur*. "As if (says he) a man be accused or indicted of treason or felony, his lands or goods cannot be granted to any, no not so much as by promise, nor any of his lands or goods seised into the king's hands, before attainder. For when a subject obtaineth promise of the forfeiture, many times undue means and more violent prosecution is used for private lucre tending to destruction, than the quiet and just proceeding of law would permit, and the party ought to live of his own until attainder." 2 Inst. 48.

With regard to real property, if an office be found for the king, it puts him in immediate possession, without the trouble of a formal entry, provided a subject in the like case would have had a right to enter; and the king shall receive all the mesne or intermediate profits from the time that his title accrued [b]. As on the other hand, by the *articuli super cartas* [c], if the king's escheator or sheriff seise 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 discloses new facts not found by the office, and his *monstrans de droit*, which relies on the facts as found: but also he may (for the most part) *traverse* or deny the matter of fact itself, and put it in a course of trial by the common law process of the court of chancery: yet still, in some special cases, he hath no remedy left but a mere petition of right [d]. These *traverses* as well as the *monstrans de droit*, were greatly enlarged and regulated for the benefit of the subject, by the statutes before-mentioned, and others [e]. And in the traverses thus given by statute, which came in the place of the old petition of right, the party traversing is considered as the plaintiff [f]; and must therefore make out his own title, as well as impeach that of the crown, and then shall have judgment *quod manus domini regis amoveantur, &c.*

3. Where the crown hath unadvisedly granted any thing by letters patent, which ought not to be granted [g], or where the patentee hath done an act 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 re- [261

[b] Finch. L. 325, 326.
[c] 28 Edw. I. st. 3. c. 19. Finch. L. 324.
[e] Stat 34 Edw. III. c. 13 36 Edw. III. c 13. 2 & 3 Edw. VI. c. 8.
[f] Law of *Nisi Prius*, 214,
[g] See book II. ch. 21.
[h] Dyer 198
[i] 3 Lev. 220. 4 Inst. 88.

pealing 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. An *information* on behalf of the crown, filed in the exchequer by the king's attorney-general, is a method of suit for recovering money or other chattels, or for obtaining satisfaction in damages for any personal wrong [m] committed in the lands or other possessions of the crown. It differs from an information filed in the court of king's bench, of which we shall treat in the next book; in that *this* is instituted to redress a private wrong, by which the property of the crown is affected; *that* is calculated to punish some public wrong, or heinous misdemesnor 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 under-"stand 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 establish-
[262] ment and support of the revenue: others, which regard mere matters of police and public convenience, being usually left to be inforced 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 antiently in the

[k] 2 Vent. 344.
[l] Bro. *Abr. t. scire facias.* 69. 185.
[m] Moor. 375.
[n] Cro. Jac. 212. 1 Leon. 48. Savil. 49.
[o] See pag. 162.
[p] Hard. 201.

case of treasure-trove, wrecks, waifs, and estrays, seised by the king's officer for his use. Upon such seisure 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. (3)

5. A WRIT of *quo warranto* is in the nature of a writ of right for the king, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right [r]. It lies also in case of non-user or long neglect of a franchise, or misuser or abuse of it; being a writ commanding the defendant to shew by what warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. (4) This was originally returnable before the king's

[q] Gilb. Hist of Exch 134. [r] Finch L 322 2 Inst. 282

(3) And the judgment in this case is *conclusive* evidence in any other court, and as against the whole world, that the goods were liable to forfeiture The seizure itself, the proclamations, and the appraisement, give the owner sufficient notice to come in and try his right, and from the very nature of the judgment, it must have the same force against all other persons: if the goods are liable to forfeiture as against one, they must be so as against all. See *Scott* v. *Shearman*, 2 Bl. Rep. 979.

(4) It is, perhaps, speaking too generally to say, that a writ of *quo warranto* lies for the usurpation of *any* office; as it was instituted only to protect the rights and prerogatives of the crown, it is limited to usurpations which trench on them; and, accordingly, the information, which has grown up in the place of it, can only be filed in such cases. In the cases of the *King* v. *Daubeny*, 2 Str. 1196 and of the *King* v *Shepperd & others*, 4 T. R. 581. the court refused leave to file informations in the nature of *quo warranto* for the alleged usurpation of the office of churchwarden on this ground

It seems questionable, too, whether a *quo warranto* will lie in case of mere non-user of a franchise. See Lord Bruce's case, 2 Str. 819.

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. [t]; 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 it's effect [u]; and writs of *quo warranto* (if brought at all) must now be prosecuted and determined before the king's justices at Westminster. And in case of judgment for the defendant, he shall have an allowance of his franchise; but in case of judgment for the king, for that the party is entitled to no such franchise, or hath disused or abused it, the franchise is either 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 [w].

The judgment on a writ of *quo warranto* (being in the nature of a writ of right) is final and conclusive even against the crown [x]. Which, together with the length of it's 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 seise 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
[264] 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, forfei-

[s] Old *Nat. Brev. fol.* 107. *edit.* 1534.
[t] 2 Inst. 498. Rast. Entr. 540.
[u] 2 Inst. 498.
[w] Cro. Jac. 259. 1 Show. 280.
[x] 1 Sid. 86. 2 Show. 47. 12 Mod. 225.

ture of their franchises 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-modelling 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.

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 stiled the *relator*,) against any person usurping, intruding into, or unlawfully holding any franchise or office in any city, borough, or town corporate; provides for it's 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. (5)

(5) As the statute of Anne is confined to corporate offices or franchises it is important for the student to bear in mind, that there are still many cases of informations at common law, which are distinguished by some peculiarities from those under the statute Neither can be filed, except by the attorney-general, without leave of the court; but the statute extends to the courts of the counties Palatine and Wales, as well as to the K. B., while those at the common law can only be filed in the K. B. Under the statute there must always be an individual relator on the record; and it is, in fact, a suit between party and party. The judgment may be of ouster as well as fine, if the defendant be convicted, together with costs to the relator, which last the defendant recovers whenever the judgment is for him. At common law there is no relator on the record; it is matter of doubt whether there can be judgment of ouster; — the last decision was in the negative, and upon principle

6. The writ of *mandamus*[y] is also made by the same statute 9Ann. 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
[265] removal, when a person is legally possessed. These are injuries, for which, though 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

[y] See pag 110.

principle it should seem that there could not. See the cases cited in Selwyn's Ni. Pri. 1130. And with respect to costs, as the real prosecutor by the 4&5 W.&M. c 18, except where the court expressly orders otherwise, enters into a recognizance in the penalty of 20*l.* the defendant may, under certain circumstances, recover costs to that amount from him, but not more; and the defendant, if judgment be against him, in no case pays any costs See *R.* v. *Wallis*, *5* T. R. *375.*

It has been stated that neither sort of information can be filed without leave of the court, in granting which some general rules have been laid down for the guidance of its discretion The first turns on the nature of the office; — as to which the court is regulated by the limits of the old common law writ, and the purview of the stat. of Anne. A second turns on the circumstances, and even motives, of the party applying; — if it appear, that being a brother-corporator, his own election is open to the same objection on which he relies to oust the defendant, or that he concurred in the election, where the defect is one which he actually or by presumption of law was cognizant of; or that, being a stranger, he is not subject to the local jurisdiction of the body corporate; in all such cases the court will refuse leave. See Selwyn's Ni. Pri. 1133. A third rule turned on the time during which the party had been in the undisturbed possession and exercise of his franchise or office; — as to which the court first limited itself to twenty, and then to six years. But the stat. 32 G. III. c. 58. has taken away this discretion in cases under the stat. of Anne, by enacting in effect that six years' undisturbed possession and exercise before the leave granted by the court for the information shall be a legal bar to it; and where the defect in the party's title arises from some defect in the title of the person electing him, that he shall not be prejudiced by such defect, if that person shall have been a similar length of time in undisturbed possession and exercise of his office before the filing of the information.

issue, or demur, and the same proceedings may be had, as if an action on the case had been brought, for making a false return: and, after judgment obtained for the prosecutor, he shall have a peremptory writ of *mandamus* to compel his admission or restitution; which latter (in case of an action) is effected by a writ of restitution [z]. So that now the writ of *mandamus*, in cases within this statute, is in the nature of an action: whereupon the party applying and succeeding may be entitled to costs, in case it be the franchise of a citizen, burgess, or freeman [a]; and also, in general, a writ of error may be had thereupon [b].

THIS writ of *mandamus* may also be issued, in pursuance of the statute 11 Geo. I. c. 4. in case within the regular time no election shall be made of the mayor or other chief officer of any city, borough, or town corporate, or (being made) it shall afterwards become void; requiring the electors to proceed to election, and proper courts to be held for admitting and swearing in the magistrates so respectively chosen. (6)

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

[z] 11 Rep. 99
[a] Stat. 12 Geo. III c 21
[b] 1 P Wms. 351.

(6) By the common law the court of K. B. had no power to issue a *mandamus* for the election of a mayor or other chief officer of a corporation, on any other day than that fixed by the charter, except where the vacancy was occasioned by the death of the existing officer; for such election would not have been a compliance with the charter, but a disobedience to it. An omission, therefore, to elect or complete an election on the proper day, however occasioned, (and it might be occasioned by fraud, inadvertence, or even accident,) or the removal of an officer unduly elected, might occasion a forfeiture of the charter and a dissolution of the corporation. The 11 Geo. I. c 4. was passed to remedy this inconvenience, and being a very remedial law is construed very liberally; and though three or four years may have elasped since a regular election, the court will grant the *mandamus* under it. See Selwyn's Ni. Pri. 1064

in the memory: a difficulty not a little increased by the very immethodical arrangement, in which they are delivered to us by our antient writers, and the numerous terms of art in which the language of our ancestors has obscured them. Terms of art there will unavoidably be in all sciences; the easy conception and thorough comprehension of which must depend upon 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 antient 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 have permitted the rights of real property to be drawn into question in mixed or personal

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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 enterprizing 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 it's wisdom or utility. But who that is acquainted with the difficulty of new-modelling any branch of our statute laws, (though relating but to roads or to parish settlements,) will conceive it ever feasible to alter any fundamental point of the common law, with all its appendages and consequents, and set up another rule in it's stead? When, therefore, by the gradual influence of foreign trade and domestic tranquillity, 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 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 [268]

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 enterprizing 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 circuities: 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 out again into common use; but also because, as a sensible writer [269] has well observed [c], "whoever considers how great a coherence "there is between the several parts of the law, and how much "the reason of one case opens and depends upon that of an-"other, 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 THE EIGHTEENTH.

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 the courts of equity.

In treating of remedies by action at common law, I shall confine myself to the *modern* method of practice in our courts of judicature. For, though I thought it necessary to throw out a few observations on the nature of real actions, however
[271] 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 these 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 antient forms, to extend their remedial influence to the necessities of modern times, have now obtained a concurrent jurisdiction and cognizance of very many civil suits: but, as causes are therein conducted by much the same advocates and attorneys, and the several courts and their judges have an entire communication with each other, the methods and forms of proceeding are in all material respects the same in all of them. So that, in giving an abstract or history [a] of the progress of a suit through the court of common pleas, we shall at the same [27

[a] In deducing this history the student must not expect authorities to be constantly cited as practical knowledge is not so much to be learned from any books of law, as from experience and attendance on the courts. The compiler must therefore be frequently obliged to rely upon his own observations, which in general he hath been studious to avoid where those of any other might be had. To accompany and illustrate these remarks, such gentlemen as are designed for the profession will find it necessary to peruse the books of *entries*, antient and modern; which are transcripts of proceedings that have been had in some particular actions. A book or two of technical learning will also be found very convenient, from which a man of liberal education and tolerable understanding may glean *pro re nata* as much as is sufficient for his purpose. These *books of practice*, as they are called, are all pretty much on a level, in point of composition and solid instruction; so that that which bears the latest edition is usually the best But *Gilbert's History and Practice of the Court of Common Pleas* is a book of a very different stamp and though (like the rest of his posthumous works) it has suffered most grossly by ignorant or careless transcribers, yet it has traced out the reason of many parts of our modern practice, from the feodal institutions and the primitive construction of our courts, in a most clear and ingenious manner.

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 it's incidents: 7. The proceedings in nature of appeals: 8. The execution.

FIRST, then, of the *original*, or original writ; 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*
[273] *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. It is a mandatory letter from the king in parchment, sealed with his great seal [b], and directed to the sheriff of the county wherein the injury is committed or supposed so to

[b] Finch. L. 237.

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 from the king. Now indeed even the royal writs are held to be demandable of common right, on paying the usual fees: for any delay in the granting them, or setting an unusual or exorbitant price upon them, would be a breach of *magna carta*, c. 29.; "*Nulli* "*vendemus, nulli negabimus, aut differemus, justitiam vel rectum.*"

ORIGINAL writs are either *optional* or *peremptory*; or, in [2
the language of our lawyers, they are either a *praecipe*, or a *si te fecerit securum* [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,

[c] Flet. l. 2. c. 34.
[d] Mirr. c. 2. § 3.
[e] Finch L. 257.
[f] Append. No. III. § 1.

or stand the suit. The other species of original writs is called a *si fecerit te securum*, from the words of the writ; which directs the sheriff to cause the defendant to appear in court, without any option given him, provided the plaintiff gives the sheriff security effectually to prosecute his claim [g]. This writ is in use, where nothing is specifically demanded, but only a satisfaction in general; to obtain which, and minister complete redress, the intervention of some judicature is necessary. Such are writs of trespass, or on the case, wherein no debt or other specific thing is sued for in certain, but only damages to be assessed by a jury. For this end the defendant is immeately called upon to appear in court, provided the plaintiff gives good security of prosecuting his claim. Both species of writs are *teste*'d, or witnessed in the king's own name; "witness ourself at Westminster," or wherever the chancery may be held.

The security here spoken of, to be given by the plaintiff for prosecuting his claim, is common to both writs, though it gives denomination only to the latter. The whole of it is at present become a mere matter of form: and John Doe and Richard Roe are always returned as the standing pledges for this purpose. The antient use of them was to answer for the
[275] plaintiff, who in case he brought an action without cause, or failed in the prosecution of it when brought, was liable to an amercement from the crown for raising a false accusation; and so the form of the judgment still is [h]. In like manner, as by the Gothic constitutions no person was permitted to lay a complaint against another, "*nisi sub scriptura aut specificatione trium* "*testium, quod actionem vellet persequi* [i]," and, as by the laws of Sancho I. king of Portugal, damages were given against a plaintiff who prosecuted a groundless action [k].

The day on which the defendant is ordered to appear in court, and on which the sheriff is to bring in the writ, and report how far he has obeyed it, is called the *return* of the writ; it being then returned by him to the king's justices at Westminster. And it is always made returnable at the distance of

[g] Append. No. II. § 1
[h] Finch. L. 189. 252
[i] Stiern *de jure Gothor. l.* iii. *c.* 7.
[k] Mod. Un. Hist. xxii. 45.

at least fifteen days from the date or *teste*, (1) 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[1] 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. 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 [276 church interposed and exempted certain holy seasons from being profaned by the tumult of forensic litigations. As, particularly, the time of advent and christmas, which gave rise to the winter vacation; the time of lent and easter, which created that in the spring; the time of pentecost, which produced the third; and the long vacation, between midsummer and 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 constitu-

[1] *Jan. Angl. l.* 2 § 9.

(1) As Easter term ends on the Monday before Whitsunday, and Trinity term begins on the Monday next following Trinity Sunday, which is the first return-day of that term, the 24 G 2. c 48. provides, that writs issued on the first, and returnable on the last of these days, shall be good and effectual, though fifteen days do not intervene between the *teste* and return. Although original writs must always be returnable in term time, because the courts into which they are returned are then only sitting, yet they may be sued out and tested at any time, because the chancery, from which they issue, is always open.

tion of the younger Theodosius, comprised in the Theodosian code [m]. (2)

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 Britton 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, 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

[m] Spelman of the terms.
[n] c. 3. *de temporibus et diebus pacis*
[o] c. 3. § 8.
[p] c. 53
[q] See pag 59.

(2) There are not only, it seems, *dies juridici*, but *horæ juridicæ* also, according to Lord Coke, (2 Inst 265.) who cites a passage from Fortescue, which presents a curious contrast to the usages of the present times: — "Furthermore I would ye should know, (addressing prince Edward, son of Hen. VI.) that the justices of England sit not in the king's courts above three hours in a day, that is to say, from eight of the clock in the forenoone till eleven compleat; for in the afternoones those courts are not holden or kept But the suters then resort * to the perusing of their writings, and elsewhere consulting with the serjeants at law, and other their councellours. Wherefore the justices, after they have taken their refection, do pass and bestow all the residue of the day in the study of the laws, in reading of Holy Scripture, and using other kind of contemplation at their pleasure, so that their life may seem more contemplative than active And thus do they lead a quiet life, discharged of all worldly cares and troubles." De Laud. c. 51.

* I have cited the translation given in Selden's edition, but it is clearly faulty in this passage, "*tunc se divertunt ad pervisum*," which Selden in a note explains to be "an afternoon's exercise or moot to the instruction of young students."

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. [277 which declares, that "by the assent of all the prelates, assises "of *novel disseisin*, *mort d'ancestor*, and *darrein presentment*, "shall be taken in advent, septuagesima, and lent; and that "at the special request of the king to the bishops." The portions of time, that were not included within these prohibited seasons, fell naturally into a fourfold division, and, from some festival day that immediately preceded their commencement, were denominated the terms of St. Hilary, of Easter, of the Holy Trinity, and of St. Michael: which terms have been since regulated and abbreviated by several acts of parliament; particularly Trinity term by statute 32 Hen.VIII. c.21., and Michaelmas term by statute 16 Car.I. c.6., and again by statute 24 Geo.II. c.48.

THERE are in each of these terms stated days called *days in bank*, *dies in banco*: that is, days of appearance in the court of common bench. They are generally at the distance of about a week from each other, and have reference to some festival of the church. On some one of these days in bank all original writs must be made returnable; and therefore they are generally called the *returns* of that term: whereof every term has more or less, said by the Mirror [s] to have been originally fixed by king Alfred, but certainly settled as early as the statute of 51 Hen.III. st.2. But though many of the return days are fixed upon sundays, yet the court never sits to receive these returns till the monday after [t]: and therefore no proceedings can be held, or judgment can be given, or supposed to be given, on the sunday [u].

THE first return in every term is, properly speaking, the first day in 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

[r] *Temp.Hen.III. passim.*
[s] c.5 § 1.
[t] Registr.19. Salk.627. 6 Mod.250.
[u] Sir W. Jon. 156. Swann & Broome, *B.R. Mich. 5 Geo.III. et in Dom. Proc.* 1766.

first day of Hilary term is the twentieth of January. And thereon the court sits to take *essoigns*, or excuses, for such as
[278] do not appear according to the summons of the writ: wherefore this is usually called the *essoign day* of the term. But on every return-day in the term, the person summoned has three days of grace, beyond the day named in the writ, in which to make his appearance; and if he appears on the fourth day inclusive, *quarto die post*, it is sufficient. (3) 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 ut jussi conveniunt, sed et alter et* tertius "*dies cunctatione coeuntium absumitur.*" And a similar indulgence prevailed in the Gothic constitution: "*illud enim nimiae* "*libertatis indicium, concessa toties impunitas non parendi, nec* "*enim* trinis *judicii consessibus 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; 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

[v] *Feud. l.2. t.22.*

[w] *De mor. Ger.* c.11.

[x] Stiern *de jure Goth. l.1. c.6.*

[y] See 1 Bulstr. 35.

[z] See Spelman on the terms ch.17. Note, that if the feast of saint John the baptist, or midsummer-day, falls on the morrow of *Corpus Christi* day, (as it did *A.D.* 1614, 1698, and 1709, and will again *A.D.* 1791,) Trinity full term then *commences*, and the courts sit on that day, though in other years it is no juridical day. Yet in 1702, 1713, and 1724, when midsummer-day fell upon what was regularly the *last* day of the term, the courts did not then sit, but it was regarded like a sunday, and the term was prolonged to the twenty-fifth of June (*Rot C.B. Bunb.*176.)

(3) The first or return day was called the essoign day for the reason mentioned in the text; if no essoign was then cast, the demandant had a right on the second to enter an *exception*, and obtain an order that no essoign should now be received, whence this day was called the day of exception. On the third the sheriff actually returned his writs into court, and this was therefore called the day of return of writs. The fourth was called the appearance day, or *day of love*, being the day granted from indulgence for the tenant's or defendant's appearance. 1 Tidd's Prac. 7th edit. p. 122.

called and set down in the almanacs as the first days of the term, and the court also sits till the *quarto die post* or appearance day of the last return, which is therefore the end of each term. (4)

(4) By 1 & 2 G. 4. three or more of the judges of the K. B. are required to meet on some day before Easter, Michaelmas, and Hilary terms respectively, and to sit for the dispatch of all matters left pending at the end of the term preceding; but it is provided that this regulation shall not alter the return of any writ, or require an appearance thereto before the day therein mentioned.

CHAPTER THE NINETEENTH.

OF

THE next step for carrying on the suit, after suing out the original, is called the *process*, being the means of compelling the defendant to appear in court. This is sometimes called *original* process, being founded upon the original writ; and also to distinguish it from *mesne* or intermediate process, which issues, pending the suit, upon some collateral interlocutory matter; as to summon juries, witnesses, and the like [a]. *Mesne* process is also sometimes put in contradistinction to *final* process, or process *of execution*; and then it signifies all such process as intervenes between the beginning and end of a suit.

BUT process, as we are now to consider it, is the method taken by the law to compel a compliance with the original writ, of which the primary step is by giving the party notice to obey it. This notice is given upon all real *praecipes*, 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
[280] 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.

[a] Finch. L. 436.
[b] *Ibid.* 344. 352.
[d] Dalt. of sher. c. 31.
[e] Stiern. *de jure Sueon. l.* 1. *c.* 6.

If the defendant disobeys this verbal monition, the next process is by writ of *attachment* or *pone*, so called from the words of the writ [f], "*pone per vadium et salvos plegios*, put by gage and "safe pledges A. B. the defendant, &c." This is a writ not issuing out of chancery, but out of the court of common pleas, being grounded on the non-appearance of the defendant at the return of the original writ; and thereby the sheriff is commanded to attach him, by taking *gage*, that is, certain of his goods, which he shall forfeit if he doth not appear [g]; or by making him find *safe pledges* or sureties who shall be amerced in case of his non-appearance [h]. This is also the first and immediate process, without any previous summons, upon actions of trespass *vi et armis*, or for other injuries, which, though not forcible, are yet trespasses against the peace, as *deceit* and *conspiracy* [i]; where the violence of the wrong requires a more speedy remedy, and therefore the original writ commands the defendant to be at once attached, without any precedent warning [j].

If, after *attachment*, the defendant neglects to appear, he not only forfeits this security, but is moreover to be farther compelled by writ of *distringas* [k], or *distress infinite*, which is a subsequent process issuing from the court of common pleas, commanding the sheriff to distrein the defendant from time to time, and continually afterwards, by taking his goods and the profits of his lands, which are called *issues*, and which by the common law he forfeits to the king if he doth not appear [l]. But now the issues may be sold, if the court shall so direct, in order to defray the reasonable costs of the plaintiff [m]. In like manner by the civil law, if the defendant absconds, so that the [281
citation is of no effect, "*mittitur adversarius in possessionem bonorum ejus* [n]." (1)

[f] Append. No. III. § 2.
[g] Finch. L. 345. Lord Raym. 278.
[h] Dalt. sher. c. 32.
[i] Finch. L. 305. 352.
[j] Append. No. II. § 1.
[k] Append. No. III. § 2.
[l] Finch. L. 352.
[m] Stat. 10 Geo. III c. 50.
[n] *Ff.* 2. 4. 6.

(1) The delay and expence of this mode of proceeding have induced the legislature to enact, by 51 G. 3. c. 124. (continued by 57 G. 3. c. 101.) that the *distringas* shall not issue in the first instance for default of appearance; but if the defendant can be personally served with the summons or attachment,

And here by the common, as well as the civil, law, the process ended in case of injuries without force: the defendant, if he had any substance, being gradually stripped of it all by repeated distresses, till he rendered obedience to the king's writ; and, if he had no substance, the law held him incapable of making satisfaction, and therefore looked upon all farther process as nugatory. And besides, upon feodal principles, the person of a feudatory was not liable to be attached for injuries merely civil, lest thereby his lord should be deprived of his personal services. But, in cases of injury accompanied with force, the law, to punish the breach of the peace, and prevent it's disturbance for the future, provided also a process against the defendant's *person* in case he neglected to appear upon the former process of attachment, or had no substance whereby to be attached; subjecting his body to imprisonment by the writ of *capias ad respondendum* [o]. But this immunity of the defendant's person, in case of peaceable though fraudulent injuries, producing great contempt of the law in indigent wrongdoers, a *capias* was also allowed to arrest the person, in actions of *account*, though no breach of the peace be suggested, by the statutes of Marlbridge, 52 Hen. III. c. 23., and Westm. 2. 13 Edw. I. c. 11., in actions of *debt* and *detinue* by statute 25 Edw. III. c. 17., and in all actions *on the case*, by statute 19 Hen. VII. c. 9. Before which last statute a practice had been introduced of commencing the suit by bringing an original writ of trespass *quare clausum fregit*, for breaking the plaintiff's close *vi et armis*; which by the old common law subjected the defendant's person to be arrested by writ of *capias*. and then afterwards, by connivance of the court, the plaintiff might proceed to prosecute for any other less forcible injury. This practice (through custom rather

[o] 3 Rep. 12.

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ment, he shall at the same time have a written notice, that if he does not appear, the plaintiff will cause an appearance to be entered for him, and proceed thereon, as if he had himself appeared by his attorney. But in case it shall be made appear that the defendant could not be personally served, and that a service has taken place at his dwelling-house, then a *distringas*, by leave of the court, may be sued out; the service of which shall be accompanied by a similar written notice. And if within eight days after the return of the original writ or *distringas* the defendant do not appear, then the plaintiff may enter a common appearance for him, and the suit proceeds as if he had regularly appeared.

than necessity, and for saving some trouble and expense, in suing out a special original adapted to the particular injury,) still continues in almost all cases, except in actions of debt; though now, by virtue of the statutes above cited and others, a *capias* might be had upon almost every species of complaint. [282]

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.

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 undersheriff 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

[p] Append. No. III. §2.

the action is laid) cannot find the defendant in his jurisdiction, he returns that he is not found, *non est inventus*, in his bailiwick: whereupon another writ issues, 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 against him, an original writ must then be sued out regularly, and after that a *capias*. And if the sheriff cannot find the defendant upon the first writ of *capias*, and returns a *non est inventus*, there issues out an *alias* writ, and after that a *pluries*, to the same effect as the former [r]: only after these words "we command you," this clause is inserted, "as we have *formerly*," or "as we have *often* commanded "you:" — "*sicut* alias," or "*sicut* pluries, *praecepimus*." 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*
[284] is sued out, a *writ of proclamation* [t] shall issue out at the same time with the *exigent*, commanding the sheriff of the county, wherein the defendant dwells, to make three proclamations

[q] Append. No. III. § 2
[r]
[s] Append. No. III. § 2

thereof in places the most notorious, and most likely to come to his knowledge, a month before the outlawry shall take place. (2) 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. (3) 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* [t]. And since his days, by a variety of statutes, (the same which allow the writ of *capias* before mentioned,) process of outlawry doth lie in divers actions that are merely civil; provided they be commenced by original and not by bill [v]. If after outlawry the defendant appears publicly, he may be arrested by a writ of *capias utlagatum* [u], and committed till the outlawry be reversed. Which reversal may be had by the defendant's appearing personally in court or by attorney [w]; (though in the king's bench he could not appear by attorney [x], 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.

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]; (4) re-

[t] Co Litt. 128.
[v] 1 Sid. 159
[u] Append No III. § 2.
[w] 2 Roll. Rep. 490. *Regul.* C. B. A D 1654 c. 13.
[x] Cro Jac. 616. Salk. 496.
[y] Append. No. II. § 1.

(2) "One in the open county court, another at the general quarter sessions of the peace in those parts where the defendant at the time of the *exigent* awarded shall be dwelling; and the third, one month at the least before the *quinto exactus* by virtue of the *exigent*, at the church or chapel of the town or parish where the defendant shall be so dwelling."

(3) A woman under the same circumstances is said to be "*waived*;" as she never took the oath of allegiance in the leet, she was said not to be sworn to the law, and therefore not capable of outlawry

(4) See p. 43 ante, *n* 6.

turnable, not at Westminster, where the common pleas are now fixed in consequence of *magna carta*, but "*ubicunque* "*fuerimus in Anglia*," wheresoever the king shall then be in
[285] 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 it's 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 misdemesnor 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 it's 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]) (5) 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

[z] Thus, when the court sate at Oxford, by reason of the plague, Mich. 1665, the process was by *bill of Oxfordshire*. Trye's *Jus Filizar*. 101.

[a] Bro. *Abr. t. oyer & terminer*. 8.

[b] Bro. *Abr. t jurisdiction*. 66. 3 Inst. 27.

[c] Append. No. III. § 3.

[d] Trye's *Jus Filizar*. 98.

(5) The process upon the plaint was an attachment, to which the sheriff returned either that he had attached the defendant, or that he had nothing by which he could be attached. It was upon this latter return, and the non-appearance of the defendant, that the bill of Middlesex issued, which being a kind of *capias* it would have been hard to have issued in the first instance and as a matter of course. See Tidd's Pract. 166. 7th edit.

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 [286 suggested, whatever else may be the real cause of action. This bill of Middlesex must be served on the defendant by the sheriff, if he finds him in that county; but if he returns "*non* "*est inventus*," then there issues out a writ of *latitat* [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 "*latitat et discurrit*," lurks and wanders about in Berks; and therefore commands the sheriff to take him, and have his body in court on the day of the return. But, as in the common pleas the *testatum capias* may be sued out upon only a supposed, and not an actual, preceding *capias*; so in the king's bench a *latitat* is usually sued out upon only a supposed, and not an actual *bill of Middlesex*. So that, in fact, a *latitat* may be called the first process in the court of king's bench, as the *testatum capias* is in the common pleas. Yet, as in the common pleas, if the defendant lives in the county wherein the action is laid, a common *capias* suffices; so in the king's bench, likewise, if he lives in Middlesex, the process must still be by *bill of Middlesex* only.

In the exchequer the first process is by writ of *quo minus*, in order to give the court a jurisdiction over pleas between party and party. In which writ [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

[e] 4 Inst. 72. [f] Append. No. III. § 3. [g] *Ibid.* § 4.

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 antiently 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. And if the defendant thinks proper to appear upon this notice, his appearance is recorded, and he puts in sureties for his future attendance and obedience; which sureties are called *common bail*, being the same two imaginary persons that were pledges for the plaintiff's prosecution, John Doe and Richard Roe. Or, if the defendant does not appear upon the return of the writ, or within four (or, in some cases, eight) days after, the plaintiff may enter an appearance for him, as if he had really appeared; and may file common bail in the defendant's name, and proceed thereupon as if the defendant had done it himself.

BUT if the plaintiff will make *affidavit*, or assert upon oath, that the cause of action amounts to ten pounds or upwards (7), then he may arrest the defendant, and make him put in sub-

(7) By 51 G. 3 c 124 (continued by 57 G. 3 c. 101.) this sum is increased to fifteen pounds, except where the action is brought on any bill of exchange or promissory note.

stantial sureties for his appearance, called *special bail.* In order to which, it is required by statute 13 Car. II. st. 2. c. 2. that the true cause of action should be expressed in the body of the writ or process: else no security can be taken in a greater sum than 40*l.* This statute (without any such intention in the makers) had like to have ousted the king's bench of all it's ju- [288
risdiction over civil injuries without force; (8) for, as the bill of Middlesex was framed only for actions of trespass, a defendant could not be arrested and held to bail thereupon for breaches of civil contracts. But to remedy this inconvenience, the officers of the king's bench devised a method of adding what is called a clause of *ac etiam* to the usual complaint of trespass: the bill of Middlesex commanding the defendant to be brought in to answer the plaintiff of a plea of trespass, *and also* to a bill of debt [f]: the complaint of trespass giving cognizance to the court, and that of debt authorising 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 cer- "tain 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 defendant, and, having so done, to return the writ with a *cepi corpus* endorsed thereon.

An *arrest* must be by corporal seising or touching the defendant's body; (9) after which the bailiff may justify breaking

[f] Trye's *Jus Filizar.* 102. Append. No. III. § 3.

[g] Lilly Pract. Reg *tit ac etiam.* North's life of Lord Guildford, 99.

