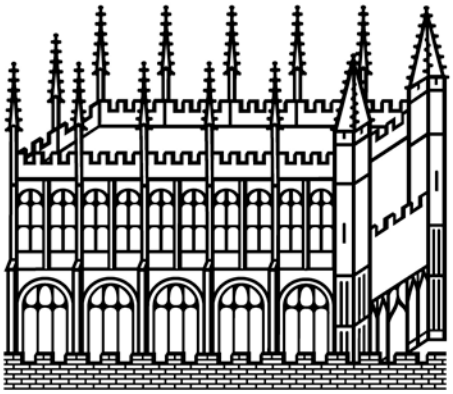

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COMMENTARIES

ON THE

Laws of England.

BOOK THE THIRD.

BY

Sir WILLIAM BLACKSTONE, Knt.
ONE OF THE JUSTICES OF HIS MAJESTY'S
COURT OF COMMON PLEAS.

THE THIRTEENTH EDITION,
WITH THE LAST CORRECTIONS OF THE AUTHOR;
AND WITH NOTES AND ADDITIONS
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CONTENTS.

CONTENTS.

BOOK III.

Of PRIVATE WRONGS.

CHAP. I.

Of the REDRESS *of* PRIVATE WRONGS *by the mere act of the* PARTIES. Page 1

CHAP. II.

Of REDRESS *by the mere operation of* LAW. 18

CHAP. III.

Of COURTS *in general.* 22

CHAP. IV.

Of the PUBLIC COURTS *of* COMMON LAW *and* EQUITY. 30

CHAP. V.

Of COURTS ECCLESIASTICAL, MILITARY, *and* MARITIME. 61

CHAP. VI.

Of COURTS *of a* SPECIAL JURISDICTION. 71

CHAP. VII.

Of the COGNIZANCE *of* PRIVATE WRONGS. 86

CHAP. VIII.

Of WRONGS *and their* REMEDIES, *reſpecting the* RIGHTS *of* PERSONS. 115

CHAP. IX.

Of INJURIES *to* PERSONAL PROPERTY. 144

CHAP. X.

Of INJURIES *to* REAL PROPERTY, *and firſt of* DISPOSSESSION, *or* OUSTER, *of the* FREEHOLD. 167

CHAP. XI.

Of DISPOSSESSION *or* OUSTER *of* CHATTELS REAL. 198

CHAP. XII.

Of TRESPASS. 208

CHAP. XIII.

Of NUSANCE. 216

CHAP. XIV.

Of WASTE. 223

CHAP. XV.

Of SUBTRACTION. 230

CHAP. XVI.

Of DISTURBANCE. 236

CHAP. XVII.

Of INJURIES *proceeding from, or affecting the* CROWN. 254

CHAP. XVIII.

Of the PURSUIT *of* REMEDIES *by* ACTION; *and, firſt, of the* ORIGINAL WRIT. 270

CHAP. XIX.

Of PROCESS. 279

CHAP. XX.

Of PLEADING. 293

CHAP. XXI.

Of ISSUE *and* DEMURRER. 314

CHAP. XXII.

Of the ſeveral SPECIES *of* TRIAL. 325

CHAP. XXIII.

Of the TRIAL *by* JURY. 349

CHAP. XXIV.

Of JUDGMENT, *and it's* INCIDENTS. 386

CHAP. XXV.

Of PROCEEDINGS *in the nature of* APPEALS. 402

CHAP. XXVI.

Of EXECUTION. 412

CHAP. XXVII.

Of PROCEEDINGS *in the* COURTS *of* EQUITY. 426

APPENDIX.

N° I. *Proceedings on a Writ of* RIGHT *Patent.* Page i

§ 1. *Writ of* RIGHT *patent in the* COURT BARON. ibid.
§ 2. *Writ of* TOLT, *to remove it into the* COUNTRY COURT. ibid.
§ 3. *Writ of* PONE, *to remove it into the Court of* COMMON PLEAS. ii
§ 4. *Writ of* RIGHT, quia Dominus remiſit Curiam. iii
§ 5. *The Record, with award of Battel.* iv
§ 6. *Trial by the Grand Aſſize.* vi

N° II. *Proceedings on an Action of Treſpaſs in* EJECTMENT, *by Original in the* King's Bench. ix

§ 1. *The Original Writ.* ibid.
§ 2. *Copy of the Declaration againſt the caſual Ejector; who gives Notice thereupon to the Tenant in Poſſeſſion.* ibid.
§ 3. *The Rule of Court.* xi
§ 4. *The Record.* xii

N° III. *Proceedings on an action of* DEBT, *in the Court of* Common Pleas; *removed into the* King's Bench *by Writ of* ERROR. xvi

§ 1. *Original.* ibid.
§ 2. *Proceſs.* ibid.
§ 3. *Bill of* Middleſex, *and* Latitat *thereupon, in the Court of* King's Bench. xxii
§ 4. *Writ of* Quo minus *in the* Exchequer. xxiv
§ 5. *Special Bail; on the Arreſt of the Defendant, purſuant to the* Teſtatum Capias, *in page* xiv. ibid.
§ 6. *The Record, as removed by Writ of* ERROR. xxvi
§ 7. *Proceſs of Execution.* xxxiii

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.

IN the proſecution of the firſt of theſe inquiries, we diſtinguiſhed rights into two ſorts: firſt, ſuch as concern or are [2]

[a] Introd. § 2.

[b] *Sanctio juſta, jubens honeſta, et prohibens contraria.* Cic. 11 *Philipp.* 12. Bract. *l.* 1. *c.* 3.

[c] Book I. ch. 1.

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

WRONGS are diviſible into two ſorts or ſpecies; *private wrongs*, and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals, conſidered as individuals; and are thereupon frequently termed *civil injuries*: the latter are a breach and violation of public rights and duties, which affect the whole community, conſidered as a 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
[3] courts of juſtice; that is, by civil ſuit or action. For which 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

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 (1); and the breach of the peace, which happens, is chargeable upon him only who began the affray[d]. For the law, in this caſe, reſpects the paſſions of the human mind; and (when external violence is offered to a man himſelf, or thoſe to whom he bears a near connection) makes it lawful in him to do himſelf that immediate juſtice, to which he is prompted by nature, and which no prudential motives [4] are ſtrong enough to reſtrain. It conſiders, that the future proceſs of law is by no means an adequate remedy for injuries

[d] 2 Roll. Abr. 546. 1 Hawk. P. C. 131.

(1) It is ſaid, that the defence of his ſervant is not a ſufficient juſtification in an action brought againſt the maſter, for he may maintain an action for the loſs of the ſervice of his ſervant. *Salk.* 407.

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[c]. The reaſon for this is obvious; ſince it may frequently happen that the owner may have this only opportunity of doing himſelf juſtice: his goods may be afterwards conveyed away or deſtroyed; and his wife, children, or ſervants, concealed or carried out of his reach; if he had no ſpeedier remedy than the ordinary proceſs of law. If therefore he can ſo contrive it as to gain poſſeſſion of his property again, without force or terror, the law favours and will juſtify his proceeding. But, as the public peace is a ſuperior conſideration to any one man's private property; and as, if individuals were once allowed to uſe private force as a remedy for private injuries, all ſocial juſtice muſt ceaſe, the ſtrong would give law to the weak, and every man would revert to a ſtate of nature; for theſe reaſons it is provided, that this natural right of recap-
[5] tion 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 common, a fair, or public inn, I may lawfully ſeiſe him

[c] 3 Inſt. 134. Hal. Anal. § 46.

to

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 *nuiſances*. What nuiſances 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 nuiſance; and ſuch nuiſance may be abated, that is, taken away or removed, by the party aggrieved thereby, ſo as he commits no riot in the doing of it[g]. If a houſe or wall is erected ſo near to mine that it ſtops my antient lights, which is a *private* nuiſance, 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* nuiſance, 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 [6] method of doing one's ſelf juſtice, is becauſe injuries of this kind, which obſtruct or annoy ſuch things as are of daily convenience and uſe, require an immediate remedy; and cannot wait for the ſlow progreſs of the ordinary forms of juſtice.

[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 nonpayment 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 diſtreſſes is a point of great uſe and conſequence, I ſhall conſider it with ſome minuteneſs: by inquiring, firſt, for what injuries a diſtreſs may be taken; ſecondly, what things may be 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 of a perſonal chattel out of the poſſeſſion of the wrongdoer into the cuſtody of the party injured, to procure a ſatisfaction for the wrong committed. 1. The moſt uſual injury, for which a diſtreſs may be taken, is that of nonpayment 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 (2). So that now we may lay it down as an univerſal principle,
[7] that a diſtreſs may be taken for any kind of rent in arrear; the detaining whereof beyond the day of payment is an injury to him that is entitled to receive it. 2. For neglecting to do ſuit to the lord's court [l], or other certain perſonal ſervice [m], the lord may diſtrein, of common right. 3. For

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

[k] Book II. ch. 3.

[l] Bro. *Abr. tit. diſtreſs.* 15.

[m] Co. Litt. 46.

(2) See 2 vol. page 42.

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 ſubſtained. 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 reſembling 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 diſtreined is preſumed to be the property of the wrongdoer, it will follow that ſuch things wherein no man can have an abſolute and valuable property (as dogs, cats, rabbits, and all animals *ferae naturae*) cannot be diſtreined. Yet if deer [8] (which are *ferae naturae*) 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

[n] Brownl. 36.
[o] Stat. 7 Ann. c. 10.
[p] Stat. 43 Eliz. c. 2.
[q] 4 Burr. 589.
[r] Co. Litt. 47.
[s] Davis v. Powel. *C. B. Hil.* 11 *Geo. II.*

protected from any diſtreſs; as an ax 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] (3). 3. Valuable things in the way of trade ſhall not be liable to diſtreſs. As a horſe ſtanding in a ſmith's ſhop to be ſhoed, or in a common inn; or cloth at a taylor's houſe; or corn ſent to a mill or a market. For all theſe are protected and privileged for the benefit of trade; and are ſuppoſed in 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 the 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 [v] (4). So alſo if the ſtranger's cattle break the fenees,

[t] 1 Sid. 440. [v] Cro. Eliz. 549.

(3) The contrary has lately been determined by the court of King's Bench, *viz.* that a horſe cannot be diſtrained damage-feaſant whilſt any perſon is riding him, for it would perpetually lead to a breach of the peace. 6 *T. R.* 138.

(4) As if horſes or cattle are ſent to agiſt, they may be immediately diſtrained by the landlord for rent in arrear, and the owner muſt ſeek his remedy by action againſt the farmer: the principle of this law extends to public livery ſtables, to which, if horſes and carriages are ſent to ſtand, it is determined that they are diſtrainable by the landlord, as if they were upon any other farm. 3 *Burr.* 1498.

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 [u]. But if the lands were not ſufficiently fenced ſo as to keep out cattle, the landlord 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 laid down and roſe up to feed; which in general is held to be one night at leaſt: and then the law preſumes, that the owner may have notice whether his cattle have ſtrayed, and it is his own negligence not to have taken them away. Yet, if the leſſor or his tenant were bound to repair the fences and did not, and thereby the cattle eſcaped into their grounds without the negligence or default of the owner; in this caſe, though the cattle may have been *levant* and *couchant*, yet they are not diſtreinable for rent, till actual notice is given to the owner that they are there, and he neglects to remove them [w]: for the law will not ſuffer the landlord to take advantage of his own or his tenant's wrong. 4. There are alſo other things privileged by the antient common law; as a man's tools and utenſils of his trade: the ax 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 (5). So, beaſts of the plough, *averia carucae*, and ſheep, are privileged from diſtreſſes at [9]

[u] Co. Litt. 47. [w] Lutw. 1580.

(5) But utenſils and implements of trade may be diſtrained where they are not in actual uſe, and where there is not ſufficient property beſides upon the premiſes to ſatisfy the demand of the landlord. 4 *T. R.* 565. The reaſon for the protection of the implements of trade ſeems to be ſtrongly expreſſed in the Jewiſh law; "No man ſhall take the nether or the upper mill-ſtone to "pledge; for he taketh a man's life to pledge." *Deut.* c. 24. v. 6. And perhaps in alluſion to this the Jew in Shakeſpeare is made to declare, "You take my life, when you do take the means whereby "I live."

common

common law [x]; 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
[10] 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 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.

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

[x] Stat. 51 Hen. III. ſt. 4. *diſtrictione ſcaccarii.*

[y] 4 Burr. 589.

[z] *Ibid.* 588.

law

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.

In the firſt place then, all diſtreſſes muſt be made *by day*, [11] unleſs in the caſe of *damage feaſant;* an exception being there allowed, leſt the beaſts ſhould eſcape before they are taken [a]. And, when a perſon intends to make a diſtreſs, he muſt, by himſelf, or his bailiff, enter on the demiſed premiſes; formerly during the continuance of the leaſe, but now [b], if the tenant holds over, the landlord may 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 (6). The landlord may alſo diſtrein the beaſts of

[a] Co. Litt. 142.
[b] Stat. 8 Ann. c. 14.
[c] Stat. 8 Ann. c. 14. 11 Geo. II. c. 19.

(6) And by the ſame ſtatute, the 11 Geo. II. c. 19. if any tenant ſhall fraudulently remove his goods and chattels in order to deprive the

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.

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 hap-
[12] pens 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 twelvepence 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 ſervice, as alſo for parliamentary wages, it is ſaid that no diſtreſs can be ex-

[d] Co. Litt. 161. Comberb. 17.
[e] Stat. 11 Geo. II. c. 19.
[f] 2 Lutw. 1532.
[g] Cro. Eliz 13. Stat. 17 Car. II. c. 7. 4 Burr. 590.
[h] 2 Inſt. 107.

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the landlord of the benefit of diſtraining them, or if any perſon aſſiſts the tenant in ſuch a fraudulent conveyance, they ſhall reſpectively forfeit double the value to the landlord to be recovered by an action. But if the value of the goods ſo removed is leſs than 50*l.* then the double value may be recovered before two neighbouring juſtices of the peace. See *Burn.* tit. *Diſtreſs.*

ceſſive.

ceſſive [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].

A POUND (*parcus*, which ſignifies any incloſure) is either pound-*overt*, that is, open overhead; or pound-*covert*, that is, cloſe. By the ſtatute 1 & 2 P. & M. c. 12. no diſtreſs of cattle can be driven out of the hundred where it is taken, unleſs to a pound-overt within the ſame ſhire: and within [13] three miles of the place where it was taken. This is for the benefit of the tenants, that they may know where to find and replevy the diſtreſs. And by ſtatute 11 Geo. II. c. 19. which was made for the benefit of landlords, any perſon 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

[i] Bro. *Abr. t. aſſiſe.* 291. *prerogative* 98.
[j] 1 Ventr. 104. Fitzgibb. 85. 4 Burr. 590.
[k] Co. Litt. 160, 161.
[l] *Ibid.* 47.

give

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 at law, and, if that be determined againſt him, to return the cattle or goods once more into the hands of the deſtreinor. 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
[14] law only in nature of a ſecurity for the rent or damages done, a replevin 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, it is no remedy at all to the diſtreinor. But for a debt due to the crown, unleſs paid within forty days, the diſtreſs was

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

always

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, it's 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 (7). 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 [15] made the diſtreinors treſpaſſors *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 treſpaſſors *ab initio*: but that the party grieved ſhall

[o] Bro. *Abr. t. diſtreſs.* 71.
[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.

(7) Of the days of taking and ſale, one is incluſive, the other excluſive; as if the goods are diſtrained on the firſt, they may be ſold on the ſixth. 1 *H. Bl.* 14.

only

only have an action for the real damage ſuſtained; and not even that, if tender of amends is made before any action is brought (8).

VI. THE ſeiſing of heriots, when due on the death of a tenant, is alſo another ſpecies of ſelf-remedy; not much unlike that of taking cattle or goods in diſtreſs. As for that diviſion of heriots, which is called heriot-ſervice, and is only a ſpecies of rent, the lord may 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]. 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*.

[t] Cop. § 25. [u] Cro. Eliz. 590. Cro. Car. 260.

(8) The ſtatute directs that the action ſhall be an action of treſpaſs or upon the caſe, and therefore an action of trover cannot be brought to recover goods taken under an irregular diſtreſs. 1 *H. Bl.* 13. To an action under this ſtatute, the defendant may plead the general iſſue. But if a party pay money to redeem his goods from a wrongful diſtreſs for rent, he may afterwards maintain trover againſt the perſon who diſtrained them. 6 *T. R.* 298.

I. ACCORD

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

II. ARBITRATION is where the parties, injuring and injured, ſubmit all matters in diſpute, concerning any perſonal chattels or perſonal wrong, to the judgment of two or more *arbitrators*; who are to decide the controverſy: and if they do not agree, it is uſual to add, that another perſon be called in as *umpire*, (*imperator* or *impar* [x],) to whoſe ſole judgment it is then referred: or frequently there is only one arbitrator originally appointed. This deciſion, in any of theſe caſes, is called an *award*. And thereby the queſtion is as fully determined, and the right transferred or ſettled, as it could have been by the agreement of the parties or the judgment of a court of juſtice [y]. But the right of real property cannot thus paſs by a mere award [z]: which ſubtilty in point of form (for it is now reduced to nothing elſe) had it's riſe from feodal principles; for, if this had been permitted, the land might have been aliened collaſively 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

[w] 9 Rep. 79.

[x] Whart. *Angl ſacr.* i. 772. Nichols. Scot. hiſt. libr. ch. 1. *prope finem.*

[y] Brownl. 55. 1 Freem. 410.

[z] 1 Roll. Abr. 242. 1 Lord Raym. 115.

is now become the practice to enter into mutual bonds, with condition to ſtand to the award or arbitration of the arbitrators
[17] or umpire therein named [a]. And experience having 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 (9). And, in conſequence of this ſtatute, it

[a] Append. No. III. §. 6.

(9) A motion to ſet aſide an award under a ſubmiſſion by an obligation, muſt be made before the laſt day of the next term after the award is made. 9 & 10 *W. III. c.* 15. *ſ.* 2. 2 *T. R.* 781. But this does not extend to an award made in purſuance of an order of *niſi prius*. *Str.* 301. If a motion be made to ſet aſide an award under the ſtatute, becauſe it has been procured by corruption or undue means, or for any matter extrinſic the award, it muſt be made before the end of the next term; but an application for an attachment for not performing an award, may be reſiſted at any time for defects appearing on the face of the award itſelf; for ſuch an award, after that time, might be pleaded in bar to any action brought upon it. Pedley v. Goddard, 7 *T. R.* 78.

Submiſſions

is now become a conſiderable part of the buſineſs of the ſuperior courts, to ſet aſide ſuch awards when partially or ille-

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Submiſſions to arbitration were entered into by a rule of the court at the common law when a cauſe was depending, and the ſtatute of king William was intended to give the ſame efficacy to awards where no ſuit or action was inſtituted. 2 *Burr.* 701. A verbal agreement to abide by an award cannot be made a rule of court. 7 *T. R.* 1.

Where a cauſe is referred by an order of *niſi prius*, and it is agreed that the coſts ſhall abide the event of the award, this ſignifies the legal event; and if the arbitrator awards ſuch damages for a treſpaſs or an aſſault as would not, if given in a verdict, carry coſts to the plaintiff, he cannot recover them under this reference, the award in ſuch inſtances being not equivalent to the certificate of a judge. 3 *T. R.* 138. But arbitrators may award coſts at their diſcretion, unleſs there is an expreſs proviſion in the rule, that the coſts ſhall abide the event of the award. 2 *T. R.* 644. If it is awarded that one of the parties ſhall pay the coſts of the action, the coſts of the award are not included. *H. Bl. Rep.* 223.

When arbitrators have the power of electing an umpire, they may chuſe him and call in his aſſiſtance as ſoon as they begin to take the ſubject into conſideration. And this is the more convenient practice, as it ſecures a deciſion upon a ſingle inveſtigation of the controverſy. 2 *T. R.* 644. The agreement to a reference muſt be expreſſed with great caution and accuracy, for if it is agreed to refer all *matters in difference between the parties in the cauſe;* the arbitrators are not confined to the ſubject of the cauſe alone, as they are when it is agreed to refer all *matters in difference in the cauſe between the parties.* 2 *T. R.* 645. Yet after an award under a reference in the firſt caſe, either party may maintain an action for a right or demand ſubſiſting at the time of the reference, but not diſputed or referred to the arbitrators. 4 *T. R.* 146.

The court will not grant an attachment againſt a member of parliament for non-payment of money according to an award. 7 *T. R.* 448. If an arbitrator award that an adminiſtrator, who has ſubmitted to the award, ſhall pay a certain ſum, he is precluded afterwards from objecting that he has no aſſets to ſatisfy the demand. 7 *T. R.* 453.

Courts of equity exerciſe a juriſdiction in ſetting aſide awards, particularly if a diſcovery or an account is prayed; but an arbi-

gally 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.

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trator cannot be made a party, if it is agreed by the ſubmiſſion bond that no bill in equity ſhall be filed againſt him. 2 *Atk.* 395. Where it was one of the articles of co-partnerſhip that all differences ſhould be referred to arbitration, it was decided, that a court of equity could entertain no juriſdiction of the ſubject until the parties had referred their diſputes to the conſideration of arbitrators. 2 *Bro.* 336. But it has ſince been determined that an agreement or covenant to refer all differences to arbitration, and not to file any bill in equity, or bring any action at law, cannot take away the juriſdiction of any court in Weſtminſter Hall. But an action might be brought for the breach of this covenant. 2 *Veſ. jun.* 129. And where a ſubmiſſion to an award is made a rule of court, and it is part of the rule that the parties ſhall file no bill in equity, it is in the diſcretion of the court of law, whether they will enforce that part of the rule by attachment or not. *Ib.* 451.

Arbitrations being unattended by the inevitable delay and expence of public litigation, are of ſuch infinite importance to the community, that it is rather ſurprizing that the legiſlature has not yet given to arbitrators a power of compelling the attendance of witneſſes, or of adminiſtering an oath to them. For until they poſſeſs this authority, like courts of juſtice, however wiſe and righteous their awards may be, it cannot be expected that they can give the ſame ſatisfaction to thoſe who are intereſted in the event of the controverſy.

CHAPTER THE SECOND.

OF REDRESS BY THE MERE OPERATION OF LAW.

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

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

[a] 1 Roll. Abr. 922. Plowd. 543. See vol. II. page 511.

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

II. REMITTER 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

[b] Viner. *Abr. t. executors.* D. 2.
[c] 5 Rep. 30.
[d] Litt. § 659.
[e] Co. Litt. 358. Cro. Jac. 489.

is

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: 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 waiver 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

[f] Finch. L. 194. Litt. § 683.
[g] Co. Litt. 348. 350.
[h] § 661.
[i] Elem. c. 9.

remitter to a right, for which the party has no remedy by action [k]: as if the iſſue in tail be barred by the fine or warranty of his anceſtor, and the freehold is afterwards caſt upon him; he ſhall not be remitted to his eſtate tail [l]: for the operation of the remitter is exactly the ſame, after the union of the two rights, as that of a real action would have been before it. As therefore the iſſue in tail could not by any action have recovered his antient eſtate, he ſhall not recover it by remitter.

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

[k] Co. Litt. 349. [l] Moor. 115. 1 Ann. 286.

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-operate; the act of the parties being neceſſary to ſet the law in motion, and the proceſs of the law being in general the only inſtrument by which the parties are enabled to procure a certain and adequate redreſs.

AND here it will not be improper to obſerve, that although, in the ſeveral caſes of redreſs by the act of the parties mentioned in a former chapter [a], the law allows an extrajudicial remedy, yet that does not exclude the ordinary courſe of juſtice: but it is only an additional weapon put into the hands of certain perſons in particular inſtances, where natural equity or the peculiar circumſtances of their ſituation required a more expeditious remedy, than the formal proceſs of any court of judicature can furniſh. Therefore, though I may defend myſelf, or relations, from external violence, I yet am afterwards entitled to an action of aſſault and battery: though I may retake my goods, if I have a fair and peaceable opportunity, this power of recaption does not debar me from my action of trover or 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 nuſance 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-* [23]

[a] ch. 1.

feaſant,

is the court of a private man; whom the law will not intruſt with any diſcretionary power over the fortune or liberty of his fellow-ſubjects. Such are the courts-baron incident to every manor, and other inferior juriſdictions: where the proceedings are not enrolled or recorded; but as well their exiſtence as the truth of the matters therein contained ſhall, if diſputed, be tried and determined by a jury. Theſe courts can hold no plea of matters cognizable by the common law, unleſs under the value of 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 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 it's officers to apply the remedy. It is alſo uſual in the ſuperior courts to have attorneys, and advocates or counſel, as aſſiſtants.

AN attorney at law anſwers to the *procurator*, or proctor, of the civilians and canoniſts [i]. And he is one who is put in the place, ſtead, or *turn* of another, to manage his matters of law. Formerly every ſuitor was obliged to appear in perſon, to proſecute or defend his ſuit, (according to the old Gothic conſtitution [k],) unleſs by ſpecial licence under the king's letters patent [l]. This is ſtill the law in criminal caſes. And an idiot cannot to this day appear by attorney, but in perſon [m]; for he hath not diſcretion to enable him to appoint a proper ſubſtitute: and upon his being brought before the
[26] court in ſo defenceleſs a condition, the judges are bound to take care of his intereſts, and they ſhall admit the beſt plea in his behalf that any one preſent can ſuggeſt [n]. But, as in

[h] 2 Inſt. 311.

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

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

[l] F. N. B. 25.

[m] *Ibid.* 27.

[n] Bro. *Abr. t. idiot.* 1.

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. 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 practice in the court of common pleas; nor *vice verſa*. To practice in the court of chancery it is alſo neceſſary to be admitted a ſolicitor therein: and by the ſtatute 22 Geo. II. c. 46. no perſon ſhall act as an attorney at the court of quarter ſeſſions, but ſuch as has been regularly admitted in ſome ſuperior court of record. So early as the ſtatute 4 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 (1).

[o] *Inſt.* 4. *tit.* 10.

[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.

(1) The number of attorneys has much increaſed within the laſt three centuries; for an act of parliament paſſed in the 33 Hen. VI. c. 7. ſtates, that not long before that time there had not been more than ſix or eight attorneys in Norfolk and Suffolk, *quo tempore* (it obſerves) *magna tranquillitas regnabat*, but that the number had increaſed to twenty-four, to the great vexation and prejudice of theſe counties; it therefore enacts that for the future there ſhall only be ſix attorneys in Norfolk, ſix in Suffolk, and two in the city of Norwich. As it does not appear that this ſtatute was ever repealed, it might be curious to inquire how it was originally

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 old
[27] books ſtiled apprentices, *apprenticii ad legem*, being looked upon as merely learners, and not qualified to execute the full office of an advocate till they were ſixteen years ſtanding; at which time, according to Forteſcue[r], they might be called to the ſtate and degree of ſerjeants, or *ſervientes ad legem*. How antient and honourable this ſtate and degree is, with the form, ſplendor, and profits attending it, hath been ſo fully diſplayed by many learned writers[s], that it need not be here enlarged on (2). 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 ſta-

[q] See Vol. I. introd. § 1.
[r] *de LL. c* 50.
[s] Forteſc. *ibid.* 10 Rep pref. Dugdal. *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.

originally evaded. The 2 Geo. II. c. 23. requires that every perſon admitted an attorney ſhall have been bound to ſerve as a clerk to an attorney for five years, and ſhall have continued in ſuch ſervice for five years; and the court of King's Bench thought themſelves bound to ſtrike an attorney off the roll of attorneys of that court, who had ſerved part of the time with another maſter, but with the conſent of the firſt. 7 *T. R.* 456. But a bill is now pending in parliament to give relief in ſuch caſes in future.

For regulations reſpecting attorneys, ſee *Burn, tit. Attorney.*

(2) The influence and authority which advocates uſually acquire in popular ſtates, is elegantly deſcribed by Giannone: S'aggiungea, che coloro, che ſapevan ben aringare, avean un gran vantaggio nell' aſſemblee del popolo, il quale ſi mena volontieri per l'orecchie; onde avviene che nello ſtato popolare gli avvocati ſono ordinariamente quegli, chi hanno piu potenza, ed autorità. Lib. II. c. 6.

tute

tute of 14 Edw. III. c. 16. From both theſe degrees ſome are uſually ſelected to be his majeſty's counſel learned in the law; the two principal of whom are called his attorney, and ſolicitor, general. The firſt king's counſel, under the degree of ſerjeant, was ſir Francis Bacon, who was made ſo *honoris cauſa*, without either patent or fee[w]; ſo that the firſt of the modern order (who are now the ſworn ſervants of the crown, with a ſtanding ſalary) ſeems to have been ſir Francis North, afterwards lord keeper of the great ſeal to king Charles II[x]. Theſe king's counſel anſwer in ſome meaſure to the advocates of the revenue, *advocati fiſci*, among the Romans. For they muſt not be employed in any cauſe againſt the crown without ſpecial licence (3); 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 permitied to be at all concerned in private ſuits between ſubject and ſubject[z]. A cuſtom [28] 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.

[w] See his letters. 256.

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

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

[z] *Ibid.* 2. 7. 13.

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

1. The king's premier ſerjeant (ſo conſtituted by ſpecial patent).
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.
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 experieneed barriſters, called the *poſt*-man and the *tub*-man (from the places in which they ſit) have alſo a precedence in motions.

(3) Hence none of the king's counſel can publicly plead in court for a priſoner, or a defendant in a criminal proſecution, without a licence, which is never refuſed; but an expence of about 9*l.* muſt be incurred in obtaining it.

Theſe

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 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 (4); 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
[29] ſeſterces, or about 80 *l.* of Engliſh money [f] (5). And, in order

[b] Seld. tit. hon. 1. 6. 7.
[c] Davis pref. 22. 1 Ch. Rep. 38.
[d] Davis. 23.
[e] *Ff.* 11. 61.
[f] Tac. *ann. l.* 11.

(4) Upon the ſame principle a phyſician cannot maintain an action for his fees. 4 *T. R.* 317.

(5) The circumſtances which led to this decree, as recorded by Tacitus, deſerve to be mentioned. Samius, a Roman knight of diſtinction, having given Suilius a fee of three thouſand guineas to undertake his defence, and finding that he was betrayed by his advocate, *ferro in domo ejus incubuit*. In conſequence of this the ſenate inſiſted upon enforcing the Cincian law, *quâ cavetur antiquitùs, nequis ob cauſam orandam pecuniam donumve accipiat*.

Tacitus then recites the arguments of thoſe who ſpoke againſt the payment of fees, and of thoſe who ſupported the practice, and concludes with telling us, that Claudius Cæſar thinking that there was more reaſon, though leſs liberality, in the arguments of the latter, *capiendis pecuniis poſuit modum, uſque ad dena ſeſtertia, quem egreſſi repetundarum tenerentur*. 1 *Ann. lib.* 11. *c.* 5.

But beſides the acceptance of ſuch immenſe fees, the perfidy of advocates had become a common traffic; for Tacitus introduces the

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 clients 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]. And counſel guilty of deceit or colluſion are puniſhable by the ſtatute Weſtm. 1. 3 Edw. I. c. 28. with impriſonment for a year and a day, and perpetual ſilence in the courts; a puniſhment ſtill ſometimes inflicted for groſs miſdemeſnors in practice [h].

[g] Cro. Jac. 90. [h] Raym. 376.

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the ſubject by obſerving, *nec quidquam publicæ mercis tam venale fuit quam advocatorum perfidia*. To the honour of our courts the corruption of judges and the treachery of counſel are crimes unheard of in this country. *Quod enim eſt jus civile? Quod neque inflecti gratiâ, neque perfringi potentiâ, neque adulterari pecuniâ poſſit*. Cic. pro Cæcinâ.

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 acknowleged and uſed in this kingdom. And theſe are either ſuch as are of public and general juriſdiction throughout the whole realm; or ſuch as are only of a private and ſpecial juriſdiction in ſome particular parts of it. Of the former there are four ſorts; the univerſally eſtabliſhed courts of common law and equity; the eccleſiaſtical courts; the courts military; and courts maritime. And, firſt, of ſuch public courts as are courts of common law and equity.

THE policy of our ancient conſtitution, as regulated and eſtabliſhed by the great Alfred, was to bring juſtice home to every man's door, by conſtituting as many courts of judicature as there are manors and townſhips in the kingdom; wherein injuries were redreſſed in an eaſy and expeditious manner, by the ſuffrage of neighbours and friends. Theſe little courts however communicated with others of a larger juriſdiction, and thoſe with others of a ſtill greater power; aſcending gradually from the loweſt to the ſupreme courts, which were
[31] reſpectively conſtituted to correct the errors of the inferior ones, and to determine ſuch cauſes as by reaſon of their weight and difficulty demanded a more ſolemn diſcuſſion. The courſe of juſtice flowing in large ſtreams from the king, as the fountain, to his ſuperior courts of record; and being then ſubdivided into ſmaller channels, till the whole and every part of the kingdom were plentifully watered and refreſhed. An inſtitution that ſeems highly agreeable to the dictates of natural reaſon, as well as of more enlightened policy;

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 it's 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 regiſtred, 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 it's ſeparate judge or magiſtrate, with a proper degree of ſubordination [b]. In like manner we read of Moſes, that, finding the ſole adminiſtration of juſtice too heavy for him, he "choſe able men out of all Iſrael, ſuch as feared God, men "of truth, hating covetouſneſs; and made them heads over "the people, rulers of thouſands, rulers of hundreds, rulers "of fifties, and rulers of tens: and they judged the people "at all ſeaſons; the hard cauſes they brought unto Moſes, "but every ſmall matter they judged themſelves [c]." Theſe inferior courts, at leaſt the name and form of them, ſtill continue in our legal conſtitution: but as the ſuperior courts of record have in practice obtained a concurrent original juriſdiction with theſe; and as there is beſides a power of removing plaints or actions thither from all the inferior juriſdictions; upon theſe accounts (among 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. [32]

[a] Mod. Un. Hiſt. xxxviii. 469.
[b] *Ibid.* xxxix. 14.
[c] Exod. c. 18.

THE order I ſhall obſerve in diſcourſing on theſe ſeveral courts, conſtituted for the redreſs of *civil* injuries, (for with thoſe of a juriſdiction merely *criminal* I ſhall not at preſent concern myſelf,) will be by beginning with the loweſt, and thoſe whoſe juriſdiction, though public and generally diſperſed throughout the kingdom, is yet (with regard to each particular court) confined to very narrow limits; and ſo aſcending gradually to thoſe of the moſt extenſive and tranſcendant 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 puldreux*, (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
[33] has the toll of the market, is the judge: and it's juriſdiction extends to adminiſter juſtice for all commercial injuries done in that very fair or market, and not in any preceding one. So that the injury muſt be done, complained of, heard, and determined, within the compaſs of one and the ſame day, unleſs the fair continues longer. The court hath cognizance of all matters of contract that can poſſibly ariſe within the precinct of that fair or market; and the plaintiff muſt make oath that the cauſe of an action aroſe there[g]. From this court a writ of error lies, in the nature of an appeal, to the courts at Weſtminſter[h]; which are now alſo bound by the ſtatute 19 Geo. III. c. 70. to iſſue writs of execution, in aid of its

[d] 4 Inſt. 272.
[e] Ruth. c. 4.
[f] Barrington's obſervat. on the ſtat. 337.
[g] Stat. 17 Edw. IV. c. 2.
[h] Cro. Eliz. 773.

proceſs,

proceſs, after judgment, where the perſon or effects of the defendant are not within the limits of this inferior juriſdiction; which may poſſibly occaſion the revival of the practice and proceedings in theſe courts, which are now in a manner forgotten. The reaſon of their original inſtitution ſeems to have been, to do juſtice expeditiouſly among the variety of perſons, that reſort from diſtant places to a fair or market: ſince it is probable that no other inferior court might be able to ſerve 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 (1): for that it is held before the freeholders who owe ſuit and ſervice to the manor, the ſteward being rather the regiſtrar than the judge. Theſe courts, though in their nature diſtinct, are frequently confounded together. The court we are now conſidering, *viz.* the freeholder's court, was compoſed of the lord's tenants, who were the *pares* of each other, and were bound by their feodal te- [34]

[1] Co. Litt. 58. [k] Book II. ch. 4 ch. 6. and ch. 22.

(1) All the freeholders of the king were called barons, but the Editor is not aware that it appears from any authority that this word was ever applied to thoſe who held freeholds of a ſubject. See an account of the antient barons, 1 vol. 398. n. 3. It ſeems to be the more obvious explanation of the court-baron, that it was the court of the baron or lord of the manor, to which his freeholders owed ſuit and ſervice. In like manner we ſay the king's court and the ſheriff's court.

nure 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 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 the nature of the ſuit[q]. After judgment given, a writ alſo of *falſe judgment*[r] lies to the courts at Weſtminſter to rehear and review the cauſe, and not a writ of *error*; for this is not a court of record: and therefore, in ſome of theſe writs of removal, the firſt direction given is to cauſe the plaint to be recorded, *recordari facias loquelam*.

III. A HUNDRED court is only a larger court-baron, being held for all the inhabitants of a particular hundred inſtead of a manor. The free ſuitors are here alſo the judges and the ſteward the regiſtrar, as in the caſe of a court baron. It is likewiſe no court of record; reſembling the former in all points, except that in point of territory it is of a greater juriſdiction[s]. This is ſaid by ſir Edward Coke to have been derived out of the county court for the eaſe of the people, that they might have juſtice done to them at their own doors, without any charge or loſs of time[t]; but it's inſtitution was probably co-eval with that of hundreds themſelves, which were formerly obſerved[v] to have been introduced though not

[l] Finch. 248.
[m] Stiernhook *de jure Goth. l.* 1. *c.* 2.
[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. 248. 4 Inſt. 267.
[t] 2 Inſt. 71.
[v] Vol. I. pag. 116.

invented

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 an *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, at-*" *que pagorum,*" (which we may fairly conſtrue, the lords of hundreds and manors,) "*inter ſuos jus dicunt, controverſi-*" *aſque 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. "*Eliguntur in conciliis et principes, qui jura per pagos vicoſque*" *reddunt: centeni ſingulis, ex plebe comites, conſilium ſimul et*" *auctoritas, adſunt*[x]." This hundred-court was denominated *haereda* in the Gothic conſtitution[y]. But this court, as cauſes are equally liable to removal from hence, as from the common court-baron, and by the ſame writs, and may alſo be reviewed by writ of falſe judgment, is therefore fallen into equal diſuſe with regard to the trial of actions.

IV. THE county court 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

[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.* 22.

[x] *de Mor. German. c.* 13.

[y] Stiernhook. *l.* 1. *c.* 2.

[z] 4 Inſt. 266.

[a] 6 Edw. I. c. 8.

[b] 2 Inſt. 391.

court of exchequer (2). 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, which are ſuppoſed always to attend at the county court, (which Spelman calls *forum 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 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 quar-*
"*tam 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

[c] Finch 318. F. N. B. 152. [d] *Gloſſ. v. comitatus.* [e] *c.* 11.

(2) But if an action is inſtituted in any of the courts of Weſtminſter, and if the defendant makes an affidavit that the debt is under 40*s.* the proceedings will be ſtayed, unleſs the plaintiff will alſo make an affidavit to the contrary. 4 *T. R.* 495. 5 *T. R.* 64.

men

men of the ſhire ſitting therein to adminiſter juſtice both in lay and eccleſiaſtical cauſes[f]. But it's dignity was much impaired, when the biſhop was prohibited and the earl neglected to attend it. And, in modern times, as proceedings are removeable 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 wri 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 ancient Saxon conſtitution there was only one ſuperior court of juſtice in the kingdom; and that court had cognizance both of civil and ſpiritual cauſes: *viz.* the *wittenagemote*, or general council, which aſſembled annually or oftener, wherever the king kept his Chriſtmas, Eaſter, or Whitſuntide, as well to do private juſtice as to conſult upon public buſineſs. At the conqueſt the eccleſiaſtical juriſdiction was diverted into another channel; and the conqueror, fearing [38] 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

[f] *LL. Eadgari. c.* 5.
[g] F. N. B. 70. Finch. 445.
[h] *l.* 3. *tr.* 1. *c.* 7.

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 houſhold; 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 Angliae;* 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 j.

THIS great univerſal court being bound to follow the king's houſhold in all his progreſſes and expeditions, the trial
[39] of common cauſes therein was found very burthenſome to the ſubject. Wherefore king John, who dreaded alſo the power of the juſticiar, very readily conſented to that article which now forms the eleventh chapter of *magna carta*, and enacts, "that *communia placita non ſequantur curiam regis, ſed* "*teneantur in aliquo loco certo.*" This certain place was eſtabliſhed in Weſtminſter-hall, the place where the *aula regis* originally ſate, when the king reſided in that city; and there it hath ever ſince continued. And the court being thus rendered fixed and ſtationary, the judge became ſo too, and a chief with other juſtices of the common pleas was thereupon

j Spelm. *Gl.* 331, 2, 3. Gilb. Hiſt. C. P. introd. 17.

appointed;

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 it's learned judges[k]. And thus alſo in 1495 the emperor Maximilian I. fixed the imperial chamber (which before always travelled with the court and houſhold) 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 it's juriſdiction, and the power of the chief juſticiar being alſo conſiderably curbed by many articles in the great charter, the authority of both began to decline apace under the long and troubleſome reign of king Henry III. [40] 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) 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 houſhold 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

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

into

into ſo provident an order, that the great judicial officers were made to form a cheque upon each other: the court of chancery iſſuing all original writs under the great ſeal to the other courts; the common pleas being allowed to determine all cauſes between private ſubjects; the exchequer managing the king's revenue; and the court of king's bench retaining all the juriſdiction which was not cantoned out to other courts, and particularly the ſuperintendence of all the reſt by way of appeal; and the ſole cognizance of pleas of the crown or criminal cauſes. For pleas or ſuits are regularly divided into two ſorts; *pleas of the crown*, which comprehend all crimes and 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 ſtiled 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.

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

[m] 4 Inſt. 97.

[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.

VI. THE

VI. THE court of king's bench (ſo called becauſe the king uſed formerly to ſit there in perſon[o], the ſtile of the court ſtill being *coram ipſo rege*)(3) is the ſupreme court of common law in the kingdom; conſiſting of a chief juſtice and three *puiſnè* juſtices, who are by their office the ſovereign conſervators of the peace and ſupreme coroners of the land. Yet, though the king himſelf uſed to ſit in this court, and ſtill is ſuppoſed ſo to do; he did not, neither by law is he empowered [p] to, determine any cauſe or motion, but by the mouth of his judges, to whom he hath committed his whole judicial authority[q].

[o] 4 Inſt. 73.

[p] See book I. ch. 7. The king uſed to decide cauſes in perſon in the *aula regia*. "*In curia domini regis ipſe in propria perſona jura decernit.*" (*Dial. de Scacch. l.* 1. §. 4.) After it's diſſolution king Edward I. frequently ſat in the court of king's bench. (See the records cited 4 Burr. 851.)(4). And, in later times James I. is ſaid to have ſat there in perſon, but was informed by his judges that he could not deliver an opinion.

[q] 4 Inſt. 71.

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

(4) Lord Mansfield, in 4 *Burr.* 851. does not mean to ſay, nor do the records there cited warrant the concluſion, that Ed. I. actually ſat in the king's bench. Dr. Henry, in his very accurate Hiſtory of Great Britain, informs us, that he has found no inſtance of any of our kings ſitting in a court of juſtice before Ed. IV. "And "Ed. IV. (he ſays) in the ſecond year of his reign, ſat three days "together, during Michaelmas term, in the court of king's bench; "but it is not ſaid that he interfered in the buſineſs of the court; "and as he was then a very young man, it is probable that it was "his intention to learn in what manner juſtice was adminiſtered, "rather than to act the part of a judge." 5 vol. 382. 4to edit.

Lord Coke ſays, that the words in *magna charta*, c. 29. *nec ſuper eum ibimus nec ſuper eum mittemus niſi*, &c. ſignifying that we ſhall not ſit in judgment ourſelves, nor ſend our commiſſioners or judges to try him. 2 *Inſt.* 46.

But that this is an erroneous conſtruction of theſe words, appears from a charter granted by king John in the 16th year of his reign, which is thus expreſſed, *nec ſuper eos per vim vel per arma ibimus niſi per legem regni noſtri vel per judicium parium ſuorum*. See Int. to *Bl. Mag. Ch.* p. xiii.

THIS

THIS court, which (as we have ſaid) is the remnant of the *aula regia*, is not, nor can be, from the very nature and conſtitution of it, fixed to any certain place, but may follow the king's perſon wherever he goes; for which reaſon all proceſs iſſuing out of this court in the king's name is return-
[42] able "*ubicunque fuerimus in Anglia.*" It hath indeed, for ſome centuries paſt, uſually ſate at Weſtminſter, being an antient palace of the crown; but might remove with the king to York or Exeter, if he thought proper to command it. And we find that, after Edward I. had conquered Scotland, it actually ſate at Roxburgh [r]. And this moveable quality, as well as it's dignity and power, are fully expreſſed by Bracton, when he ſays that the juſtices of this court are "*capi-*
"*tales, generales, perpetui, et majores; a latere regis reſidentes;*
"*qui omnium aliorum corrigere tenentur injurias et errores* [s]." And it is moreover eſpecially provided in the *articuli ſuper cartas* [t] that the king's chancellor, and the juſtices of his bench, ſhall follow him, ſo that he may have at all times near unto him ſome that be learned in the laws.

THE juriſdiction of this court is very high and tranſcendent. It keeps all inferior juriſdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progreſs below. It ſuperintends all civil corporations in the kingdom. It commands magiſtrates and others to do what their duty requires, in every caſe where there is no other ſpecific remedy. It protects the liberty of the ſubject, by ſpeedy and ſummary interpoſition. It takes cognizance both of criminal and civil cauſes; the former in what is called the crown-ſide or crown-office; the latter in the plea-ſide of the court. The juriſdiction of the crown-ſide it is not our preſent buſineſs to conſider; that will be more properly diſcuſſed in the enſuing volume. But on the plea-ſide, or civil branch, it hath an original juriſdiction and cognizance of all actions of treſpaſs, or other injury alleged to be committed *vi et armis;* of actions for forgery of deeds, maintenance, conſpiracy, de-

[r] M. 20, 21 Edw. I. Hale Hiſt. C. L. 200.

[s] *l.* 3. *c.* 10.

[t] 28 Edw. I. c. 5.

ceit,

ceit, and actions on the caſe which allege any falſity or fraud: all of which favour of a criminal nature, although the action is brought for a civil remedy; and make the defendant liable in ſtrictneſs to pay a fine to the king, as well [43] as damages to the injured party [u]. The ſame doctrine is alſo now extended to all actions on the caſe whatſoever [w]: but no action of debt or detinue, or other mere civil action, can by the *common law* be proſecuted by any ſubject in this court, by *original* writ out of chancery [x]; though an action of debt, given by *ſtatute*, may be brought in the king's bench as well as in the common pleas [y]. And yet this court might always have held plea of any civil action (other than actions real) provided the defendant was an officer of the court; or in the cuſtody of the marſhal, or priſon-keeper, of this court, for a breach of the peace or any other offence [z]. And, in proceſs of time, it began by a fiction to hold plea of all perſonal actions whatſoever, and has continued to do ſo for ages [a]: it being ſurmiſed that the defendant is arreſted for a ſuppoſed treſpaſs, which he never has in reality committed; and, being thus in the cuſtody of the marſhal of this court, the plaintiff is at liberty to proceed againſt him for any other perſonal injury: which ſurmiſe, of being in the marſhal's cuſtody, the defendant is not at liberty to diſpute [b]. And theſe fictions of law, though at firſt they may ſtartle the ſtudent, he will find upon farther 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

[u] Finch. L. 198. 2 Inſt 23. *Dyverſite de courtes.* c. *bank le roy.*

[w] F. N. B 86. 92. 1 Lilly. pract. Reg. 503.

[x] 4 Inſt. 76. Trye's Jus Filazar. 101.

[y] Carth. 234.

[z] 4 Inſt. 71.

[a] *Ibid.* 72.

[b] Thus too in the civil law: *contra fictionem non admittitur probatio: quid enim efficeret probatio veritatis, ubi fictio adverſus veritatem fingit? Nam fictio nihil aliud eſt, quam legis adverſus veritatem in re 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.

more

more than one tribunal, before which he may inſtitute his action; and prevents the circuity and delay of juſtice, by allow-
[44] ing 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(5). Yet even this ſo high and honourable court is not the *dernier reſort* of the ſubject: for, if he be not ſatisfied with any determination here, he may remove it by writ of error into the houſe of lords, or the court of exchequer chamber, as the caſe may happen, according to the nature of the ſuit, and the manner in which it has been proſecuted.

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 ancient 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 chequed cloth, reſembling a cheſs board, which covers the table there; and on which, when certain of the king's accounts are made up, the ſums are marked and ſcored with counters. It conſiſts of two diviſions: the receipt of the exchequer, which manages the royal revenue, and with which theſe commentaries have no con-

[e] Lamb. *Archeion.* 24. [g] Spelm. *Guil. I. in cog. leg. vet. apud* Wilkins.
[f] Madox. hiſt. exch. 109. [h] 4 Inſt. 103.—116.

(5) This altered by the 23 Geo. III. c. 28. which ſee in the 1 vol. 104. n. 14.

cern;

cern; 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. Seldon conjectures[i] to have been anciently made out of ſuch as were barons of the kingdom, or parliamentary barons; and thence to have derived their name; which conjecture receives great ſtrength from Bracton's explanation of *magna carta*, c. 14. which directs that the earls and barons be amerced by their peers; that is, ſays he, by the barons of the exchequer[k]. The primary and original buſineſs of this court is to call the king's debtors to account, by bill filed by the attorney-general; and to recover any lands, tenements, or hereditaments, any goods, chattels, or other profits or benefits, belonging to the crown. So that by their original conſtitution the juriſdiction of the courts of common pleas, king's bench, and exchequer, was entirely ſeparate and diſtinct: the common pleas being intended to decide all controverſies between ſubject and ſubject; the king's bench to correct all crimes and 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 like-

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[i] Tit. hon. 2. 5. 16.

[k] *l.* 3. *tr.* 2. *c.* 1. § 3.

wiſe 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.

AN appeal from the equity ſide of this court lies immediately to the houſe of peers; but from the common law ſide,

[l] 10 Edw. I. c. 11. [m] 28 Edw. I. c. 4.

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in purſuance of the ſtatute 31 Edw. III. c. 12. a writ of error muſt be firſt brought into the court of exchequer chamber. And from the determination there had there lies, in the *dernier reſort*, a writ of error to the houſe of lords.

VIII. THE high court of chancery is the only remaining, [47] 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 declared to be exactly the ſame,) is with us at this day created by the mere delivery of the king's great ſeal into his cuſtody[o]: whereby he becomes, without writ or patent, an officer of the greateſt weight and power of any now ſubſiſting in the kingdom; and ſuperior in point of precedency to every tem-

[n] 4 Inſt. 88. [o] Lamb. *Archeion.* 65. 1 Roll. Abr. 385.

poral 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 appoint-
[48] ment 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 (6). He is the general guardian of all infants,

[p] Stat. 31 Hen. VIII. c. 10.
[q] Selden. office of lord chanc. § 3.
[r] of the office of lord chancellor. *edit.* 1651.
[s] Madox. hiſt. of exch. 42.
[t] 38 Edw. III. 3. F. N. B. 35. though Hobart (214.) extends this value to twenty *pounds*.