(8) Where the sum, for which bail was required, exceeded 40*l.*

(9) Or something adequate to it, as if a bailiff comes into a room in which the defendant is, and tells him that he arrests him, and locks the door, this is an arrest, for the defendant is in the officer's custody. *Cas. Temp. Lord Hardwicke,* 301. But bare words will not make an arrest. *Genner* v. *Sparkes,* 1 Salk. 79. *Russen* v. *Lucas,* 1 R. & M. 26

open the house in which he is, 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. Which principle is carried so far in the civil law, that for the most part not so much as a common citation or summons, much less an arrest, can be executed upon a man within
[289] 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*. (10) 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]. (11) 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. 15., 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. And no arrest can be made in the king's presence, nor within the verge of his royal

[h] 2. 4. 6.
[i] Whitelock of parl. 206, 207.
[j] See pag 280.
[k] Bro *Abr t bille.* 29. 12 Mod 163.

(10) The process against peers and corporations must therefore still be by original writ and summons, for not being liable to arrest they cannot in the K.B. be supposed to be in the custody of the marshal, and in the C.P. it would be useless to issue a *capias* against them As to members of parliament the legislature has interfered, and by 12 & 13 W 3 c. 3. and 45 G 3. c. 124. enabled plaintiffs to sue them by bills, issuing from the respective courts, and upon default of appearance within a certain time to enter appearances for them.

(11) It might be inferred from the wording of this sentence, that an attorney was liable to be arrested by some extraordinary process of the court; but he is privileged from all arrest as a mode of compelling appearance, and is also entitled to be sued by bill of privilege.

palace[l], nor in any place where the king's justices are actually sitting. The king hath moreover a special prerogative, (which indeed is very seldom exerted[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 creditor may proceed [290 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.

When the defendant is regularly arrested, he must either go to prison, for safe custody: or put in *special bail* to the sheriff. (12) 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 de-

[l] See Vol. 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 albeit queen Elizabeth maintained "many wars, yet she granted few or no "protections and her reason was, that "he was no fit subject to be employed "in her service, that was subject to "other men's actions, lest she might "be thought to delay justice." But king William, in 1692, granted one to lord Cutts, to protect him from being outlawed by his taylor (3 Lev. 332.): which is the last that appears upon our books.

[n] Finch L. 454. 3 Lev. 332.

[o] F.N.B. 28. Co. Litt. 131.

(12) Or by 43 G. 3. c. 46 deposit with the sheriff the sum sworn to on the back of the writ, together with ten pounds for the costs, and whatever fine may have been paid for suing forth the original writ, if the proceeding be by original This deposit, which discharges the defendant from the arrest, is paid by the sheriff into court, and is either restored to the defendant, if he, at the proper time, puts in bail *to the action*, (for which see next page,) or is paid out to the plaintiff, who may then enter an appearance for him.

fendant 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]. The sheriff, if he pleases, *may* let the defendant go without any sureties; but that is at his own peril: for, after once taking him, the sheriff is bound to keep him safely, so as to be forthcoming in court; otherwise an action lies against him for an escape. But, on the other hand, he is obliged, by statute 23 Hen. VI. c. 9. to take (if it be tendered) a sufficient bail-bond: and by statute 12 Geo. I. c. 29. the sheriff shall take bail for no other sum than such as is sworn to by the plaintiff, and endorsed on the back of the writ. (13)

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
[291] *to the action;* which is commonly called putting in bail *above*. If this be not done, and the bail that were taken by the sheriff *below* are responsible persons, 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. (14)

[p] Append No. III § 5.

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(13) The practice, however, is to take bail in double the sum, and the bail are held to be liable to the full extent of that penalty, if the real debt and costs amount to so much. Tidd's Pract. 246 7th edit.

(14) The defendant may surrender himself to the sheriff in discharge of his bail before or on the return day of the writ, if the sheriff choose to accept that

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. [in] which [case the recognizance] must be transmitted to the court. (15) 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 must be *perfected*, that is, they must *justify* themselves in court, or before the commissioner in the country, by swearing themselves housekeepers, and each of them to be worth the full sum for which they are bail, after payment of all their debts. This answers in some measure to the *stipulatio* or *satisdatio* 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-jussores* were there absolutely bound *judicatum solvere*, to see the costs and condemnation [292
paid at all events: whereas our special bail may be discharged, by surrendering the defendant into custody, within the time allowed by law; for which purpose they are at all times entitled to a warrant to apprehend him [t].

[q] Append. No. III § 5
[r] *Ibid.*
[s] *Inst. l* 4 *t* 11. *Ff. l.* 2. *t* 8
[t] Show. 202 6 Mod. 231.

that as a fulfilment of the bail bond, and accordingly deliver it up to be cancelled But he cannot be compelled so to do, because he has a right to be discharged from all the risque of the intervening custody If, however, he accepts the defendant's body and produces it, the plaintiff can then maintain no action against him. Tidd's Pract. 248. 7th edit.

(15) In the K. B bail are now put in before one of the judges, sitting in a court commonly called the bail court, by virtue of the 57 G.3. c.11.

Special bail is required (as of course) only upon actions of debt, or actions on the case in trover (16) or for money due, where the plaintiff can swear that the cause of action amounts to ten pounds (17): but in actions where the damages are precarious, being to be assessed *ad libitum* by a jury, as in actions for words, ejectment, or trespass, it is very seldom possible for a plaintiff to swear to the amount of his cause of action; and therefore no special bail is taken thereon, unless by a judge's order, or the particular directions of the court, in some peculiar species of injuries, as in cases of mayhem or atrocious battery; or upon such special circumstances as make it absolutely necessary, that the defendant should be kept within the reach of justice. Also in actions against heirs, executors, and administrators, for debts of the deceased, special bail is not demandable; for the action is not so properly against them in person, as against the effects of the deceased in their possession. But special bail is required even of them, in actions for a *devastavit*, or wasting the goods of the deceased; that wrong being of their own committing.

Thus much for *process;* which is only meant to bring the defendant into court, in order to contest the suit, and abide the determination of the law. When he appears either in person as a prisoner, or out upon bail, then follow the *pleadings* between the parties, which we shall consider at large in the next chapter. (18)

(16) By a late rule in all the courts, (48 G. 3. A D. 1808) no person can be holden to special bail in any action of trover or detinue, unless by an order of one of the judges Tidd's Pract. 193. 7th edit.

(17) Now fifteen. See ante, p. 287. n. (7).

(18) Mr. Tidd, to whom I have been so much indebted, observes, "that it is curious to remark the changes which the law of arrest has undergone at different periods. Anciently, as no *capias* lay, an arrest was not allowed, except in actions of trespass *vi et armis;* afterwards an arrest was introduced with the *capias* in other actions; and now an arrest cannot be had in the only action wherein it was formerly allowed." Tidd's Pract. 187. 7th edit.

CHAPTER THE TWENTIETH.

OF PLEADING

PLEADINGS are the mutual altercations between the plaintiff and defendant; which at present are set down and delivered into the proper office in writing, though formerly they were usually put in by their counsel *ore tenus*, or *viva voce*, in court, and then minuted down by the chief clerks, or prothonotaries; whence in our old law French the pleadings are frequently denominated the *parol*.

THE first of these is the *declaration*, *narratio*, or *count*, antiently called the *tale* [a]; in which the plaintiff sets forth his cause of complaint at length: being indeed only an amplification or exposition of the original writ upon which his action is founded, with the additional circumstances of time and place, when and where the injury was committed. But we may remember [b], that in the king's bench, when the defendant is brought into court by bill of Middlesex, upon a supposed trespass, in order to give the court a jurisdiction, the plaintiff may declare in whatever action, or charge him with whatever injury he thinks proper; unless he has held him to bail by a special *ac etiam*, which the plaintiff is then bound to pursue. And so also, in order to have the benefit of a *capias* to secure the defendant's person, it was the antient practice, and is therefore still warrantable in the common pleas, to sue out a writ of trespass *quare clausum fregit*, for breaking the plaintiff's close: and when the defendant is once brought in upon this writ, the plaintiff declares in whatever action the nature of his true injury may require; as in an action of covenant, or

[a] Append. No. II. § 2. No. III. § 6. [b] See pag. 285. 288.

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.

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 [in]; 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. (1) 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 *visne*, (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,

[c] 2 Ventr. 259.

[d] Rastal. *t. Dette.* 184. *b Fitz. Abr t. Briefe.* 18. Salk. 670. Trye's *Jus Filiz* 231. Styl. Pract. Reg. (*edit.* 1657.) 331.

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(1) The principles upon which the necessity for a venue and the distinctions between local and transitory actions turn, may be stated shortly thus: — In a local action, as defined in the text, the proceeding is in some measure *in rem*, and the plaintiff cannot have the benefit of his judgment, unless he has laid his action in the right county; for how can the sheriff of York interfere to deliver up to him land in the county of Devon? In transitory actions, though they may be supposed to have happened in one county as well as in another, still they must be laid in *some* county; for writs and all processes are directed to the sheriff, and he is but a county officer. See Lord Mansfield's judgment in *Mostyn* v. *Fabrigas*, Cowp 161.

at the time of the summer circuit. (2) And it will sometimes remove the *venue* from the proper jurisdiction, (especially of a narrow and limited kind,) upon a suggestion duly supported, that a fair and impartial trial cannot be had therein [e].

[295]

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; and at last concludes with declaring, that the defendant had refused to fulfil any of these agreements, whereby he is endamaged to such a value. And if he proves the case laid in any one of his counts, though he fails in the rest, he shall recover proportionable damages. This declaration always concludes with these words, "and thereupon he brings *suit*," &c. "*inde pro-*" "*ducit sectam*," &c. 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,

[e] Stra. 874. — Mylock v. Saladine *Trin.* 4 *Geo III. B.R.* 3 Burr 1564. 1 Bl. Rep. 480.

[f] Seld. on Fortesc. c. 21.

[g] Bract 400. Flet. *l.* 2. *c.* 63.

(2) But see ante, p. 58. n. (17).

which, as we before observed [h], are now mere names of form; though formerly they were of use to answer to the king for the amercement of the plaintiff, in case he were nonsuited, barred of his action, or had a verdict or judgment against him [i]. For, if the plaintiff neglects to deliver a declaration for two terms after the defendant appears, or is guilty of other delays or defaults against the rules of law in any subsequent
[296] 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*. And for thus deserting his complaint, after making a false claim or complaint, (*pro falso clamore suo*,) he shall not only pay costs to the defendant, but is liable to be amerced to the king. A *retraxit* differs from a nonsuit, in that the one is negative, and the other positive: the nonsuit is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again, upon payment of costs; but a *retraxit* is an open and voluntary renunciation of his suit, in court, and by this he 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. Antiently, by the demise of the king, all suits depending in his courts were at once discontinued, and the plaintiff was obliged to renew the process, by suing out a fresh writ from the successor; the virtue of the former writ being totally gone, and the defendant no longer bound to attend in consequence thereof; but, to prevent the expense as well as delay attending this rule of law, the statute 1 Edw. VI. c. 7. enacts, that by the death of the king no action shall be discontinued; but all proceedings shall stand good as if the same king had been living.

When the plaintiff hath stated his case in the declaration, it is incumbent on the defendant within a reasonable time to make his *defence* and to put in a *plea*, else the plaintiff will

[h] See pag 274. [i] 3 Bulstr. 275. 4 Inst. 180.

at once recover judgment by *default*, or *nihil dicit* of the defendant.

DEFENCE, in it's true legal sense, signifies not a justification, protection, or guard, which is now it's 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 is afterwards extended and maintained in his plea. For it would be [297] 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 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 praedicti 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 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

[k] Rastal. Ent. 234

[l] Booth of real actions, 118.

[m] Vol. II. Append. No. V. § 2.

[n] Append. No. I. § 5.

[o] Co. Entr. 182.

[p] *Nov. Nar.* 230. *edit.* 1534.

[q] The true reason of this, says Booth, (on real actions, 94. 112.) I could never yet find; so little did he understand of principles!

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,
[298] the defendant waved all pleas of misnomer [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 behove 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 entitles the defendant to plead to the jurisdiction of the court [y]. Upon this claim of cognizance, if allowed, all proceedings shall cease in the superior court, and the plaintiff is left at liberty to pursue his remedy in the special jurisdiction. As, when a scholar, or other privileged person of the universities of Oxford or Cambridge, is impleaded in the courts at Westminster, for any cause of action whatsoever, unless upon a question of freehold [z]. In these cases, by the charters of those learned bodies, confirmed

[r] Co. Litt. 127.

[s] *Edit.* 1534.

[t] Theloal. dig. *l* 14. *c.* 1. *pag.* 357.

[u] *En la defence sont ij choses entendantz, per tant quil defende tort et force, home doyt entendre quil se excuse de tort a luy surmys per counte, et fait se partie al ple, et per tant quil defende les damages, il affirm le partie able destre respondu, et per tant quil defende ou et quant il devera, il accepte la poar de court de conustre ou trier lour ple.* (*Mod. tenend. cur.* 408. *edit.* 1534.) See also Co. Litt 127

[w] Salk. 217 Lord Raym. 282.

[x] Carth. 230. Lord Raym. 217.

[y] 2 Lord Raym. 836 10 Mod 126.

[z] See pag. 83.

by act of parliament, the chancellor or vice-chancellor may put in a claim of cognizance; which, if made in due time and form, and with due proof of the facts alleged, is regularly allowed by the courts [a]. It must be demanded before full defence is made [b] or imparlance prayed; for these are a submission to the jurisdiction of the superior court, and the delay is a *laches* in the lord of the franchise: and it will not be allowed, if it occasions a failure of justice [c], or if an action be [299] brought against the person himself, who claims the franchise, unless he hath also a power in such case of making another judge [d].

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 loquendi*, and may, before he pleads, have more 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 in 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*. (3) There are also many other previous steps

[a] Hardr. 505.

[b] Rast Entr. 128, &c

[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 Serjeant Rolfe, on behalf of the cognizance, is curious and worth transcribing.— *Jeo vous dirai un fable En ascun temps fuit un pape, et avoit fait un grand offence, et le cardinals vindrent a luy et disoyent a luy "peccasti," et il dit, "judica me," et ils disoyent, non possumus, quia caput es "ecclesiae judica teipsum" et l'apostol dit, "judico me cremari," et fuit combustus, et apres fuit un sainct. Et in ceo cas il fuit son juge demene, et issint n'est pas inconvenient que un home soit juge demene.*

[e] Append. No. III. § 6

[f] Gilb. Hist. Com. Pl. 35.

[g] Matt. v 25.

(3) Imparlances, or time to plead, do not now depend upon the form of process which the plaintiff has adopted, but upon the time when that process was returnable, the time when the declaration was actually delivered, and

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 it's identity and other circumstances. He may crave *oyer* [h] of the writ, or of the bond, or other specialty upon which the action is brought: that is, to *hear* it read to him; the generality of defendants in the times of antient simplicity being supposed incapable to read it themselves; whereupon the whole is entered *verbatim* upon the record, and the defendant may take advantage of any condition or other part of it, not stated in the plaintiff's declaration. (4)
[300] In real actions also the tenant may pray in *aid*, or call for assistance of another, to help him to plead, because of the feebleness or imbecility of his own estate. Thus a tenant for life may pray in aid of him that hath the inheritance in remainder or reversion; and an incumbent may pray in aid of the patron and ordinary: that is, that they shall be joined in the action and help to defend the title. *Voucher* also is the calling in of some person to answer the action, that hath war-

[h] Append. No. III. § 6.

and the distance of the defendant's residence from London. The subject, as is unfortunately too much the case with many parts of the practice of the courts, is full of minute distinctions; but as a general rule it may be laid down, that where the bail is filed, and perfected if special, or a common appearance entered for the defendant under the statute, and the declaration filed or delivered, with notice thereof, four days exclusive before the end of the term in which the writ was returnable, the defendant, if he live within twenty miles of London, and the venue be laid in London or Middlesex, must plead within four days; if otherwise, within eight days exclusive. But as this rule might impose, in some cases, a great hardship on the defendant, the judges of the respective courts at their chambers exercise an equitable jurisdiction of granting further time upon the application of the defendant, according to the exigency of each case. And as this is a favour done to the defendant, it enables the judge to impose such conditions on him in return, as may remove technical obstructions, and advance the ends of justice at the trial. When the defendant craves oyer, changes the venue, requires a bill of the particulars of the plaintiff's demand, or any thing of that sort occurs, he has the same time to plead allowed him after a compliance with the requisition as he had before. Tidd's Pract. 476. 7th edit.

(4) The plaintiff is equally entitled to oyer if the defendant should state any deed in the course of his pleading: the party demanding, if he pleases, may have a copy, paying for it at a fixed rate, and the party of whom it is demanded is bound to carry it to the other. The courts will not now grant oyer of the writ on which the action is brought.

ranted the title to the tenant or defendant. This we still make use of in the form of common recoveries [j], 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 vouchor: 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 staid; 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, the parol shall not demur: otherwise he might be [deforced of his whole property, and even 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. (5)

[j] Vol II. Append. No. V § 2
[k] F.N.B.135.
[l] Dyer. 137.
[m] Finch. L. 360.
[n] 1 Roll Abr. 137.
[o] *Ibid* 138.

(5) Before plea also it is usual for the defendant, in cases in which the declaration does not disclose the specific items of the plaintiff's demand, as

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*, 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, 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 antient 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 (6), or a monk professed. 3. In *abatement*, which abate-
[302] ment is either of the writ or the count, for some defect in one

[p] 12 Mod. 529.

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in an action for goods sold and delivered generally, to call for a bill of particulars. This is done by application to a judge at chambers; and if the order is made, the plaintiff is bound to deliver in writing such an account of the items as shall give the defendant reasonable information of what he is to come prepared to answer: technical accuracy of description is not necessary, but the plaintiff cannot at the trial give evidence of any item of demand not included in the bill. The same benefit which the defendant has where the declaration is general, the plaintiff is entitled to where the defendant's notice or plea of set-off by its generality makes a bill of particulars necessary.

(6) The student must not understand the author to imply that either infants or married women are absolutely disabled from bringing an action; the former cannot do it in person or by attorney, nor the married woman without her husband; the plea here supposed applies only when such persons sue irregularly.

of them;' as by misnaming the defendant, which is called a *misnomer*; giving him a wrong addition, as *esquire* instead of *knight* (7); or other want of form in any material respect. Or, it may be, that the plaintiff is dead: for the death of either party is at once an abatement of the suit. (8) 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. (9) But in actions arising *ex contractu*, by

[q] 4 Inst. 315

(7) In the year-book, 14 E. 4. p. 7. pl. 12, is a case in which Starkey asked this question in the Exchequer Chamber before the Judges, "If action be brought against a woman, who is neither maid, widow, nor wife, what addition shall she have: — some said that she shall be called single woman, and some that she shall be called servant, and others said that servant at the common law was not an addition." I cite this case to shew what importance was formerly attached to this form, when such a question upon it could be gravely stated to the Judges, and argued by them; but now as a plea of this kind would be bad without oyer of the writ, which oyer the court, as stated above, will not grant, it seems that the plea is no longer pleadable. See Vol. IV. p. 334.

(8) By the st. 8 & 9 W. 3. c. 11. if there be two or more plaintiffs or defendants, and one or more of them die, if the cause of action survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated, but such death being suggested on the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants.

(9) The reason here assigned is a singular one; for if the executors have received or committed an injury "in their own personal capacity," an action will lie for or against them, not as executors, but in their own right. The true ground of the rule is that they represent not so much the persons as the personal estate of their testators; and this leads to a qualification with which the rule should be stated; that the action which dies with the person must be for a wrong, which neither by implication of law nor averment on the record appears to operate to the injury of the personal estate. Accordingly, in the case of *Chamberlain* v. *Williamson*, 2 M & S. 408., where an action was brought by an administrator for a breach of promise of marriage with the intestate, a female, the judgment was arrested, because loss of marriage in itself by no means implied an injury

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.

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. (10) 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 pleas 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.

[303] 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 declar-

[r] March. 14. [s] Brownl 139.

to the personal estate of a female, which the administrator represented, (on the contrary, marriage was ordinarily an extinction of it,) and if any injury to that estate had in fact arisen by the defendant's conduct, none was stated on the record.

(10) In the same spirit the courts have determined that they must be pleaded within four days inclusive after the delivery of the declaration; unless that took place so late in the term that the defendant is not bound to plead till the following term; neither will the courts allow them to be amended.

ation; 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 over-ruled 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, *uncore 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]. (11) But frequently the defendant confesses one [304

[t] Co Entr 271.
[v] 1 Vent. 21.
[u] Litt. § 338. Co. Litt. 209.

(11) That is to say, if the only right which A has to the money, arise from the offer which B makes to him of it, and he once refuse to accept that offer, he thereby loses all right, and of course can bring no action. The case put by Lord Coke is, "if A *without any loane, debt, or dutie preceding* infeoffe B of land, upon condition for the payment of a hundred pounds to B *in nature of a gratuitie or gift*, in that case if he (A) tender the hundred pound to him (B) according to the condition, and he refuseth it, B hath no remedie therefore." Here B had primarily no title to the

part of the complaint, (by a *cognovit actionem* in respect thereof,) and traverses or denies the rest: in order to avoid the expense of carrying that part to a formal trial, which he has no ground to litigate. A species of this sort of confession is the *payment of money into court* [w]: which is for the most part necessary upon pleading a tender, and is itself a kind of tender to the plaintiff; by paying into the hands of the proper officer of the court as much as the defendant acknowledges to be due, together with the costs hitherto incurred, in order to prevent the expense of any farther 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

[w] Styl. Pract. Reg. (*edit.* 1657.) 201. 2 Keb. 555. Salk. 596.

land or the money; if he does not accept it, therefore, when offered, no debt is due to him, but A by the offer has discharged his land from that burthen which he had voluntarily imposed on it. But supposing the land to have been mortgaged by A to B for money lent, which A is to repay on a certain day, there if the money is duly tendered on the day, and refused, A shall have his land again, because he has performed the condition, but still B may bring an action for his money.

The plea of tender must always, except in the case above supposed, be accompanied by a bringing of the sum tendered into court, or the plea is a mere nullity; and though the plaintiff denies that the tender was made before he commenced the action, or disputes the sufficiency of the sum tendered, and therefore goes on with the action, still he is entitled to take that sum out of court at once, which the defendant by the tender has admitted to be his due; if, however, he neglects to do so, and a verdict on either point should pass for the defendant, the court will then lay hold of the money as a security for the defendant's costs. *Le Grew* v. *Cooke*, 1 B. & P. 332. See also *Birks* v. *Trippet*, 1 Saund. R. 33 *a*. notes 2 d, e, f, g, h, i. edit. 1824.

acknowledged to be his due. (12) 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 [x]. 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 merchandize sold to the plaintiff, and in case he *pleads* such set-off, must pay the remaining balance into court. (13) This answers very nearly to the *compensatio*, or *stoppage*, of the [305
civil law [y], and depends on the statutes 2 Geo. II. c. 22. and 8 Geo. II. c. 24. which enact, that where there are mutual debts between the plaintiff and defendant, one debt may be set against the other, and either pleaded in bar or given in evidence upon the general issue at the trial; which shall

[x] Sp. L. b. 6. c. 4.

[y] *Ff.* 16. 2. 1.

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(12) Money cannot be brought into court, nor a tender pleaded in all actions in which ultimately money is to be recovered Where the plaintiff is suing for general damages, either for the non-performance of a contract, or for some trespass, men may so reasonably differ in their estimate of the injury sustained, that it would be unfair to compel a plaintiff either to accept the sum at which the defendant rates the damages, or expose himself to the costs of the action by going on, if the jury should chance to think the sum brought in or tendered sufficient. This, therefore, is only allowed by statute in certain cases where actions are brought against magistrates, and other functionaries, to whom it is thought right to afford a special protection. Again, where the plaintiff sues only for a specific sum, and has no right to any thing if not to the whole, as in suing for a penalty, it would be absurd to allow the defendant to pay a part only into court; if, indeed, the plaintiff sues for several penalties, the defendant may bring as many into court as he thinks he has incurred. See Tidd's Prac. 640.

(13) Compensation is known in the present French law; it is regulated much upon the same principles as set-off, as to the cases in which it applies, but it operates in a different manner; it is considered as a mode by which a debt is extinguished by the mere act of law, without the concurrence or motion of the parties. *La compensation s'opere de plein droit par la seule force de la loi, même à l'insu des debiteurs; les deux dettes s'éteignent reciproquement, à l'instant où elles se trouvent exister à la fois, jusqu'à concurrence de leurs quotités respectives. Code Civile, l. 3. t. 3. s.* iv.

operate as payment, and extinguish so much of the plaintiff's demand.

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 [z]; 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

[z] Append No. II. § 4

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(14) Where the plaintiff is suing for general unliquidated damages for the non-performance of a contract, or for any tort committed, it is clear that the statutes cannot apply, which speak of *mutual debts* between plaintiff and defendant, for here there is in law no *debt* due from the defendant to the plaintiff, against which the defendant is to set off the plaintiff's debt due to him. Assumpsit, covenant and debt, for the non-payment of money are therefore the only forms of action in which a set-off is allowed And where it is allowed, the defendant can only set off a debt, which debt must be liquidated in amount. Another restriction implied in the term *mutual*, is that the debts to be set against each other must be due in the same right; thus if a man be sued as executor for the debt of his testator, he cannot set off a debt, which the plaintiff may owe to him personally, or *vice versâ*.

In certain cases the set-off must be pleaded, and where it is intended to give it in evidence under the general issue, a notice must be given with the plea of the general issue, specifying the subject-matter of the set-off, that the plaintiff may come prepared to dispute it. See the cases collected in *Selwyn's N. P.* 148.

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 apprize 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 [306] perverted to the purposes of chicane and delay, the courts have of late in some instances, and the legislature in many more, permitted the general issue to be pleaded, which leaves every thing open, the fact, the law, and the equity of the case; and have allowed special matter to be given in evidence at the trial. And, though it should seem as if much confusion and uncertainty would follow from so great a relaxation of the strictness antiently observed, yet experience has shewn it to be otherwise; especially with the aid of a new trial, in case either party be unfairly surprized by the other.

2. SPECIAL pleas, *in bar* of the plaintiff's demand, are very various, according to the circumstances of the defendant's case. As, in real actions, a general release or a fine, both of which may destroy and bar the plaintiff's title. Or, in personal actions, an accord, arbitration, conditions performed, nonage of the defendant, or some other fact which precludes the plaintiff from his action [z]. 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; or the 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 writ of right, is *sixty* years: in assises, writs of entry, or other possessory actions real, of

[z] Append. No. III. § 6.

[a] See pag. 188. 196.

the seisin of one's ancestors, in lands; and either of their seisin, or one's own, in rents, suits, and services; *fifty* years: and in actions real for lands grounded upon one's own seisin or possession, such possession must have been within *thirty* years. By statute 1 Mar. st. 2. c. 5. this limitation does not extend to
[307] any suit for advowsons, upon reasons given in a former chapter [b]. But by the statute 21 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 antient maxim "*nullum tempus occurrit regi.*" By another statute, 21 Jac. I. c. 16. *twenty* years is the time of limitation in any writ of formedon: and, by a consequence, *twenty* years is also the limitation in every action of ejectment; for no ejectment can be brought, unless where the lessor of the plaintiff is entitled to enter on the lands [d], and, by the statute 21 Jac. I. c. 16. 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, replevin, account, and case, (except upon accounts between merchants,) debt on simple contract, or for arrears of rent, are limited by the statute last mentioned to *six* years after the cause of action commenced: and actions of assault, menace, battery, mayhem, and imprisonment, must be brought within *four* years, and actions for words within *two* years after the injury committed. (15)

[b] See pag. 250. [c] 3 Inst. 189. [d] See pag. 206.

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(15) This clause of the statute is divided into three parts; the words "trespass *quare clausum fregit*, and trespass," in the first, are confined to actions for trespasses on real or personal property; the exception in the same part of "accounts between merchants," includes only mutual current accounts not stated and balanced; but wherever there are mutual open accounts between parties, and credit has been given for any item within six years, this is neither within the specific exception of the statute, nor the statute itself, the item in question being held to be such an acknowledgment of a subsisting unsatisfied debt, as takes it out; the word "case" in this first part includes all such actions as are brought for the special damage result-

And by the statute 31 Eliz. c. 5. all suits, indictments, and informations, upon any penal statutes, where any forfeiture is

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but the consequence of them, and therefore does not fall within the last part of the clause; this also includes actions for libels. In the second part, under the words "assault and battery," are included actions for seduction of daughters, and criminal conversation; this flows as a necessary consequence from the decisions which have determined these actions to be trespass and not case, and the doubts which were expressed, were prior to those decisions. The last part is confined to actions for actionable words, that is, in the strict sense, actions of slander.

It has been hinted that there may be cases of simple contracts which have been entered into and broken more than six years before the action brought, and which yet are not affected by the statute; these are where there is evidence of a subsequent promise to pay the debt, or an acknowledgment of its existence; and they stand upon strict principle. The declaration states a consideration, a promise, and a breach, the plea denies a cause of action within six years, and the replication affirms it; now as nothing ties the plaintiff down to sustain his declaration by any one of two promises, rather than the other, (supposing two applicable promises to have been made,) he is at liberty to take the latest; if therefore there be a subsequent express promise made within six years, proof of that will sustain the replication, and it will apply itself to the promise laid in the declaration; and there must be the same result from a mere acknowledgment, because from that acknowledgment the law will raise a promise in all respects of the same import as an express promise. The true way, therefore of considering these cases is to regard them not as exceptions out of the statute, but as actions brought on promises made within six years. And that this is so, is clear from this, that the subsequent promise or acknowledgment must always be of such a nature as to agree with that laid in the declaration. Thus, suppose an executor suing upon a promise to the testator, and the statute pleaded and replied to, a subsequent promise or acknowledgment to the executor himself would not support the action, because it would not prove the declaration.

It will be observed that there is no statutory limitation to actions on contracts by specialty; the instrument there is a standing solemn testimony of the existence of the contract, and therefore the case is not within the same danger, as those which rest merely on parol, or less solemn authentication; yet even here some regulation has been felt to be necessary; and therefore where a party sues on a bond, over which he has slumbered for twenty years, and there is no evidence of any demand of payment, or any payment of interest or acknowledgment within that time, the court will direct the jury to presume that in point of fact it has long ago been duly paid.

A provision is made by the statute for plaintiffs who at the time of the cause of action accruing may be labouring under any disability of infancy, coverture, insanity, imprisonment, or absence beyond the seas; these have the *same* respective periods allowed them after removal of the disability. The 4 Ann. c. 16. enacts the same where a defendant is beyond the seas at the

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 (16), unless where any other time is specially limited by the statute. Lastly, by statute 10&11 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
[308] an action for any injury committed at any distance of time. Upon both these accounts the law therefore holds, that "*in-*
"*terest reipublicae 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. (17)

[e] Pott Ant. b. 1. c. 21.

the time of the cause of action accruing. In both cases the disability must exist *at the time* of the cause of action first accruing; if the time once begins to run, no subsequent impediment will stop it The 10 & 11 W. 3. c. 14. which is mentioned in the text, gives *five* years after the removal of any such disability, in the cases to which it applies.

(16) If the informer fail to sue within one year, then by the same section the crown has two years to sue in from that period

(17) In actions upon promises there will very commonly be three periods to be considered, that of the promise made, the performance for default of which the action is brought, and the injurious consequence to the plaintiff. The courts have determined that the *breach* of the promise is the period to reckon from, and not the making of it, or the happening of the damage, for it is the breach, which gives the right of action. See *Battley* v. *Faulkner*, 3 B & A 288., and *Short* v. *M'Arthy*, *ibid.* p.626. Hence will appear collaterally that the plea of *non assumpsit infra sex annos* will be an improper plea in all cases where the promise was to do a future act, because the breach may have been committed within six years, though the promise was made before; and therefore it is more safe in all cases to plead that the cause of action did not accrue within six years.

An *estoppel* is likewise a special plea in bar; which happens where a man hath done some act, or executed some deed, which estops or precludes him from averring any thing to the contrary. As if tenant for years (who hath no freehold) levies a fine to another person. Though this is void as to strangers, yet it shall work as an estoppel to the cognizor; for, if he afterwards brings an action to recover these lands, and his fine is pleaded against him, he shall thereby be estopped from saying, that he had no freehold at the time, and therefore was incapable of levying it.

The conditions and qualities of a plea (which, as well as the doctrine of estoppels, will also hold equally, *mutatis mutandis*, with regard to other parts of pleading,) are, 1. That it be single and containing only one matter; for duplicity begets confusion. But by statute 4 & 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. (18) 2. That it be direct and positive, and not argumentative. 3. That it have convenient certainty of time, place, and persons. 4. That it answer the plaintiff's allegations in every material point. 5. That it be so pleaded as to be capable of trial.

Special pleas are usually in the affirmative, sometimes in [309] 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.

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(18) This statute does not extend to appeals of murder or felony, to indictments, or to actions or informations on any penal statutes; but it is extended by 9 Ann. c. 20 to writs of mandamus, and informations in the nature of *quo warranto*. The court will not grant leave to plead two matters which are upon the face of them inconsistent, as *non assumpsit* to the whole demand, and tender of part, 4 T R. 194.; nor two matters which require different trials. 2 Bl. R 1157. 1207.

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, *nul tort*, *nul 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 in an action of debt upon bond the defendant
[310] pleads *solvit ad diem*, that he paid the money when due, here the plaintiff in his *replication* may totally traverse this plea, by denying that the defendant paid it: or, he may allege new matter in contradiction to the defendant's plea; as when the defendant pleads *no award made*, the plaintiff may reply, and set forth an actual award, and assign a breach [g]: or the replication may *confess and avoid* the plea, by some new matter or distinction consistent with the plaintiff's former declaration; as, in an action for trespassing upon land whereof the plaintiff is seised, if the defendant 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

[f] Dr. & Stud. 2. c. 53.

[g] Append. No. III. § 6.

fact of the descent; or he may confess and avoid it, by replying, that true it is that such descent happened, but that since the descent the defendant himself demised the lands to the plaintiff for term of life. To the replication the defendant may *rejoin*, or put in an answer called a *rejoinder*. The plaintiff may answer the rejoinder by a *sur-rejoinder*; upon which the defendant may *rebut*; and the plaintiff answer him by a *sur-rebutter*. Which pleas, replications, rejoinders, sur-rejoinders, rebutters, and sur-rebutters, answer to the *exceptio*, *replicatio*, *duplicatio*, *triplicatio*, and *quadruplicatio* of the Roman laws [h].

THE whole of this process is denominated the *pleading*; in the several stages of which it must be carefully observed, not to depart or vary from the title or defence, which the party has once insisted on. For this (which is called a *departure* in pleading) might occasion endless altercation. Therefore the replication must support the declaration, and the rejoinder must support the plea, without departing out of it. As in the case of pleading no award made, in consequence of a bond of arbitration, to which the plaintiff replies, setting forth an actual award; now the defendant cannot rejoin that he hath performed this award, for such rejoinder would be an entire departure from his original plea, which alleged that no such award was made: therefore he has now no 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 it's 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

[h] *Inst.* 4. 14. Bract. *l.* 5. *tr.* 5. *c.* 1.

plaintiff may reply and assign another close in D, specifying the abuttals and boundaries, as the real place of the injury[i].

IT hath previously been observed[k] that *duplicity* in pleading must be avoided. Every plea must be simple, entire, connected, and confined to one single point: it must never be entangled with a variety of distinct independent answers to the same matter; which must require as many different replies, and introduce a multitude of issues upon one and the same dispute. For this would often embarrass the jury, and sometimes the court itself, and at all events would greatly enhance the expense of the parties. Yet it frequently is expedient to plead in such a manner as to avoid any implied admission of a fact, which cannot with propriety or safety be positively affirmed or denied. 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
[312] age) to be "an exclusion of a conclusion." For the use of it is, to save the party from being concluded with respect to some fact or circumstance, which cannot be directly affirmed or denied without falling into duplicity of pleading; and which yet, if he did not thus enter his protest, he might be deemed to have tacitly waived or admitted. Thus, while tenure in villenage subsisted, if a villein had brought an action against his lord, and the lord was inclined to try the merits of the demand, and at the same time to prevent any conclusion against himself that he had waived his 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

[i] Bro *Abr. t. trespass*, 205. 284.
[k] *p.* 308.
[l] 1 Inst. 124.

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 any thing 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

[m] Co. Litt. 126.
[n] See book II. ch. 6. pag. 94
[o] Appendix, No. III. § 6.
[p] *Ibid.* No. II. § 4.

not yet appear whether the fact will be disputed, the plaintiff not having yet asserted the existence of any award; but when the plaintiff replies, and sets forth an actual 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 THE TWENTY-FIRST.

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; (1) 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 [31
judgment for want of sufficient matter alleged [a]. Sometimes demurrers are merely for want of sufficient *form* in the writ or declaration. But in case of exceptions to the form or manner

[a] Append. No. III. § 6.

(1) The demurrer confesses only such facts as are properly pleaded, and are material to the issue.

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. (2) And upon either a *general*, or such a *special* demurrer, the opposite party must aver it to be sufficient, which is called a joinder in demurrer [b], and then the parties are at issue in point of law. Which issue in law, or demurrer, the judges of the court, before which the action is brought, must determine.

An issue of fact is where the fact only, and not the law, is disputed. And when he that denies or traverses the fact pleaded by his antagonist has tendered the issue thus: "and "this he prays may be inquired of by the country;" or, "and "of this he puts himself upon the country;" it may immediately be subjoined by the other party, "and the said A. B. "doth the like." Which done, the issue is said to be joined, both parties having agreed to rest the fate of the cause upon the truth of the fact in question [c]. And this issue of fact must, generally speaking, be determined, not by the judges of the court, but by some other method; the principal of which methods is that by the country, *per pais*, (in Latin *per patriam*,) that is, by jury. Which establishment of different tribunals for determining these different issues, is in some measure agreeable to the course of justice in the Roman republic, where the *judices ordinarii* determined only questions of fact, but questions of law were referred to the decisions of the *centumviri* [d].

But here it will be proper to observe, that during the whole of these proceedings, from the time of the defendant's appearance in obedience to the king's writ, it is necessary that both
[316] 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 attornies, or upon default of one of them, after his original appearance and a time prefixed for his ap-

[b] Append. No. III. § 6
[c] Append. No. II. § 4.
[d] Cic. *de Orator.* l. 1. c. 38.

(2) He must not merely show the kind of fault, but the specific fault of which he complains; it would not be enough to say that the plea was double, but he must show wherein the duplicity consists.

pearance 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 the proceedings are continued without interruption from one adjournment to another. If these continuances are omitted, the cause is thereby discontinued, and the defendant is discharged *sine die*, without a day, for this turn: for by his appearance in court he has obeyed the command of the king's writ; and, unless he be adjourned over to a day certain, he is no longer bound to attend upon that summons; but he must be warned afresh, and the whole must begin *de novo*. (3)

Now it may sometimes happen, that after the defendant has pleaded, nay, even after issue or demurrer joined, there may have arisen some new matter, which it is proper for the defendant to plead; as, that the plaintiff, being a feme-sole, is since married, or that she has given the defendant a release, and the like: here, if the defendant takes advantage of this new matter, as early as he possibly can, *viz.* at the day given for his next appearance, he is permitted to plead it in what is called a plea *puis darrein continuance*, or since the last adjournment. For it would be unjust to exclude him from the benefit of this [317
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

[e] Cro. Eliz. 49

(3) But these continuances are now become mere matter of form, and may be entered at any time, to make the record complete.

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. (4)

We have said, that demurrers, or questions concerning the *sufficiency* of the matters alleged in the pleadings, are to be determined by the judges of the court, upon solemn argument by counsel on both sides, and to that end a demurrer-book is made up, containing all the proceedings at length, which are afterwards entered on *record*, and copies thereof, called *paper-books*, are delivered to the judges to peruse. The *record*[f] is a history of the most material proceedings in the cause entered on a parchment roll, and continued down to the present time; in which must be stated the original writ and summons, all the pleadings, the declaration, view, or *oyer* prayed, the imparlances, plea, replication, rejoinder, continuances, and whatever farther proceedings have been had; all entered *verbatim* on the roll, and also the issue or demurrer, and joinder therein.

These were formerly all written, as indeed all public proceedings were, in Norman or law French, 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 fa-*

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[f] Appendix, No. II. § 4. No. III. § 6.

(4) This plea it is imperative upon the court to receive, but then it is in some respects treated as a dilatory plea, and must be verified on oath, before it can be filed. *Paris* v. *Salkeld*, 2 Wils. 157.

"*cunda Britannos*[g]." This continued till the reign of Edward III.; who, having employed his arms successfully in subduing the *crown* of France, thought it unbeseeming the dignity of the victors to use any longer the *language* of a vanquished country. By a statute, therefore, passed in the thirty-sixth year of his reign[h], it was enacted, that for the future all pleas should be pleaded, shewn, defended, answered, debated, and judged in the English tongue; but be entered and enrolled in Latin. In like manner as don Alonso X. king of Castile, (the great-grandfather of our Edward III.) obliged his subjects to use the Castilian tongue in all legal proceedings[i]; and as, in 1286, the German language was established in the courts of the empire[k]. And perhaps if our legislature had then directed that the writs themselves, which are mandates from the king to his subjects to perform certain acts, or to appear at certain places, should have been framed in the English language, according to the rule of our antient 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 a Gothic black letter, has occasioned many a student to throw away his Plowden and Littleton, without venturing to attack a page of them. And yet in reality, upon a nearer acquaintance, they would have found nothing very formidable in the language; which differs in it's grammar and orthography as much from [319
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

[g] *Juv.* xv. 111.
[h] *c.* 15.
[i] Mod. Un. Hist. xx. 211.
[k] Mod. Un. Hist. xxix. 235.
[l] Mirr. c. 4. § 2.

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 undertand 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 it's texture, calculated to express the ideas of mankind just as they arise in the human mind, without any rhetorical flourishes, or perplexed ornaments of style: for it may be observed, that those laws and ordinances, of public as well as private communities, are generally the most easily understood, where strength and perspicuity, not harmony or elegance of expression, have been principally consulted in compiling them. These northern nations, or rather their legislators, though they resolved to make use of the Latin tongue in promulging their laws, as being more durable and more generally known to their conquered subjects than their own Teutonic dialects, yet (either through choice or necessity) have frequently intermixed therein some words of a Gothic original, which is, more or less, the case in every country of
[320] 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

[m] The following sentence, "*si quis "ad battalia curte sua exierit*, if any one "goes out of his own court to fight," &c. may raise a smile in the student as a flaming modern anglicism, but he may meet with it among others of the same stamp, in the laws of the Burgundians on the continent, before the end of the fifth century. (*Add.* 1. c. 5. § 2.)

language, calculated for eternal duration, and easy to be apprehended both in present and future times; and on those accounts best suited to preserve those memorials which are intended for perpetual rules of action. The rude pyramids of Egypt have endured from the earliest ages, while the more modern and more elegant structures of Attica, Rome, and Palmyra, have sunk beneath the stroke of time.

As to the objection of locking up the law in a strange and unknown tongue, this is of little weight with regard to records, which few have occasion to read but such as do, or ought to, understand the rudiments of Latin. And besides it may be observed of the law-latin, as the very ingenious sir John 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 chuse to live in "ignorance of things the most useful and important, than to "have their delicate ears wounded by the use of a word un-"known 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 [321
latinity, for a constable, a record, or a deed of feoffment; it is therefore to be imputed as much to necessity, as ignorance, that they were stiled in our forensic dialect *constabularius*, *recordum*, and *feoffamentum*. Thus again, another uncouth word of our *antient* laws, (for I defend not the ridiculous barbarisms sometimes introduced by the ignorance of *modern* practisers,) the substantive *murdrum*, or the verb *murdrare*, however harsh and unclassical it may seem, was necessarily

[n] Pref. Rep.

[o] Pref. *ad Eadmer.*

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.* (5)

A SIMILAR necessity to this produced a similar effect at Byzantium, when the Roman laws were turned into Greek for the use of the oriental empire; for, without any regard to Attic elegance, the lawyers of the imperial courts made no scruple to translate *fidei commissarios*, φιδειϰομμισσαριυς [p]; *cubiculum*, ϰυβυϰλειον [q]; *filium-familias*, ϖαιδα-φαμιλιας [r]; *repudium*, ρεπυδιον [s]; *compromissum*, ϰομπρομισσον [t]; *reverentia et obsequium*, ρευερεντια ϰαι οβσεϰυιον [u]; and the like. They studied more the exact and precise import of the words, than the neatness and delicacy of their cadence. And my academical readers will excuse me for suggesting, that the terms of the law are not more numerous, more uncouth, or more difficult to be explained by a teacher, than those of logic, physics, and the whole circle of Aristotle's philosophy, nay even of the politer arts of architecture and its kindred studies, or the science of rhetoric itself. Sir Thomas More's famous legal question [w] contains in it nothing more difficult, than the de-
322] finition 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 it's subsequent explanation by Adrian Heereboord, who assures us [x] that "*materia prima non est corpus, neque per formam cor-* "*poreitatis, 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.

[p] *Nov* 1. *c.* 1.
[q] *Nov.* 8. *edict. Constantinop.*
[r] *Nov.* 117. *c.* 1.
[s] *Ibid. c.* 8.
[t] *Nov.* 82. *c.* 11.
[u] *Nov.* 78. *c.* 2.
[w] See pag 149.
[x] *Philosoph. natural. c.* 1. § 28. *&c.*

(5) See Vol. IV. p. 195. for the original meaning of the word *murdrum.*

THIS technical Latin continued in use from the time of it's first introduction, till the subversion of our antient 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 [323] increased) to write only a stated number of words in a sheet; and as the English language, through the multitude of it's 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 impedit*, *fieri facias*, *habeas corpus*, and the rest, not being capable of an English dress with any degree of seriousness) that in two years time it was found necessary to make a new act, 6 Geo. II. c. 14.; which allows all technical words to continue in the usual

[y] For instance, these three words, converted into seven, "according to the "*secundum formam statuti*," are now "form of the statute."

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 antient immutable *court hand* in writing the records or other legal proceedings; whereby the reading of any record that is fifty years old is now become the object of science, and calls for the help of an antiquarian. But that branch of it, which forbids the use of abbreviations, seems to be of more solid advantage, in delivering such proceedings from obscurity: according to the precept of Justinian [z]; "*ne per scripturam aliqua fiat in posterum dubitatio,* "*jubemus non per siglorum captiones et compendiosa enigmata* "*ejusdem codicis textum conscribi, sed per literarum conse-* "*quentiam 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
[324] justifies it *causa venationis*, for that he was hunting; and to this the plaintiff demurs, that is, he admits the truth of the plea, but denies the justification to be legal: now, on arguing this demurrer, if the court be of opinion, that a man may not justify trespass in hunting, they will give judgment for the plaintiff; if they think that he may, then judgment is given for the defendant. Thus is an issue in law, or demurrer, disposed of.

An issue of fact takes up more form and preparation to settle it; for here the truth of the matters alleged must be solemnly examined and established by proper evidence in the channel prescribed by law. To which examination of facts, the name of trial is usually confined, which will be treated of at large in the two succeeding chapters.

[z] *de concept. digest.* § 13.

CHAPTER THE TWENTY-SECOND.

OF THE SEVERAL SPECIES OF TRIAL.

THE uncertainty of legal proceedings is a notion so generally adopted, and has so long been the standing theme of wit and good humour, that he who should attempt to refute it would be looked upon as a man, who was either incapable of discernment himself, or else meant to impose upon others. Yet it may not be amiss, before we enter upon the several modes whereby certainty is meant to be obtained in our courts of justice, to inquire a little wherein this uncertainty, so frequently complained of, consists; and to what causes it owes it's original.

IT hath sometimes been said to owe it's 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, of [326] Denmark, Muscovy, and Prussia; of wild and uncultivated

[a] See the preface to sir John Davies's reports; wherein many of the following topics are discussed more at large.

nations, the savages of Africa and America; or of narrow domestic republics, in antient Greece and modern Switzerland; and unreasonably require the same paucity of laws, the same conciseness of practice, in a nation of freemen, a polite and commercial people, and a populous extent of territory.

In an arbitrary despotic government, where the lands are at the disposal of the prince, the rules of succession, or the mode of enjoyment, must depend upon his will and pleasure. Hence there can be but few legal determinations relating to the property, the descent, or the conveyance of real estates; and the same holds in a stronger degree with regard to goods and chattels, and the contracts relating thereto. Under a tyrannical sway trade must be continually in jeopardy, and of consequence can never be extensive: this therefore puts an end to the necessity of an infinite number of rules, which the English merchant daily recurs to for adjusting commercial differences. Marriages are there usually contracted with slaves; or at least women are treated as such: no laws can be therefore expected to regulate the rights of dower, jointures, and marriage settlements. Few also are the persons who can claim the privileges of any laws; the bulk of those nations, *viz.* the commonalty, boors, or peasants, being merely villeins and bondmen. Those are therefore left to the private coercion of their lords, are esteemed (in the contemplation of these boasted legislators) incapable of either right or injury, and of consequence are entitled to no redress. We may see, in these arbitrary states, how large a field of legal contests is already rooted up and destroyed.

Again; were we a poor and naked people, as the savages of America are, strangers to science, to commerce, and the arts as well of convenience as of luxury, we might perhaps be content, as some of them are said to be, to refer all disputes to the next man we met upon the road, and so put a short
[327] end to every controversy. For in a state of nature there is no room for municipal laws; and the nearer any nation approaches to that state, the fewer they will have occasion for. When the people of Rome were little better than sturdy shepherds or herdsmen, all their laws were contained in ten tables: but as luxury, politeness, and dominion

increased, the civil law increased in the same proportion; and swelled to that amazing bulk which it now occupies, though successively pruned and retrenched by the emperors Theodosius and Justinian.

In like manner we may lastly observe, that, in petty states and narrow territories, much fewer laws will suffice than in large ones, because there are fewer objects upon which the laws can operate. The regulations of a private family are short and well known; those of a prince's household are necessarily more various and diffuse.

The causes therefore of the multiplicity of the English laws are, the extent of the country which they govern; the commerce and refinement of its inhabitants; but, above all, the liberty and property of the subject. These will naturally produce an infinite fund of disputes, which must be terminated in a judicial way; and it is essential to a free people, that these determinations be published and adhered to; that their property may be as certain and fixed as the very constitution of their state. For though in many other countries every thing is left in the breast of the judge to determine, yet with us he is only to *declare* and *pronounce*, not to *make* or *new-model*, the law. Hence a multitude of decisions, or cases adjudged, will arise; for seldom will it happen that any one rule will exactly suit with many cases. And in proportion as the decisions of courts of judicature are multiplied, the law will be loaded with decrees, that may sometimes (though rarely) interfere with each other: either because succeeding judges may not be apprized of the prior adjudication; or because they may think differently from their predecessors; or because the same arguments did not occur formerly as at present; or, in fine, because of the natural imbecility and imperfection that attends all human 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 uncer-

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 antient any system of laws is, the more it is liable to be perplexed with the multitude of judicial decrees. When therefore a body of laws, of so high antiquity as the English, is in general so clear and perspicuous, it argues deep wisdom and foresight in such as laid the foundations, and great care and circumspection in such as have built the superstructure.

[329] But is not (it will be asked) the multitude of law-suits, which we daily see and experience, an argument against the clearness and certainty of the law itself? By no means: for among the various disputes and 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 it's 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 or that estate, has occasionally been disputed for more than two centuries past, and will continue to be disputed as long as the carelessness, the ignorance, or singularity of testators shall continue to clothe their intentions in dark or new-fangled expressions.

BUT, notwithstanding so vast an accession of legal controversies, arising from so fertile a fund as the ignorance and wilfulness of individuals, these will bear no comparison in point of number to those which are founded upon the dishonesty, and disingenuity of the parties: by either their suggesting complaints that are false in fact, and thereupon bringing groundless actions; or by their denying such facts as are true, in setting up unwarrantable defences. *Ex facto oritur jus:* if therefore the fact be perverted or misrepresented, the law which arises from thence will unavoidably be unjust or partial. And, in order to prevent this, it is necessary to set right the [330] 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 falshood.

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 lawsuits 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 it's examination of facts according to the nature of the facts themselves: this being the one invariable principle pursued, that as well as 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 by *wager of law*, and by *jury*.

I. First then of the trial by *record*. This is only used in one particular instance: and that is where a matter of record [331] is pleaded in any action, as a fine, a judgment, or the like; and the opposite party pleads, "*nul tiel record*," that there is no such matter of record existing: upon this, issue is tendered and joined in the following form, "and this he prays may be "inquired of by *the record*, and the other doth the like;" and hereupon the party pleading the record has a day given him to bring it in, and proclamation is made in court for him to "bring forth the record by him in pleading alleged, or "else he shall be condemned;" and, on his failure, his antagonist shall have judgment to recover. The trial therefore of this issue is merely by the record; for, as sir Edward Coke [b] observes, a record or enrollment 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 re-

[b] 1 Inst. 117. 260

[c] 6 Rep. 53.

cord [d]. And also, whether a manor be to be held in antient demesne or not, shall be tried by the record of *domesday* in the king's exchequer [e]. (1)

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 it's nature, must be evident to the court either from ocular demonstration or other irrefragable proof, there the law departs from it's [332
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 [f]; commanding him that he constrain the said party to appear, that it may be ascertained by the view of his body by the king's justices, whether he be of full age or not; "*ut per aspectum* "*corporis sui constare poterit justiciariis nostris, si praedictus* "*A sit plenae aetatis necne* [g]." If however the court has, upon inspection, any doubt of the age of the party, (as may frequently be the case,) it may proceed to take proofs of the fact; and, particularly, may examine the infant himself upon an oath of *voir dire*, *veritatem dicere*, that is, to make true answer to such questions as the court shall demand of him: or the court may examine his mother, his godfather, or the like [h].

[d] 9 Rep. 31.
[e] *Ibid*
[f] *Ibid.*
[g] This question of non-age was formerly, according to Glanvil, c. 15.) tried by a jury of eight men, though now it is tried by inspection.
[h] 2 Roll Abr. 573.

(1) See Tidd's Practice, 781. 7th edit., as to the distinctions in form and the course of proceeding when the record pleaded is of the same, or a different court from that in which it is pleaded.

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
333] the court upon inspection; for which purpose they may call in the assistance of surgeons [j]. 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

[h] 9 Rep. 30.
[i] *Ibid.* 31.
[j] 2 Roll. Abr. 578.
[k] 1 Sid. 108.
[l] Hardr. 408.
[m] Cro. Eliz. 227.

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 mareschall 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 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

[n] Litt. § 102.
[o] 9 Rep 31
[p] 2 Roll. Abr. 583.
[q] Dyer. 176, 177.
[r] Co. Litt. 74. 4 Burr. 248.

(2) It cannot fail to strike the reader as extraordinary that the judges should have been thought competent to decide by inspection the greater number of questions here stated; and, in fact, the trial by inspection is seldom or never resorted to in modern practice.

country [a]. 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. (3) 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

[a] Bro. *Abr. tit. trial. pl.* 96.

ante, Vol I. p. 76. This privilege of London, (see Hobart, p. 86.) "is to be understood of such customs as are of the nature of local "laws, peculiar laws for that city, general to all the citizens differing from "the general law of the kingdom," such as the distribution of the effects of deceased freemen By these laws the citizens act, and it is but justice that they should be tried and indemnified by them, even where they are sued in the king's general courts. Then, as the judges of these courts cannot be supposed to be cognisant of these customs, when they come before the court for the first time, they take the best evidence they can have of them, a formal certificate of them from the mayor and aldermen, the judges of the city courts, through the mouth of their recorder. But when a custom does not come before them for the first time, that is, has once been certified, it then falls within the rule applicable to any other general custom, which having been once tried, determined, and recorded, comes to be pleaded again afterwards in the same court; the court then being cognisant of it, takes notice of it judicially, and will not suffer it to be certified over again. *Blaquiere* v. *Hawkins*, Dougl 380.

In the privilege thus explained, there is scarcely any thing more than an application of general principles in the administration of justice, that a party living under particular laws should be entitled to the protection of those laws, wherever his conduct may be called in question; and that the courts of one jurisdiction should receive from those of the other, by their certificate, the particular laws in question. But where the matter in dispute is not a point of customary law, but of prescriptive right or interest, which the city claims to enjoy, and which may affect the rights or interests of other persons, these principles do not apply; and it would be unjust to allow the party to be witness and judge in his own cause. It is said that a grant of cognisance of pleas before the steward of the grantee may extend even to cases in which the grantee is party, because the steward is judge and not the grantee; as the king's judges ordinarily try causes in which he is party. But in the case of London the certificate is not the recorder's, but that of the mayor and aldermen. The certificate is conclusive and cannot be reversed; and the only remedy for a false one is by action on the case, not against the recorder, who is purely ministerial, but the mayor and aldermen. Hob. 87 *Day* v. *Savadge*.

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 [v], in case of privilege pleaded to be sued only in the city courts. Of a nature somewhat similar to which is the trial of the privilege of the university, when the chancellor claims cognizance of the cause, because one of the parties is a privileged person. [335] 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 [u]: 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. (4)

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 bastardy shall be tried by

[t] Hob. 85.
[v] Co. Litt. 74.
[u] 2 Roll. Abr. 583.
[w] Co. Litt. 74. 2 Lev. 250.
[x] Hob. 179.

(4) See ante, p. 85. n. (11).

the bishop's certificate, but by a jury [y]. For a special bastard is one born before marriage, of parents who afterwards intermarry: which is bastardy by our law, though not by the ecclesiastical. It would therefore be improper to refer the trial of that question to the bishop; who, whether the child
[336] be born before or after marriage, will be sure to return or certify him legitimate [z]. (5) *Ability* of a clerk presented [a], *admission*, *institution*, and *deprivation* of a clerk, shall also be tried by certificate from the ordinary or metropolitan, because of these he is the most competent judge [b]: but *induction* shall be tried by a jury, because it is a matter of public notoriety [c], and is likewise the corporal investiture of the temporal profits. *Resignation* of a benefice may be tried in either way [d]; but it

[y] Dyer. 79.
[z] See Introd. to the great charter, *edit. Oxon. sub anno* 1233.
[a] See Book I. ch. 11.
[b] 2 Inst. 632. Show. Parl. c. 88. 2 Roll. Abr. 583, &c
[c] Dyer 228
[d] 2 Roll. Abr. 583.

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(5) The progress of this matter is rather curious, and is detailed by the author in his introductory discourse to the history of the charters, pp. lv. lvii. In the year 1180, 26 H. 2., Pope Alexander directed, under pain of spiritual censures, that those whom we call special bastards, should be admitted to the secular inheritances of their parents The English lawyers, however, still held that such persons were not inheritable in England. But as the trial, whether bastard or not, was by certificate from the bishops, and they made returns sometimes evasive, and sometimes according to the canon, but in defiance of the common, law; to remedy this it was ordained in a parliament held at Tewkesbury, A D. 1234, 18 H. 3., that for the future the question submitted to them should be "whether born before nuptials or no," to which they should return a direct answer This drove them in the parliament held at Merton, in the next year, to declare openly, that they neither would nor could make any return to this new form of inquisition, because that would be to the prejudice of holy church; and they implored the barons to admit Alexander's canon; their request was met by the memorable answer, *Nolumus leges Angliæ mutare, &c.* The refusal of the bishops, however, set the judges on considering how special bastardy was to be ascertained; and it was soon perceived that in truth it was not a question of a spiritual nature; for assuming the legality of the marriage (which in such a question would always be admitted), the dispute could only be concerning the priority or posteriority of the birth, which was a matter whereof laymen were as competent judges as the clergy. And so it came to be established law, that though general bastardy, which involved the question of the legality of the marriage, should be tried by the bishop's certificate, yet special bastardy should be by a jury.

seems most properly to fall within the bishop's cognizance. 6. The trial of all customs and practice of the courts shall be by certificate from the proper officers of those courts respectively; and, what return was made on a writ by the sheriff or under-sheriff, shall be only tried by his own certificate [e]. And thus much for those several issues, or matters of fact, which are proper to be tried by certificate.

IV. A FOURTH species of trial is that by *witnesses*, *per testes*, without the intervention of a jury. This is the only method of trial known to the civil law; in which the judge is left to form in his own breast his sentence upon the credit of the witnesses examined: but it is very rarely used in our law, which prefers the trial by jury before it in almost every instance. Save only that when a widow brings a writ of dower, and the tenant pleads that the husband is not dead; this being looked upon as a dilatory plea, is in favour of the widow, and for greater expedition allowed to be tried by witnesses examined before the judges: and so, saith Finch [f], shall no other case in *our* law. But sir Edward Coke [g] mentions some others: as to try whether the tenant in a real action was duly summoned, or the validity of a challenge to a juror: so that Finch's observation must be confined to the trial of direct, and not collateral, issues. (6) And in every case sir Edward Coke lays it down, that the affirmative must be proved by two witnesses at the least.

V. THE next species of trial is of great antiquity, but much disused; though still in force if the parties chuse to abide by it; I mean the trial by *wager of battel*. (7) This seems to have owed its original to the military spirit of our ancestors, [337]

[e] 9 Rep. 31. [f] L. 423. [g] 1 Inst. 6.

(6) In the Reports, b. 9. p. 30, other analogous instances of *direct* issues, which are to be tried by witnesses, are given; as if a widow brings an appeal of the death of her husband, or an assise to recover land, and the husband's life is pleaded, in both cases the trial will be by witnesses. Probably Finch's instance, stated very concisely, was intended to include these.

(7) By the 59 G. 3. c. 46. it is enacted that for the future in no writ of right shall the tenant be received to wage battel, nor shall issue be joined, nor trial be had by battel in any writ of right.

joined to a superstitious frame of mind: it being in the nature of an appeal to Providence, under an apprehension and hope (however presumptuous and unwarrantable) that heaven would give the victory to him who had the right. The decision of suits, by this appeal to the God of battles, is by some said to have been invented by the Burgundi, one of the northern or German clans that planted themselves in Gaul. And it is true, that the first written injunction of judiciary combats that we meet with, is in the laws of Gundebald, *A.D.* 501, which are preserved in the Burgundian 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 antient Goths in Sweden we find the practice of judiciary duels established upon much the same footing as they formerly were in our own country [j].

This trial was introduced into England among other Norman customs by William the conqueror; but was only used in three cases, one military, one criminal, and the third civil. The first in the court-martial, or court of chivalry and honour [k]; the second in appeals of felony [l], of which we shall speak in the next book; and the third upon issue joined in a
[338] 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

[h] Seld of duels c. 5.
[i] *l.* 2. *c.*118. Stiernh. *de jure Sueon l.* 1. *c.*7.
[k] Co. Litt 261.
[l] 2 Hawk. P.C c. 45.

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 Goliah 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, it may be matter of curiosity, at least, to inquire into the forms of this proceeding, as we may gather them from antient 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 was himself a witness of the ceremony. The form, as appears from the authors before cited, is as follows:

WHEN the tenant in a writ of right pleads the general issue, *viz.* that he hath more right to hold, than the demandant hath to recover; and offers to prove it by the body of his [339] champion, which tender is accepted by the demandant; the tenant in the first place must produce his champion, who, by throwing down his glove as a gage or pledge, thus *wages* or stipulates battel with the champion of the demandant; who, by taking up the gage or glove, stipulates on his part to accept the challenge. The reason why it is waged by champions, and not by the parties themselves, in civil actions, is because, if any party to the suit dies, the suit must abate and

[m] c. 3. § 23.
[n] *Decret. part* 2. *caus.* 2. *qu.* 5. *c.* 22.
[o] Append No. I. § 5.
[p] Glanvil. *l.* 2. *c.* 3. *Vet. nat brev. fol.* 2. *Nov. Nar. tit. Droit. patent, fol.* 221. (*edit.* 1534) Year-book, 29 Edw. III. 12. Finch. L. 421. Dyer. 301. 2 Inst. 247.
[q] Rushw. coll. vol. 2. part 2. fol. 112. 19 Rym. 322.
[r] Cro. Car. 512.
[s] Dyer. 301.
[t] *Gloss.* 102.

be at an end for the present; and therefore no judgment could be given for the lands in question, if either of the parties were slain in battel [t]: and also that no person might claim an exemption from this trial, as was allowed in criminal cases, where the battel was waged in person. (8)

A PIECE of ground is then in due time set out, of sixty feet square, enclosed with lists, and on one side a court erected for the judges of the court of common pleas, who attend there in their scarlet robes; and also a bar is prepared for the learned serjeants at law. When the court sits, which ought to be by sunrising, proclamation is made for the parties, and their champions; who are introduced by two knights, and are dressed in a coat of armour, with red sandals, barelegged from the knee downwards, bareheaded, and with bare arms to the elbows. The weapons allowed them are only batons, or staves of an ell long, and a four-cornered leather target; so that death very seldom ensued this civil combat. In the court military indeed they fought with sword and lance, according to Spelman and Rushworth; as likewise in France only villeins fought with the buckler and baton, gentlemen armed at all points. And upon this and other circumstances, the president Montesquieu [u] hath with great ingenuity not only deduced the impious custom of private duels upon imaginary points of honour, but hath also traced the heroic madness of knight-errantry, from the same original of judicial combats. But to proceed.

[340] WHEN the champions, thus armed with batons, arrive within the lists or place of combat, the champion of the tenant takes his adversary by the hand, and makes oath that the tenements in dispute are not the right of the demandant,

[t] Co. Litt. 294. *Dyversite des courts*, 304. [u] Sp. L. b. 28. c. 20. 22.