(6) With regard to the chancellor's patronage, there ſeems to be ſome inaccuracy in the learned judge's text and references. I humbly conceive that a truer ſtatement is this, *viz.* that it appears from the rolls of parliament in the time of Ed. III. that it had been the uſage before that time for the chancellors to give all the king's livings, taxed (by the ſubſidy aſſeſſments) at twenty marks or under, to the clerks, who were then actually *cleri* or clergymen, who had long laboured in the court of chancery; but that the biſhop of Lincoln, when he was chancellor, had given ſuch livings to his own and other clerks, contrary to the pleaſure of the king and the antient uſage; and therefore it is recommended to the king by the council to command the chancellor to give ſuch livings only to the clerks of chancery, the exchequer, and the other two benches or courts of Weſtminſter-hall. 4 *Edw. III. no.* 51. But ſince the new valuation of benefices, or the king's books in the time of Henry the eighth, and the clerks ceaſed to be in orders, the chancellor has had the abſolute diſpoſal of all the king's livings, even where the preſentation devolves to the crown by lapſe, of the value of twenty-pounds a year or under in the king's books. It does not appear how this enlarged patronage has been obtained by the chancellor, but it is probable by a private grant of the crown, from a conſideration that the twenty marks in the time of Ed. III. were equivalent to twenty pounds in the time of Henry VIII. *Gibſ.* 764. 1 *Burn. Ec. Law*, 129.

idiots, and lunatics; and has the general ſuperintendance of all charitable uſes in the kingdom. And all this, over and above

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So far this was the note in the laſt edition; but a reverend gentleman has been ſo obliging as to ſuggeſt to me, that, having once had occaſion to examine the ſubject, he was inclined to think, that the chancellor's patronage was confined to benefices under 20 *l.* a year, and that livings exactly of that value belonged to the king, to be preſented to by himſelf or his miniſter. Having, in conſequence, looked more attentively into the ſubject, I am ſtill of opinion, that the authorities ſupport what is advanced in the preceding part of the note. It cannot be doubted, that ſince the new *valor beneficiorum*, *pounds* were intended to be ſubſtituted for *marks*, and this is expreſsly ſtated by biſhop Gibſon, p. 764. In the 4 Ed. III. cited above, the chancellor's patronage is ſtated to be of all livings of 20 marks and under, *del tax de vint marcs et dedeyns*. In the 1 *Hen. VI. no.* 25, *Rolls of Parliament*, there is a record appointing the duke of Bedford protector, and the duke of Glouceſter protector in his abſence; and amongſt other privileges it grants the protector for the time being, the patronage of all the livings belonging to the crown, *ultra taxam viginti marcarum uſque ad taxam triginta marcarum incluſivè*, and reſerves the reſt of the royal patronage to the king, except the benefices belonging to the chancellor, *virtute officii ſui*. The word *incluſivè* can only apply to the words *uſque ad triginta*; it cannot be reconciled with *ultra*, which was intended to leave the chancellor 20 or under. This is alſo clearly expreſſed in the *Regiſtrum Brevium* 307, where there is an antient writ called *de primo beneficio eccleſiaſtico habendo. Volumus quod idem A ad primum beneficium eccleſiaſticum (taxationem viginti marcarum excedens) vacaturum, quod ad præſentationem noſtram pertinuerit, &c.*

In the year book 38 Ed. III. 3. it is laid down as law, that the king ſhall preſent to *toutz eſgliſes que paſſent l'extent de* 20 *marcs*; and in the next line it is ſaid, that the chancellor ſhall preſent to all not taxed at 20 marks, and having underſtood that the living in queſtion was taxed at 40 *s.* he had preſented to it, but as in fact it was taxed at 40 *l.* the king claimed it. The words in French ſtate the general law, the reſt only apply to the particular caſe. Yet Watſon is ſo careleſs as to ſtate the chancellor's patronage to be under 20 marks and under 20 *l.* and refers to this authority, ch. 9. But it is correctly cited by Comyns, to ſupport the poſition, that the chancellor has the patronage of 20 marks, or 20 *l.* *Dig. Tit. Eſgl. H.* 5. In *Fitz. n. b.* 35, it is ſtated to be *under* 20 marks, without taking any notice of 20 exactly. And in a

the vaſt and extenſive juriſdiction which he exerciſes in his judicial capacity in the court of chancery; wherein, as in the exchequer, there are two diſtinct tribunals: the one ordinary, being a court of common law; the other extraordinary, being a court of equity.

THE ordinary legal court is much more antient than the court of equity. It's 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

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caſe in *Hob.* 214, the word is *under*. In that caſe the chancellor had preſented to a living lapſed to the crown above 20 *l.* a year, and it was held that the king could have no remedy, becauſe the preſentation had paſſed the great ſeal, and therefore apparently made by the king himſelf; but if the preſentation had ſtated, that the benefice was under the value of 20 *l.* then it would have been void, becauſe the chancellor muſt have been deceived.—In this caſe there was no occaſion to ſtate the inſtance of a living of the exact value of 20 *l.* This was a benefice, which had devolved to the crown by lapſe, but no objection is made on that ground, and there ſeems to be no reaſon for any diſtinction, whether the benefice devolves to the king by lapſe or by promotion of the incumbent, or it is part of his original patronage. I have ſtated the authorities which expreſsly give the chancellor the patronage of the value of 20 marks, or now 20 *l.* and I have referred to thoſe which ſtate it to be *under;* and I cannot but obſerve ſo far they are all conſiſtent, as I find no authority in oppoſition to thoſe above, declaring that livings of the value of 20 *l.* belong to the king and not to the chancellor.

The gentleman who wiſhed me to examine the authorities upon this ſubject, was ſo obliging as to inform me that the crown has the patronage of five livings of the exact value of 20 *l.* in the king's books, but that ſeveral others of that value occaſionally devolve to the crown by lapſe and promotion; that he has examined the church book in the ſecretary of ſtate's office, and that he finds within the preſent century many inſtances of preſentations to thoſe livings by the crown, but he admits in ſome modern inſtances, where the right to the preſentation has been claimed both by the chancellor and the miniſter, that the latter has yielded to the former. From the whole, one is led to conclude that theſe preſentations made by the crown, were owing either to the inattention or the accommodation of the chancellor.

plea

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 [t]. 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 [u]. It might likewiſe hold plea (by *ſcire facias*) of partitions of lands in coparcenary [w], and of dower [x], where any ward of the crown was concerned in intereſt, ſo long as the military tenures ſubſiſted: as it now may alſo do of the tithes of foreſt land, where granted by the king and claimed [49] by a ſtranger againſt the grantee of the crown [y]; and of executions on ſtatutes, or recognizances in nature thereof by the ſtatute 23 Hen. VIII. c. 6 [z]. But if any cauſe comes to iſſue in this court, that is, if any fact be diſputed between the parties, the chancellor cannot try it, having no power to ſummon a jury: but muſt deliver the record *propria manu* into the court of king's bench, where it ſhall be tried by the country, and judgment ſhall be there given thereon [a]. And when judgment is given in chancery upon demurrer or the like, a writ of error, in nature of an appeal, lies out of this ordinary court into the court of king's bench [b]: though ſo little is uſually done on the common law ſide of the court, that I have met with no traces of any writ of error [c] being actually brought, ſince the fourteenth year of queen Elizabeth, *A. D.* 1572.

IN this ordinary, or legal, court is alſo kept the *officina juſtitiae*: out of which all original writs that paſs under the

[t] 4 Rep. 54.
[u] 4 Inſt. 80.
[w] Co. Litt. 171. F. N. B. 62.
[x] Bro. *Abr. tit. dower*. 66. Moor. 565.
[y] Bro. *Abr. t. diſmes*. 10.
[z] 2 Roll. Abr. 469.
[a] Cro. Jac. 12. Latch. 112.
[b] Yearbook, 18 *Edw. III*. 25. 17 *Aſſ*. 24. 29 *Aſſ*. 47. Dyer. 315. 1 Roll. Rep. 287. 4 Inſt. 80.
[c] The opinion of lord keeper North in 1682 (1 Vern. 131. 1 Equ. Caſ. abr. 129.) that no ſuch writ of error lay, and that an injunction might be iſſued againſt it, ſeems not to have been well conſidered.

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.

[50] BUT the extraordinary court, or court of equity, is now become the court of the greateſt judicial conſequence. This diſtinction between law and equity, as adminiſtered in different courts, is not at preſent known, nor ſeems to have ever been known, in any other country at any time[d]: and yet the difference of one from the other, when adminiſtered by the ſame tribunal, was perfectly familiar to the Romans[e]; the *jus praetorium*, or diſcretion of the praetor, being diſtinct from the *leges* or ſtanding laws[f]: but the power of both centered in one and the ſame magiſtrate, who was equally entruſted to pronounce the rule of law, and to apply it to 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

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

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

[f] Thus Cicero; "*jam illis promiſſis* "*non eſſe ſtandum, quis non videt, quae* "*coactus quis metu et deceptus dolo pro-* "*miſerit? quae quidem plerumque jure* "*praetorio liberantur, nonnulla legibus.*" Offic. *l.* 1.

Bracton,

Bracton[g], as a thing contraſted to ſtrict law, yet neither in that writer, nor in Glanvil or Fleta, nor yet in Britton, (compoſed under the auſpices and in the name of Edward I, and treating particularly of courts and their ſeveral juriſdictions,) is there a ſyllable to be found relating to the equitable juriſdiction of the court of chancery. It ſeems therefore probable, that when the courts of law, proceeding merely upon the ground of the king's original writs, and confining themſelves ſtrictly to that bottom, gave a harſh or imperfect judgment, the application for redreſs uſed to be to the king in perſon aſſiſted by his privy council; (from whence alſo aroſe the juriſ- [51] diction of the court of requeſts[h], which was virtually aboliſhed by the ſtatute 16 Car. I. c. 10.) and they were wont to refer the matter either to the chancellor and a ſelect committee, or by degrees to the chancellor only, who mitigated the ſeverity or ſupplied the defects of the judgments pronounced in the courts of law, upon weighing the circumſtances of the caſe. This was the cuſtom not only among our Saxon anceſtors, before the inſtitution of the *aula regia*[i], but alſo after it's diſſolution, in the reign of king Edward I[k]; and perhaps during it's continuance, in that of Henry II[l].

In theſe early times the chief judicial employment of the chancellor muſt have been in deviſing new writs, directed to the courts of common law, to give remedy in caſes where none was before adminiſtered. And to quicken the diligence of the clerks in the chancery, who were too much attached to 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

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

[h] 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 be-"fore him: but originally and proper-"ly all poor men's ſuits, which were "made to his majeſty by ſupplication; "and upon which they were entitled to "have right, without payment of any "money for the ſame." (Smith's commonwealth. b. 3. c. 7.)

[i] *Nemo ad regem appellet pro aliqua lite, niſi jus domi conſequi non poſſit. Si jus nimis ſeverum ſit, alleviatio deinde quaeratur apud regem. LL. Edg. c.* 2.

[k] Lambard. *Archeion.* 59.

[l] Johannes 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.

"like

" like caſe falling under the ſame right and requiring like re-
" medy 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 par-
" liament, where a writ ſhall be framed by conſent of the
" learned in the law[m], leſt it happen for the future, that the
" court of our lord the king be deficient in doing juſtice to
[52] " the ſuitors." And this accounts for the very great variety of writs of treſpaſs on the caſe, to be met with in the regiſter; whereby the ſuitor had ready relief, according to the exigency of his buſineſs, and adapted to the ſpecialty, reaſon, and equity of his very caſe[n]. Which proviſion (with a little accuracy in the clerks of the chancery, and a little liberality in the judges, by extending rather than narrowing the remedial effects of the writ) might have effectually anſwered all the purpoſes of a court of equity[o]; except that of obtaining a diſcovery by the oath of the defendant.

BUT when, about the end of the reign of king Edward III. uſes of land were introduced[p], and, though totally diſcountenanced by the courts of common law, were conſidered as fiduciary depoſits and binding in conſcience by the clergy, the ſeparate juriſdiction of the chancery as a court of equity began to be eſtabliſhed[q]; and John Waltham, who was biſhop 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

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

[n] Lamb. *Archeion.* 61.

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

[p] See book II. ch. 20.

[q] Spelm. *Gloſſ.* 106. 1 Lev. 242.

to

to turn their eccleſiaſtical courts into courts of equity, by entertaining ſuits *pro laeſione fidei*, as a ſpiritual offence againſt conſcience, in caſe of non-payment of debts or any breach of civil contracts[r]; till checked by the conſtitutions of Clarendon[s], which declared that, "*placita de debitis, que fide interpoſita debentur, vel abſque interpoſitione fidei, ſint in juſticia regis:*" therefore probably the eccleſiaſtical chancellors, [53] who then held the ſeal, were remiſs in abridging their own new-acquired juriſdiction; eſpecially as the ſpiritual courts continued[t] to graſp at the ſame authority as before, in ſuits *pro laeſione fidei*, ſo late as the fifteenth century[u], till finally prohibited by the unanimous concurrence of all the judges. However, it appears from the parliament rolls[w], that in the reigns of Henry IV and V the commons were repeatedly urgent to have the writ of *ſubpoena* entirely ſuppreſſed, as being a novelty deviſed by the 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 *ſubpœna* was become the daily practice of the court[x].

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

[s] 10 Hen. II. c. 15. Speed. 458.

[t] In 4 Hen. III. ſuits in court chriſtian *pro laeſione fidei* upon temporal contracts were adjudged to be contrary to law. (Fitzh. *Abr. t. Prohibition.* 15.) But in the ſtatute or writ of *circumſpecte agatis*, ſuppoſed by ſome to have iſſued 13 Edw. I. but more probably (3 Pryn. Rec. 336.) 9 Edw. II. ſuits *pro laeſione fidei* were allowed to the eccleſiaſtical courts; according to ſome ancient copies, (Berthelet *ſtat. antiqu.* 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.

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

[w] *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. 83. 1 Roll. Abr. 370, 371, 372.

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

BUT this did not extend very far: for in the antient treatiſe, entitled *diverſite des courtes* [y], ſuppoſed to be written very early in the ſixteenth century, we have a catalogue of the matters of conſcience then cognizable by *ſubpoena* in chancery,
54] which fall within a very narrow compaſs. No regular judicial ſyſtem at that time prevailed in the court; but the ſuitor, when he thought himſelf aggrieved, found a deſultory and uncertain remedy, according to the private opinion of the chancellor, who was generally an eccleſiaſtic, or ſometimes (though rarely) a ſtateſman: no lawyer having ſate in the court of chancery from the times of the chief juſtices Thorpe and Knyvet, ſucceſſively chancellors to king Edward III in 1372 and 1373 [z], to the promotion of ſir Thomas More by king Henry VIII in 1530. After which the great ſeal was indiſcriminately committed to the cuſtody of lawyers, or courtiers [a], or churchmen [b], according as the convenience of the times and the diſpoſition of the prince required, till 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 [c].

IN the time of lord Elleſmere (*A. D.* 1616.) aroſe that notable diſpute between the courts of law and equity, ſet on foot by ſir Edward Coke, then chief juſtice of the court of king's bench; whether a court of equity could give relief after or againſt a judgment at the common law. This conteſt was ſo warmly carried on, that indictments were preferred againſt the ſuitors, the ſolicitors, the counſel, and even a maſter in chancery, for having incurred a *praemunire*, by queſtioning in a court of equity a judgment in the court of king's bench, obtained by groſs fraud and impoſition [d]. This matter being brought before the king, was by him referred to his learned counſel for their advice and opinion; who re-

[y] *tit. chancery. fol.* 296. Raſtell's edit. *A. D.* 1534.

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

[a] Wriotheſly, St. John, and Hatton.

[b] Goodrick, Gardiner, and Heath.

[c] *Biogr. Brit.* 4278.

[d] Bacon's Works. IV. 611, 612. 632.

ported

ported ſo ſtrongly in favour of the courts of equity [e], 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 rather to decide the queſtion by referring it to the ple- [55]
nitude of his royal prerogatize [f]. Sir Edward Coke ſubmitted to the deciſion [g], and thereby made atonement for his error: but this ſtruggle, together with the buſineſs of *commendams* (in which he acted a very noble part [h], and his controlling the commiſſioners of ſewers [i], were the open and avowed cauſes [k], firſt of his ſuſpenſion, and ſoon after of his removal, from his office.

LORD Bacon, who ſucceeded lord Elleſmere, reduced the practice of the court into a more regular ſyſtem; but did not ſit long enough to effect any conſiderable revolution in the ſcience itſelf: and few of his decrees which have reached us are of any great conſequence to poſterity. His ſucceſſors, in the reign of Charles I, did little to improve upon his plan: and even after the reſtoration the ſeal was committed to the earl of Clarendon, who had withdrawn from practice as a lawyer near twenty years; and afterwards to the earl of Shafteſbury, who (though a lawyer by education) had never

[e] Whitelocke of parl. ii. 390. 1 Chan. Rep. append. 11.

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

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

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

[i] See that article in chap. 6.

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

practiſed

practiſed at all. Sir Heneage Finch, who ſucceeded in 1673, and became afterwards earl of Nottingham, was a perſon of
[56] the greateſt abilities and moſt uncorrupted integrity; a thorough maſter and zealous defender of the laws and conſtitution of his country; and endued with a pervading genius, that enabled him to diſcover and to purſue the true ſpirit of juſtice, notwithſtanding the embarraſſments raiſed by the narrow and technical notions which then prevailed in the courts of law, and the imperfect ideas of redreſs which had poſſeſſed the courts of equity. The reaſon and neceſſities of mankind, ariſing from the great change in property by the extenſion of trade and the abolition of military tenures, co-operated in eſtabliſhing his plan, and enabled him in the courſe of nine years to build a ſyſtem of juriſprudence and juriſdiction upon wide and rational foundations; which have alſo been extended, and improved by many great men, who have ſince preſided in chancery. And from that time to this, the power and buſineſs of the court have increaſed to an amazing degree.

FROM this court of equity in chancery, as from the other ſuperior courts, an appeal lies to the houſe of peers. But there are theſe differences between appeals from a court of equity, and writs of error from a court of law: 1. That the former may be brought upon any interlocutory matter, the latter upon nothing but only a definitive judgment: 2. That on writs of error the houſe of lords pronounces the judgment, on appeals it gives direction to the court below to rectify it's 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 upon 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 him the juſtices of the king's bench and common pleas. In imitation of which, a ſecond court of exchequer chamber was erected by ſtatute 27 Eliz. c. 8. conſiſting of the juſtices of the common
[57] pleas, and the barons of the exchequer; before whom writs of

of error may be brought to reverſe judgments in certain ſuits[l] originally begun in the court of king's bench. Into the court alſo of exchequer chamber, (which then conſiſts of all the judges of the three ſuperior courts, and now and then the lord chancellor alſo,) are ſometimes adjourned from the other courts ſuch cauſes, as the judges upon argument find to be of great weight and difficulty, before any judgment is given upon them in the court below[m].

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

X. THE houſe of peers; which is the ſupreme court of judicature in the kingdom, having at preſent no original juriſdiction over cauſes, but only upon appeals and writs of error, to rectify any injuſtice or miſtake of the law, committed by the courts below. To this authority this auguſt tribunal ſucceeded of courſe upon the diſſolution of the *aula regia*. For, as the barons of parliament were conſtituent members of that court; and the reſt of 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) 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 [58]

[l] See ch. 25. pag. 411.

[m] 4 Inſt. 119. 2 Bulſtr. 146.

the

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(7); and except the four northern counties, where the aſſiſes are holden only once a year,) 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

(7) The courts of *niſi prius* in London and Middleſex are called *ſittings*, and thoſe for Middleſex were eſtabliſhed by the legiſlature in the reign of queen Elizabeth. In antient times all iſſues in actions brought in that county were tried at Weſtminſter in the terms, at the bar of the court in which the action was inſtituted; but when the buſineſs of the courts increaſed, theſe trials were found ſo great an inconvenience, that it was enacted by the 18 Eliz. c. 12. that the chief juſtice of the king's bench ſhould be empowered to try within the term, or within four days after the end of the term, all the iſſues joined in the courts of chancery and king's bench; and that the chief juſtice of the common pleas, and the chief baron, ſhould try in like manner the iſſues joined in their reſpective courts.

In the abſence of any one of the chiefs, the ſame authority was given to two of the judges or barons of his court. The ſtatute 12 Geo. I. c. 31. extended the time to eight days after term, and empowered one judge or baron to ſit in the abſence of the chief. The 24 Geo. II. c. 18. has extended the time after term ſtill farther to fourteen days.

uſe

uſe in the room of the ancient juſtices in eyre, *juſticiarii in itinere;* who were regularly eſtabliſhed, if not firſt appointed, by the parliament of Northampton, *A. D.* 1176, 22 Hen. II [n], with a delegated power from the king's great court or *aula regia*, being looked upon as members thereof: and they afterwards made their circuit round the kingdom once in ſeven years for the purpoſe of trying cauſes [o]. They were after- [59] wards directed by *magna carta*, c. 12. to be ſent into every county once a year, to take (or receive the verdict of the jurors or recognitors in certain actions, then called) recognitions or aſſiſes; the moſt difficult of which they are directed to adjourn into the court of common pleas to be there determined. The itinerant juſtices were ſometimes mere juſtices of aſſize, or of dower, or of gaol-delivery, and the like; and they had ſometimes a more general commiſſion, to determine all manner of cauſes, being conſtituted *juſticiarii ad omnia placita* [p]: but the preſent juſtices of aſſiſe and *niſi prius* are more immediately derived from the ſtatute Weſtm. 2. 13 Edw. I. c. 30. which directs them to be aſſigned out of the king's ſworn juſtices, aſſociating to themſelves one or two diſcreet knights of each county. By ſtatute 27 Edw. I. c. 4. (explained by 12 Edw. II. c. 3.) aſſiſes and inqueſts were allowed to be taken before any one juſtice of the court in which the plea was brought; aſſociating to him one knight or other 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

[n] Seld. *Jan. l.* 2. § 5. Spelm. *Cod.* 329.

[o] 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.)

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

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 con-
[60] cluded that they muſt be of eccleſiaſtical cognizance [q]. The prudent jealouſy of our anceſtors ordained [r], that no man of law ſhould be judge of aſſiſe in his own country, wherein he was born or doth inhabit (8): and a ſimilar prohibition is found in the civil law [s], which has carried this principle ſo far, that it is equivalent to the crime of ſacrilege, for a man to be governor of the province in which he was born, or has any civil connexion [t].

THE judges upon their circuits now ſit by virtue of five ſeveral authorities. 1. The commiſſion of the *peace*. 2. A commiſſion of *oyer* and *terminer*. 3. A commiſſion of general *gaol delivery*. The conſideration of all which belongs 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 con-

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

[r] Stat. 4 Edw. III. c. 2. 8 Rich. II. c. 2. 33 Hen. VIII. c. 24.

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

[t] *C.* 9. 29. 4.

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

ſequence

ſequence of the commiſſion of *aſſiſe*[u], 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[w] are uſually appointed to be tried at Weſtminſter in ſome Eaſter or Michaelmas term, by a jury returned from the county wherein the cauſe of action ariſes; but with this proviſo, *niſi prius*, *unleſs before* the day prefixed the judges of aſſiſe come into the county in queſtion. This they are ſure to do in the vacations preceding each Eaſter and Michaelmas term, which ſaves much expenſe and trouble. Theſe commiſſions are conſtantly accompanied by writs of *aſſociation*, in purſuance of the ſtatutes of Edward I and II before mentioned; whereby [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.

THESE are the ſeveral courts of common law and equity, which are of public and general juriſdiction throughout the kingdom. And, upon the whole, we cannot but admire the wiſe economy and admirable proviſion of our anceſtors, in ſettling the diſtribution of juſtice in a method ſo well calculated for cheapneſs, expedition, and eaſe. By the conſtitution which they eſtabliſhed, all trivial debts, and injuries of ſmall conſequence, were to be recovered or redreſſed in every man's own county, hundred, or perhaps pariſh. Pleas 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

[u] Salk. 454. [w] See ch. 23. pag. 353.

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 its minuter ſtrokes are by the length of time at all obſcured or decayed, they may ſtill be with eaſe reſtored to their priſtine vigour: and that not ſo much by fanciful alterations and wild experiments, (ſo frequent in this fertile age,) as by cloſely adhering to the wiſdom of the ancient plan, concerted by Alfred and perfected by Edward I; and by attending to the ſpirit, without neglecting the forms, of their excellent and venerable inſtitutions.

CHAPTER 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 it's conſtant attendant, there ſtill remain ſome other courts of a juriſdiction equally public and general: which take cognizance of other ſpecies of injuries, of an eccleſiaſtical, military, and maritime nature; and therefore are properly diſtinguiſhed by the title of eccleſiaſtical courts, courts military, and courts maritime.

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

[a] *Celeberrimo huic conventui epiſcopus et aldermannus interſunto; quorum alter jura divina, alter humana populum edoceto.* LL. Eadgar. c. 5.

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 decree 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 emphatical reliance on a fabulous tale which it tells of the emperor Conſtantine: that when ſome petitions were brought to him, imploring the aid of his authority againſt certain of his biſhops, accuſed of oppreſſion and injuſtice, he cauſed (ſays the holy canon) the petitions to be burnt in their preſence, diſmiſſing them with this valediction; "*ite* "*et inter vos cauſas veſtras diſcutite, quia dignum non eſt ut nos* "*judicemus Deos*[c]."

IT was not however till after the Norman conqueſt, that this doctrine was received in England; when William I. (whoſe title was warmly eſpouſed by the monaſteries which he liberally endowed, and by the foreign clergy, whom he brought over in ſhoals from France and Italy and planted in the beſt preferments of the Engliſh church) was at length prevailed upon to eſtabliſh this fatal incroachment, 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

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

certain.

certain. But the latter, if not the cauſe, was undoubtedly the conſequence, of this ſeparation: for the Saxon laws were ſoon overborne by the Norman juſticiaries, when the county court fell into diſregard by the biſhop's withdrawing his preſence, in obedience to the charter of the conqueror [d]; which prohibited any ſpiritual cauſe from being tried in the ſecular courts, and commanded the ſuitors to appear before the biſhop only, whoſe deciſions were directed to conform to the canon law [e].

KING Henry the firſt, at his acceſſion, among other reſtorations of the laws of king Edward the confeſſor, revived this of the union of the civil and eccleſiaſtical courts [f]. Which was, according to ſir Edward Coke [g], after the great heat of the conqueſt was paſt, only a reſtitution of the 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. I. they ordained that no biſhop ſhould attend the diſcuſſion of temporal cauſes [h]; which ſoon diſſolved this newly effected union. And when, upon the death of king Henry the firſt,

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

[e] *Nullus epiſcopus vel archidiaconus de legibus epiſcopalibus amplius in hundret 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 ſua reſpondeat; et non ſecundum hundret, ſed ſecundum canones et epiſcopales leges, rectum Deo et epiſcopo ſuo faciat.*

[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.

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

IN briefly recounting the various ſpecies of eccleſiaſtical courts, or, as they are often ſtiled, 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 it's 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 anciently held his court in

[i] *Ibid.* 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*.

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

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

[m] Book II. ch. 32.

ſtatute

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

I PASS by ſuch eccleſiaſtical courts, as have only what is called a *voluntary*, and not a *contentious*, juriſdiction; which are merely concerned in doing or ſelling what no one oppoſes, and which keep an open office for that purpoſe, (as granting diſpenſations, licences, faculties, and other remnants of the papal extortions,) but do not concern themſelves with adminiſtring 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 op-

[n] *Cod. vet. leg.* 325. [o] chap. 8.

portunities

portunities of extending his juriſdiction hither, at length rivetted the cuſtom of appealing to Rome in cauſes eccleſiaſtical ſo ſtrongly, that it never could be thoroughly broken off, till the grand rupture happened in the reign of Henry the eighth; when all the juriſdiction uſurped by the pope in matters eccleſiaſtical was reſtored to the crown, to which it originally belonged: ſo that the ſtatute 25 Hen. VIII. was but declaratory of the 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 (1).

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

[p] 4 Inſt. 341.

(1) No ſuch aſſembly can exiſt as all the biſhops of the realm in any houſe of convocation. But the ſtatute ſays, that the appeal ſhall be to the biſhops, abbots, and priors of the upper houſe of the convocation of the province, in which the cauſe of the *ſuit ariſes*. Therefore in the province of York, the appeal lies now to the archbiſhop and his three biſhops. In the province of Canterbury, to the reſt of the bench of biſhops. See 1 vol. 280. n. 24. When the delegates are equally divided in opinion, ſo that no judgment can be pronounced, a commiſſion of adjuncts may iſſue. See an inſtance referred to in 4 *Burr.* 2254.

A commiſſion of review was applied for in the court of Chancery in Michaelmas Term 1798, when the chancellor, upon hearing the arguments of civilians and barriſters reſpecting the judgment of the delegates, determined to recommend to the king to grant a commiſſion of review. It was then ſaid, that only two had iſſued in the preſent century, one in 1705, and another in 1741.

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 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. 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

[q] 4 Inſt. 341. [r] *Ibid.* 324.

matters

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 it's 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 it's juriſdiction, and want of power to enforce it's judgments; as it can neither fine nor impriſon, not being a court of record [u].

III. THE maritime courts, or ſuch as have power and juriſdiction to determine all maritime injuries, ariſing upon the ſeas, or in parts out of the reach of the common law, are [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

[s] 1 Lev. 230. Show. Parl. Caſ. 60.
[t] 4 Inſt. 125.
[u] 7 Mod. 127.
[w] *Cliff.* 13.
[x] *Archeon.* 41.

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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] 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 it's deciſions conducted by a judge, whoſe maſterly acquaintance with the law of nations was known and revered by every ſtate in Europe [y].

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

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

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

court

court the foreſters or keepers are to bring in their attachments, or preſentments *de viridi et venatione*; and the verderors are to receive the ſame, and to enroll them, and to certify them under their ſeals to the court of juſtice-ſeat, or ſweinmote[d]: for this court can only inquire of, but not convict offenders. 2. The court of *regard*, or ſurvey of dogs, is to be holden every third year for the lawing or expeditation of maſtiffs, which is done by cutting off the claws and ball (or
[72] pelote) of the forefeet, to prevent them from running after deer[e]. No other dogs but maſtiffs are to be thus lawed or expeditated, for none others were permitted to be kept within the precincts of the foreſt; it being ſuppoſed that the keeping of theſe, and theſe only, was neceſſary for the defence of a man's houſe[f]. 3. The court of *ſweinmote* is to be holden before the verderors, as judges, by the ſteward of the ſweinmote thrice in every year[g], the 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 foreſtariorum, et aliorum miniſtrorum foreſtae; et de eorum oppreſſionibus populo regis illatis:*" and, ſecondly, to receive and try preſentments certified from the court of attachments againſt offences in vert and veniſon[h]. And this court may not only inquire, but convict alſo, which conviction ſhall be certified to the court of juſtice-ſeat under the ſeals of the jury; for this court cannot proceed to judgment[i]. But the principal court is, 4. The court of *juſtice ſeat*, which is held before the chief juſtice in eyre, or chief itinerant judge, *capitalis juſtitiarius in itinere*, or his deputy; to hear and determine all treſpaſſes within the foreſt, and all claims of franchiſes, liberties, and privileges, and all pleas and cauſes whatſoever therein ariſing[k]. It may alſo proceed to try preſentments in the inferior courts of the foreſts, and to give judgment upon conviction of the ſweinmote. And the chief juſtice may

[d] *Cart. de foreſt. c.* 16.
[e] *Ibid. c.* 6.
[f] 4 Inſt. 308.
[g] *Cart. de for. ſt. c.* 8.
[h] Stat. 34 Edw. I. c. 1.
[i] 4 Inſt. 289.
[k] *Ibid.* 291.

therefor

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 it's 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 was held *pro forma* only, before the earl of Oxford[q]; but ſince the aera of the revolution in 1688, the foreſt laws have fallen into total diſuſe, to the great advantage of the ſubject (1).

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

[l] Stat. 1 Edw. III. c. 8. 7 Ric. II. c. 4.
[m] 4 Inſt. 313.
[n] *Ibid.* 297.
[o] 4 Inſt. 295.
[p] Hoveden.
[q] North's Life of Lord Guildford, 45.
[r] F. N. B. 113.

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

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 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-

[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.

[v] Moor, 825, 826. See pag. 55.

[w] Milt. parad. loſt. iv. 393.

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"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 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 com-

[x] 1 Ventr. 66. Salk. 146.
[y] Styl. 166.
[z] 1 Show. 396.

miſſion 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.

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 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 houſhold; and then the inqueſt ſhall be compoſed of men of the houſ-
[76] hold 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

[a] Stat. 13 & 14 Car. II. c. 22. § 3. & 4.

[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. Hicke's *diſſertat. epiſtol.* 114.

(though a court of record) to the king's bench, but only to parliament [g], till the ſtatutes of 5 Edw. III. c. 2. and 10 Edw. III. ſt. 2. c. 3. which allowed ſuch writ of error before the king in his place. But this court being ambulatory, and obliged to follow the king in all his progreſſes, ſo that by the removal of the houſhold, 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 houſhold 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 Southwark: and a writ of error lies from thence to the court of king's bench. But if the cauſe is of any conſiderable conſequence, it is uſually removed on 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. c. 27.

V. A FIFTH ſpecies of private courts of a limited, though [77] extenſive, juriſdiction are thoſe of the principality of Wales; which upon its thorough reduction, and the ſettling of it's 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-

[g] 1 Bulſtr. 211. 10 Rep. 79.
[h] F. N. B. 241. 2 Inſt. 548.
[i] 1 Bulſtr. 208.
[k] 1 Sid. 180. Salk. 439.
[l] See vol. I. introd. § 4.

baron, hundred, and county courts are there eſtabliſhed as in England. A ſeſſion is alſo to be held twice in every year in each county, by judges [m] appointed by the king, to be called the great ſeſſions of the ſeveral counties in Wales: in which all pleas of real and perſonal actions ſhall be held, with the ſame form of proceſs and in as ample a manner as in the court of common pleas at Weſtminſter [n]: and writs of error ſhall lie from judgments therein (it being a court of record) to the court of king's bench at Weſtminſter. But the ordinary original writs of proceſs of the king's courts at Weſtminſter do not run into the principality of Wales [o]: though proceſs of execution does [p]; as do alſo prerogative writs, as writs of *certiorari*, *quo minus*, *mandamus*, and the like [q]. And even in cauſes between ſubject and ſubject, to prevent injuſtice through family factions or prejudices, it is held lawful (in cauſes of freehold at leaſt, and it is uſual in all others) to bring an action in the Engliſh courts, and try the ſame in the next Engliſh county adjoining to that part of Wales where the cauſe ariſes [r], and wherein the venue is laid. But on the other hand, to prevent trifling and frivolous ſuits it is enacted by ſtatute 13 Geo. III. c. 51. that in *perſonal* actions, *tried* in any Engliſh county, where the cauſe of action aroſe, and the defendant reſides in Wales, if the plaintiff ſhall not recover a verdict for ten pounds, he ſhall be nonſuited and pay the defendant's coſts, unleſs it be certified by the judge that the freehold or title came principally in queſtion, or that the cauſe was proper to
[78] be tried in ſuch Engliſh county. And if any *tranſitory* action, the cauſe whereof aroſe and the defendant is reſident in Wales, ſhall be *brought* in any Engliſh county, and the plaintiff ſhall not recover a verdict for ten pounds, the plaintiff ſhall be nonſuited, and ſhall pay the defendant's coſts, deducting thereout the ſum recovered by the verdict.

[m] Stat. 18 Eliz. c. 8.

[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.

VI. THE

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[s]: which is a thing very diſtinct from the county palatine, (which hath alſo it's ſeparate chancery, for ſealing of writs, and the like[t],) and comprizes much territory which lies at a vaſt diſtance from it; as particularly a very large diſtrict ſurrounded by the city of Weſtminſter. The proceedings in this court are the ſame as on the equity ſide in the courts of exchequer and chancery[u]; ſo that it ſeems not to be a court of record: and indeed it has been holden that thoſe courts have a concurrent juriſdiction with the duchy court, and may take cognizance of the ſame cauſes[w].

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[x], are thoſe which appertain to the counties palatine of Cheſter, Lancaſter, and Durham, and the royal franchiſe of Ely[y]. In all theſe, as in the principality of Wales, the king's ordinary writs, iſſuing under the great ſeal out of chancery, do not run; that is, they are of no force. For, as originally all *jura regalia* were granted to the lords of theſe counties palatine, they had of courſe the ſole adminiſtration of juſtice, by their own judges appointed by themſelves and not by the crown. It would therefore be incongruous for the king to ſend his writ to direct the judge of another's court in what manner to adminiſter juſtice between the ſuitors. But when the privileges of theſe counties palatine and franchiſes were abridged by ſtatute 27 Hen. VIII. c. 24. it was alſo enacted, that all writs and proceſs ſhould be made in the king's [79] name, but ſhould be *teſte*'d or witneſſed in the name of the owner of the franchiſe. Wherefore all writs, whereon actions

[s] Hob. 77. 2 Lev. 24.
[t] 1 Ventr. 257.
[u] 4 Inſt. 206.
[w] 1 Chan. Rep. 55. Toth. 145. Hard. 171.
[x] 4 Inſt. 213. 218. Finch. R. 452.
[y] See vol. I. introd. § 4.

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 Winchelſey and Rye have been ſince added: which have alſo ſimilar franchiſes in many reſpects [x] with the counties palatine, and particularly an excluſive juriſdiction, (before the mayor and jurats of the ports,) in which excluſive juriſdiction the king's ordinary writ does not run. A writ of error lies from the mayor and jurats of each port to the lord warden of the *cinque ports*, in his court of *Shepway*: and from the court of *Shepway* to the king's bench [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 tinmines there, to ſue and be ſued only in their own

[x] 1 Sid. 165.

[y] Jenk. 71. *Dyverſyte 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.

courts,

courts, that they may not be drawn from their buſineſs which is highly profitable to the public, by attending their lawſuits 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 of other courts, and be only impleaded in the ſtannary court in all matters, excepting pleas of land, life, and member. No writ of error lies from hence to any court in Weſtminſter-hall; as was agreed by all the judges[e] in 4 Jac. I. But an appeal lies from the ſteward of the court to the under-warden; and from him to the lord-warden; and thence to the privy council of the prince of Wales, as duke of Cornwall[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:

[c] 4 Inſt. 232.
[d] See this at length in 4 Inſt. 232.
[e] 4 Inſt. 231.
[f] *Ibid.* 230.
[g] 3 Bulſt. 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. 32.) And from the judgment of thoſe juſtices a writ of error lies immediately to the houſe of lords.

that,

that, for the moſt part, the courts at Weſtminſter-hall have a concurrent juriſdiction with theſe, or elſe a ſuperintendency over them[j]; 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 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 expence 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 (2).

[j] Salk. 144. 263.

(2) By the 25 Geo. III. c. 45. and 26 Geo. III. c. 38. no debtor or defendant, in any court for the recovery of ſmall debts,

THE anxious deſire that has been ſhewn to obtain theſe ſeveral acts, proves clearly that the nation in general is truly ſenſible of the great inconvenience ariſing from the diſuſe of the 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 burthening 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 have of transferring at pleaſure their ſuits to the courts at Weſtminſter! And we may with ſatisfaction obſerve, that this experiment has been actually tried, and has ſucceeded in the populous county of Middleſex; which might ſerve as an example for others. For by ſtatute 23 Geo. II. c. 33. it is enacted, 1. That a ſpecial county court ſhall 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,

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where the debt does not exceed twenty ſhillings, ſhall be committed to priſon for more than twenty days, and if the debt does not exceed forty ſhillings, for more than forty days; unleſs it be proved to the ſatisfaction of the court, that he has money or goods which he fraudulently conceals, and in the firſt caſe the impriſonment may be extended to thirty days, and in the latter to ſixty.

ſhall

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

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

[k] Vol. I. introd. § 1.

THESE

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[l]. 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[m], 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[n], eſtabliſhed this high privilege without any doubt or oppoſition[o]: or, as ſir Matthew Hale[p] very fully expreſſes the ſenſe of the common law and the operation of the act of parliament, "although king Henry the eighth, 14 *A. R. ſui*, "granted to the univerſity a liberal charter, to proceed 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 [85]

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

"common

"common law cognizance, where either of the parties is "privileged."

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

I HAVE now gone through the ſeveral ſpecies of private or ſpecial courts, of the greateſt note in the kingdom, inſtituted for the local redreſs of private wrongs; and muſt, in the cloſe of all, make one general obſervation from ſir Edward Coke[s]: 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.

[q] *Tit.* 21. § 19. [r] *Cod.* 7. 17. 1. [s] 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 were principally guided by the rules of the imperial and canon laws) as they ſubſiſt and are admitted

mitted in England, not by any right of their own [a], but upon bare ſufferance and toleration from the municipal laws, muſt have recourſe to the laws of that country wherein they are thus adopted, to be informed how far their juriſdiction extends, or what cauſes are permitted, and what forbidden, to be diſcuſſed or drawn in queſtion before them. It matters not therefore what the pandects of Juſtinian, or the decretals of Gregory have ordained. They are here of no more intrinſic authority than the laws of Solon and Lycurgus: curious perhaps for their antiquity, reſpectable for their equity, and frequently of admirable uſe in illuſtrating a point of hiſtory. Nor is it at all material in what light other nations may conſider this matter of juriſdiction. Every nation muſt and will abide by its own municipal laws; which various accidents conſpire to render different in almoſt every country in Europe. We permit ſome kinds of ſuits to be of eccleſiaſtical cognizance, which other nations have referred entirely to the temporal courts; as concerning wills and ſucceſſions to inteſtates' chattels: and perhaps we may, in our turn, prohibit them from interfering in ſome controverſies, which on the continent may be looked upon as merely ſpiritual. In ſhort, the common law of England is the one uniform rule to determine the juriſdiction of our courts: and, if any tribunals whatſoever attempt to exceed the limits ſo preſcribed them, the king's courts of common law may and do prohibit them; and in ſome caſes puniſh their judges [b].

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

I. THE wrongs or injuries cognizable by the eccleſiaſtical courts. I 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

[a] See Vol. I. introd. § 1.

[b] Hal. Hiſt. C. L. c. 2.

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the damage which he has ſuſtained. And theſe I ſhall reduce under three general heads; of cauſes *pecuniary*, cauſes *matrimonial*, and cauſes *teſtamentary*.

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

THE principal of theſe is the ſubtraction or withholding of *tithes* from the parſon or vicar, whether the former be a clergyman or a lay appropriator [c]. But herein a diſtinction muſt be taken: for the eccleſiaſtical courts have no juriſdiction to try the *right* of tithes unleſs between ſpiritual perſons [d]; but in ordinary caſes, between ſpiritual men and lay men, are only to compel the payment of them, when the right is not diſputed [e]. By the ſtatute or rather writ [f] of *circumſpecte agatis* [g], it is declared that the court chriſtian ſhall not be prohibited from holding plea, "*ſi rector petat verſus parochia-*" *nos oblationes et decimas debitas et conſuetas:*" ſo that if any diſpute ariſes whether ſuch tithes be *due* and *accuſtomed*, this cannot be determined in the eccleſiaſtical court, but before the king's courts of the common law; as ſuch queſtion affects the temporal inheritance, and the determination muſt bind the real property. But where the *right* does not come into queſtion, but only the *fact* whether or no the tithes allowed to be due are really ſubtracted or withdrawn, this is a tranſient perſonal injury, for which the remedy may properly be had in the ſpiritual court; *viz.* the recovery of the tithes, or their equivalent. By ſtatute 2 & 3 Edw. VI. c. 13. it is enacted, that if any perſon ſhall carry off his predial tithes (*viz.* of corn, hay, or the like) before the tenth part

[c] Stat. 32 Hen. VIII. c. 7.
[d] 2 Roll. Abr. 309, 310. Bro. *Abr. t. juriſdiction.* 85.
[e] 2 Inſt. 364. 489, 490.
[f] See Barrington. 123. 3 Pryn. Rec. 336.
[g] 13 Edw. I. ſt. 4. or rather, 9 Edw. II.

is duly ſet forth, or agreement is made with the proprietor, or ſhall willingly withdraw his tithes of the ſame, or ſhall ſtop or hinder the proprietor of the tithes or his deputy from viewing or carrying them away; ſuch offender ſhall pay *double* the value of the tithes, with coſts, to be recovered before the eccleſiaſtical judge, according to the king's eccleſiaſtical laws. By a former clauſe of the ſame ſtatute, the *treble* value of the tithes, ſo ſubtracted or withheld, may be ſued for in the temporal courts, which is equivalent to the *double* value to be ſued for in the eccleſiaſtical. For one may ſue for and recover in the eccleſiaſtical courts the tithes themſelves, or a recompenſe for them, by the antient law; to which the ſuit for the *double* value is ſuperadded by the ſtatute. But as no ſuit lay in the temporal courts for the ſubtraction of tithes themſelves, therefore the ſtatute gave a *treble* forfeiture, if ſued for there; in order to make the courſe of juſtice uniform, by giving the ſame reparation in one court as in the other [h] (1). However it now ſeldom happens that tithes are ſued for at all in the ſpiritual court; for if the defendant pleads any cuſtom, *modus*, compoſition, or other matter whereby the right of tithing is called in queſtion, this takes it out of the juriſdiction of the eccleſiaſtical judges; for the law will not ſuffer the exiſtence of ſuch a right to be decided by the ſentence of

[h] 2 Inſt. 250.

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

any

any ſingle, much leſs an eccleſiaſtical, judge; without the verdict of a jury. But a more ſummary method than either of recovering ſmall tithes under the value of 40*s*. is given by ſtatute 7 & 8 W. III. c. 6. by complaint to two juſtices of the peace: and, by another ſtatute of the ſame year, c. 34. the ſame remedy is extended to all tithes withheld by quakers under the value of ten pounds.

ANOTHER pecuniary injury, cognizable in the ſpiritual courts, is the *non-payment* of other eccleſiaſtical *dues* to the clergy; as penſions, mortuaries, compoſitions, offerings, and whatſoever falls under the denomination of ſurplice-fees, for marriages or other miniſterial offices of the church: all which injuries are redreſſed by a decree for their actual payment. Beſides which all offerings, oblations, and obventions [90] 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 authorized by the canon, is contrary to common right: for of common right no fee is due to the miniſter even for performing ſuch branches of his duty, and it can only be ſupported by a ſpecial cuſtom [l]; but no cuſtom can ſupport the demand of a fee without performing them at all.

FOR *fees* alſo, ſettled and acknowledged to be due to the officers of the eccleſiaſtical courts, a ſuit will lie therein: but not if the *right* of the fees is at all diſputable; for then it muſt be decided by the common law [m]. It is alſo ſaid, that if a curate be licenced, and his ſalary appointed by the biſhop, and he be not paid, the curate has a remedy in the eccleſi-

[i] Stat. 7 & 8 W. III. c. 16.
[k] Salk. 332.
[l] *Ibid.* 334. Lord Raym. 450. 1558. Fitzg. 55.
[m] 1 Ventr. 165.

aſtical court [m]: but, if he be not licenced, or hath no ſuch ſalary appointed, or hath made a ſpecial agreement with the rector, he muſt ſue for a ſatisfaction at common law [n]; either by proving ſuch ſpecial agreement, or elſe by leaving it to a jury to give damages upon a *quantum meruit*, that is, in conſideration of what he reaſonably deſerved in proportion to the ſervice performed.

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

SPOLIATION is an injury done by one clerk or incumbent to another, in taking the fruits of his benefice without any
[91] right thereunto, but under a pretended title. It is remedied by a decree to account for the profits ſo taken. This injury, when the *jus patronatus* or right of advowſon doth not come in debate, is cognizable in the ſpiritual court: as if a patron firſt preſents A to a benefice, who is inſtituted and inducted thereto; and then, upon pretence of a vacancy, *the ſame* patron preſents B to the ſame living, and he alſo obtains inſtitution and induction. Now, if the fact of the vacancy be diſputed, then that clerk who is kept out of the profits of the living, whichever it be, may ſue the other in the ſpiritual court for ſpoliation, or taking the profits of his benefice. And it ſhall there be tried, whether the living were, or were not, vacant; upon which the validity of the ſecond clerk's pretenſions muſt depend [o]. But if the right of patronage comes at all into diſpute, as if one patron preſented A, and another patron preſented B, there the eccleſiaſtical court hath no cognizance, provided the tithes ſued for amount to a fourth part of the value of the living, but may be prohibited at the inſtance of the patron by the king's writ of *indicavit* [p]. So alſo if a clerk, without any colour of title, ejects another from his parſonage, this injury muſt be redreſſed in the tem-

[m] 1 Burn. eccl. law. 438.
[n] 1 Freem. 70.
[o] F. N. B. 36.
[p] *Circumſpecte agatis*; 13 Edw. I. ſt 4. *Artic. Cleri*, 9 Edw. II. c. 2. F. N. B. 45.

poral

poral courts: for it depends upon no queſtion determinable by the ſpiritual law, (as plurality of benefices are no plurality, vacancy or no vacancy,) but is merely a civil injury.

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

As to the neglect of reparations of the church, churchyard, and the like, the ſpiritual court has undoubted cognizance thereof [t]; and a ſuit may be brought therein for nonpayment of a rate made by the church-wardens for that purpoſe. And theſe are the principal pecuniary injuries, which are cognizable, or for which ſuits may be inſtituted, in eccleſiaſtical courts.

2. MATRIMONIAL cauſes, or injuries reſpecting the rights of marriage, are another, and a much more undiſturbed, branch of the eccleſiaſtical juriſdiction. Though, if we con-

[q] Cart. 224. 3 Lev. 268. [s] 3 Bulſtr. 158. 1 Roll. Rep. 335.
[r] 1 Roll. Rep. 86. 11 Rep. 98. Godb. 259. [t] *Circumſpecte agatis.* 5 Rep. 66.

bility for the marriage ſtate may be looked upon as an injury to the ſuffering party; and for this the eccleſiaſtical law adminiſters the remedy of ſeparation, or a divorce *a menſa et thoro*. But if the cauſe exiſted previous to the marriage, and was ſuch a one as rendered the marriage unlawful *ab initio*, as conſanguinity, corporal imbecility, or the like; in this caſe the law looks upon the marriage to have been always null and void, being contracted *in fraudem legis*, and decrees not only a ſeparation from bed and board, but *a vinculo matrimonii* itſelf. 5. The laſt ſpecies of matrimonial cauſes is a conſequence drawn from one of the ſpecies of divorce, that *a menſa et thoro*; which is the ſuit for *alimony*, a term which ſignifies maintenance: which ſuit the wife, in caſe of ſeparation, may have againſt her huſband, if he neglects or refuſes to make her an allowance ſuitable to their ſtation in life. This is an injury to the wife, and the court chriſtian will redreſs it by aſſigning her a competent maintenance, and compelling the huſband by eccleſiaſtical cenſures to pay it. But no alimony will be aſſigned in caſe of a divorce for adultery on her part; for as that amounts to a forfeiture of her
[95] 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

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

in

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 acknowleged by Lindewode, the ableſt canoniſt of the fifteenth century. Teſtamentary cauſes, he obſerves, belong to the eccleſiaſtical courts "*de conſuetudine* "*Angliae, et ſuper conſenſu regio et ſuorum procerum in talibus* "*ab antiquo conceſſo*[a]." The ſame was, about a century before, very openly profeſſed in a canon of archbiſhop Stratford, *viz.* that the adminiſtration of inteſtates' goods was "*ab olim*" granted to the ordinary, "*conſenſu regio et mag-* "*natum regni Angliae*[b]." The conſtitutions of cardinal Othobon alſo teſtify, that this proviſion "*olim a praelatis cum* "*approbatione regis et baronum dicitur emanaſſe*[c]." And archbiſhop Parker[d], in queen Elizabeth's time, affirms in expreſs words, that originally in matters teſtamentary "*non ullam* "*habebant epiſcopi authoritatem, praeter eam quam a rege ac-* [96] "*ceptam referebant. Jus teſtamenta probandi non habebant,* "*adminiſtrationis poteſtatem cuique delegare non poterant.*"

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

[a] *Provincial. l.* 3. *t.* 13. *fol.* 176.
[b] *Ibid. l.* 3. *t.* 38. *fol.* 263.
[c] *cap.* 23.
[d] See 9 Rep. 38.
[e] *fol.* 263.
[f] Fitz. *Abr. tit. teſtament. pl.* 4. 2 Roll. Abr. 217. 9 Rep. 37. Vaugh. 207.

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: aud 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 it's full determination.

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

IT muſt (in the firſt place) be acknowleged, to the honour of the ſpiritual courts, that though they continue to this
[99] day to decide many queſtions which are properly of temporal cognizance, yet juſtice is in general ſo ably and impartially adminiſtered in thoſe tribunals (eſpecially of the ſuperior kind,) and the boundaries of their power are now ſo well known and eſtabliſhed, that no material inconvenience at preſent ariſes from this juriſdiction ſtill continuing in the 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 hazard.

hazard. And this conſideration had undoubtedly it's 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 diſſentions 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 ardor a method of judicial proceedings, which was carried on in a language unknown to the bulk of the people, which baniſhed the intervention of a jury, (that bulwark of Gothic liberty,) and which placed an arbitrary power of de- [100]
ciſion in the breaſt of a ſingle man.

THE proceedings in the eccleſiaſtical courts are therefore regulated according to the practice of the civil and canon laws; or rather according to a mixture of both, corrected and new-modelled by their own particular uſages, and the interpoſition of the courts of common law. For, if the proceedings in the ſpiritual court be ever ſo regularly conſonant to the rules of the Roman law, yet if they be manifeſtly repugnant to the fundamental maxims of the municipal laws, to which upon principles of ſound policy the eccleſiaſtical proceſs ought in every ſtate to conform [r]; (as if they require two witneſſes to prove a fact, where one will ſuffice at common law;) in ſuch caſes a prohibition will be awarded againſt

[q] Vol. I. introd. § 1.

[r] Warb. alliance. 179.

them.

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 overruled in the court of chancery, the genius of the Engliſh law having broken through the bondage impoſed on it by it's clerical chancellors, and aſſerted the doctrines of judicial as well as civil liberty,) continued till the middle of the laſt century to be upheld by the ſpiritual courts: when the legiſlature was obliged to interpoſe, to teach them a leſſon of ſimilar moderation. By the ſtatute of 13 Car. II. c. 12. it is enacted, that it ſhall not be lawful for any biſhop or eccleſiaſtical judge, to 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] 2 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 [102] ſupporting hand to an otherwiſe tottering authority. Imitating herein the policy of our britiſh anceſtors, among whom, according to Cæſar [x], whoever were interdicted by the Druids from their ſacrifices, "*in numero impiorum ac ſceleratorum habentur: ab iis omnes decedunt, aditum eorum ſermonemque defugiunt, ne quid ex contagione incommodi accipiant: neque iis petentibus jus redditur, neque honos ullus communicatur.*" And ſo with us by the common law an excommunicated perſon is diſabled to do any act, that is required to be done by one that is *probus et legalis homo.* He cannot ſerve upon juries, cannot be a witneſs in any court (3), and, which is

[u] Co. Litt. 133. [w] 2 Inſt. 623. [x] *de bello Gall. l.* 6.