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(8) In the year-book, 1 H. 6 p. 6., is an entry of the proceedings in wager of battel, up to the time of the battel, in a writ of right for the manor of Cappenhow, in Cumberland, between Sir Peter C. and Henry Percy, Earl of Northumberland. The Earl made default at the day; the report several times intimates that the proceedings were very carefully settled, and therefore it may be a good precedent to refer to in a matter of some curiosity.

and the champion of the demandant, then taking the other by the hand, swears in the same manner that they are; so that each champion is, or ought to be, thoroughly persuaded of the truth of the cause he fights for. Next an oath against sorcery and enchantment is to be taken by both the champions, in this or a similar form: "Hear this, ye justices, that "I have this day neither eat, drank, nor have upon me, "neither bone, stone, ne grass; nor any enchantment, sor- "cery, or witchcraft, whereby the law of God may be abased, "or the law of the devil exalted. So help me God and his "saints." (9)

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 defend himself till the stars appear, the tenant shall prevail in his cause; for it is sufficient for him to maintain his ground, and make it a drawn battle, he being already in possession; but, if victory declares itself for either party, for him is judgment finally given. This victory may arise, from the death of either of the champions: which indeed hath rarely happened; the whole ceremony, to say the truth, bearing a near resemblance to certain rural athletic diversions, which are probably derived from this original. Or victory is obtained, if either champion proves *recreant*, that is, yields, and pronounces the horrible word of *craven*; a word of disgrace and obloquy, rather than of any determinate meaning. But a horrible word it indeed is to the vanquished champion: since as a punishment to him for forfeiting the land of his principal by pronouncing that shameful word, he is condemned, as a recreant, *amittere liberam legem*, that is, to become infamous, and not be accounted *liber et legalis homo*; being supposed by the event to be proved for-

(9) In order to prevent any unfairness in the arms, or the use of any enchantments, the champions appear to have been compelled sometimes to strip themselves of their accoutrements, and leave them under the care of an officer of the palace, for the inspection of the judges; and that this was not always unnecessary, we may easily believe; in the year-book, 29 E. 3. p. 12., where this was done in a suit between the bishop and earl of Salisbury, for Salisbury castle, the reporter says, "and it was said that the justices had found in the coat of Shawel, who was the bishop's champion, several rolls of 'orisons, and sortileges.'"

sworn, 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*[w], 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*, *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 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.

[w] Append. No. I § 6

[x] *Est autem magna assisa regale quoddam beneficium, clementia principis, de consilio procerum, populis indultum; quo vitae hominum, et status integritati tam salubriter consulitur, ut in jure quod quis in libero soli tenemento possidet retinendo, duelli casum declinare possint homines ambiguum Ac per hoc contingit, insperatae et praematurae mortis ultimum evadere supplicium, vel saltem perennis infamiae opprobrium illius infesti et inverecundi verbi, quod in ore victi turpiter sonat, consecutivum. Ex aequitate autem maxima prodita est legalis ista institutio. Jus enim, quod post multas et longas dilationes vix evincitur per duellum, per beneficium istius constitutionis commodius et acceleratius expeditur.* (*l.* 2. *c* 7.)

[y] Co. Litt. 295.

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 it's ruins [z]; but it's 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 [343 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

[z] Sp. L. b 28. c 13. Stiernhook, *de jure Sueonum. l* 1 *c* 9. *Feud. l* 1. *t* 4. 10. 28.

[a] Exod xxii. 10.

[b] *Cod.* 4. 1. 12.

[c] Bro. *Abr. t.*

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 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 Hen. III., when a defendant in an action of debt waged his law, it was adjudged by the court "*quod defendat se duodecima* "*manu*[i]." Thus too, in an author of the age of Edward the first[k], we read, "*adjudicabitur reus ad legem suam duodecima* "*manu.*" And the antient treatise, entitled, *Dyversite des courts*, expressly confirms sir Edward Coke's opinion[l]. (10)

[d] *Cap* 3. Wilk. *LL. Angl. Sax.*
[e] Salk. 682.
[f] Co. Litt. 295.
[g] 2 Ventr. 171.
[h] *l.* 1. *c.* 9.
[i] Fitz. *Abr. t. ley* 78.
[k] *Hengham magna. c.* 5.
[l] *Il covient aver' oue luy xi maynz de jurer oue luy, sc. que luy entendre en lour consciens que il disoyt voier. (fol.*305. *edit.*1534.)

(10) In the case of *King* v. *Williams*, 2 B & C. 538., the defendant having waged his law, applied to the court to assign the number of compurgators, with whom he should come to perfect it. It was contended for him that the books left the number uncertain, and that it was the office of the court to assign it in each case. But the court refused the application, and left him to bring as many as he thought sufficient, observing that the question would be more fairly discussed if the plaintiff should object to the number brought; when both sides would be heard. The defendant then prepared to bring eleven, but the plaintiff abandoned the action.

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 wager 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, hoc est testimonium hominum legalium qui con-* "*tractui inter eos habito interfuerint præsentes, qui a judice* "*examinati, si concordes inveniantur, tunc reus poterit va-* "*diare legem suam contra petentem et contra sectam suam pro-* "*latam, ***et 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 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 345

[m] *l.* 2. *c.* 63.
[n] Bro. *Abr. t. ley gager.* 9
[o] Mod. Un. Hist. xxxiii. 22.
[p] Stiernhook *de jure Sueonum. l.* 1. *c.* 5

no man can with a safe conscience wage law of another man's contract; that is, swear that he never entered into it, or at least that he privately discharged it. (12) 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 accomptant; for, on a writ of *quo minus* in the exchequer for a debt on simple contract, the defendant is not allowed to wage his law[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 chuses 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, an action of

[z] Finch. L. 425. [a] Co. Litt. 295

(12) And, therefore, generally speaking, an action of debt for the simple contract debt of the deceased will not lie against them, because they are deprived of a legal defence, which those whom they represent might have made use of. See the cases collected in *Selwyn's N. P.* 787. *6th edit.*

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. (13) [348]

THESE six species of trials, that we have considered in the present chapter, are only had in certain special and eccentrical

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(13) In a work, entitled *Esprit, Origine, et Progrès des Institutions Judiciaires de l'Europe*, by M. Meyer, an ingenious attempt is made to explain and put on a reasonable footing the system of compurgation. As by the antient laws of nearly all the Northern States, the neighbourhood was responsible for every crime of which the author was not discovered, unless by another process they could clear themselves from all participation or collusion, certainly when a man was charged with a crime his neighbours had a direct interest in fixing the guilt on him; if then a number of them came forward to attest on oath their belief in his innocence, they swore against their own interest, and were highly credible. It is some confirmation of this, that no one was originally admitted as a compurgator, who did not stand under this responsibility; that is, who was not a free citizen, of full age, enrolled in the decennary. The difficulty is to explain how the system was adopted in civil suits, where I have never understood that the same liability was cast on the decennary; perhaps the transition began in the case of actions for trespasses and wrongs, which being of a criminal nature, might, at the option of the party, have been pursued criminally.

If this theory be a true one, it is somewhat singular that we have no trace, that I remember, of compurgation, as a mode of criminal trial at common law. Meyer, vol. i. p. 299.

placed to the account of their own Hercules whatever atchievement 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. It's 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 con-* "*suetudinem antecessorum nostrorum et per judicium parium* "*suorum.*" And it was ever esteemed, in all countries, a privilege of the highest and most beneficial nature.

But I will not mispend the reader's time in fruitless encomiums on this method of trial: but shall proceed to the dissection and examination of it in all it's parts, from whence indeed it's 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 it's 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.

[e] *LL. Longob. l.* 3. *t.* 8. *l.* 4.

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 chuse 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].

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; 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.

WHEN, therefore, an issue is joined, by these words, "and [352
"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

[f] F.N.B. 4.
[g] *l.* 2. *c.* 11—21.
[h] Finch. L. 412. 1 Leon. 303.

"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 this 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 at 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 it's 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. If any exception lies to the coroners, the *venire* shall be directed to two clerks of the court, or two persons of the county
[355] 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. (1)

[m] See pag. 59. [n] Fortesc *de Laud LL. c* 25 Co. Litt. 158.

(1) It seems to be a general rule, that where an array is returned by any special officer of the court, or by persons, as the elisors, specially appointed by the court for the purpose, it cannot be challenged; and the reason is that such challenge must be founded on some objection to the person making the return; which objection it is more correct and proper to make to

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 less tempted to commit wilful errors, but likewise be responsible for the faults of either himself or his officers: and he is also bound by the obligation of an oath faithfully to execute his duty. Next, as to the *time of their return*: the panel is returned to the court upon the original *venire*, and the jurors are to be summoned and brought in many weeks afterwards to the trial, whereby the parties may have notice of the jurors, and of their sufficiency or insufficiency, characters, connections, and relations, that so they may be challenged upon just cause; while at the same time by means of the compulsory process (of *distringas* or *habeas corpora*) the cause is not like to be retarded through defect of jurors. Thirdly, as to the *place* of their appearance: which in causes of weight and consequence is at the bar of the court; but in ordinary cases at the 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 expence to the parties. For though the preparation of the causes in point of pleading is transacted at Westminster, whereby the order and uniformity of proceeding is preserved throughout the kingdom, and multiplicity of forms is prevented; yet this is no great charge or trouble, one attorney being able to transact the business of forty clients. But the troublesome and most expensive attendance is that of jurors and witnesses at the trial; which therefore is brought home to them, in the country where most of them inhabit. Fourthly, the *persons before whom* they are to appear, and before whom the trial is [356
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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 assises. (5)

But we will now suppose all previous steps to be regularly settled, and the cause to be called on in court. The record [or an abstract of it] 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 freeholders' book; and the officer
[358] is to take indifferently forty-eight of the principal freeholders in the presence of the attornies on both sides: who are each of them to strike off twelve, and the remaining twenty-four are returned upon the panel. (6) By the statute 3 Geo. II.

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(5) Sometimes at a late stage, and immediately preceding the trial, delay becomes important; in this case, as the plaintiff may, if he please, withdraw his record, the trial will not be put off at *his* instance to the next assises or sittings. In this there is no hardship, for whether he withdraw the record, or the judge permit the trial to be put off, he will equally have to pay costs to the defendant, and be equally able to bring his cause on again at the next assises. But the judge will defer the trial for a good reason to a later day in the same assises or sittings. *Ansley* v. *Birch*, 3 Campb. 333.

(6) The nomination of the forty-eight, and the striking off the twenty-four, do not take place at the same time; but a list is given to each party of the forty-eight, and an interval allowed before the appointment is made for the striking off the twenty-four, to enable the parties to ascertain the qualifications and characters of those named. The parties or their representatives, however, are present at the nomination, and may suggest the absence, ill health, &c. of any person named in the freeholders' book, whom the officer of the court may have nominated. See *R.* v. *Edmonds*, 4 B. & A. 488. Tidd's Pract. 825. 827. 7th edit.

c. 25. either party is entitled upon motion to have a special jury struck upon the trial of any issue, as well at the assises as at bar; he paying the extraordinary expense, unless the judge will certify [immediately after the trial in open court] (in pursuance of the statute 24 Geo. II. c. 18.) that the cause required such special jury.

A COMMON jury is one returned by the sheriff according to the directions of the statute 3 Geo. II. c. 25. which appoints that the sheriff or officer shall not return a separate panel for every separate cause, as formerly; but one and the same panel for every cause to be tried at the same 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 messuages, lands, or place in question, shall have been thought necessary 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 corpora* or *distringas* to have the matters in question shewn to them by two persons named in the writ (7); and then such of the jury as have had the view, or so many of them as appear, shall be sworn on the inquest previous to any other jurors. These acts are well calculated to restrain any suspicion of partiality in the sheriff, or any tampering with the jurors when returned.

As the jurors appear, when called, they shall be sworn unless *challenged* by either party. Challenges are of two sorts; challenges to the *array*, and challenges to the *polls*.

[p] Stat. 4 Ann. c. 16

(7) The two persons so named are called the shewers; they are at liberty to point out marks, boundaries, &c which will afterwards be relied on in evidence at the trial; but the rule of court under which the view is had, positively forbids the giving any evidence on either side at the time of the taking it.

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 generally speaking, the same reasons that before the awarding the *venire* were sufficient to have directed it to the coroners or elisors, will be also sufficient to quash the array, when made by a person or officer of whose partiality there is any tolerable ground of suspicion. Also, though there be no personal objection against the sheriff, yet if he arrays the panel at the nomination, or under the direction of either party, this is good cause of challenge to the array. Formerly, if a lord of parliament had a cause to be tried, and no knight was returned upon the jury, it was a cause of challenge to the array[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 attaint, a knight must be returned on the jury[s]. Also, by the policy of the antient law, the jury was to come *de vicineto*, from the neighbourhood of the vill or place where the cause of action was laid in the declaration: and therefore some of the jury were obliged to be returned from the hundred in which such vill lay; and, if none were returned, the array might be challenged for defect of hundredors. Thus the Gothic jury, or *nembda*, was also collected out of every quarter of the country: "*binos, trinos, vel etiam senos, ex singulis territorii quadranti-*" "*bus*[t]." 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, coming
360] out of the immediate neighbourhood, would be apt to intermix their prejudices and partialities in the trial of right. And

[q] Co. Litt. 156. Selden baronage II. 11.

[r] K. v. Bishop of Worcester, M. 28 Geo. II. B.R.

[s] Co. Litt. 156.

[t] Stiernhook *de jure Goth. l.* 1. c. 4.

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 antient 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. The array by the antient 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 antient 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 be denizens. And it now might be a question, how far the statute 3 Geo. II. c. 25. [361] (before referred to) hath in civil causes undesignedly abridged this privilege of foreigners, by the positive directions therein

[t] Gilb. Hist C P. c. 8.
[u] *de Laud. LL. c.* 25.
[v] 1 Inst. 157.
[w] Yearb. 21 Hen. IV. 4.

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 qualification of jurors in suits to which aliens were parties) a court might perhaps hesitate, whether it has now a power to direct a panel to be returned *de medietate linguae*, and thereby alter the method prescribed for striking a special jury, or balloting for common jurors.

Challenges to the polls, *in capita*, are exceptions to particular jurors; and seem to answer to the *recusatio judicis* in the civil and canon laws: by the constitutions of which a judge might be refused upon any suspicion of partiality [x]. By the laws of England also, in the times of Bracton [y] and Fleta [z], a judge might be refused for good cause; but now the law is otherwise, and it is held that judges and justices cannot be challenged [a]. For the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea. And should the fact at any time prove flagrantly such, as the delicacy of the law will not presume beforehand, there is no doubt but that such misbehaviour would draw down a heavy censure from those to whom the judge is accountable for his conduct.

But challenges to the polls of the jury (who are judges of fact) are reduced to four heads by sir Edward Coke [b]; *propter honoris respectum; propter defectum, propter affectum*, and *propter delictum.*

1. *Propter honoris respectum*, as if a lord of parliament be impanelled on a jury, he may be challenged by either party, he may challenge himself.

[362] 2. *Propter defectum;* as if a juryman be an alien born, this is defect of birth; if he be a slave or bondman, this is defect

[x] *Cod.* 3. 1. 16. *Decretal. l.* 2. *t.* 28. *c.* 36.
[y] *l.* 5. *tr.* 5. *c.* 15.
[z] *l* 6. *c.* 37.
[a] Co. Litt 294.
[b] 1 Inst. 156.

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 dispend 20*s.* by the year at the least; which is increased to 40*s.* by the statutes 21 Edw. I. st. 2. 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 4*l.* 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 20*l.* *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 10*l.* *per annum* in England and 6*l.* in Wales, of freehold lands *or copyhold* [within the county]; 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 19 Hen. VII. c. 13. And, lastly, by statute 3 Geo. II. c. 25. any leaseholder for the term of five hundred years absolute, or for any term determinable upon life or lives, of the clear yearly value of 20*l.* *per annum* over and above the rent reserved, is qualified to serve upon juries. When the jury is *de medietate 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 363 incapable to hold any, this would totally defeat the privilege[d].

3. JURORS may be challenged *propter affectum*, for picion of bias or partiality. This may be either a *principal*

[c] Cro. Eliz 566.

[d] See stat. 2 Hen. V. st 2. c. 3. 8 Hen. VI. c. 29.

challenge, or *to the favour*. A *principal* challenge is such, where the cause assigned carries with it *prima facie* evident marks of suspicion, either of malice or favour: as, that a juror is of kin to either party within the ninth degree[e]; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him: all these are principal causes of challenge; which, if true, cannot be overruled, for jurors must be *omni exceptione majores*. Challenges *to the favour*, are where the party hath no principal challenge: but objects only some probable circumstances of suspicion, as acquaintance and the like[f]; the validity of which must be left to the determination of *triors*, whose office 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].

4. Challenges *propter delictum*, are for some crime or misdemesnor, 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
[364] judgment of the pillory, tumbrel, or the like; or to be branded, whipt, or stigmatized; or if he be outlawed or excommunicated, or hath been attainted of false verdict, *praemunire*, or forgery; or lastly, if he hath proved recreant when champion in the trial by battel, and thereby hath lost his *liberam 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

[e] Finch. L. 401.

[f] In the *nembda*, or jury of the antient Goths, three challenges only were allowed to the favour, but the principal challenges were indefinite. "*Licebat palam excipere, et semper ex probabili causa tres repudiare: etiam plures ex causa praegnanti et manifesta.*" (Stiernhook, *l.* 1. *c.* 4.

[g] Co. Litt. 158.

any crime, or any thing which tends to his disgrace or disadvantage [h]. (8)

BESIDES these challenges, which are exceptions against the fitness of jurors, and whereby they may be *excluded* from serving, there are also other causes to be made use of by the jurors themselves, which are matter of exemption; whereby their service is *excused*, and not *excluded*. As by statute West. 2. 13 Edw. I. c. 38. sick and decrepit persons, persons not commorant in the county, and men above seventy years old; and by the statute of 7 & 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 alicujus episcopi* [i]."

IF by means of challenges, or other cause, a sufficient number of unexceptionable jurors doth not appear at the trial, either party may pray a *tales*. A *tales* is a supply of *such* men as are summoned upon the first panel, in order to make up the deficiency. For this purpose, a writ of *decem tales*, *octo tales*, and the like, was used to be issued to the sheriff at common law, and must be still so done at a trial at bar, if the jurors make default. But at the 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 [365
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

[h] Co. Litt. 158. *b*.
[i] F. N. B. 166 *Reg Brev.* 179.
[j] Append. No. II. § 4.

(8) See *R.* v. *Edmonds*, 4 B. & A. 490.

sir Edward Coke[k] hath discovered abundance of mystery[l]. (9)

When a sufficient number of persons impanelled, or *tales*-men, appear, they are then separately sworn, well and truly to try the issue between the parties, and a true verdict to give according to the evidence; and hence they are denominated the jury, *jurata*, and jurors, *sc. juratores*.

We may here again observe, and observing we cannot but admire, how scrupulously delicate, and how impartially just the law of England approves itself, in the constitution and frame of a tribunal, thus excellently contrived for the test and investigation of truth; which appears most remarkably, 1. In the avoiding of frauds and secret management, by electing the twelve jurors out of the whole panel by lot. 2. In it's caution against all partiality and bias, by quashing the whole panel or array, if the officer returning is suspected to be other than

[k] 1 Inst. 155

[l] 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 si in ipso hoc numero secreta quæ-* "*dam esset religio.*" (*Dissert epistolar* 49) Spelm. *Gloss.* 329.

(9) Since the passing of the 3 G 2 c. 25 (see ante, p 358) as each panel has commonly seventy-two names in it, it can hardly ever be necessary in a common-jury cause to pray a tales. But it is still necessary very often in special juries, where the panel contains only twenty-four. The tales-men are then taken, under the directions of the 7 & 8 W. 3. c. 32., from those who are returned upon some other panel, and then attending in the court It is rather in contradiction of the term tales that, by 4 & 5 W. & M. c. 24 the qualification of the talesmen is only one half of that of the original panel. Neither party can be compelled to pray a tales, and if no special jurymen attend, the practice is uniform that neither can In this and similar cases a new special jury cannot be summoned, but the cause must be tried by the jury first appointed. *R.* v. *Perry*, 5 T. R. 453 But where the same special jurors were struck to try several causes on the same question, and the court, dissatisfied with the verdict in the first, directed it to abide the event of another cause; they also on motion discharged the jury from trying the second cause. *Mayor of Doncaster* v. *Coe*, 3 Taunt. 404.

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 prætor with the mutual consent of the parties. Or, as Tully[m] [366 expresses it: "*neminem voluerunt majores nostri, non modo* "*de existimatione cujusquam, 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 prætor; *de decuria senatoria conscribuntur:* then their names were drawn by lot, till a certain number was completed: *in urnam sortito mittuntur, ut de pluribus necessarius numerus conficì posset:* then the parties were allowed their challenges; *post urnam permittitur accusatori, ac reo, ut ex illo numero rejiciant quos putaverint sibi, aut inimicos aut ex aliqua re incommodos fore* · next they struck what we call a *tales: rejectione celebrata, in eorum locum qui rejecti fuerunt subsortiebatur praetor alios, quibus ille judicum legitimus numerus compleretur* · lastly, the judges, like our jury, were sworn; *his perfectis, jurabant in leges judices, ut obstricti religione judicarent*[n].

THE jury are now ready to hear the merits; and, to fix their attention the closer to the facts which they are impanelled and sworn to try, the pleadings are opened to them by counsel on that side which holds the affirmative of the question in issue. For the issue is said to lie, and proof is always first required, upon that side which affirms the matter in question: in which our law agrees with the civil[o]; "*ei incumbit probatio, qui dicit, non qui negat, cum per rerum* "*naturam factum-negantis probatio nulla sit.*" The opening

[m] *Pro Cluentio.* 43.

[n] Ascon. *in Cic. Ver.* 1. 6. A learned writer of our own, Dr Pettingal, hath shewn in an elaborate work (published *A. D.* 1769) so many resemblances between the δικασται of the Greeks, the *judices selecti* of the Romans, and the juries of the English, that he is tempted to conclude that the latter are derived from the former.

[o] *Jf.* 22. 3, 2. *Cod.* 4. 19. 23.

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 formerly [p] the whole
[367] record and process of the pleadings 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 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. (10)

[p] Fortesc. c. 26.

[q] This is admirably well performed in lord chief baron Gilbert's excellent treatise of evidence, a work which it is impossible to abstract or abridge, without losing some beauty and destroying the chain of the whole, and which hath lately been engrafted into a very useful work, *the introduction to the law of nisi prius*, 4to 1767.

(10) The forms of what are called general issues vary in the different species of action; and some of them are so comprehensive, that they put in issue, that is, compel the plaintiff to prove, every material averment in the declaration, but even where the form is more narrow, as in the instance given, the rule which is founded in justice must not be taken so literally as

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. (11) 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. Antient deeds of thirty years standing, which prove themselves; (12) but 3. Modern deeds, and 4. Other writings, must be attested and verified by *parol* evidence of [368
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. (13) For if it be found that there

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as to destroy its own end Thus, if a defendant says it is not his deed, the plaintiff, upon whom the affirmative lies, is bound to shew a deed valid in itself, corresponding exactly with the statement of it in the declaration, delivered by the defendant as his deed, at a time when he was in a competent state to do such an act. If the defendant can impeach the instrument in any of these respects, as for example, that he was made to sign the instrument when too drunk to know what he did, he may do so in support of a plea that it is not his deed

(11) See post, p 374.

(12) This rule requires some qualification: original records are not often produced in evidence before a jury, because they are for public security generally made irremoveable, and their contents are to be proved by copies. Where the original is produced, though it requires no extrinsic evidence to confirm the truth of its contents, yet it must itself be authenticated by seal, or certificate, or parol evidence to be what it professes to be, and to come from the right place Of copies, again, there are various kinds, of higher and lower credit, and therefore requiring less or more authentication; and they vary also in this respect according to the rank of the court from which they come, but the highest kind of copy has the authentication of the seal of the court in which the original is; and if it comes from a foreign court, the genuineness of the seal must also be proved. So again of deeds, though if a deed appears to have been executed thirty years by the date, the execution of it ordinarily need not be proved; yet some account should be given of it, where it was found, in whose custody, &c, and if there be any suspicious circumstances about it, any blemish, or rasure, there must be some evidence given to clear these up. See Phillipps on Evidence, vol. i. 438. 476 5th edit.

(13) That is, the best legal evidence, for no difficulty or inability of procuring primary evidence will suffice to let in that which is not legal. Thus if A, who alone saw the trespass of which I complain committed by the defendant, be unavoidably absent, I cannot therefore call B to state what he

is any better evidence existing than is produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed. Thus, in order to prove a lease for years, nothing else shall be admitted but the very deed of lease itself, if in being; but if that be positively proved to be burnt or destroyed, (not relying on any loose negative, as that it cannot be found, or the like,) then an attested copy may be produced; or *parol* evidence be given of it's 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 life-time: but such evidence will not be received of any particular facts. (14) So too, books of account, or shop-books, are not allowed of themselves to be given in evidence for the owner; but a servant who made the entry may have recourse to them to refresh his memory; and, if such servant (who was accustomed to make those entries) be dead, and his hand be proved, the book may be read in evidence [r]: for as tradesmen are often under a necessity of giving credit without any note or writing, this is therefore, when accompanied with such other collateral proofs of fairness and regularity [s], the best evidence that can then be produced. However this dangerous species of evidence is not

[r] Law of *nisi prius*, 282. [s] Salk. 285

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he heard A say about it, for that would be allowing A to give testimony neither on oath, nor confronted with the defendant, nor liable to his cross-examination.

(14) This is a distinction which will require an explanation: suppose the question to be upon the custom of a manor, a witness would be allowed to state that he had heard an old man, once steward of the manor, now dead, say that the custom was, that whoever did such and such a thing forfeited his copyhold, but he would not be allowed to state, that he had heard him say that A B had forfeited for that reason. It is said "that in general single facts are so frequently mis-represented, or mis-reported, either from intention or ignorance, and the various circumstances which have accompanied a fact, and which may be essentially characteristic, are often so little known, or if known are so likely to pass unobserved, and to be forgotten in the course of time, that no credit can be safely given to such a tradition." Phillipps's Law of Evidence, vol. 1 251. 5th edit.

carried so far in England as abroad[s]; where a man's own books of accounts, by a distortion of the civil law (which seems to have meant the same thing as is practised with us[t]) with the suppletory oath of the merchant, amount at all [369
times to full proof. But as 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. I. c. 12. (the penners of which seem to have imagined that the books of themselves were evidence at common law) confines this species of proof to such transactions as have happened within one year before the action brought; unless between merchant and merchant in the usual intercourse of trade. For accounts of so recent a date, if erroneous, may more easily be unravelled and adjusted. (15)

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 100*l.* to be forfeited to the king; to which the statute 5 Eliz. c. 9. has added a penalty of 10*l.* to the party aggrieved, and damages equivalent to the loss sustained by want of his evidence. But no witness, unless his reasonable expenses be tendered him, is bound to appear at all; nor, if he appears, is he bound to give evidence till such charges are actually paid him; except he resides within the bills of mortality, and is summoned to give evidence within the same. This compulsory process, to bring in unwilling witnesses, and the additional terrors of an attachment in case of diso-

[s] Gail *observat.* 2. 20 23.

[t] *Instrumenta domestica, seu privata testatio, seu adnotatio, si non alius quoque adminiculis adjuventur, ad probationem sola non sufficiunt.* (*Cod.* 4. 19. 5.) *Nam exemplo perniciosum est, ut ei scripturae credatur, qua unusquisque sibi adnotatione propria debitorem constituit.* (*Ibid.* c. 7.)

(15) See the observations of Mr. Phillipps, Law of Evidence, vol. i. p. 263. 5th edit upon the dangerous nature of this species of testimony. The statute of James having been made upon a misconception of the common law, seems to have little or no operation. For as the books by themselves are not evidence for the owners within the year, so I conceive under the restrictions mentioned in the text, they are admissible after the year.

bedience, are of excellent use in the thorough investigation of truth: and, upon the same principle, in the Athenian courts, the witnesses who were summoned to attend the trial had the choice of three things: either to swear to the truth of the fact in question, to deny or abjure it, or else to pay a fine of a thousand drachmas [u].(16)

ALL witnesses, of whatever religion or country, that have the use of their reason, are to be received and examined except such as are *infamous*, or such as are *interested* in the event of the cause (17). All others are *competent* witnesses; though the jury from other circumstances will judge of their
370] *credibility*. Infamous persons are such as may be challenged as jurors, *propter delictum*, and therefore never shall be ad-

[u] Pott. Antiq. b 1. c. 21.

(16) It would have been hard to compel a man to deny a fact positively, of which he might know nothing Potter only says that he was to deny "that he was privy to it"

(17) The infamy which disqualifies a witness is legal infamy, and results from "the conviction of an infamous crime followed by judgment" The crimes which are infamous, are all treasons, felonies, (except petty larcenies,) and every species of the *crimen falsi*, as forgery, perjury. In all cases the infamy must be strictly proved on the witness, even his admission of the fact will not be sufficient, and the incompetency is removed in all cases, where it is only a consequence of the judgment, by a pardon under the great seal; and where the crime is a felony within benefit of clergy, the suffering of the punishment has the same effect.

As to the interest which disqualifies a witness, it is not very easy to reconcile the antient with the modern decisions, or even always the modern with each other. The safest general rules are, that where the verdict may be used for or against the witness in a subsequent action, or where he has a certain, direct, and immediate interest in the event of the suit, he cannot at common law be a witness, unless he be a servant or agent for either party. For persons in that situation are admitted for the sake of trade, and the common usage of business, contracts being constantly made, money paid, goods delivered, &c. by agents and servants, and only capable of proof by them, who yet of course are answerable over to their principals. Interest also will not disqualify the witness if it has been subsequently and improperly acquired for the mere purpose of shutting out his own testimony. It need hardly be stated that wherever the interest is capable of being released, and is so released, or even where the witness or party offers to release it, but the offer is declined, the competency of the witness is restored. See Phillipps's Law of Evidence, vol. 1. pp. 28.

5th

mitted 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 his own infamy. 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[v]: 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 any single fact, though undoubtedly the concurrence of two or more corroborates the proof. Yet our law considers that there are many transactions to which only one person is privy; and therefore does not *always* demand the testimony of two, which the civil law universally requires. "*Unius omnino testis responsio 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 be *plena probatio*, they call the testimony of one, though never so clear and positive, *semiplena probatio* only, on which no sentence can be founded. To make up, therefore, the necessary complement of witnesses, when they have one only to a single fact, they admit the party himself (plaintiff or defendant) to be examined in his own behalf; and administer to him what is called the *suppletory* oath; and, if his evidence happens to be in his own favour, this immediately converts the half proof into a whole one. By this ingenious device satisfying at once the forms of the Roman law, and acknowledging the superior reasonableness of the law of England: 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*.

[v] Law of *nisi prius*, 284.

[w] *Cod.* 4. 20. 9.

Positive proof is always required, where from the nature of the case it appears it might possibly have been had. But next to *positive* proof, *circumstantial* evidence or the doctrine of *presumptions* must take place; for when the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact is the proof of such circumstances as either *necessarily* or *usually*, attend such facts; and these are called presumptions, which are only to be relied upon till the contrary be actually proved. *Stabitur 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 former rent, and is equivalent to full proof; for though the actual payment is not proved, yet the acquittance in full of all demands is proved, which could not be without such payment; and it therefore induces so forcible a presumption, that no proof shall be admitted to the contrary[z]. (18) *Probable* presumption, arising

[x] Co. Litt. 373. [y] *Ibid.* 6. [z] Gilb. evid. 161.

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(18) The author does not, perhaps, literally mean here that no evidence would be *received*, if in fact it could be produced, to rebut even the most violent presumption, for the maxim which he has cited above, implies the contrary; but I suppose him to mean that such a presumption is so weighty, that no evidence will countervail it. Even in this light it is too strongly expressed, for the acquittance might undoubtedly be shewn to have been given by mistake, or extorted by menace, or drawn from the party by fraud. So in Lord Coke's instance, "if one be runne thorow the bodie with a sword in a house, whereof he instantly dieth, and a man is seene to come out of that house with a bloody sword, and no other man was at that time in the house." The party here might have run himself through the body in spite of the endeavours of the other to the contrary, and if a witness had seen that from an opposite window, undoubtedly he would be received to destroy the violent presumption arising from the apparent circumstances. Indeed if witnesses are receivable, as they daily are, to contradict or explain away *positive* proof, of course they must *à fortiori* be so to rebut presumptive proof.

But there are presumptions in law, which are not controvertible; that is, where the law has declared that such a consequence *always* follows such a fact, and therefore withdraws that consequence from the decision of the

from such circumstances as *usually* attend the fact, hath also it's 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.

THE oath administered to the witness is not only that what he deposes shall be true, but that he shall also depose the *whole* truth: so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not. And all this evidence is to be given in open court, in the presence of the parties, their attorneys, the counsel, and all by-standers, and before the judge and jury: each party having liberty to except to it's competency, which exceptions are publicly stated, and by the judge are openly and publicly allowed or disallowed, in the face of the country: which must curb any secret bias or partiality that might arise in his own breast. And if, either in his directions or decisions, he misstates the law by ignorance, inadvertence, or design, the counsel on either side may require him publicly to seal a *bill of exceptions*, stating the point wherein he is supposed to err: and this he is obliged to seal by statute Westm. 2. 13 Edw. I. c. 31. or, if he refuses so to do, the party may have a compulsory writ against him [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 [372

[a] Co. Litt. 373. [b] Reg.

jury. These therefore are not the proper subject of evidence, as
derstand the word here, and therefore when the causing
as no evidence *aliunde* is required to prove, so none will be admitted to
rebut the consequence. Thus if a conspiracy to
person be proved, the law presumes an intention to kill him. Fost. 196.

of error, after judgment given in the court below. (19) 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, demur to the whole evidence; which admits the truth of every fact that has been alleged, but denies the sufficiency of them all in point of law to maintain or overthrow the issue[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*. (20)

This open examination of witnesses *viva voce*, in the presence of all 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 depose

[c] Co Litt. 72. 5 Rep. 104. [d] Hale's Hist. C L. 254, 5, 6

(19) As a writ of error, whether for error in law, or error in fact, must always be grounded upon some fault either apparent on the record, or suggested upon it, (see post, p 407) there was before this statute no remedy by way of appeal, if the judge received or admitted evidence improperly at the trial, and the court out of which the record came, confirmed his decision upon an application for a new trial; (indeed at the time of the passing of the statute, new trials were not granted for such reasons;) for as the record gives no account of the evidence or the particulars of the trial, the error committed would not appear upon it; and yet it is obvious that the fate of the cause might have turned upon the decision complained of. The statute, therefore, was a most beneficial one. In proceeding under it, the judgment is first entered up in the court below, and the party then sues out his writ of error, enters upon the record the proceedings below to which he objects, and assigns the fault he finds with them. These are considered by the court of error, and the judgment is either confirmed or reversed, as in other cases.

For an account of demurrers to evidence, see the case of *Gibson* v. *Hunter*, 2 H. Bl. 205.

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 the matter of it. These are a few of the advantages [374 attending this, the English way of giving testimony, *ore tenus*. Which was also indeed familiar among the *antient* Romans, as may be collected from Quintilian [c]; 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

[c] *Institut. Orat. l. 5. c 7.*

[f] See his epistle to Varus, the legate or judge of Cilicia "*tu magis scire potes, quanta fides habenda sit testibus, matronis sint, et, qui simpliciter visi sint dicere; utrum unum eundemque meditatum sermonem attulerint, an ad ea quæ interrogaveras, extempore ve-*

antient 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 antient 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 common jurors; that they might escape the heavy penalties of the *attaint*, in case they could shew by any additional proof, that their verdict was agreeable to the truth, though not according to the evidence produced; with
[375] which additional proof the law presumed they were privately acquainted, though it did not appear in court. But this doctrine was again gradually exploded, when *attaints* began to be disused, and *new trials* introduced in their stead. For it is quite incompatible with the grounds upon which such new trials are every day awarded, *viz.* that the verdict was given *without*, or *contrary to*, evidence. And therefore, together with new trials, the practice seems to have been first introduced [k], which now universally obtains, that if a juror knows any thing of the matter in issue, he may be sworn as a witness, and give his evidence publicly in court.

When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury: omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given

[g] 14 Hen. VII. 29. Plowd. [h] Bract. *l.* 4, *tr.* 1. *c.* 19. § 3. Flet.

to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence.

THE jury, after the proofs are summed up, unless the case be very clear, withdraw from the bar to consider of their verdict: and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed. A method of accelerating unanimity not wholly unknown in other constitutions of Europe, and in matters of greater concern. For by the golden bull of the empire[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, without consent of the court, and before verdict, it is fineable; and if they do so at his charge for whom they afterwards find, it will set aside the verdict. Also if they speak with either of the parties or their agents, after they are gone from the bar; or if they receive any fresh [376
evidence in private; or if to prevent disputes they cast lots for whom they shall find; any of these circumstances will entirely vitiate the verdict. (21) And it has been held, that if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned[m], the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart[n]. This necessity of a total unanimity seems to be peculiar to our own constitution[o]; or, at least in the *nembda*

[l] ch 2.
[m] Mirr. c. 4 § 24
[n] *Lib. Ass. fol.* 40. *pl.* 11.
[o] See Barrington on the statutes, 19, 20, 21

(21) But the courts are extremely scrupulous as to the means by which they arrive at the knowledge of any such facts, as it might lead to the worst consequences both in corrupting and degrading the administration of justice, if verdicts were lightly questioned on these grounds. They will, therefore, not receive affidavits of jurymen themselves to the fact, who thereby disclose their own misdemeanor; the information must come from third persons; and be specific and clear. See 1 T.R. 11, 326. 8 Taunt. 26.

or jury of the antient Goths, there was required (even in criminal cases) only the consent of the major part; and in case of an equality, the defendant was held to be acquitted [p].

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 *à mercie*, is to be at the king's mercy with regard to the fine to be imposed; *in misericordia domini regis pro falso clamore suo.* The amercement is disused, but the form still continues; and if the plaintiff does not appear, no verdict can be given, but the plaintiff is said to be *nonsuit*, *non sequitur clamorem suum.* Therefore it is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or withdraw himself: whereupon the crier is ordered to *call the plaintiff* and if neither he, nor anybody 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
[377] 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.

A verdict, *vere dictum*, is either *privy*, or *public*. A *privy* verdict is when the judge hath left or adjourned the court: and the jury, being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court [r]: which privy verdict is of no force, unless afterwards affirmed by a public verdict given openly in

[p] Stiern *l.* 1. *c.* 4

[q] Page 275 See also Vol IV. 379.

[r] If the judge hath adjourned the court to his own lodgings, and there receives the verdict, it is a *public* and not a *privy* verdict.

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. 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. (22)

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 of 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 expence, and obtains a much speedier decision; the *postea* (of which in the next chapter) being stayed in the hands of the officer of *nisi prius*, till the question is determined, and the verdict is then entered for the plaintiff or defendant, as the

(22) The jury cannot be compelled to find a special verdict, and it is this circumstance which renders the demurrer to evidence a necessary provision in the law. No man will demur to evidence, if the jury will find the facts specially, for by demurring he admits the truth of all the evidence, which prevents him from taking the chance of the jury negativing some parts of it by their verdict.

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 expence 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.

[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

[s] Litt. § 368.

celebrated French writer[t], 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 it's 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 entrusted 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 spight 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 entrusted 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 power- [380]

[t] Montesq. Sp. L. xi. 6.

ful 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 feodal system, which for the sake of military subordination pursued an aristocratical plan in all it's 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 feodal 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,
381] 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 antient dignity, if at all impaired by the different value of property, or otherwise deviated from

[u] 2 Whitelocke of parl 427

[w] Mod. Un. Hist xxxiii 22

[x] *Ibid.* 17.

it's first institution; to amend it wherever it is defective; and, above all, to guard with the most jealous circumspection against the introduction of new and arbitrary methods of trial, which, under a variety of plausible pretences, may in time imperceptibly undermine this best preservative of English liberty.

YET, after all, it must be owned, that the best and most effectual method to preserve and extend the trial by jury in practice, would be by endeavouring to remove all the defects, as well as to improve the advantages, incident to this mode of inquiry. If justice is not done to the entire satisfaction of the people, in this method of deciding facts, in spite of all encomiums and panegyrics on trials at the common law, they will resort in search of that justice to another tribunal; though more dilatory, though more expensive, though more arbitrary in it's 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 circuity of a court of equity, and therefore it is sometimes had by consent, even in the courts of law. How far such a mode of compulsive examination is agreeable to the rights of mankind, and ought to be introduced in any country, may be matter of curious discussion, but is foreign to our present inquiries. It has long been introduced and established in our courts of equity, not to mention the civil law courts . and it seems the height of judicial absurdity, that in the same cause between the same parties, in the examination of the same facts, a discovery by the oath of the parties should be permitted on one side of Westminster-hall, and denied on the other: or that the judges of one and the same court should be bound by law to reject such a species of evidence, if attempted on a trial at bar, but, when sitting the next day as a court of equity, should be obliged to hear such examination read, and to found their decrees upon it. In short, within the same country, governed by the same

laws, such a mode of inquiry should be universally admitted, or else universally rejected.

2. A SECOND defect is of a nature somewhat similar to the first: the want of a compulsive power for the production of books and papers belonging to the 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. (23)

3. ANOTHER want is that of powers to examine witnesses abroad, and to receive their depositions in writing, where the
[383] 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

[y] See page 75.

(23) This defect is partially remedied by giving the party a notice to produce them, which is not, indeed, compulsory on him, but if disobeyed it throws some reflection on his case, and enables the other party to adduce secondary evidence, if he have any such, of the contents of the books:—The *subpœna duces tecum* on a witness is compulsory, the papers in his possession must be brought into court, but whether on grounds of public policy, or private professional confidence, or any other reason, it may be proper to read them in evidence, is a question for the judge to determine

a court of law. (24) Yet where the cause of action arises in India, and a suit is brought thereupon in any of the king's courts at Westminster, the court may issue a commission to examine witnesses upon the spot, and transmit the depositions to England[z].

4. The administration of justice should not only be chaste, but should not even be suspected. A jury coming from the neighbourhood has in some respects a great advantage; but is often liable to strong objections; especially in small jurisdictions, as in cities which are counties of themselves, and such where 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 the multitude been inflamed; or where one of the parties is popular, and the other a stranger or obnoxious. It is true that, if a whole county is interested in the question to be tried, the trial by the rule of law[a] must be in some adjoining county; but, as there may be a strict interest so minute as not to occasion any bias, so there may be the strongest bias without any pecuniary interest. In all these cases, to summon a jury, labouring under local prejudices, is laying a snare for their consciences: and, though they should have virtue and vigour of mind sufficient to keep them upright, the parties will grow suspicious, and resort under various pretences to another mode of trial. The courts of law will therefore in *transitory* actions very often change the *venue*, or county wherein the cause is to be tried[b]; but in *local* actions, though they sometimes do it indirectly and by mutual consent, yet to effect it directly and absolutely, the parties are driven to a court of equity; where, upon making out a proper case, it is done upon the ground of being necessary to a fair, impartial, and satisfactory trial[c]. [384

[z] Stat 13 Geo. III c. 63

[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.

(24) But the courts have nearly obviated this difficulty, for if the plaintiff will not consent, they will put off the trial at the instance of the defendant, and if the defendant refuses, they will not compel the plaintiff to go to trial.

The locality of trial required by the common law seems a consequence of the antient locality of jurisdiction. All over the world, actions transitory follow the person of the defendant, territorial suits must be discussed in the territorial tribunal. I may sue a Frenchman here for a debt contracted abroad; but lands lying in France must be sued for there, and English lands must be sued for in the kingdom of England. Formerly they were usually demanded only in the court-baron of the manor, where the steward could summon no jurors but such as were the tenants of the lord. When the cause was removed to the hundred court, (as seems to have been the course in the Saxon times [d],) the lord of the hundred had a farther power, to convoke the inhabitants of different 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 from any part of the kingdom, yet they chose to take the cause as they found it, with all it's 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
[385]* counties still remains, for many beneficial purposes: but, as the king's courts have a jurisdiction co-extensive with the kingdom, there surely can be no impropriety in sometimes departing from the general rule, when the great ends of justice warrant and require an exception.

I have ventured to mark these defects, that the just panegyric, which I have given on the trial by jury, might appear to be the result of sober reflection, and not of enthusiasm or

[d] *LL. Edw. Conf.* c. 32. Wilk. 203.

[e] See page 360.

prejudice. But should they, after all, continue unremedied and unsupplied, still, (with all it's 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 THE TWENTY-FOURTH.

OF JUDGMENT AND IT'S 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]. The substance of which is, that *postea*, *afterwards*, the said plaintiff and defendant appeared by their attornies at the place of trial; and a jury, being sworn, found such a verdict; or, that the plaintiff, after the jury sworn, made default, and did not prosecute his suit; or, as the case may happen. This is added to the roll, which is now returned to the court from which it was sent (1); 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
[387] 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

[a] Append No. II. § 4.

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 *trial*, are at present wholly *extrinsic*, arising from matter foreign to, or *dehors* the record. Of this sort are want of notice of trial; or any flagrant misbehaviour of the party prevailing towards the jury, which may have influenced their verdict; or any gross misbehaviour of the jury among themselves: also, if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith [b]; or if they have given exorbitant damages [c]; or if the judge himself has misdirected the jury, so that they found an unjustifiable verdict: for these, and other reasons of the like kind, it is the practice of the court to award a *new*, or second, *trial*. But if two juries agree in the same or a similar verdict, a third trial is seldom awarded [d]: for the law will not readily suppose, that the verdict of any one subsequent jury can countervail the oaths of the two preceding ones.

THE exertion of these superintendent powers of the king's courts, in setting aside the verdict of a jury and granting a new trial, on account of misbehaviour in the jurors, is of a date extremely antient. 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 *venires* awarded, because the jury had eat and drank without [388
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: ap-

[b] Law of *nisi prius*, 303, 304.
[c] Comb. 357.
[d] 6 Mod 22. Salk. 649.
[e] *Edw. III.* 24. Bro. *Abr. t. verdite.* 17.
[f] 11 *Hen IV* 18. Bro. *Abr. t. enquest.* 75.
[g] 14 *Hen VII.* 1. Bro. *Abr. t. verdite.* 18
[h] Styl. 466.

prehending 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 [l], of granting new trials upon the mere certificate of the judge, (unfortified by any report of the evidence,) that the verdict had passed against his opinion; though chief justice Rolle (who allowed of new trials in case of misbehaviour, surprise, or fraud, or if the verdict was notoriously contrary to evidence [k]) refused to adopt that practice in the court of king's bench. And at that time it was clearly held for law [l], that whatever matter was of force to avoid a verdict, ought to be returned upon the *postea*, and not merely surmised by the court; lest posterity should wonder why a new *venire* was awarded, without any sufficient reason appearing upon the record. But very early in the reign of Charles the second new trials were granted upon *affidavits* [m]; and the former strictness of the courts of law, in respect of new trials, having driven many parties into courts of equity to be relieved from oppressive verdicts, they are now more liberal in granting them: the maxim at present adopted being this, that (in all cases of moment) where justice is not done upon one trial, the injured party is entitled to another [n].

Formerly the principal remedy, for reversal of a verdict unduly given, was by writ of *attaint*; of which we shall speak in the next chapter, and which is at least as old as the institution of the grand assise by Henry II. [o], in lieu of the Norman trial by battel. Such a sanction was probably thought neces-
[389] sary, when instead of appealing to Providence for the decision of a dubious right, it was referred to the oath of fallible or perhaps corrupted men. Our ancestors saw, that a jury might give an erroneous verdict; and, if they did, that it ought not finally to conclude the question in the first instance: but the remedy which they provided, 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

[k] 1 Sid. 235. Styl. *pract. Reg.* 310. 311, *edit.* 1657.

[l] Cro. El. 616. Palm. 325. 1 Brownl. 207

[m] 1 Sid. 235. 2 Lev. 140.

[n] 1 Burr. 395.

[o] *Ipsa regali institutioni eleganter inserta.* (Glanv. *l.* 2. *c.* 19.)

always so clear, that, if they found a wrong verdict, they must be wilfully and corruptly perjured. Whereas a juror may find a just verdict from unrighteous motives, which can only be known to the great searcher of hearts: and he may, on the contrary, find a verdict very manifestly wrong, without any bad motive at all; from inexperience in business, incapacity, misapprehension, inattention to circumstances, and a thousand other innocent causes. But such a remedy as this laid the injured party under an insuperable hardship, by making a conviction of the jurors for perjury the condition of his redress.

THE judges saw this; and therefore very early, even upon writs of assise, they devised a great variety of distinctions; by which an attaint might be avoided, and the verdict set to rights in a more temperate and dispassionate method [p]. Thus if excessive damages were given, they were moderated by the discretion of the justices [q]. And if, either in that, or in any other instance, justice was not completely done, through the error of either the judge or the recognitors, it was remedied by *certificate of 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 attaint 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, they referred it to another examination [s]. When afterwards [390] attaints, by several statutes, were more universally extended, the judges frequently, even for the misbehaviour of jurymen, instead of prosecuting the writ of attaint, awarded a second trial; and subsequent resolutions, for more than a century past, have so amplified the benefit of this remedy, that the attaint is now as obsolete as the trial by battel which it succeeded; and we shall probably see the revival of the one as soon as the revival of the other. And here I cannot but again admire [t] the wis-

[p] Bract. *l.* 4. *tr.* 5. *c.* 4. § 2.

[q] *Ibid. tr.* 1. c. 19. § 8.

[r] *Ibid. tr.* 5. *c.* 6. § 2. F.N.B. 181. 2 Inst. 415.

[s] *Si juratores erraverint, et justiciarii secundum eorum dictum judicium pronuntiaverint, falsam faciunt pronuntiationem; et ideo eorum dictum, sed illud emendare tenerentur per diligentem examinationem. Si autem dijudicare nesciant, recurrendum erit ad majus consilium.* Bract. *l.* 4. *tr.* 5. *c.* 4. § 2.

[t]

dom of suffering time to bring to perfection new remedies, more easy and beneficial to the subject; which, by degrees, from the experience and approbation of the people, supersede the necessity or desire of using or continuing the old.

If every verdict was final in the first instance, it would tend to destroy this valuable method of trial, and would drive away all causes of consequence to be decided according to the forms of the imperial law, upon depositions in writing; which might be reviewed in a course of appeal. Causes of great importance, titles to land, and large questions of commercial property, come often to be tried by a jury, merely upon the general issue: where the facts are complicated and intricate, the evidence of great length and variety, and sometimes contradicting each other; and where the nature of the dispute very frequently introduces nice questions and subtilties of law. Either party may be surprized by a piece of evidence, which (had he known of it's 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*,
[391] 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 opinion 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 [392] large why a new examination ought or ought not to be allowed. The true import of the evidence is duly weighed, false colours are taken off, and all points of law which arose at the trial are upon full deliberation clearly explained and settled.

NOR do the courts lend too easy an ear to every application for a review of the former verdict. They must be satisfied, that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case. A new trial is not granted, where the value is too inconsiderable to merit a second examination. It is not granted upon nice and formal objections, which do not go to the real merits. It is not granted in cases of strict right or *summum jus*, where the rigorous exaction of extreme legal justice is hardly 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, 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 it's 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 attaint 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

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[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 the time, or have cost a twentieth part of the expense.

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 attornies, or even of the judge or jury. (2)

(2) The necessity of occasionally granting a new trial is exceedingly well laid down in the text, and the reader will see the source from which the author has drawn, in the judgment of Lord Mansfield in the case of *Bright* v. *Eynon*, 1 Burr. 393. It is obvious that the power of awarding a new trial can no where be lodged so properly as in the breast of the court, which has awarded the first, which is in possession of the whole materials of the cause, and which ought to be satisfied in its conscience as to the judgment which it is to pronounce in pursuance of the verdict. One cannot indeed but consider this as one of the most wise and beneficial of the many wise and beneficial assumptions of power, which the judges have made and gradually organised in the course of the long history of our law.

The principle upon which a new trial is granted, is, I conceive, the same upon which any trial proceeds, the attainment of justice; and this therefore imposes upon the party who applies for it, two conditions; he must lay probable grounds of belief, not merely that justice has not been attained in the first, but that it may be by a contrary verdict in the second trial. To this principle there seem to be two subsidiary, proceeding on legal and constitutional grounds: the first, that the jury is not to be interfered with in the fair exercise of its functions; and the second, that a verdict shall never stand which proceeds upon an erroneous view of the law. These two principles, which look beyond the immediate case before the court into future and general consequences, will sometimes induce it to grant or refuse a new trial, where, so far as the parties themselves were concerned, it might have come to a different determination. Upon all or some of these principles, I believe it will be found that the various rules laid down in different books and cases proceed; and a very few instances will show how they work. Thus, if a witness has been improperly admitted to prove a fact, still if, striking his evidence out, enough remains to support the verdict, the error was immaterial; the party cannot say that justice has not been done, and therefore is not entitled to a new trial. So if an unconscionable defence be set up against a just demand, and the weight of evidence be in favour of that defence, still if the jury presume against it, and have any thing on which to ground the presumption, the party cannot say that real justice would be attained by a contrary verdict, and will therefore be refused a new trial. Again, the degree of damages which a party shall receive for any injury proved, is peculiarly a question for the jury; and where the injury has been to the honour or the feelings, it is still more decisively so, because it is less possible to reduce such things to any arbitrary standard, by which all minds may measure them alike. The court, therefore, will not ordinarily interfere in such cases, and in actions for assault, criminal conversation, seduction, &c. it is seldom

2. Arrests of judgment arise from *intrinsic* causes, appearing upon the 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

seldom that the amount of damages is admitted as a sufficient ground for a new trial. But then, even here, the general rule is not an arbitrary one, and the hands of the court are not absolutely tied; for if it sees that the jury has proceeded on manifestly wrong views, or under corrupt impressions, it will grant another trial even in a case of criminal conversation: for the jury is to be uninterrupted only in the *fair* exercise of its functions. Again, so far as the parties are concerned, where the sum sought to be recovered is trifling, (for example, under 20*l*, which is the limit usually adhered to by the court,) it is thought that the ends of justice are better answered by standing to the first erroneous verdict, than by exposing the parties to the expense and delay of a second trial But if the verdict has proceeded from an erroneous exposition of the law by the judge, interests beyond those of the parties become concerned, it is important to the public that such an exposition should not go down uncorrected, and it is due to the court itself, not to sanction by a judgment, what appears manifestly not to be the law. Where, therefore, the application is made on the ground of a misdirection, the trifling value of the sum is no answer to it.

It is stated in the text, that the ground of the application, if it arises from what passes at the trial, is taken from the judge's report; and certainly so far as regards the evidence, no method can be suggested more decorous, or proper. But it will not be deemed disrespectful in me, I trust, if I suggest a doubt, whether the same mode is so unobjectionable when the application is made on the ground of a misdirection In the course of a summing up, when a judge lays down the law in a manner which dissatisfies the counsel of either party, it is not usual, nor would it be decorous, to interrupt him, or discuss the point then; but the counsel commits to paper at once the position which he does not assent to; and if upon after examination, he remains confirmed in his dissent, he makes his application in the following term for a new trial. The judge often makes no note of his own summing up at the time in the press of business, his attention being immediately called to the next cause; or if he does, it must frequently happen that, all that he has said, will not occur to him. In either case it may be very painful, on many accounts, to the judge himself, and never can be satisfactory to the party, that the decision of the court should turn upon his report — the question is not between his notes and the counsel's notes, but between his recollection, and notes taken at the moment Certain it is, that public satisfaction is not always given in this way, when not the slightest imputation is intended to be thrown on the intentions of the judge who reports; and I would venture to suggest whether more might not be given, and the learned judges be relieved from a painful difficulty, if it were made the duty of the associate, or some competent officer, to make a minute of the direction of the judge; this minute might be immediately him even before the deliberation of the jury; if he found therein

an action on the case for [the breach of] 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.] (3) 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 upon. And this is an invariable rule with regard to arrests of judgment upon matter [394 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

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any error, he might correct it at once, but if he approved of it, it would remain to be appealed to, whenever the direction should be brought in question thereafter

Where the new trial is granted, the costs of the former are generally a matter of consideration, and the payment of them is or is not a condition imposed according to the circumstances. Upon this subject I cannot do better than refer the student to Mr Tidd's Practice, p 921. 7th edit The general rule seems to be, that if the new trial is granted for the misdirection of the judge, or the misbehaviour of the jury, the payment of costs is not usually imposed as a condition, but that it is, where the new trial is for the mere error of the jury.

(3) By the 21 J. 1. c. 13, any variance in form only between the original writ and declaration, is aided after verdict; and by the 5 G. 1. c. 13., it is enacted, that after verdict, the judgment shall not be staid or reversed for any defect in form or substance in any bill, writ original or judicial, or for *any* variance in such writs from the declaration or other proceedings. Independently of these statutes, it is not easy to see how the defendant could have availed himself of any variance between the writ and declaration after verdict, or any interlocutory judgment, for it was then too late for him to pray oyer of the writ, and expose the variance.

"alleged as cause of demurrer will be good in arrest of "judgment:" for if a declaration or plea omits to state some particular circumstance, without proving of which, at the trial, it is impossible to support the action or defence, this omission shall be aided by a verdict. As if, in an action of trespass, the declaration doth not allege that the trespass was committed on any certain day[w]; or if the defendant justifies, by prescribing for a right of common for his cattle, and does not plead that his cattle were *levant* and *couchant* on the land[x]; though either of these defects might be good cause to demur to the declaration or plea, yet if the adverse party omits to take advantage of such omission in due time, but takes issue, and has a verdict against him, these exceptions cannot after verdict be moved in arrest of judgment. For the verdict ascertains those facts, which before from the inaccuracy of the pleadings might be dubious; since the law will not suppose, that a jury under the inspection of a judge, would find a verdict for the plaintiff or defendant, unless he had proved those circumstances, without which his general allegation is defective[y]. (4) Exceptions, therefore, that are moved in arrest of judgment, must be much more material and glaring than such

[w] Carth. 389. [x] Cro. Jac. 44. [y] 1 Mod. 292.

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(4) It is correctly observed, upon this passage, that though Sir W. Blackstone has stated with correctness, the principle upon which defects are aided by a verdict at common law, yet his two examples are instances of defects aided after verdict by the statutes of jeofails (see post, 408.) *Stennel* v. *Hogg*, 1 Saund. 228. *n.* (1). In the first case, the trespass was alleged to *have been* committed on a day not yet come; this was clearly no omission of any circumstance necessary in the proof, but a formal mistatement: so again, where the party stated a prescriptive right of common, but neglected to bring his case formally within it by averring the levancy and couchancy of the cattle, which was one condition of the prescription, the issue being taken on the prescription itself, no proof was necessary that the particular cattle were levant and couchant in fact; the omission of that fact therefore was not the omission of a circumstance necessary in the proof; in other words, the verdict in neither case raises a presumption that the fact omitted was proved to the jury. But an instance in point may be put thus: if a man states the grant of a reversion, which can only be conveyed by deed, without alleging it to have been by deed, here if the fact of the grant be in issue, and found by the jury, the verdict cures the omission, for proof of the deed, the presumption is that it could not have been so found.

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 in the last stage of a cause, to unravel the whole proceedings. But if the thing omitted be essential to the action or defence, as, if the plaintiff does not merely state his title in a defective [395
manner, but sets forth a title that is totally defective in itself[z]; or if to an action of debt the defendant pleads *not guilty* instead of *nil debet*[a], these cannot be cured by a verdict for the plaintiff in the first case, or for the defendant in

If, by the misconduct or inadvertence of the pleaders, the issue be joined on a fact totally immaterial, or insufficient to determine the right, so that the court upon the finding cannot know for whom judgment ought to be given; as if, in an action on the case in *assumpsit* against an executor, he pleads that he himself (instead of the testator) made no such promise[b]: or if, in an action of debt on bond conditioned to pay money *on* or *before* a certain day, the defendant pleads payment *on* the day[c]; (which issue, if found for the plaintiff, would be inconclusive, as the money might have been paid *before*;) in these cases the court will after verdict award a *repleader*, *quod partes replacitent*; 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]. (5)

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

[z] Salk. 365.
[a] Cro. Eliz. 778.
[b] 2 Ventr. 190.
[c] Stra. 994.
[d] 1 Burr. 301, 302.
[e] Raym. 458. Salk. 579.

(5) A repleader is never granted in favour of the person who made the first fault in the pleading, Douglas, 596.; nor are any costs allowed, 2 Ventr. 196., for the party who applies for it ought not to have overlooked the fault, and proceeded to trial; by doing so, he has contributed to the costs.

be entered on the roll or record. Judgments are the sentence of the law, pronounced by the court upon the matter contained in the record; and are of four sorts. First, where the facts are confessed by the parties, and the law determined by the court; as in case of judgment upon *demurrer*: secondly, where the law is admitted by the parties, and the facts disputed; as in case of judgment on a *verdict*: thirdly, where
[396] both the fact and 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 *retraxit*.

The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of *the law*. It is the conclusion that naturally and regularly follows from the premises of law and fact, which stand thus: against him, who hath rode over my corn, I may recover damages by law: but A hath rode over my corn; therefore I shall recover damages against A. If the major proposition be denied, this is a demurrer in law. if the minor, it is then an issue of fact: but if both be confessed (or determined) to be right, the conclusion or judgment of the court cannot but follow. Which judgment or conclusion depends not therefore on the arbitrary caprice of the judge, but on the settled and invariable principles of justice. The judgment, in short, is the remedy prescribed by law for the redress of injuries; and the suit or action is the vehicle or means of administering it. What that remedy may be, is indeed the result of deliberation and study to point out, and therefore the style of the judgment is, not that it is decreed or resolved by the court, for then the judgment might appear to be their own; but, "it is considered," *consideratum est per curiam*, that the plaintiff do recover his damages, his debt, his possession, and the like: which implies that the judgment is none of their own; but the act of law, pronounced and declared by the court, after due deliberation and inquiry.

All these species of judgments are either *interlocutory* or *final*. *Interlocutory* judgments are such as are given in the

middle of a cause, upon some plea, proceeding or default, which is only intermediate, and does not finally determine or complete the suit. Of this nature are all judgments for the plaintiff upon pleas in abatement of the suit or action: in which it is considered by the court, that the defendant do [397] 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 hath put in a better answer.

But the interlocutory judgments, most usually spoken of, are those incomplete judgments, whereby the *right* of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained: which is a matter that cannot be done without the intervention of a jury. As by the old Gothic constitution the cause was not completely finished, till the *nembda* or jurors were called in "*ad execu-* "*tionem 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,

[f] 2 Saund. 30.

[g] Stiernhook, *de jure Goth. l.* 1. *c.* 4.

when confessed, is absolutely complete and binding; provided the same (as is also required in all other judgments) be regularly *docquetted*, that is, abstracted and entered in a book,
[398] according to the directions 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 charges, will confess the whole damages laid in the declaration: otherwise the entry of the judgment is, "that the plaintiff ought to "recover his damages, (indefinitely,) but because the court "know not what damages the said plaintiff hath sustained, "therefore the sheriff is commanded, that by the oaths of "twelve honest and lawful men he inquire into the said "damages, and return such inquisition into court." This process is called a *writ of inquiry*: in the execution of which the sheriff sits as judge, and tries by a jury, subject to nearly the same law and conditions as the trial by jury at *nisi prius*, what damages the plaintiff hath really sustained; and when their verdict is given, which must assess *some* damages, the sheriff returns the inquisition, which is entered upon the roll in manner of a *postea*; and thereupon it is considered, that the plaintiff do recover the exact sum of the damages so assessed. In like manner, when a demurrer is determined for the plaintiff upon an action wherein damages are recovered, the judgment is also incomplete, without the aid of a writ of inquiry. (6)

(6) With respect to awarding a writ of inquiry, the court will look through the form of action to see whether substantially, such an inquiry is necessary; if it be, though the form of action be debt for a sum certain, yet they will award it; and if it be not, though the form be assumpsit for unliquidated damages, they will not put the parties to the unnecessary delay and expense: thus, if debt be brought for foreign money, or for the use and occupation of lands, though in form the plaintiff demands a sum certain, yet as he need not prove that precise sum, they will in case of judgment by default, direct the sheriff to inquire what is the sum really due. On the other hand, where, by the form of action the plaintiff demands general damages, as when he sues in assumpsit on a bill of exchange, or promissory note, or in covenant for rent, and the defendant suffers judgment by default, as these are mere matters of figures, which the officers of the court can calculate as well as a jury, it is a common practice to order them to be referred to one of them, and judgment is entered upon their report.

In

FINAL judgments are such as at once put an end to the action, by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for. In which case, if 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 [h]; or be taken up, *capiatur*, till he pays a fine to the king for the public misdemesnor 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 *capias* shall issue for this fine, [399] nor any fine be paid; but the plaintiff shall pay 6*s.* 8*d.* to the proper officer, and be allowed it against the defendant among his other costs. And therefore upon such judgments in the common pleas they used to enter that the fine was remitted, and now in both courts they take no notice of any fine or *capias* at all [m]. But if judgment be for the defendant, then in case of fraud and deceit to the court, or malicious or vexatious suits, the plaintiff may also be fined [n]; but in most cases it is only considered, that he and his pledges of prosecuting be (nominally) amerced for his false claim, *pro falso clamore suo*, and that the defendant may go thereof without

[h] 8 Rep. 40. 61

[i] 8 Rep. 59. 11 Rep. 43. 5 Mod. 285. See Append. No. II. § 4.

[k] F.N.B.121. Co. Litt.131. 8 Rep. 60. 1 Roll. Abr. 219. Lill. Entr. 379. C.B. *Hil.* 4 Ann. *rot.* 430.

[l] 8 Rep. 60.

[m] Salk. 54. Carth. 390.

[n] 8 Rep. 59, 60.