(3) In antient times, a perſon, who by his contempt of the laws and judgments of the church, had brought upon himſelf the ſentence

the worſt of all, cannot bring an action, either real or perſonal, to recover lands or money due to him [y]. Nor is this the whole: for if, within forty days after the ſentence has been publiſhed in the church, the offender does not ſubmit and abide by the ſentence of the ſpiritual court, the biſhop may certify ſuch contempt to the king in chancery. Upon which there iſſues out a writ to the ſheriff of the county, called, from the biſhop's certificates, a *ſignificavit*; or from it's effects a writ *de excommunicato capiendo*: and the ſheriff ſhall thereupon take the offender, and impriſon him in the county goal, till he is reconciled to the church, and ſuch reconciliation certified by the biſhop; upon which another writ, *de excommunicato deliberando*, iſſues out of chancery to deliver and releaſe him [z]. This proceſs ſeems founded on the charter of ſeparation (ſo often referred to) of William the conqueror. "*Si aliquis per ſuperbiam elatus ad juſtitiam epiſcopalem venire noluerit, 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 of the eccleſiaſtical judge by the defendant in any ſuit for tithes, any privy counſellor, or any
[103] 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

[y] Litt. § 201. [z] F. N. B. 62.

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tence of excommunication, was thought to be influenced by no religious ſentiments, and conſequently to be regardleſs of the obligation of an oath; but as the ſame degree of reverence is not at preſent attached to the cenſures and decrees of the ſpiritual judge, and as this incapacity of witneſſes is a great obſtruction to the adminiſtration of juſtice, it ought to be removed by the authority of the legiſlature.

recog-

recognizance with ſufficient ſureties to give due obedience to the proceſs and ſentence of the court. Theſe timely aids, which the common and ſtatute laws have lent to the eccleſiaſtical juriſdiction, may ſerve to refute that groundleſs notion which ſome are too apt to entertain, that the courts 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 this court of chivalry is principally in two points; the redreſſing injuries [104]

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 was 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 it's civil juriſdiction, the redreſſing of incroachments and uſurpations in matters of heraldry and coat-armour: it is the buſineſs of this court, according to

[a] Year book, 37 Hen. VI. 21. Selden of duels, c. 10. Hal. hiſt. C. L. 37.
[b] Salk. 533. 7 Mod. 125. 2 Hawk. P. C. 11.
[c] Hal. hiſt. C. L. 37.
[d] 1 Roll. Abr. 128.

ſir

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 overruled by this court) have not already determined it.

THE proceedings in this court are by petition, in a ſummary way; and the trial not by a jury of twelve men, but by witneſſes, or by combat [e]. But as it cannot impriſon, not being a court of record, and as by the reſolutions of the ſuperior courts it is now confined to ſo narrow and reſtrained a juriſdiction, it has fallen into contempt and diſuſe. The marſhalling of coat-armour, which was formerly the pride and ſtudy of all the beſt families in the kingdom, is now greatly diſregarded; and has fallen into the hands of certain officers and attendants upon this court, called heralds, who conſider it only as a matter of lucre and not of juſtice: whereby ſuch falſity and confuſion have crept into their records, (which ought to be the ſtanding evidence of families, deſcents, and coat-armour) that, though formerly ſome credit has been paid to their teſtimony, now even their common ſeal will not be received as evidence in any court of juſtice in the kingdom [f]. But their original viſitation books, compiled when progreſſes were ſolemnly and regularly made into every part of the kingdom, to inquire into the ſtate of families, and to regiſter ſuch marriages and deſcents as were verified to them upon oath, are allowed to be good evidence of pedigrees [g]. And it is much to be wiſhed, that this practice of viſitation at certain periods were revived; for the failure of inquiſitions *poſt mortem*, by the abolition of military tenures, combined with the negligence of the heralds in omitting their uſual progreſſes, has rendered the proof of a modern deſcent, for the recovery of an eſtate or ſucceſſion to a title of honour, more difficult than that of an ancient. This will be indeed remedied for the future, with reſpect to claims of peerage, by a late ſtanding order [h] of the houſe of lords; directing the [106]

[e] Co. Litt. 261.
[f] 2 Roll. Abr. 686, 2 Jon. 224.
[g] Comb. 63.
[h] 11 May, 1767.

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] (4). 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, the common or general law takes place of the particular [l]. Therefore,

[i] Co. Litt. 260. Hob. 79.
[j] See book I. ch. 8.
[k] 5 Rep. 106.
[l] Co. Litt. 261.

(4) See much learning reſpecting the juriſdiction of the court of admiralty in the caſe of *Le Caux* v. *Eden*, *Doug.* 572.

though pure maritime acquiſitions, which are earned and become due on the high ſeas, as ſeamen's wages, are one proper object of the admiralty juriſdiction, even though the contract for them be made upon land [m]; yet, in general, if there be a contract made in England and to be executed upon the ſeas, as a charter party or covenant that a ſhip ſhall ſail to Jamaica, or ſhall be in ſuch a latitude by ſuch a day; or a contract made upon the ſea to be performed in England, as a bond made on ſhipboard to pay money in London or the like: theſe kinds of mixed contracts belong not to the admiralty juriſdiction, but to the courts of common law [n]. And indeed it hath been farther holden, that the admiralty court cannot hold plea of any contract under ſeal [o].

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

[m] 1 Ventr. 146.
[n] Hob. 12. Hal. hiſt. C. L. 35.
[o] Hob. 212.
[p] 4 Inſt. 134.
[q] View of the civil law, b. 3. p. 1. § 3.
[r] *Inſt.* 1. *tit.* 25.
[s] *Ff.* 49. 15. 12. § 6.
[t] *Ff.* 49. 15. 18.

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

THE proceedings of the courts of admiralty bear much reſemblance to thoſe of the civil law, but are not entirely founded thereon: and they likewiſe adopt and make uſe of other laws, as occaſion requires; ſuch as the Rhodian laws and the laws of Oleron [y]. For the law of England, as has frequently been obſerved, doth not acknowlege or pay any deference to the civil law conſidered as ſuch; but merely permits it's uſe in ſuch caſes where it judged 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 ſtipulation of certain fidejuſſors in the nature of bail [a], and in caſe of default may

[v] Comb. 462.
[u] 13 Rep. 53 2 Lev. 25. Hardr. 183.
[w] 1 Sid. 158.
[x] 2 Show. 232. Comb. 474.
[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.

impriſon

impriſon both them and their principal [b]. They may alſo fine and impriſon for a contempt in the face of the court [c]. And all this is ſupported by immemorial uſage, grounded on the neceſſity of ſupporting a juriſdiction ſo extenſive [d]; though oppoſite to the uſual doctrines of the common law: theſe being no courts of record, becauſe in general their proceſs is much conformed to that of the civil law [e].

IV. I AM next to conſider ſuch injuries as are cognizable by the courts of the common law. And herein I ſhall for the preſent only remark, that all poſſible injuries whatſoever, that did not fall within the excluſive cognizance of either the eccleſiaſtical, military, or maritime tribunals, are for that very reaſon within the cognizance of the common law courts of 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 on the other, when they ought ſo to do. In this caſe a writ of *procedendo* ſhall be awarded, commanding them in the king's name to proceed to judgment; but without ſpeci-

[b] 1 Roll. Abr. 531. Godb. 193. 260.
[c] 1 Ventr. 1.
[d] 1 Keb. 552.
[e] Bro. *Abr. t. error.* 177.

fying any particular judgment, for that (if erroneous) may
[110] be ſet aſide in the courſe of appeal, or by writ of error or falſe judgment: and, upon farther neglect or refuſal, the judges of the inferior court may be puniſhed for their contempt, by writ of attachment returnable in the king's bench or common pleas [f].

A WRIT of *mandamus* is, in general, a command iſſuing in the king's name from the court of king's bench, and directed to any perſon, corporation, or inferior court of judicature within the king's dominions, requiring them to do ſome *particular* thing therein ſpecified, which appertains to their office and duty, and which the court of king's bench has previouſly determined, or at leaſt ſuppoſes to be conſonant to right and juſtice. It is a high prerogative writ, of a moſt extenſive 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: 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 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

[f] F. N. B. 153, 154, 249.

which

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 [s]; 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, or other perſon to whom the writ is directed, returns or ſignifies an inſufficient reaſon, then there iſſues in the ſecond place a *peremptory mandamus*, to do the thing abſolutely; to which no other return will be admitted, but a certificate of perfect obedience and due execution of the writ. If the inferior judge or other perſon makes no return, or fails in his reſpect and obedience, he is puniſhable for his contempt by attachment. But, if he, at the firſt, returns a ſufficient cauſe, although it ſhould be falſe in fact, the court of king's bench will not try the truth of the fact upon affidavits; but will for the preſent believe him, and proceed no farther on the *mandamus*. But then the party injured may have an action againſt him for his falſe return, and (if found to be falſe by the jury) ſhall recover damages equivalent to the injury ſuſtained; together with a *peremptory mandamus* to the defendant to do his duty (5). Thus much for the injury of neglect or refuſal of juſtice.

[s] Raym. 214.

(5) See further upon the writ of *mandamus*, p. 264, poſt.

2. THE

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

[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.

payment,

payment, is not properly a ſpiritual queſtion, but only allowed to be decided in thoſe courts, becauſe incident or acceſſory to ſome original queſtion clearly within their juriſdiction; it ought, therefore, where the two laws differ, to be decided not according to the ſpiritual, but the temporal law; elſe the ſame queſtion might be determined different ways, according to the court in which the ſuit is depending: an impropriety, which no wiſe government can or ought to endure, and which is therefore a ground of prohibition. And if ei- [113]
ther 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

[o] F. N. B. 40. [p] 2 Inſt. 601—618.

not to proſecute, the plea (6). But ſometimes the point may be too nice and doubtful to be decided merely upon a motion: and then, for the more ſolemn determination of the queſtion, the party applying for the prohibition is directed by the court to *declare* in prohibition; that is, to proſecute an action, by filing a declaration, againſt the other, upon a ſuppoſition or fiction (which is not traverſable [q]) that he has proceeded in the ſuit below, notwithſtanding the writ of prohibition. And if, upon demurrer and argument, the court ſhall finally be of opinion, that the matter ſuggeſted is a good and ſufficient ground of
[114] prohibition in point of law, then judgment with nominal damages ſhall be given for the party complaining, and the defendant, and alſo the inferior court, ſhall be prohibited from proceeding any farther. On the other hand, if the ſuperior court ſhall think it no competent ground for reſtraining the inferior juriſdiction, then judgment ſhall be given againſt him who applied for the prohibition in the court above, and a writ of *conſultation* ſhall be awarded; ſo called, becauſe, upon deliberation and conſultation had, the judges find the prohibition to be ill founded, and therefore by this writ they return the cauſe to it's original juriſdiction, to be there determined,

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

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(6) The general grounds for a prohibition to the eccleſiaſtical courts are, either a defect of juriſdiction or a defect in the mode of trial. If any fact be pleaded in the court below, and the parties are at iſſue, that court has no juriſdiction to try it, becauſe it cannot proceed according to the rules of the common law; and in ſuch caſe a prohibition lies. Or where the ſpiritual court has no original juriſdiction, a prohibition may be granted even after ſentence. But where it has juriſdiction, and gives a wrong judgment, it is the ſubject matter of appeal and not of prohibition. *Lord Kenyon*, 3 *T. R.* 4.

But when a prohibition is granted after ſentence, the want of juriſdiction muſt appear upon the face of the proceedings of the ſpiritual court. *Ibid. Cowp.* 422. See alſo 4 *T. R.* 382.

in

in the inferior court. And even in ordinary caſes, the writ of prohibition is not abſolutely final and concluſive. For, though the ground be a proper one in point of *law*, for granting the prohibition, yet if the *fact* that gave riſe to it be afterwards falſified, the cauſe ſhall be remanded to the prior juriſdiction. If, for inſtance, a cuſtom be pleaded in the ſpiritual court; a prohibition ought to go, becauſe that court has no authority to try it: but, if the fact of ſuch a cuſtom be brought to a competent trial, and be there found falſe, a writ of *conſultation* will be granted. For this purpoſe the party prohibited may appear to the prohibition, and take a declaration, (which muſt always purſue the ſuggeſtion,) and ſo plead to iſſue upon it; denying the contempt, and traverſing the cuſtom upon which the prohibition was grounded: and, if that iſſue be found for the defendant, he ſhall then have a writ of *conſultation*. The writ of *conſultation* may alſo be, and is frequently, granted by the court without any action brought; when, after a prohibition iſſued, upon more mature conſideration the court are of opinion that the matter ſuggeſted is not a good and ſufficient ground to ſtop the proceedings below. Thus careful has the law been, in compelling the inferior 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 injuries

injuries or encroachments as may occur between the crown and the ſubject to be diſtinctly conſidered hereafter, as the remedy in ſuch caſes is generally of a peculiar and eccentrical nature.

Now, ſince all wrong may be conſidered as merely a privation of right, the plain natural remedy for every ſpecies of wrong is the being put in poſſeſſion of that right, whereof the party injured is deprived. This may either be effected by a ſpecific delivery or reſtoration of the ſubject-matter in diſpute to the legal owner; as when lands or perſonal chattels are unjuſtly withheld or invaded: or, where that is not a poſſible, or at leaſt not an adequate remedy, by making the ſufferer a pecuniary ſatisfaction in damages; as in caſe of aſſault, breach of contract, *&c.*: to which damages the party injured has acquired an incomplete or inchoate right, the inſtant he receives the injury[a]; though ſuch right be not fully aſcertained till they are aſſeſſed by the intervention of the law. The inſtruments whereby this remedy is obtained (which are ſometimes conſidered in the light of the remedy itſelf) are a diverſity of ſuits and actions, which are defined by the mirror[b] to be "the lawful demand of one's right:" or as Bracton and Fleta expreſs it, in the words of Juſtinian[c], *jus proſequendi in judicio quod 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 po-*"*pulus prout vellet inſtitueret, certas ſolenneſque eſſe voluerunt*[d]." The forms of theſe actions were originally preſerved in the books of the pontifical college, as choice and ineſtimable ſecrets; till one Cneius Flavius, the ſecretary of Appius Claudius, ſtole a copy and publiſhed them to the people[e]. The

[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.

concealment

concealment was ridiculous: but the eſtabliſhment of ſome ſtandard was undoubtedly neceſſary, to fix the true ſtate of a queſtion of right; leſt in a long and arbitrary proceſs it might be ſhifted continually, and be at length no longer diſcernible. Or, as Cicero expreſſes it [f], "*ſunt jura, ſunt formulae, de omnibus rebus conſtitutae, ne quis aut in genere injuriae, aut in ratione actionis, errare poſſit. Expreſſae enim ſunt ex uniuſcujuſque damno, dolore, incommodo, calamitate, injuria, publicae a 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*.

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

REAL actions, (or, as they are called in the mirror [i], *feodal* actions) which concern real property only, are ſuch whereby the plaintiff, here called the demandant, claims title to have any lands or tenements, rents, commons, or other heredita-

[f] *Pro. Qu. Roſcio.* §. 8.

[g] *Sunt quaedam brevia formata ſuper certis caſibus de curſu, et de communi conſilio totius regni approbata et conceſſa, quae quidem nullatenus mutari poterint abſque conſenſu et voluntate eorum. (l. 5. de exceptionibus. c. 17. §. 2.)*

[h] *Inſt.* 4. 6. 15.

[i] c. 2. §. 6.

ments,

ments, in fee-ſimple, fee-tail, or for term of life. By theſe actions formerly all diſputes concerning real eſtates were decided; but they are now pretty generally laid aſide in practice, upon account of the great nicety required in their management, and the inconvenient length of their proceſs: a much more expeditious method of trying titles being ſince introduced, by other actions perſonal and mixed.

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

[k] 6 Ed. I. c. 5.

[l] Finch. L. 184.

well as a private ſatisfaction to the party injured [m]. And this diſtinction of private wrongs, into injuries *with* and *without* force, we ſhall find to run through all the variety of which we are now to treat. In conſidering of which, I ſhall follow the ſame method that was purſued with regard to the diſtribution of rights: for as theſe are nothing elſe but an infringement or breach of thoſe rights, which we have before laid down and explained, it will follow that this negative ſyſtem of *wrongs*, muſt correſpond and tally with the former poſitive ſyſtem, of *rights*. As therefore we divided [n] all rights into thoſe of *perſons*, and thoſe of *things*, ſo we muſt make the ſame general diſtribution of injuries into ſuch as affect the *rights of perſons*, and ſuch as affect the *rights of property*.

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

I. As to injuries which affect the perſonal ſecurity of individuals, 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 me-

[m] Finch. L. 198. Jenk. Cent. 185. [n] See book I. ch. 1.

naces

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

[o] Finch. L. 202.
[p] Regiſt. 104. 27 *Aſſ.* 11. 7 *Edw.* *W* 24.
[q] Finch. L. 202.
[r] *Ff.* 47. 10. 5.

(1) But in any criminal proſecution by indictment, or information for an aſſault or battery, the defendant may plead the general

fence of my goods or poſſeſſion, if a man endeavours to deprive me of them, I may juſtify laying hands upon him to prevent him; and in caſe he perſiſts with violence, I may proceed to beat him away[f]. Thus too in the exerciſe of an office, as that of church-warden or beadle, a man may lay hands upon another to turn him out of church, and prevent his diſturbing the congregation[s]. 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[t], and alſo ſome others[u]. 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 neceſ-

[f] 1 Finch. L. 203.
[s] 1 Sid. 301.
[t] Finch. L. 204.
[u] 1 Hawk. P. C. 111.

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iſſue, and give in evidence that the perſon aſſaulted or beat was the firſt aſſailant, or that he firſt made an attack upon the defendant himſelf, his wife, his father, ſon, maſter, or perhaps, ſervant (ſee p. 3. n. 1. *ante*); and, upon producing ſatisfactory proof of this juſtification, the defendant ought to be acquitted by the jury.

ſary

ſary ſelf-preſervation (2). If the ear be cut off, treble damages are given by ſtatute 37 Hen. VIII. c. 6. though this is not mayhem at common law. And here I muſt obſerve that for theſe four laſt injuries, aſſault, battery, wounding, and mayhem, an indictment may be brought as well as an action; and frequently both are accordingly proſecuted; the one at the ſuit of the crown for the crime againſt the public; the other at the ſuit of the party injured, to make him a repara- [122] tion 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*,

[w] 1 Roll. Abr. 90.
[x] 9 Rep. 52. Hutt. 135.
[y] Lord Raym. 214.
[z] *Inſt.* 4. 3. 6. & 7.

(2) One remarkable property is peculiar to the action for a mayhem, *viz.* that the court in which the action is brought have a diſcretionary power to increaſe the damages, if they think the jury at the trial have not been ſufficiently liberal to the plaintiff; but this muſt be done *ſuper viſum vulneris*, and upon proof that it is the ſame wound, concerning which evidence was given to the jury. 1 *Wilſ.* 5. 1 *Barnes*, 106.

is an univerſal remedy, given for all perſonal wrongs and injuries without force; ſo called becauſe the plaintiff's whole caſe or cauſe of complaint is ſet forth at length in the original writ [a]. For though in general there are methods preſcribed and forms of actions previouſly ſettled, for redreſſing thoſe wrongs which moſt uſually occur, and in which the very act itſelf is immediately prejudicial or injurious to the plaintiff's perſon or property, as battery, non-payment of debts, detaining one's goods, or the like; yet where
[123] any ſpecial conſequential damage ariſes which could not be foreſeen and provided for in the ordinary courſe of juſtice, the party injured is allowed, both by common law and the ſtatute of Weſtm. 2. c. 24. to bring a ſpecial action on his own caſe, by a writ formed according to the peculiar cirumſtances 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. LASTLY; injuries affecting a man's *reputation* or good name are, firſt, by malicious, ſcandalous, and ſlanderous

[a] For example: "*Rex vicecomiti ſalutem. Si A fecerit te ſecurum de clamore ſuo preſequendo, tunc pone per vadium et ſalvos plegios B quod ſit coram juſtitiariis noſtris apud Weſtmonaſterium in octabis ſancti Michaelis, oſtenſurus quare cum idem B ad dextrum oculum ipſius A caſualiter laeſum bene et competenter curandum apud S, pro quadam pecuniae ſumma prae manibus ſoluta aſſumpſiſſet, idem B curam ſuam circa oculum praedictum tam negligenter et improvide appoſuit, quod idem A defectu ipſius B viſum oculi praedicti totaliter amiſit, ad damnum ipſius A viginti librarum, ut dicit. Et habeas ibi nomina plegiorum et hoc breve. Teſte meipſo apud Weſtmonaſterium, &c.*" (*Regiſtr. Brev.* 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.

words,

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] (3). 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

[f] Finch. L. 185. [g] *Ibid.* 186. [h] 1 Ventr. 60.

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(3) When words, that are actionable in themſelves if unexplained, are accompanied by qualifications and alluſions, which prove that the meaning of them is ſuch, that even if they were true, they would not ſubject the perſon of whom they are ſpoken to any puniſhment or penalty, they are not ſlanderous; as to ſay a man is a thief becauſe he has ſtolen a cat, the ſtealing of which is not a felony; or to charge a lady with theft or murder, where the accuſation is intended as a compliment, and alludes only to the faſcinating or fatal influence of her beauty. There are only three diſorders which the law deems it ſcandalous to report that a perſon labours under, *viz.* the plague, the leproſy, and the *lues venerea*. *Com. Dig. Act. Def. D.* 28. Theſe three maladies in ancient times were ſo contagious and alarming that the perſon afflicted was obliged to be abandoned by his friends; and when the leproſy prevailed in this country, there was a peculiar writ *de leproſo amovendo* to remove a leper from ſociety. The probability that this inconvenience may reſult from ſuch a charge being the principle which conſtitutes the ſlander, it has agreeably thereto been decided that it is not actionable to ſay a perſon has had ſuch a diſorder, the infection of which may long have been removed. *2 T. R.* 473.

antient ſtatutes[i]; as well on behalf of the crown, to inflict the puniſhment of impriſonment on the ſlanderer, as on behalf of the party, to recover damages for the injury ſuſtained (4). 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,

[i] Weſtm. 1. 3 Edw. I. c. 34. 2 Ric. II. c. 5. 12 Ric. II. c. 11.

[k] Lord Raym. 1369.

[l] 2 Vent. 28.

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(4) This action or public proſecution, for it partakes of both, for *ſcandalum magnatum*, is totally different from the action of ſlander in the caſe of common perſons. The *ſcandalum magnatum* is reduced to no rule or certain definition, but it may be whatever the courts in their diſcretion ſhall judge to be derogatory to the high character of the perſon of whom it is ſpoken; as it was held to be *ſcandalum magnatum* to ſay of a peer, "he was no more to be "valued than a dog;" which words would have been perfectly harmleſs if uttered of any inferior perſon. *Bull. N. P.* 4. This action is now ſeldom or never reſorted to. By the two firſt ſtatutes upon which it is founded, (3 Ed. I. c. 34. and 2 R. II. ſt. 2. c. 5.) the defendant may be impriſoned till he produces the firſt author of the ſcandal; hence probably is the origin of the vulgar notion that a perſon who has propagated a ſlander may be compelled to give up his author.

But in common ſlanders, if a perſon declares that he heard A ſay B was a traitor or thief, he is juſtified, if B brings an action againſt him, if he pleads and can prove that A did ſay ſo; but if he aſſerts generally that he has heard ſo without naming his author at the time, he cannot defend himſelf againſt B's action by pleading and proving that he actually was told ſo. The reaſon aſſigned in 12 Co. 134. is, that if the author had been named, his credit might have been in ſo low eſtimation that B might have ſuffered no injury from the ſlander. And Lord Kenyon adds: "It "is juſt that, when a perſon repeats any ſlander againſt another, "he ſhould at the ſame time declare from whom he heard it, in "order that the party injured may ſue the author of the ſlander." 7 *T. R.* 17.

too

too great encouragement being given by this lenity to falſe and malicious ſlanderers, it is now held that for ſcandalous words of the ſeveral ſpecies before-mentioned, (that may endanger a man by ſubjecting him to the penalties of the law, may exclude him from ſociety, may impair his trade, or may affect a peer of the realm, a magiſtrate, or one in public truſt,) an action on the caſe may be had, without proving any particular damage to have happened, but merely upon the probability that it might happen. But with regard to words that do not thus apparently, and upon the face of them, import ſuch defamation as will of courſe be injurious, it is neceſſary that the plaintiff ſhould aver ſome particular damage to have happened; which is called laying his action with a *per quod*. As if I ſay that ſuch a clergyman is a baſtard, he cannot for this bring any action againſt me, unleſs he can ſhew ſome ſpecial loſs by it; in which caſe he may bring his action againſt me, for ſaying he was a baſtard, *per quod* he loſt the preſentation to ſuch a living [m]. In like manner to ſlander another man's title, by ſpreading ſuch injurious reports, as, if true, would deprive him of his eſtate (as to call the iſſue in tail, or one who hath land by deſcent, a baſtard) is actionable, provided any ſpecial damage accrues to the proprietor thereby; as if he loſes an opportunity of ſelling the land [n]. But mere ſcurrility, or opprobrious words, which neither in themſelves import, nor are in fact attended with, any injurious effects, will not ſupport an action. So ſcandals, which concern matters merely ſpiritual, as to call a man heretic or adulterer, are cognizable only in the eccleſiaſtical court [o]; unleſs any temporal damage enſues, which [125] 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,

[m] 4 Rep. 17. 1 Lev. 248.
[n] Cro. Jac. 213. Cro. Eliz. 197.
[o] Noy. 64. 1 Freem. 277.

in

in both theſe caſes, they are not *maliciouſly* ſpoken, which is part of the definition of ſlander [p] (5). 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

[p] Finch. L. 186. 1 Lev. 82. Cro. Jac. 91.

[q] pag. 29.

[r] Dyer. 285. Cro. Jac. 90.

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(5) The words ſcoundrel, raſcal, villain, knave, miſcreant, liar, fool, and ſuch like general terms of ſcurrility, may be uſed with impunity, and are part of the rights and privileges of the vulgar. To conſtitute legal ſlander, the words muſt impute a preciſe crime; hence it is actionable to ſay a man is a highwayman, but it is not ſo, to ſay he is worſe than a highwayman. *G. Cooke*, 160. 3 *Wilſ.* 184. This ſubject has been fully diſcuſſed by C. J. De Grey, who lays down this poſition, "that there muſt be ſome certain or "probable temporal loſs or damage to make words actionable: "but to impute to a man the mere defect or want of moral virtue, "moral duties or obligations, which renders a man obnoxious to "mankind, is not actionable." And therefore he and the court determined, that the following declaration concerning a member of parliament at a county meeting, did not amount to a legal ſlander, *viz.* "As to inſtructing our members to obtain redreſs, I am "totally againſt that plan, for as to inſtructing Mr. O. we might "as well inſtruct the winds, and ſhould he even promiſe his aſſiſt-"ance, I ſhould not expect him to give it us." 3 *Wilſ.* 177.

It is not actionable to ſay of a perſon he is forſworn, or that he has taken a falſe oath, for upon many occaſions a perſon may be guilty of falſe ſwearing without being ſubject to any temporal puniſhment. 6 *T. R.* 691. See the explanation of perjury, 4 vol. p. 137.

A verbal charge of incontinence and proſtitution againſt a woman of modeſty and honour, is not a ſlander cognizable in any temporal court except in the city court, where the cauſe of action ariſes within the juriſdiction of the city of London. See 1 vol. p. 76. n. 9.

No action can be maintained for words even attended with a ſpecial damage, if they are ſpoken from friendſhip or juſtice to another, and not from malice towards the perſon who is the ſub-

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

A SECOND way of affecting a man's reputation is by printed or written libels, pictures, ſigns, and the like; which ſet him in an odious or ridiculous[u] light, and thereby diminiſh his reputation. With regard to libels in general, there are, as in many other caſes, two remedies; one by indictment and another by action. The former for the *public* offence; for every libel has a tendency to the breach of the peace, by provoking the perſon libelled to break it; which offence is the ſame (in point of law) whether the matter contained be true or falſe; and therefore the defendant, on an indictment for publiſhing a libel, is not allowed to allege the truth of it by way of juſtification[w]. But in the remedy by ac-

[s] 4 Rep. 13.
[t] *Ff.* 47. 10. 18.
[u] 2 Show. 314. 11 Mod. 99.
[w] 5 Rep. 125.

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ject of them; as if upon an enquiry being made a maſter is obliged to give an unfavourable character of a diſcarded ſervant. 1 *T. R.* 110.

The principal diſtinctions between actions for words which are actionable in themſelves, and actions for words which are not ſo without a ſpecial damage, are theſe, *viz.* the firſt by 21 J. I. c. 16. muſt be brought within two years, and if the damages are under 40*s.* the plaintiff ſhall recover coſts only to the extent of the damages, but the latter may be brought at any time within ſix years, and a verdict with any damages whatever will entitle the plaintiff to full coſts. *Bull. N. P.* 11. See *Eſpinaſſe, tit. Slander.*

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tion on the caſe, which is to repair the *party* in damages for
[126] 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 (6): but as to ſigns or pictures, it ſeems neceſ-

[x] Hob. 253. 11 Mod. 99.

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(6) When this was originally written by the learned Commentator, the important diſtinction between libels and words ſpoken does not ſeem to have been ſo fully eſtabliſhed as it was ſome time afterwards by the caſe of Villers *v.* Mouſley, 2 *Wilſ.* 403. *viz.* that whatever renders a man ridiculous, or lowers him in the eſteem and opinion of the world, amounts to a libel; though the ſame expreſſions, if ſpoken, would not have been defamation: as to call a perſon in writing *an itchy old toad*, was held in that caſe to be a libel; although as words ſpoken they would not have been actionable.

A young lady of quality lately recovered 4000 *l.* damages for reflections upon her chaſtity publiſhed in a newſpaper; yet ſhe could have brought no action for the groſſeſt aſperſions which could have been uttered againſt her honour.

There are authorities, that truth is not a juſtification in an action for a libel, and a very learned writer ſeems to doubt, whether ſuch a plea would now be admitted by the courts, if the accuſation in the libel did not amount to an indictable offence: (3 *Woodd.* 182.) but I am inclined to think that the contrary is the prevailing opinion of the profeſſions; and that in every action for a libel, if ſpecific inſtances can be ſtated upon the record and proved by evidence, ſo as to ſupport the general charge of the libel, the courts would determine them to be a ſufficient juſtification of the defendant. 1 *T. R.* 748. And the chief excellence of the civil action for a libel conſiſts in this, that it not only affords a reparation for the injury ſuſtained, but it is a full vindication of the innocence of the perſon traduced.

If an action is brought for a libel written in a foreign language, the original with a tranſlation muſt be ſtated in the declaration, the tranſlation alone will not be ſufficient. 6. *T. R.* 162.

To ſupport an action for a libellous ſign or picture, the learned judge ſays, it is neceſſary to ſhew, *that ſome ſpecial damage has*

ſary always to ſhew, by proper *innuendo*'s and averments of the defendant's meaning, the import and application of the ſcandal, and that ſome ſpecial damage has followed; otherwiſe it cannot appear, that ſuch libel by picture was underſtood to be levelled at the plaintiff, or that it was attended with any actionable conſequences.

A THIRD way of deſtroying or injuring a man's reputation is by preferring malicious indictments or proſecutions againſt him; which, under the maſk of juſtice and public ſpirit, are ſometimes made the engines of private ſpite and enmity. For this however the law has given a very adequate remedy in damages, either by an action of *conſpiracy* [y], which cannot be brought but againſt two at the leaſt; or, which is the more uſual way, by a ſpecial action on the caſe for a falſe and malicious proſecution [z]. In order to carry on the former (which gives a recompenſe for the danger to which the party has been expoſed) it is neceſſary that the plaintiff ſhould obtain a copy of the record of his indictment and acquittal (7); but, in proſecutions for felony, it is uſual to deny a copy of the indictment, where there is any, the leaſt, probable cauſe to found ſuch proſecution upon [a]. For it would be a very great diſcouragement to the public juſtice of the kingdom, if pro-

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

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followed; but I conceive there is no ground for this opinion, and that a picture intended to make any one ridiculous is equally actionable, as if the ſame effect had been produced by any other mode of publication, though no damage can be proved.

An action for a libel differs from an action for words, for the former may be brought at any time within ſix years, and any damages will entitle the plaintiff to full coſts.

See more upon libels, 4 vol. p. 150.

(7) In an action for a malicious proſecution, where the plaintiff has been indicted for a felony, it is neceſſary to produce a copy of the record granted by the court before which he was acquitted; but the practice is otherwiſe in miſdemeanours, and in ſuch a caſe the action may be ſuſtained by the production of the original record of the acquittal. 1 *Bl. Rep.* 385.

ſecutors,

ſecutors, who had a tolerable ground of ſuſpicion, were liable to be ſued at law whenever their indictments miſcarried.
[127] But an action on the caſe for a malicious proſecution may be founded upon an indictment, whereon no acquittal can be had; as if it be rejected by the grand jury, or be *coram non judice*, or be inſufficiently drawn. For it is not the danger of the plaintiff, but the ſcandal, vexation, and expenſe, upon which this action is founded [b]. However, any probable cauſe for preferring it is ſufficient to juſtify the defendant (8).

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,

[b] 10 Mod. 219, 220. Stra. 691. [c] 2 Inſt. 589. [d] *Ibid.* 46.

(8) The eſſential ground of this action is, that a legal proſecution was carried on without a probable cauſe; but this muſt be ſubſtantively and expreſsly proved, and cannot be implied. From the want of probable cauſe, malice may be, and moſt commonly is, implied. The knowlege of the defendant is alſo implied. From the moſt expreſs malice, the want of probable cauſe cannot be implied. *Sutton* v. *Johnſtone*, 1 *T. R.* 544.

for

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 [c]. Falſe impriſonment alſo may ariſe by executing a lawful warrant or proceſs at an unlawful time, as on a Sunday [f]; for the ſtatute hath declared, [128] that ſuch ſervice of proceſs ſhall be void (9). 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

[c] Stat. 13 Geo. III. c. 78.
[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 mainpr. ch. 10.
[h] Co. *ibid.* ch. 3. 4 Inſt. 179.

(9) But the ſtatute has excepted caſes of treaſon, felony, and breach of the peace, in which the execution of a lawful warrant or proceſs is allowed upon a Sunday.

ill-will; and if upon the inquiſition due cauſe of ſuſpicion did not appear, then there iſſued another writ for the ſheriff to admit him to bail. This writ, according to Bracton [i], ought not to be denied to any man; it being expreſsly ordered to be made out *gratis*, without any denial, by *magna carta*, c. 26. and ſtatute Weſtm. 2. 13 Edw. I. c. 29. But the ſtatute
[129] of Gloceſter, 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

[i] *l.* 3. *tr.* 2. *c.* 8.
[k] 2 Inſt. 43. 55. 315.
[l] F. N. B. 66.
[m] Raym. 474.
[n] *Niſi captus eſt per ſpeciale præceptum noſtrum, vel capitalis juſtitiarii noſtri, vel pro morte hominis, vel pro foreſta noſtra, vel pro aliquo alio retto, quare ſecundum conſuetudinem Angliæ non ſit replegiabilis.* (*Regiſtr.* 77)

juſtice,

juſtice. Such is the *habeas corpus ad reſpondendum*, when a man hath a cauſe of action againſt one who is confined by the proceſs of ſome inferior court, in order to remove the priſoner, and charge him with this new action in the court above [o]. Such is that *ad ſatisfaciendum*, when a priſoner hath had judgment againſt him in an action, and the plaintiff is [130] 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. Such is, laſtly, the common writ *ad faciendum et recipiendum*, which iſſues out of any of the courts of Weſtminſter hall, when a perſon is ſued in ſome inferior juriſdiction, and is deſirous to remove the action into the ſuperior court; commanding the inferior judges to produce the body of the defendant, together with the day and cauſe of his caption and detainer (whence the writ is frequently denominated an *habeas corpus cum cauſa*) to *do and receive* whatſoever the king's court ſhall conſider in that behalf. This is a writ grantable of common right, without any motion in court [q], and it inſtantly ſuperſedes all proceedings in the court below. But, in order to prevent the ſurreptitious diſcharge of priſoners, it is ordered by ſtatute 1 & 2 P. & M. c. 13. that no *habeas corpus* ſhall iſſue to remove any priſoner out of any gaol, unleſs ſigned by ſome judge of the court out of which it is awarded. And, to avoid vexatious delays by removal of frivolous cauſes, it is enacted by ſtatute 21 Jac. I. c. 23. that, where the judge of an inferior court of record is a barriſter of three years ſtanding, no cauſe ſhall be removed from thence by *habeas corpus* or other writ, after iſſue or demurrer deliberately joined: that no cauſe, if once remanded to the inferior court by writ of *procedendo* or otherwiſe, ſhall ever afterwards be again removed: and that no cauſe ſhall be removed at all, if the debt or damages laid in the declaration do not amount to the ſum of five pounds. But an [r] *expedient*

[o] 2 Mod. 198.
[p] 2 Lilly prac. reg. 4.
[q] 2 Mod. 306.
[r] Bohun. *inſtit. legal.* 85. *edit.* 1708.

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

BUT the great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad ſubjiciendum*: directed to the perſon detaining another, and commanding him to produce the body of the priſoner, with the day and cauſe of his caption and detention, *ad faciendum, ſubjiciendum, et recipiendum*, to do, ſubmit to, and receive whatſoever the judge or court awarding ſuch writ ſhall conſider in that behalf [s]. This is a high prerogative writ, and therefore by the common law iſſuing out of the court of king's bench not only in term-time, but alſo during the vacation [t], by a *fiat* from the chief juſtice or any other of the judges, and running into all parts of the king's dominions: for the king is at all times entitled to have an account, why the liberty of any of his ſubjects is reſtrained [u], wherever that reſtraint may be inflicted. If it iſſues in vacation, it is uſually returnable before the judge himſelf who awarded it, and he proceeds by himſelf thereon [v]; unleſs the term ſhould intervene, and then it may be returned in court [w]. Indeed, if the party were privileged in the courts of common pleas and exchequer, as being (or ſuppoſed to be) an officer or ſuitor of the court, an *habeas corpus ad ſubji-*

[s] St. Trials. viii. 142.

[t] The *pluries habeas corpus* directed to Berwick in 43 Eliz. (cited 4 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.

[u] Cro. Jac. 543.

[v] 4 Burr. 856.

[w] *Ibid.* 460. 542. 606.

ciendum might alſo by common law have been awarded from thence [x]; and, if the cauſe of impriſonment were palpably illegal, they might have diſcharged him [y]: but, if he were committed for any criminal matter, they could only have remanded him, or taken bail for his appearance in the court of king's bench [z]; which occaſioned the common pleas for ſome time to diſcountenance ſuch applications. 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. [132]

IN the king's bench and common pleas it is neceſſary to apply for it by motion to the court [d], as in the caſe of all other prerogative writs (*certiorari*, prohibition, *mandamus*, *&c.*) which do not iſſue as of mere courſe, without ſhewing ſome probable cauſe why the extraordinary power of the crown is called in to the party's aſſiſtance. For, as was argued by lord chief juſtice Vaughan [e], "it is granted on motion, becauſe "it cannot be had of courſe; and there is therefore no *ne-* "*ceſſity* 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

[x] 2 Inſt. 55. 4 Inſt. 290. 2 Hal. P. C. 144. 2 Ventr. 22.
[y] Vaugh. 155.
[z] Carter. 221. 2 Jon. 13.
[a] 2 Mod. 198. Wood's Caſe. C. B. Hil. 11 Geo. III.
[b] 4 Inſt. 182. 2 Hal. P. C. 147.
[c] Lord. Nott. MSS. Rep. July 1675.
[d] 2 Mod. 306. 1 Lev. 1.
[e] Buſhell's Caſe. 2 Jon. 13.
[f] Cro. Jac. 543.

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 ob-
[133] tain a temporary enlargement by ſuing out an *habeas corpus*, though ſure to be remanded as ſoon as brought up to the court. And therefore ſir Edward Coke, when chief juſtice, did not ſcruple in 13 Jac. I. to deny a *habeas corpus* to one confined by the court of admiralty for piracy; there appearing, upon his 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 com-"mand of the king, the privy council, or any other [i]."

IN a former part of theſe commentaries [k] we expatiated at large on the perſonal liberty of the ſubject. This was ſhewn to be a natural inherent right, which could not be ſurrendered or forfeited unleſs by the commiſſion of ſome great and atrocious crime, and which ought not to be abridged in any caſe without the ſpecial permiſſion of law. A doctrine coëval 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 contained by the ferocity of the times, and the occaſional deſpotiſm of jealous or uſurping princes, yet eſtabliſhed a little more than the proviſions of *magna carta*, and on the firmeſt baſis by 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 it's protection impoſſible: but the glory of the Engliſh law con-

[g] 3 Bulſtr. 27. See alſo 2 Roll. Rep. 138.

[h] 2 Inſt. 615.

[i] Com. Journ. 1 Apr. 1628.

[k] Book. I. ch. 1.

ſiſts

ſiſts in clearly defining the times, the cauſes, and the extent, when, wherefore, and to what degree, the impriſonment of the ſubject may be lawful. This it is, which induces the ab- [134] ſolute neceſſity of expreſſing upon every commitment the reaſon for which it is made: that the court upon an *habeas corpus* may examine into it's 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 parliamentary inquiry, and produced the *petition of right*, 3 Car. I. which recites this illegal judgment, and enacts that no freeman hereafter ſhall be ſo impriſoned or detained. But when, in the following year, Mr. Selden and others were committed by the lords of the council, in purſuance of his majeſty's ſpecial command, under a general charge of "notable contempts and ſtirring up "ſedition againſt the king and government," the judges delayed for two terms (including alſo the long vacation) to deliver an opinion how far ſuch a charge was bailable. And, when at length they agreed that it was, they however annexed a condition of finding ſureties for the good behaviour, which ſtill protracted their impriſonment, the chief juſtice, ſir Nicholas Hyde, at the ſame time declaring[m], that "if they "were again remanded for that cauſe, perhaps the court "would not afterwards grant a *habeas corpus*, being already "made acquainted with the cauſe of the impriſonment." But this was heard with indignation and aſtoniſhment by every lawyer preſent; according to Mr. Selden's own[n] account

[l] State Tr. vii. 136.

[m] *Ibid.* 240.

[n] "*Etiam judicum tunc primarius, niſi "illud faceremus, reſcripti illius forenſis, "qui libertatis perſonalis omnimodae vindex legitimus eſt fere ſolus, uſum omni-modum palam pronuntiavit (ſui ſimper ſimilis) nobis perpetuo in poſterum denegandum. Quod, ut odioſiſſimum juris prodigium, ſcientioribus hic univerſis cenſitum.*" (*Vindic. Mar. clauſ. edit. A. D.* 1653)

of the matter, whoſe reſentment was not cooled at the diſtance of four and twenty years.

THESE pitiful evaſions gave riſe to the ſtatute 16 Car. I. c. 10. § 8. whereby it is enacted, that if any perſon be committed by the king himſelf in perſon, 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 deviſes 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 it's miniſters, has always been productive of a ſtruggle; which either diſcovers the exerciſe of that power to be contrary to law, or (if legal) reſtrains it for the future. This was the caſe in the preſent inſtance. The oppreſſion of an obſcure individual gave birth to the famous *habeas corpus* act, 31 Car. II. c. 2. which is frequently conſidered as another

[o] pag. 132. [p] State Trials, vii. 471.

magna

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 (10).

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

[q] See book I. ch. 1.

(10) Biſhop Burnet relates a circumſtance reſpecting the *habeas corpus* act, which is more curious than credible; but though we cannot be induced to ſuppoſe that this important ſtatute was obtained by a jeſt and a fraud, yet the ſtory proves that a very formidable oppoſition was made to it at that time. "It was carried (ſays "he) by an odd artifice in the houſe of lords. Lord Grey and "lord Norris were named to be the tellers, lord Norris being a "man ſubject to vapours, was not at all times attentive to what he "was doing, ſo a very fat lord coming in, lord Grey counted him "for ten as a jeſt at firſt, but ſeeing lord Norris had not obſerved "it, he went on with this miſreckoning of ten, ſo it was re"ported to the houſe, and declared that they who were for the "bill were the majority, though it indeed went on the other ſide; "and by this means the bill paſt." 1 *Burnet, Hiſt. Ch. II.* 485

to the accuſation in the proper court of judicature. 2. That ſuch writs ſhall be indorſed, as granted in purſuance of this act, and ſigned by the perſon awarding them. 3. That the writ ſhall be returned and the priſoner brought up, within a limited time according to the diſtance, not exceeding in any caſe twenty days. 4. That officers and keepers neglecting to make due returns, or not delivering to the priſoner or his agent within ſix hours after demand a copy of the warrant of commitment, or ſhifting the cuſtody of a priſoner from one to another, without ſufficient reaſon or authority, (ſpecified in the act,) ſhall for the firſt offence forfeit 100 *l.* and for the ſecond offence 200 *l.* to the party grieved, and be diſabled to hold his office. 5. That no perſon, once delivered by *habeas corpus*, ſhall be recommitted for the ſame offence, on penalty of 500 *l.* 6. That every perſon committed for treaſon or felony ſhall, if he requires it the firſt week of the next term, or the firſt day of the next ſeſſion of *oyer* and *terminer*, be indicted
[137] in that term or ſeſſion, or elſe admitted to bail; unleſs the king's witneſſes cannot be produced at that time: and if acquitted, or if not indicted and tried in the ſecond term or ſeſſion, he ſhall be diſcharged from his impriſonment for ſuch imputed offence: but that no perſon, after the aſſizes ſhall be open for the county in which he is detained, ſhall be removed by *habeas corpus*, till after the aſſizes are ended; but ſhall be left to the juſtice of the judges of aſſize. 7. That any ſuch priſoner may move for and obtain his *habeas corpus*, as well out of the chancery or exchequer, as out of the king's bench or common pleas; and the lord chancellor or judges denying the ſame, on ſight of the warrant or oath that the ſame is refuſed, forfeit ſeverally to the party grieved the ſum of 500 *l.* 8. That this writ of *habeas corpus* ſhall run into the counties palatine, cinque ports, and other privileged places, and the iſlands of Jerſey and Guernſey. 9. That no inhabitant of England (except perſons contracting, or convicts praying, to be tranſported; or having committed ſome capital offence in the place to which they are ſent) ſhall be ſent priſoner to Scotland, Ireland, Jerſey, Guernſey, or any places beyond the ſeas, within or without the king's dominions: on

pain

pain that the party committing, his adviſers, aiders, and aſſiſtants, ſhall forfeit to the party grieved 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 *praemunire*; and ſhall be incapable of the king's pardon.

THIS is the ſubſtance of that great and important ſtatute: which extends (we may obſerve) only to the caſe of commitments for ſuch criminal charge, as can produce no inconvenience to public juſtice by a temporary enlargement of the priſoner: all other caſes of unjuſt impriſonment being left to the *habeas corpus* at common law. But even upon writs at the common law it is now expected by the court, agreeable to 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 which admirable regulations, judicial as well as parliamentary, the remedy is now complete for *removing* the injury of unjuſt and illegal confinement. A remedy the more neceſſary, becauſe the oppreſſion does not always ariſe from the ill-nature, but ſometimes from the mere inattention, of government. For it frequently happens in foreign countries, (and has happened in England during temporary ſuſpenſions [s] of the ſtatute) that perſons apprehended upon ſuſpicion have ſuffered a long impriſonment, merely becauſe they were forgotten (11). [138]

[r] 4 Burr. 856. [s] See vol. I. pag. 136.

(11) Beſides the efficacy of the writ of *habeas corpus* in liberating the ſubject from illegal confinement in a public priſon, it alſo extends it's influence to remove every unjuſt reſtraint of perſonal freedom in private life, though impoſed by a huſband or a father; but when women or infants are brought before the court by a *habeas corpus*, the court will only ſet them free from an unmerited or unreaſonable confinement, and will not determine the validity of a marriage, or the right to the guardianſhip, but will leave them at liberty to chuſe where they will go: and if there be any reaſon to apprehend that they will be ſeized in returning from the court, they will be ſent home under the protection of an officer. But if a child

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

III. WITH regard to the third abſolute right of individuals, or that of private property, though the enjoyment of it, when acquired, is ſtrictly a perſonal right: yet as it's nature and original, and the means of it's 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
[139] ties and relations: and, in particular, ſuch injuries as may be done to perſons under the four following relations; huſband and wife, parent and child, guardian and ward, maſter and ſervant.

I. INJURIES that may be offered to a perſon, conſidered as a *huſband*, are principally three: *abduction*, or taking away

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a child is too young to have any diſcretion of it's own, then the court will deliver it into the cuſtody of it's parent, or the perſon who appears to be it's legal guardian. See 3 *Burr.* 1434, where all the prior caſes are conſidered by lord Mansfield.

If an equivocal return is made to a *habeas corpus*, the court will immediately grant an attachment. 5 *T. R.* 89.

a man's

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 be either 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 Weſt. 1. 3 Edw. I. c. 13. the offender ſhall alſo be impriſoned two years, and be fined at the pleaſure of the king. Both the king and the huſband may therefore have this action [w]; and the huſband is alſo entitled to recover damages in an action on the caſe againſt ſuch as perſuade and entice the wife to live ſeparate from him without a ſufficient cauſe [x]. The old law was ſo ſtrict in this point, that, if one's wife miſſed her way upon the road, it was not lawful for another man to take her into his houſe, unleſs ſhe was benighted and in danger of being loſt or drowned [y]: but a ſtranger might carry her behind him on horſeback to market, to a juſtice of the peace for a warrant againſt her huſband, or to the ſpiritual court to ſue for a divorce [z]. 2. *Adultery*, or criminal converſation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the ſpiritual courts; yet, conſidered as a civil injury, (and ſurely there can be no greater,) the law gives a ſatisfaction to the huſband for it by action of treſpaſs *vi et armis* againſt the adulterer, wherein the damages recovered are uſually very large and exemplary. But theſe are properly [140] 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, which he cannot but ſuſpect to be ſpurious. In this caſe, and upon indictments for polygamy, a marriage

[t] F. N. B. 89.
[u] 2 Inſt. 434. [w] *Ibid.*
[x] Law of *niſi prius*. 74.
[y] Bro. *Abr. t. treſpaſs*. 23.
[z] *Ibid.* 207. 440.
[a] Law of *niſi prius*. 26.

in

in fact muſt be proved; though generally, in other caſes, reputation and cohabitation are ſufficient evidence of marriage[b] (12). 3. The third injury is that of *beating* a man's wife,

[b] Burr. 2057.

(12) Evidence may be given in mitigation of damages, that the huſband had criminal connections with other women, or that he was not accuſtomed to treat his wife with tenderneſs and affection, or that they did not live together upon terms of harmony or cordiality, for the jury muſt collect, from a conſideration of ſuch circumſtances, the extent of the wound which is given to the huſband's feelings and happineſs. It is now ſettled, that if the jury ſhould be convinced that the huſband conſented to the infamy of his wife, they ought to find a verdict for the defendant. 4 *T. R.* 651. This is founded either upon the maxim *volenti non fit injuria*, or upon the conſideration that the plaintiff as a profligate *particeps criminis*, appears under too unfavourable circumſtances to receive any countenance or protection in a court of juſtice. But if the huſband's conduct does not prove actual conſent, but only that degree of negligence or levity, which probably contributed to the ſeduction of his wife, it will not deprive him of a verdict, however it may leſſen the damages. But he can maintain no action if he lives entirely ſeparated from his wife in conſequence of a mutual agreement; for the *gît* or foundation of the action is held to conſiſt in the huſband's loſs of the comfort and ſociety of his wife. 5 *T. R.* 357.

The judges have declared, that in all actions of this ſort it is the peculiar province of the jury to eſtimate what pecuniary reparation ought to be granted; and they have refuſed to grant a new trial for exceſſive damages, where a verdict was given for 5000*l.* under circumſtances which were ſuch, that one learned judge was of opinion they amounted to evidence of conſent, and that a verdict ought to have been given for the defendant. 4 *T. R.* 651. However reluctant the judges may appear to become the arbitrators of the price of adultery, yet that delicacy perhaps ought not to be extended to a verdict; which from the manifeſt circumſtances of the caſe cannot poſſibly be reconciled with any fair and rational meaſure of juſtice.

This action for criminal converſation having in it a mixture of penal proſecution, ſufficient evidence muſt be produced to ſatisfy the jury of the actual marriage, and the identity, of the parties. *Doug.* 166.

or

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 civil action will lie. As to the other, of abduction or taking away the children from the father, that is alſo a matter of doubt whether it be a civil injury, or no; for, before the abolition of the tenure in chivalry, it was equally a doubt whether an action would lie for taking and carrying away any other child beſides the heir: ſome holding that it would [141 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 a writ of *raviſhment*, or action of *treſpaſs vi et armis*,

[c] Cro. Jac. 501. 538. [d] Cro. Eliz. 770.

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.

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 right. But a more ſpeedy and ſummary method of redreſſing all complaints relative to wards and guardians hath of late obtained by an application to the court of chancery; which is the ſupreme guardian, and has the 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
[142] 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

[e] F. N. B. 90.
[f] *Ibid.* 139.
[g] *Ibid.*
[h] Hale on F. N. B. 139.
[i] F. N. B. *ibid.*
[k] 2 P. Wms. 108.

ungentle-

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 (13). The other point of injury, is that of beating, confining, or diſabling a man's ſervant, which depends upon the ſame principle as the laſt; *viz.* the property which the maſter has by his contract acquired in the labour of the ſervant. In this caſe, beſides the remedy of an action of battery or impriſonment, which the ſervant himſelf as an individual may have againſt the aggreſſor, the maſter alſo, as a recompenſe for *his* immediate loſs, may maintain an action of treſpaſs *vi et armis*; in which he muſt allege and prove the ſpecial damage he has ſuſtained by the beating of his ſervant, *per quod ſervitium amiſit* [n]; and then the jury will make him a proportionable pecuniary ſatisfaction. A ſimilar practice to which, we find alſo to have obtained among the Athenians; where maſters were entitled to an action againſt ſuch as beat or ill-treated their ſervants [o] (14).