In one important case the legislature interfered most beneficially by the 8&9 W.3. c.11. Where a bond was given to secure the performance of covenants, a single breach was at law a forfeiture of the whole penalty. But by the statute last mentioned, the hardship which pressed upon *both* parties in consequence of this, is removed: the plaintiff is allowed still to enter up his judgment for the whole penalty, which stands as a security against future breaches; but he is for the present compelled to assign all the existing breaches of which he complains, the damages accruing from them are assessed, and upon payment of them execution is stayed upon the judgment entered up.

a day, *eat inde sine die*, that is, without any farther continuance or adjournment; the king's writ, commanding his attendance, being now fully satisfied, and his innocence publicly cleared [o]. (7)

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 demandant in a real action was the statute of Gloucester, 6 Ed. I. c. 1., as did the statute of Marlbridge, 52 Hen. III. c. 6., to the defendant in one particular case, relative to wardship in chivalry. though in reality costs were 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

[o] Append. No. III. § 6
[p] *Cod* 3. 1. 13
[q] Append. No. II § 4

(7) At common law the death of either party before signing final judgment, put an end to the suit, though after verdict, unless the death was in the vacation after any term in which the plaintiff had been entitled to enter up judgment, in which case he might still enter it up by an equitable fiction as of that preceding term: but now by the 17 C. 2. c 8 where either party dies between verdict and judgment, it may still be entered up at any time within two terms after the verdict. And by 8 & 9 W 3. c. 11. a provision is made for the case of either party dying between interlocutory and final judgment in any action, which might have been originally maintained against the personal representative; as well as for that of one or more plaintiffs or defendants of a greater number dying between the same periods in any action, the cause of which would by law survive to or against the surviving plaintiffs or defendants Where, however, the delay has been occasioned by the time taken for arguing and deciding a special verdict, a motion in arrest of judgment, or any thing of that sort, and either party dies during that interval, however long, judgment may be entered up at common law, for the delay which arises from the act of the court must not turn to the prejudice of the suitors.

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.) [400] no costs are now allowed[r]; unless they have been expressly given by some subsequent statute. (8) The statute 3 Hen. VII. c. 10. was the first which allowed any costs on a writ of error. But no costs were allowed the *defendant* in any shape, till the statutes 23 Hen. VIII. c. 15. 4 Jac. I. c. 3. 8 & 9 W. III. c. 11. and 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.

THE king (and any person suing to his use[s]) shall neither pay nor receive costs; for, besides that he is not included under the general words of these statutes, as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them. (9) And it seems reasonable to suppose, that

[r] 10 Rep. 116. [s] Stat 24 Hen. VIII. c 8

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(8) But the statute of Gloucester extends to give costs where damages are given to any demandant or plaintiff in any action by any statute made after that parliament, 2 Inst. 289 The distinction now adopted, seems to be this, that where a party sustains damage, and has a right of action at common law, he is within the benefit of the statute of Gloucester, though a later statute giving a new remedy with damages is silent as to costs, and he pursues that new remedy. On the contrary, where the modern statute gives not merely the new remedy, but the right of action, with damages, and is silent as to costs, none are recoverable *Cresswell* v. *Houghton*, 6 T. R 359

(9) This is stated too generally as to the receiving costs; for by the 33 H 8 c. 39, the king recovers costs as "other common persons" in actions of debt upon specialties made to himself, or any one to his use, And in equity, the attorney general constantly receives costs, where he is made a defendant in respect of legacies given to charities, and even where he is made a defendant in respect of the immediate rights of the crown in cases of intestacy. In the case of the *Attorney General* v. *Earl of Ashburnham*, which was a proceeding under the 59 G 3. c. 91 (see p. 428. n. (3);) and there was no relator liable to pay costs to the defendant, the attorney general was still decreed his costs, 1 S. & S. 394. The principle therefore on which the general rule rests, should seem to be that costs *eo nomine*

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 supposeth the contract to be made with, or the wrong to be done to, the plaintiff himself. And paupers, that is, such as will swear themselves not worth five pounds, are, by statute 11 Hen. VII. c. 12., to have original writs and *subpoenas gratis*, and counsel and attorney assigned them without fee; and are excused from paying costs, when plaintiffs, by the statute 23 Hen. VIII. c. 15. but shall suffer other punishment at the discretion of the judges. And it was formerly usual to give such paupers, if nonsuited, their election either to be whipped or pay the costs [w]: though that practice is now disused [x]. It seems
[401] however agreed, that a pauper may recover costs, though he pays none; for the counsel and clerks are bound to give their labour to *him*, but not to his antagonist [y]. (10) To prevent also trifling and malicious actions, for words, for assault and battery, and for trespass, it is enacted by statutes 43 Eliz. c. 6, 21 Jac. I. c. 16., and 22 & 23 Car. II. c. 9. § 136. that, where the jury who try any of these actions shall give less damages than 40*s*. 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,

[t] Co. Litt. 133.
[u] Cro. Jac. 229. 1 Ventr. 92
[w] 1 Sid. 261. 7 Mod. 114.
[x] Salk. 506.
[y] 1 Equ. Cas. abr. 125.

were unknown to the common law; and that the statute of Gloucester does not extend to the king; if it had depended on the king's dignity it would have equally applied to the courts of equity.

(10) In this case the pauper will only recover as costs what he *is* really out of pocket, not such sums as in an ordinary suit a common plaintiff *would* have been; and therefore, in a case in equity the plaintiff and solicitor were directed to make oath what they had paid, or were to pay; and were allowed those sums only. Hullock on Costs, p. 228. 2d edit.

or that in trespass the freehold or title of the land came chiefly in question. (11) Also 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 [z], though his damages, as assessed by the jury, amount to less than 40*s*.

[z] See pag. 214, 215.

(11) The account given of the 43 Eliz. c 6. is not quite correct. That statute is not confined to the causes of action specified in the text, (indeed it specifically excludes one of them, battery,) but extends generally to all personal actions; and its object was to confine suits for trifling matters to inferior courts It does not require a certificate to *give* full costs, but to take them away; and it was the unwillingness of the judges to interpose under this statute, which induced the legislature to pass the statutes of James and Charles upon a different system, these last restraining *generally* the costs in certain cases unless the judge by his certificate deemed it proper to grant them. Indeed there seems to have been generally a difference of opinion between the legislature and the bench on this subject: the former displaying an anxiety to confine litigation for trifling interests to lower and less expensive courts; the latter careful that the subject should not be too strongly deterred from having his claims determined in those courts to which he has a strict constitutional right of access, and the decisions of which after all are generally found to be the most satisfactory. Thus the words of the statute of C. 2. are "all actions of trespass, assault and battery, and *other personal actions*, wherein the judge at the trial shall not find and certify under his hand on the record, that an assault and battery was proved, or that the freehold or title of the land mentioned in the declaration was chiefly in question." It can scarcely be doubted that the intention of the legislature was to restrain costs generally with qualifications in two particular cases, but with the exception of one or two early decisions which adopted this view of the statute, the uniform construction has been that it extends only to these two cases, because the qualifications can apply only to them. So that a large class of actions of trespass, and the words "other personal actions" are effectually struck out of the statute. See Hullock on Costs, pp 35. 39. Tidd, 975.

It is usual to guard the local jurisdictions, which are created by act of parliament, with provisions restraining the costs, where an action which might have been brought in them is commenced in a superior court; of these there are many in the statute book. See Tidd, 970.

The general principle of preventing litigation by denying costs has by a late statute been extended to the inferior courts, which have jurisdiction to hold pleas to the amount of 40*s*., and even to those whose jurisdiction does not extend so far, 58 G. 3. c. 30.

After *judgment* is entered, *execution* will immediately follow, unless the party condemned thinks himself unjustly aggrieved by any of these proceedings, and then he has his remedy to reverse them by several writs in the nature of appeals, which we shall consider in the succeeding chapter.

CHAPTER THE TWENTY-FIFTH.

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 *attaint*; which lieth to inquire whether a jury of *twelve* men gave a false verdict [a]; that so the judgment following thereupon may be reversed: and this must be brought in the lifetime of him for whom the verdict was given; and of two at least of the jurors who gave it. This lay at the common law, only upon writs of *assise*; and seems to have been co-eval with that institution by king Henry II. at the instance of his chief justice Glanvil: being probably meant as a check upon the vast power then reposed in the recognitors of assise, of finding a verdict according to their own personal knowledge, without the examination of witnesses. And even here it extended no farther than to such instances, where the issue was joined upon the very point of assise (the [403
heirship, disseisin, &c.), and not on any collateral matter; as villenage, bastardy, or any other disputed fact. In these cases the *assise* was said to be turned into an *inquest* or *jury*, (*assisa vertitur in juratam*,) or that the assise should be taken *in modum juratae et non in modum assisae*; that is, that the issue should be tried by a common jury or inquest, and not

[a] Finch. L. 484.

by recognitors of assise[b]: and then I apprehend that no attaint lay against the inquest or jury that determined such collateral issue[c]. Neither do I find any mention made by our antient writers, of such a process obtaining after the trial by inquest or jury, in the old Norman or feodal actions prosecuted by writ of *entry*. Nor did any attaint lie in *trespass*, *debt*, or other action personal, by the old common law: because those were always determined by common inquests or juries[d]. At length the statute of Westm. 1. 3 Edw. I. c. 38. allowed an attaint to be sued upon *inquests*, as well as *assises*, which were taken upon any plea of *land* or of *freehold*. But this was at the king's discretion, and is so understood by the author of Fleta[e], a writer contemporary with the statute; though sir Edward Coke[f] seems to hold a different opinion. Other subsequent statutes[g] introduced the same remedy in all pleas of *trespass*, and the statute 34 Edw. III. c. 7. extended it to *all* pleas whatsoever, personal as well as real; except only the writ of *right*, in such cases where the mise or issue is joined on the *mere right*, and not on any *collateral* question. For though the attaint seems to have been generally allowed in the reign of Henry the second[h], at the first introduction of the grand assise, (which at that time might consist of only *twelve* recognitors, in case they were all unanimous,) yet subsequent authorities have holden, that no attaint lies on a false verdict given upon the mere right, either at common law or by statute; because that is determined by the grand assise, appealed to by the party himself, and now consisting of *sixteen* jurors[i].

[404]

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

[b] Bract. *l.* 4. *tr.* 1 *c* 34. § 2, 3, 4.— *tr.* 3. *c.* 17. — *tr.* 5. *c.* 4. § 1, 2 Flet *l.* 5. *c.* 22. § 8. Co. Entr. 61 *b.* Booth. 213.

[c] Bract. *l.* 4. *tr.* 1. *c.* 34. § 2. Flet. *ibid.*

[d] Yearb. 28 Edw. III. 15. 17 *Ass. pl.* 15. Flet. 5. 22. 16.

[e] *l.* 5. *c.* 22. § 8. & 16.

[f] 2 Inst 130 237.

[g] Stat 1 Edw. III. st. 1 c 6. 5 Edw. III. c. 7. 28 Edw. III. c. 8.

[h] See pag. 389.

[i] Bract. *l.* 4. *tr.* 5. c. 4. § 2. Flet. 5. 22 7.. Britt. 242. *b.* Yearb. 12 Hen. VI. 6. Bro. *Abr. t. attaint.* 42. 1 Roll. *Abr.* 289.

set aside by an equal number, nor by less indeed than double the former[k]. If the matter in dispute be of forty pounds value in personals, or of forty shillings a year in lands and tenements, then by statute 15 Hen. VI. c. 5. each grand juror must have freehold to the annual value of twenty pounds. And he that brings the attaint can give no other evidence to the grand jury, than what was originally given to the petit. For as their verdict is now trying, and the question is, whether or no they did right upon the evidence that appeared to them, the law adjudged it the highest absurdity to produce any subsequent proof upon such trial, and to condemn the prior jurisdiction for not believing evidence which they never knew. But those against whom it is brought are allowed, in affirmance of the first verdict, to produce new matter[l]: because the petit jury may have formed their verdict upon evidence of their own knowledge, which never appeared in court. If the grand jury found their 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 it's 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 [405
made perpetual by 13 Eliz. c. 25. an attaint is allowed to be brought after the death of the party, and a more moderate punishment was inflicted upon attainted jurors; *viz.* perpetual infamy, and, if the cause of action were above 40*l.* value, a forfeiture of 20*l.* apiece by the jurors, or, if under 40*l.*, then 5*l.* apiece: to be divided between the king and the party injured. So that a man may now bring an attaint either upon the statute or at common law, at his election[m]; and in both of them may reverse the former judgment. But the practice of setting aside verdicts upon motion, and granting *new trials*, has so superseded the use of both sorts of attaints, that I

[k] Bract. *l.* 4. *tr.* 5. *c.* 4. § 1. Flet. *l.* 5. *c.* 22. § 7.

[l] Finch. L. 486.

[m] 3

have observed very few instances of an attaint in our books, later than the sixteenth century [n]. By the old Gothic constitution indeed, no certificate of a judge was allowed, in matters of evidence, to countervail the oath of the jury: but their verdict, however erroneous, was absolutely final and conclusive. Yet there was a proceeding from whence our attaint may be derived. — If, upon a lawful trial before a superior tribunal, the jury were found to have given a false verdict, they were fined, and rendered infamous for the future [o].

II. The writ of *deceit*, or action on the case in nature of it, may be brought in the court of common pleas, to reverse a judgment there had by fraud or collusion in a real action, whereby lands and tenements have been recovered to the prejudice of him that hath right. But of this enough hath been observed in a former chapter [p].

III. An *audita querela* is where a defendant, against whom judgment is recovered, and who is therefore in danger of exe-
[406] cution, 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 the satisfaction to be entered on the record. In these and the like cases, wherein the defendant hath good matter to plead, but hath had no opportunity of pleading it, (either at the beginning of the suit, or *puis darrein continuance*, which, as was 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 jus-

[n] Cro. Eliz. 309. Cro. Jac 90.

[o] "*Si tamen evidenti argumento falsum jurasse convincantur (id quod superius judicium cognoscere debet) mulctantur in bonis, de caetero perjuri et intestabiles.*" Stiernhook *de jure Goth. l.* 1. *c* 4

[p] See pag 165.

[q] See pag 316

tice to be done between them[r]. It also lies for bail, when judgment is obtained against them by *scire facias* to answer the debt of their principal, and it happens afterwards that the original judgment against their principal is reversed: for here the bail, after judgment had against them, have no opportunity to *plead* this special matter, and therefore they shall have redress by *audita querela*[s]: which is a writ of a most remedial nature, and 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.

IV. BUT, fourthly, the principal method of redress for erroneous judgments in the king's courts of record, is by *writ of error* to some superior court of appeal.

A WRIT of error[u] lies for some supposed mistake in the [407] proceedings of a court of record; for to amend errors in a base court, not of record, a writ of *false judgment* lies[w]. 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 attaint, or a new trial, to correct the mistakes of the former verdict. (1)

FORMERLY, the suitors were much perplexed by writs of error brought upon very slight and trivial grounds, as misspellings 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

[r] Finch L. 488 F.N.B.102.
[s] 1 Roll. Abr. 308.
[t] Lord Raym. 439.
[u] Append. No. III. § 6.
[w] Finch L. 484
[x] 4 Burr. 1099.

(1) See post, 411. n. (7)

common law no amendment could be permitted, unless within the very term in which the judicial act so recorded was done: for during the term the record is in the breast of the court; but afterwards it admitted of no alteration[x]. But now the courts are become more liberal; and where justice requires it, will allow of amendments at any time while the suit is depending, notwithstanding the record be made up, and the term be past. For they at present consider the proceedings as in *fieri*, till judgment is given; and therefore that, till then, they have power to permit amendments by the common law: but when judgment is once given and enrolled, no amendment is permitted in any subsequent term[y]. Mistakes are also effectually helped by the statutes of amendment and *jeofails*: so called, because when a pleader perceives any slip in the form of his proceedings, and acknowledges such error (*jeo faile*), he is at liberty by those statutes to amend it; which amendment is seldom actually made, but the benefit of the
[408] 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.

This is at present the general doctrine of amendments; and it's 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 antient year-books. So liberal were then the sentiments of the crown as well as the judges, that in the statute of Wales, made at Rothelan, 12 Edw. I, the pleadings are directed to be carried on in that principality, "*sine calumpnia verborum, non observata illa dura con-*

[x] Co. Litt. 260.
[y] Stat 11 Hen. IV. c. 3.
[z] Stra. 1011.
[a] Stat. 14 Edw III. c. 6. 9 Hen. V c. 4. 4 Hen. VI. c. 3. 8 Hen. VI. c 12. & 15. 32 Hen. VIII. c. 30. 18 Eliz. c. 14. 21 Jac I c 13. 16 & 17 Car. II. c. 8. (stiled in 1 Ventr. 100 an omnipotent act), 4 & 5 Ann. c. 16. 9 Ann. c. 20. 5 Geo. I. c. 13.

"*suetudine, 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 mis-entry was made, it was rectified by the minutes, or by the remembrance of the court itself.

When the treatise by Britton was published, in the name and by authority of the king, (probably about the 13 Edw. I. because the last statutes therein referred to, are those of Winchester and Westminster the second) a check 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 [409] "that their own record shall be a warranty for their own "wrong, nor that they may rase their rolls, nor amend "them, nor record them contrary to their original enrol-"ment." The whole of which, taken together, amounts to this, that a record surreptitiously or erroneously made up, to stifle or pervert the truth, should not be a sanction for error; and that a record, originally made up according to the truth of the case, should not afterwards by any private rasure or amendment be altered to any sinister purpose.

But when afterwards king Edward, on his return from his French dominions in the seventeenth year of his reign, after upwards of three years' absence, found it necessary (or convenient, in order to replenish his exchequer) to prosecute his judges for their corruption and other 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, even the most able and upright [d]. The

[b] Brit. *proëm.* 2, 3.

[c] *Judicia perverterunt, et in alus erraverunt.* (Matth 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.

severity of which proceedings seems so to have alarmed the
[410] 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 com-

estates the whole amount of the forfeitures being upwards of 100,000 marks, or 70,000 pounds. (3 Pryn. 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. (*Claus. 6 Edw. I. m.* 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 practice) was only, according to a tradition that was current in Richard the third's time, (year-book, M *2 Ric. III* 10.) his altering out of mere compassion, a fine which was set upon a very poor man, from 13*s* 4*d* to 6*s*. 8*d* 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. 255.) 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 turri Lond. 29 Edw. I. m.* 8.), and the next year made chief justice of the common pleas, (*Pat. 29 Edw. I. m.* 7. Dugd. *chron ser.* 32,) in which office he continued till his death in 2 Edw. II. (*Claus.* 1 *Edw. II m.* 19. *Pat. 2 Edw. II. p.* 1 m. 9. Dudg. 34 Selden. pref to Hengham. There is an appendix to this tradition, remembered by justice Southcote in the reign of queen Elizabeth (3 Inst. 72 4 Inst *255*), 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 exertion of mechanical genius, in constructing horological machines) clocks came not into common use till a hundred years afterwards, about the end of the fourteenth century (*Encyclopedie*, tit *horloge* 6 Rym. *Foed.* 590. Derham's Artif. Clockmaker 91.) (2)

(2) There seems, however, no good reason to doubt the fact, of which very currency of the tradition is some proof, and which according to the æra of the invention was clearly possible It is not necessary to suppose that the clock was set up in the very year in which the fine was imposed, and in 1292, three years only later than the 17 Ed. 1., a clock was erected in the cathedral at Canterbury. Dante, who died in 1321, makes mention of an *orologio* in the Paradiso, can. x. v. 139 in a way which shows that he intended an instrument with wheels and striking the hours. The author, indeed, of a learned and cautious paper in Beckmann's History of Inventions, vol. i. pp. 419—462, inclines to attribute clocks to the 11th century, but adduces clear evidence of their existence in the twelfth. See also Archæo. vol. v. p. 416. A dictum of Lord Holt in an anonymous case, 6 Mod. 130. is intelligible only by reference to this story: an application

passionate 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 inrolled 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[f]. 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 narrowness of thinking was added, that every slip (even of a syllable or a letter[h]) was now held to be fatal to the pleader, and overturned his client's cause[i]. If they durst [411]

[e] 1 Hal. P.C. 647.

[f] 1 Leon. 183. Co. Litt. 117 See pag. 331.

[g] 1 Hal. P.C. 648.

[h] Stat. 14 Edw. III. c. 6.

[i] In those days it was strictly true, what Ruggle (in his *Ignoramus*) has humorously applied to more modern pleadings, "*in nostra lege unum comma "evertit totum placitum.*"

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was made to the court to renew the term in an action of ejectment, it having expired during the pendency of an injunction from chancery: the court refused to do it, because it involved an alteration of the record; and Holt C.J. said "he considered there wanted a clock-house over against the hall gate."

Perhaps there is not much weight in the observation made on the smallness of the judge's salaries as contrasted with the amount of the fines imposed. Where the direct means of becoming wealthy were so small, that very circumstance may have led to the use of indirect means. Certain it is that the judges were men of great wealth; of this there are abundant proofs: I will mention one. In a capitation-tax granted to Richard II. not a century after the time mentioned, and when certainly no proportionate increase had been made in the salaries of the judges, I find archbishops, and the dukes of Lancaster and Bretagne (specially), rated at

not, or would not, set right mere formal mistakes at any time, upon equitable terms and conditions, 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 attaint, how easy was it to make waving the attaint the condition of allowing the amendment! And yet these were among the absurd 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 formerly suffered as much by this scrupulous obstinacy and literal strictness of the courts as they could have done even by their iniquity. After verdicts 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 it's 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 remembered than the learning of essoigns and defaults, or the counterpleas of voucher, are at present. But to return to our writs of error.

[*410] 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

[k] Styl. 207. [l] 8 Rep. 156. &c.

6*l.* 13*s.* 4*d.*; earls and bishops at 4*l*; Barons at 2*l.*, and the judges and chief baron at 5*l.*; and serjeants and "great apprentices of the law at 2*l.*"

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 (3); and for securing payment of costs and damages, which are now payable by the vanquished party in all, except a few particular instances, by virtue of the several statutes cited in the margin[n]. (4)

A WRIT of error lies from the inferior courts of record in England into the king's bench[o], and not into the common pleas[p]. Also from the king's bench in Ireland to the king's bench in England. (5) 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 removeable 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 (6); 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

[m] Stat. 3 Jac. I. c 8 13 Car. II. st. 2. c. 2. 8 & 9 W. III. c.11. 4 & st. 2. c. 2 16 & 17 Car. II. c 8. 5 Ann c 16. 19 Geo III c 70.

[n] 3 Hen. VII. c. 10 13 Car. II.

[o] See chap. 4

[p] Finch L 480. Dyer, 250

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(3) The sum of ten is extended to fifteen pounds by the 51 G. 3. c 124 The statute of James extends to every kind of judgment, but is confined to one form of action, that of debt; the statutes of Charles embrace, with a few exceptions, every kind of action, but are confined to judgments after verdict. This gives the proceeding in debt an advantage, where the defendant has really no good defence, and is likely to resort to vexatious delays of the plaintiff's judgment

(4) None of these statutes provide for the case of a judgment reversed in the court of error; and therefore in such a case each party must pay his own costs from the beginning. *Bell* v. *Potts*, 5 East. 49.

(5) But see Vol. I. p. 104.

(6) The statute 20 C. 2. c. 4. has dispensed with the presence of the lord treasurer, when the office is vacant. The chancellor and the treasurer are the judges of this court, and the justices whom they call to their assistance are but assistants; in practice, however, it is usual, for the chief justices to sit alone, who report their opinion to the chancellor, and the judgment is pronounced by him. See *Johnstone* v. *Sutton*. 1 T.R. 510.

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
[*411] laid down by the statute [s]; so that the writ of error then lies, without any intermediate stage of appeal, directly to the house of lords, the dernier resort for the ultimate decision of every civil action. Each court of appeal, in their respective stages, may, upon hearing the matter of law in which the error is assigned, reverse or affirm the judgment of the inferior courts, but none of them are final, save only the house of peers, to whose judicial decisions all other tribunals must therefore submit, and conform their own. And thus much for the reversal or affirmance of judgments at law, by writs in the nature of appeals. (7)

[q] Stat. 27 Eliz c. 8.
[r] See pag. 43
[s] 1 Roll. Rep. 264. 1 Sid. 424. 1 Saund. 346. Carth. 180. Comb. 295.

(7) By the 10&11 W.3. c 14 No judgment in any real or personal action shall be reversed or avoided for any error or defect therein, unless the writ of error or suit for reversing the same, be brought and prosecuted with effect within twenty years after such judgment signed or entered of record. But the following section has the usual provision in favour of infants, *feme coverts, persons non compotes,* imprisoned or beyond the seas, allowing them five years from the ceasing of their respective disabilities.

In this chapter, Sir W Blackstone has considered only the modes by which a judgment may be reversed by writ of error brought in a court of appeal, and has stated that this can only be done for error in law. There is, however, a proceeding to reverse a judgment by writ of error in the same court, where the error complained of is *in fact,* and not in law, and where of course no fault is imputed to the court in pronouncing it's judgment. This writ is called the writ *coram nobis,* or *coram vobis,* according as the proceedings are in the king's bench or common pleas, because the record is stated to *remain* before us (the king), if in the former; and before you (the judges), if in the latter, and is not removed to another court In this proceeding it is of course necessary to suggest a new fact upon the record, from which the error in the first judgment will appear; thus, supposing the defendant, being an infant, has appeared by attorney instead of guardian, it will be necessary to suggest the fact of his infancy of which the court was not before informed. There is, therefore, no inconsistency in bringing this writ of error before the same judges who pronounced the judgment in the first instance; because they are required to pronounce upon a new state of facts without impeachment of the former judgment on the

CHAPTER THE TWENTY-SIXTH.

OF EXECUTION.

IF the regular judgment of the court, after the decision of the suit, be not suspended, superseded, or reversed by one or other of the methods mentioned in the two preceding chapters, the next and last step is the *execution* of that judgment; or putting the sentence of the law in force. This is performed in different manners, according to the nature of the action upon which it is founded, and of the judgment which is had or recovered.

IF the plaintiff recovers in an action real or mixed, whereby the seisin or possession of land is awarded to him, the writ of execution shall be an *habere facias seisinam*, or writ of seisin, of a freehold; or an *habere facias possessionem*, or writ of possession [a], of a chattel interest [b]. These are writs directed to the sheriff of the county, commanding him to give actual possession to the plaintiff of the land so recovered: in the execution of which the sheriff may take with him the *posse comitatus*, or power of the county; and may justify breaking open doors, if the possession be not quietly delivered. But, if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of the door, in the name of seisin, is sufficient execution of the writ. Upon a presentation to a benefice recovered in a *quare impedit*, or assise of *darrein presentment*, the execution is by a writ *de clerico admittendo*; directed, not [413
to the sheriff, but to the bishop or archbishop, and requiring him to admit and institute the clerk of the plaintiff. (1)

[a] Append. No. II. § 4. [b] Finch. L. 470.

(1) The writ commands the bishop to admit and institute not any clerk by name, but *idoneam personam* at the presentation of the plaintiff, because though the plaintiff's right to present is now decided, yet the bishop still retains his power of determining on the fitness of the individual presented.

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 nusance, or *quod permittat prosternere*, where one part of the judgment is *quod nocumentum amoveatur*, a writ goes to the sheriff to abate it at the charge of the party, which likewise issues even in case of an indictment [c]. (2) Upon a replevin, the writ of execution is the writ *de retorno habendo* [d]: and, if the distress be eloigned, 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 they should not be delivered: and if the defendant still continues obstinate, then, (if the judgment hath been by default or on demurrer) the sheriff shall summon an inquest to ascertain the value of the goods, and the plaintiff's damages: which (being either so assessed, or by the verdict in case of an issue [h]) shall be levied on the person or goods of the defendant. So that, after all, in replevin and detinue, (the only actions for recovering the specific possession of personal chattels,) if the wrongdoer be very perverse, he cannot be compelled to a restitution of the identical thing taken or detained; but he still has his election to deliver the goods, or their value [i]: an imperfection in the law, that results from the nature of personal

[c] Comb. 10.
[d] See pag. 150.
[e] See pag. 149.
[f] 2 Leon. 174.
[g] 1 Roll. Abr. 737. Rast. Entr. 215.
[h] Bro. Abr. *t. damages*. 29.
[i] Keilw. 64.

(2) That is, if the indictment states the nusance to be continuing; if it does not, there is only judgment of fine or imprisonment, as in the case of any other misdemesnor. See *R.* v. *Stead and another*, 8 T. R. 142.

(3) From this passage, as well as from the account of replevin at p. 147. it might be supposed (as, indeed, it has been), that the author considered the action to be confined to cases of wrongful distress. At p. 146. however, he formally and correctly states it to be the legal remedy for every wrongful taking of goods, and I think it may fairly be supposed, that in the other places he refers only to the modern practice, which certainly confines of wrongful distress. See Selw. Ni. Pri. 1156.

property, which is easily concealed or conveyed out of the reach of justice, and not always amesnable to the magistrate.

EXECUTIONS in actions where money only is recovered, [414] 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]. (4) 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, (5) 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 the 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

j Append. No. III. § 7.
k 3 Rep. 12. Moor. 767.
l 1 Inst. 289.
m Moor. 704.
n Cro. Jac. 323.
o Cro. Car. 513.

(4) This rule does not hold true universally, though the converse of it does, that whenever a *capias* is allowed on mesne process before judgment, it may be had on the judgment itself.

(5) Except they have bound themselves by a statute merchant, or statute staple, or recognisance in nature of a statute staple. Tidd, 1042.

husband only: which is one of the many great privileges of English wives. (6)

[415] The writ of *capias ad satisfaciendum* is an execution of the highest nature, inasmuch as it deprives a man of his liberty, till he makes the satisfaction awarded; and therefore, when a man is once taken in execution upon this writ, no other process can be sued out against his lands or goods. Only by statute 21 Jac. I. c. 24. if the defendant dies, while charged in execution upon this writ, the plaintiff may, after his death, sue out a new execution against his lands, goods, or chattels. The writ is directed to the sheriff, commanding him to take the body of the defendant, and have him at Westminster on a day therein named, to make the plaintiff satisfaction for his demand. And, if he does not then make satisfaction, he must remain in custody till he does. This writ may be sued out, as may all other executory process, for costs, against a plaintiff as well as a defendant, when judgment is had against him.

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. Escapes are either voluntary, or negligent. Voluntary are such as are by the express consent of the keeper; after which he never can retake his prisoner again [q], (though the plaintiff

[p] See page 279. [q] 3 Rep. 52. · 1 Sid. 330.

(6) This position may, perhaps, be questioned in point of form, though it is substantially correct; as it offends against the general rule, that the execution should correspond with the judgment. Indeed, in the margin of the report in Coke, is cited a prior case, in the same volume, p. 407. which is contradictory to it. In practice the courts always discharge the wife on motion, when she has been taken on a *capias ad satisfaciendum* herself

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 re-taken, and the sheriff shall be excused, if he has him again before any action brought [416
against himself for the escape [s]. A rescue of a prisoner *in execution*, either going to gaol or in gaol, or a breach of prison, will not excuse the sheriff from being guilty of and answering for the escape; for he ought to have sufficient force to keep him, since he may command the power of the county [t]. But by statute 32 Geo. II. c. 28. if a defendant, charged in execution for any debt not exceeding 100*l.* will surrender all his effects to his creditors (except his apparel, bedding, and tools of his trade, not amounting in the whole to the value of 10*l.*), and will make oath of his punctual compliance with the statute, he may be discharged, unless the creditor insists on detaining him; in which case he shall allow him 2*s.* 4*d.* *per* week, to be paid on the first day of every week, and on failure of regular payment the prisoner shall be discharged. Yet the creditor may at any future time have execution against the lands and goods of such defendant, though never more against his person. (7) And, on the other hand, the creditors may,

[r] Stat. 8 & 9 W. III. c. 27 [s] F. N. B 130. [t] Cro. Jac. 419.

(7) By the 33 G. 3. c 5 this sum of 100*l.* is increased to 300*l*, and by the 37 G. 3. c 85. the allowance of 2*s.* 4*d.* to 3*s.* 6*d.* if there be but one detaining creditor, and if more, then to any sum in the discretion of the court not exceeding 2*s.* from each. Where the prisoner is in custody more than twenty miles from Westminster Hall, the court may order him to be brought up for his discharge before the judge of assise at the assises, or before the magistrates at quarter sessions; who are respectively invested, with the necessary powers by 32 G. 2. c. 28. and 52 G. 3. c. 34. The application is directed to be made by the prisoner before the end of the first term after his arrest, but where the neglect is shewn to have arisen from mistake or ignorance, it must be received, though made at a later period. These acts extend not merely to cases of persons in execution for debts between party and party, but to persons in custody by attachment for non-payment of costs, non-performance of awards, and similar contempts, as well as (by the 49 G 3. c. 6.) to persons in custody for contempt of any court of equity, by not paying money, or costs ordered to be paid.

Where the debt recovered does not exceed 20*l.* exclusive of the costs of the action, the 48 G. 3. c. 123. provides for the discharge of the debtor's person, after he shall have lain in prison twelve successive calendar months.

as in case of bankruptcy, compel (under pain of transportation for seven years) such debtor charged in execution for any debt under 100*l.* to make a discovery and surrender of all his effects for their benefit, whereupon he is also entitled to the like discharge of his person. (8)

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

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But the most important enactments in this branch of the law are the statutes of the 1 G. 4. c. 119. and 5 G. 4. c. 61. which have established a new court of record, called the court for the Relief of Insolvent Debtors, the judges of which are to make three circuits in the year for the discharge of insolvents. Few problems in legislation have been more puzzling than that of discovering the true practical limit to the imprisonment of the body for debt. The principle seems clear; so long as imprisonment may be a mean to enforce payment of the debt from the debtor, it is justifiable; but it ceases to be so, as between the parties, when from want of ability in the debtor, his imprisonment cannot produce that effect. But the public has an interest to prevent the contracting of debts fraudulently or extravagantly, and therefore when the first principle has ceased to operate, the fraudulent or extravagant debtor may be lawfully punished by a still longer confinement. Upon these two principles these acts proceed; the prisoner discharged under them is personally free as to all debts and demands specified in the order of discharge; but his present effects and credits, of which he is bound to give in a correct schedule, and all his future property, are made liable; and if he shall have been guilty of any fraud or bad practices in contracting any debt, or have opposed a vexatious defence to the action for recovering it; if he shall have fraudulently destroyed his papers, kept false books, made false entries, concealed debts or credits, given a voluntary preference to any creditor, (which, if done within three months before the filing of his petition for discharge, is declared to be void,) or made away with his property, or his imprisonment be for damages recovered against him in an action for crim. con., seduction, or malicious injury; in these and similar cases, the court may postpone his enlargement for two or three years at it's discretion; and a fraudulent concealment of property in his schedule subjects him to imprisonment and hard labour for any term not exceeding three years.

(8) This clause applies in favour of any creditor, having charged a prisoner in execution, whose debt does not exceed the stated sum (now extended to 500*l.* by the 26 G 3. c. 44. and 33 G. 3. c. 5) and he may compel the discovery and surrender, though the prisoner's whole debts may exceed that sum, and he may therefore be out of the benefit of the statute. *Chappell* v. *Ashley*. 5 B. & A. 537.

costs; or that he should surrender himself a prisoner; or, that they would pay it for him: as, therefore, the two former branches of the alternative are neither of them complied with, the latter must immediately take place [u]. In order to which a writ of *scire facias* may be sued out against the bail, commanding them to shew cause why the plaintiff should not have execution against them for his debt and damages: and on such [417] 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. 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 a chattel real [z]) of the defendant, till he has raised enough to satisfy the judgment and costs: (10) first paying the landlord of the premises, upon which the goods are found, the arrears of rent then due, not exceeding one year's rent in the whole. [a] If part only of

[u] Lutw. 1269—1273.
[w] Append. No. III. § 7.
[x] 5 Rep. 92.
[y] Palm. 54.
[z] 8 Rep. 171.
[a] Stat. 8 Ann. c

(9) In the common pleas the undertaking of the bail does not subject them to execution against the body. *Troughton* v. *Clarke and another*. 2 Taunt. 113.

(10) By the common law the sheriff might seize and sell growing crops, but the statute 56 G. 3. c. 50. has restrained him from selling, to be carried off any farm at lease, straw, turnips, manure, or any crops, which by the covenants or agreement with the landlord, were to be consumed on the property; and the same statute forbids him in any case to sell clover, or any artificial grass crops growing under standing corn.

debt be levied on a *fieri facias*, the plaintiff may have a *capias ad satisfaciendum* for the residue [b].

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 seise all his goods, and receive the rents and profits of his lands, till satisfaction be made to the plaintiff [c]. Little use is now made
[418] of this writ; the remedy by *elegit*, which takes possession of the lands themselves, being much more effectual. But of this species is a writ of 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 damages *de bonis ecclesiasticis*, which are not to be touched by lay hands: and thereupon the bishop sends out a *sequestration* of the profits of the clerk's benefice, directed to the churchwardens, to collect the same and pay them to the plaintiff, till the full sum be raised [e].

4. THE fourth species of execution is by the writ of *elegit*; which is a judicial writ given by the statute Westm. 2. 13 Edw. I. c. 18. either upon a judgment for a debt, or damages; or upon the forfeiture of a recognizance taken in the king's court. By the common law a man could only have satisfaction of goods, chattels, and the present profits of lands, by the two last mentioned writs of *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

[b] 1 Roll. Abr. 904. Cro. Eliz. 344.
[c] Finch. L. 471.
[d] *Registr. orig* 300. *judic.* 22.
[e] 2 Burn. eccl. law, 329.

whether he will sue out this writ or one of the former,) by which the defendant's goods and chattels are not sold, but only appraised; and all of them (except oxen and beasts of the plough) are delivered to the plaintiff, at such reasonable appraisement and price, in part of satisfaction of his debt. If the goods are not sufficient, then the moiety or one half of his [419] freehold lands, which he had at the time of the judgment given [f], whether held in his own name, or by any other in trust for him [g], (11) are also to be delivered to the plaintiff; to hold, till out of the rents and profits thereof the debt be levied, or till the defendant's interest be expired; as till the death of the defendant, if he be tenant for life or in tail. During this period the plaintiff is called tenant by *elegit*, of whom we spoke in a former part of these commentaries [h]. We there observed that till this statute, by the antient common law, lands were not liable to be charged with, or seised for, debts; because by these means the connection between lord and tenant might be destroyed, fraudulent alienations might be made, and the services be transferred to be performed by a stranger; provided the tenant incurred a large debt, sufficient to cover the land. And therefore, even by this statute, only one half was, and now is, subject to execution; that out of the remainder sufficient might be left for the lord to distrain upon for his services. And upon the same 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 vasal; and could not be said to be defrauded of his services, when the ouster of the vasal 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 de-

f. 395.
g Stat. 29 Car. II. c. 3.
h Book II. ch. 10.
i 1 Roll. Abr. 888.

(11) If the lands delivered are lands held in trust for the defendant, the operation of the writ by the words of the statute of Charles cited in the margin is confined to lands so held *at the time of the execution sued*, and does not relate back to the judgment. Com. Rep. 226.

fendant 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 lands and goods; but not body and land too, upon any judgment between subject and subject 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,
[420] 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* or *extendi facias*, because the sheriff is to cause the lands, &c. to be appraised to their full extended value, before he delivers them to the plaintiff, that it may be certainly known how soon the debt will be satisfied [k]. And by statute 33 Hen. VIII. c. 39. all obligations made to the king shall have the same force, and of consequence the same remedy to recover them, as a statute staple; though indeed, before this statute, the king was entitled to sue out execution against the body, lands, and goods of his accountant or debtor [l]. And his debt shall, in suing out execution, be preferred to that of every other creditor, who hath not obtained judgment before the king commenced his suit [m]. The king's judgment also affects all lands, which the king's debtor hath at or after the time of contracting his debt, or which any of his officers mentioned in the statute 13 Eliz. c. 4. hath at or after the time of his entering on the office; so that, if such officer of the crown aliens for a valuable consideration, the land shall be liable to the king's debt even in the hands of a *bona fide* purchaser; though the debt due to the king was contracted by the vendor many years after the alienation [n]. Whereas judgment between subject and subject related, even at common law, no farther back than the first

[j]. 58.
[k] F.N.B. 131.
[m] Stat. 33 Hen. VIII. c. 39. § 74.
[n] 10 Rep. 55, 56.

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 [421] 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 indorse 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; 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 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 volume, 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

[o] Skin. 257. [p] Co. Litt. 290.

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 shewn in what particular courts application must be made for the redress of particular
[422] injuries, or the doctrine of jurisdictions and cognizance. We afterwards proceeded to consider the nature 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 it's final *execution*; which puts the party in specific possession of his right by the intervention of ministerial officers, or else gives him an ample satisfaction, either by equivalent damages, or by the confinement of his body who is guilty of the injury complained of.

This care and circumspection in the law,—in providing that no man's right shall be affected by any legal proceeding without giving him previous notice, and yet that the debtor shall not by receiving such notice take occasion to escape from justice; in requiring that every complaint be accurately and precisely ascertained in writing, and be as pointedly and exactly answered; in clearly stating the question either of law or of fact; in deliberately resolving the former after full argumentative discussion, and indisputably fixing the latter by a diligent and impartial trial; in correcting such errors as may have arisen in either of those modes of decision, from accident, mistake, or surprise; and in finally enforcing the judgment, when nothing can be alleged to impeach it;—this anxiety to maintain and restore to every individual the enjoy-

ment 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 [423] 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 an handle, in some degree, to those complaints, of delay in the practice of the law, which are not wholly without foundation, but are greatly exaggerated beyond the truth. There may be, it is true, in this, as in all other departments of knowledge, a few unworthy professors: who study the science of chicane and sophistry rather than of truth and justice; and who, to gratify the spleen, the dishonesty, and wilfulness of their clients, may 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 seized 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

[q] See pag. 327.

[r] Sp. L. b. 6. ch. 2.

in 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 practices, 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 upon the prodigious improvements which have been made in the celerity of justice by the disuse of real actions, by the statutes of amendment and *jeofails*[v], 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[u] days allowed to the praetor for deciding causes[w]: whereas, with us, one-fourth of the year is term time, in which three courts constantly sit for the dispatch of matters of law; besides the very close attendance of the court of chancery for determining suits in equity, and the numerous courts of assise and *nisi prius* that sit in vacation for the trial of matters

[425]

[s] *de Laud. LL. c. 53.*

[t] Bodin. *de Republ. l. 6. c. 6.*

[v] See pag. 407.

[u] Otherwise called *dies fasti in quibus licebat praetori fari tria verba, do, dico, addico.* (*Calv. Lex.* 285.)

[w] Spelman of the terms, § 4. *c.* 2.

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 THE TWENTY-SEVENTH.

OF PROCEEDINGS IN THE COURTS OF EQUITY.

BEFORE we enter on the proposed subject of the ensuing chapter, *viz.* the nature and method of proceedings in the courts of equity, it will be proper to recollect the observations which were made in the beginning of this book[a] on the principal tribunals of that kind, acknowledged by the constitution of England; and to premise a few remarks upon those particular causes, wherein any of them claims and exercises a sole jurisdiction, distinct from and exclusive of the other.

I HAVE already[b] attempted to trace (though very concisely) the history, rise, and progress, of the extraordinary court, or court of equity, in chancery. The same jurisdiction is exercised, and the same system of redress pursued, in the equity court of the exchequer; with a distinction, however, as to some few matters, peculiar to each tribunal, and in which the other cannot interfere. And, first, of those peculiar to the chancery.

1. UPON the abolition of the court of wards, the care, which the crown was bound to take as guardian of it's infant tenants, was totally extinguished in every feodal view; but
[427] resulted to the king in his court of chancery, together with the general protection[c] of all other *infants* in the kingdom. When therefore a fatherless child has no other guardian, the court of chancery has a right to appoint one: and from all proceedings relative thereto, an appeal lies to the house of

[a] pag. 45. 50. 78. [b] pag. 50, &c. [c] F.N.B. 27.

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. (1)

2. As to *idiots* and *lunatics*: the king himself used formerly to commit the custody of them to proper committees, in every particular case; but now, to avoid solicitations and the very

[d] *Cro. Jac. 641. 2 Lev. 163.*

(1) The origin of the jurisdiction of the court of chancery over infants, has been much discussed, without being brought to any satisfactory decision. Mr Hargrave (Co Litt 88 b. n. 70) is of opinion that, so far as appears from present evidence, it is not of antient date, and though now unquestionable, was at first an usurpation. Mr Fonblanque (on Equity, vol. ii. pp 226. 232 5th edit) argues that the jurisdiction is general, and entirely independent of the statute of H. 8., which created the court of wards and liveries; that it is part of the great parental superintendence, originally vested in the crown by the constitution, and exercised by the crown through the chancellor. The whole argument is well worth reading: one point is at least clear, that as the court of wards and liveries was expressly confined to the infant heirs of the tenants of the crown, its creation, or its abolition, could have no effect on the guardianship of infants in general. It will be observed that the jurisdiction as to infants, is very distinct from that as to idiots and lunatics; as to idiots, whether by common law or the statute 17 E 2. c 9, (see Vol. I. p. 303.) the king has a beneficial interest in their lands, and as a special warrant from the crown is in all cases necessary to the grant of its interest, the separate commission, which gives the chancellor jurisdiction over their persons and estates, may be referred to that; and as to lunatics, though the same beneficial interest does not exist, yet as the 17 E 2 c. 10. gives either a new power to the crown, or at least a new regulation of an old power, (see Vol. I. p. 304.) in either case some new commission might be thought necessary beyond the general jurisdiction conferred by the delivery of the great seal. And, accordingly, as Mr. Fonblanque observes, the two jurisdictions are exercised in a different way, as if they flowed from different sources; in that over idiots and lunatics, no other court of equity partakes, nor is there an appeal to the lords; in short, the power is delegated by warrant to a particular officer, and the appeal is from him to the authority delegating it; but in that over infants, the master of the rolls has concurrent jurisdiction, and the appeal is to the lords, which are both circumstances tending the general jurisdiction of the chancellor.

shadow of undue partiality, a warrant is issued by the king[e] under his royal sign manual to the chancellor or keeper of his seal to perform this office for him: and, if he acts improperly in granting such custodies, the complaint must be made to the king himself in council[f]. But the previous proceedings on the commission, to inquire whether or no the party be an idiot or a lunatic, are on the law side of the court of chancery, and can only be redressed (if erroneous) by writ of error in the regular course of law.

3. The king, as *parens patriae*, has the general superintendence of all *charities*; which he exercises by the keeper of his conscience, the chancellor. (2) 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
428] 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

[e] . ch. 8. [f] 3 P. Wms. 108.

This seems to be too generally stated, for though it is true that where a charity is established, and there is no charter to regulate it, as there must be somewhere a power for that purpose, the king has in such case a general superintendence; yet if there is a charter with proper powers, the charity must be regulated in the manner prescribed in the charter, and there is no room for the controlling interposition of the court of chancery. The interposition of the court, therefore, in those instances in which the charities were founded by charters, or by act of parliament, and a visitor or governor, or trustees appointed, must be referred to the jurisdiction which that court has in all cases in which a trust conferred appears to have been abused, and not to an original right to direct the management of the charity. Fonblanque, 2. 207.

may allege what new matter he pleases; upon which they go to proof, and examine witnesses in writing upon all the matters in issue: and the court may decree the respondent to pay all the costs, though no such authority is given by the statute. And as it is thus considered as an original cause throughout, an appeal lies of course from the chancellor's decree to the house of peers [g], notwithstanding any loose opinions to the contrary [h]. (3)

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 a

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

[g] Duke's char. uses, 62. 128. Corporation of Burford *v* Lenthal 9 May 1743

[h] 2 Vern 118 *Canc*

(3) By the 52 G. 3. c. 101. in cases of supposed breach of any trust created for charitable purposes, or whenever the direction of a court of equity shall be deemed necessary for the administration of any such, two or more persons may proceed either in chancery, the rolls, or the exchequer, by way of petition allowed by the attorney or solicitor-general, which the court shall hear summarily, with discretion as to the costs of the application; and none of the proceedings shall be subject to any stamp duty whatever.

With respect to charities in England, for the education of the poor, the objects of the 43 Eliz. c. 4. have recently been followed up by the legislature on an extended scale. By the 58 G. 3. c. 91. & 59 G. 3. c. 81. His majesty is authorised to appoint commissioners for the investigation of such charities with very extensive powers of inquiry These commissioners divide themselves for different parts of the country, and make a half-yearly report to his majesty on the state of the foundations which they have examined, specifying the amount, management, and appropriation of the funds, and suggesting the best mode of remedying abuses, and preventing future misapplications; and if any five or more of them certify the particulars of any case to the attorney-general, with their opinion that the interference of a court of equity is necessary for remedying misapplication, or regulating the future management, he may proceed by summary petition in the court of chancery, or by information in the exchequer sitting i equity for relief.

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 [1]. Such causes must be determined in the court of exchequer, as a court of revenue; which alone has power over
[429] the king's treasury, and the officers employed in it's 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.

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 it's true and genuine meaning, is the soul and spirit of all law: *positive* law is construed, and *rational* law is made by it. In this equity is synonymous to justice: in that to the true sense and sound interpretation of the rule. But the very terms of a court of *equity*, and a court of *law*, as contrasted to each other, are apt to confound and mislead us;

[1] Huggins *v.* York Buildings' Company. *Canc.* 24 Oct. 1740. Reeve *v.* Attorney-general. *Canc.* 27 *Nov.* 1741. Lightbourn *v.* Attorney-general. *Canc.* 2 May 1743.

[k] Vol. I. introd. § 2 & 3. *ad calc.*

as if the one judged without equity, and the other was not bound by any law. Whereas every definition or illustration to be met with, which now draws a line between the two jurisdictions, by setting law and equity in opposition to each other, will be found either totally erroneous or erroneous to a certain degree. [430]

1. THUS in the first place it is said [l], that it is the business of a court of equity in England to abate the rigour of the common law. But no such power is contended for. Hard was the case of bond-creditors, whose debtor devised away his real estate; rigorous and unjust the rule, which put the devisee in a better condition than the heir [m]; yet a court of equity had no power to interpose. Hard is the common law still subsisting, that land devised, or descending to the heir, shall not be liable to simple contract debts of the ancestor or 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 feodal 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 perquam durum est, sed ita lex scripta est.*"

2. IT is said [s], that a court of equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a court of law. Both, for instance, are equally bound, and equally profess, to interpret statutes according to the true intent of the legislature. In general law all cases cannot be foreseen, or, if foreseen,

[l] Lord Kaims. princ. of equit. 44.
[m] See Vol. II. ch. 23. pag. 378.
[n] See Vol. II. ch. 15. pag. 243, 244. chap. 23. pag. 377.
[o] *Ibid.* ch. 14. pag. 208.
[p] *Ibid.* pag. 227.
[q] See pag. 300.
[r] *Ff.* 40. 9. 12.
[s] Lord Kaims. princ. of equit. 177.

cannot be expressed: some will arise that will fall within the
[431] 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: 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 in a single tittle.

3. Again, it hath been said [u], that *fraud, accident,* and are the proper and peculiar objects of a court of equity. (4) 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. (5) Many *accidents* are also supplied in a court of law; as, loss of deeds, mistakes in receipts, or accounts, wrong payments, deaths which make it impossible to perform a condition literally, and a multitude of other contingencies; and many cannot be relieved even in a court of equity; if by accident a recovery is ill suffered, a devise ill executed,

[u] 1 Roll. Abr. 374. 4 Inst. 84, 10. Mod. 1

Rolle says, *jeo aie oie mon seigneur Coke a citer, two verses pur ceo hors de sir Thomas Moore.*

"Three things are to be helpt in conscience,
Fraud, accident, and things of confidence."
v. Claverden. 2 Atk. 424.

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 mentioned [w]; and [432] this species of trusts, extended by inference and construction, have ever since remained as a kind of *peculium* in those courts. But there are other trusts, which are cognizable in a court of law: as deposits, and all manner of bailments; and especially that implied contract, so highly beneficial and useful, of having undertaken to account for money received to another's use [x], which is the ground of an action on the case almost as universally remedial as a bill in equity.

4. ONCE more; it has been said that a court of equity is not bound by rules or precedents, but acts from the opinion of the judge [y], founded on the circumstances of every particular case. Whereas the system of our courts of equity is a laboured connected system, governed by established rules, and bound down by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection. Thus the refusing 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,

[w] Book II. ch. 20.

[x] See pag. 163.

[y] This is stated by Mr. Selden, (Table-talk, tit. equity) with more pleasantry than truth. "Equity is a roguish thing. "For *law*, we have a measure, and "know what trust to *equity* is ac-"cording to the conscience of him that "is chancellor; and, as that is larger "or narrower, so is equity. 'Tis all "one, as if they should make the "standard for the measure a chancel-"lor's foot. What an uncertain mea-"sure 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 con-"science."

[z] 2 P. Wms. 640. See Vol. II. 337.

[a] Salk. 154.

[b] 2 Vern. 289. 316. 3 Atk.

are plainly rules of positive law; supported only by the re-
[433] verence 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.

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 beforementioned 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 re nata*, with more probity of intention than
[434] knowledge of the subject; founded on no settled principles, as being never designed, and therefore never used, for precedents. But the systems of jurisprudence, in our courts both

[c] See the case of Foster and Munt, 1 Vern. 473. with regard to the undisposed *residuum* of personal estates.

[d] *Quae in summis itaque tribunalibus multa e legum canone decernunt judices, (si res exigerit) cohibeat cancellarius nec aliter decretis tenetur nova ratione, recognoscat quae voluerit, mutet et deleat prout suae videbitur prudentiae.* (*Glos.* 108.)

[e] See pag. 54, 55.

[f] *Archeion.* 71, 72, 73.

[g] *ubi supra.*

[h] *de Augm. Scient. l.* 8. *c.* 3.

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 judgment that the interest should be specifically paid. But when afterwards the taking of interest became legal, as the necessary companion of commerce[1], nay, after the statute of 37 Hen. VIII. c. 9. had declared the debt or loan itself to be "the just and true [435] intent" for which the obligation was given, their narrow-minded successors still adhered wilfully and technically to the letter of the antient precedents, and refused to consider the payment of principal, interest, and costs, as a full satisfaction

[1] See Vol. II. pag. 456.

of the bond. At the same time more liberal men, who sate in the courts of equity, construed the instrument according to it's "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 it's just intent. A court of equity, no more than a court of law, can relieve against a penalty in the nature of stated damages; as a rent of 5*l.* an acre for ploughing up antient 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.

[436] The rules of decision are in both courts equally apposite to the subjects of which they take cognizance. Where the subject matter is such as requires to be determined *secundum aequum et bonum*, as generally upon actions on the case, the judgments of the courts of law are guided by the most liberal

[j] 553. 555. Salk. 597. [k] 2 Atk. 239

equity. In matters of positive right, both courts must submit to and follow those antient and invariable maxims "*quæ 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 case of the privileges of embassadors[m], hostages, or ransom-bills[n]. (6) In mercantile transactions they follow the marine-law[o], and argue from the usages and authorities received in all maritime countries. Where they exercise a concurrent jurisdiction, they both follow the law of the proper *forum*[p], in matters originally of ecclesiastical cognizance, they both equally adopt the canon or imperial law, according to the nature of the subject[q]; and, if a question came before either, which was properly the object of a foreign municipal law, they would both receive information what is the rule of the country[r], and would both decide accordingly.

Such then being the parity of law and reason which both species of courts, wherein (it may be asked) does their essential difference consist? It principally consists in the different modes of administering justice in each; in the mode of proof, the mode of trial, and the mode of relief. Upon these, and upon two other accidental grounds of jurisdiction, which were formerly driven into those courts by narrow decisions of the courts of law, *viz.* the true construction of securities for money lent, and the form and effect of a trust or [437
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

[l] *De jure naturae cogitare per nos atque dicere debemus; de jure populi Romani, quae relicta sunt et tradita.* (Cic. *de Leg. l.* 3. *ad calc.*)

[m] See Vol. I. pag. 253.

[n] Ricord *v.* Bettenham Tr. 5 Geo. III.

[o] See Vol. I. pag. 75. Vol. II. pag. 459. 461. 467.

[p] See Vol. II. pag 515.

[q] *Ibid.* 504.

[r]

(6) A ransom-bill is the security which the master of a captured vessel gives to the captor for the ransom of her; but by st. 22 G. 3. c. 25. all contracts for that purpose are rendered illegal, and all such bills absolutely void.

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
[438] 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

[s] 1 Chan. Cas. 57.
[t] 2 P. Wms. 145.
[u] 2 Chan Cas. 152.
[w] 1 Equ. Cas. abr. 367.
[x] 2 Vern. 688.
[z] 2 Chan. Cas. 46.
[a] 3 P. Wms. 148. Year-book,

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) 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 it's 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 expence 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 [439

[b] 1 Equ. Cas abr. 16.
[c] 3 P. Wms 215.
[d] 1 Ch. Rep. 14. 2 Chan. Cas. 32.
[e] 1 Vern. 308. Prec. Chan. 261. 1 P. Wms 672. Str. 404.
[f] 2 P. Wms. 156.
[g] 1 Vern. 32. 1 P. Wms. 239.
[h] 1 Vern. 237.
[i] 2 Vern. 84.

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 determinations, which have settled the doctrine of personal pledges or securities, and are equally applicable to mortgages of real property. The mortgagor continues owner of the land, the mortgagee of the money lent upon it; but this ownership is mutually transferred, and the mortgagor is barred from redemption, if, when called upon by the mortgagee, he does not redeem within a time limited by the court; or he may when out of possession be barred by length of time, by analogy to the statute of limitations. (7)

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 estate in a court of law[l], if no trustee was interposed: and
[440] 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

k. Cas. abr. 337.
[l] 2 P. Wms. 645. 668, 669. 713. 736.
[m] See page 433

(7) See 2 Fonblanque, 264, 5th edit.

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 be appealed unto, but only in "rare and extraordinary matters: and that a good chancel- "lor will not receive knowledge of every complaint that shall "be brought before him upon whatsoever suggestion: and "thereby both overthrow the authority of the courts of com- "mon law, and also bring upon men such a confusion and "uncertainty, as hardly any man should know how or when "he may hold his own assured." 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. It's 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 seal, have by degrees erected the system of relief administered by a court of equity into a regular science, which cannot be [441] attained without study and experience, any more than the science of law: but from which, when understood, it may be known what remedy a suitor is entitled to expect, and by what mode of suit, as readily and with as much precision, in a court of equity as in a court of law.

It were much to be wished, for the sake of certainty, peace, and justice, that each court would as far as possible follow the other, in the best and most effectual rules for attaining those desirable ends. It is a maxim that equity follows the law; and in former days the law has not scrupled to follow even that equity, which was laid down by the clerical chancellors. Every one who is conversant in our antient books, knows

[n] *Archeion.* 80, 81.

[o] 2 P. Wms. 685, 686.

[p] See pages 54, 55, 56.

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 farther into this matter. I have been tempted to go so far, because strangers are apt to be confounded by nominal distinctions, and the loose unguarded expressions to be met with in the best of our writers; and thence to form erroneous ideas of the separate jurisdictions now existing in England, but which never were separated in any other country in the universe. It hath also afforded me an opportunity to vindicate, on
442] 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

[q] Gilbert of ejectment, 2. 2 Bac. Abr. 160.

[r] Bro. *Abr t. tenant. per copie. pl.* 10. Litt. § 77.

[s] See page 200.

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 (8); and must be signed by counsel, as a certificate of it's 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.[s] The [443] master is to examine the propriety of the bill: and if he reports

[s] Smith's Commonw. b. 2. c. 12.

(8) This rule, however, admits of some qualifications arising either from necessity or convenience. Thus where a person who ought to be a party is out of the jurisdiction of the court, that fact being stated in the bill, and admitted by the defendants, or proved at the hearing, is in most cases a sufficient reason for not bringing him before the court, and the court will proceed without him against the other parties as far as circumstances will permit. * * * So when the object of a suit is to charge the personal property of a deceased person with a demand, it is generally sufficient to bring before the court the person constituted by law to represent that property, and to answer all demands upon it So also persons having a demand on trust property, prior to the creation of the trust, may enforce their demand against the trustees, without bringing before the court the persons interested under the trust, if the absolute disposition of the property is vested in the trustees. And upon the same principles the court has been induced in some instances to depart from the same rule as applied to plaintiffs, where the suit is on behalf of many in the same interest, and they cannot easily be all discovered, or where great expence and delay will be saved by, and no injustice can result from, the departure. As in the case of bills, by a few of many creditors or legatees, in behalf of themselves and the others, where all the others may, if they please, come in, and cause themselves to be made parties to the suit after its commencement. Mitford's Plead. 134.

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. (9)

When the bill is filed in the office of the six clerks, (who originally were all in orders; and therefore, when the constitution of the court began to alter, a law [t] was made to permit them to marry,) when, I say, the bill is thus filed, if an injunction be prayed therein, it may be had at various stages of the cause, according to the circumstances of the case. If the bill be to stay execution upon an oppressive judgment, and the defendant does not put in his answer within the stated time allowed by the rules of the court, an injunction will issue of course: and, when the answer comes in, the injunction can only be continued upon a sufficient ground appearing from the answer itself. But if an injunction be wanted to stay waste, or other injuries of an equally urgent nature, then upon the filing of the bill, and a proper case supported by *affidavits*, the court will grant an injunction immediately to continue till the defendant has put in his answer, and till the court shall make some farther order concerning it: and, when the answer comes in, whether it shall then be dissolved or continued till the hearing of the cause is determined by the court upon argument, drawn from considering the answer and affidavit together.

But, upon common bills, as soon as they are filed, process of *subpoena* is taken out; which is a writ commanding the defendant to appear and answer to the bill, on pain of 100*l*. But this is not all; for, if the defendant, on service of the *subpoena*, does not appear within the time limited by the rules of the court, and plead, demur, or answer to the bill, he is then said to be in *contempt*, and the respective processes of contempt are in successive order awarded against him. The first
[444] of which is an *attachment*, which is a writ in the nature of a *capias*, directed to the sheriff, and commanding him to attach,

[t] Stat. 14 & 15 Hen. VIII. c. 8.

(9) But if that which is stated is material to the issue, it may be false, but cannot be scandalous; if relevant, it is not impertinent; though scandalous in its nature, if relevant and pertinent, it cannot be treated as scandalous. Per Ld. Eldon C., Ex parte Simpson, 15 Vesey, 477.

or take up, the defendant, and bring him into court. If the sheriff returns that the defendant *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 *sequestration* issues to seise 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 [445] is issued to enforce, 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 it's dissolution [w]) is issued out in all sorts

[u] pag. 50. [v] 1 Vern. 421. [w] 18 Rym. *Foed.* 195.

of contempts during the progress of the cause, if the parties in any point refuse or neglect to obey the order of the court.

The process against a body corporate is by *distringas*, to distrein 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. (10)

The ordinary process before mentioned cannot be sued out till after 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*.

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(10) And if the defendant, having privilege of parliament, neglects to appear after the process of sequestration returned, the court may, upon the application of the plaintiff, appoint a clerk in court to enter an appearance for him, and the cause then proceeds as if he had actually appeared. 45 G. 3. c. 124. See ante, p. 289. n. (10), for a similar provision in the courts of law.

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 mis-behaviour. For any of these causes a defendant may demur to the bill. And if, on demurrer, the defendant prevails, the plaintiff's bill shall be dismissed: if the demurrer be over-ruled, the defendant is ordered to answer.

A PLEA may be either to the *jurisdiction*; 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 various matter, a man may plead as to part, demur as to part, and answer to the residue. But no exceptions to formal *minutiae* 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 there, in almost every case, the plaintiff may demand the oath of his adversary in supply of proof. Formerly this was [447
done in those courts with compurgators, in the manner of our waging of law: but this has been long disused; and instead

[x] *En cest court de chauncerie, home ne serra prejudice par son mispleding ou pur defaut de forme, mes solonque le veryte del mater, car il dout agarder solonque conscienc, et nemi ex rigore juris.* (*Dyversite des courts, edit.* 1584, *fol.* 296, 297. *Bro. Abr. t. jurisdiction.* 50.)

of it the present kind of purgation, by the single oath of the party himself, was introduced. This oath was made use of in the spiritual courts, as well in criminal cases of ecclesiastical cognizance, as in matters of civil right; and it was then usually denominated the oath *ex officio*: whereof the high commission court in particular made a most extravagant and illegal use; forming a court of inquisition, in which all persons were obliged to answer in cases of bare suspicion, if the commissioners thought proper to proceed against them *ex officio* for any supposed ecclesiastical enormities. But when the high commission court was abolished by statute 16 Car. I. c. 11. this oath *ex officio* was abolished with it; and it is also enacted by statute 13 Car. II. st. 1. c. 12. "that it shall not be lawful "for any bishop or ecclesiastical judge to tender to any per- "son the oath *ex officio*, or any other oath whereby the party "may be charged or compelled to confess, accuse, or purge "himself, of any *criminal* matter." But this does not extend to oaths in a civil suit, and therefore it is still the practice, both in the spiritual courts and in equity, to demand the personal answer of the party himself upon oath. Yet if in the bill any question be put, that tends to the discovery of any crime, the defendant may thereupon demur, as was before observed, and may refuse to answer.

If the defendant lives within twenty miles of London, he must be sworn before one of the masters of the court: if farther off, there may be a *dedimus potestatem* or commission to take his answer in the country, where the commissioners administer him the usual oath; and then, the answer being sealed up, either one of the commissioners carries it up to the court; or it is sent by a messenger, who swears he received it from one of the commissioners, and that the same has not been opened or altered since he received it. An answer must be signed by counsel (11), and must either deny or confess
[448] all the material parts of the bill; or it may confess and avoid, that is, justify or palliate the facts. If one of these is not

(11) It need not be signed by counsel, when taken by commissioners in the country, who are responsible for the propriety of its contents. If the answer is excepted to for insufficiency, these exceptions must also be counsel. Mitford's Pleading, 255. 3d edit.