[l] F. N. B 167.
[m] *Ibid.* Winch. 51.
[n] 9 Rep. 113. 10 Rep. 310.
[o] Pott. Antiqu. b. 1. c. 26.

(13) But an action lies for receiving or continuing to employ the ſervant of another after the ſecond maſter has notice that he is the ſervant of another, though he was not apprized of that circumſtance when he hired him. *6 T. R.* 221.

(14) It appears to be a remarkable omiſſion in the law of England, which with ſuch ſcrupulous ſolicitude guards the rights of individuals, and ſecures the morals and good order of the community, that it ſhould have afforded ſo little protection to female chaſtity. It is true that it has defended it by the puniſhment of death from force and violence, but has left it expoſed to perhaps greater danger from the artifices and ſolicitations of ſeduction. In no caſe whatever,

WE may obſerve that in theſe relative injuries, notice is only taken of the wrong done to the ſuperior of the parties

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whatever, unleſs ſhe has had a promiſe of marriage, can a woman herſelf obtain any reparation for the injury ſhe has ſuſtained from the ſeducer of her virtue. And even where her weakneſs and credulity have been impoſed upon by the moſt ſolemn promiſes of marriage, unleſs they have been overheard or made in writing, ſhe cannot recover any compenſation, being incapable of giving evidence in her own cauſe. Nor can a parent maintain any action in the temporal courts againſt the perſon who has done this wrong to his family, and to his honour and happineſs, but by ſtating and proving, that from the conſequences of the ſeduction his daughter is leſs able to aſſiſt him as a ſervant, or that the ſeducer in the purſuit of his daughter was a treſpaſſer upon his premiſes. Hence no action can be maintained for the ſeduction of a daughter, which is not attended with a loſs of ſervice or an injury to property. Therefore, in that action for ſeduction which is in moſt general uſe, *viz.* a *per quod ſervitium amiſit*, the father muſt prove that his daughter, when ſeduced, actually aſſiſted in ſome degree, however inconſiderable, in the houſewifery of his family; and that ſhe has been rendered leſs ſerviceable to him by her pregnancy: or the action would probably be ſuſtained upon the evidence of a conſumption or any other diſorder, contracted by the daughter, in conſequence of her ſeduction, or of her ſhame and ſorrow for the violation of her honour. It is immaterial what is the age of the daughter, but it is neceſſary that at the time of the ſeduction ſhe ſhould be living in, or be conſidered part of, her father's family. 4 *Burr.* 1878. 3 *Wilſ.* 18. And Mr. J. Wilſon, in a caſe upon the northern circuit, was of opinion, that a young woman who was upon a viſit at a relation's houſe, and was there ſeduced, might be conſidered, in ſupport of this action, as in the ſervice of her father, or as part of his family. In this action, as the daughter does not neceſſarily receive any part of the damages recovered, ſhe is a competent witneſs, and is generally produced to prove the fact of the ſeduction. But in ſuch caſes, as in actions for adultery, the damages are eſtimated from the rank and ſituation of the parent, or from the degree of affliction which, under all the circumſtances, he may be ſuppoſed to ſuffer. It ſhould ſeem that this action may be brought by a grandfather, brother, uncle, aunt, or any relation under the protection of whom, *in loco parentis*, a

related by the breach and diſſolution of either the relation itſelf, or at leaſt the advantages accruing therefrom; while the loſs of the inferior by ſuch injuries is totally unregarded. One reaſon for which may be this: that the inferior hath no kind of property in the company, care, or aſſiſtance of the ſuperior, as the ſuperior is held to have in thoſe of the inferior; and therefore the inferior can ſuffer no loſs or injury. The wife cannot recover damages for beating her huſband, for ſhe hath no ſeparate intereſt in any thing during her coverture. The child hath no property in his father or guardian; as they have in him, for the ſake of giving him education and nurture. Yet the wife or the child, if the huſband or parent be ſlain, have a peculiar ſpecies of criminal proſecution allowed them, in the nature of a civil ſatisfaction; which is called an *appeal*, 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.

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woman reſides; eſpecially if the caſe be ſuch that ſhe can bring no action herſelf: but the courts would not permit a perſon to be puniſhed twice by exemplary damages for the ſame injury. 2 *T. R.* 4.

Another action for ſeduction is a common action for treſpaſs, which may be brought when the ſeducer has illegally entered the father's houſe; in which action the debauching his daughter may be ſtated and proved as an aggravation of the treſpaſs. 2 *T. R.* 166.

In this action the ſeduction may be proved, though it may not have been followed by the conſequences of pregnancy or the loſs of ſervice. But theſe are the only actions which have been extended by the modern ingenuity of the courts, to enable an unhappy parent to recover a recompenſe, under certain circumſtances, for the injury he has ſuſtained by the ſeduction of his daughter.

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.

[145] 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].

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

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

1. AND firſt of an unlawful *taking*. The right of property in all external things being ſolely acquired by occupancy, as has been formerly ſtated, and preſerved and tranſferred by grants, deeds, and wills, which are a continuation of that occupancy; it follows as a neceſſary conſequence, that when I once have gained a rightful poſſeſſion of any goods or chattels, either by a juſt occupancy or by a legal transfer, whoever either by fraud or force diſpoſſeſſes me of them is guilty of a tranſgreſſion againſt the law of ſociety, which is a kind of ſecondary law of nature. For there muſt be an end of all ſocial commerce between man and man, unleſs private 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

[c] c. 2. § 6.

the only actions, in which the actual ſpecific poſſeſſion of the identical perſonal chattel is reſtored to the proper owner. For things perſonal are looked upon by the law as of a nature ſo tranſitory and periſhable, that it is for the moſt part impoſſible either to aſcertain their identity, or to reſtore them in the ſame condition as when they came to the hands of the wrongful poſſeſſor. And, ſince it is a maxim that "*lex neminem cogit ad vana, ſeu 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
[147] *reſcous* to the court out of which the proceſs iſſued, the reſcuer will be puniſhed by attachment [h].

AN action of replevin, the regular way of conteſting the validity of the tranſaction, is founded, I ſaid, upon a diſtreſs taken wrongfully and without ſufficient cauſe: being a redelivery of the pledge [i], or thing taking in diſtreſs, to the

[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.
[i] See pag. 13.

owner; upon his giving ſecurity to try the right of the diſtreſs, and to reſtore it if the right be adjudged againſt him[j]: after which the diſtreinor may keep it, till tender made of ſufficient amends: but muſt then redeliver it to the owner[k]. 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*[l]; which iſſued out of chancery, commanding the ſheriff to deliver the diſtreſs to the owner, and afterwards to do juſtice in reſpect of the matter in diſpute in his own county court. But this being a tedious method of proceeding, the beaſts or other goods were long detained from the owner, to his great loſs and damage[m]. For which reaſon the ſtatute of Marlbridge[n] directs, that (without ſuing a writ out of the chancery) the ſheriff immediately, upon plaint to him made, ſhall proceed to replevy the goods. And, for the greater eaſe of the parties, it is farther provided by ſtatute 1 P. & M. c. 12. that the ſheriff ſhall make at leaſt four deputies in each county, for the ſole purpoſe of making replevins. Upon application therefore, either to the ſheriff or one of his ſaid deputies, ſecurity is to be given, in purſuance of the ſtatute of Weſtm. 2. 13 Edw. I. c. 2. 1. That the party replevying will purſue his action againſt the diſtreinor, for which purpoſe he puts in *plegios de proſequendo*, or pledges to proſecute; and, 2. That if the right be determined againſt him, he will return the diſtreſs again; for which purpoſe he is alſo bound to find *plegios de retorno habendo*. Beſides theſe pledges, the ſufficiency of [148] which is diſcretionary and at the peril of the ſheriff, the ſtatute 11 Geo. II. c. 19. requires that the officer, granting a replevin on a diſtreſs for rent, ſhall take a bond with two ſureties in a ſum of double the value of the goods diſtreined, conditioned to proſecute the ſuit with effect and without delay, and for return of the goods; which bond ſhall be aſſigned to the avowant or perſon making cognizance, on re-

j Co. Litt. 145.
k 8 Rep. 147.
l F. N. B. 68.
m 2 Inſt. 139.
n 52 Hen. III. c. 21.

queſt made to the officer; and, if forfeited, may be ſued in the name of the aſſignee. And certainly, as the end of all diſtreſſes is only to compel the party diſtreined upon to ſatisfy the debt or duty owing from him, this end is as well anſwered by ſuch ſufficient ſureties as by retaining the very diſtreſs, which might frequently occaſion great inconvenience to the owner; and that the law never wantonly inflicts. The ſheriff, on receiving ſuch ſecurity, is immediately, by his officers, to cauſe the chattels taken in diſtreſs to be reſtored into the poſſeſſion of the party diſtreined upon (1); unleſs the diſtreinor claims a property in the goods ſo taken. For if, by this method of diſtreſs, the diſtreinor happens to come again into poſſeſſion of his own property in goods which before he had loſt, the law allows him to keep them, without any reference to the manner by which he thus has 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

[o] See pag. 19.
[p] Finch. L. 316.
[q] Co. Litt. 145. Finch. L. 450.
[r] 2 Inſt. 193.

(1) If goods are taken in diſtreſs for rent and are replevied, the landlord who diſtrained has no lien upon the goods, but his only remedy is upon the replevin-bond. 1 *Bro.* 427.

goods,

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].

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 [150] diſtreinor, who is now the defendant, makes *avowry*: that

[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 ſuecon. l.* 1. *c.* 10.)

[v] Raym. 475. The ſubſtance of this rule compoſed the terms of that famous queſtion, with which ſir Thomas More (when a ſtudent on his travels) is ſaid to have puzzled a pragmatical profeſſor in the univerſity of Bruges in Flanders; who gave a univerſal challenge to diſpute with any perſon in any ſcience: *in omni ſcibili, et de quolibet ente.* Upon which Mr. More ſent him this queſtion "*utrum* "*averia carucae, capta in vetito namio,* "*ſint irreplegibilia*;" whether beaſts of the plough, taken in *withernam*, are incapable of being replevied. (Hoddeſd. c. 5.)

[w] 2 Inſt. 139.

[x] 2 Inſt. 23.

[y] F. N. B. 69, 70.

[z] Finch, L. 317.

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 *acknowleges* 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 *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, 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 irreplevi*ſable; 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 17 Car. II. c. 7. which directs that, if the plaintiff be nonſuit before iſſue joined, then upon ſuggeſtion made on the record in nature of an avowry or cognizance; or if judgment be given againſt him on demurrer, then, without any ſuch ſuggeſtion, the defendant may have a writ to inquire into the value of the diſtreſs by a jury, and

[151]

[a] 2 Saund. 195.
[b] F. N. B. 69.
[c] 2 Inſt. 340.
[d] 1 Ventr. 64.

ſhall

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 impannelled 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]. 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; wherein the plaintiff ſhall not recover the thing itſelf, but only damages for the loſs of it. 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 [152] I lend a man a horſe, and he afterwards refuſes to reſtore it,

[e] Stat. 17 Car. II. c. 7.
[f] F. N. B. 71.
[g] F N. B. 69.

this

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; 3. That the goods themſelves be of ſome value; and 4. That they be aſcertained in point of identity. Upon this the jury, if they find for the plaintiff, aſſeſs the reſpective values of the ſeveral parcels detained, and alſo damages for the detention. And the judgment is conditional; that the plaintiff recover the ſaid goods, or (if they cannot be had) their reſpective values, and alſo the damages for detaining them [j]. 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 [k], and thereby defeat the plaintiff of his remedy: which privilege is grounded on the confidence originally repoſed in the bailee by the bailor, in the borrower by the lender, and the like; from whence aroſe a ſtrong preſumptive evidence, that in the plaintiff's own opinion the defendant was worthy of credit. But for this reaſon the action itſelf is of late much diſuſed, and has given place to the action of *trover*.

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

[h] F. N. B. 138.
[i] Co. Litt. 286.
[j] Co. Ent. 170. Cro. Jac. 681.
[k] Co. Litt. 295.

wager

wager of law, and the leſs degree of certainty requiſite in deſcribing the goods[l], gave it ſo conſiderable an advantage over the action of *detinue*, that by a fiction of law actions of *trover* were at length permitted to be brought againſt any man who had in his poſſeſſion by any means whatſoever the perſonal goods of another, and ſold them or uſed them without the conſent of the owner, or refuſed to deliver them when demanded. The injury lies in the converſion: for any man may take the goods of another into poſſeſſion, if he finds them; but no finder is allowed to acquire a property therein, unleſs the owner be for ever unknown[m]: and therefore he muſt not convert them to his own uſe, which the law preſumes him to do, if he refuſes to reſtore them to the owner; for which reaſon ſuch refuſal alone is, *prima faciae*, ſufficient evidence of a converſion[n]. The fact of the finding, or *trover*, is therefore now totally immaterial: for the plaintiff needs only to ſuggeſt (as words of form) that he loſt ſuch goods, and that the defendant found them: and, if he proves that the goods are *his* property, and that the defendant had them in his poſſeſſion, it is ſufficient. But a converſion muſt be fully proved: and then in this action the plaintiff ſhall recover damages, equal to the value of the thing converted, but not the thing itſelf; which nothing will recover but an action of *detinue* or *replevin*.

As to the damage that may be offered to things perſonal, while in the poſſeſſion of the owner, as hunting a man's deer, ſhooting his dogs, poiſoning his cattle, or in any wiſe taking from the value of any of his chattels, or making them in a worſe condition than before, theſe are injuries too obvious to need explication. I have only therefore to mention the remedies given by the law to redreſs them, which are in two ſhapes; by action of *treſpaſs vi et armis*, where the act is in itſelf immediately injurious to another's property, and therefore neceſſarily accompanied with ſome degree of force; and [154] by ſpecial action *on the caſe*, where the act is in itſelf indifferent, and the injury only *conſequential*, and therefore ariſing

[l] Salk. 654.
[m] See book I. ch. 8. book II. ch. 1, and 26.
[n] 10 Rep. 56.

without

without any breach of the peace. In both of which ſuits the plaintiff ſhall recover damages, in proportion to the injury which he proves that his property has ſuſtained. And it is not material whether the damage be done by the defendant himſelf, or his ſervants by his direction; for the action will lie againſt the maſter as well as the ſervant [o]. And, if a man keeps a dog or other brute animal, uſed to do miſchief, as by worrying ſheep, or the like, the owner muſt anſwer for the conſequences, if he knows of ſuch evil habit [p] (2).

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

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

[o] Noy's Max. c. 44.
[p] Cro. Car. 254. 487.
[q] See book II. ch. 30.

(2) But the owner is not anſwerable for the firſt miſchief done by a dog, a bull, or other tame animal, *Bull. N. P.* 77. Yet if he ſhould carry his dog into a field, where he himſelf is a treſpaſſer, and the dog ſhould kill ſheep, this, though the firſt offence, might I conceive be ſtated and proved as an aggravation of the treſpaſs.

But where a fierce and vicious dog is kept chained for the defence of the premiſes, and any one incautiouſly, or not knowing of it, ſhould go ſo near it as to be injured by it, no action can be maintained by the perſon injured, though he was ſeeking the owner, with whom he had buſineſs. *Bates* v. *Croſbie*, *M. T.* 1798, in the King's Bench.

1. THE

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 is by action of *debt*[r], to compel the performance of the contract and recover the ſpecifical ſum due[s]. This is the [155] ſhorteſt and ſureſt remedy; particularly where the debt ariſes upon a ſpecialty, that is, upon a deed or inſtrument under ſeal. So alſo, if I verbally agree to pay a man a certain price for a certain parcel of goods, and fail in the performance, an action of debt lies againſt me; for this is alſo a *determinate* contract: but if I agree for no ſettled price, I am not liable to an action of debt, but a ſpecial action on the caſe, according to the nature of my contract. And indeed actions of debt are now ſeldom brought but upon ſpecial contracts under ſeal; wherein the ſum due is clearly and preciſely expreſſed: for, in caſe of ſuch an action upon a ſimple contract, the plaintiff labours under two difficulties. Firſt, the defendant has here the ſame advantage as in an action of *detinue*, that of waging his law, or purging himſelf of the debt by oath, if he thinks proper[t]. Secondly, in an action of debt the plaintiff muſt prove the whole debt he claims, or recover nothing at all. For the debt is one ſingle cauſe of action, fixed and determined; and which therefore, if the proof varies from the claim, cannot be looked upon as the ſame contract whereof the performance is ſued for. If therefore I bring an action of debt for 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 (3). For I fail in the proof of that contract, which my action or

[r] F. N. B. 119.
[s] See appendix, No III. § 1.
[t] 4 Rep. 94.
[t] Bro. *Le y gager*. 93. Dyer. 219. 2 Roll. Abr. 706. 1 Show. 215.

(3) But it is now determined that, in an action of debt upon a ſimple contract, the plaintiff may recover a leſs ſum than is ſtated in his writ or declaration. 1 *Hen. Bl.* 249. 2 *Bl. Rep.* 1221.

complaint

complaint has alleged to be ſpecific, expreſs, and determinate. But in an action on the caſe, on what is called an *indebitatus aſſumpſit*, which is not brought to compel a ſpecific performance of the contract, but to recover damages for its non-performance, the implied *aſſumpſit*, and conſequently the damages for the breach of it, are of 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
[156] if *any* debt be proved, however leſs than the ſum demanded, the law will raiſe a promiſe *pro tanto*, and the damages will of courſe be proportioned to the actual debt. So that I may declare that the defendant, *being indebted* to me in 30*l.* *undertook* or promiſed to pay it, but failed; and lay my damages ariſing from ſuch failure at what ſum I pleaſe: and the jury will, according to the nature of my proof, allow me either the whole in damages, or any inferior ſum. And, even in actions of *debt*, where the contract is proved or admitted, if the defendant can ſhew that he has diſcharged any part of it, the plaintiff ſhall recover the reſidue[v].

THE form of the writ of *debt* is ſometimes in the *debet* and *detinet*, and ſometimes in the *detinet* only: that is, the writ ſtates, either that the defendant *owes* and unjuſtly *detains* the debt or thing in queſtion, or only that he unjuſtly *detains* it. It is brought in the *debet* as well as *detinet*, when ſued by one of the original contracting parties who perſonally gave the credit, againſt the other who perſonally incurred the debt, or againſt his heirs, if they are bound to the payment; as by the obligee againſt the obligor, the landlord againſt the tenant, *&c.* But, if it be brought by or againſt an executor for a debt due to or from the teſtator, this not being his own debt, ſhall be ſued for in the *detinet* only[w]. So alſo if the action be for goods, for corn, or an horſe, the writ ſhall be in the *detinet* only; for nothing but a ſum of money, for which I (or my anceſtors in my name) have perſonally contracted, is properly conſidered as my *debt*. And indeed a writ of *debt* in the *detinet* only, for

[v] 1 Roll. Rep. 257. Salk. 664. [w] F. N. B. 119.

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 carries on his trade in the place forbidden, theſe are direct breaches of his covenant; and may be perhaps [157] greatly to the diſadvantage and loſs of the covenantee. The remedy for this is by a writ of *covenant* [y]: which directs the ſheriff to command the defendant generally to keep his covenant with the plaintiff (without ſpecifying the nature of the covenant) or ſhew good cauſe to the contrary: and if he continues refractory, or the covenant is already ſo broken that it cannot now be ſpecifically performed, then the ſubſequent proceedings ſet forth with preciſion the covenant, the breach, and the loſs which has happened thereby; whereupon the jury will give damages, in proportion to the injury ſuſtained by the plaintiff, and occaſioned by ſuch breach of the defendant's contract.

THERE is one ſpecies of covenant, of a different nature from the reſt; and 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

[x] Raſt. Entr. 174.
[y] F. N. B. 145.
[z] Hal. on F. N. B. 146.
[a] See book II. ch. 21.

end

end of this ſuppoſed difference, the fine or *finalis concordia* is made, whereby the deforciant (now called the cognizor) acknowleges the tenements to be the right of the plaintiff, now called the cognizee. And moreover, as leaſes for years were formerly conſidered only as contracts [b] or covenants for the enjoyment of the rents and profits, and not as the conveyance of any real intereſt in the land, the antient remedy for the
[158] leſſee, if ejected, was by a writ of covenant againſt the leſſor, to recover the term (if in being) and damages, in caſe the ouſter was committed by the leſſor himſelf: or, if the term was expired, or the ouſter was committed by a ſtranger, claiming by an elder title, then to recover damages only [c].

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

3. A PROMISE is in the nature of a verbal covenant, and wants nothing but the ſolemnity of writing and ſealing to make it abſolutely the ſame. If therefore it be to do any explicit act, it is an expreſs contract, as much as any covenant; and the breach of it is an equal injury. The remedy indeed is not exactly the ſame: ſince, inſtead of an action of covenant, there only lies an action upon the caſe, for what is called the *aſſumpſit* or undertaking of the defendant; the failure of performing which is the wrong or injury done to

[b] See book II. ch. 9.
[c] Bro. *Abr. t. covenant.* 33. F. N. B. 476.
[d] Co. Litt. 215. Moor. 876. Cro. Jac. 145.

the

the plaintiff, the damages whereof a jury are to eſtimate and ſettle. As if a builder promiſes, undertakes, or aſſumes to Caius, that he will build and cover his houſe within a time limited, and fails to do it; Caius has an action on the caſe againſt the builder, for this breach of his expreſs promiſe, undertaking, or *aſſumpſit*; and ſhall recover a pecuniary ſatisfaction for the injury ſuſtained by ſuch delay. So alſo in the caſe before-mentioned, of a debt by ſimple contract, if the debtor promiſes to pay it and does not, this breach of promiſe [159] entitles the creditor to his action on the caſe, inſtead of being driven to an action of debt [e]. Thus likewiſe a promiſſory note, or note of hand not under ſeal, to pay money at a day certain, is an expreſs *aſſumpſit*; and the payee at common law, or by cuſtom and act of parliament the indorſee [f], may recover the value of the note in damages, if it remains unpaid. Some agreements indeed, though never ſo expreſsly made, are deemed of ſo important a nature, that they ought not to reſt in verbal promiſe only, which cannot be proved but by the memory (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: 1. Where an executor or adminiſtrator promiſes to anſwer damages out of his own eſtate. 2. Where a man undertakes to anſwer for the debt, default, or miſcarriage of another. 3. Where any agreement is made, upon conſideration of marriage. 4. Where any contract or ſale is made of lands, tenements, or hereditaments, or any intereſt therein. 5. And, laſtly, where there is any agreement that is not to be performed within a year from the making thereof. In all theſe caſes a mere verbal *aſſumpſit* is void (4).

[e] 4 Rep. 92. [f] See book II. ch. 30.

(4) Theſe proviſions in the ſtatute have produced many deciſions both in the courts of law and equity.

It is determined, that if two perſons go to a ſhop, and one orders goods, and the other ſays, "if he does not pay I will, or I "will

FROM theſe *expreſs* contracts the tranſition is eaſy to thoſe that are only *implied* by law. Which are ſuch as reaſon and

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" will ſee you paid," he is not bound unleſs his engagement is reduced into writing. In all ſuch caſes the queſtion is, who is the buyer, or to whom the credit is given, and who is the ſurety; and that queſtion, from all the circumſtances, muſt be aſcertained by the jury: for if the perſon for whoſe uſe the goods are furniſhed be liable at all, any promiſe by a third perſon to diſcharge the debt muſt be in writing, otherwiſe it is void. 2 *T. R.* 80. *H. Bl. Rep.* 126. Mutual promiſes to marry need not be in writing, but the ſtatute relates only to agreements made in conſideration of the marriage. A leaſe not exceeding three years from the making thereof, and in which the rent reſerved amounts to two thirds of the improved value, is good without writing; but all other parol leaſes or agreements for any intereſt in lands, have the effect of eſtates at will only. *Bull. N. P.* 279. All declarations of truſts, except ſuch as reſult by implication of law, muſt be made in writing. 29 *Car. II. c.* 3. *ſ.* 7. & 8.

If a promiſe depends upon a contingency, which may or may not fall within a year, it is not within the ſtatute; as a promiſe to pay a ſum of money upon a death or marriage, or upon the return of a ſhip, or to leave a legacy by will, is good by parol; for ſuch a promiſe may by poſſibility be performed within the year. 3 *Burr.* 1378. 1 *Salk.* 280. 3 *Salk.* 9. *&c.*

With regard to the contracts for goods of the value of 10*l.*, ſee 2 vol. 448. n. 6. & 7.

But a court of equity will decree a ſpecific performance of a verbal contract, when it is confeſſed by a defendant in his anſwer, or when there has been a part performance of it; as by payment of part of the conſideration money, or by entering and expending money upon the eſtate, for ſuch acts preclude the party from denying the exiſtence of the contract, and prove that there can be no fraud or perjury in obtaining the execution of it.

If one party only ſigns an agreement, he is bound by it; and if an agreement is by parol, but it is agreed it ſhall be reduced into writing, and this is prevented by the fraud of one of the parties, performance of it will be decreed. 2 *Bro.* 564, 5, 6. See 3 *Wood. Lect.* lvii. and *Fonblanque Tr. of Eq. b.* 1. *c.* 3. *ſ.* 8. & 9, where this ſubject is fully and learnedly diſcuſſed.

juſtice dictate, and which therefore the law preſumes that every man has contracted to perform; and, upon this preſumption makes him anſwerable to ſuch perſons, as ſuffer by his non-performance.

OF this nature, are, firſt, ſuch as are neceſſarily implied by the fundamental conſtitution of government, to which every man is a contracting party. And thus it is that every perſon is bound and hath virtually agreed to pay ſuch particular ſums [160] of money, as are charged on him by the ſentence, or aſſeſſed by the interpretation, of the law. For it is a part of the original contract, entered into by all mankind who partake the benefits of ſociety, to ſubmit in all points to the municipal conſtitutions and local ordinances of that ſtate, of which each individual is a member. Whatever therefore the laws order any one to pay, that becomes inſtantly a debt, which he hath beforehand contracted to diſcharge. And this implied agreement it is, that gives the plaintiff a right to inſtitute a ſecond action, founded merely on the general contract, in order to recover ſuch damages or ſum of money, as are aſſeſſed by the jury and adjudged by the court to be due from the defendant to the plaintiff in any former action. So that if he hath once obtained a judgment againſt another for a certain ſum, and neglects to take out execution thereupon, he may afterwards bring an action of debt upon this judgment[s], and ſhall not be put upon the proof of the original cauſe of action; but upon ſhewing the judgment once obtained, ſtill in full force, and yet unſatisfied, the law immediately implies, that by the original contract of ſociety the defendant hath contracted a debt, and is bound to pay it. This method ſeems to have been invented, when *real* actions were more in uſe than at preſent, and damages were permitted to be recovered thereon; in order to have the benefit of a writ of *capias* to take the defendant's body in execution for thoſe damages, which proceſs was allowable in an action of

[s] 1 Roll. Abr. 600, 601.

debt (in conſequence of the ſtatute 25 Edw. III. c. 17.) but not in an action real. Wherefore, ſince the diſuſe of thoſe real actions, actions of debt upon judgment in perſonal ſuits have been pretty much diſcountenanced by the courts, as being generally vexatious and oppreſſive, by haraſſing the defendant with the coſts of two actions inſtead of one.

ON the ſame principle it is, (of an implied original contract to ſubmit to the rules of the community whereof we are members,) that a forfeiture impoſed by the bye-laws and
[161] private ordinances of a corporation upon any that belong to the body, or an amercement ſet in a court-leet or court-baron upon any of the ſuitors to the court (for otherwiſe it will not be binding[h]) immediately create a debt in the eye of the law: and ſuch forfeiture or amercement, if unpaid, work an injury to the party or parties entitled to receive it; for which the remedy is by action of debt[i].

THE ſame reaſon may with equal juſtice be applied to all penal ſtatutes, that is, ſuch acts of parliament whereby a forfeiture is inflicted for tranſgreſſing the proviſions therein enacted. The party offending is here bound by the fundamental contract of ſociety to obey the directions of the legiſlature, and pay the forfeiture incurred to ſuch perſons as the law requires. The uſual application of this forfeiture is either to the party aggrieved, or elſe to any of the king's ſubjects in general. Of the 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

[h] Law of *niſi prius*. 155.
[i] 5 Rep. 64. Hob. 279.
[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.

given

given by ſtatute 9 Geo. I. c. 22. commonly called the black act, againſt the inhabitants of any hundred, in order to make ſatisfaction in damages to all perſons who have ſuffered by the offences enumerated and made felony by that act. But, more uſually, theſe forfeitures created by ſtatute are given at large, to any common informer; or, in other words, to any ſuch perſon or perſons as will ſue for the ſame: and hence ſuch actions are called *popular* actions, becauſe they are given to the people in general [m]. Sometimes one part is given to the king, to the poor, or to ſome public uſe, and the other part to the informer or proſecutor; and then the ſuit is called a *qui tam* action, becauſe it is brought by a perſon "*qui* [162] "*tam pro domino rege, &c. quam pro ſe ipſo in hac parte ſequi-* "*tur.*" If the king therefore himſelf commences this ſuit, he ſhall have the whole forfeiture [n]. But if any one hath begun a *qui tam*, or popular action, no other perſon can purſue it; and the verdict paſſed upon the defendant in the firſt ſuit is a bar to all others, and concluſive even to the king himſelf. This has frequently occaſioned offenders to procure their own friends to begin a ſuit, in order to foreſtall and prevent other actions: which practice is in ſome meaſure prevented by a ſtatute made in the reign of a very ſharp-ſighted prince in penal laws, 4 Hen. VII. c. 20. which enacts, that no recovery, otherwiſe than by verdict, obtained by collufion in an action popular, ſhall be a bar to any other action proſecuted *bona fide*. A proviſion, that ſeems borrowed from the rule of the Roman law, that if a perſon was acquitted of any accuſation, merely by the prevarication of the accuſer, a new proſecution might be commenced againſt him [o].

A SECOND claſs of implied contracts are ſuch as do not ariſe from the expreſs determination of any court, or the poſitive direction of any ſtatute; but from natural reaſon, and the juſt conſtruction of law. Which claſs extends to all preſumptive undertakings or *aſſumpſits*; which though never perhaps actually made, yet conſtantly ariſe from this general

[m] See book II. ch. 29.
[n] 2 Hawk. P. C. 268.
[o] *Ff.* 47. 15. 3.

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
[163] aver that his trouble was really worth ſuch a particular ſum, which the defendant has omitted to pay. But this valuation of his trouble is ſubmitted to the determination of a jury; who will aſſeſs ſuch a ſum in damages as they think he really merited. This is called an *aſſumpſit* on a *quantum meruit*.

2. THERE is alſo an implied *aſſumpſit* on a *quantum valebat*, which is very ſimilar to the former; being only where one takes up goods or wares of a tradeſman, without expreſsly agreeing for the price. There the law concludes, that both parties did intentionally agree, that the 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 repair the owner in damages, equivalent to what he has detained in violation of ſuch his promiſe. This is a very extenſive and beneficial remedy,

medy, applicable to almoſt every caſe where the defendant has received money which *ex aequo et bono* he ought to refund. It lies for money paid by miſtake or on a conſideration which happens to fail, or through impoſition, extortion, or oppreſſion, or where any undue advantage is taken of the plaintiff's ſituation [p].

4. WHERE a perſon has laid out and expended his own money for the uſe of another, at his requeſt, the law implies a promiſe of repayment, and an action will lie on this *aſſumpſit* [q] (5).

5. LIKEWISE, fifthly, upon a ſtated account between two merchants, or other perſons, the law implies that he againſt whom the balance appears has engaged to pay it to the other; though there be not any actual promiſe. And from this implication it is frequent for actions on the caſe to be brought, declaring that the plaintiff and defendant had ſettled their accounts together, *inſimul computaſſent*, (which gives name to this ſpecies of *aſſumpſit*,) and that the defendant engaged to pay the plaintiff the balance, but has ſince neglected to do it. But if no account has been made up, then the legal remedy is by bringing a writ of *account*, *de computo* [r]; commanding the defendant to render a juſt account 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 [164]

[p] 4 Burr. 1012. [r] F. N. B. 116.
[q] Carth. 446. 2 Keb. 99.

(5) If a ſurety in a bond pays the debt of the principal, he may recover it back from the principal in an action of *aſſumpſit*, for ſo much money paid and advanced to his uſe; yet in ancient times this action could not be maintained; and it is ſaid, that the firſt caſe of the kind, in which the plaintiff ſucceeded, was tried before the late Mr. J. Gould at Dorcheſter. But this is perfectly conſiſtent with the equitable principles of an *aſſumpſit*. 2 T. R. 105.

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 in their own knowlege. 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 [31] 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.

[165] 6. THE laſt claſs of contracts, implied by reaſon and conſtruction of law, ariſes upon this ſuppoſition, that every one who undertakes any office, employment, truſt, or duty, contracts with thoſe who employ or entruſt him, to perform it with integrity, diligence, and ſkill. And, if by his want of either of thoſe qualities any injury accrues to individuals, they have therefore their remedy in damages by a ſpecial action on the caſe. A few inſtances will fully illuſtrate this matter. If an officer of the public is guilty of neglect of duty, or a palpable breach of it, of non-feaſance or of miſfeaſance; as, if the ſheriff does not execute a writ ſent to him, or if he wilfully makes a falſe return thereof; in both theſe caſes the party aggrieved ſhall have an action *on the caſe*, for damages to be aſſeſſed by a jury[t]. If a ſheriff or gaoler ſuffers a priſoner, who is taken upon meſne proceſs (that

[s] Co. Litt. 90. [t] Moor. 431. 11 Rep. 99.

is,

is, during the pendency of a ſuit) to eſcape, he is liable to an action *on the caſe* [u]. But if, after judgment, a gaoler or a ſheriff permits a debtor to eſcape, who is charged in execution for a certain ſum; the debt immediately becomes his own, and he is compellable by action of *debt*, being for a ſum liquidated and aſcertained, to ſatisfy the creditor his whole demand: which doctrine is grounded [w] on the equity of the ſtatutes of Weſtm. 2. 13 Edw. I. c. 11. and 1 Ric. II. c. 12. An advocate or attorney that betray the cauſe of their client, or, being retained, neglect to appear at the trial, by which the cauſe miſcarries, are liable to an action on the caſe, for a reparation to their injured client [x] (6). There is alſo in law always an implied contract with a common inn-keeper, to ſecure his gueſts goods in his inn; with a common carrier or bargemaſter, to be anſwerable for the goods he carries (7);

[u] Cro. Eliz. 625. Comb. 69. [x] Finch. L. 388.
[w] *Bro. Abr. t. parliament.* 19. 2 Inſt. 382.

(6) It has been held, that an action could not be maintained againſt an advocate for neglecting to appear at the trial, by which the cauſe miſcarried. The client muſt rely only upon his advocate's honour. But in ſuch a caſe I conceive if complaint was made to the court in which the advocate practices, it would cenſure him, or perhaps diſbar him.

(7) In the caſe of *Forward* v. *Pittard*, 1 *T. R.* 27. it was determined that the carrier was liable for a loſs occaſioned by a fire, which the jury expreſsly found was not owing to any negligence on the part of the carrier; and Lord Mansfield declared, that "by "the cuſtom of the realm, that is, by the common law, a carrier "is in the nature of an inſurer. It is laid down, that he is liable "for every accident, except by the act of God or the king's "enemies. Now what is the act of God? I conſider it to mean "ſomething in oppoſition to the act of man, for every thing is "the act of God that happens by his permiſſion; every thing, "by his knowledge. But to prevent litigation, colluſion, and "the neceſſity of going into circumſtances impoſſible to be unravelled, the law preſumes againſt the carrier, unleſs he ſhews "it was done by the king's enemies, or by ſuch act as could not "happen

with a common farrier, that he ſhoes a horſe well, without laming him; with a common taylor, or other workman, that

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"happen by the intervention of man, as ſtorms, lightning, and "tempeſts. If an armed force come to rob the carrier of the "goods, he is liable; and the true reaſon is, for fear it may give "room for colluſion, that the maſter may contrive to be robbed "on purpoſe and ſhare the ſpoil."

The ſame is the law reſpecting carriers on navigable rivers or the high ſeas, ſubject to reſtrictions by two acts of parliament. The 7 Geo. II. c. 15. provides that, if the loſs ariſes by the embezzlement or diſhoneſty of the maſter or any of the mariners in the ſhip, the owner ſhall only be liable to the amount of the value of the ſhip and freight. 1 *T. R.* 18.

The 26 Geo. III. c. 86. ſtill farther provides, that the ſhip-owners ſhall not be liable for a loſs occaſioned by a robbery or embezzlement committed by any perſon whatever without their privity beyond the value of the ſhip and the freight.

And it exempts them from all liability to anſwer for a loſs occaſioned by fire, and alſo in the caſe of a robbery of gold, ſilver, watches, and precious ſtones, unleſs the proprietor declare to the maſter or ſhip-owners in writing the nature and value of ſuch articles. But ſtill many caſes occur, which the ſhip-owners think ſo hard upon them, that they have made frequent attempts, but without ſucceſs, to prevail upon the legiſlature to give them farther relief.

The rate of carriage being not only a compenſation for labour and the expence incurred, but alſo a premium of inſurance for the ſafe delivery of the goods entruſted to the care of the carrier, he may therefore make a ſpecial contract, by giving notice that he will not be anſwerable for money or other valuable articles above a certain ſum unleſs he has notice of them, and is paid an extraordinary ſum for the inſurance. But the carrier muſt prove notice of this to the owner of the goods, in order to defend himſelf in an action, by proving that ſuch notice was ſtuck up in a conſpicuous part of the office, when the owner brought his goods, or that it was advertized in a Newſpaper, which he was accuſtomed to read; but the practice is now ſo general, or perhaps univerſal, with the proprietors of ſtage-coaches, that the jury will preſume that the owner of the article carried had notice upon the

ſlighteſt

he performs his buſineſs in a workmanlike manner: in which if they fail, an action on the caſe lies to recover damages for ſuch breach of their general undertaking [y]. But if I employ [166] a perſon to tranſact any of theſe concerns, whoſe common profeſſion and buſineſs it is not, the law implies no ſuch *general* undertaking; but, in order to charge him with damages, a *ſpecial* agreement is required. Alſo, if an inn-keeper, or other victualler, hangs out a ſign and opens his houſe for travellers, it is an implied engagement to entertain all perſons who travel that way; and upon this univerſal *aſſumpſit* an action on the caſe will lie againſt him for damages, if he without good reaſon refuſes to admit a traveller [z]. If any one cheats me with falſe cards or dice, or by falſe weights and meaſures, or by ſelling me one commodity for another, an action on the caſe alſo lies againſt him for damages upon the contract which the law always implies, that every tranſaction is fair and honeſt [a]. In contracts likewiſe for ſales, it is conſtantly underſtood that the ſeller undertakes that the commodity he ſells is his own; and if it proves 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

[y] 11 Rep. 54. 1 Saund. 324.
[z] 2 Ventr. 333.
[a] 10 Rep. 56.
[b] F. N. B. 94.
[c] Finch. L. 189.

ſlighteſt evidence of this nature. And the court of common pleas have determined, that if a perſon, who has notice of ſuch conditions, ſends his goods without paying the extraordinary premium, he is guilty of a fraud, and if they are loſt, he ſhall not recover even to the extend of 5*l.* or the ſum limited. 4 *Burr.* 2298. 1 *Hen. Bl.* 298.

then

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 (8). But if the vendor knew the goods to be unſound, and hath uſed any art to diſguiſe them [d], or if they are in any ſhape different from what he repreſents them to be [*165] to the buyer, this artifice ſhall be equivalent to an expreſs warranty, and the vendor is anſwerable for their goodneſs. A general warranty will not extend to guard againſt defects that are plainly and obviouſly the object of one's ſenſes, as if a horſe be warranted perfect, and wants either a tail or an ear, unleſs the buyer in this caſe be blind. But if cloth is warranted to be of ſuch a length, when it is not, there an action on the caſe lies for damages; for that cannot be diſcerned by ſight, but only by a collateral proof, the meaſuring it [e]. Alſo if a horſe is warranted ſound, and he wants the ſight of an eye, though this ſeems to be the object of one's ſenſes, yet as the diſcernment of ſuch defects is frequently matter of ſkill, it hath been held that an action on the caſe lieth, to recover damages for this impoſition [f].

BESIDES the ſpecial action on the caſe, there is alſo a peculiar remedy, 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 non-ſuit, whereby the plaintiff becomes liable to coſts: or where one obtains or ſuffers a

[d] 2 Roll. Rep. 5.
[e] Finch. L. 189.
[f] Salk. 611.
[g] F. N. B 95.
[h] Law of *niſi prius*. 30.

(8) There ſeems to be no reaſon or principle, why, upon a ſufficient conſideration, an expreſs warranty that a horſe ſhould continue ſound for two years, ſhould not be valid. Lord Mansfield declared, in a caſe in which the ſentence in the text was cited, "there "is no doubt but you may warrant a future event." *Doug.* 707.

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 de- [*166] meſne, 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.

[i] Booth. real actions, 251. Raſt. Ent. 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. Nuſance; 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 ſtranger who

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 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 nuſance, of which we ſpoke in the beginning of this book [b]; and in a like ſenſe it is uſed in ſtatute Weſtm. 1. 3 Edw. I. c. 17. where mention is made of abating a caſtle or fortreſs; in which caſe it clearly ſignifies to pull it down, and level it with the ground. The ſecond ſignification of abatement is that of abating a writ or action, of which we ſhall ſay more hereafter: here it is taken figuratively, and ſignifies the overthrow or defeating of ſuch writ, by ſome fatal exception to it. The laſt ſpecies of abatement is that we have now before us; which is alſo a figurative expreſſion to denote that the rightful poſſeſſion or freehold of the heir or deviſee is overthrown by the rude intervention of a ſtranger.

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

[a] Finch. L. 295. [b] page 5.

keeps

keeps the heir or deviſee out of poſſeſſion, is one of the higheſt injuries to the right of real property.

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

3. THE third ſpecies of injury by ouſter, or privation of the freehold, is by *diſſeiſin*. 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,

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

or

or incorporeal. 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 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] mention 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. 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

[e] Co. Litt. 181.
[f] Finch. L. 165, 166. Litt. § 237, &c.
[g] Litt. § 588, 589.

driven to the more tedious proceſs of a writ of entry [g]. The true injury of compulſive diſſeiſin ſeems to be that of diſpoſſeſſing the tenant, and ſubſtituting oneſelf to be the tenant of the lord in his ſtead; in order to which in the times of pure feodal tenure the conſent or connivance of the lord, who upon every deſcent or alienation perſonally gave, and who therefore alone could change, the ſeiſin or inveſtiture, ſeems to have been conſidered as neceſſary. But when in proceſs of time the feodal form of alienations wore off, and the lord was no longer the inſtrument of giving actual ſeiſin, it is probable that the lord's acceptance of rent or ſervice, from him who had diſpoſſeſſed another, might conſtitute a complete diſſeiſin. Afterwards, no regard was had to the lord's concurrence, but the diſpoſſeſſor himſelf was conſidered as the ſole diſſeiſor: and this wrong was then allowed to be remedied by entry only, without any form of law, as againſt the diſſeiſor himſelf; but required a legal proceſs againſt his heir or 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 [h]: in which caſe the eſtate is good, ſo far as his power extends who made it, but no farther. As if tenant in tail makes a feoffment in fee-ſimple, or for the life of the feoffee, or in tail; all

[g] *Hengh. parv.* c. 7. 4 Burr. 110.

[h] Finch. L. 190.

which are beyond his power to make, for that by the common law extends no farther than to make a leaſe for his own life; in ſuch caſe the entry of the feoffee is lawful during the life of the feoffor; but if he retains the poſſeſſion after the death of the feoffor, it is an injury, which is termed a diſcontinuance; the 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 an 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[i]. 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[k]. So that this includes as well an abatement, an intruſion, a diſſeiſin, or a diſcontinuance, as any other ſpecies of wrong whatſoever, whereby he that hath right to the freehold is kept out of poſſeſſion. But, as contradiſtinguiſhed from the former, it is only ſuch a detainer of the

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

freehold, from him that hath the right of property, but never had any poſſeſſion under that right, as falls within none of the injuries which we have before explained. As in caſe where a lord has a ſeignory, and lands eſcheat to him *propter defectum ſanguinis*, but the ſeiſin of the lands is withheld from him: here the injury is not *abatement*, for the right veſts not in the lord as heir or deviſee, nor is it *intruſion*, for it veſts not in him who hath the remainder or reverſion; nor is it *diſſeiſin*, for the lord was never ſeiſed; nor does it all bear the nature of any ſpecies of *diſcontinuance*; but, being neither of theſe four, it is therefore a *deforcement*[l]. If a man marries a woman, and during the coverture is ſeiſed of lands, and alienes, and dies; is diſſeiſed, and dies; or dies in poſſeſſion; and the alienee, diſſeiſor, or heir, enters on the tenements and doth not aſſign the widow her dower; this is alſo a deforcement to the widow, by withholding lands to which ſhe hath a right[m]. In like manner, if a man leaſe lands to another for term of years, or for the life of a third perſon, and the term expires by ſurrender, efflux of time, or death of the *ceſtuy que vie*; and the leſſee or any ſtranger, who was at the expiration of the term in poſſeſſion, holds over, and refuſes to deliver the poſſeſſion to him in remainder or reverſion, this is likewiſe a deforcement[n]. Deforcements may alſo ariſe upon the breach of a condition in law; as if a woman gives lands to a man by deed, to the intent that he marry her, and he will not when thereunto required, but continues to hold the lands: this is ſuch a fraud on the man's part, that the law will not allow it to deveſt the woman's right of poſſeſſion; though, his entry being lawful, it does diveſt the actual poſſeſſion, and thereby becomes a deforcement[o]. Deforcements may alſo be grounded on the diſability of the party deforced: as if an infant do make an alienation of his lands, and the alienee enters and keeps poſſeſſion; now, as the alienation is voidable this poſſeſſion as againſt the infant (or, in caſe of his deceaſe, as againſt his heir) is after avoidance wrongful, and therefore a deforcement[p]. The ſame happens,

[l] F. N. B. 143.
[m] *Ibid.* 8. 147.
[n] Finch. L. 263. F. N. B. 201. 205, 6, 7. See book II. c. 9. pag. 151.
[o] F. N. B. 205.
[p] Finch. L. 264. F. N. B. 192.

when

when one of nonſane memory alienes his lands or tenements, and the alienee enters and holds poſſeſſion, this may alſo be a deforcement [q]. Another ſpecies of deforcement is, where two perſons have the ſame title to land, and one of them enters and keeps poſſeſſion againſt the other: as where the anceſtor dies ſeiſed of an eſtate in fee-ſimple, which deſcends to two ſiſters or coparceners, and one of them enters before the other, and will not ſuffer her ſiſter to enter and enjoy her moiety, this is alſo a deforcement [r]. Deforcement may alſo be grounded on the non-performance of a covenant real: as if a man, ſeiſed of lands, covenants to convey them to another, and neglects or refuſes ſo to do, but continues poſſeſſion againſt him; this poſſeſſion, being wrongful, is a deforcement [s]: whence, in levying a fine of lands, the perſon, againſt whom the fictitious action is brought upon a ſuppoſed breach of covenant, is called the *deforciant*. And, laſtly, by way of analogy, keeping a man by any means out of a freehold office is conſtrued to be a deforcement; though, being an incorporeal hereditament, the deforciant has no corporeal poſſeſſion. So that whatever injury (withholding the poſſeſſion of a freehold) is not included under one of the four former heads, is comprized under this of deforcement.

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

I. THE firſt is that extrajudicial and ſummary one, which we ſlightly touched in the firſt chapter of the preſent book [t], of *entry* by the legal owner, when another perſon, who hath no right, hath previouſly taken poſſeſſion of lands or tenements. In this caſe the party entitled may make a formal, but peaceable, entry thereon, declaring that thereby he takes poſſeſſion; which notorious act of ownerſhip is equivalent to a feodal inveſtiture by the lord [v]: or he may enter on any

[q] Finch. *Ibid.* F. N. B. 202.
[r] Finch. L. 293. 294. F. N. B. 197.
[s] F. N. B. 146.
[t] See pag. 5.
[v] See book II. ch. 14. pag. 209.

part of it in the ſame county, declaring it to be in the name of the whole [u]: but if it lies in different counties he muſt make different entries; for the notoriety of ſuch entry or claim to the *pares* or freeholders of Weſtmorland, is not any notoriety to the *pares* or freeholders of Suſſex. Alſo if there be *two* diſſeiſors, the party diſſeiſed muſt make his entry on *both*; or if *one* diſſeiſor has conveyed the lands with livery to *two* diſtinct feoffees, entry muſt be made on *both* [w]: for as their ſeiſin is diſtinct, ſo alſo muſt be the act which deveſts that ſeiſin. If the claimant be deterred from entering by menaces or bodily fear, he may make *claim*, as near to the eſtate as he can, with the like forms and ſolemnities: which claim is in force for only a year and a day [x]. And this claim, if it be repeated once in the ſpace of every year and day, (which is called *continual claim*,) has the ſame effect with, and in all reſpects amounts to, a legal entry [y]. Such an entry gives a man ſeiſin [z], or puts into immediate poſſeſſion him that hath right of entry on the eſtate, and thereby makes him complete owner, and capable of conveying it from himſelf by either deſcent or purchaſe.

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

[u] Litt. § 417.
[w] Co. Litt. 252.
[x] Litt. § 422.
[y] *Ibid.* § 419. 423.
[z] Co. Litt. 15.
[a] *Ibid.* 237, 238.
[b] See book II. pag. 150.
[c] Co. Litt. 57

have

have gained a tortious freehold, he is then remediable by writ of entry, *ad terminum qui praeteriit*.

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[d], 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[e]. 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.

FOR, in every complete title[f] to lands, there are two things neceſſary; the poſſeſſion or ſeiſin, and the right or property therein[g]: or, as it is expreſſed in Fleta, *juris et ſeiſinae conjunctio*[h]. Now, if the poſſeſſion be ſevered from the property, if A has the *jus proprietatis*, and B by ſome unlawful means has gained poſſeſſion of the lands, this is an injury to A; for which the law gives a remedy, by putting

[d] Litt. § 385—413.
[e] Co. Litt. 237.
[f] See book II. ch. 13.
[g] Mirror. c. 2. § 27.
[h] *l.* 3. *c.* 15. § 5.

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 [i], wherein thoſe reaſons ceaſe, upon which the general doctrine is grounded; eſpecially if the claimant were under any legal diſabilities, during the life of the anceſtor, either of infancy, coverture, impriſonment, inſanity, or being out of the realm: in all which caſes there is no neglect or *laches* in the claimant, and therefore no deſcent ſhall bar, or take away his entry [k]. And this title of taking away entries by deſcent, is ſtill farther narrowed by the ſtatute 32 Hen. VIII. c. 33. which enacts, that if any perſon diſſeiſes or turns another out of poſſeſſion, no deſcent to the heir of the diſſeiſor ſhall take away the entry of him that has right to the land, unleſs the diſſeiſor had peaceable poſſeſſion five years next after the diſſeiſin. But the ſtatute extendeth not to any feoffee or donee of the diſſeiſor, mediate or immediate [l]: becauſe ſuch a one by the genuine feodal conſtitutions always came into the tenure ſolemnly

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

[k] Co. Litt. 246.

[l] *Ibid.* 256.

and

and with the lord's concurrence, by actual delivery of ſeiſin, that is, open and public inveſtiture. On the other hand, it is enacted by the ſtatute of limitations, 21 Jac. I. c. 16. that no entry ſhall be made by any man upon lands, unleſs within twenty years after his right ſhall accrue. And by ſtatute 4 & 5 Ann. c. 16. no entry ſhall be of force to ſatisfy the ſaid ſtatute of limitations, or to avoid a fine levied of lands, unleſs an action be thereupon commenced within one year after, and proſecuted with effect.

UPON an ouſter, by the diſcontinuance of tenant in tail, we have ſaid that no remedy by mere entry is allowed; but that, when tenant in tail alienes the lands entailed, this takes away the entry of the iſſue in tail, and drives him to his action at law to recover the poſſeſſion [m]. For, as in the former caſes the law will not ſuppoſe, without proof, that the anceſtor of him in poſſeſſion acquired the eſtate by wrong; and, therefore, after five years peaceable poſſeſſion, and a deſcent caſt, will not ſuffer the poſſeſſion of the heir to be diſturbed by mere entry without action; ſo here, the law will not ſuppoſe the diſcontinuor to have aliened the eſtate without power ſo to do, and therefore leaves the heir in tail to his action at law, and permits not his entry to be lawful. Beſides, the alienee, who came into poſſeſſion by a lawful conveyance, which was at leaſt good for the life of the alienor, hath not only a *bare* poſſeſſion, but alſo an *apparent right* of poſſeſſion; which is not allowed to be 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 deforcements 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*

[m] Co. Litt. 325.

facie

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. For by the ſtatute 8 Hen. VI. c. 9. upon complaint made to any juſtice of the peace, of a forcible entry, with ſtrong hand, on lands or tenements; or a forcible detainer after a peaceable entry; he ſhall try the truth of the complaint by jury, and, upon force found, ſhall reſtore the poſſeſſion to the party ſo put out: and in ſuch caſe, or if any alienation be made to defraud the poſſeſſor of his right, (which is likewiſe declared to be abſolutely void,) the offender ſhall forfeit, for the force found, treble damages to the party grieved, and making 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 ſhewn that though he hath at preſent poſſeſſion and therefore

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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.