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.* (12)

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. (13) And

(12) This is not the only use of a cross-bill, nor is it only against the plaintiff that it may be filed. It may be filed against the plaintiff to answer the purpose of a plea *puis darrein continuance* at common law, where after issue joined some new matter, such as a release, has arisen available for the defence. But questions often arise between co-defendants in a bill, and it may be necessary to bring additional points connected with their opposite interests before the court, to enable it to do complete justice to all parties; when this happens, some or one of the defendants may file a cross-bill against some or one of the rest, and the plaintiff, to disclose this new matter Mitford's Pleading, 64. 3d ed.

(13) The simple bill of revivor is adapted to the case of the death of a party, and a transmission of his interest to some representative ascertained by law, so that there can be no dispute (at least none in chancery) as to the title, but only as to the person; this meets the case of interests transmitted to heir, executor, or administrator But if the interest be transmitted in such a way, (as to a devisee for instance,) that both the title and the person may be in dispute in chancery, the new party must proceed by original bill, in the nature of a bill of revivor, to let in that litigation, and when the title and person are established, he will have the same benefit from the proceedings under the former bill, as if it had been continued by revivor: the pleadings and the depositions may be used as if filed in the second cause; and if any decree has been made in the first cause, the same shall be made in the second. Lastly, if the death of the party determines his interest, and the property passes, as in the case of a benefice, to some one not claiming under the original party, neither of these modes can be adopted; the successor, indeed, may file a bill in nature of a supplemental

there is likewise a bill of *interpleader*; where a person owes a debt or rent to one of the parties in suit, but, till the determination of it, he knows not 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.

If the plaintiff finds sufficient matter confessed in the defendant's answer to ground a decree upon, he may proceed to the hearing of the cause upon bill and answer only. But in that case he must take the defendant's answer to be true, in every point. Otherwise the course is for the plaintiff to reply generally to the answer, averring his bill to be true, certain, and sufficient, and the defendant's answer to be directly the reverse; which he is ready to prove as the court [449] 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. 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,

bill, but the defendant may make a new defence, the pleadings and depositions are new; it is, indeed, a new suit; and the only use which can be made of a decree in the former is as matter of argument to induce the court to make a similar one in the second cause. Mitford's pp. 53—57. 3d. ed.

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 skilful interpreters. And it hath been established[y] that the deposition of an heathen who believes in the Supreme Being, taken by commission in the most solemn manner according to the custom of his own country, may be read in evidence.

THE commissioners are sworn to take the examinations truly and without partiality, and not to divulge them till published in the court of chancery; and their clerks are also sworn to secrecy. The witnesses are compellable by process of *subpoena*, as in the courts of common law, to appear and submit to examination. And when their depositions are taken, they are transmitted to the court with the same care that the answer of a defendant is sent.

IF witnesses to a disputable fact are old and infirm, it is [450 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 it's validity: and then, the defendant having answered, they proceed to issue as in other cases, and examine the witnesses to the will; after which the cause is at an end, without proceeding to any decree, no relief being prayed by the bill: but the heir is entitled to his costs, even though he contests the will. This is what is usually meant by proving a will in chancery. (14)

[y] Omichund *v.* Barker, 1 Atk. 21.

(14) The bill to perpetuate testimony must shew a present vested interest (however trifling in value); it may, therefore, be filed by him, who has a remainder or reversion after an estate for life. But a mere expectation or possibility will not be sufficient; thus the devisee of a living person, who is a lunatic, cannot file it to perpetuate the testimony of witnesses to the

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
[451] on the day so fixed for the hearing: and then, if the plaintiff does not attend, his bill is dismissed with costs; or, if the defendant makes default, a decree will be made against him, which will be final, unless he pays the plaintiff's costs of attendance, and 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 nonsuit at law, if he suffers three terms to elapse without moving forward in the cause.

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will against the presumptive heir at law; for the law regards no lunatic as incurable, or incapable of lucid intervals, and therefore the will may be altered. Cooper, Eq. Pl. 52. 54.

With regard to the costs, the rule seems laid down too generally: if the defendant's opposition is confined to a cross-examination of the plaintiff's witnesses, he is entitled to his costs, but if he examine witnesses of his own as to the execution of the will, he thereby makes use of the plaintiff's will to perpetuate testimony on his part, and is not, it seems, entitled to his costs. And if, in a bill of this kind, an issue is directed at his instance, the costs are in the discretion of the court. Maddock's Ch. Practice, 1. 195. 2d edit.

When there are cross-causes, on a cross-bill filed by the defendant against the plaintiff in the original cause, they are generally contrived to be brought on together, that the same hearing and the same decree may serve for both of them. The method of hearing causes in court is usually this. The parties on both sides appearing by their counsel, the plaintiff's bill is first opened, or briefly abridged, and the defendant's answer also, by the junior counsel on each side: after which the plaintiff's leading counsel states the case and the matters in issue, and the points of equity arising therefrom: and then such depositions as are called for by the plaintiff are read by one of the six clerks, and the plaintiff may also read such part of the defendant's answer, as he thinks material or convenient[z]: and after this the rest of the counsel for the plaintiff make their observations and arguments. Then the defendant's counsel go through the same process for him, except that they may not read any part of his answer; and the counsel for the plaintiff are heard in reply. When all are heard, the court pronounces the *decree*, adjusting every point in debate according to equity and good conscience; which decree being usually very long, the minutes of it are taken down, and read openly in court by the registrar. The matter of costs to be given to either party is not here held to be a point of right, but merely discretionary (by the statute 17 Ric. II. c. 6.) according to the circumstances of the case, as they appear more or less favourable to the party vanquished. And yet the statute 15 Hen. VI. c. 4. seems expressly to direct, that as well damages as costs shall be given to the defendant, if wrongfully vexed in this court. [452]

[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. (15)

(15) Where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the testimony of the party making the answer, and he does not thereby admit as evidence all the facts which may happen to have been stated by way of hearsay only in the course of the answer. Chambre J. in *Roe* v. *Ferrars*, 2 B. & P. 548.

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 a 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 5*l*. with the defendant, that A was heir at law to B; and then avers that he is so; and therefore demands the 5*l*. The defendant admits the feigned wager, but avers that A is not the heir to B; and 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 right without the formality of pleading, and thereby to save much time and expence in the decision of a cause.

So likewise, if a question of mere law arises in the course of a cause, as whether by the words of a will an estate for life
453] or in tail is created, or whether a future interest devised by a testator shall operate as a remainder or an executory devise, it is the practice of this court to refer it to the opinion of the judges of the court of king's bench or common pleas, upon a case stated for that purpose; wherein all the material facts are admitted, and the point of law is submitted to their decision: who thereupon hear it solemnly argued by counsel on

[a] *Nota est sponsio judicialis "spondesne quingentos si meus sit? spondeo, "si tuus sit. Et tu quoque spondesne sit?* "meus sit." *Vide* Heinec. l. 3. t. 16. § 3. & Sigon. de l. 21. p. 466. citat. ibid.

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 over-ruled; 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 is proper to be reheard. And upon the rehearing, all the evidence taken in the cause, whether read [454
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. (16)

[b] Stat. 3 Geo. II. c. 39. See p. 450. [c] Gilb. Rep.

(16) If a decree has been obtained by fraud, it may be impeached original bill, without leave of the court; the fraud used in obtaining decree

A BILL of *review* may be had upon apparent error in judgment, appearing on the face of the decree; or, by special leave of the court, upon oath made of the discovery of new matter or evidence, which could not possibly be had or used at the time when the decree passed. But no new evidence or matter then in the knowledge of the parties, and which might have been used before, shall be a sufficient ground for a bill of review.

AN *appeal* to parliament, that is, to the house of lords, is the dernier resort of the subject who thinks himself aggrieved by an interlocutory order or final determination in this court: and it is effected by *petition* to the house of peers, and not by *writ of error*, as upon judgments at common law. This jurisdiction is said [d] to have begun in 18 Jac. I., and it is certain that the first petition, which appears in the records of parliament, was preferred in that year [e]; and that the first which was heard and determined (though the name of appeal was then a novelty) was presented 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
[455] of their decrees (by way of appeal) became equally necessary, as a writ of error from the judgment of a court of law. And, upon the same principle, from decrees of the chancellor relating to the commissioners for the dissolution of chauntries, &c. under the statute 37 Hen. VIII. c. 4. (as well as for charitable uses under the statute 43 Eliz. c. 4.) an appeal to the

[d] Com. Journ. 13 Mar. 1704.
[e] Lords' Journ. 23 Mar. 1620.
[f] Lords' Journ. 3. 11. 12 Dec. 1621.
[g] Com. Journ. 19 Nov. 1675, &c.
[h] Show. Parl. C. 81.

decree being the principal point in issue, and necessary to be established by proof before the propriety of the decree can be investigated. The bill must state the decree, and the proceedings which led to it, with the circumstances of fraud on which it is impeached; and the judgment, if in favour of the bill, will restore the parties to their former situation, whatever their rights may be. Mitford's Pleading, 73, 74. 3d. ed.

king in parliament was always unquestionably allowed [1]. 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 it's 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.

[1] Duke's Charitable Uses, 62.

[k] Gilb. Rep. 155, 156.

THE END OF THE THIRD BOOK.

APPENDIX.

N° I.

Proceedings on a Writ of RIGHT *Patent.*

§ 1. *Writ of* RIGHT *Patent in the* COURT BARON.

GEORGE the second, by the Grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to Willoughby earl of Abingdon, greeting. We command you that without delay you hold full right to William Kent esquire, of one messuage and twenty acres of land with the appurtenances in Dorchester, which he claims to hold of you by the free service of one penny yearly in lieu of all services, of which Richard Allen deforces him. And unless you so do, 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, {

§ 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

N° I.

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 deforces 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.

§ 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. Put, 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.

§ 4. *Writ of* RIGHT 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 whereof he complains that the aforesaid Richard unjustly deforces him. And unless he shall so do, and if the said William shall give you security of prosecuting his claim, then summon, by good summoners the said Richard, that he appear before our justices at Westminster on the morrow of All Souls, to shew 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. N° I.

Pledges of Prosecution, { John Doe, Rich. Roe. } Summoners of the within-named Richard, { John Den, Rich. Fen. } Sheriff's Return.

§ 5. *The Record, with Award of Battel.*

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.

Oxon, to wit. } William Kent, esquire, by James Parker, his attorney, demands 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 thereupon, 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 value* [of ten shillings, and more, in rents, corn, and grass.] And that such is his right he offers [suit and good proof.] And the said Richard Allen, by Peter Jones his attorney, comes

Writ. *Dominus remisit curiam.* Count. Esplees. Defence.

* 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

N° I.

and defends the right of the said William Kent and his seisin, when [and where it shall behove 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; 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 any thing wherefore battel ought not to be awarded in this case; who say that they cannot. Therefore it is considered, that battel be made thereon, *&c.* And the said George Rumbold findeth pledges of battel, to wit, Paul Jenkins and Charles Carter; and the said Henry Broughton findeth also pledges of battel, to wit, Reginald Reed and Simon Taylor. 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

Wager of Battel.

Replication.

Joinder of Battel.

Gages given.

Award of Battel. Pledges.

Continuance.

N° I.

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 Tothill near the city of Westminster in the county of Middlesex, to wit, on the morrow of the purification of the blessed virgin Mary next coming, by the assent as well of the said William 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 Tothill aforesaid, comes the said Richard Allen by his attorney aforesaid, and the said George Rumbold and Henry Broughton in their proper persons likewise come, sufficiently furnished with competent armour as becomes them, ready to make the 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.

Champions appear.

Adjournment to *Tothill* Field.

Demandant nonsuit.

Final judgment for the Tenant.

§ 6. *Trial by the grand Assise.*

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 assise 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 demanded them. And he

Defence.

Mise.

No I.

Tender of the *Demi mark*.

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 assise, 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

Summons of the knights.

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 assise 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

Return.

the sheriff, to wit, sir Adam Alstone knight now returns, that he had caused to be summoned Charles Stephens, Randal 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, Randal Wheler, Toby Cox, and Thomas Munday, four lawful knights

Election of the recognitors

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, Randal 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 Stewart, 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 assise 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 assise whereof mention is above made being called, come, and

Recognitors sworn.

certain of them, to wit, Charles Stephens, Randal Wheler, Toby Cox, Thomas Munday, Charles Price, knights, Daniel Prince,

No I.

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 demanded 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,

Verdict for the Demandant.

Judgment.

N° II.

N° II.

Proceedings in an Action of Trespass in EJECTMENT, *by Original, in the* King's Bench.

§ 1. *The Original Writ.*

Si fecerit te securum.

GEORGE the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth, to the sheriff of Berkshire, greeting. If Richard Smith shall give you security of prosecuting his claim, then put by gage and safe pledges William Stiles, late of Newbury, gentleman, so that he be before us on the morrow of All Souls, wheresoever we shall then be in England, to shew wherefore with force and arms he entered into one messuage with the appurtenances, in Sutton, which John Rogers esquire hath demised to the aforesaid Richard, for a term which is not yet expired, and ejected him from his said farm, and other enormities to him did, to the great damage of the said Richard, and against our peace And have you there the names of the pledges, and this writ Witness ourself at Westminster, the twelfth day of October, in the twenty-ninth year of our reign.

Sheriff's Return.

Pledges of prosecution,	John Doe. Richard Roe.	The within-named William Stiles is attached by pledges,	John Den. Richard Fen.

§ 2. *Copy of the Declaration against the casual Ejector; who gives Notice thereupon to the Tenant in Possession.*

Michaelmas, the 29th of king George the second.

Declaration.

Berks, to wit. } William Stiles, late of Newbury in the said county, gentleman, was attached to answer Richard Smith, of a plea, wherefore with force and arms he entered into one messuage, with the appurtenances in Sutton in the county aforesaid, which John Rogers esquire demised to the said Richard Smith for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the lord the king, &c.

No II.

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 St. Michael the archangel then last past, to the end and term of five years from thence next following and fully to be complete and ended, by virtue of which demise the said Richard entered into the said tenement, with the appurtenances, and was thereof possessed, and, the said Richard being so possessed thereof, the said William afterwards, that is to say, on the said first day of October in the said twenty-ninth year, with force and arms, that is to say, with swords, staves, and knives, entered into the said tenement, with the appurtenances, which the said John Rogers demised to the said Richard in form aforesaid for the term aforesaid which is not yet expired, and ejected the said Richard out of his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the said lord the king; whereby the said Richard saith, that he is injured and damaged to the value of twenty pounds. And thereupon he brings suit, &c.

Martin, for the plaintiff. } Pledges of } John Doe.
Peters, for the defendant. } prosecution, } Richard Roe.

Mr. George Saunders,

Notice.

I am informed that you are in possession of, or claim title to, the premises mentioned in this declaration of ejectment, or to some part thereof, and I, being sued in this action as a casual ejector, and having no claim or title to the same, do advise you to appear next Hilary term in his majesty's court of king's bench at Westminster, by some attorney of that court, and then and there, by a rule to be made of the same court, to cause yourself to be made defendant in my stead: otherwise I shall suffer judgment to be entered against me, and you will be turned out of possession.

Your loving friend,

William Stiles.

5 *January*, 1756.

No II.

§ 3. *The Rule of Court.*

Hilary *Term, in the twenty-ninth Year of King* GEORGE *the second.*

Smith against Stiles; for one messuage with the appurtenances in Sutton, on the demise of John Rogers.

Berks, to wit. } It is ordered by the court, by the assent of both parties, and 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 declaration 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 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 *nonpros.* shall cease, and the said George shall pay such costs to the plaintiff, as by the court of 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.

Martin, for the plaintiff.
Newman, for the defendant.

§ 4. *The Record.*

Pleas before the lord the king at Westminster, of the term of saint Hilary, in the twenty-ninth year of the reign of the lord GEORGE the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, *&c.*

Berks, to wit. } George Saunders, late of Sutton in the county aforesaid, gentleman, was attached to answer Richard

No II.

Smith, of a plea, wherefore with force and arms he entered into one messuage, with the appurtenances, in Sutton, which John Rogers esquire had 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 thereupon the said Richard by Robert Martin his attorney complains, that whereas the said John Rogers on the first day of October in the twenty-ninth year of the reign of the lord the king that now is, at Sutton aforesaid, had demised to the same Richard the tenement aforesaid, with the appurtenances to have and to hold the said tenement, with the appurtenances, to the said Richard and his assigns, from the feast of saint Michael the archangel then last past, to the end and term of five years from thence next following and fully to be complete and ended: by virtue of which demise the said Richard entered into the said tenement, with the appurtenances, and was thereof possessed: and, the said Richard being so possessed thereof, the said 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 endamaged to the value of twenty pounds; and thereupon he brings suit, [and good proof.] And the aforesaid George Saunders, by Charles Newman his attorney, comes and defends the force and injury, when [and where it shall behove him;] and saith that he is in nowise 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,

Declaration or count.

Defence.

Plea, not guilty.

Issue.

Venire awarded.

Respite, for default of jurors.

No II.

Nisi prius.

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 Heneage Legge, esquire, one of the barons of the exchequer of the lord the king, and sir John Eardly Wilmot, knight, one of the justices of the said lord the king, assigned to hold pleas before the king himself, justices of the said lord the king, assigned to take 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-standers being chosen by the sheriff, at the request of the said Richard Smith, and by the command of the justices aforesaid, are appointed anew, whose names are affixed to the panel within-written, according to the form of the statute in such case made and provided: which said jurors so appointed anew, to wit, Roger Bacon, Thomas Small, Charles Pye, Edward Hawkins, Samuel Roberts, and Daniel Parker, being likewise called, come; and together with the other jurors aforesaid before impanelled and sworn, being elected, tried, and sworn, to speak the truth of the matter within contained, upon their oath say, that the aforesaid George Saunders is guilty of the trespass and ejectment within-written, in manner and form as the aforesaid Richard Smith within complains against him; and assess the damages of the said Richard Smith, on occasion of that trespass and ejectment, besides his costs and charges which he hath been put unto about his suit in that behalf, to twelve pence: and, for those costs and charges, to forty shillings. Whereupon the said Richard Smith, by his attorney aforesaid, prayeth judgment against the said George Saunders, in and upon the verdict aforesaid by the jurors aforesaid given in the form aforesaid: and the said George Saunders, by his

Postea.

Tales de circumstantibus.

Verdict for the plaintiff.

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 nowise 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 encrease; 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 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

No II.

Motion in arrest of judgment.

Continuance.

Opinion of the court.

Judgment for the Plaintiff.

Costs.

Capiatur pro fine.

Writ of possession,

and return

* Now omitted. See page 398.

No II. 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.

No III.

Proceedings in an Action of DEBT *in the Court of* Common Pleas; *removed into the* King's Bench *by Writ of* ERROR.

§ 1. *Original.*

GEORGE the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire greeting. 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 St. Hilary, to shew wherefore he hath not done it. And have you there then the summoners and this writ. Witness ourself at Westminster, the twenty-fourth day of December, in the twenty-eighth year of our reign. *Præcipe.*

Pledges of prosecution, } John Doe. Richard Roe.

Summoners of the within-named Charles Long. } Roger Morris, Henry Johnson

Sheriff's return.

§ 2. *Process.*

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 shew wherefore he was not before our justices at Westminster on the octave of saint Hilary, as he was summoned. And have there then the names of the

Attachment. *Pone.*

N° III.

pledges and this writ. Witness sir John Willes, knight, at Westminster, the twenty-third day of January, in the twenty-eighth year of our reign.

Sheriff's return.

The within-named Charles Long is attached by pledges, { Edward Leigh. / Robert Tanner.

Distringas.

GEORGE the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire, greeting. We command you, that you distrein Charles Long, late of Burford, 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 the day of Easter in fifteen days to answer to William Burton of a plea, that he render to him two hundred pounds which he owes him and unjustly detains, as he saith, and to hear his judgment of his many defaults. Witness sir John Willes, knight, at Westminster, the twelfth day of February, in the twenty-eighth year of our reign.

Sheriff's return. *Nihil.*

The within-named Charles Long hath nothing in my bailiwick, whereby he may be distreined.

Capias ad respondendum.

GEORGE the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire, greeting. We command you, that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before our justices at Westminster, from the day of Easter in five weeks, to answer to William Burton, gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he saith; and whereupon you have returned to our justices at Westminster, that the said Charles hath nothing in your bailiwick, whereby he may be distreined. And have you there then this writ. Witness sir John Willes, knight, at Westminster, the sixteenth day of April, in the twenty-eighth year of our reign.

Sheriff's return.

The within-named Charles Long is not found in my bailiwick.

in-

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. N° III.

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. Sheriff's return. *Cepi corpus.*

" *Or, upon the Return of* Non est inventus *upon the first*
" Capias, *the Plaintiff may sue out an* Alias *and a* Pluries,
" *and thence proceed to Outlawry; thus:*

" 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. Wit- " ness sir John Willes, knight, at Westminster, the seventh day " of May, in the twenty-eighth year of our reign. " *Alias capias.*

" The within-named Charles Long is not found in my baili- " wick. " Sheriff's return. " *inventus.*

" the second, by the grace of God of Great Britain, " France, and Ireland king, defender of the faith, and so forth; " to the sheriff of Oxfordshire, greeting. We command you, as " we have more than once commanded you, that you " Charles Long, late of Burford, gentleman, if he may be

N° III.

" 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 thirtieth day of May, in the twenty- " eighth year of our reign.

" Sheriff's return. *Non est inventus.*

" The within-named Charles Long is not found in my baili- " wick.

" *Exigi facias.*

" GEORGE the second, by the grace of God of Great Britain, " France, and Ireland king, defender of the faith, and so forth; " to the sheriff of Oxfordshire, greeting. *We* command you, " that you cause Charles Long, late of Burford, gentleman, to be " required from county court to county court, until, according " to the law and custom of our realm of England, he be outlawed, " if he doth not appear: and if he doth appear, then take him " and cause him to be safely kept, so that you may have his " body before our justices at Westminster, on the morrow of All " Souls, to answer to William Burton, gentleman, of a plea, that " he render to him two hundred pounds, which he owes him and " unjustly detains, as he saith, and whereupon you have returned " to our justices at Westminster from the day of the holy Trinity " in three weeks, that he is not found in your bailiwick. And " have you there then this writ. *Witness* sir John Willes, knight, " at Westminster, the eighteenth day of June, in the twenty- " eighth year of our reign.

" Sheriff's return. *Primo exactus. Secundo exactus. Tertio exactus. Quarto exactus.*

" 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

N° III.

" 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.

" *Quinto exactus.* " *Ideo utla* "

the second, by the grace of God of Great Britain, " France, and Ireland king, defender of the faith, and so forth; " to the sheriff of Oxfordshire, greeting. Whereas by our writ " we have lately commanded you that you should cause Charles " Long, late of Burford, gentleman, to be required from county " court to county court, until according to the law and custom of " our realm of England he should be outlawed, if he did not " appear: and if he did appear, then that you should take him " and cause him to be safely kept, so that you might have his " body before our justices at Westminster, on the morrow of All " Souls, to answer to William Burton, gentleman, of a plea, that " he render to him two hundred pounds, which he owes him and " unjustly detains, as he saith: Therefore we command you, by " virtue of the statute in the thirty-first year of the lady Eliza- " beth 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 pro- " clamation shall be made at or near the most usual door of the " church of the parish wherein he inhabits,) that he render him- " self unto you, so that you may have his body before our justices " at Westminster at the day aforesaid to answer the said William " Burton of the plea aforesaid. And have you there then this " writ. Witness sir John Willes, knight, at Westminster, the " eighteenth day of June, in the twenty-eighth year of our reign.

" Writ of " procla- " mation.

" 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

Sheriff's return. " *Procla-* "

N° III.

" 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.

" *Capias ut-* " *lagatum.*

" 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 saint 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.

" Sheriff's return. " *cor-*

" 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.

" § 3. * *Bill of* Middlesex *and* Latitat *thereupon in the Court of* King's Bench.

" Bill of " Middle- " sex for " trespass.

" Middlesex, } " to wit. }

" 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

" *Ac etiam* " in debt.

* Note, that § 3. and § 4. are the usual methods 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 proceedings being nearly alike in them all.

" 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. " Sheriff's return. " *Non est inventus.*

the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth, to the sheriff of Berkshire, greeting. Whereas we lately commanded our sheriff of Middlesex, that he should take Charles Long, late of Burford in the county of Oxford, if he might be found in his bailiwick, and him safely keep, so that he might be before us at Westminster at a certain day now past, to answer unto William Burton, gentleman, of a plea of trespass, [and also to a bill of the said William against the aforesaid Charles, for two hundred pounds of debt, according to the custom of our court, before us to be exhibited,] and our said sheriff of Middlesex at that day returned to us that the aforesaid Charles was not found in his bailiwick; where- " " *Ac etiam.*

upon on 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 to 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. " Sheriff's return. " *Cepi corpus.*

" § 4. *Writ of* Quo Minus *in the Exchequer.*

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,

N° III.

" 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 " shew that the same he ought to render: and have you there " this writ. Witness sir Thomas Parker, knight, at Westmin- " ster, the sixth day of May, in the twenty-eighth year of our " reign.

" Sheriff's " return. " *Cepi cor-* " *pus.*

" 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."

5. *Special Bail; on the Arrest of the Defendant, pursuant to the* Testatum Capias, *in page* xvi.

Bail-bond to the sheriff.

Know all men by these presents, that we Charles Long of Burford in the county of Oxford, gentleman, Peter Hammond 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 hun-

dred pounds, then this obligation shall be void and of none effect, or else shall be and remain in full force and virtue. N° III.

Sealed, and delivered, being first duly stamped, in the presence of
Henry Shaw.
Timothy Griffith.

Charles Long. (L.S.)
Peter Hammond. (L.S.)
Edward Thomlinson (L.S.)

You Charles Long do acknowledge to owe unto the plaintiff four hundred pounds, and you John Rose and Peter Hammond 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 Hammond do undertake to do it for him. Recognizance of bail, before the commissioner.

Trinity Term, 28 Geo. II

Berks, to wit. } On a *Testatum Capias* from Oxfordshire against Charles Long, late of Burford in the county of Oxford, gentleman, returnable on the morrow of the holy Trinity, at the suit of William Burton, of a plea of debt of two hundred pounds: Bailpiece.

Bail are, John Rose of Witney, in the county of Oxford, esquire. Peter Hammond of Bix, in the said county, yeoman.

Richard Price, attorney
for the defendant.

The party himself in £400.
Each of the bail in £200.

Taken and acknowledged the twenty-eighth day of May, in the year of our Lord one thousand seven hundred and fifty-five *de bene esse*, before me,

Robert Grove,
one of the commissioners.

№ III.

§ 6. *The Record, as removed by Writ of* ERROR.

Writ of error.

The lord the king hath given in charge to his trusty and loved sir John Willes, knight, his writ closed in these words: George the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth, to our trusty and beloved sir John Willes, knight, greeting. Because in the record, and process, and also in the giving of judgment, of the plaint which was in our court before you, and your fellows, our justices of the bench, by our writ, between William Burton, gentleman, and Charles Long, late of Burford in the county of Oxford, gentleman, of a certain debt of two hundred pounds, which the said William demands of the said Charles, manifest error hath intervened, to the great damage of him the said William, as we from his complaint are informed: we, being willing that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, do command you, that if judgment thereof be given, then under your seal you do distinctly and openly send the record and process of the plaint aforesaid, with all things concerning them and this writ; so that we may have them from the day of Easter in fifteen days, wheresoever we shall then be in England; that the record and process aforesaid being inspected, we may cause to be done thereupon, for correcting that error, what of right and according to the law and custom of our realm of England ought to be done. Witness ourself at Westminster, the twelfth day of February, in the twenty-ninth year of our reign.

Chief justice's return.

The record and process, whereof in the said writ mention above is made, follow in these words, to wit:

The record.

Pleas at Westminster, before sir John Willes, knight, and his brethren, justices of the bench of the lord the king at Westminster, of the term of the holy Trinity, in the twenty-eighth year of the reign of the lord GEORGE the second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, &c.

Oxon, to wit. } Charles Long, late of Burford in the county aforesaid, gentleman, was summoned to answer William Burton of Yarnton in the said county, gentleman, of a plea that he render unto him two hundred pounds, which he owes him and

N° III.

unjustly detains, [as he saith.] And thereupon 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 thereto required; nevertheless the said Charles (although often required) hath not paid to the said William the said sum of two hundred pounds, nor any part thereof, but hitherto altogether hath refused, and doth still refuse, to render the same; wherefore he saith that he is injured, and hath damage to the value of ten pounds: and thereupon he brings suit, [and good proof.] And he brings here into court the writing obligatory aforesaid; which testifies the debt aforesaid in form aforesaid; the date whereof is the day and year before mentioned. And the aforesaid Charles, by Richard Price his attorney, comes and defends the force and injury when [and where it shall behove 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 ob- "ligation is such, that if the above-bounden Charles Long, his "heirs, executors, and administrators, and every of them, shall "and do from time to time, and at all times hereafter, well "and truly stand to, obey, observe, fulfil, and keep, the award, "arbitrament, order, rule, judgment, final end, and determin- "ation, of David Stiles, of Woodstock in the said county, clerk, "and Henry Bacon, of Woodstock aforesaid, gentleman, (arbi- "trators 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 be- "ginning of the world until the day of the date hereof,) which "the said arbitrators shall make and publish, of or in the pre- "mises, 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." Which being read and

Declaration, or count, on a bond.

Profert in curia.

Defence.

Oyer prayed of the bond, and condition, *viz* to perform and award.

Imparlance

N° III.

Continuance.

heard, the said Charles prays leave to imparl therein here until the octave of the holy Trinity; and it is granted unto him. The same day is given unto 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.

Plea; No such award.

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 before named in the said condition, did not make any such award, arbitrament, order, rule, judgment, final end, or determination, of or in the premises above specified in the said condition, on or before the first day of January, in the condition aforesaid above-mentioned, according to the form and effect of the said condition, and this he is ready to verify. Wherefore he prays judgment, whether the said William ought to have or maintain his said action thereof against him [and that he may go thereof without a day.]

Setting forth an award.

And the aforesaid William saith, that for any thing above alleged by the said Charles in pleading, he ought not to be precluded from having his said action thereof against him, because he saith, that after the making of the said writing obligatory, and before the said first day of January, to wit, on the twenty-sixth day of December, in the year aforesaid, at Banbury aforesaid, in the presence of two credible witnesses, namely, John Dew of Chalbury, in the county aforesaid, and Richard Morris of 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 nowise 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 aforesaid 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, shews 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 him the said William thereupon against the said Charles: which said plea, and the matter therein contained, the said William is ready to verify and prove as the court shall award; and because the aforesaid Charles hath not answered to that plea, nor hath he hitherto in any manner denied the same, the said William as before prays judgment, and his debt aforesaid, together with his damages occasioned by the detention of that debt, to be adjudged unto him, &c. And because the justices here will advise themselves of and upon the premises before they give judgment thereupon, a day is 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

Demurrer.

Causes of demurrer.

Joinder in demurrer.

Continuances.

N° III. 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.

Opinion of the court. 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

Replication insufficient. thereupon; for that it seems to the said justices here, that the said plea of the said William Burton before in his replication pleaded, and the matter therein contained, are not sufficient in law, to have and maintain the action of the aforesaid William

Judgment for the defendant. 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,

Querens nihil capiat per breve. be in mercy for his false complaint, and that the aforesaid Charles go thereof without a day, &c.

Amercement. And it is farther considered, that the

Costs. 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

Execution. statute in that case made and provided: and that the aforesaid Charles may have execution thereof, &c.

General error assigned. 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 saith, that in the record and process aforesaid, and also in the giving of the judgment in the plaint aforesaid, it is manifestly erred in this, to wit, that the judgment aforesaid was given in form aforesaid for the said Charles Long against the aforesaid William Burton, where by the law of the land judgment should have been given for the said William Burton against the

Writ of *Scire facias*, to hear errors. 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 day 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 sus-

No III.

Sheriff's return; *fecit.*

Error assigned afresh.

Rejoinder; *In nullo est erratum.*

Continuance.

Opinion of the court.

Judgment of the *common pleas* reversed.

Judgment for the Plaintiff.

No III.

Costs.

tained, 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.

Defendant amerced.

§ 7. *Process of Execution.*

Writ of *capias ad satisfaciendum.*

GEORGE the second, by the grace of God 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 has 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.

Sheriff's return; *Cepi corpus.*

By virtue of this writ to me directed, I have taken the body of the within-named Charles Long; which I have ready before the lord the king, at Westminster, at the day within-written, as within it is commanded me.

Writ of *Fieri facias.*

GEORGE the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire, greeting. We command you that 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 senior puisne justice; there being no chief-justice that term.

the detention of his said debt, as for his costs and charges to which he hath been put about his suit in this behalf, whereof the said Charles Long is convicted, as it appears to us of record; and have that money before us in three weeks from the day of the holy Trinity, wheresoever we shall then be in England, to render to the said William of his debt and damages aforesaid: and have there then this writ. Witness sir Thomas Denison, knight, at Westminster, the nineteenth day of June, in the twenty-ninth year of our reign. No III

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 END OF THE THIRD VOLUME.

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