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 appear 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

[n] Mirr. c. 4. § 24.
[o] Finch. L. 261.
[p] See vol. II. append. N° V. § 1.

ſeiſin

ſeiſin of the 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.

IN 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 ingreſſum niſi per intruſionem quam ipſe fecit:*" But if the intruder, diſſeiſor, or the like, has made any alienation of the land to a third perſon, or it has deſcended to his heir, that circumſtance muſt be alleged in the writ, for the action muſt always be brought againſt the tenant of the land; and the defect of his poſſeſſory title, whether ariſing from his own wrong or that of thoſe under whom he claims, muſt be ſet forth. One ſuch alienation or deſcent makes the firſt [q] degree, which is called the *per*, becauſe then the form of a writ of entry is this; that the tenant had not entry but *by* the original wrongdoer, who alienated the land, or from whom it deſcended, to him: "*non habuit ingreſſum* "*niſi* per *Guilielmum, 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 *Guilielmus* "*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

[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.

[r] Booth. 181.

[s] Finch. L. 263. F. N. B. 203, 204.

quietneſs

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. 30. it was provided, that when the number of alienations or deſcents exceeded the uſual degrees, a new writ ſhould be allowed without any mention of degrees at all. And accordingly a new writ has been framed, called a writ of entry in the *poſt*, which only alleges the injury of the wrongdoer, without deducing all the intermediate title from him to the tenant: ſtating it in this manner; that the tenant had not entry unleſs *after*, or ſubſequent to, the ouſter or injury done by the original diſpoſſeſſor; "*non habuit* "*ingreſſum niſi* poſt *intruſionem quam Guilielmus in illud* "*fecit;*" and rightly concluding, that if the original title was wrongful, all claims derived from thence muſt participate of the ſame wrong. Upon the latter of theſe writs it is (the writ of entry *ſur diſſeiſin* in the *poſt*) that the form of our common recoveries of landed eſtates [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

[t] 2 Inſt. 153.
[u] Book II. ch. 21.
[v] See book II. append. N° V.

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 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

[w] F. N. B. 147.

[x] *Ibid.* 16.

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

[z] See Bracton. *l.* 4. *tr.* 7. *c.* 6. § 4. Britton. c. 114. fol. 264. The moſt uſual were, 1. The writs of entry *ſur diſſeiſin*, and of *intruſion:* (F. N. B. 191. 203.) which are brought to remedy either of thoſe ſpecies of ouſter. 2. The writs of *dum fuit infra aetatem*, and *dum fuit non compos mentis:* (*Ibid.* 192. 202.) which lie for a perſon of full age, or one who hath recovered his underſtanding, after having (when under age or inſane) aliened his lands; or for the heirs of ſuch alienor. 3. The 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 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 Edw. I. c. 24. for the reverſioner after the alienation, but during the life, of the tenant in dower or other tenant for life. 6. The writ *ad terminum qui praeteriit:* (*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 praelocutii:* (*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.

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is 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 proviſion of the ſtatute Weſtm. 2. 13 Edw. I. c. 24. for framing new writs when wanted, is almoſt rendered uſeleſs by the very great perfection of the 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 exceeding dilatory, being at leaſt four times as ſlow as the other. And hence a new remedy was invented in many caſes, to do juſtice to the people, and to determine the poſſeſſion in the proper counties, and yet by the king's judges. This was the remedy by *aſſiſe*, which is called by ſtatute Weſtm. 2. 13 Edw. I. c. 24. *feſtinum remedium*, in compariſon with that by a writ of entry; it not admitting of many dilatory pleas and proceedings, to which other real actions are ſubject [b].

2. THE writ of *aſſiſe* is ſaid to have been invented by Glanvil, chief juſtice to Henry the ſecond [c]; and, if ſo, it ſeems to owe it's introduction to the parliament held at Northampton, in the twenty-ſecond year of that prince's reign; when juſtices in eyre were appointed to go round the kingdom in order to take theſe aſſiſes: and the aſſiſes themſelves (particularly thoſe of *mort d'anceſtor* and *novel diſſeiſin*)

[a] Gilb. Ten. 42.
[b] Booth. 262.
[c] Mirror c. 2. § 25.

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were clearly pointed out and deſcribed [d]. As a writ of entry is a real action, which *diſproves* the title of the tenant by ſhewing the unlawful commencement of his poſſeſſion; ſo an aſſiſe is a real action, which *proves* the title of the demandant merely by ſhewing his, or his anceſtor's, poſſeſſion [e]: and theſe two remedies are in all other reſpects ſo totally alike, that a judgment or recovery in one is a bar againſt the other; ſo that when a man's poſſeſſion is once eſtabliſhed by either of theſe poſſeſſory actions, it can never be diſturbed by the ſame antagoniſt in any other of them. The word *aſſiſe* is derived by ſir Edward Coke [f] from the Latin *aſſideo*, to ſit together; and it ſignifies, originally, the jury who try the cauſe, and ſit together for that purpoſe. By a figure it is now made to ſignify the court or juriſdiction, which ſummons this jury together by a commiſſion of aſſiſe, or *ad aſſiſas capiendas*: and hence the judicial aſſemblies held by the king's commiſſion in every county, as well to take theſe writs of aſſiſe, as to try cauſes at *niſi prius*, are termed in common ſpeech the *aſſiſes*. By another ſomewhat ſimilar figure, the name of aſſiſe is alſo applied to this action, for recovering poſſeſſion of lands: for the reaſon, ſaith Littleton [g], why ſuch writs at the beginning were called aſſiſes, was, for that in theſe writs the ſheriff is ordered to ſummon a jury, or aſſiſe; which is not expreſſed in any other original writ [h].

THIS remedy, by writ of aſſiſe, is only applicable to two ſpecies of injury by ouſter, *viz.* *abatement*, and a recent or *novel diſſeiſin*. If the abatement happened upon the death of the demandant's father or mother, brother or ſiſter, uncle or aunt, nephew or niece, the remedy is by an aſſiſe of *mort d'anceſtor*, or the death of one's anceſtor. This writ directs

[d] § 9. *Si dominus feodi negat haeredibus defuncti ſaiſinam ejuſdem feodi, juſtitiarii domini regis faciant inde fieri recognitionem per xii legales homines, qualem ſaiſinam defunctus inde habuit, die qua fuit vivus et mortuus; et, ſicut recognitum fuerit, ita haeredibus ejus reſtituant.* § 10. *Juſtitiarii domini regis faciant fieri recognitionem de diſſaiſinis factis ſuper aſſiſam, a tempore quo dominus rex venit in Angliam proxime poſt pacem factam inter ipſum et regem filium ſuum.* (Spelm. *Cod.* 330.)

[e] Finch. L. 284.

[f] 1 Inſt. 153.

[g] § 234.

[h] Co. Litt. 159.

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the ſheriff to ſummon a jury or aſſiſe, who ſhall view the land in queſtion, and recognize whether ſuch anceſtor were ſeiſed thereof on the day of his death, and whether the demandant be the next heir[i]: ſoon after which, the judges come down by the king's commiſſion to take the recognition of aſſiſe: when, if theſe points are found in the affirmative, the law immediately tranſfers the poſſeſſion from the tenant to the demandant. If the abatement happened on the death of one's grandfather or grandmother, then an aſſiſe of *mort d'anceſtor* no longer lies, but a writ of *ayle*, or *de avo*: if on the death of the great grandfather or great grandmother, then a writ of *beſayle*, or *de proavo*: but if it amounts one degree higher, to the *treſayle*, or grandfather's grandfather, or if the abatement happened upon the death of any collateral relation, other than thoſe before-mentioned, the writ is called a writ of *coſinage*, or *de conſanguineo*[k]. And the ſame points ſhall be inquired of in all theſe actions *anceſtrel*, as in an aſſiſe of *mort d'anceſtor*: they being of the very ſame nature[l]: though they differ in this point of form, that theſe *anceſtrel* writs (like all other writs of *praecipe*) expreſsly aſſert a title in the demandant, (*viz.* the ſeiſin of the anceſtor at his death, and his own right of inheritance,) the aſſiſe aſſerts nothing directly, but only prays an inquiry whether thoſe points be ſo[m]. There is alſo another anceſtrel writ, denominated a *nuper obiit*, to eſtabliſh an equal diviſion of the land in queſtion, where on the death of an anceſtor, who has ſeveral heirs, one enters and holds the others out of poſſeſſion[n]. But a man is not allowed to have any of theſe actions 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.

[i] F. N. B. 195. Finch. L. 290.
[k] Finch. L. 266, 267.
[l] Stat. Weſtm. 2 13 Edw. I. c. 20.
[m] 2 Inſt. 399.
[n] F. N. B 197. Finch. L. 293.
[o] Hale on F. N. B. 221.
[p] Fitzh. Abr. *tit. coſinage*. 15.

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 land 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.

AN aſſiſe of *novel* (or recent) *diſſeiſin* is an action of the ſame nature with the aſſiſe of *mort d'anceſtor* before-mentioned, in that herein the demandant's poſſeſſion muſt be ſhewn. But it differs conſiderably in other points: particularly in that it recites a complaint by the demandant of the diſſeiſin committed, in terms of direct averment: whereupon the ſheriff is commanded to reſeiſe the land and all the chattels thereon, and keep the ſame in his cuſtody till the arrival of the juſtices of aſſiſe (which in fact hath been uſually omitted [s]); and in the mean time to ſummon a jury to view the premiſes, and make recognition of the aſſiſe before the juſtices [t]. At which time the tenant may plead either the general iſſues *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

[q] Bracton, *l.* 4. *de aſſiſ. mortis anteceſſoris. c.* 13. § 3. F. N. B. 196.

[r] See 1 Leon. 267.

[s] Booth. 211. Bract. 4. 1. 19. § 7.

[t] F. N. B. 177.

[u] Bract. 187. Stat. Marlbr. c. 16.

him

him to perform the feodal ſervices. But coſts and damages were annexed to many other poſſeſſory actions by the ſtatutes of Marlberge, 52 Hen. III. c. 16. and 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 qui ita convictus fuerit, duepliciter 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 he would ſooner have been ſued. This

[w] 2 Inſt. 83, 84. [x] *l.* 4. *c.* 49.

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 aeras, *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 once in the lord's or tenant's life; as fealty, and the like [b]. And all writs, grounded upon the poſſeſſion of the demandant himſelf, are directed to be ſued out within thirty years after the diſſeiſin complained of; for if it be an older date, it can with no propriety be called a freſh, recent, or *novel diſſeiſin*; which name ſir Edward Coke informs us was originally given to this proceeding, becauſe the diſſeiſin muſt have been ſince the laſt *eyre* or circuit of the juſtices, which happened once in ſeven years, otherwiſe the action was gone [c]. And we may obſerve [d], that the limitation, preſcribed by Henry the ſecond at the firſt inſtitution of the aſſiſe of *novel diſſeiſin*, was from his own return into England after the peace made between him and the young king his ſon; which was but the year before.

[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 rents, *&c.*

[a] 8 Rep. 65.

[b] Co. Litt. 115.

[c] 1 Inſt. 153. Booth. 216.

[d] See pag. 184.

WHAT has been here obſerved may throw ſome light on the doctrine of *remitter*, which we ſpoke of in the ſecond chapter of this book; and which, we may remember, was, where one who hath right to lands, but is out of poſſeſſion, hath afterwards the freehold caſt upon him by ſome ſubſequent defective title, and enters by virtue of that title. In this caſe the law remits him to his 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 poſſeſſion 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 ſeiſinæ conjunctionem*.

III. BY theſe ſeveral poſſeſſory remedies the right of poſſeſſion may be reſtored to him, that is unjuſtly deprived thereof. But the right of *poſſeſſion* (though it carries with it a ſtrong preſumption) is not always concluſive evidence of the right of *property*, which may ſtill ſubſiſt in another man. For, as one man may have the *poſſeſſion*, and another the *right of poſſeſſion*, which is recovered by theſe poſſeſſory actions; ſo

one man may have the *right of poſſeſſion*, and ſo not be liable to eviction by any poſſeſſory action, and another may have the *right of property*, which cannot be otherwiſe aſſerted than by the great and final remedy of a writ of right, or ſuch correſpondent writs as are in the nature of a writ of right.

THIS happens principally in four caſes: 1. Upon diſcontinuance by the alienation of tenant in tail: whereby he, who had the right of poſſeſſion, hath transferred it to the 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 propriety. 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

[e] Finch. L. 267. [f] Co. Litt. 316.

Weſtm.

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 falls in upon the donor, his heirs or aſſigns: in ſuch caſe the reverſioner ſhall have this writ to recover the lands, wherein he ſhall ſuggeſt the gift, his own title to the reverſion minutely derived from the donor, and the failure of iſſue upon which his reverſion takes place[k]. This lay at common law, before the ſtatute *de donis*, if the donee aliened before he had performed the condition of the gift, by having iſſue, and afterwards died without any[l]. The time of limitation in a *formedon* by ſtatute 21 Jac. I. c. 16. is twenty years; within

[g] F. N. B. 255.
[h] *Ibid.* 211, 212.
[i] *Ibid.* 217.
[k] *Ibid.* 219. 8 Rep. 88.
[l] Finch. L. 268.

which ſpace of time after his title accrues, the demandant muſt bring his action, or elſe is for ever barred.

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

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 ac-

[m] F. N. B. 155.
[n] See book II. ch. 21.
[o] F. N. B. 1.

tion.

tion[p]. But though a writ of right may be brought, where the demandant is entitled to the poſſeſſion, yet it rarely is adviſable to be brought in ſuch caſes; as a more expeditious and eaſy remedy is had, without meddling with the property, by proving the demandant's own, or his anceſtor's, poſſeſſion, and their illegal ouſter, in one of the poſſeſſory actions. But, in caſe the right of poſſeſſion be loſt by length of time, or by judgment againſt the true owner in one of theſe inferior ſuits, there is no other choice: this is then the only remedy that can be had; and it is of ſo forcible a nature, that it overcomes all obſtacles, and clears all objections that may have ariſen to cloud and obſcure the title. And, after iſſue once joined in a writ of right, the judgment is abſolutely final; ſo that a recovery had in this action may be pleaded in bar of any other claim or demand[q].

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

[p] F. N. B. 1. 5.
[q] *Ibid.* 6. Co. Litt. 158.
[r] F. N. B. 143.
[s] Booth. 135.
[t] F. N. B. 9.

ſeiſin

ſeiſin of the anceſtor at any time during his life; whereas in a *nuper obiit* (which is a poſſeſſory remedy [u]) he muſt be ſeiſed at the time of his death. But, waiving theſe and other minute diſtinctions, let us now return to the general writ of right.

THIS writ ought to be firſt brought in the [w] court-baron of the lord, of whom the lands are holden; and then it is open or *patent*: but if he holds no court, or hath waived his right, *remiſit curiam ſuam*, it may be brought in the king's courts by writ of *praecipe* originally [x]; and then it is a writ of right *cloſe* [y], being directed to the ſheriff and not the lord [z]. Alſo, when one of the king's immediate tenants *in capite* is deforced, his writ of right is called a writ of *praecipe in capite*, (the improper uſe of which, as well as of the former *praecipe quia dominus remiſit curiam*, ſo as to ouſt the lord of his juriſdiction, is reſtrained by *magna carta* [a],) and, being directed to the ſheriff and originally returnable in the king's courts, is alſo a writ of right *cloſe* [b]. There is likewiſe a little writ of *right cloſe, ſecundum conſuetudinem manerii*, which lies for the king's tenants in 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 court, 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

[u] See page 186.
[w] Append. N° I. § 1.
[x] F. N. B. 2. Finch. L. 313.
[y] Booth. 91.
[z] Append. N° 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. briefe de recto claus* F. N. B. 11.
[f] Append. N° I. § 2.
[g] *Ibid.* § 3.
[h] F. N. B. 3, 4.
[i] Append. N° I. § 5.

from

from the perſon ſo ſeiſed to himſelf; to which the tenant may anſwer by denying the demandant's right, and averring that he has more right to hold the lands than the demandant has to demand them: and, this right of the tenant being ſhewn, it then puts the demandant upon the proof of his title: in which if he fails, or if the tenant hath ſhewn a better, the demandant and his heirs are perpetually barred of their claim; but if he can make it appear that his right is ſuperior to the tenant's, he ſhall recover the land againſt the tenant and his heirs for ever. But even this writ of right, however ſuperior to any other, cannot be ſued out at any diſtance of time. For by the antient law no ſeiſin could be alleged by the demandant, but from the time of Henry the firſt [f]; by the ſtatute of Merton, 20 Hen. III. c. 8. from the time of Henry the ſecond; by the ſtatute of Weſtm. 1. 3 Edw. I. c. 39. from the time of Richard the firſt; and now, by ſtatute 32 Hen. 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 three-ſcore years, is at preſent a ſufficient title againſt all the world; and cannot be impeached by any dormant claim whatſoever (1).

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

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

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

reaſon

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 abſo-
[197] lutely 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.

BIBLIOTHECA BODLEIANA

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 aſſiſe of *novel diſſeiſin*[a]. But this depends upon the ſeveral ſtatutes, which

[a] F. N. B. 178.

create

create theſe reſpective intereſts [b], and which expreſsly provide and allow this remedy in caſe of diſpoſſeſſion. Upon which account it is that ſir Edward Coke obſerves [c], that theſe tenants are ſaid to hold their eſtates *ut liberum tenementum*, until their debts be paid: becauſe by the ſtatutes they ſhall have an aſſiſe, as tenants of the freehold ſhall have; and in that reſpect they have the ſimilitude of a freehold [d].

II. As for ouſter, or 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 left 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

[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. 43.

[d] See book II. ch. 10.

[e] F. N. B. 220.

[f] See appendix N°II. § 1.

tenements.

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 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 ſet-

[g] See pag. 157.

[h] F. N. B. 145.

[i] See book II. ch. 9.

[k] *P.* 6 *Ric 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 ſeſer; 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, brieſe de covenant; et ſi par leſſée ou grantee de reverſion brieſe 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. N° II. § 4. *prope fin.*

tled 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.

THE better to apprehend the contrivance, whereby this end is effected, we muſt recollect that the remedy by ejectment 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[o]. When therefore a perſon, who hath right of entry into lands, determines to acquire that poſſeſſion, which is wrongfully withheld by the preſent tenant, he makes (as by law he may) a formal entry on the premiſes; and being ſo in the poſſeſſion of the ſoil, he there, upon the land, ſeals and delivers a leaſe for years to ſome third 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 out or ejects him. For this injury the leſſee is entitled to his action of ejectment againſt the tenant, or this *caſual ejector*, which ever 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

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

[n] F. N. B. 220.

[o] 1 Ch. Rep. append. 39.

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 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 or 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. 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

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

merely ideal, for the ſole purpoſe of trying the title (1). To this end, in the proceedings [q] a leaſe for a term of years is ſtated to have been made by him who claims title, to the plaintiff who brings the action, as by John Rogers to Richard Smith, which plaintiff ought to be ſome real perſon, and not merely an ideal fictitious one who hath no exiſtence, as is frequently though unwarrantably practiſed [r]: it is alſo ſtated that Smith the leſſee entered; and that the defendant William Stiles, who is called the *caſual ejector*, ouſted him; for which ouſter he brings this action. As ſoon as this action is brought, and the complaint fully ſtated in the declaration [s], Stiles, the caſual ejector, or defendant, ſends a written notice to the tenant in poſſeſſion of the lands, as George Saunders, informing him of the action brought by Richard Smith, and tranſmitting him a copy of the declaration: withal aſſuring him that he, Stiles the defendant, has no title at all to the premiſes, and ſhall make no defence; and therefore adviſing the tenant to appear in court and defend his own title: otherwiſe he, the caſual ejector, will ſuffer judgment to be had againſt him; and thereby the actual tenant Saunders will inevitably be turned out of poſſeſſion [t]. On receipt of this friendly caution, if the tenant in poſſeſſion does not within a limited time apply to the court to be admitted a defendant in the ſtead of Stiles, he is ſuppoſed to have no right at all; and, upon judgment being had againſt Stiles the caſual

[q] See appendix, N° II. § 1, 2.
[r] 6 Mod. 309.
[s] Append. N° II. § 2.
[t] *Ibid.*

(1) An actual entry is neceſſary to avoid a fine levied with proclamations, and the demiſe laid in the ejectment muſt be ſubſequent to the entry; but that is the only caſe in which an actual entry is required. 2 *Str.* 1086. *Doug.* 468. 1 *T. R.* 741. Unleſs it is an ejectment brought to recover on a vacant poſſeſſion, and not by a landlord upon a right of re-entry under the 4 Geo. II. c. 28; in which caſe the leſſor or his attorney muſt actually ſeal a leaſe upon the premiſes to the plaintiff, who muſt be ejected by a real perſon. See the mode of proceeding, 2 *Cromp. Prac.* 198.

ejector,

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 [t] 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 the plaintiff, and his *ouſter* by Saunders himſelf, now made [204] 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 (2). This done, the declaration is altered by inſerting the name of George Saunders inſtead of William Stiles, and the cauſe goes down to trial under the name of Smith, (the plaintiff,) on the demiſe of Rogers, (the leſſor,) againſt Saunders, the new defendant.

[t] Append. N° II. § 3.

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(2) It has been determined, that no ejectment can be maintained where the leſſor of the plaintiff has not a legal right of entry; as the heir at law was barred from recovering in ejectment, where there was an unſatisfied term raiſed for the purpoſe of ſecuring an annuity, though the heir claimed the eſtate ſubject to that charge. But a ſatisfied term will be preſumed to be ſurrendered; and the courts will not permit the plaintiff in ejectment to be non-ſuited by a term ſtanding out in the truſtee of the leſſor. 2 *T. R.* 695. 1 *T. R.* 758.

In *Doe* on the demiſe of *Bowerman* v. *Sybourn*, 7 *T. R.* 2. Lord Kenyon declared that in all caſes where truſtees ought to convey to the beneficial owner, he would leave it to the jury to preſume, where ſuch a preſumption might reaſonably be made, that they had conveyed accordingly, in order to prevent a juſt title from being defeated by a matter of form. But if ſuch a preſumption cannot be made, he who has the equitable eſtate only cannot recover in ejectment. *Jones* v. *Jones*, 7 *T. R.* 46.

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

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

[w] Bracton. l. 5. c. 10. § 14.

(3) A deviſee, although he has never been in poſſeſſion, has been permitted to defend as a landlord under this ſtatute. 11 *Geo.* 2. *c.* 19. 4 *T. R.* 122.

all; the conſequence of which (we have ſeen) would have been, that judgment would have been entered for the plaintiff, and the ſheriff, by virtue of a writ for that purpoſe, would have turned out Saunders, and delivered poſſeſſion to Smith. The ſame proceſs therefore as would have been had, provided no conditional rule had been ever made, muſt now be purſued as ſoon as the condition is broken (4).

THE damages recovered in theſe actions, though formerly their only intent, are now uſually (ſince the title has been

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(4) Where an ejectment is defended merely to continue the poſſeſſion of the premiſes, and no defence is made at the trial, the practice is for the cryer of the court, firſt, to call the defendant to confeſs leaſe, entry, and ouſter, and then the plaintiff, as in other caſes of nonſuits, to come forth or he will loſe his writ of *niſi prius*.

Though in this caſe the judgment is given againſt the caſual ejector, yet the coſts are taxed as in other caſes, and if the real defendant refuſes to pay them, the court will grant an attachment againſt him. *Salk.* 259.

In like manner if there be a verdict for the defendant, or the nominal plaintiff be nonſuited without the default of the defendant, the defendant muſt tax his coſts, and ſue out a writ of execution againſt the nominal plaintiff; and if, upon ſerving the leſſor of the plaintiff with this writ and a copy of the rule to confeſs leaſe, entry, and ouſter, the leſſor of the plaintiff does not pay the coſts, the court will grant an attachment againſt him. 2 *Cromp. Braſt.* 214. In ejectment the unſucceſsful party may re-try the ſame queſtion as often as he pleaſes without the leave of the court; for by making a freſh demiſe to another nominal character, it becomes the action of a new plaintiff upon another right, and the courts of law cannot any farther prevent this repetition of the action, than by ordering the proceedings in one ejectment to be ſtayed till the coſts of a former ejectment, though brought in another court, be diſcharged. 2 *Bl. Rep.* 1158. *Barnes*, 133. But a court of equity, in ſome inſtances where there have been ſeveral trials in ejectment for the ſame premiſes, though the title was entirely legal, has granted a perpetual injunction. 1 *P. W.* 672.

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).

SUCH is the modern way of obliquely bringing in queſtion the title to lands and tenements, in order to try it in this collateral manner; a method which is now univerſally adopted in almoſt every caſe. It is founded on the ſame principle as the antient writs of aſſize, being calculated to try the mere *poſſeſſory* title to an eſtate; and hath ſucceeded to thoſe real actions, as being infinitely more convenient for attaining the
[206] 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 plain-"tiff againſt the tenant in poſſeſſion: invented, under the "control and power of the court, for the advancement of

[x] Burr. 668. [y] Mich. 32 Geo. II. 4 Burr. 668.

(5) The defendant may plead the ſtatute of limitations, and by that means protect himſelf from the payment of all meſne profits, except thoſe which have accrued within the laſt ſix years. *Bull. N. P.* 88.

"juſtice

" 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 means to try the title of all eſtates; for on thoſe things, whereon an entry cannot in fact be made, no entry ſhall be ſuppoſed by any fiction of the parties. Therefore an ejectment will not lie of an advowſon, a rent, a common, or other incorporeal hereditament [z]: except for tithes in the hands of lay appropriators, by the expreſs purview of ſtatute 32 Hen. VIII. c. 7. which doctrine hath ſince been extended by analogy to tithes in the hands of the clergy [a]: nor will it lie in ſuch caſes, where the entry of him that hath right is taken away by deſcent, diſcontinuance, twenty years diſpoſſeſſion, or otherwiſe.

THIS action of ejectment is however rendered a very eaſy and expeditious remedy to landlords whoſe tenants are in arrear, by ſtatute 4 Geo. II. c. 28. which enacts, that every landlord, who hath by his leaſe a right of re-entry in caſe of non-payment of rent, when half a year's rent is due, and no ſufficient diſtreſs is to be had, may ſerve a declaration in ejectment on his tenant, or fix the ſame upon ſome notorious part of the premiſes, which ſhall be valid without any formal re-entry or previous demand of rent. And a recovery in ſuch ejectment ſhall be final and concluſive, both in law and equity, unleſs the rent and all coſts be paid or tendered within ſix calendar months afterwards (6).

2. THE writ of *quare ejecit infra terminum* lieth, by the ancient law, where the wrongdoer or ejector is not himſelf in poſſeſſion of the lands, but another who claims under him. As where a man leaſeth lands to another for years, and, after [207]

[z] Brownl. 129. Cro. Car. 492. Stra. 54. [a] Cro. Car. 301. 2 Lord Raym. 789.

(6) Where there is a ſufficient diſtreſs upon the premiſes, the landlord cannot maintain an ejectment upon his right of re-entry for non-payment of rent, if he has not demanded the rent on the very day on which it was due.

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 feoffee; becauſe he did not eject him, but the reverſioner: neither can he have any ſuch action to recover his term againſt the reverſioner, who did ouſt him; becauſe he is not now in poſſeſſion. And upon that account this writ was deviſed, upon the equity of the ſtatute Weſtm. 2. c. 24. as in a caſe where no adequate remedy was already provided [b]. And the action is brought againſt the feoffee for deforcing, or keeping out, the original leſſee, during the continuance of his term; and herein, as in the ejectment, the plaintiff ſhall recover ſo much of the term as remains; and alſo ſhall have actual damages for that portion of it whereof he has been unjuſtly deprived. But ſince the introduction of fictitious ouſters, whereby the title may be tried againſt any tenant in poſſeſſion, (by what means ſoever he acquired it,) and the ſubſequent recovery of damages by action of treſpaſs for meſne profits, this action is fallen into diſuſe.

[b] F. N. B. 198.

CHAPTER THE TWELFTH.

OF TRESPASS.

IN the two preceding chapters we have conſidered ſuch injuries to real property, as conſiſted in an ouſter, or amotion of the poſſeſſion. Thoſe which remain to be diſcuſſed are ſuch as may be offered to a man's real property without any amotion from it.

THE ſecond ſpecies therefore of real injuries, or wrongs that affect a man's lands, tenements, or hereditaments, is that of *treſpaſs*. Treſpaſs, in its largeſt and moſt extenſive ſenſe, ſignifies any tranſgreſſion or offence againſt the law of nature, of ſociety, or of the country in which we live; whether it relates to a man's perſon, or his property. Therefore beating another is a treſpaſs; for which (as we have formerly ſeen) an action of treſpaſs *vi et armis* in aſſault and battery will lie; taking or detaining a man's goods are reſpectively treſpaſſes; for which an action of treſpaſs *vi et armis*, or on the caſe in trover and converſion, is given by the law: ſo alſo nonperformance of promiſes or undertakings in a treſpaſs, upon which an action of treſpaſs on the caſe in *aſſumpſit* is grounded: and, in general, any miſfeaſance or act of one man, whereby another is injuriouſly treated or damnified, is a tranſgreſſion or treſpaſs in its largeſt ſenſe; for which we have already ſeen [a] that, whenever the act itſelf is directly, and immediately injurious to the perſon or property of another, and therefore neceſſarily accompanied with ſome force, an [209] action of treſpaſs *vi et armis* will lie; but, if the injury is only conſequential, a ſpecial action of treſpaſs *on the caſe* may be brought (1).

[a] See pag. 123.

(1) The diſtinctions beween actions of treſpaſs *vi et armis* for an immediate injury, and actions of treſpaſs upon the caſe for a conſe-

BUT in the limited and confined ſenſe, in which we are at preſent to conſider it, it ſignifies no more than an entry on another man's ground without a lawful authority, and doing ſome damage, however inconſiderable, to his real property. For the right of *meum* and *tuum*, or property in lands, being once eſtabliſhed, it follows as a neceſſary conſequence, that this right muſt be excluſive; that is, that the owner may retain to himſelf the ſole uſe and occupation of his ſoil: every entry therefore thereon without the owner's leave, and eſpecially if contrary to his expreſs order, is a treſpaſs or tranſgreſſion. The Roman laws ſeem to have made a direct prohibition neceſſary, in order to conſtitute this injury: "*qui alienum fundum ingreditur, poteſt a domino, ſi is praeviderit, prohiberi ne ingrediatur*[b]." But the law of England, juſtly

[b] *Inſt.* 2. 1. 12.

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conſequential damage, are frequently very delicate; ſee the ſubject much conſidered in 2 *Bl. Rep.* 892, in a caſe where an action of treſpaſs *vi et armis* was brought againſt the defendant for throwing a lighted ſquib in a public market, which fell upon a ſtall, the owner of which, to defend himſelf and his goods, took it up, and threw it to another part of the market, where it ſtruck the plaintiff and put out his eye.

The queſtion was much diſcuſſed, whether the perſon injured ought to have brought an action of treſpaſs *vi et armis*, or an action upon the caſe; and one of the four judges ſtrenuouſly contended that it ought to have been an action upon the caſe. But I ſhould humbly conceive, that the queſtion was more properly this, viz. whether an action of treſpaſs *vi et armis* lay againſt the original or the intermediate thrower, or whether the act of the ſecond thrower was involuntary, (which ſeems to have been the opinion of the jury,) or wilful and miſchievous, and if ſo, whether he alone ought not to have been anſwerable for the conſequences. For if A throws a ſtone at B, which after it lies quietly at his foot, B takes up and throws again at C, it is preſumed that C has his action againſt B only; but if it is thrown at B, and B, by warding it off from himſelf, gives it a different direction, in conſequence of which it ſtrikes C, in that caſe, it is wholly the act of A, and B muſt be conſidered merely as an inanimate object, which may chance to divert its courſe.

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 any ideal inviſible boundary, exiſting only in the contemplation of law, as when one man's [210] land adjoins to another's in the ſame field. And every ſuch entry or breach of a man's cloſe carries neceſſarily along with it ſome damage or other: for, if no other ſpecial loſs can be aſſigned, yet ſtill the words of the writ itſelf ſpecify one general damage, *viz.* the treading down and bruiſing his herbage [c].

ONE muſt have a property (either abſolute or temporary) in the ſoil, and actual poſſeſſion by entry, to be able to maintain an action of treſpaſs: or, at leaſt, it is requiſite that the party have a leaſe and poſſeſſion of the veſture and herbage of the land [d]. 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

[c] F. N. B. 87, 88.
[d] Dyer, 285. 2 Roll. Abr. 549.
[e] Cro. Eliz. 421.
[f] 2 Rol. Abr. 553.

againſt

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 Ann. c. 18. if a guardian or truſtee for any infant, a huſband ſeiſed *jure uxoris*, or a perſon having any eſtate or
[211] intereſt determinable upon a life or lives, ſhall, after the determination of their reſpective intereſts, hold over and continue in poſſeſſion of the lands or tenements, without the conſent of the perſon entitled thereto, they are adjudged to be treſpaſſers; and any reverſioner or remainder-man, expectant on any life-eſtate, may once in every year, by motion to the court of chancery, procure the *ceſtuy que vie* to be produced by the tenant of the land, or may enter thereon in caſe of his refuſal or wilful neglect. And by the ſtatutes of 4 Geo. II. c. 28. and 11 Geo. II. c. 19. in caſe after the determination of any term of life, lives, or years, any perſon ſhall wilfully hold over the ſame, the leſſor or reverſioner is entitled to recover by action of debt, either at the rate of double the annual value of the premiſes, in caſe he himſelf hath demanded and given notice in writing to the tenant to deliver the poſſeſſion; or elſe double the uſual rent, in caſe the notice of quitting proceeds from the tenant himſelf, having power to determine his leaſe, and he afterwards neglects to carry that notice into due execution (2).

A MAN is anſwerable for not only his own treſpaſs, but that of his cattle alſo: for, if by his negligent keeping they

[g] 11 Rep. 5.

(2) See 2 vol. p. 151. n. 5.

ſtray

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. And herein, if any unwarrantable act of the [212] defendant or his beaſts in coming upon the lands be proved, it is an act of treſpaſs for which the plaintiff muſt recover ſome damages; ſuch however as the jury ſhall think proper to aſſeſs.

In treſpaſſes of a permanent nature, where the injury is continually renewed, (as by ſpoiling or conſuming the herbage with the defendant's cattle,) the declaration may allege the injury to have been committed by *continuation* from one given day to another, (which is called laying the action with a *continuando*,) and the plaintiff ſhall not be compelled to bring ſeparate actions for every day's ſeparate offence [i]. But where the treſpaſs is by one or ſeveral acts, each of which terminates in itſelf, and being once done cannot be done again, it cannot be laid with a *continuando*: yet if there be repeated acts of treſpaſs committed, (as cutting down a certain number of trees,) they may be laid to be done, not continually, but at divers days and times within a given period [k].

[h] *Regiſtr.* 94.
[i] 2 Roll. Abr. 545. Lord. Raym. 240.
[k] Salk. 638, 639. Lord Raym. 823. 7 Mod. 152.

IN ſome caſes treſpaſs is juſtifiable; or, rather, entry on another's land or houſe ſhall not in thoſe caſes be accounted treſpaſs: as if a man comes thither to demand or pay money, there payable; or to execute, in a legal manner, the proceſs of the law. Alſo a man may juſtify entering into an inn or public houſe, without the leave of the owner firſt ſpecially aſked; becauſe when a man profeſſes the keeping of 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 diſtrain for rent; a commoner to attend his cattle, commoning on another's land; and a reverſioner, to ſee if any waſte be committed on the eſtate; for the apparent neceſſity of the thing[l]. Alſo it hath been ſaid, that by the common law and cuſtom of England the poor are allowed to enter and glean upon another's ground after the harveſt, without
[213] being guilty of treſpaſs[m]: which humane proviſion ſeems borrowed from the Moſaical law[n] (3). 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 de-

[l] 8 Rep. 146.
[m] Gilb. Ev. 253. Trials *per pais*, ch. 15. pa. 438.
[n] Levit. c. 19. v. 9. & c. 23. v. 22, Deut. c. 24. v. 19, &c.

(3) Two actions of treſpaſs have been brought in the common pleas againſt gleaners, with an intent to try the general queſtion, *viz.* whether ſuch a right exiſted; in the firſt, the defendant pleaded that he being a poor, neceſſitous, and indigent perſon, entered the plaintiff's cloſe to glean; in the ſecond, the defendant's plea was as before, with the addition that he was an inhabitant legally ſettled within the pariſh: to the plea in each caſe there was a general demurrer. Mr. J. Gould delivered a learned judgment in favour of gleaning, but the other three judges were clearly of opinion that this claim had no foundation in law; that the only authority to ſupport it was an extrajudicial dictum of lord Hale; that it was a practice incompatible with the excluſive enjoyment of property, and was productive of vagrancy, and many miſchievous conſequences. 1 *H. Bl. Rep.* 51.

ſtroying

ſtroying ſuch creatures is ſaid to be profitable to the public[o](4). 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 effect and have relation back even to his firſt entry, and make the whole a treſpaſs[q]. But a bare non-feaſance, 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 ſhall make his firſt entry a treſpaſs; but the party injured ſhall have a ſpecial action of treſpaſs or on the caſe, for the real ſpecific injury ſuſtained, unleſs tender of amends hath been made. But ſtill, if a reverſioner, who enters on pretence of ſeeing waſte, breaks the houſe, or ſtays there all night; or if the commoner who comes to tend his cattle, cuts down a tree; in theſe and ſimilar caſes, the law judges that he entered for this unlawful purpoſe, and therefore, as the act which demonſtrates ſuch his purpoſe is a treſpaſs, he ſhall be eſteemed a treſpaſſer *ab initio*[t]. So alſo in the caſe of hunting the fox or the badger, a man cannot juſtify breaking the ſoil, and digging him out of his earth: for though the law warrants the hunting of ſuch noxious animals for the [214] public good, yet it is held[u] that ſuch things muſt be done in

[o] Cro. Jac. 321.
[p] Finch. L. 47. Cro. Jac. 148.
[q] 2 Roll. Abr. 561.
[r] 8 Rep. 147.
[s] Finch. L. 47.
[t] 8 Rep. 146.
[u] Cro. Jac. 321.

(4) It has been determined in a late caſe, that it is lawful to follow a fox with horſes and hounds over another's ground, if no more damage be done than is neceſſary for the deſtruction of the animal by ſuch a purſuit. 1 *T. R.* 338.

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an ordinary and uſual manner; therefore, as there is an ordinary courſe to kill them, *viz.* by hunting, the court held that the digging for them was unlawful.

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

IN order to prevent trifling and vexatious actions of treſpaſs, as well as other perſonal actions, it is *(inter alia)* enacted by ſtatutes 43 Eliz. c. 6. and 22 & 23 Car. II. c. 9. § 136. that where the jury, who try an action of treſpaſs, give leſs damages than forty ſhillings, the plaintiff ſhall be allowed no more coſts than damages; unleſs the judge ſhall certify under his hand that the freehold or title of the land came chiefly in queſtion. But this rule now admits of two exceptions more, which have been made by ſubſequent ſtatutes. One is by ſtatute 8 & 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 (5). Every treſpaſs is *wilful*, where the defendant has notice, and is eſpecially forewarned not to come on the land; as every treſpaſs is *malicious*, though the damage may not amount to forty ſhillings, where the intent of the defendant plainly appears to
[215] be to haraſs and diſtreſs the plaintiff (6). The other exception

(5) The judge muſt certify in open court after the trial, otherwiſe the certificate is void. 2 *Wilſ.* 21.

(6) If a perſon has notice not to come or continue upon another's land, as if a ſportſman has notice or warning not to come again,

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](7).

[w] Lord Raym. 149.

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again, or to go off, and he repeats or continues the treſpaſs, upon proof of this, the judges think themſelves bound to certify that the treſpaſs is wilful and malicious, and the plaintiff will in conſequence be entitled to full coſts. 1 *Eſp.* 425.

It has been determined that the judge was bound to certify, although the notice had been general to all perſons not to treſpaſs upon the plaintiff's lands, and given four years before, and although the defendant was unacquainted with the boundaries of the plaintiff's eſtate. 6 *T. R.* 11.

(7) The perſons deſcribed in the 4 & 5 W. & M. c. 23. are ſubject to pay full coſts, though the damages are under 40*s.*, without any certificate of the judge or previous notice from the party. The words *inferior tradeſman* are ſo vague that the court of common pleas were divided in opinion, whether a perſon who was a ſurgeon and apothecary came under that deſcription. 2 *Wils.* 70.

It has been decided, that a gentleman's huntſman is not a diſſolute perſon under this act; and where the plaintiff ſtates the defendant in his declaration to be a diſſolute perſon, or other perſon mentioned in the act, if he ſhould not prove him ſo at the trial, ſtill he may recover a verdict as in a common action of treſpaſs. 2 *Bl. Rep.* 900.

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 effect 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

[a] Finch. L. 188. [b] F. N. B. 184.

lights

lights and windows is a nuſance of a ſimilar nature [c]. But 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 (1). For he hath as much right to build a new edifice upon his ground, as I have upon mine: ſince every man may erect what he pleaſes upon the upright or perpendicular of his own ſoil, ſo as not to prejudice what has long been enjoyed by another; and it was my folly to build ſo near another's ground [d]. Alſo, if a perſon keeps his hogs, or other noiſome animals, ſo near the houſe of another, that the ſtench of him incommodes him and makes the air unwholeſome (2), 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 tallowchandler'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*: 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].

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

(1) The judges now hold, that lights will be conſidered antient to ſupport this action, of which there has been an uninterrupted enjoyment above twenty years.

(2) Lord Mansfield has ſaid, that "it is not neceſſary that the "ſmell ſhould be unwholeſome; it is enough, if it renders the "enjoyment of life and property uncomfortable." 1 *Burr.* 337.

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
[218] him to find ſome other place to do that act, where it will be leſs offenſive. So alſo, if my neighbour ought to ſcour a ditch, and does not, whereby my land is overflowed, this is an actionable 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 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

[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.
[m] F. N. B. 183. 2 Roll. Abr. 140.
[n] F. N. B. 148. 2 Roll. Abr. 140.

Hale

Hale [o] conſtrues the *dieta*, or reaſonable day's journey mentioned by Bracton [p], to be twenty miles; as indeed it is uſually underſtood, not only in our own law [q], but alſo in the civil [r], from which we probably borrowed it. So that if the new market be not within ſeven miles of the old one, it is no nuſance: for it is held reaſonable that every man ſhould have [219] 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 grievouſly amerced [s]: it would be therefore extremely hard, if a new ferry were ſuffered to ſhare his profits, which does not alſo ſhare his burthen. But where the reaſon ceaſes, the law alſo ceaſes with it: therefore it is no 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

[o] on F. N. B. 184.
[p] *l.* 3. *c.* 16.
[q] 2 Inſt. 567.
[r] *Ff.* 2. 11. 1.
[s] 2 Roll. Abr. 140.
[t] Hale on F. N. B. 184.

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 capa-
[220] city of ſupreme governor, and *pater familias* of the kingdom [u]. Yet this rule admits of one exception; where a private perſon ſuffers ſome extraordinary damage, beyond the reſt of the king's ſubjects, by a public 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 (3), which is not common to others, the party ſhall have his action [w]. 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 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

[u] Vaugh. 341, 342.
[w] Co. Litt 56. 5 Rep. 73.
[x] 9 Rep. 55.
[y] 2 Leon. pl. 129. Cro. Eliz. 402.

(3) But the particular damage in this caſe muſt be direct, and not conſequential, as by being delayed in a journey of importance. *Bull. N. P.* 26.

verdict

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].

2. AN *aſſiſe of nuſance* is a writ: wherein it is ſtated that [221] 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, and have them at the next commiſſion of aſſiſes, that juſtice may be done therein[a]: and, if the aſſiſe is found for the plaintiff, he ſhall have judgment of two things; 1. To have the 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 aliened 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 tranſ-* "*fertur 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,

[z] Finch. L. 289.
[a] F. N. B. 183.
[b] 9 Rep. 55.
[c] *Ibid.*

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;
[222] 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]. And the plaintiff ſhall have judgment herein 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.

[d] 2 Inſt. 405.
[e] F. N. B. 124.
[f] 5 Rep. 100, 101.

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 (1), without any incumbrance or

[a] See vol. II. ch. 18.

(1) A tenant in fee-tail has the ſame uncontrolled and unlimited power in committing waſte, as a tenant in fee-ſimple.

charge

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 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 or years,

[b] F. N. B. 59. 9 Rep. 112.

[c] 2 Inſt. 299.

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 its moſt deſirable incidents and ornaments, among which timber and houſes may juſtly be reckoned the principal. To him therefore in remainder or reverſion, to whom the *inheritance* appertains in expectancy [f], the law hath given an adequate remedy. For he, who hath the remainder *for life* only, is not entitled to ſue for waſte; ſince his intereſt may never perhaps come into poſſeſſion, and then he hath ſuffered no injury (2) Yet a parſon, vicar, arch-deacon, 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

[d] 52 Hen. III. c. 23.
[e] 6 Edw. I. c. 5.
[f] Co. Litt. 53.
[g] *Ibid.* 341.

(2) No perſon is entitled to an action of waſte againſt a tenant for life, but he who has the immediate eſtate of inheritance in remainder or reverſion, expectant upon the eſtate for life. If between the eſtate of the tenant for life who commits waſte, and the ſubſequent eſtate of inheritance, there is interpoſed an eſtate of freehold to any perſon *in eſſe*, then, during the continuance of ſuch interpoſed eſtate, the action of waſte is ſuſpended; and if the firſt tenant for life dies during the continuance of ſuch interpoſed eſtate, the action is gone for ever. *Harg. Co. Litt.* 218. *b.*

at

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* pending the ſuit, well knowing the weakneſs of his title, therefore the ſtatute of Gloceſter [i] gave another writ of *eſtrepement*, *pendente placito*, commanding the ſheriff firmly
[226] 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

[h] 2 Inſt. 328.
[i] 6 Edw. I. c. 13.
[k] *Regiſt.* 77.
[l] 2 Inſt. 329.
[m] F. N. B. 60, 61.
[n] *Ibid.* 61.

after

after judgment. For the plaintiff cannot recover damages for more waſte than is contained in his original complaint: neither is he at liberty to aſſign or give in evidence any waſte made after the ſuing out of the writ: it is therefore reaſonable that he ſhould have this writ of *preventive* juſtice, ſince he is in his preſent ſuit debarred of any farther *remedial* [o]. If a writ of *eſtrepement*, forbidding waſte, be directed and delivered to the tenant himſelf, as it may be, and he afterwards proceeds to commit waſte, an action may be carried on upon the foundation of this writ; wherein the only plea of the tenant [227] can be, *non fecit vaſtum contra prohibitionem*: and, if upon verdict it be found that he did, the plaintiff may recover coſts and damages [p], or the party may proceed to puniſh the defendant for the contempt: for if, after the writ directed and delivered to the tenant or his ſervants, they proceed to commit waſte, the court will impriſon them for this contempt of the writ [q]. But not ſo, if it be directed to the ſheriff, for then it is incumbent upon him to prevent the *eſtrepement* abſolutely, even by raiſing the *poſſe comitatus*, if it can be done no other way.

BESIDES this preventive redreſs at common law, the courts of equity, upon bill exhibited therein, complaining of waſte and deſtruction, will grant an injunction or order to ſtay waſte, until the defendant ſhall have put in his anſwer, and the court ſhall thereupon make farther 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 inherit-

[o] 5 Rep. 114.
[p] Moor. 100.
[q] Hob. 85.
[r] 6 Ed. I. c. 5.
[s] 13 Ed. I. c. 22.

ance

ance againſt another, who makes waſte in the eſtate holden in common. The equity of which ſtatute extends to joint-tenants, but not to coparceners: becauſe by the old law coparceners might make partition, whenever either of them thought proper, and thereby prevent future waſte, but tenants in common and joint-tenants could not; and therefore the ſtatute gave them this remedy, compelling the defendant either to make partition, and take the place waſted to his own ſhare, or to give ſecurity not to commit any farther waſte [t]. But theſe tenants in common and joint-tenants are
[228] 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].

THIS action of waſte is a mixed action; partly real, ſo far as it recovers land, and partly perſonal, ſo far as it recovers damages. For it is brought for both thoſe purpoſes; and, if the waſte be proved, the plaintiff ſhall recover the thing or place waſted, and alſo treble damages by the ſtatute of Gloceſter. The writ of waſte calls upon the tenant to appear and ſhew cauſe, why he hath committed waſte and deſtruction in the place named, *ad exhaeredationem*, to the diſinheriſon, of the plaintiff [w]. And if the defendant makes default, or does not appear at the day aſſigned him, then the ſheriff is to take with him a jury of twelve men, and go in perſon to the place alleged to be waſted, and there inquire of the waſte done, and the damages; and make a return or report of the ſame to the court, upon which report the judgment is founded [x]. For the law will not ſuffer ſo heavy a judgment, as the forfeiture and treble damages, to be paſſed upon a mere default, without full aſſurance that the fact is according as it is ſtated in the writ. But if the defendant appears to the writ, and *afterwards* ſuffers judgment to go againſt him

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

by

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 [229] was no waſte committed, as that the deſtruction happened by lightning, tempeſt, the king's enemies, or other inevitable accident [z] (3). 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 plaintiff ſhall recover the place waſted; for which he has immediately a writ of *ſeiſin*, provided the particular eſtate be ſtill ſubſiſting, (for, if it be expired, there can be no forfeiture of the land,) and alſo that the plaintiff ſhall recover treble the damages aſſeſſed by the jury; 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.

[y] Cro. Eliz. 18. 290.
[z] Co. Litt. 53.
[a] Law of *niſi prius*. 112.

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(3) But the deſtruction of a houſe by fire, unleſs in convenient time repaired, is waſte. So between landlord and tenant, though there be no covenant to repair or rebuild, the tenant is ſubject to waſte in general; and, if the houſe be burnt by fire, he muſt rebuild. 1 *Veſ.* 462.

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 in non-performance; *that* ſtrikes at the very title of the party injured, and amounts to an ouſter or actual diſpoſſeſſion. Subtraction however, being clearly an injury, is remediable by due courſe of law: but the remedy differs according to the nature of the ſervices; whether they be due by virtue of any tenure, or by cuſtom only.

I. FEALTY, ſuit of court, and rent, are duties and ſervices uſually iſſuing and ariſing *ratione tenurae*, 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

praedial

praedial labours, or (which is *inſtar omnium*) in money, which will provide all the reſt; all which are comprized under the one general name of *reditus*, return, or rent. And the ſubtraction or non-obſervance of any of theſe conditions, by neglecting to ſwear fealty, to do ſuit of court, or to render the rent or ſervice reſerved, is an injury to the freehold of the lord, by diminiſhing and depreciating the value of his 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] See page 6. 148.

[b] Finch. L. 285.

a leaſe for life, &c. no action of *debt* lay by the common law, during the continuance of the freehold out of which it iſſued[c]; for the law would not ſuffer a *real* injury to be remedied by an action that was merely *perſonal*. However, by the ſtatutes 8 Ann. c. 14. and 5 Geo. III. c. 17. actions of debt may now be brought at any time to recover ſuch freehold 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 Edw. I. c. 4. and of Weſtm. 2. 13 Edw. I. c. 21 & 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, un-

[c] 1 Roll. Abr. 595.
[d] F. N. B. 195.
[e] *Ibid.* 151.
[f] *Ibid.* 208.
[g] *Cod.* 4. 66. 2.

leſs

leſs they have lain freſh and uncultivated for two years, and there be not ſufficient diſtreſs upon the premiſes; or unleſs the tenant hath ſo encloſed the land, that the lord cannot come upon it to diſtrein [h]. For the law prefers the ſimple and ordinary remedies, by diſtreſs or by the actions juſt now mentioned, to this extraordinary one of forfeiture for a *ceſſavit*: and therefore the ſame ſtatute of Gloceſter has provided farther, that upon tender of arrears and damages before judgment, and giving ſecurity for the future performance of the ſervices, the proceſs ſhall be at an end, and the tenant ſhall retain his lands; 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 of 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. II. c. 19. § 16. which enacts, that where any tenant at rack-rent ſhall be one year's rent in arrear, and ſhall deſert the demiſed premiſes, leaving the ſame uncultivated or unoccupied, ſo that no ſufficient diſtreſs can be had: two juſtices of the peace (after notice affixed on the premiſes for fourteen days without effect) may give the landlord poſſeſſion thereof, and thenceforth the leaſe ſhall be void.

5. There is alſo another very effectual remedy, which takes place when the tenant upon a writ of aſſiſe for rent, or on a replevin, diſowns or diſclaims his tenure, whereby the lord loſes his verdict: in which caſe the lord may have a writ of right, *ſur diſclaimer*, grounded on this denial of tenure; and ſhall, upon proof of the tenure, recover back the land itſelf ſo holden, as a puniſhment to the tenant for ſuch his falſe diſclaimer [l]. This piece of retalliating juſtice, whereby the tenant who endeavours to defraud his lord is himſelf deprived of the eſtate, as it evidently proceeds upon feodal principles,

[h] F. N. B. 209. 2 Inſt. 298.
[i] 2 Inſt. 401. 460.
[k] See page 206.
[l] Finch. L. 270, 271.

ſo it is expreſsly to be met with in the feodal conſtitutions[m]: "*vaſallus, qui abnegavit feudum ejuſve conditionem, exſpo-* "*liabitur.*"

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; 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]. 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].

[m] *Feud. l.* 2. *t.* 26.
[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. page 59, 60.
[t] F. N. B. 135.
[u] 2 Inſt. 374.

II. THUS

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: 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 (1). And thus much for the injury of ſubtraction.

[w] F. N. B. 123. [x] Co. Entr. 461. [y] fol. 153.

(1) This is now the only action in uſe for moſt of the injuries ſpecified in this chapter; the antient appropriate writs have become ſo obſolete, that few ſpecial pleaders, if any, would know how to proceed in them.

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 ſeiſing 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 ſeiſing 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

[a] Finch. L. 187.

therefore

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].

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 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 rabbets, ſo as they do not encreaſe 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].

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 contract-

[b] Cro. Eliz. 558.
[c] 1 Roll. Abr. 396.
[d] Co. Litt. 122.
[e] Cro. Eliz. 876. Cro. Jac. 195. Lutw. 108.
[f] 9 Rep. 112.
[g] *Ibid.*

ing them into a ſmaller compaſs. This injury by ſurcharging can properly ſpeaking only happen, where the common is *appendant* or *appurtenant* [h], and of courſe limitable by law; or where, when *in groſs*, it is expreſsly limited and certain: for where a man hath common *in groſs*, *ſans nombre* or *without ſtint*, he cannot be a ſurcharger. However, even where a man is ſaid to have common without ſtint, ſtill there muſt be left ſufficient for the lord's own beaſts [i]: for the law will not ſuppoſe that, at the original grant of the common, the lord meant to exclude himſelf.

THE uſual remedies, for ſurcharging the common, are either by 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, the quantity of which common has never yet been aſcertained. In either of theſe caſes, as well the lord, as any of the commoners, is entitled to this writ of admeaſurement; which is one of thoſe writs, that are called *vicontiel* [k], being directed to the ſheriff, (*vice comiti*,) and not to be returned to any ſuperior court, till finally executed by him. It recites a complaint, that the defendant hath ſurcharged, *ſuperoneravit*, the common: and therefore commands the ſheriff to admeaſure and apportion it; that the defendant may not have more than belongs to him, and that the plaintiff may have his rightful ſhare. And upon this ſuit all the commoners ſhall be admeaſured, as well thoſe who have not, as thoſe who have, ſurcharged the common; as well the plaintiff, as the defendant [l]. The execution of this writ muſt be by a jury of twelve men, who are upon their

[h] See book II. ch. 3.
[i] 1 Roll. Abr. 399.
[j] Freem. 273.
[k] 2 Inſt. 369. Finch, L. 314.
[l] F. N. B. 125.

oaths

oaths to aſcertain, under the ſuperintendence of the ſheriff, what and how many cattle each commoner is entitled to feed. And the rule for this admeaſurement is generally underſtood to be, that the commoner ſhall not turn more cattle upon the common, than are ſufficient to manure and ſtock the land to which his right of common is annexed; or, as our antient law expreſſed it, ſuch cattle only as are *levant* and *couchant* upon his tenement [m] (1): 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. c. 8. and thereby the ſheriff is directed to inquire by a jury, whether the defendant has in fact again ſurcharged the common contrary to the tenor of the laſt admeaſurement: and if he has, he ſhall then forfeit to the king the ſupernumerary cattle put in, and alſo ſhall pay damages to the plaintiff [p]. This proceſs ſeems highly equitable: for the firſt offence is held to be committed through mere inadvertence, and therefore there are no damages or forfeiture on the firſt writ, which was only to aſcertain the right which was diſputed: but the ſecond offence is a wilful contempt and injuſtice; and therefore puniſhed very properly with not only damages, but alſo forfeiture. And herein the right, being once ſettled, is never again diſputed; but only the fact is tried, whether there be any ſecond ſurcharge or no: which gives this neglected pro-

[m] Bro. *Abr. t. preſcription.* 28.
[n] Hardr. 117.
[o] Lord Raym. 407.
[p] F. N. B. 126. 2 Inſt. 370.

(1) And agreeably to this rule it has been decided, that a claim of a right of common for all commonable cattle, *levant* and *couchant*, in right of a meſſuage, to which no land is appurtenant, cannot be ſupported. 5 *T. R.* 46.

ceeding

ceeding 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.

[240] THERE is yet another diſturbance of common, when the 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 rabbets 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 rabbets, 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 aſſize of *novel diſſeiſin*, againſt the lord, to recover the poſſeſſion of his common [s]. Or it has given a writ of *quod permittat*, againſt any ſtranger, as well as the owner of the land, in caſe of ſuch a diſturbance to the plaintiff as amounts to a total deprivation of his common; whereby the defendant ſhall be compelled to permit the plaintiff to enjoy his common as he ought [t]. But if the commoner does not 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

[q] Cro. Eliz. 198.
[r] Cro. Jac. 195.
[s] F. N. B. 179.
[t] Finch. L. 275. F. N. B. 123.
[u] Cro. Jac. 195.

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(2). And this is extremely reaſonable: for it would be very hard if the lord, whoſe anceſtors granted out theſe eſtates to which the commons are appendant, ſhould be precluded from making what advantage he can of the reſt of his manor; provided ſuch advantage and improvement be no way derogatory from the former grants. The ſtatute Weſtm. 2. 13 Edw. I. c. 46. extends this liberty of approving, in like manner, againſt *all others* that have common *appurtenant*, or *in groſs*, as well as againſt the tenants of the lord, who have their common *appendant;* and farther enacts, that no aſſiſe of *novel diſſeiſin*, for common, ſhall lie againſt a lord for erecting on the common any windmill, ſheephouſe, or other neceſſary buildings therein ſpecified: which, ſir Edward Coke ſays[w], are only put as examples; and that any other neceſſary improvements may be made by the lord, though in reality they abridge the common, and make it leſs ſufficient for the commoners. And laſtly by ſtatute 29 Geo. II. c. 36. and 31 Geo. II. c. 41. it is particularly enacted, that any lords of waſtes and commons, with the conſent of the major part, in number and value, of the commoners, may encloſe any part thereof, for the growth of timber and underwood.

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 or way, or at leaſt not in ſo commodious a manner as he might have done. If this be a

[w] 2 Inſt. 476.

(2) See 2 vol. p. 34. n. 14.

way

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 tene-
[242] ments,) or if the obſtruction of a way belonging to an houſe or land is made by a ſtranger, it is then in either caſe merely a diſturbance: for the obſtruction of a way in groſs is no detriment to any lands or tenements, and therefore does not fall under the legal notion of a nuſance, which muſt be laid, *ad 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 and circumvention, or other means, contrives to drive him away, or inveigle him to leave his tenancy, this the law very juſtly conſtrues to be a wrong and injury to the lord [a], and gives him a reparation in damages againſt the offender by a ſpecial action on the caſe.

V. THE fifth and laſt ſpecies of diſturbance, but by far the moſt conſiderable, is that of diſturbance of *patronage*;

[x] ch. 13. p. 218.
[y] F. N. B. 183.
[z] Hale on F. N. B. 183. Lutw. 111. 119.
[a] Hal. Anal. c. 40. 1 Roll. Abr. 108.

which is an hindrance or obſtruction of a patron to preſent his clerk to a benefice.

THIS injury was diſtinguiſhed at common law from another ſpecies of injury, called *uſurpation;* which is an abſolute ouſter or diſpoſſeſſion of the patron, and happens when a ſtranger, that hath no right, preſenteth a clerk, and he is thereupon admitted and inſtituted [b]. In which caſe, of uſurpation, the [243] 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. And the patron alſo loſt the inheritance of his advowſon, unleſs he recovered it in a writ of right, becauſe by ſuch uſurpation he was put out of poſſeſſion of his advowſon, as much as when by actual entry and ouſter he is diſſeiſed of lands or houſes; ſince the only poſſeſſion, of which an advowſon is capable, is by actual preſentation and admiſſion of one's clerk. As therefore, when the clerk was once inſtituted (except in the caſe of the king, where he muſt alſo be inducted [d]) the church became abſolutely *full;* ſo the uſurper by ſuch plenarty, ariſing from his own preſentation, became in fact *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 fullneſs of the church; and when it became void afreſh, he could not then preſent, ſince another had the right of poſſeſſion. The only remedy therefore, which the patron had left, was to try the mere right in a writ of *right of advowſon;* which is a peculiar writ of right, framed for this ſpecial pur-

[b] Co. Litt. 277. [c] 6 Rep. 49. [d] *Ibid.*

poſe,

poſe, but in every other reſpect correſponding with other writs of right[e]: and if a man recovered therein, he regained the poſſeſſion of his advowſon, and was entitled to preſent at the next avoidance[f]. But in order to ſuch recovery he muſt allege a preſentation in himſelf or ſome of his anceſtors: which proves him or them to have been once in poſſeſſion: for, as a grant of the advowſon, during the fullneſs of the
[244] church, conveys no manner of poſſeſſion for the preſent, therefore a purchaſor, until he hath preſented, hath no actual ſeiſin whereon to ground a wtit 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 uſurpation ſhall diſplace the eſtate or intereſt of the patron, or turn it to a mere right; but that the true patron may preſent upon the next avoidance, as if no ſuch uſurpation had happened. So that the title of uſurpation is now much narrowed, and the law ſtands upon this reaſonable foundation: that if a ſtranger uſurps my preſentation, and I do not purſue my right within ſix months, I ſhall loſe that turn without remedy, for the peace of the church, and as a puniſhment for my own negligence; but that turn is the only one I ſhall loſe thereby. Uſurpation now gains no right to the uſurper, with regard to any future avoidance, but only to the preſent vacancy: it

[e] F. N. B. 30. [f] *Ibid.* 36. [g] 2 Inſt. 357.

cannot

cannot indeed be remedied after ſix months are paſt; but, during thoſe ſix months, it is only a ſpecies of diſturbance.

DISTURBERS of a right of advowſon may therefore be theſe three perſons; the pſeudo-patron, his clerk, and the ordinary: the pretended patron, by preſenting to a church to which he has no right, and thereby making it litigious or diſputable; the clerk, by demanding or obtaining inſtitution, which tends to and promotes the ſame inconvenience; and [245] the ordinary, by refuſing to admit the real patron's clerk, or admitting the clerk of the pretender. Theſe diſturbances are vexatious and injurious to him who hath the right: and therefore, if he be not wanting to himſelf, the law (beſides the writ of *right of advowſon*, which is a final and concluſive remedy) hath given him two inferior poſſeſſory actions for his relief; an aſſiſe of *darrein preſentment*, and a writ of *quare impedit*; in which the patron is always the plaintiff, and not the clerk. For the law ſuppoſes the injury to be offered to him only, by obſtructing or refuſing the admiſſion of his nominee; and not to the clerk, who hath no right in him till inſtitution, and of courſe can ſuffer no injury.

1. AN aſſiſe of *darrein preſentment*, or laſt preſentation, lies when a man, or his anceſtors, under whom he claims, have preſented a clerk to a benefice, who is inſtituted; and afterwards upon the next avoidance a ſtranger preſents a clerk, and thereby diſturbs him that is the real patron. In which caſe the patron ſhall have this writ[h] directed to the ſheriff to ſummon an aſſiſe or jury, to inquire who was the laſt patron that preſented to the church now vacant, of which the plaintiff complains that he is deforced by the defendant: and, according as the aſſiſe determines that queſtion, a writ ſhall iſſue to the biſhop; to inſtitute the clerk of that patron, in whoſe favour the determination is made, and alſo to give damages, in purſuance of ſtatute Weſtm. 2. 13 Edw. I. c. 5. This queſtion, it is to be obſerved, was, before the ſtatute

[h] F. N. B. 31.

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
[246] 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].

2. I PROCEED therefore, ſecondly, to inquire into the nature [k] of a writ of *quare impedit*, now the only action uſed in caſe of the diſturbance of patronage: and ſhall firſt premiſe the uſual proceedings previous to the bringing of the writ.

UPON the vacancy of a living the patron, we know, is bound to preſent within ſix calendar months [l], otherwiſe it will lapſe to the biſhop. But if the preſentation be made within that time, the biſhop is bound to admit and inſtitute the clerk, if found ſufficient [m]; unleſs the church be full, or there be notice of any litigation. For if any oppoſition be intended, it is uſual for each party to enter a *caveat* with the biſhop, to prevent his inſtitution of his antagoniſt's clerk. An inſtitution after a *caveat* entered is 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,

[i] 2 Inſt. 355.
[k] See Boſwell's caſe, 6 Rep. 48.
[l] See book II. ch. 18.
[m] See book I. ch. 11.
[n] 1 Burn. 207.
[o] 1 Roll. Rep. 191.

the

the church is then ſaid to become *litigious;* and, if nothing farther be done, the biſhop may ſuſpend the admiſſion of either, and ſuffer a lapſe to incur. Yet if the patron or clerk on either ſide requeſt him to award a *jus patronatus*, he is bound to do it. A *jus patronatus* is a commiſſion from the biſhop, directed uſually to his chancellor and others of competent learning: who are to ſummon a jury of ſix clergymen and ſix laymen, to inquire into and examine who is the rightful patron[p]; and if, upon ſuch inquiry made and certificate thereof returned by 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. [247]

THE clerk refuſed by the biſhop may alſo have a remedy againſt him in the ſpiritual court, denominated a *duplex querela*[q]: which is a complaint in the nature of an appeal from the ordinary to his next immediate ſuperior; as from a biſhop to the archbiſhop, or from an archbiſhop to the delegates: and if the ſuperior court adjudges the cauſe of refuſal to be inſufficient, it will grant inſtitution to the appellant.

THUS far matters *may* go on in the mere eccleſiaſtical courſe; but in conteſted preſentations they ſeldom go ſo far: for, upon the firſt delay or refuſal of the biſhop to admit his clerk, the patron uſually brings his writ of *quare impedit* againſt the biſhop, for the temporal injury done to his property, in diſturbing him in his preſentation. And, if the delay ariſes from the biſhop alone, as upon pretence of incapacity, or the like, then he only is named in the writ; but if there be another preſentation ſet up, then the pretended patron and his clerk are alſo joined in the action; or it may be brought againſt the patron and clerk, leaving out the biſhop; or againſt the patron only. But it is moſt adviſeable to bring it againſt all three: for if the biſhop be left out, and

[p] 1 Burn 16, 17. [q] *Ibid.* 113.

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
[248] clerk be left out, and has received inſtitution before the action brought (as is ſometimes the caſe), the patron by this ſuit may recover his right of patronage, but not the preſent turn; for he cannot have judgment to remove the clerk, unleſs he be made a defendant, and party to the ſuit, to hear what he can allege againſt it. For which reaſon it is the ſafer way to inſert all three in the writ.

THE writ of *quare impedit*[u] commands the diſturbers, the biſhop, the pſeudo-patron, and his clerk, to permit the plaintiff to preſent a proper perſon (without ſpecifying the particular clerk) to ſuch a vacant church, which pertains to his patronage; and which the defendants, as he alleges, do obſtruct; and unleſs they ſo do, then that they appear in court to ſhew the reaſon why they hinder him.

IMMEDIATELY on the ſuing out of the *quare impedit*, if the plaintiff ſuſpects that the biſhop will admit the defendant's or any other clerk, pending the ſuit, he may have a prohibitory writ, called a *ne admittas*[w]; which recites the contention begun in the king's courts, and forbids the biſhop to admit any clerk whatſoever till ſuch contention be determined. And if the biſhop doth, after the receipt of this writ, admit any perſon, even though the patron's right may have been found in a *jure patronatus*, then the plaintiff, after he has obtained judgment in the *quare impedit*, may remove the incumbent, if the clerk of a ſtranger, by writ of *ſcire facias*[x]: and ſhall have a ſpecial action againſt the biſhop,

[r] Cro. Jac. 93.
[s] Hob. 316.
[t] 7 Rep. 25.
[u] F. N. B. 32.
[w] *Ibid.* 37.
[x] 2 Sid. 94.

called

called a *quare incumbravit*, to recover the preſentation, and alſo ſatisfaction in damages for the injury done him by incumbering the church with a clerk, pending the ſuit, and after the *ne admittas* received [y]. But if the biſhop has incumbered the church by inſtituting the clerk, before the *ne admittas* iſſued, no *quare incumbravit* lies; for the biſhop hath no legal notice, till the writ of *ne admittas* is ſerved upon him. The patron is therefore left to his *quare impedit* mere- [249] ly; which, as was before obſerved, now lies (ſince the ſtatute of Weſtm. 2.) as well upon a recent uſurpation within ſix months paſt, as upon a diſturbance without any uſurpation had.

IN the proceedings upon a *quare impedit*, the plaintiff muſt ſet out his title at length, and prove at leaſt one preſentation in himſelf, his anceſtors, or thoſe under whom he claims; for he muſt recover by the ſtrength of his own right, and not by the weakneſs of the defendant's [z]: and he muſt alſo ſhew a diſturbance before the action brought [a]. Upon this the biſhop and the clerk uſually diſclaim all title: ſave only, the one as ordinary, to admit and inſtitute; and the other as preſentee of the patron, who is left to defend his own right. And, upon failure of the plaintiff in making out his own title, the defendant is put upon the proof of his, in order to obtain judgment for himſelf, if needful. But if the right be found for the plaintiff, on the trial, three farther points are alſo to be inquired: 1. If the church be full; and, if full, then of whoſe preſentation: for if it be of the defendant's preſentation, then the clerk is removeable by writ brought in due time. 2. Of what value the living is: and this in order to aſſeſs the damages which are directed to be given by the ſtatute of Weſtm. 2. 3. In caſe of plenarty upon an uſurpation, whether ſix calendar [b] months have paſſed between the avoidance and the time of bringing the action: for then it would not be within the ſtatute, which permits an uſurpation to be deveſted by a *quare impedit*, brought *infra*

[y] F. N. B. 48.
[z] Vaugh 7, 8.
[a] Hob. 199.
[b] 2 Inſt. 361.

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 judg-
[250] ment to recover the preſentation; and, if the church be full by inſtitution of any clerk, to remove him: unleſs it were filled *pendente lite* by lapſe to the ordinary, he not being party to the ſuit; in which caſe the plaintiff loſes his preſentation *pro hac vice*, but ſhall recover two years' full value of the church from the defendant the pretended patron, as a ſatisfaction for the turn loſt by his diſturbance: or, in caſe of inſolvency, the defendant ſhall be impriſoned for two years [c]. But if the church remains ſtill void at the end of the ſuit, then whichever party the preſentation is found to belong to, whether plaintiff or defendant, ſhall have a writ directed to the biſhop *ad admittendum clericum* [d], reciting the judgment of the court, and ordering him to admit and inſtitute the clerk of the prevailing party; and, if upon this order he does not admit him, the patron may ſue the biſhop in a writ of *quare non admiſit* [e], and recover ample ſatisfaction in damages.

BESIDES theſe poſſeſſory actions, there may be alſo had (as hath before been 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

[c] Stat. Weſtm. 2. 13 Edw. I. c. 5. § 3.
[d] F. N. B. 38.
[e] F. N. B. 47.

right

right of advowſon, *quare impedit*, or aſſiſe of *darrein preſentment*, or *jus patronatus*. And this upon very good reaſon; becauſe it may very eaſily happen that the title to an advowſon may not come in queſtion, nor the right have opportunity to be tried, within ſixty years; which is the longeſt period of limitation aſſigned by the ſtatute of Henry VIII. For ſir Edward Coke [f] tells us, that there was a parſon of one of his churches, that had been incumbent there above fifty years; [251] nor are inſtances wanting wherein two ſucceſſive incumbents have continued for upwards of a hundred years [g]. Had therefore the laſt of theſe incumbents been the clerk of a uſurper, or had been preſented by lapſe, it would have been neceſſary and unavoidable for the patron, in caſe of a diſpute, to have recurred back above a century; in order to have ſhewn a clear title and ſeiſin by preſentation and admiſſion of the prior incumbent. But though, for theſe reaſons, a limitation is highly improper with reſpect only to the length of time; yet, as the title of advowſons 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 is one ſpecies of preſentations, in which a remedy, to be ſued in the temporal

[f] 1 Inſt. 115.

[g] Two ſucceſſive incumbents of the rectory of Chelsfield *cum* Farnborough in Kent, continued 101 years; of whom the former was admitted in 1650, the latter in 1700, and died in 1751.

[h] Stat. 3 Jac. I. c. 5. 1 W. & M. c. 26. 12 Ann. ſt. 2. c. 14. 11 Geo. II. c. 17.

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
[252] proceeding is provided; *viz.* that, beſides the writs of *quare impedit*, which the univerſities as patrons are entitled to bring, they, or their clerks, may be at liberty to file a bill in equity again any perſon preſenting to ſuch livings, and diſturbing their right of patronage, or his *ceſtuy que truſt*, or any other perſon whom they have cauſe to ſuſpect; in order to compel a diſcovery of any ſecret truſts, for the benefit of papiſts, in evaſion of thoſe laws whereby this right of advowſon is veſted in thoſe learned bodies: and alſo (by the ſtatute 11 Geo. II. c. 17.) to compel a diſcovery whether any grant or conveyance, ſaid to be made of ſuch advowſon, were made *bona fide* to a proteſtant purchaſor, for the benefit of proteſtants, and for a full conſideration; without which requiſites every ſuch grant and conveyance of any advowſon or avoidance is abſolutely null and void. This is a particular law, and calculated for a particular purpoſe: but in no inſtance but this does the common law permit the clerk himſelf to interfere in recovering a preſentation, of which he is afterwards to have the advantage. For beſides that he has (as was before obſerved) no temporal right in him till after inſtitution and induction; and as he therefore can ſuffer no wrong, is conſequently entitled to no remedy; this excluſion of the clerk from being plaintiff ſeems alſo to ariſe from the very great honour and regard which the law pays to his ſacred function. For it looks upon the cure of ſouls as too arduous and important a taſk to be eagerly ſought for by any ſerious clergyman; and therefore will not permit him to contend openly at law for a charge and truſt, which it preſumes he undertakes with diffidence.

BUT when the clerk is in full poſſeſſion of the benefice, the law gives him the ſame poſſeſſory remedies to recover his glebe, his rents, his tithes, and other eccleſiaſtical dues,

by writ of entry, 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 [253] parſon or a prebendary at common law, and for a vicar by ſtatute 14 Edw. III. c. 17. and is in the nature of an aſſiſe, to inquire whether the tenements in queſtion are frankalmoign belonging to the church of the demandant, or elſe the lay fee of the tenant [m]. And thereby the demandant may recover lands and tenements, belonging to the church, which were aliened 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.

[i] F. N. B. 49.
[k] Booth. 221.
[l] F. N. B. 48.
[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 his 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

[a] Bro. *Abr. t. petition.* 12. *t. prerogativ.* 2. [b] Book I. ch. 7. pag. 243—246.

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 it's ſubjects, though no action will lie againſt the ſovereign [d], (for who ſhall command the king [e]?) yet the law hath furniſhed the ſubject with a decent and reſpectful mode of removing that invaſion, by informing the king of the true ſtate of the matter in diſpute: and, as it preſumes that to *know of* any injury and to *redreſs* it are inſeparable in the royal breaſt, it then iſſues as of courſe in the king's own name, his orders to his judges to do juſtice to the party aggrieved.

THE diſtance between the ſovereign and his ſubjects is ſuch, that it rarely can happen that any *perſonal* injury can immediately and directly proceed from the prince to any private man: and, as it can ſo ſeldom happen, the law in decency ſuppoſes that 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 it's 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.

[c] Plowd. 487.
[d] Jenkins. 78.
[e] Finch. L. 83.
[f] on Gov. p. 2. § 205.

THE

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 it's original to king Edward the firſt [g]. 2. By *monſtrans de droit*, manifeſtation or plea of right: both of which may be preferred or proſecuted either in the chancery or exchequer [h]. The former is of uſe, where the king is in full poſſeſſion of any hereditaments or chattels, and the petitioner ſuggeſts ſuch a right as controverts the title of the crown, grounded on facts diſcloſed in the petition itſelf; in which caſe he muſt be careful to ſtate truly the whole title of the crown, otherwiſe the petition ſhall abate [i]: and then, upon this anſwer being endorſed or underwritten by the king, *ſoit droit fait al partie*, (let right be done to the party j,) a commiſſion ſhall iſſue to inquire of the truth of this ſuggeſtion [k]: after the return of which, the king's attorney is at liberty to plead in bar; and the merits ſhall be determined upon iſſue or demurrer, as in ſuits between ſubject and 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 acknowleged 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

[g] Bro *Abr. t. prerog.* 2 Fitz. *Abr. t. error.* 8.
[h] Skin. 609.
[i] Finch. L. 256.
[j] Stat. Tr. vii. 134.
[k] Skin. 608. Raſt. Entr. 461.
[l] Bro. *Abr. t. petition.* 20. 4 Rep. 58.
[m] 4 Rep. 55.

the

the remedy by *petition* was extremely tedious and expenſive, that by *monſtrans* was much enlarged and rendered almoſt univerſal by ſeveral ſtatutes, particularly 36 Edw. III. c. 13. and 2 & 3 Edw. VI. c. 8. which alſo allow inquiſitions of office to be traverſed or denied, wherever the right of a ſubject is concerned, except in a very few caſes [n]. Theſe proceedings are had in the petty bag office in the court of chancery: and, if upon either of them the right be determined againſt the crown, the judgment is, *quod manus domini regis amoveantur et poſſeſſio reſtituatur petenti, ſalvo jure domini regis* [o]; which laſt clauſe is always added to judgments againſt the king [p], to whom no *laches* is ever imputed, and whoſe right (till ſome late ſtatutes [q]) was never defeated by any limitation or length of time. And by ſuch judgment the crown is inſtantly out of poſſeſſion [r]; ſo that there needs not the indecent interpoſition of his own officers to transfer the ſeiſin from the king to the party aggrieved.

II. THE methods of redreſſing ſuch injuries as the crown may receive from the ſubject are,

1. BY ſuch uſual common law actions, as are conſiſtent with the royal prerogative and dignity. As therefore the king, by reaſon of his legal ubiquity, cannot be diſſeiſed or diſpoſſeſſed of any real property which is once veſted in him, he can maintain no action which ſuppoſes a diſpoſſeſſion of the plaintiff; ſuch as an aſſiſe or an ejectment [s]: 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 equally tedious

[n] Skin. 608.
[o] 2 Inſt. 695. Raſt. Entr. 463.
[p] Finch. L. 460.
[q] 21 Jac. I. c. 2. 9 Geo. III. c. 16.
[r] Finch. L. 459.
[s] Bro. *Abr. t. prerogative.* 89.
[t] F. N. B. 32.
[u] *Dyverſite de courtes. c. bank le roy.*
[w] Bro. *Abr. t. prerog.* 130. F. N. B. 90. Year book. 4 Hen. IV. 4.

and

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.

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.

[x] Finch. L. 323, 4, 5.

WITH

WITH regard to other matters, the inqueſts of office ſtill remain in force, and are taken upon proper occaſions; being extended not only to lands, but alſo to goods and chattels perſonal, as in the caſe of wreck, treaſure-trove, and the like; and eſpecially as to forfeitures for offences. For every jury which tries a man for treaſon or felony, every coroner's inqueſt that ſits upon *a felo de ſe*, or one killed by chance-medley, is, not only with regard to chattels, but alſo as to real intereſts, in all reſpects an inqueſt of office: and if they find the treaſon or felony, or even the flight of the party accuſed, (though innocent) the king is thereupon, by virtue of this *office found*, entitled to have his forfeitures; and alſo, in the caſe of chance-medley, he or his grantees are entitled to ſuch things by way of deodand, as have moved to the death of the party.

THESE inqueſts of office were deviſed by law, as an authentic means to give the king his right by ſolemn matter of record; without which he in general can neither take, nor part from any thing[y]. For it is a part of the liberties of England, and greatly for the ſafety of the ſubject, that the king may not enter upon or ſeize any man's poſſeſſions upon bare ſurmiſes without the intervention of a jury[z]. It is however particularly enacted by the ſtatute 33 Hen. VIII. c. 20. that, in caſe of attainder for high treaſon, the king ſhall have the forfeiture inſtantly without any inquiſition of office. And, as the king hath (in general) no title at all to any property of this ſort before office found, therefore by the ſtatute 18 Hen. VI. c. 6. it was enacted, that all letters patent or grants of lands and tenements before office found, or returned into the exchequer, ſhall be void. And, by the bill of rights at the revolution, 1 W. & 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].

[y] Finch. L. 82.
[z] Gilb. hiſt. exch. 132. Hob. 347.
[a] 2 Inſt. 48.

WITH

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
[261] 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

[b] Finch. L. 325, 326.
[c] 28 Edw. I. ſt. 3. c. 19.
[d] 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*. 201, 202.
[g] See book II. ch. 21.
[h] Dyer. 198.
[i] 3 Lev. 220. 4 Inſt. 88.

of

of the king, in order to reſume the thing granted; or, if the grant be injurious to a ſubject, the king is bound of right to permit him (upon his petition) to uſe his royal name for repealing the patent in a *ſcire facias*[k]. And ſo alſo, if, upon office untruly found for the king, he grants the land over to another, he who is grieved thereby, and traverſes the office itſelf, is entitled before iſſue joined to a *ſcire facias* againſt the patentee, in order to avoid the grant[l].

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 eſtabliſhment and ſupport of the revenue: others, which regard mere mat- [262]
ters of police and public convenience, being uſually left to be inforced by common informers, in the *qui tam* informa-

[k] 2 Ventr. 344.
[l] Bro. *Abr. t. ſcire facias.* 69. 185.
[m] Moor. 375.
[n] Cro. Jac 212. 1 Leon. 48. Savil. 49.

tions

tions 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 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.

5. A WRIT of *quo warranto* is in the nature of a writ of right for the king, againſt him who claims or uſurps any office, franchiſe, or liberty, to inquire by what authority he ſupports his claim, in order to determine the right [r]. It lies alſo in caſe of non-uſer or long neglect of a franchiſe, or miſ-uſer or abuſe of it; being a writ commanding the defendant to ſhew by what warrant he exerciſes ſuch a franchiſe, having never had any grant of it, or having forfeited it by neglect or abuſe. This was originally returnable before the king's juſtice at Weſtminſter [s]; but afterwards only
[263] 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 aſſize, the judges on the ſeveral circuits, this

[o] See pag. 162.
[p] Hard. 201.
[q] Gilb. hiſt. of exch. ch. 13.
[r] Finch. L. 322. 2 Inſt. 282.
[s] Old *Nat. Brev. fol* 107. *edit* 1534.
[t] 2 Inſt. 498. Raſt. Entr. 540.

branch

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 of thoſe bodies were perſuaded to ſurrender their charters, and [264]
informations in the nature of *quo warranto* were brought againſt others, upon a ſuppoſed, or frequently a real, forfeiture of their franchiſes by neglect or abuſe of them. And the conſequence was, that the liberties of moſt of them were

[u] 2 Inſt. 498.
[w] Cro. Jac. 259. 1 Show. 280.
[x] 1 Sidd. 86. 2 Show. 47. 12 Mod. 225.

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 (1).

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(1) This ſtatute, with regard to coſts, extends only to caſes where the title of a perſon to be a corporate officer, as mayor, bailiff, or freeman, is in queſtion; but an information to try the right of holding a court is not within it, but ſtands upon the common law only, and being a proſecution in the name of the king, no coſts are given. 1 *Burr.* 402.

The court of king's bench having a diſcretionary power of granting informations in the nature of *quo warranto*, had long ago eſtabliſhed a general rule to guide their diſcretion, *viz.* not to allow in any caſe an information in the nature of *quo warranto* againſt a perſon

6. THE writ of *mandamus* [y] is alſo made by the ſame ſtatute 9 Ann. c. 20. a moſt full and effectual remedy, in the firſt place, for refuſal of admiſſion where a perſon is entitled to an office or place in any ſuch corporation; and, ſecondly, for wrongful removal, when a perſon is legally poſſeſſed. Theſe are injuries, for which though redreſs for the party in- [265]
tereſted may be had by aſſiſe, or other means, yet as the franchiſes concern the public, and may affect the adminiſtration of juſtice, this prerogative writ alſo iſſues from the court of king's bench; commanding, upon good cauſe ſhewn to the court, the party complaining to be admitted or reſtored to his office. And the ſtatute requires, that a return be immediately made to the firſt writ of *mandamus*; which return may be pleaded to or traverſed by the proſecutor, and his antagoniſt may reply, take iſſue, or demur, and the ſame proceedings may be had, as if an action on the caſe had been brought, for making a falſe return: and, after judgment obtained for the proſecutor, he ſhall have a peremptory writ of *mandamus* to compel his admiſſion or reſtitution; which latter (in caſe of an action) is effected by a writ of reſtitution [z].

[y] See pag. 110. [z] 11 Rep. 79.

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perſon who had been twenty-years in the poſſeſſion of his franchiſe; but having reaſon to conſider this too extenſive a limit, they reſolved upon a new rule, *viz.* not to allow ſuch an information againſt any perſon who had been ſix years in poſſeſſion. 4 *T. R.* 284.

But the legiſlature thinking this too ſudden a change in the practice of the court, and becauſe it did not extend to informations filed by the attorney-general, enacted by 32 Geo. III. c. 58. that to any information in the nature of *quo warranto*, for the exerciſe of any corporate office or franchiſe, the defendant might plead that he had been in poſſeſſion of, or had executed, the office for ſix years or more. And that no defendant ſhould be affected by any defect in the title of the perſon from whom he derived his right and title, if that perſon had been in the undiſturbed exerciſe of his office or franchiſe ſix years previous to the filing of the information.

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.

WE have now gone through the whole circle of civil injuries, and the redreſs which the laws of England have anxiouſly provided for each. In which the ſtudent cannot but obſerve that the main difficulty which attends their diſcuſſion ariſes from their great variety, which is apt at our firſt acquaintance to breed a confuſion of ideas, and a kind of diſtraction in the memory: a difficulty not a little increaſed
[266] 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

[a] Stat. 12 Geo. III. c. 21. [b] 1 P. Wms. 351.

excellence

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 [267] drawn into queſtion in mixed or perſonal ſuits, we are (it muſt be owned) obliged to have recourſe to ſuch arbitrary fictions and expedients, that unleſs we had developed their principles, and traced out their progreſs and hiſtory, our preſent ſyſtem of remedial juriſprudence (in reſpect of landed property) would appear the moſt intricate and unnatural that ever was adopted by a free and enlightened people.

BUT this intricacy of our legal proceſs will be found, when attentively conſidered, to be one of thoſe troubleſome, but not dangerous, evils, which have their root in the frame of our conſtitution, and which therefore can never be cured, without hazarding every thing that is dear to us. In abſolute governments, when new arrangements of property and

a gradual change of manners have deſtroyed the original ideas, on which the laws were deviſed and eſtabliſhed, the prince by his edict may promulge a new code, more ſuited to the preſent emergencies. But when laws are to be framed by popular aſſemblies, even of the repreſentative kind, it is too Herculean a taſk to begin the work of legiſlation afreſh, and extract a new ſyſtem from the diſcordant opinions of more than five hundred counſellors. A ſingle legiſlator or an 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 it's 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
[268] more ſimple and commercial mode of property which ſucceeded the former, and required a more ſpeedy deciſion of right, to facilitate exchange and alienation. Yet they wiſely avoided ſoliciting any great legiſlative revolution in the old eſtabliſhed forms, which might have been productive of conſequences more numerous and extenſive than the moſt penetrating genius could foreſee; but left them as they were, to languiſh in obſcurity and oblivion, and endeavoured by a ſeries of minute contrivances to accommodate ſuch perſonal actions, as were then in uſe, to all the moſt uſeful purpoſes of remedial juſtice: and where, through the dread of innovation, they heſitated at going ſo far as perhaps their good ſenſe would have prompted them, they left an opening for the more liberal and enterprizing judges, who have ſate in

our

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 has well obſerved[z], "whoever conſiders how great a [269] "coherence there is between the ſeveral parts of the law, "and how much the reaſon of one caſe opens and depends "upon that of another, will I preſume be far from thinking "any of the old learning uſeleſs, which will ſo much con-"duce 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.

[z] Hawk. Abr. Co. Litt. pref.

CHAPTER THE EIGHTEENTH.

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

HAVING, under the head of *redreſs by ſuits in courts*, pointed out in the preceding pages, in the firſt place, the *nature* and ſeveral *ſpecies* of courts of juſtice, wherein remedies are adminiſtered for all ſorts of private wrongs; and, in the ſecond place, ſhewn to which of theſe courts in particular application muſt be made for redreſs, according to the diſtinction of injuries, or, in other words, what wrongs are *cognizable* by one court, and what by another; I proceeded, under the title of *injuries cognizable by the courts of common law*, to define and explain the ſpecifical remedies by action provided for every poſſible degree of wrong or injury; as well ſuch remedies as are dormant and out of uſe, as thoſe which are in every day's practice, apprehending that the reaſon of the one could never be clearly comprehended, without ſome acquaintance with the other: and, I am now, in the laſt place, to examine the *manner* in which theſe ſeveral remedies are *purſued* and applied, by action in the courts of common law; to which I ſhall afterwards ſubjoin a brief account of the proceedings in courts of equity.

IN treating of remedies by action at common law, I ſhall confine myſelf to the *modern* method of practice in our courts of judicature. For, though I thought it neceſſary to throw out a few obſervations on the nature of real actions, however

ever 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

[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 cautious 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 a 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

ſhall at the ſame time give a general account of the proceedings of the other two courts; taking notice, however, of any conſiderable difference in the local practice of each. And the ſame abſtract will moreover afford us ſome general idea of the conduct of a cauſe in the inferior courts of common law, thoſe in cities and boroughs, or in the court-baron, or hundred, or county court: all which conform (as near as may be) to the example of the ſuperior tribunals, to which their cauſes may probably be, in ſome ſtage or other, removed.

THE moſt natural and perſpicuous way of conſidering the ſubject before us will be (I apprehend) to purſue it in the order and method wherein the proceedings themſelves follow each other; rather than to diſtract and ſubdivide it by any more logical analyſis. The general therefore and orderly parts of a ſuit are theſe; 1. The original writ: 2. The proceſs: 3. The pleadings: 4. The iſſue or demurrer: 5. The trial: 6. The judgment, and 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 et armis*; or to try the title of lands,

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.

a *writ*

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 juſticiae*, the ſhop or mint of juſtice, wherein all the king's writs are framed. It is a mandatory letter from the king in parchment, ſealed with his great ſeal [b], and directed to the ſheriff of the county wherein the injury is committed or ſuppoſed ſo to be, requiring him to command the wrongdoer or party accuſed, either to do juſtice to the complainant, or elſe to appear in court, and anſwer the accuſation againſt him. Whatever the ſheriff does in purſuance of this writ, he muſt *return* or certify to the court of common pleas, together with the writ itſelf: which is the foundation of the juriſdiction of that court, being the king's warrant for the judges to proceed to the determination of the cauſe. For it was a maxim introduced by the Normans, that there ſhould be no 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.*"

[b] Finch. L. 237.
[c] Flet. *l.* 2. *c.* 34.
[d] Mirr. c. 2. § 3.

ORIGINAL

ORIGINAL writs are either *optional or peremptory*: or, in 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 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 immediately 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 Weſt-"minſter," 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

[e] Finch. L. 257.
[f] Append. No. III. § 2.
[g] Append. No. II. § 1.

the

the plaintiff, who in caſe he brought an action without cauſe, or failed in the proſecution of it when brought, was liable to an amercement from the crown for raiſing a falſe accuſation; and ſo the form of the judgment ſtill is[h]: In like manner, as by the Gothic conſtitutions no perſon was permitted to lay a complaint againſt *another*, "*niſi ſub ſcriptura aut ſpecificatione trium teſtium, quod actionem vellet perſequi*[i]; and, as by the laws of Sancho I. king of Portugal, damages were given againſt a plaintiff who proſecuted a groundleſs action[k].

THE day, on which the defendant is ordered to appear in court, and on which the ſheriff is to bring in the writ and report how far he has obeyed it, is called the *return* of the writ; it being then returned by him to the king's juſtices at Weſtminſter. And it is always made returnable at the diſtance of at leaſt fifteen days from the date or *teſte*, that the defendant may have time to come up to Weſtminſter, even from the most remote parts of the kingdom; and upon ſome day in one of the four *terms*, in which the court ſits for the diſpatch of buſineſs.

THESE terms are ſupposed by Mr. Seldon[l] to have been inſtituted by William the conqueror: but ſir Henry Spelman hath clearly and learnedly ſhewn, that they were gradually formed from the canonical conſtitutions of the church; being indeed no other than thoſe leiſure ſeaſons of the year, which were not occupied by the great feſtivals or faſts, or which were not liable to the general avocations of rural buſineſs. 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

[h] Finch. L. 189. 252.
[i] Stiern. *de jure Gothor. l.* 3. *c.* 7.
[k] Mod. Un. Hiſt. xxii. 45.
[l] *Jan. Angl. l.* 2. § 9.

length

length the church interpoſed and exempted certain holy ſeaſons from being profaned by the tumult of forenſic litigations. As, particularly, the time of advent and chriſtmas, which gave riſe to the winter vacation; the time of lent and eaſter, which created that in the ſpring; the time of pentecoſt, which produced the third; and the long vacation, between midſummer and michaelmas, which was allowed for the hay time and harveſt. All ſundays alſo, and ſome particular feſtivals, as the days of the purification, aſcenſion, and ſome others, were included in the ſame prohibition: which was eſtabliſhed by a canon of the church, *A. D.* 517. and was fortified by an imperial conſtitution of the younger Theodoſius, comprized in the Theodoſian code [m].

AFTERWARDS, when our own legal conſtitution came to be ſettled, the commencement and duration of our law terms were appointed with an eye to thoſe canonical prohibitions; and it was ordered by the laws of king Edward the confeſſor [n], that from advent to the octave of the epiphany, from *ſeptuageſima* to the octave of eaſter, from the aſcenſion to the octave of pentecoſt, and from three in the afternoon of all ſaturdays till monday morning, the peace of God and 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 in Rymer's *fœdera* [r]) that aſſiſes and juries might be taken in ſome of

[m] Spelman of the terms.
[n] c. 3. *de temporibus et diebus pacis.*
[o] c. 3. § 8.
[p] c. 53.
[q] See pag. 59.
[r] *temp. Hen. III. paſſim.*

theſe

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. 3. 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, or 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 there-

[s] c. 5. § 108.
[t] Regiſtr. 19. Salk. 627. 6 Mod. 250.
[u] 1 Jon. 156. Swann & Broome. *B. R. Mich. 5 Geo. III. et in Dom. Proc. 1766.*

fore or firſt day of Hilary term is the twentieth of January. And thereon the court ſits to take *eſſoigns*, or excuſes for ſuch
[278] as do not appear according to the ſummons of the writ: wherefore this is uſually called the *eſſoign day* of the term. But on every return-day in the term, the perſon ſummoned has three days of grace, beyond the day named in the writ, in which to make his appearance; and if he appears on the fourth day incluſive, *quarto die poſt*, it is ſufficient. For our ſturdy anceſtors held it beneath the condition of a freeman to appear, or to do any other act, at the preciſe time appointed. The feodal law therefore always allowed three diſtinct days of citation, before the defendant was adjudged contumacious for not appearing [v]: preſerving in this reſpect the German cuſtom, of which Tacitus thus ſpeaks [w], "*illud ex libertate* "*vitium quod non ſimul nec juſſi conveniunt; ſed et alter et* "tertius *dies cunctatione coëuntium abſumitur.*" And a ſimilar indulgence prevailed in the Gothic conſtitution: "*illud enim* "*nimiae libertatis indicium, conceſſa toties impunitas non pa-* "*rendi; 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 (1); and in Trinity term, by ſtatute 32 Hen. VIII. c. 21. not till the *fifth* day, the *fourth*

v *Feud. l.* 2. *t.* 22.
w *de mor. Ger. c.* 11.
x Stiern. *de jure Goth. l.* 1. *c.* 6.
y See 1 Bulſt. 35.

(1) Michaelmas term always begins on the 6th of November, and ends on the 28th of the ſame month; Hilary term always begins on the 23d of January, and ends on the 12th of February; unleſs any of theſe four days falls on a ſunday, then the term begins or ends on the day following. Eaſter term begins always on the wedneſday fortnight after Eaſter ſunday, and ends on the monday three weeks afterwards. Trinity term begins always on the friday after Trinity ſunday, and ends on the wedneſday fortnight after it begins. 1 *Cromp. Prac.* 1.

happening on the great popiſh feſtival of *Corpus Chriſti* [z]; which days are therefore 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.

[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.)

CHAPTER THE NINETEENTH.

OF PROCESS.

THE next ſtep for carrying on the ſuit, after ſuing out the original, is called the *proceſs*; being the means of compelling the defendant to appear in court. This is ſometimes called *original* proceſs, being founded upon the original writ; and alſo to diſtinguiſh it from *meſne* or intermediate proceſs, which iſſues, pending the ſuit, upon ſome collateral interlocutory matter; as to ſummon juries, witneſſes, and the like[a]. *Meſne* proceſs is alſo ſometimes put in contradiſtinction to *final* proceſs, or proceſs *of execution*; and then it ſignifies all ſuch proceſs as intervenes between the beginning and end of a ſuit.

BUT proceſs, as we are now to conſider it, is the method taken by the law to compel a compliance with the original writ, of which the primary ſtep is by giving the party notice to obey it. This notice is given upon all real *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 among the northern nations is called the *baculus*

[a] Finch. L. 436.
[b] *Ibid.* 344.
[c] *Ff.* 2. 4. 1.
[d] Dalt. of ſher. c. 31.

nuncia-

nunciatorius[e];) and by ſtatute 31 Eliz. c. 3. the notice muſt alſo be proclaimed on ſome ſunday before the door of the pariſh church.

IF the defendant diſobeys this verbal monition, the next proceſs is by writ of attachment, or *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

[e] Stiernh. *de jure Sueon. l.* 1. *c.* 6.
[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.

manner by the civil law, if the defendant abſconds, ſo that the citation is of no effect, "*mittitur adverſarius in poſſeſſio-*"*nem bonorum ejus*[n]."

AND here by the common, as well as the civil, law the proceſs ended in caſe of injuries without force: the defendant, if he had any ſubſtance, being gradually ſtripped of it all by repeated diſtreſſes, till he rendered obedience to the king's writ; and, if he had no ſubſtance, the law held him incapable of making ſatisfaction, and therefore looked upon all farther proceſs as nugatory. And beſides, upon 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 than neceſſity, and for ſaving ſome trouble and expenſe, in ſuing out a ſpecial original

[n] *Ff.* 2. 4. 19. [o] 3 Rep. 12.

adapted

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.

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 orderly method of proceſs. But it is now uſual in practice, to ſue out the *capias* in the firſt inſtance, upon a ſuppoſed return of the ſheriff; eſpecially if it be ſuſpected that the defendant, upon notice of the action, will abſcond: and afterwards a fictitious original is drawn up, if the party is called upon ſo to do, with a proper return thereupon, in order to give the proceedings a colour of regularity. When this *capias* is delivered to the ſheriff, he by his under-ſheriff grants a warrant to his inferior officers, or bailiffs to execute it on the defendant. And, if the ſheriff of Oxfordſhire (in which county the injury is ſuppoſed to be

[p] Append. N° III. § 2.

committed and the action is laid) cannot find the defendant
[283] 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, "*praecipimus*." And, if a *non eſt inventus* is returned upon all of them, then a writ of *exigent* or *exigi facias* may be ſued out[s], which requires the ſheriff to cauſe the defendant to be proclaimed, required or exacted, in five county courts ſucceſſively, to render himſelf; and if he does, then to take him, as in a *capias*: but if he does not appear, and is returned *quinto exactus*, he ſhall then be outlawed by the coroners of the county. Alſo by ſtatutes 6 Hen. VIII. c. 4. and 31 Eliz. c. 3. whether the defendant dwells within the ſame

[q] Append. N° III. § 2. [r] *Ibid.* [s] *Ibid.*

or

or another county than that wherein the *exigent* is ſued out, a *writ of proclamation*[s] ſhall iſſue out at the ſame time with [284] the *exigent*, commanding the ſheriff of the county, wherein the defendant dwells, to make three proclamations thereof in places the moſt notorious, and moſt likely to come to his knowlege, a month before the outlawry ſhall take place. Such *outlawry* is putting a man out of the protection of the law, ſo that he is incapable to bring an action for redreſs of injuries; and it is alſo attended with a forfeiture of all one's goods and chattels to the king. And therefore, till ſome time after the conqueſt, no man could be outlawed but for felony; but in Bracton's time, and ſomewhat earlier, proceſs of outlawry was ordained to lie in all actions for treſpaſſes *vi et armis*[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]; returnable, not at Weſtminſter, where the common pleas are

[s] Append. N° III. § 2.
[t] Co. Litt. 128.
[v] 1 Sid. 159.
[u] Append. N° III. § 2.
[w] 2 Roll. Rep. 490. *Regul.* C. B. A. D. 1654. c. 13.
[x] Cro. Jac. 616. Salk. 496.
[y] Append. N° II. § 1.

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 its fundamental conſtitution, power to determine all offences and treſpaſſes, by the common law and cuſtom of the realm[a], it needed no original writ from the crown to give it cognizance of any 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]) is a kind of *capias*, directed to the ſheriff of that county, and commanding him to take the defendant, and have him before our lord the king at Weſtminſter on a day prefixed, to anſwer to the plaintiff of a plea of treſpaſs. For this accuſation of treſpaſs it is that gives the court of king's bench juriſdiction in other civil cauſes, as was formerly obſerved; ſince, when once the defendant is taken into cuſtody of the marſhal, or priſon-keeper of this court, for the ſuppoſed treſpaſs, he, being then a priſoner of this court, may here be proſecuted for any other ſpecies of injury. Yet, in order to found this juriſdiction, it is not neceſſary that the defendant be actually the marſhal's priſoner; for, as ſoon as he appears, or puts

[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 and determiner*, 8.

[b] Bro. *Abr. t. juriſdiction*, 66. 3 Inſt. 27.

[c] Append. No III. § 3.

[d] Trye's *Jus Filizar*, 98.

in

in bail, to the proceſs, he is deemed by ſo doing to be in ſuch cuſtody of the marſhal, as will give the court a juriſdiction to proceed[e]. And upon theſe accounts, in the bill or proceſs a complaint of treſpaſs is always ſuggeſted, whatever elſe [286] 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

[e] 4 Inſt. 72. [f] Append. No III. § 3. [g] *Ibid.* § 4.

of

of king's bench and exchequer to hold plea in cauſes between ſubject and ſubject, which by the original conſtitution of Weſtminſter-hall they were not empowered to do. Afterwards, when the cauſe is once drawn into the reſpective courts, the method of purſuing it is pretty much the ſame in all of them.

[287] IF the ſheriff has found the defendant upon any of the former writs, the *capias*, *latitat*, &c. he was 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 (1), the plaintiff may

(1) In all caſes where the defendant is ſerved with a copy of the proceſs, he has eight days to file common bail in the king's bench, or to enter a common appearance in the common pleas, excluſive of the return day; and if the laſt of the eight days be a ſunday, he has all the next day. 1 *Cromp. Prac.* 48. 1 *Burr.* 56.

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(2), then he may arreſt the defendant, and make him put in ſubſtantial ſureties for his appearance, called *ſpecial bail*. In order to which, it is required by ſtatute 13 Car. II. ſt. 2. c. 2. that the true cauſe of action ſhould be expreſſed in the body of the writ or proceſs: elſe no ſecurity can be taken in a greater ſum than 40*l*. This ſtatute (without any ſuch intention in the makers) had like to have ouſted the king's bench of all it's juriſdiction over civil injuries without force; for, as [288] 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 authorizing the arreſt. In imitation of which, lord chief juſtice North a few years afterwards, in order to ſave the ſuitors of his court the trouble and expenſe of ſuing out ſpecial originals directed that in the common pleas, beſides the uſual complaint of breaking the plaintiff's cloſe, a clauſe of *ac etiam* might be alſo added to the writ of *capias*, containing

[f] Trye's *Jus Filizar.* 102. Append. N° III. § 3.

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(2) This affidavit muſt be certain and poſitive; for an affidavit made upon belief, or with a reference to ſomething elſe, as where the plaintiff ſwears the defendant is indebted to him in ten pounds or upwards, as appears by his books, or by a bill delivered, will not be ſufficient, unleſs the plaintiff is an executor, adminiſtrator, or aſſignee, for then, from the nature of his ſituation, he cannot ſwear more poſitively than from belief, or from a reference to the accounts of others. 1 *Sellon's Prac.* 112.

the

the true cauſe of action; as, "that the ſaid Charles the de-"fendant may anſwer to the plaintiff of a plea of treſpaſs in "breaking his cloſe: and alſo, *ac etiam*, may anſwer him, "according to the cuſtom of the court, in a certain plea of "treſpaſs upon the caſe, upon promiſes, to the value of "twenty pounds, &c.[g]" The ſum ſworn to by the plaintiff is marked upon the back of the writ; and the ſheriff, or his officer the bailiff, is then obliged actually to arreſt or take into cuſtody the body of the 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; after which the bailiff may juſtify breaking 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(3). 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 his own walls[h]. Peers of the realm, members
[289] of parliament, and corporations, are privileged from arreſts; and of courſe from outlawries[i]. And againſt them the proceſs

[g] Lilly pract. Reg. *t. ac etiam.* North's life of lord Guilford. 99.

[h] *Ff.* 2. 4. 18—21.

[i] Whitelocke of parl. 206, 207.

(3) A bailiff before he has made the arreſt cannot break open an outer door of a houſe; but if he enters the outer door peaceably, he may then break open the inner door, though it be the apartment of a lodger, if the owner himſelf occupies part of the houſe. *Cowp.* 1. But if the whole houſe be let in lodgings, as each lodging is then conſidered a dwelling houſe, in which burglary may be ſtated to have been committed, ſo in that caſe I conceive the door of each apartment would be conſidered an outer door, which could not be legally broken open to execute an arreſt. *Cowp.* 2. It is not neceſſary that the arreſt ſhould be made by the hand of the bailiff, nor that he ſhould be actually in ſight; yet where an arreſt is made by his aſſiſtant or follower, the bailiff ought to be ſo near as to be conſidered as acting in it. *Cowp.* 65.

to enforce an appearance muſt be by ſummons and diſtreſs infinite j, inſtead of a *capias*. Alſo clerks, attorneys, and all other perſons attending the courts of juſtice (for attorneys, being officers of the court, are always ſuppoſed to be there attending) are not liable to be arreſted by the ordinary proceſs of the court, but muſt be ſued by *bill* (called uſually a *bill of privilege*) as being perſonally preſent in court[k]. 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 Ric. II. c. 16, as likewiſe members of convocation actually attending thereon, by ſtatute 8 Hen. VI. c. 1. Suitors, witneſſes, and other perſons, neceſſarily attending any courts of record upon buſineſs, are not to be arreſted during their actual attendance, which includes their neceſſary coming and returning (4). And no arreſt can be made in the king's preſence, nor within the verge of his royal palace[l], nor in any place where the king's juſtices are actually ſitting. The king hath moreover

j See page 280.

k Bro. *Abr. t. bille.* 29. 12 Mod. 163.

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.

(4) The court of common pleas have laid down this general rule, viz. that all perſons who have relation to a ſuit, which call for their attendance, whether they are compelled to attend by proceſs or not, are entitled to privilege *eundo et redeundo*, provided they come *bonâ fide*. A perſon, therefore, attending the court to juſtify himſelf as an honeſt bail, is privileged. 1 *H. Bl.* 636. Barriſters arreſted upon the circuit have frequently been diſcharged by the judges. *Ibid.* The court of king's bench have refuſed to diſcharge a creditor of a bankrupt arreſted whilſt attending the commiſſioners to prove his debt; but probably he would have been diſcharged by the chancellor, from whom the commiſſioners of bankrupt immediately derive their authority. 4 *T. R.* 377. The king's ſervants are privileged from arreſt; and if they are taken in execution they are entitled to be diſcharged upon motion. 6 *T. R.* 686. Where a cauſe is referred by a rule of court, the party is protected from arreſt whilſt attending the arbitrator. 3 *Anſt.* 941.

a ſpecial

caſes (6) double) to that which the plaintiff has 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 asour 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
[292] *fidejuſſores* were there abſolutely bound, *judicatum ſolvere*, to ſee the coſts and condemnation 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] (7).

[r] Append. N° III. § 5.
[s] *Inſt. l.* 4. *t.* 11. *Ff. l.* 2. *t.* 8.
[t] Show. 202. 6 Mod. 231.

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falls on a ſunday, it may then be put in on the monday following. In any other county where the action is brought in the common pleas ſpecial bail may be put in within eight days. 1 *Cromp. Prac.* 59.

(6) If the defendant is not preſent, and does not enter into the recognizance, then the bail are bound in double the ſum ſworn to. 1 *Cromp.* 56.

(7) The bail to the ſheriff cannot take and ſurrender the defendant; for it is held, that nothing can be a performance of the condition of the bail-bond, but putting in bail above, 5 *Burr.* 2683; except the defendant voluntarily ſurrenders himſelf to the ſheriff before the return of the writ. 6 *T. R.* 753. But bail above may be

SPECIAL bail is required (as of courſe) only upon actions of debt, or actions on the caſe in trover or for money due, where the plaintiff can ſwear that the cauſe of action amounts to ten pounds: but in actions where the damages are precarious, being to be aſſeſſed *ad libitum* by a jury, as in actions for words, ejectment, or treſpaſs, it is very ſeldom poſſible for a plaintiff to ſwear to the amount of his cauſe of action; and therefore no ſpecial bail is taken thereon, unleſs by a judge's order or the particular directions of the court, in ſome peculiar ſpecies of injuries, as in caſes of mayhem or atrocious battery; or upon ſuch ſpecial circumſtances, as make it abſolutely neceſſary that the defendant ſhould be kept within the reach of juſtice. Alſo in actions againſt heirs, executors, and adminiſtrators, for debts of the deceaſed, ſpecial bail is not demandable; for the action is not ſo properly againſt them in perſon, as againſt the effects of the deceaſed in their poſſeſſion. But ſpecial bail is required even of them, in actions for a *devaſtavit*, or waſting the goods of the deceaſed; that wrong being of their own committing.

THUS much for *proceſs*; which is only meant to bring the defendant into court, in order to conteſt the ſuit, and abide the determination of the law. When he appears either in perſon as a priſoner, or out upon bail, then follow the *pleadings* between the parties, which we ſhall conſider at large in the next chapter.

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be put in without the defendant's conſent, who may the next day take up the defendant and ſurrender him in diſcharge of themſelves. The defendant is conſidered in the cuſtody of his bail, who may therefore apprehend him without any warrant, even if he is attending a court of juſtice, or is a bankrupt who has not paſſed his laſt examination. 5 *T. R.* 210. And if the defendant is in cuſtody, either in a civil action or upon a criminal charge, they may have a writ of *habeas corpus* to bring him up to the court to be ſurrendered in diſcharge of the bail. 7 *T. R.* 226. In what caſes an exoneretur may be entered upon the bail-piece, and for the proceedings upon the bail-bond, &c. ſee the various books of practice with which it is neceſſary that every ſtudent, who intends to practice the law, ſhould make himſelf familiar.

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

[a] Append. N° II. § 2. N° III. § 6. [b] See pag. 285. 288.

brought

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 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; but in *tranſitory* actions, for injuries that might have happened any where, as debt, detinue, ſlander, and the like, the plaintiff may declare in what county he pleaſes, and then the trial muſt be had in that county in which the declaration is laid. Though if the defendant will make affidavit, that the cauſe of action, if any, aroſe not in that but in another county, the court will direct a change of *the venue* or *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 (1). For the ſtatute 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, impowered 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;

[c] 2 Ventr. 259.

[d] Raſtell *t. Datte.* 184. *b. Fitz. Abr. t. Briefe.* 18. Salk. 670. Trye's *Juſ Filiz.* 231. Styl. pract. Reg. *(edit.* 1657.) 331.

(1) But if he fails to produce at the trial material evidence of the cauſe of action in the county, in which he has laid it, he muſt be nonſuited, though he might have recovered a verdict in another county. 2 *Bl. Rep.* 1031.

becauſe there the aſſiſes are holden only once a year, at the time of the ſummer circuit. And it will ſometimes remove the *venue* from the proper juriſdiction, (eſpecially of a narrow and limited kind,) upon a ſuggeſtion, duly ſupported, that a fair and impartial trial cannot be had therein [e](2).

[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 antiently underſtood the witneſſes or followers of the plaintiff[f]. For in former times the law would not put the de-

[e] Stra. 874.—Mylock v. Saladine, *Trin.* 4 *Geo. III. B. R.*

[f] Seld. on Forteſc. c. 21.

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(2) The court will not change the *venue* in an action brought upon a ſpecialty, a promiſſory note, or a bill of exchange; yet in one caſe where the action was upon a bond, and the witneſſes of both parties lived in the county to which the defendant prayed the venue might be changed, the court ordered it to be changed upon condition that the defendant ſhould bring no writ of error, and ſhould give judgment of the term preceding the trial. 1 *T. R.* 781.

fendant 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, which, as we before obſerved[h], are now mere names of form; though formerly they were of uſe to anſwer to the king for the amercement of the plaintiff, in caſe he were nonſuited, barred of his action, or had a verdict or judgment againſt him[i]. For, if the plaintiff neglects to deliver a declaration for two terms after the defendant appears, or is guilty of other delays or defaults againſt the rules of law in any ſubſequent ſtage of the action, he is adjudged *not to follow* or purſue his [296] 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

[g] Bract. 400. Flet. *l.* 2. *c.* 6.
[h] See pag. 274.
[i] 3 Bulſtr. 275. 4 Inſt. 189.

of the former writ being totally gone, and the defendant no longer bound to attend in conſequence thereof: but, to prevent the expence as well as delay attending this rule of law, the ſtatute 1 Edw. VI. c. 7. enacts, that by the death of the king no action ſhall be diſcontinued; but all proceedings ſhall ſtand good as if the ſame king had been living.

WHEN the plaintiff hath ſtated his caſe in the declaration, it is incumbent on the defendant within a reaſonable time to make his *defence*, and to put in a *plea*; elſe the plaintiff will at once recover judgment by *default*, or *nihil dicit* of the defendant.

DEFENCE, in 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
[297] and maintained in his plea. For it would be ridiculous to ſuppoſe that the defendant comes and *defends* (or, in the vulgar acceptation, juſtifies) the force and injury, in one line, and pleads that he is *not guilty* of the treſpaſs complained of, in the next. And therefore in actions of dower, where the demandant doth not count of any injury done, but merely demands her endowment [k], and in aſſiſes of land, where alſo there is no injury alleged, but merely a queſtion of right ſtated for the determination of the recognitors or jury, the tenant makes no ſuch defence [l]. In writs of entry [m], where no injury is ſtated in the count, but merely the right of the demandant and the defective title of the tenant, the tenant comes and defends or denies *his* right, *jus ſuum*; that is, (as I underſtand it, though with a ſmall grammatical inaccuracy,) the right of the demandant, the only one expreſsly mentioned in the pleadings: or elſe denies his own right to be ſuch, as is ſuggeſted by the count of the demandant. And in writs of right [n] the tenant always comes and defends the right of the demandant

[k] Raſtal. entr. 234.
[l] Booth of real actions. 118.
[m] Vol. II. Append. N° V. § 2.
[n] Append. N° I. § 5.

and

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 made, though a ſufficient plea was pleaded, the plaintiff ſhould recover judgment[r]: and therefore the book intitled *novae narrationes* or *the new talys*[s], at the end of almoſt every count, *narratio*, or tale, ſubjoins ſuch defence as is proper for the defendant to make. For a general defence or denial was not prudent in every ſituation, ſince thereby the propriety of the writ, the competency of the plaintiff, and the cognizance of the court, were allowed. By defending the force and injury the defendant waived all pleas of miſnoſmer[t]; by defending the [298] 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:*

[o] Co. Entr. 182.

[p] *Nov. Narr.* 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!

[r] Co. Litt. 127.

[s] *Edit.* 1534.

[t] Theloal. dig. *l.* 14. *c* 1. *pag.* 357.

[u] *En la defence ſont iij 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 parte able deſtre reſpondu; et per tant quil defende ou et quant il devera, il accepte la poiar 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. 117.

and that, either *without* any words excluſive of other courts, which entitles the lord of the franchiſe, whenever any ſuit that belongs to his juriſdiction is commenced in the courts at Weſtminſter, to demand the cognizance thereof; or *with* ſuch excluſive words, which alſo entitle the defendant to plead to the juriſdiction of the court [y]. Upon this claim of cognizance, if allowed, all proceedings ſhall ceaſe in the ſuperior court, and the plaintiff is left at liberty to purſue his remedy in the ſpecial juriſdiction. As, when a ſcholar, or other privileged perſon of the univerſities of Oxford or Cambridge is impleaded in the courts at Weſtminſter, for any cauſe of action whatſoever, unleſs upon a queſtion of freehold [z]. In theſe caſes, by the charter of thoſe learned bodies, confirmed by act of parliament, the chancellor or vice-chancellor may put in a claim of cognizance; which, if made in due time and form, and with due proof of the facts alleged, is regularly allowed by the courts [a]. It muſt be demanded before full defence is made [b] or imparlance prayed; for theſe are a ſubmiſſion to the juriſdiction of the ſuperior court, and the delay is a *laches* in the lord of the franchiſe. and it will not be allowed, if it occaſions a failure of juſtice [c], or if an
[299] action be brought againſt the perſon himſelf, who claims the franchiſe, unleſs he hath alſo a power in ſuch caſe of making another judge [d].

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 de-

[y] 2 Lord Raym. 836. 10 Mod. 126.

[z] See pag. 83.

[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 diſyent a luy, "peccaſti:" et il dit, "judica me:" et ils diſoyent, "non poſſumus, quia caput es eccleſiae; "judica teipſum:" et l'apoſtel dit, "judico me cremari;" et fuit combuſtus; et apres fu t un ſainct. Et in ceo cas il fuit ſon juge demene, et iſſint n'eſt pas inconvenient que un home ſeit juge demene.*

mand

mand one *imparlance*[e], or *licentia loquendi*; and may, before he pleads, have more time granted by conſent of the court; to ſee if he can end the matter amicably without farther ſuit, by talking with the plaintiff: a practice, which is[f] ſuppoſed to have ariſen from a principle of religion, in obedience to that precept of the goſpel, "agree with thine adverſary quickly, "whilſt thou art *in the way* with him[g]." And it may be obſerved that this goſpel precept has a plain reference to the Roman law of the twelve tables, which expreſsly directed the plaintiff and defendant to make up the matter, while they were *in the way*, or going to the praetor—*in via, rem uti pacunt orato.* There are alſo many other previous ſteps which may be taken by a defendant before he puts in his plea. He may, in real actions, demand a *view* of the thing in queſtion, in order to aſcertain 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. In real actions alſo the tenant may pray in *aid*, or call for aſ- [300]
ſiſtance of another, to help him to plead, becauſe of the feebleneſs or imbecility of his own eſtate. Thus a tenant for life may pray in aid of him that hath the inheritance in remainder or reverſion; and an incumbent may pray in aid of the patron and ordinary: that is, that they ſhall be joined in the action and help to defend the title. *Voucher* alſo is the calling in of ſome perſon to anſwer the action, that hath warranted the title to the tenant or defendant. This we ſtill make uſe of in the form of common recoveries[i], which are grounded on a writ of entry; a ſpecies of action that we may remember relies chiefly on the weakneſs of the tenant's title, who therefore vouches another perſon to warrant it. If the vouchee appears, he is made defendant inſtead of the vouchor:

[e] Append. N° III. § 6.
[f] Gilb. Hiſt. Com. Pl. 35.
[g] Matt. v. 25.
[h] Append. N° III. § 6.
[i] Vol. II. Append. N° V. § 2.

but,

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
[301] 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.

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

[k] F. N. B. 135.
[l] Dyer. 137.
[m] Finch. L. 360.
[n] 1 Roll. Abr. 137.
[o] *Ibid.* 138.

BIBLIOTHECA BODLEIANA

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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 acknowlegement 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, or a monk profeſſed. 3. In *abatement:* which abatement is either of the writ, or the count, for ſome defect in one of them; as by [302] miſnaming the defendant, which is called a *miſnoſmer;* giving him a wrong addition, as *eſquire* inſtead of *knight;* or other want of form in any material reſpect (3). Or, it may be, that

[p] 12 Mod. 529.

(3) All dilatory pleas are called pleas *in abatement*, in contradiſtinction to pleas *in bar*. By the 4 & 5 Ann. c. 16. and the practice of the courts, no plea in abatement can be received unleſs the defendant proves the truth of it by affidavit. 1 *Cromp.* 132. 3 *Burr.* 1618.

Theſe pleas are not favoured by the courts, and they muſt be filed within four days after the day upon which the declaration is delivered, both days being incluſive. 1 *T. R.* 277. 5 *T. R.* 210.

Where an action is brought againſt one or ſome only of a number of partners, if the defendant or defendants intend to take ad-

the plaintiff is dead; for the death of either party is at once an abatement of the ſuit. And in actions merely perſonal, ariſing *ex delicto*, for wrongs actually done or committed by the defendant, as treſpaſs, battery, and ſlander, the rule is that *actio perſonalis moritur cum perſona* [q]; and it never ſhall be revived either by or againſt the executors or other repreſentatives. For neither the executors of the plaintiff have received, nor thoſe of the defendant have committed, in their own perſonal capacity, any manner of wrong or injury. But in actions ariſing *ex contractu*, by breach of promiſe and the like, where the right deſcends to the repreſentatives of the plaintiff, and thoſe of the defendant have aſſets to anſwer the demand, though the ſuits ſhall abate by the death of the parties, yet they may be revived againſt or by the executors [r]: being indeed rather actions againſt the property than the perſon, in which the executors have now the ſame intereſt that their teſtator had before.

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. And with reſpect to the pleas them-

[q] 4 Inſt. 315. [r] March. 14.

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vantage of the partnerſhip, it muſt be pleaded in abatement, or it is ſuppoſed to be waived. And the plea in abatement muſt ſtate who are the real partners. 2 *Bl. Rep.* 947. If one of ſeveral part-owners of a chattel, as of a ſhip ſue alone, and although this appears by the declaration, for an injury done to the chattel, the defendant can only take advantage of this by a plea in abatement; but if there is no ſuch plea, the plaintiff may recover damages for his ſhare. 6 *T. R.* 766. And if another part-owner brings a ſimilar action, then the defendant cannot plead in abatement that the former part-owner is not joined in the action, for he has already obtained a compenſation for the injury done to him. 7 *T. R.* 279.

ſelves,

ſelves, it is a rule, that no exception ſhall be admitted againſt a declaration or writ, unleſs the defendant will in the ſame plea give the plaintiff a better[s]; that is, ſhew him how it might be amended, that there may not be two objections upon the ſame account. Neither, by ſtatute 8 & 9 W. III. c. 31. ſhall any plea in abatement be admitted in any ſuit for partition of lands; nor ſhall the ſame be abated by reaſon of the death of any tenant.

ALL pleas to the juriſdiction conclude to the cognizance [303] of the court; praying "judgment, whether the court will "have further cognizance of the ſuit:" pleas to the diſability conclude to the perſon; by praying "judgment, if the "ſaid A the plaintiff ought to be anſwered:" and pleas in abatement (when the ſuit is by original) conclude to the writ or declaration; by praying "judgment of the writ, or "declaration, and that the ſame may be quaſhed," *caſſetur*, made void, or abated: but, if the action be by bill, the plea muſt pray "judgment of the bill," and not of the declaration; the bill being here the original, and the declaration only a copy of the bill.

WHEN theſe dilatory pleas are allowed, the cauſe is either diſmiſſed from that juriſdiction; or the plaintiff is ſtayed till his diſability be removed; or he is obliged to ſue out a new writ, by leave obtained from the court[t]; or to amend and new-frame his declaration. But when on the other hand they are 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 cre-

[s] Brownl. 139. [t] Co. Ent. 271.

ditor

ditor haraſſes his debtor with an action, it then becomes neceſſary for the defendant to acknowlege 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] (4).

[304] But frequently the defendant confeſſes one *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 acknowleges 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 acknowleged to be his due (5). In the French law the rule of practice

[v] 1 Vent. 21. [w] Styl. pract. Reg (*edit.* 1657.) 201.
[u] Litt. § 338. Co. Litt. 209. 2 Keb. 555. Salk. 596.

(4) A tender in bank notes is ſufficient, unleſs the creditor expreſsly refuſes to receive notes and inſiſts upon caſh. 3 *T. R.* 554.

(5) Where goods have been taken under a miſtake without any loſs to the owner, the court upon motion will ſtay the proceedings in

is grounded upon principles ſomewhat ſimilar to this; for there, if a perſon be ſued for more than he owes, yet he loſes his cauſe if he doth not tender ſo much as he really does owe[w]. To this head may alſo be referred the practice of what is called a *ſet-off*: whereby the defendant acknowleges 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. This anſwers very nearly to the *compenſatio*, or *ſtoppage*, of the civil law[x], [305] and depends on the ſtatutes 2 Geo. II. c. 22. and 8 Geo. II. c. 24. which enact, that, where there are mutual debts between the plaintiff and defendant, one debt may be ſet againſt the other, and either pleaded in bar, or given in evidence upon the general iſſue at the trial; which ſhall operate as

[w] Sp. L. b. 6. c. 4. [x] *Ff.* 16. 2. 1.

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in an action of treſpaſs, upon the defendant's undertaking to reſtore them, or to pay their full value, with the coſts of the action. 7 *T. R.* 53.

Lord Mansfield has declared, "that where a factor, dealing for a "principal, but concealing that principal, delivers goods in his own "name, the perſon contracting with him has a right to conſider "him to all intents and purpoſes as the principal; and though the "real principal may appear and bring an action upon that contract "againſt the purchaſer of the goods, yet that purchaſer may ſet "off any claim he may have againſt the factor in anſwer to the "demand of the principal. This has been long ſettled."

This has ſince been confirmed as law by lord Kenyon and the court of king's bench. 7 *T. R.* 359. And lord Kenyon has alſo held, that a demand upon one partner may be ſet off in an action by a number of partners, if that one partner was the only oſtenſible perſon engaged in the buſineſs, and appeared to the world as ſolely intereſted therein. 7 *T. R.* 361.

payment,

payment, and extinguiſh ſo much of the plaintiff's demand (6).

PLEAS, that totally deny the cauſe of complaint, are either the *general* iſſue, or a *ſpecial* plea, in bar.

1. THE *general* iſſue, or general plea, is what traverſes, thwarts, and denies at once the whole declaration; without offering any ſpecial matter whereby to evade it. As in treſpaſs either *vi et armis*, or on the caſe, *non culpabilis*, not guilty [y]; in debt upon contract, *nihil debet*, he owes nothing; in debt on bond, *non eſt factum*, it is not his deed; on an *aſſumpſit*, *non aſſumpſit*, he made no ſuch promiſe. Or in real actions, *nul tort*, no wrong done; *nul diſſeiſin*, no diſſeiſin; and in a writ of right, the miſe or iſſue is, that the tenant has more right to hold than the demandant has to demand. Theſe pleas are called the general iſſue, becauſe, by importing an abſolute and general denial of what is alleged in the declaration, they amount at once to an iſſue; by which we mean a fact affirmed on one ſide and denied on the other.

FORMERLY the general iſſue was ſeldom pleaded, except when the party meant wholly to deny the charge alleged againſt him. But when he meant to diſtinguiſh away or palliate the charge, it was always uſual to ſet forth the particular facts in

[y] Append. N° II. § 4.

(6) The debts between the plaintiff and defendant muſt be mutual, but may be of different natures; if the defendant does not ſpecially plead his debt as a ſet-off, he muſt deliver a notice of ſet-off together with the plea of the general iſſue. But where either debt ariſes upon the penalty in any bond or ſpecialty, the debt ſet-off muſt be pleaded. 8 *Geo. II. c.* 24. A notice of ſet-off ought to be expreſſed with almoſt as much certainty as a declaration; and the delivery of it muſt be proved at the trial of the cauſe. 1 *Cromp. Pr.* 157. But in actions by or againſt the aſſignees of a bankrupt, the ſum juſtly due may be recovered under the 5 *Geo. II. c.* 30. without either pleading, or giving notice of a ſet-off. 1 *T. R.* 115.

what

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 perverted to the [306] 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 ſurpriſed by the other.

2. SPECIAL pleas, *in bar* of the plaintiff's demand, are very various, according to the circumſtances of the defendant's caſe. As, in real actions, a general releaſe or a fine, both of which may deſtroy and bar the plaintiff's title. Or, in perſonal actions, an accord, arbitration, conditions performed, nonage of the defendant, or ſome other fact which precludes the plaintiff from his action [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 any ſuit for advowſons, upon reaſons given in a former chapter [b]. But by the ſtatute 21 Jac. I. c. 2. a time
[307] 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 (7), (except upon accounts between merchants (8),) 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:

[b] See pag. 250. [c] 3 Inſt. 189. [d] See pag. 206.

(7) Under the head of actions upon the caſe are included actions for libels, criminal converſation, ſeduction, and actions for words, which are not actionable without a ſpecial damage.

(8) This exception does not extend to a tradeſman's account with his cuſtomer, where the items are all on one ſide, for then the ſtatute will bar thoſe beyond ſix years; but where there is a mutual unſettled account, it is held that a new item in the account within ſix years is an acknowledgment of the whole, and takes the whole account out of the ſtatute. 6 *T. R.* 189.

and

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 (9). And by the ſtatute 31 Eliz. c. 5. all ſuits, indictments, and informations, upon any penal ſtatutes, where any forfeiture is to the crown alone, ſhall be ſued within *two* years; and where the forfeiture is to a ſubject, or to the crown and a ſubject, within *one* year after the offence committed (10), unleſs where any other time is ſpecially limited by the ſtatute. Laſtly, by ſtatute 10 W. III. c. 14. no writ of error, *ſcire facias*, or other ſuit, ſhall be brought to reverſe any judgment, fine, or recovery, for error, unleſs it be proſecuted within *twenty* years (11).

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(9) The ſtatute makes an exception for all perſons who ſhall be under age, *feme coverts*, *non compos mentis*, in priſon, or abroad, when the cauſe of action accrues; and the limitations of the ſtatute ſhall only commence from the time when their reſpective impediments or diſabilities are removed; ſec. 7. But if one only of a number of partners lives abroad, they muſt bring their action within ſix years after the cauſe of it accrued. 4 *T. R.* 516. And where a party has been guilty of any fraud in his dealings or accounts, the courts of law and equity have determined that he ſhall only protect himſelf by the ſtatute of limitations from the time his fraud is diſcovered. 3 *P. Wms.* 143. *Doug.* 630.

Any acknowledgment of the exiſtence of the debt, however ſlight, will take it out of the ſtatute, and the limitation will then run from that time; and where an expreſſion is ambiguous, it ſhall be left to the conſideration of the jury, whether it amounts or not to ſuch acknowledgment. 2 *T. R.* 760. Where there are two or more drawers of a joint and ſeveral promiſſory note, the acknowledgment of one may be given in evidence in a ſeparate action againſt another, and will defeat the effect of the ſtatute. *Doug.* 629.

(10) Where the forfeiture is to the crown and a ſubject, a common informer muſt ſue within one year, and the crown may proſecute for the whole penalty at any time within two years after that year ended.

(11) No ſtatute has fixed any limitation to a bond or ſpecialty; but where no intereſt has been paid upon a bond, and no demand

The uſe of theſe ſtatutes of limitation is to preſerve the peace of the kingdom, and to prevent thoſe innumerable perjuries which might enſue, if a man were allowed to bring an action
[308] for any injury committed at any diſtance of time. Upon both theſe accounts the law therefore holds, that "*intereſt 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.

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 mat-

[e] Pott. Ant. b. 1. c. 21.

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proved thereon for twenty years, the judges recommend it to the jury to preſume that it is diſcharged, and to find a verdict for the defendant. 2 *T. R.* 270.

ters or ſingle pleas; as, in an action of aſſault and battery, theſe three, not guilty, *ſon aſſault demeſne*, and the ſtatute of limitations. 2. That it be direct and poſitive, and not argumentative. 3. That it have convenient certainty of time, place, and perſons. 4. That it anſwer the plaintiff's allegations in every material point. 5. That it be ſo pleaded as to be capable of trial.

SPECIAL pleas are uſually in the affirmative, ſometimes [309] in the negative; but they always advance ſome new fact not mentioned in the declaration; and then they muſt be averred to be true in the common form:—"and this he is ready to "verify."—This is not neceſſary in pleas of the general iſſue; thoſe always containing a total denial of the facts before advanced by the other party, and therefore putting him upon the proof of them.

IT is a rule in pleading, that no man be allowed to plead ſpecially ſuch a plea as amounts only to the general iſſue, or a total denial of the charge; but in ſuch caſe he ſhall be driven to plead the general iſſue in terms, whereby the whole queſtion is referred to a jury. But if the defendant, in an aſſiſe or action of treſpaſs, be deſirous to refer the validity of his title to the court rather than the jury, he may ſtate his title ſpecially, and at the ſame time *give colour* to the plaintiff, or ſuppoſe him to have an appearance or colour of title, bad indeed in point of law, but of which the jury are not competent judges. As if his own true title be, that he claims by feoffment with livery from A, by force of which he entered on the lands in queſtion, he cannot plead this by itſelf, as it amounts to no more than the general iſſue, *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].

[f] Dr. & Stud. 2. c. 53.

WHEN the plea of the defendant is thus put in, if it does not amount to an iſſue or total contradiction of the declaration but only evades it, the plaintiff may plead again, and *reply* to the defendant's plea: either traverſing it; that is, totally denying it; as, if on an action of debt upon bond the defendant pleads *ſolvit ad diem*, that he paid the money when
[310] due, here the plaintiff in his *replication* may totally traverſe this plea, by denying that the defendant paid it; or, he may allege new matter in contradiction to the defendant's plea; as when the defendant pleads *no award made*, the plaintiff may reply, and ſet forth an actual award, and aſſign a breach[g]: or the replication may *confeſs and avoid* the plea, by ſome new matter or diſtinction, conſiſtent with the plaintiff's former declaration; as, in an action for treſpaſſing upon land whereof the plaintiff is ſeiſed, if the defendant ſhews a title to the land by deſcent, and that therefore he had a right to enter, and gives colour to the plaintiff, the plaintiff may either traverſe and totally deny the fact of the 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

[g] Append. No III. § 6. [h] *Inſt.* 4. 14. Bract. *l.* 5. *tr.* 5. *c.* 1.

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 [311] 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 *nove! aſſignment*. As, if the plaintiff in treſpaſs declares on a breach of his cloſe in D; and the defendant pleads that the place where the injury is ſaid to have happened is a certain cloſe of paſture in D, which deſcended to him from B his father, and ſo is his own freehold; the plaintiff may reply and aſſign another cloſe in D, ſpecifying the 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 ob-

[i] Bro. *Abr. t. treſpaſs.* 205. 284. [k] pag. 308.

lique allegation or denial of ſome fact, proteſting (by the gerund, *proteſtando)* that ſuch a matter does or does not exiſt; and at the ſame time avoiding a direct affirmation or denial. Sir Edward Coke hath defined[l] a proteſtation (in the pithy dialect of that age) to be "an excluſion of a concluſion."
[312] 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 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

[l] 1 Inſt. 124. [m] Co. Litt. 126. [n] See book II. ch. 6. pag. 194.

part

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 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." [313]

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 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.

[o] Append. No III. § 6. [p] Append. No II. § 4.

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; 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

law to maintain the action or the defence; and therefore praying judgment for want of ſufficient matter alleged [a]. Sometimes demurrers are merely for want of ſufficient *form* in the writ or declaration. But in caſe of exceptions to the form, or manner of pleading, the party demurring muſt by ſtatute 27 Eliz. c. 5. and 4 & 5 Ann. c. 16. ſet forth the cauſes of his demurrer, or wherein he apprehends the deficiency to conſiſt. 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

[a] Append. N° III. § 6.
[b] *Ibid.*
[c] Append. N° II. § 4.
[d] Cic. *de Orator. l.* 1. *c.* 38.

that

that both the parties be kept or *continued* in court from day to day, till the final determination of the ſuit. For the court can determine nothing, unleſs in the preſence of both the parties, in perſon or by their attorneys, or upon default of one of them, after his original appearance and a time prefixed for his appearance in court again. Therefore in the courſe of pleading, if either party neglects to put in his declaration, plea, replication, rejoinder, and the like, within the times allotted by the ſtanding rules of the court, the plaintiff, if the omiſſion be his, is ſaid to be *nonſuit*, or not to follow and purſue his complaint, and ſhall loſe the benefit of his writ: or, if the negligence be on the ſide of the defendant, judgment may be had againſt him, for ſuch his default. And, after iſſue or demurrer joined, as well as in ſome of the previous ſtages of proceeding, a day is continually given and entered upon the record, for the parties to appear on from time to time, as the exigence of the caſe may require. The giving of this day is called the *continuance*, becauſe thereby 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*.

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

from the benefit of this new defence, which it was not in his power to make when he pleaded the former. But it is dangerous to rely on ſuch a plea, without due conſideration; for it confeſſes the matter which was before in diſpute between the parties[e]. And it is not allowed to be put in, if any continuance has intervened between the ariſing of this freſh matter and the pleading of it: for then the defendant is guilty of neglect, or *laches*, and is ſuppoſed to rely on the merits of his former plea. Alſo it is not allowed after a demurrer is determined, or verdict given; becauſe then relief may be had in another way, namely, by writ of *audita querela*, of which hereafter. And theſe pleas *puis darrein continuance*, when brought to a demurrer in law or iſſue of fact, ſhall be determined in like manner as other pleas.

WE have ſaid, that demurrers, or queſtions concerning the *ſufficiency* of the matters alleged in the pleadings, are to be determined by the judges of the court, upon ſolemn argument by counſel on both ſides; and to that end a demurrer book is made up, containing all the proceedings at length, which are afterwards entered on *record*; and copies thereof, called *paper-books*, are delivered to the judges to peruſe. 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 French law, 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

[e] Cro. Eliz. 49.

[f] Append. No II. § 4. No III. § 6.

his

his ſons: whereby the ironical obſervation of the Roman ſatyriſt came to be literally verified, that "*Gallia cauſidicos docuit fa-*"*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 enrollment of thoſe writs and the proceedings thereon, which was calculated for the benefit of poſterity, was more ſerviceable (becauſe more durable) in a dead and immutable language than in any flux or living one. The practiſers, however, being uſed to the Norman language, and therefore imagining they could expreſs their thoughts more aptly and more conciſely in that than in any other, ſtill continued to take their notes in law French: and of courſe when thoſe notes came to be publiſhed, under the denomination of reports, they were printed in that barbarous dialect; which, joined to the additional terrors of a Gothic black letter, has occaſioned many a ſtudent to throw away his Plowden and Littleton, without venturing to attack a page of them. And yet in reality, upon a nearer acquaintance, they would have found nothing very formidable in the language; which differs in it's grammar

[g] *Juv.* xv. 111.
[h] c 15.
[i] Mod. Un. Hiſt. xx. 211.
[k] *Ibid.* xxix. 235.
[l] M'rs. c. 4. § 2.

and

and orthography as much from the modern French, as the diction of Chaucer and Gower does from that of Addiſon and Pope. Beſides, as the Engliſh and Norman languages were concurrently uſed by our anceſtors for ſeveral centuries together, the two idioms have naturally aſſimilated, and mutually borrowed from each other: for which reaſon the grammatical conſtruction of each is ſo very much the ſame, that I apprehend an Engliſhman (with a week's preparation) would underſtand the laws of Normandy, collected in their *grand couſtumier*, as well if not better than a Frenchman bred within the walls of Paris.

THE Latin, which ſucceeded the French for the entry and enrollment of pleas, and which continued in uſe for four centuries, anſwers ſo nearly to the Engliſh (oftentimes word for word) that it is not at all ſurprizing 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 theſe 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

of Europe, and therefore not to be imputed as any peculiar blemiſh in our Engliſh legal latinity [m]. The truth is, what is generally denominated law-latin is in reality a mere technical language, calculated for eternal duration, and eaſy to be apprehended both in preſent and future times; and on thoſe accounts beſt ſuited to preſerve thoſe memorials which are intended for perpetual rules of action. The rude pyramids of Egypt have endured from the earlieſt ages, while the more modern and more elegant ſtructures of Attica, Rome, and Palmyra, have ſunk beneath the ſtroke of time.

As to the objection of locking up the law in a ſtrange and unknown tongue, this is of little weight with regard to records which few have occaſion to read but ſuch as do, or ought to, underſtand the rudiments of Latin. And 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 "unknown to Cicero, Salluſt, or the other writers of the "Auguſtan age." Yet this is no more than muſt unavoidably happen when things of modern uſe, of which the Romans had no idea, and conſequently no phraſes to expreſs

[m] The following ſentence, "*ſi quis "ad battalia curte ſua exierit*, if any one "goes out of his own court to fight," &c. may raiſe a ſmile in the ſtudent as a flaming modern angliciſm: but he may meet with it, among others of the ſame ſtamp, in the laws of the Burgundians on the continent, before the end of the fifth century. (*Add.* 1. c. 5. § 2.)

[n] Pref. Rep.

[o] Pref. *ad Eadm.*

them,

them, come to be delivered in the Latin tongue. It would puzzle the moſt claſſical ſcholar to find an appellation, in his pure latinity, for a conſtable, a record, or a deed of 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 framed to expreſs a particular offence; ſince no other word in being, *occidere*, *interficere*, *necare*, or the like, was ſufficient to expreſs the *intention* of the criminal, or *quo animo* the act was perpetrated; and therefore by no means came up to the notion of murder at preſent entertained by our law; *viz.* a killing *with malice aforethought*.

A ſimilar neceſſity to this produced a ſimilar effect at Byzantium, when the Roman laws were turned into Greek for the uſe of the oriental empire; for, without any regard to Attic elegance, the lawyers of the imperial courts made no ſcruple to tranſlate *fidei commiſſarios*, φιδεικομμισσαριους[p]; *cubiculum*, κυβικλειον[q]; *filium-familias*, παιδα-φαμιλιας[r]; *repudium*, ρεπυδιον[s]; *compromiſſum*, κομπρομισσον[t]; *reverentia et obſequium*, ρευερεντια και οβσεκιον[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 it's 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-

[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.

finition which in his time the philoſophers currently gave of their *materia prima*, the groundwork of all natural knowlege; 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 corporeitatis, neque* "*per ſimplicem eſſentiam: eſt tamen ens, et quidem ſubſtantia,* "*licet incompleta; habetque actum ex ſe entitativum, et ſimul* "*eſt potentia ſubjectiva.*" The law therefore, with regard to it's technical phraſes, ſtands upon the ſame footing with other ſtudies, and requeſts only the ſame indulgence.

THIS technical Latin continued in uſe from the time of 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 concifely 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 knowlege 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

[x] *Philoſoph. natural. c.* 1, § 28, *&c.*

the ſake of the ſtamp duties, which are thereby conſiderably 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 ſerioufneſs,) that in two years time it was found neceſſary to make a new act, 6 Geo. II. c. 14; which allows all technical words to continue in the uſual language, and has thereby almoſt defeated every beneficial purpoſe of the former ſtatute.

WHAT is ſaid of the alteration of language by the ſtatute 4 Geo. II. c. 26. will hold equally ſtrong with reſpect to the prohibition of uſing the 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 conſequentiam* "*explanari concedimus.*" But, to return to our demurrer.

WHEN the ſubſtance of the record is completed, and copies are delivered to the judges, the matter of law upon which the demurrer is grounded is upon ſolemn argument determined by the court, and not by any trial by jury; and judgment is thereupon accordingly given. As, in an action of treſpaſs, if the defendant in his plea confeſſes the fact, but

[y] For inſtance, theſe three words, "*ſecundum formam ſtatuti*," are now converted into ſeven, "according to the "form of the ſtatute."

[z] *de concept. digeſt.* § 13.

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 (1).

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.

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(1) The court of king's bench upon a demurrer held it to be a good juſtification that the defendant entered the plaintiff's cloſe in purſuit of a fox. See *ante*, 213. *n.* 4.

SIR JOHN COMYNS Knt.

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.

[a] See the preface to ſir John Davies's reports: wherein many of the following topics are diſcuſſed more at large.

They bring us the examples of arbitrary governments, of Denmark, Muſcovy, and Pruſſia; of wild and uncultivated nations, the ſavages of Africa and America; or of narrow domeſtic republics, in 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 meet upon the road, and ſo put a ſhort end to

to every controverſy. For in a ſtate of nature there is no room for municipal laws; and the nearer any nation approaches to that ſtate, the fewer they will have occaſion for. When the people of Rome were little better than ſturdy ſhepherds or herdſmen, all their laws were contained in ten or twelve tables: but as luxury, politeneſs, and dominion increaſed, the civil law increaſed in the ſame proportion; and ſwelled to that amazing bulk which it now occupies, though ſucceſſively pruned and retrenched by the emperors Theodoſius and Juſtinian.

IN like manner we may laſtly obſerve, that, in petty ſtates and narrow territories, much fewer laws will ſuffice than in large ones, becauſe there are fewer objects upon which the laws can operate. The regulations of a private family are ſhort and well-known; thoſe of a prince's houſhold 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 it's 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;

ſent; or, in fine, becauſe of the natural imbecility and imperfection that attends all human proceedings. But wherever this happens to be the caſe in any material point, the legiſlature is ready, and from time to time both may, and frequently does, intervene to remove the doubt; and, upon due deliberation had, determines by a declaratory ſtatute how the law ſhall be held for the future.

WHATEVER inſtances therefore of contradiction or uncertainty may have been gleaned from our records, or reports, muſt be imputed to the defects of human laws in general, and are not owing to any particular ill conſtruction of the Engliſh ſyſtem. Indeed the reverſe is moſt ſtrictly true. The Engliſh law is leſs embarraſſed with inconſiſtent reſolutions and doubtful queſtions, than any other known ſyſtem of the ſame extent and the ſame duration. I may inſtance in the civil law: the text whereof, as collected by Juſtinian and his agents, is extremely voluminous and diffuſe; but the idle comments, obſcure gloſſes, and jarring interpretations grafted thereupon by the learned juriſts, are literally without number. And theſe gloſſes, which are mere private opinions of ſcholaſtic doctors, (and not like our books of reports, judicial determinations of the court,) are all of authority ſufficient to be vouched and relied on: which muſt needs breed great diſtraction and confuſion in their tribunals. The ſame may be ſaid of the canon law; though the text thereof is not of half the antiquity with the common law of England; and though the more 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.

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

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 cloath 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 preverted or miſ-repreſented, the law which ariſes from thence will unavoidably be unjuſt or partial.

And,

And, in order to prevent this, it is neceſſary to ſet right the fact, and eſtabliſh the truth contended for, by appealing to ſome mode of *probation* or *trial*, which the law of the country has ordained for a criterion of truth and 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 law-ſuits ariſe from diſputed facts, for one where the law is doubted of. About twenty days in the year are ſufficient in Weſtminſter-hall, to ſettle (upon ſolemn argument) every demurrer or other ſpecial point of law that ariſes throughout the nation: but two months are annually ſpent in deciding the truth of facts, before ſix diſtinct tribunals, in the ſeveral circuits of England; excluſive of Middleſex and London, which afford a ſupply of cauſes much more than equivalent to any two of the largeſt circuits.

TRIAL then is the examination of the matter of fact in iſſue; of which there are many different ſpecies, according to the difference of the ſubject, or thing to be tried: of all which we will take a curſory view in this and the ſubſequent chapter. For the law of England ſo induſtriouſly endeavours to inveſtigate truth at any rate, that it will not confine itſelf to one, or to a few, manners of trial; but varies 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 *wager of battel*; by *wager of law*; and by *jury*.

I. FIRST then of the trial by *record*. This is only uſed in one particular inſtance: and that is where a matter of record

is

is pleaded in any action, as a fine, a judgment, or the like; and the oppoſite party pleades, "*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 record [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.

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

[b] 1 Inſt. 117. 260.
[c] 6 Rep. 53.
[d] 9 Rep. 31.

from

from it's uſual reſort, the verdict of twelve men, and relies on the judgment of the court alone. As in caſe of a ſuit to reverſe a fine for non-age of the cognizor, or to ſet aſide a ſtatute or recognizance entered into by an infant; here, and in other caſes of the like ſort, a writ ſhall iſſue to the ſheriff[e]; commanding him that he conſtrain the ſaid party to appear, that it may be aſcertained by the view of his body by the king's juſtices, whether he be of full age or not; "*ut* "*per aſpectum corporis ſui conſtare poterit juſticiariis noſtris, ſi* "*praedictus A ſit plenae aetatis necne*[f]." If however the court has, upon inſpection, any doubt of the age of the party, (as may frequently be the caſe,) it may proceed to take proofs of the fact; and, particularly, may examine the infant himſelf upon an oath of *voir dire*, *veritatem dicere*, that is, to make true anſwer to ſuch queſtions as the court ſhall demand of him: or the court may examine his mother, his godfather, or the like[g].

IN like manner if a defendant pleads in abatement of the ſuit that the plaintiff is *dead*, and one appears and calls himſelf the plaintiff, which the defendant denies; in this caſe the judges ſhall determine by inſpection and examination, whether he be the plaintiff or not[h]. Alſo if a man be found by a jury an idiot *a nativitate*, he may come in perſon into the chancery before the chancellor, or be brought there by his friends, to be inſpected and examined, whether idiot or not: and, if upon ſuch view and inquiry, it appears he is not ſo, the verdict of the jury, and all the proceedings thereon, are utterly void and inſtantly of no effect[i].

ANOTHER inſtance in which the trial by inſpection may be uſed, is when upon an appeal of maihem, the iſſue joined is whether it be maihem or no maihem, this ſhall be decided by the court upon inſpection, for which purpoſe they may

[e] 9 Rep. 31.

[f] This queſtion of non age was formerly, according to Glanvil, (*l.* 13. *c.* 15.) tried by a jury of eight men though now it is tried by inſpection.

[g] 2 Roll. Abr. 573.

[h] 9 Rep. 30.

[i] *Ibid.* 31.

call

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 26 of February in that year actually fell upon a ſunday: this was held to be a ſufficient trial, and that a trial by a jury was not neceſſary, although it was an error in fact; and ſo the judgment was reverſed [m]. But, in all theſe caſes, the judges, if they conceive a doubt, may order it to be tried by jury.

III. THE trial by *certificate* is allowed in ſuch caſes, where the evidence of the perſon certifying is the only proper criterion of the point in diſpute. For, when the fact in queſtion lies out of the cognizance of the court, the judges muſt rely on the ſolemn averment or information of perſons in ſuch a ſtation, as affords them the moſt clear and competent knowlege of the truth. As therefore ſuch evidence (if given to a jury) muſt have been concluſive, the law, to ſave trouble and circuity, permits the fact to be determined upon ſuch certificate merely. Thus, 1. If the iſſue be whether A was abſent with the king in his army out of the realm in time of war, this ſhall be tried [n] by the certificate of the mareſchal of

[j] 2 Roll. Abr. 578.
[k] 1 Sid. 108.
[l] Hardr. 408.
[m] Cro. Eliz. 227.
[n] Litt. § 102.

the

preſented [a], *admiſſion*, *inſtitution*, and *deprivation* of a clerk, ſhall alſo be tried by certificate from the ordinary or metropolitan, becauſe of theſe he is the moſt competent judge [b]: but *induction* ſhall be tried by a jury, becauſe it is a matter of public notoriety [c], and is likewiſe the corporal inveſtiture of the temporal profits. *Reſignation* of a benefice may be tried in either way [d]; but it ſeems moſt properly to fall within the biſhop's cognizance. 6. The trial of all cuſtoms and practice of the courts ſhall be by certificate from the proper officers of thoſe courts reſpectively; and, what return was made on a writ by the ſheriff or under-ſheriff, ſhall be only tried by his own certificate [e]. And thus much for thoſe ſeveral iſſues, or matters of fact, which are proper to be tried by certificate.

IV. A FOURTH ſpecies of trial is that by *witneſſes*, *per teſtes*, without the intervention of a jury. This is the only method of trial known to the civil law; in which the judge is left to form in his own breaſt his ſentence upon the credit of the witneſſes examined: but it is very rarely uſed in our law, which prefers the trial by jury before it in almoſt every inſtance. Save only, that when a widow brings a writ of dower, and the tenant pleads that the huſband is not dead; this being looked upon as a dilatory plea, is, in favour of the widow and for greater expedition, allowed to be tried by witneſſes examined before the judges: and ſo, ſaith Finch [f] ſhall no other caſe in *our* law. But ſir Edward Coke [g] mentions ſome others: as to try whether the tenant in a real action was duly ſummoned, or the validity of a challenge to a juror: ſo that Finch's obſervation muſt be confined to the trial of direct, and not collateral, iſſues. And in every caſe ſir Edward Coke lays it down, that the affirmative muſt be proved by two witneſſes at the leaſt.

[337] V. THE next ſpecies of trial is of great antiquity, but much diſuſed; though ſtill in force if the parties chuſe to

[a] See Book I. ch. 11.
[b] 2 Inſt. 632. Show. Parl. C. 88. 2 Roll. Abr. 583, &c.
[c] Dyer, 229.
[d] 2 Roll. Abr. 583.
[e] 9 Rep. 31.
[f] L. 423.
[g] 1 Inſt. 6.

abide by it; I mean the trial by *wager* of *battel*. This ſeems to have owed it's original to the military ſpirit of our anceſtors, joined to a ſuperſtitious frame of mind: it being in the nature of an appeal to providence, under an apprehenſion and hope (however preſumptuous and unwarrantable) that heaven would give the victory to him who had the right. The deciſion of ſuits, by this appeal to the God of battels, 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 [j], 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 incogni-*" "*tae 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 [i].

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 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 [338]

[h] Seld. of duels. c. 5.
[j] 2. *c.* 118.
[i] Stiernh. *de jure Sueon. l.* 1. *c.* 7.
[k] Co. Litt. 261.
[l] 2 Hawk. P. C. 495.

real actions being merely queſtions of the *jus poſſeſſionis*, which are uſually more plain and obvious, our anceſtors did not in them appeal to the deciſion of providence. Another pretext for allowing it, upon theſe final writs of right, was alſo for the ſake of ſuch claimants as might have the true right, but yet by the death of witneſſes, or other defect of evidence, be unable to prove it to a jury. But the moſt curious reaſon of all is given in the mirror [m], that it is allowable upon warrant of the combat between David for the people of Iſrael of the one party, and 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 champion, which tender is accepted by the demandant; the tenant in the firſt place muſt produce his champion, who, by

[339]

[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. Narrat. Droit patent. fol.* 221. (*edit.* 1534.) Year-book. 29 Edw. III. 12. Finch. L. 411. 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.* 103.

throwing

throwing down his glove as a gage or pledge, thus *wages* or ſtipulates battel with the champion of the demandant; who, by taking up the gage or glove, ſtipulates on his part to accept the challenge. The reaſon why it is waged by champions, and not by the parties themſelves, in civil actions, is becauſe, if any party to the ſuit dies, the ſuit muſt abate and be at an end for the preſent; and therefore no judgment could be given for the lands in queſtion, if either of the parties were ſlain in 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.

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.

WHEN the champions, thus armed with batons, arrive [340] within the liſts or place of combat, the champion of the tenant then takes his adverſary by the hand, and makes oath

[t] Co. Litt. 294. *Dyverſite des courts*, 304. [u] Sp. L. b. 28. c. 20. 22.

that the tenements in diſpute are not the right of the demandant; and the champion of the demandant, then taking the other by the hand, ſwears in the ſame manner that they are; ſo that each champion is, or ought to be, thoroughly perſuaded of the truth of the cauſe he fights for. Next an oath againſt ſorcery and enchantment is to be taken by both the champions, in this or a ſimilar form; "hear this, ye "juſtices, that I have this day neither eat, drank, nor have "upon me, neither bone, ſtone, ne graſs; nor any enchant-"ment, ſorcery, or witchcraft, whereby the law of God may "be abaſed, or the law of the devil exalted. So help me "God and his ſaints."

The 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 battel, 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 forſworn, and therefore never to be put upon a jury or admitted as a witneſs in any cauſe.

[341] THIS is the form of a trial by battel; a trial which the tenant, or defendant in a writ of right, has it in his election

at this day to demand; and which was the only deciſion of ſuch writ of right after the conqueſt, till Henry the ſecond by conſent of parliament introduced the *grand aſſiſe* [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 *vadies*, 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.

THIS method of trial is not only to be found in the codes [342] of almoſt all the northern nations, that broke in upon the

[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, retinendo quodquis poſſidet in libero tenemento ſoli, duelli caſum declinare poſſint homines ambiguum. At per hoc contingit, inſperatae et prematurae mortis ultimum evadere ſupplicium, vel ſaltem perennis infamiae opprobrium illius infeſti et inverecundi verbi, quod in ore victi turpiter ſonat, confecutivum. Ex aequitate item 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.

Roman empire, and eſtabliſhed petty kingdoms upon it's ruins [z]; but its original may alſo be traced as far back as the Moſaical law. "If a man deliver unto his neighbour an "aſs, or an ox, or a ſheep, or any beaſt, to keep; and it die, "or be hurt, or driven away, no man ſeeing it; then ſhall "an oath of the Lord be between them both, that he hath "not put his 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 hath alſo deviſed other collateral remedies for the party injured, in which the defendant is excluded from his wager of law.

[343] THE manner of waging and making law is this. He that has waged, or given ſecurity, to make his law, brings with him into court eleven of his neighbours: a cuſtom, which we find particularly deſcribed ſo early as in the league

[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. ley gager.* 77.

between

between Alfred and Guthrun the Dane[d]; for by the old Saxon conſtitution every man's credit in courts of law depended upon the opinion which his neighbours had of his veracity. The defendant then ſtanding at the end of the bar, is admoniſhed by the judges of the nature and danger of a falſe oath[e]. And if he ſtill perſiſts, he is to repeat this or the like oath: "hear this, ye juſtices, that I do not owe "unto Richard Jones the ſum of ten pounds, nor any penny "thereof, in manner and form as the ſaid Richard hath de-"clared 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 duode-*"*cima manu:*" and in 9 Henry III. when a defendant in an action of debt waged his law, it was adjudged by the court "*quod defendat ſe duodecima manu*[i]." Thus too, in an author of the age of Edward the firſt[k], we read, "*adjudicabitur reus* "*ad legem ſuam duodecima manu.*" And the antient treatiſe, entitled, *Dyverſite des courts*, expreſsly confirms ſir Edward Coke's opinion[l].

IT muſt be however obſerved, that ſo long as the cuſtom continued of producing the *ſecta*, the *ſuit*, or witneſſes to give probability to the plaintiff's demand, (of which we ſpoke in a former chapter,) the defendant was not put to wage his law [344]

[d] *cap.* 3. Wilk. *LL. Angl. Sax.*
[e] Salk. 682.
[f] Co. Litt. 295.
[g] 2 Vent. 171.
[h] *l.* 1. *c.* 9.
[i] Fitzh. *Ab. t. ley.* 78.
[k] *Hengham magna. c.* 5.
[l] *Il covynt aver' oue luy xi maynz de' jurer oue luy, ſc. que ilz entendre en lour conſciens que il diſoyt voier. (fol.* 306. *edit.* 1534.)

unleſs the *ſecta* was firſt produced, and their teſtimony was found conſiſtent. To this purpoſe ſpeaks *magna carta*, *c.* 28. "*Nullus ballivus de caetero ponat aliquem ad legem manifeſtam*," (that is, wager of battel,) "*nec ad juramentum*," (that is, wager of law,) "*ſimplici loquela ſua*," (that is, merely by his count or declaration,) "*ſine teſtibus fidelibus ad hoc inductis*." Which Fleta thus explains [m]: "*ſi petens ſectam produxerit, et concordes "inveniantur, tunc reus poterit vadiare legem ſuam contra peten- "tem et contra ſectam ſuam prolatam; ſed ſi ſecta variabilis in- "veniatur, 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
[345] in all judicial proceedings, reaped afterwards an ample harveſt of perjuries: for perjuries were puniſhed in part by pecuniary fines, payable to the coffers of the church. But with us in England wager of law is never *required*; and is then only *admitted*, where an action is brought upon ſuch matters as may be ſuppoſed to be privately tranſacted between

[m] *l.* 2. *c.* 63.
[n] Bro. *Abr. t. ley gager.* 9.
[o] Mod. Un. Hiſt. xxxiii. 22.
[p] Stiernhook *de jure Sueonum. l.* 2. *c.* 9.

the

the parties, and wherein the defendant may be preſumed to have made ſatisfaction without being able to prove it. Therefore it is only in actions of debt, upon ſimple contract, or for amercement, in actions of detinue, and of account, where the debt may have been paid, the goods reſtored, or the account balanced, without any evidence of either; it is only in theſe actions, I ſay, that the defendant is admitted to wage his law [q]: ſo that wager of law lieth not, when there is any ſpecialty (as a bond or deed) to charge the defendant, for that would be cancelled if ſatisfied; but when the debt groweth by word only: nor doth it lie in an action of debt, for arrears of an account, ſettled by auditors in a former action [r]. And by ſuch wager of law (when admitted) the plaintiff is perpetually barred; for the law, in the ſimplicity of the antient times, preſumed that no one would forſwear himſelf for any worldly thing [s]. Wager of law however lieth in a real action, where the tenant alleges he was not legally ſummoned to appear, as well as in mere perſonal contracts [t].

A MAN outlawed, attainted for falſe verdict, or for conſpiracy or perjury, or otherwiſe become infamous, as by pronouncing the horrible word in a trial by battel, ſhall not be permitted to wage his law. Neither ſhall an infant under the age of twenty-one, for he cannot be admitted to his oath; and therefore, on the other hand, the courſe of juſtice ſhall flow equally, and the defendant, where an infant is plaintiff, ſhall not wage his law. But a feme-covert, when joined with her huſband, may be admitted to wage her law; and an alien ſhall do it in his own language [u].

IT is moreover a rule, that where a man is compellable by law to do any thing, whereby he becomes creditor to another, the defendant in that caſe ſhall not be admitted to wage his law: for then it would be in the power of any bad man to run in debt firſt, againſt the inclinations of his creditor, and afterwards to ſwear it away. But where the plaintiff hath [346]

[q] Co. Litt. 295.
[r] 10 Rep. 103.
[s] Co. Litt. 295.
[t] Finch. L. 423.
[u] Co. Litt. 295.

given

given voluntary credit to the defendant, there he may wage his law; for, by giving him ſuch credit, the plaintiff has himſelf borne teſtimony that he is one whoſe character may be truſted. Upon this principle it is, that in an action of debt againſt a priſoner by a gaoler for his victuals, the defendant ſhall not wage his law: for the gaoler cannot refuſe the priſoner, and ought not to ſuffer him to periſh for want of ſuſtenance. But otherwiſe it is for the board or diet of a man at liberty. In an action of debt brought by an attorney for his fees, the defendant cannot wage his law, becauſe the plaintiff is compellable to be his attorney. And ſo, if a ſervant be retained according to the ſtatute of labourers, 5 Eliz. c. 4. which obliges all ſingle perſons of a certain age, and not having other viſible means of livelihood, to go out to ſervice; in an action of debt for the wages of ſuch a ſervant, the maſter ſhall not wage his law, becauſe the plaintiff was compellable to ſerve. But it had been otherwiſe, had the hiring been by ſpecial contract, and not according to the ſtatute [w].

IN no caſe where a contempt, treſpaſs, deceit, or any injury *with force* is alleged againſt the defendant, is he permitted to wage his law [x]: for it is impoſſible to preſume he has ſatisfied the plaintiff his demand in ſuch caſes, where damages are uncertain and left to be aſſeſſed by a jury. Nor will the law truſt the defendant with an oath to diſcharge himſelf, where the private injury is coupled as it were with a public crime, that of force and violence; which would be equivalent to the purgation oath of the civil law, which ours has ſo juſtly rejected.

[347] EXECUTORS and adminiſtrators, when charged for the debt of the deceaſed, ſhall not be admitted to wage their law [y]: for no man can with a ſafe conſcience wage law of another man's contract; that is, ſwear that he never entered into it, or at leaſt that he privately diſcharged it. The king alſo has his prerogative; for, as all wager of law imports a reflection on the plaintiff for diſhoneſty, therefore there ſhall be no ſuch

[w] Co. Litt. 295. [x] *Ibid.* Raym. 286. [y] Finch. L. 424.

wager

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 it's 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 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 [348] 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

[z] Finch. L. 425. [a] Co. Litt. 295.

of

of uſe, being avoided by the mode of bringing the action; but ſtill it is not out of force. And therefore, when a new ſtatute inflicts a penalty, and gives an action of debt for recovering it, it is uſual to add, in which no wager of law ſhall be allowed: otherwiſe an hardy delinquent might eſcape any penalty of the law, by ſwearing he had never incurred, or elſe had diſcharged it.

THESE ſix ſpecies of trials, that we have conſidered in the preſent chapter, are only had in certain ſpecial and eccentrical caſes; where the trial by the country, *per pais*, or by jury, would not be ſo proper or effectual. In the next chapter we ſhall conſider at large the nature of that principal criterion of truth in the law of England.

CHAPTER THE TWENTY-THIRD.

OF THE TRIAL BY JURY.

THE ſubject of our next inquiries will be the nature and method of the trial *by jury*; called alſo the trial *per pais*, or *by the country*: a trial that hath been uſed time out of mind in this nation, and ſeems to have been coëval with the firſt civil government thereof. Some authors have endeavoured to trace the original of juries up as high as the Britons themſelves, the firſt inhabitants of our iſland; but certain it is, that they were in uſe among the earlieſt Saxon colonies, their inſtitution being aſcribed by biſhop Nicholſon [a] to Woden himſelf, their great legiſlator and captain. Hence it is, that we may find traces of juries in the laws of all thoſe nations which adopted the feodal ſyſtem, as in Germany, France, and Italy; who had all of them a tribunal compoſed of twelve good men and true, "*boni homines*," uſually the vaſals or tenants of the lord, being the equals or peers of the parties litigant; and, as the lord's vaſals judged each other in the lord's courts, ſo the king's vaſals, or the lords themſelves, judged each other in the king's court [b]. In England we find actual mention of them ſo early as the laws of king Ethelred, and that not as a new invention [c]. Stiernhook [d] aſcribes the invention of the jury, which in the Teutonic language is denominated *nembda*, to Regner, king of Sweden and Denmark, who was co-temporary with our king Egbert. Juſt as we are apt to impute the invention of this, and ſome

[a] *de jure Saxonum, p.* 12.

[b] Sp. L. b. 30. c. 18. *Capital. Lud. pii. A. D.* 819. *c.* 2.

[c] Wilk. *LL. Angl. Sax.* 117.

[d] *de jure Sueonum. l.* 1. *c.* 4.

other

other pieces of juridical polity, to the ſuperior genius of Alfred the great; to whom, on account of his having done much, it is uſual to attribute every thing: and as the tradition of antient Greece 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. Its eſtabliſhment however and uſe, in this iſland, of what date ſoever it be, though for a time greatly impaired and ſhaken by the introduction of the Norman trial by battel, was always ſo highly eſteemed and valued by the people, that no conqueſt, no change of government, could ever prevail to aboliſh it. In *magna carta* it is more than once inſiſted on as the principal bulkwark of our liberties; but eſpecially by chap. 29. that no freeman ſhall be hurt in either his perſon or property; "*niſi per legale judicium* "*parium ſuorum vel per legem terrae.*" A privilege which is couched in almoſt the ſame words with that of the emperor Conrad, two hundred years before[e]: "*nemo beneficium ſuum* "*perdat, niſi ſecundum conſuetudinem anteceſſorum noſtrorum et* "*per judicium parium ſuorum.*" And it was ever eſteemed, in all countries, a privilege of the higheſt and moſt beneficial nature.

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 knowlege 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.

[e] *LL. Longob. l.* 3. *t.* 8. *l.* 4.

TRIALS

TRIALS by jury in civil cauſes are of two kinds; *extraordinary*, and *ordinary*. The extraordinary I ſhall only briefly hint at, and confine the main of my obſervations to that which is more uſual and ordinary.

THE firſt ſpecies of extraordinary trial by jury is that of the *grand aſſiſe*, which was inſtituted by king Henry the ſecond in parliament, as was mentioned in the preceding chapter, by way of alternative offered to the choice of the tenant or defendant in a writ of right, inſtead of the barbarous and unchriſtian cuſtom of duelling. For this purpoſe a writ *de magna aſſiſa eligenda* is directed to the ſheriff [f], to return four knights, who are to elect and 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] (1).

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

[f] F. N. B. 4.
[g] *l.* 2. *c.* 11—21.
[h] Finch. L. 412. 1 Leon. 303.

(1) It ſeems not to be aſcertained that any ſpecific number above twelve is abſolutely neceſſary to conſtitute the grand aſſize; but it is the uſual courſe to ſwear upon it the four knights and twelve others. *Viner, Trial*, X e.

See the proceedings upon a writ of right before the ſixteen recognitors of the grand aſſize, in 2 *Wilſ.* 541.

out

out with in explaining the nature of profecuting actions in general, *viz.* by following the order and courfe of the proceedings themfelves, as the moft clear and perfpicuous way of treating it.

[352] WHEN therefore an iffue is joined, by thefe words, "and "this the faid A prays may be inquired of by the country," or, "and of this he puts himfelf upon the country,—and the "faid B does the like," the court awards a writ of *venire facias* upon the roll or record, commanding the fheriff "that "he cauſe to come here on fuch a day, twelve free and law-"ful men, *liberos et legales homines*, of the body of his coun-"ty, by whom the truth of the matter may be better known, "and who are neither of kin to the aforefaid A, nor the "aforefaid B, to recognize the truth of the iffue between the "faid parties[i]." And fuch writ is accordingly iffued to the fheriff.

THUS the cauſe ſtands ready for a trial *at the bar* of the court itſelf: for all trials were there antiently had, in actions which were there firſt commenced; which then never happened but in manners of weight and conſequence, all trifling ſuits being ended in the court-baron, hundred, or county courts: and indeed all cauſes of great importance or difficulty are ſtill uſually retained upon motion, to be tried at the bar in the ſuperior courts. But when the uſage began to bring actions of any trifling value in the courts of Weſtminſter-hall, it was found to be an intolerable burthen to compel the parties, witneſſes, and jurors, to come from Weſtmoreland perhaps or Cornwall, to try an action of aſſault at Weſtminſter. A practice therefore very early obtained, of *continuing* the cauſe from term to term, in the court above, provided the juſtices in eyre did not previouſly come into the county where the cauſe of action aroſe[k]: and if it happened that they arrived there within that interval, then the cauſe was removed from the juriſdic-

[i] Append. N° II. § 4.

[k] *Semper dabitur dies partibus a juſticiariis de banco, ſub tali conditione, "niſi juſticiarii itinerantes prius venerint "ad partes illas."* Bract. *l.* 3. *tr.* 2. *c.* 11. § 8.)

tion of the juſtices at Weſtminſter to that of the juſtices in eyre. Afterwards when the juſtices in eyre were ſuperſeded by the modern juſtices of aſſiſe, (who came twice or thrice in the year into the ſeveral counties, *ad capiendas aſſiſas*, to take or try writs of aſſiſe, of *mort d'anceſtor*, *novel diſſeiſin*, *nuſance*, and the like,) a power was ſuperadded by ſtatute Weſtm. 2. [353] 13 Edw. 1. c. 30. to theſe juſtices of aſſiſe to try common iſſues in treſpaſs, and other leſs important ſuits, with directions to return them (when tried) into the court above, where alone the judgment ſhould be given. And as only the trial, and not the determination of the cauſe, was now intended to be had in the court below, therefore the clauſe of *niſi prius* was left out of the conditional *continuances* before mentioned, and was directed by the ſtatute to be inſerted in the writs of *venire facias*; that is, "that the ſheriff ſhould "cauſe the jurors to come to Weſtminſter (or wherever the "king's court ſhould be held) on ſuch a day in eaſter and "michaelmas terms; *niſi prius*, unleſs before that day the "juſtices aſſigned to take aſſiſes ſhall come into his ſaid "county." By virtue of which the ſheriff returned his jurors to the court of the juſtices of aſſiſe, which was ſure to be held in the vacation before eaſter and michaelmas terms; and there the trial was had.

AN inconvenience attended this proviſion: principally becauſe, as the ſheriff made no return of the jury to the court at Weſtminſter, the parties were ignorant who they were till they came upon the trial, and therefore were not ready with their challenges or exceptions. For this reaſon, by the ſtatute 42 Edw. III. c. 11. the method of trials by *niſi prius* was altered: and it was enacted that no inqueſt (except of aſſiſe and gaol-delivery) ſhould be taken by writ of *niſi prius*, till after the ſheriff had returned the names of the jurors to the court above. So that now in almoſt every civil cauſe the clauſe of *niſi prius* is left out of the writ of *venire facias*, which is the ſheriff's warrant to warn the jury; and is inſerted in another part of the proceedings, as we ſhall ſee preſently.

FOR now the courſe is, to make the ſheriff's *venire* returnable on the laſt return of the ſame term wherein iſſue is joined, *viz.* hilary or trinity terms; which, from the making up of the iſſues therein, are uſually called *iſſuable* terms. And he returns the names of the jurors in a *panel* (a little pane, or oblong piece of parchment) annexed to the writ. This jury
[354] is not ſummoned, and therefore, not appearing at the day, muſt unavoidably make default. For which reaſon a compulſive proceſs is now awarded againſt the jurors, called in the common pleas a writ of *habeas corpora juratorum*, and in the king's bench a *diſtringas*, commanding the ſheriff to have their bodies, or to diſtrein them by their lands and goods, that they may appear upon the day appointed. The entry therefore on the roll or record is [l], "that the jury is reſpited, through "defect of the jurors, till the firſt day of the next term, then "to appear at Weſtminſter; unleſs before that time, *viz.* on "wedneſday the fourth of March, the juſtices of our lord "the king, appointed to take aſſiſes in that county, ſhall have "come to Oxford, that is, to the place aſſigned for holding "the aſſiſes." And thereupon the writ commands the ſheriff to have their bodies at Weſtminſter on the ſaid firſt day of next term, or before the ſaid juſtices of aſſiſe, if before that time they come to Oxford; *viz.* on the fourth of March aforeſaid. And, as the judges are ſure to come and open the circuit commiſſions on the day mentioned in the writ, the ſheriff returns and ſummons 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.

[l] Append. N° II. § 4.

[m] See pag. 59.

IF

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 named by the court, and ſworn [n]. And theſe two, who are [355] called *eliſors*, or electors, ſhall indifferently name the jury, and their return is final; no challenge being allowed to their array.

LET us now pauſe a while, 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 pannel 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.

[n] Forteſc. *de Laud. LL. c.* 25. Co. Litt. 158. [o] Hiſt. C. L. c. 12.

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* [356] *whom* they are to appear, and before whom the trial is to be held, are the judges of the ſuperior court, if it be a trial at bar; or the judges of aſſiſe, delegated from the courts at Weſtminſter by the king, if the trial be held in the country: perſons, whoſe learning and dignity ſecure their juriſdiction from contempt, and the novelty and very parade of whoſe appearance have no ſmall influence upon the multitude. The very point of their being ſtrangers in the county is of infinite ſervice, in preventing thoſe factions and parties, which would intrude in every cauſe of moment, were it tried only before perſons reſident on the ſpot, as juſtices of the peace, and the like. And, the better to remove all ſuſpicion of partiality, it was wiſely provided by the ſtatutes 4 Edw. III. c. 2. 8 Ric. II. c. 2. and 33 Hen. VIII. c. 24. that no judge of aſſiſe ſhould hold pleas in any county wherein he was born or inhabits (2). And, as this conſtitution prevents party and faction from intermingling in the trial of right, ſo it keeps both the rule and the adminiſtration of the laws uniform. Theſe juſtices, though thus varied and ſhifted at every aſſiſes, are all ſworn to the ſame laws, have had the ſame education, have purſued the ſame ſtudies, converſe and conſult together, communicate their deciſions and reſolutions, and preſide in thoſe courts which are mutually connected and their judgments blended together, as they are interchangeably courts of appeal or advice to each other. And hence their adminiſtration of juſtice, and conduct of trials, are conſonant and

(2) See page 6, note 8, *ante*.

uniform;

uniform; whereby that confuſion and contrariety are avoided, which would naturally ariſe from a variety of uncommunicating judges, or from any provincial eſtabliſhment. But let us now return to the aſſiſes.

WHEN the general day of trials is fixed, the plaintiff or his attorney muſt bring down the record to the aſſiſes, and enter it with the proper officer, in order to it's being called on in courſe. If it be not ſo entered, it cannot be tried; therefore it is in the plaintiff's breaſt to delay any trial by not carrying down the record: unleſs the defendant, being fearful of ſuch neglect in the plaintiff, and willing to diſcharge himſelf from the action, will himſelf undertake to bring on the trial, giving proper notice to the plaintiff. Which proceeding is called the trial by *proviſo*, by reaſon of the clauſe then inſerted in the ſheriff's *venire*, *viz.* "*proviſo*, provided "that if two writs come to your hands, (that is, one from "the plaintiff and another from the defendant,) you ſhall "execute only one of them." But this practice hath begun to be diſuſed, ſince the ſtatute 14 Geo. II. c. 17. which enacts, that if, after iſſue joined, the cauſe is not carried down to be tried according to the courſe of the court, the plaintiff ſhall be eſteemed to be nonſuited, and judgment ſhall be given for the defendant as in caſe of a nonſuit. In caſe the plaintiff intends to try the cauſe, he is bound to give the defendant (if he lives within forty miles of London) eight days notice of trial; and, if he lives at a greater diſtance, then fourteen days notice, in order to prevent ſurprize: and if the plaintiff then changes his mind, and does not countermand the notice ſix days before the trial, he ſhall be liable to pay coſts to the defendant for not proceeding to trial, by the ſame laſt mentioned ſtatute (3). The defendant, however, or plaintiff, may,

[357]

(3) The ſtatute only requires ten days notice; but at the ſittings in London and Weſtminſter, the former practice of fourteen days notice was ſtill continued. But in all country cauſes ten days notice is ſufficient; as where the commiſſion day is upon the fifteenth of any month, notice of trial muſt be given on or before the fifth. *Impey's Prac.* 305. If the defendant reſides within forty miles of London, and if the cauſe is to be tried at the ſittings

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 (4).

BUT we will now ſuppoſe all previous ſteps to be regularly ſettled, and the cauſe to be called on in court. The record is then handed to the judge, to peruſe and obſerve the pleadings, and what iſſues the parties are to maintain and prove, while the jury is called and ſworn. To this end the ſheriff returns his compulſive proceſs, the writ of *habeas corpora*, or *diſtringas*, with the panel or 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
[358] with his freeholder's book; and the officer 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. By the ſtatute 3 Geo. II. c. 25. either party is entitled upon motion to have a ſpecial jury ſtruck upon the

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in London or Weſtminſter, then two days notice of countermand, before it is to be tried, is ſufficient. 1 *Cromp. Prac.* 220

(4) Where there have been no proceedings within four terms, a full term's notice of trial muſt be given previous to the aſſiſes or ſittings (1 *Cromp. Prac.* 217.), unleſs the cauſe has been delayed by the defendant himſelf by an injunction or other means. 2 *Bl. Rep.* 784. 3 *T. R.* 530. If the defendant proceeds to trial by *proviſo*, he muſt give the ſame notice as would have been required from the plaintiff. 1 *Cromp. Prac.* 219. Sometimes the courts impoſe it as a condition upon the defendant, that he ſhall accept *ſhort notice* of trial, which in country cauſes ſhall be given at the leaſt four days before the commiſſion day, one day being excluſive, and the other incluſive. 3 *T. R.* 660. But in town cauſes, two days notice ſeems to be ſufficient in ſuch a caſe. *Tidd*, 250.

trial

trial of any iſſue (5), as well at the aſſiſes as at bar; he paying the extraordinary expenſe unleſs the judge will certify (in purſuance of the ſtatute 24 Geo. II. c. 18.) that the cauſe required ſuch ſpecial jury.

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; 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.

(5) As well in indictments and informations for miſdemeſnors, as in civil actions. But there cannot be a ſpecial jury in caſes of treaſon or felony, for the party muſt have the advantage of making twenty peremptory challenges in a proſecution for felony, and thirty-five in the caſe of high treaſon. 21 *Viner*, 301.

How treaſon and felony may be tried in the court of niſi prius, ſee 4th vol. 309. n. 3. How a tale may be prayed, ſee p. 364. n. 8. poſt.

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 quadrantibus* [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 out of the immediate neighbourhood, would be apt

[q] Co. Litt. 156. Selden baronage. II. 11.
[r] K. v. Biſhop of Worceſter. M. 23 Geo. II. B. R.
[s] Co. Litt. 156.
[t] Stiernhook *de jure Goth. l.* 1. *c.* 4.

to

to intermix their prejudices and partialities in the trial of right. And this our law was ſo ſenſible of, that it for a long time has been gradually relinquiſhing this practice; the number of neceſſary hundredors in the whole panel, which in the reign of Edward III. were conſtantly *ſix*[t], being in the time of Forteſcue[u] reduced to *four*. Afterwards indeed the ſtatute 35 Hen. VIII. c. 6. reſtored the 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 alſo[v] 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. 16. 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 Edward 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 Wallie*, (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

[t] Gilb. Hiſt. C. P. c. 8.
[u] *de Laud. LL. c.* 25.
[v] 1 Inſt. 157.
[w] Years. 21 Hen. VI. 4.

ſtatute

ſtatute 3 Geo. II. c. 25. (before referred to) hath in civil cauſes undeſignedly abridged this privilege of foreigners, by the poſitive directions therein given concerning the manner of impanelling jurors, and the perſons to be returned in ſuch panel. So that (unleſs this ſtatute is to be conſtrued by the ſame equity which the ſtatute 8 Hen. VI. c. 29. declared to be the rule of interpreting the ſtatute 2 Hen. V. ſt. 2. c. 3. concerning the landed 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 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; proper affectum;* and *propter delictum.*

1. *Propter honoris reſpectum;* as if a lord of parliament be impanelled on a jury, he may be challenged by either party, or he may challenge himſelf.

[x] *Cod.* 3. 1. 16. *Decretal. l.* 2. *t.* 28. *c.* 36.
[y] *l.* 5. *c.* 15.
[z] *l.* 6. *c.* 37.
[a] Co. Litt. 294.
[b] 1 Inſt. 156.

2. *Propter*

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 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 Weſtm. 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 ſtatute 21 Edw. I. ſt. 1. and 2 Hen. V. ſt. 2. c. 3. This was doubled by the ſtatute 27 Eliz. c. 6. which requires in every ſuch caſe the jurors to have eſtate of freehold to the yearly value of 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 and 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;* which is the firſt time that copyholders (as ſuch) were admitted to ſerve upon juries in any of the king's courts, though they had before been admitted to ſerve in ſome of the ſheriff's courts, by ſtatutes 1 Ric. III. c. 4. and 9 Hen. VII. c. 13. And, laſtly, by ſtatute 3 Geo. II. c. 25. any leaſeholder for the term of five hundred years abſolute, or for any term determinable upon life or lives, of the clear yearly value of 20*l. per annum* over and above the rent reſerved, is qualified to ſerve upon juries (6). When the jury is *de medietate*

[c] Cro. Eliz. 566.

(6) Upon account of the ſmall number of freeholders in the county of Middleſex, and the frequent occaſion for juries at Weſtminſter

linguae, that is, one moiety of the Engliſh tongue or nation, and the other of any foreign one, no want of lands ſhall be
[363] cauſe of challenge to the alien; for, as he is incapable to hold any, this would totally defeat the privilege [d].

3. JURORS may be challenged *propter affectum*, for ſuſpicion of bias or partiality. This may be either a *principal* challenge, or *to the favour*. A *principal* challenge is ſuch, where the cauſe aſſigned carries with it *prima facie* evident marks of ſuſpicion, either of malice or favour: as, that a juror is of kin to either party within the ninth degree [e]; that he has been arbitrator on either ſide; that he has an intereſt in the cauſe; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the ſame cauſe; that he is the party's maſter, ſervant, counſellor, ſteward, or attorney, or of the ſame ſociety or coporation 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

[d] See Stat. 2 Hen. V. ſt. 2. c. 3. 8 Hen. VI. c. 29. [e] Finch. L. 401.

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miniſter in that county, it was enacted by 4 *Geo. II. c.* 7. that a leaſeholder for any number of years, if the improved annual value of his leaſe be 50l. above all ground-rents and other reſervations, ſhall be liable to ſerve upon juries for that county. By the 3 *Geo. II. c.* 25. perſons impanelled upon any jury within the city of London ſhall be houſeholders, and poſſeſſed of ſome eſtate either real or perſonal of the value of 100 l.

It is one of the clauſes in the bill of rights that jurors which paſs upon men in trials for high treaſon ought to be freeholders. 1 *W. & M. ſ.* 2. *c.* 2.

But any freehold is ſufficient, if he has copyhold beſides, ſo that the whole amounts to 10 l. per annum. *Foſt.* 7.

But ſince the 4 & 5 W. & M. c. 24. it does not ſeem neceſſary that jurors in other criminal trials ſhould be freeholders.

acquaintance

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 judgment of the pillory, tumbrel, or the like; or to be branded, whipt, or ſtigmatized; or if he be outlawed or excommu- [364] nicated, or hath been attainted of falſe verdict, *praemunire*, or forgery; or laſtly, if he hath proved recreant when champion in the trial by battle, and thereby hath loſt his *liberam legem*. A juror may himſelf be examined on oath of *voir dire*, *veritatem dicere*, with regard to ſuch cauſes of challenge, as are not to his diſhonour or diſcredit; but not with regard to any crime, or any thing which tends to his diſgrace or diſadvantage[h].

BESIDES theſe challenges, which are exceptions againſt the fitneſs of jurors, and whereby they may be *excluded* from ſerving, there are alſo other cauſes to be made uſe of by the jurors themſelves, which are matter of exemption; whereby their ſervice is *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 per-

[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 repudiari; etiam plures ex* "*cauſa praegnanti et manifeſta.*" (Stiernhook. *l.* 1. *c.* 4.

[g] Co. Litt. 158.

[h] *Ibid.* 158. *b.*

ſons,

ſons, 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
[365] ſtatutes, the judge is empowered at the prayer of either party to award a *tales de circumſtantibus*[j], of perſons preſent in court, to be joined to the other jurors to try the cauſe; who are liable however to the ſame challenges as the principal jurors (8). This is uſually done, till the legal number of twelve

[i] F. N. B. 166. *Reg. Brev.* 179. [j] Append. N° II. § 4.

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(8) Before the ſtatute 3 Geo. II. c. 25. twenty-four different jurors were returned for the trial of each ſeparate cauſe, in the manner of twenty-four ſpecial jurymen at preſent; hence the neceſſity of praying a *tales* from the non-attendance of twelve unexceptionable perſons in each panel would frequently occur. And by the 7 & 8 W. III. c. 32. it was enacted, that the taleſmen ſhould be ſelected from thoſe who had been ſummoned in other panels. But ſince the practice was introduced by 3 Geo. II. c. 25. of impanelling not leſs than forty-eight, nor more than ſeventy-two, for the trial of all common cauſes, the proviſions of the ſtatutes, reſpecting a *tales*, are now confined in a great meaſure to ſpecial juries. If a tales, in default of ſpecial jurymen, is prayed, it is ſupplied agreeably to the 7 & 8 W. III. c. 32. from the panel of common jurymen. No *tales* can be prayed where all the ſpecial jurymen are abſent.

By

be completed; in which patriarchal and apoſtolical number ſir Edward Coke [k] hath diſcovered abundance of myſtery [l].

WHEN a ſufficient number of perſons impanelled, or *tales*-men, appear, they are then ſeparately ſworn, well and truly to try the iſſue between the parties, and a true verdict to give according to the evidence; and hence they are denominated the jury, *jurata*, and jurors, *ſc. juratores*.

WE may here again obſerve, and obſerving we cannot but admire, how ſcrupulouſly delicate, and how impartially juſt the law of England approves itſelf, in the conſtitution and frame of a tribunal, thus excellently contrived for the teſt and inveſtigation of truth; which appears moſt remarkably, 1. In the avoiding of frauds and ſecret management, by electing the twelve jurors out of the whole panel by lot. 2. In 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 indifferent; and repelling particular jurors,

[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 quaedam* "*eſſet religio.*" (*Diſſert. epiſtolar.* 49.) Spelm. *Gloſſ.* 329.

By the 35 Hen. VIII. c. 6. each party in the iſſue in a civil action joined at Weſtminſter may pray a *tales*, but this ſtatute did not extend to caſes in which the king was a party; therefore by the 4 & 5 Ph. & M. it was enacted, that in criminal caſes tried by writ of niſi prius, any perſon authorized, that is now the attorney general, or any proſecutor by his warrant, may pray a tales, but this does not extend to the defendant; and the proſecutor of any penal action, who ſues as well for the crown as himſelf, may pray a tales without ſuch warrant; and by the 14 Eliz. c. 9. the defendant in theſe penal actions may alſo pray a tales.

In criminal caſes, where the iſſue is joined at Weſtminſter, tried at niſi prius in counties palatine, in order to pray a tales the proſecutor muſt have the warrant of the king's attorney general, and not of the attorney general of the county. 4 *Burr.* 2171.

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,
[366] as Tully [m] 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 conſici 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 léges judices, ut obſtricti religione judicarent* [n].

THE jury are now ready to hear the merits; and, to fix their attention the cloſer to the facts which they are impanelled and ſworn to try, the pleadings are opened to them by counſel on that ſide which holds the affirmative of the queſtion in iſſue. For the iſſue is ſaid to lie, and proof is always firſt required, upon that ſide which affirms the matter in queſtion; in which our law agrees with the civil [o]; "*ei incumbit probatio, qui dicit, non qui negat: cum per rerum* "*naturam factum-negantis probatio nulla ſit.*" The opening counſel briefly informs them what has been tranſacted in the court above, the parties, the nature of the action, the de-

[m] *pro Cluentio.* 43.

[n] Aſcon. *in Cic. Verr.* 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] *Ff.* 22. 3. 2. *Cod.* 4. 19. 23.

claration,

claration, the plea, replication, and other proceedings, and laſtly, upon what point the iſſue is joined, which is there ſent down to be determined. Inſtead of which formerly [p] the whole 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. [367]

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 obſervatious on the manner of giving evidence.

AND, firſt, evidence ſignifies that which demonſtrates, makes clear, or aſcertains the truth of the very fact or point in iſſue, either on the one ſide or on the other; and no evidence ought to be admitted to any other point. Therefore upon an action of debt, when the defendant denies his bond by the plea of *non eſt factum*, and the iſſue is, whether it be the defendant's deed or no; he cannot give a releaſe of this bond in evidence; for that does not deſtroy the bond, and therefore does not prove the iſſue which he has choſen to rely upon, *viz.* that the bond has no exiſtence.

AGAIN; evidence in the trial by jury is of two kinds, either that which is given in proof, or that which the jury may receive by their own private knowlege. The former, or *proofs*, (to which in common ſpeech the name of evidence is uſually confined,) are either written, or *parol*, that is, by

[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.

word of mouth. Written proofs, or evidence, are, 1. Records, and 2. Antient deeds of thirty years ſtanding, which prove themſelves (9); but 3. Modern deeds, and 4. Other
[368] writings, muſt be atteſted and verified by *parol* evidence of witneſſes. And the one general rule that runs through all the doctrine of trials is this, that the beſt evidence the nature of the caſe will admit of ſhall always be required, if poſſible to be had; but, if not poſſible, then the beſt evidence that can be had ſhall be allowed (10). For if it be found that there is any

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(9) This rule is laid down in books of evidence without ſufficient explanation of it's principle, or of the extent of it's application. There ſeems to be danger in permitting a deed to be read merely becauſe it bears date above thirty years before it's production, and in requiring no evidence, where a forgery may be committed with the leaſt probability of detection. Chief Baron Gilbert lays down that where poſſeſſion has gone agreeably to the limitations of a deed bearing date thirty years ago, it may be read without any evidence of it's execution, though the ſubſcribing witneſſes be ſtill living. *Law of Ev.* 94. For ſuch poſſeſſion affords ſo ſtrong a preſumption in favour of the authenticity of the deed, as to ſuperſede the neceſſity of any other proof of the validity of its origin, or of it's due execution.

The court of king's-bench have determined that the mere production of a pariſh-certificate dated above thirty years ago, was ſufficient to make it evidence without giving any account of the cuſtody from which it was extracted. 5 *T. R.* 259.

(10) No rule of law is more frequently cited, and more generally miſconceived, than this. It is certainly true when rightly underſtood; but it is very limited in it's extent and application. It ſignifies nothing more than that, if the beſt *legal* evidence cannot poſſibly be produced, the next beſt *legal* evidence ſhall be admitted. Evidence may be divided into primary and ſecondary; and the ſecondary evidence is as accurately defined by the law as the primary. But in general the want of better evidence can never juſtify the admiſſion of hearſay, intereſted witneſſes, or the copies of copies, &c. Where there are exceptions to general rules, theſe exceptions are as much recognized by the law as the general rule; and where boundaries and limits are eſtabliſhed by the law for every caſe that can poſſibly occur, it is immaterial what we call the rule, and what the exception.

better

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 (11). So too, books of account, or ſhop-books,

(11) In caſes of cuſtoms and preſcriptive rights, hearſay or traditional evidence is not admitted until ſome inſtances of the cuſtom or exerciſe of the right claimed are firſt proved. The declarations of parents reſpecting their marriage, and the legitimacy of their children, are admitted after their deceaſe as evidence. And hearſay is alſo received reſpecting pedigrees and the death of relations abroad. *Bull. N. P.* 294. 2 *Eſp.* 784. What has been ſaid in converſation in the hearing of any party, if not contradicted by him, may be given in evidence; for not being denied, it amounts to a ſpecies of confeſſion. But it can only be received where it muſt be preſumed to have been heard by the party, and therefore in one caſe the court ſtopped the witneſs from repeating a converſation, which had paſſed in a room where the priſoner was, but at the time whilſt ſhe had fainted away. It has been the practice of the quarter-ſeſſions to admit the declarations of paupers reſpecting their ſettlements to be received as evidence after their death, or if living, where they could not be produced. See 3 *T. R.* 707. where the judges of the king's bench were divided upon the legality of this practice, and where the ſubject of hearſay evidence is much diſcuſſed. In criminal caſes, the declarations of a perſon, who relates *in extremis*, or under an apprehenſion of dying, the cauſe of his death, or any other material circumſtance, may be admitted in evidence; for the mind in that awful ſtate is preſumed to be under as great a religious obligation to diſcloſe the truth, as

are not allowed of themſelves to be given in evidence for the owner; but a ſervant who made the entry may have recourſe to them to refreſh his memory: and, if ſuch ſervant (who was accuſtomed to make thoſe entries) be dead, and his hand be proved, the book may be read in evidence[r]: for as tradeſmen are often under a neceſſity of giving credit without any note or writing, this is therefore, when accompanied with ſuch other collateral proofs of fairneſs and regularity[s], the beſt evidence that can then be produced. However this dangerous ſpecies of evidence is not carried ſo far in England as abroad[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
[369] the merchant, amount at all 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. 1. 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;

[r] Law of *niſi prius*, 266.

[s] Salk. 285.

[s] Gail. *obſervat.* 2. 20. 23.

[t] *Inſtrumenta domeſtica, ſeu adnotatio, ſi non aliis 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. l. 7.)*

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is created by the adminiſtration of an oath. But declarations of a deceaſed perſon ought not to be received, unleſs the court is ſatisfied, from the circumſtances of the caſe, that they were made under the impreſſion of approaching diſſolution. *Leach's Caſes*, 400. But the declarations of a felon at the place of execution cannot be received, as he is incompetent to give evidence upon oath; and the ſituation of a dying man is only thought equivalent to that of a competent witneſs, when he is ſworn. *Ibid.* 276. By the 1 & 2 Ph. & Mar. c. 13. depoſitions taken before a juſtice of peace in caſes of felony, may be read in evidence at the trial, if the witneſs dies before the trial. But as the ſtatute confines this to felony, and as it is an innovation upon the common law, it cannot be extended to any miſdemeanour. 1 *Salk.* 281.

unleſs

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 (12.)

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 expences be tendered him, is bound to appear at all; nor, if he appears, is he bound to give evidence till ſuch charges are actually paid him: except he reſides within the bills of mortality, and is ſummoned to give evidence within the ſame. This compulſory proceſs, to bring in unwilling witneſſes, and the additional terrors of an attachment in caſe of diſobedience, are of excellent uſe in the thorough inveſtigation of truth (13): and, upon the ſame principle, in the Athenian courts, the witneſſes who were ſummoned to attend the trial had their 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].

[u] Pott. Antiq. b. 1. c. 21.

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(12) The entries in the book of a perſon deceaſed not connected with the parties are of no more avail than hearſay. But the books of an incumbent reſpecting the tithes of the pariſh are evidence for his ſucceſſor. 5 *T. R.* 123. 2 *Veſ.* 43.

(13) The uſual mode of proceeding againſt witneſſes for diſobedience of the writ of ſubpoena is by the ſummary proceſs of an attachment for a contempt; but the courts will not grant an attachment againſt a witneſs, unleſs all the neceſſary expences of the journey, and the witneſs's ſtay at the place of trial, be tendered at the time of ſerving the ſubpoena. *H. Bl.* 49.

ALL witneſſes, of whatever religion or country, that have the uſe of their reaſon (14), are to be received and examined; except ſuch as are *infamous*, or ſuch as are *intereſted* in the event of the cauſe. All others are *competent* witneſſes; though the jury from other circumſtances will judge of their *credibility* (15).

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14) A Mahometan may be ſworn upon the Alcoran, and a Gentoo according to the cuſtom of India, and their evidence may be received even in a criminal caſe. *Leach's Caſes*, 52. 1 *Atk.* 21. But an Atheiſt, or a perſon who has no belief or notion of a God, or a future ſtate of rewards and puniſhment, ought not in any inſtance to be admitted as a witneſs. 1 *Atk.* 45.

I have known a witneſs rejected, and hiſſed out of court, who declared that he doubted of the exiſtence of a God and a future ſtate. But I have ſince heard a learned judge declare at niſi prius, that the judges had reſolved not to permit adult witneſſes to be interrogated reſpecting their belief of the Deity and a future ſtate. It is probably more conducive to the courſe of juſtice that this ſhould be preſumed till the contrary is proved. And the moſt religious witneſs may be ſcandalized by the imputation, which the very queſtion conveys.

Quakers, who refuſed to take an oath under any form by the 7 & 8 W. c. 34. were permitted in judicial proceedings to make a ſolemn affirmation; and if ſuch affirmation, like an oath, is proved to be falſe, they are ſubject to the penalties of perjury. But this does not extend to criminal cauſes. 8 Geo. I. c. 6. 22 Geo. II. c. 30. and c. 46.

Their affirmations are received in penal actions, as for bribery. See Atcheſon v. Everitt, *Cowp.* 382. where this ſubject is largely diſcuſſed.

Lord Mansfield lays down generally that an affirmation is not refuſed where the action, though in form a criminal action, in ſubſtance is a mere action between party and party. Lord Mansfield there laments that ſuch an exception had been made by the legiſlature.

(15) "The old caſes upon the competency of witneſſes have "gone upon very ſubtle grounds. But of late years the courts "have endeavoured, as far as poſſible, conſiſtent with authorities, "to let the objection go to the credit, rather than to the com-"petency of a witneſs." *Lord Mansfield*, 1 *T. R.* 300.

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Infamous perſons are ſuch as may be challenged as jurors, *propter delictum*; and therefore never ſhall be admitted to give evidence to inform that jury, with whom they were too ſcandalous to aſſociate. Intereſted witneſſes may be examined upon a *voir dire*, if ſuſpected 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 (16). 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 knowlege by virtue of ſuch truſt and confidence [v] (17): but he may

[v] Law of *niſi prius*, 267.

It ſeems now to be eſtabliſhed, that if a witneſs does not immediately gain or loſe by the event of the cauſe, and if the verdict in the cauſe cannot be evidence either for or againſt him in any other ſuit, he ſhall be admitted as a competent witneſs, though the circumſtances of the caſe may in ſome degree leſſen his credibility. Bent v. Baker, 3 *T. R.* 27. See 4 vol. 157. n. 4.

A ſervant of a tradeſman from neceſſity is permitted in an action by his maſter to prove the delivery of goods, though he himſelf may have purloined them; but in an action brought againſt the maſter for the negligence of his ſervant, the ſervant cannot be a witneſs for his maſter without a releaſe; for his maſter may afterwards have his action againſt the ſervant, and the verdict recovered againſt him may be given in evidence in that action to prove the damage which the maſter has ſuſtained. 4 *T. R.* 589.

(16) A witneſs may be examined with regard to his own infamy, if the confeſſion of it does not ſubject him to any future puniſhment; as a witneſs may be aſked if he has not ſtood in the pillory for perjury. 4 *T. R.* 440.

(17) But the principles and policy of this rule reſtrain it to that confidence only, which is placed in a counſel or ſolicitor, and which muſt neceſſarily be inviolable, where the uſe of advocates and legal aſſiſtants is admitted. But the purpoſes of public juſtice ſuperſede the delicacy of every other ſpecies of confidential communication. In the trial of the ducheſs of Kingſton it was determined that a friend might be bound to diſcloſe, if ne-

be examined as to mere matters of fact, as the execution of a deed or the like, which might have come to his knowlege without being intruſted in the cauſe.

ONE witneſs (if credible) is *ſufficient* evidence to a jury of any ſingle fact: though undoubtedly the concurrence of two or more corroborates the proof. Yet our law conſiders that there are many tranſactions to which only one perſon is privy; and therefore does not *always* demand the teſtimony of two, as the civil law univerſally requires. "*Unius reſponſio teſtis* "*omnino non audiatur*[w]." To extricate itſelf out of which abſurdity, the modern practice of the civil law courts has plunged itſelf into another. For, as they do not allow a leſs number than two witneſſes to be *plena probatio*, they call the teſtimony of one, though never ſo clear and poſitive, *ſemi plena probatio* only, on whom no ſentence can be founded. To make up therefore the neceſſary complement of witneſſes, when they have one only to a ſingle fact, they admit the party himſelf (plaintiff or defendant) to be examined in his own behalf; and adminiſter to him what is called the *ſuppletory* oath; and, if his evidence happens to be in his own favour, this immediately converts the half proof into a whole one. By this ingenious device ſatisfying at once the forms of the Roman law, and acknowleging the ſuperior reaſon-
[371] ableneſs 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*.

POSITIVE proof is always required, where from the nature of the caſe it appears it might poſſibly have been had. But,

[w] *Cod.* 4. 20. 9.

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ceſſary in a court of juſtice, ſecrets of the moſt ſacred nature, which one ſex could repoſe in the other. And that a ſurgeon was bound to communicate any information whatever, which he was poſſeſſed of in conſequence of his profeſſional attendance. 11 *St. Tr.* 243. 246. And thoſe ſecrets only, communicated to a counſel or attorney, are inviolable in a court of juſtice, which have been intruſted to them whilſt acting in their reſpective characters to the party as their client. 4 *T. R.* 431. 753.

next to *poſitive* proof, *circumſtantial* evidence or the doctrine of *preſumptions* muſt take place: for when the fact itſelf cannot be demonſtratively evinced, that which comes neareſt to the proof of the fact is the proof of ſuch circumſtances which either *neceſſarily*, or *uſually*, attend ſuch facts; and theſe are called preſumptions, which are only to be relied upon till the contrary be actually proved. *Stabitur præſumptioni 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 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 (19).

[x] Co. Litt. 373.
[y] *Ibid.* 6.
[z] Gilb. evid. 161.
[a] Co. Litt. 373.

(18) This can ſcarcely be correct; I ſhould conceive that proof may be admitted to repel all preſumptions whatever; and even if a receipt ſhould be produced expreſsly for the rent of the year 1754, ſtill the landlord might ſhew that it had been obtained by miſtake or fraud, and that no rent had been received at the time.

(19) It is difficult to ſay what is a light and raſh preſumption, if it is any preſumption at all. Any circumſtance may be proved from

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 mis-ſtates 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 of error, after judgment given in the court below. But a *demurrer* to evidence ſhall be determined by the court, out of which the record is ſent. This happens, where a record or other matter is produced in evidence, concerning the legal conſequences of which there ariſes a doubt in law: in which

[b] Reg. Br. 182. 2 Inſt. 487.

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from which a fair inference can be drawn, though alone it would be too ſlight to ſupport the verdict of the jury, yet it may corroborate other teſtimony, and a number of ſuch preſumptions may become of importance. *Poſſunt diverſa genera ita conjungi, ut quæ ſingula non nocerent, ea univerſa tanquam grando reum opprimant.* Matthæus de Crim.

caſe

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 uſe as formerly; ſince the more frequent extenſion of the [373] diſcretionary powers of the court in granting a new trial, which is now very commonly had for the miſdirection of the judge at *niſi prius*.

THIS open examination of witneſſes *viva voce*, in the preſence of all 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 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

[c] Co. Litt. 72. 5 Rep. 104.

[d] Hale's Hiſt. C. L. 254, 5, 6.

upon

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
[374] it. Theſe are a few of the advantages attending this, the Engliſh, way of giving teſtimony, *ore tenus*. Which was alſo indeed familiar among the *antient* Romans, as may be collected from Quintillian [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 knowlege of facts, it was an 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 knowlege. 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 knowlege, without hearing extrinſic evidence or receiving any direction from the judge [i]. And the ſame doctrine

[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 ſit habenda teſtibus;* "*qui, et cujus dignitatis, et cujus acſti-* "*mationis ſint; et, qui ſimpliciter viſi* "*ſint dicere; utrum unum eundemque* "*meditatum ſermonem attulerint, an ad ea* "*quae interrogaveras extempore veriſi-* "*milia reſponderint.*" (*Ff. 22. 5. 3.*)

[g] Year-book, 14 Hen. VII. 29 Plowd. 12. Hob. 227. 1 Lev. 87.

[h] Vaugh. 148, 149.

[i] Bract. *l. 4. tr. 1. c. 19. § 3. Flet. l. 4. c. 9. § 2.*

(when

(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 which additional proof the law preſumed they were privately acquainted, though it did not [375] 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 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 bulle 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

[k] Styl. 233. 1 Sid. 133. [l] ch. 2.

with

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
[376] from the bar; or if they receive any freſh evidence in private; or if to prevent diſputes they caſt lots for whom they ſhall find; any of theſe circumſtances will entirely vitiate the verdict. And it has been held, that if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or impriſoned [m], the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart [n]. This neceſſity of a total unanimity ſeems to be peculiar to our own conſtitution [o]; or, at leaſt, in the *nembda* or jury of the 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] (20).

[m] Mirr. c. § 24.
[n] *Lib. Aſſ. fol.* 40. *pl.* 11.
[o] See Barrington on the ſtatutes 19, 20, 21.
[p] Stiern. *l.* 1. *c.* 4.

(20) The learned judge has diſplayed much erudition in the beginning of this chapter, to prove the antiquity of the trial by jury; but the trials referred to by the authors there cited, and even the *judicium parium*, mentioned in the celebrated chapter of *magna charta*, are trials which were ſomething ſimilar to that by a jury, rather than inſtances of a trial by jury according to it's preſent eſtabliſhed form. The *judicium parium* ſeems ſtrictly the judgment of a ſubject's equals in the feudal courts of the king and barons. And ſo little appears to be aſcertained by antiquarians, reſpecting the introduction of the trial in criminal caſes by two juries, that, although it is one of the moſt important, yet it is certainly one of the moſt obſcure and inexplicable parts of the law of England.

The unanimity of twelve men, ſo repugnant to all experience of human conduct, paſſions, and underſtandings, could hardly in any age have been introduced into practice by a deliberate act of the legiſlature.

But

WHEN they are all unanimouſly agreed, the jury return back to the bar; and, before they deliver their verdict, the plaintiff is bound to appear in court, by himſelf, attorney, or counſel, in order to anſwer the amercement to which by the old law he is liable, as has been formerly mentioned [q], in caſe he fails in his ſuit, as a puniſhment for his falſe claim. To be *amerced*, or *a mercie*, is to be at the king's mercy with regard to the fine to be impoſed: *in miſericordia domini regis pro falſo clamore ſuo.* The amercement is diſuſed, but the form ſtill continues; and if the plaintiff does not appear, no verdict can be given, but the plaintiff is ſaid to be *nonſuit*, *non ſequitur clamorem ſuum.* Therefore it is uſual for a plaintiff, when he or his counſel perceives that he has not given evidence ſufficient to maintain his iſſue, to be voluntarily

[q] Page 275. See alſo Vol. IV. 379.

But that the life, and perhaps the liberty and property of a ſubject, ſhould not be affected by the concurring judgment of a leſs number than twelve, where more were preſent, was a law founded in reaſon and caution; and ſeems to be tranſmitted to us by the common law, or from immemorial antiquity. The grand aſſize might have conſiſted of more than twelve, yet the verdict muſt have been given by twelve or more; and if twelve did not agree, the aſſize was afforced, that is, others were added till twelve did concur. See 1 *Reeves's Hiſt. of Eng. Law.* 241. 480. This was a majority and not unanimity. A grand jury may conſiſt of any number from twelve to twenty-three incluſive, but a preſentment ought not to be made by leſs than twelve. 2 *Hale, P. C.* 161. The ſame is true alſo of an inquiſition before the coroner. In the high court of parliament, and the court of the lord high ſteward, a peer may be convicted by the greater number; yet there can be no conviction unleſs the greater number conſiſts at leaſt of twelve. 3 *Inſt.* 30. *Kelyng.* 56. *Moore,* 622. Hence in all theſe caſes if twelve only appeared, it followed as a neceſſary conſequence, that to act with effect they muſt have been unanimous.

Hence this may be ſuggeſted as a conjecture reſpecting the origin of the unanimity of juries, that, as leſs than twelve, if twelve or more were preſent, could pronounce no effective verdict when twelve only were ſworn, their unanimity became indiſpenſable.

nonſuited,

nonſuited, or withdraw himſelf: whereupon the crier is ordered to *call the plaintiff*, and if neither he, nor any body for him, appears, he is nonſuited, the jurors are diſcharged, the action is at an end, and the defendant ſhall recover his coſts. The reaſon of this practice is, that a nonſuit is more eligible for the plaintiff, than a verdict againſt him: for after a nonſuit, which is only a default, he may commence the ſame ſuit
[377] 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 (21).

A VERDICT, *vere dictum*, is either *privy*, or *public*. A *privy* verdict is when the judge hath left or adjourned the court: and the jury, being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court[r]: which privy verdict is of no force, unleſs afterwards affirmed by a public verdict given openly in court; wherein the jury may, if they pleaſe, vary from their 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 (22). But the only effectual and legal

[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.

(21) When a verdict will carry all the coſts, and it is doubtful from the evidence for which party it will be given, it is a common practice for the judge to recommend, and the parties to conſent, that a juror ſhould be withdrawn; and thus no verdict is given, and each party pays his own coſts.

Where there is a doubt at the trial whether the evidence produced by the plaintiff is ſufficient to ſupport the verdict given in his favour by the jury, the judge will give leave to apply to the court above to ſet aſide the verdict and to enter a nonſuit; but if ſuch liberty is not reſerved at the trial, the court above can only grant the defendant a new trial, if they think the plaintiff's evidence inſufficient to ſupport his caſe. 6 *T. R.* 67.

(22) A privy verdict cannot be given in treaſon and felony. 2 *H. P. C.* 300.

verdict

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 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 ſhall be of opinion that the plaintiff had cauſe of action, they then find for the plaintiff; if otherwiſe, then for the defendant. This is entered at length on the record, and afterwards argued and determined in the court at Weſtminſter, from whence the iſſue came to be tried.

ANOTHER method of finding a ſpecies of ſpecial verdict, is [378] when the jury find a verdict generally for the plaintiff, but ſubject nevertheleſs to the opinion of the judge or the court above, on a *ſpecial caſe* ſtated by the counſel on both ſides with regard to a matter of law: which has this advantage over a ſpecial verdict, that it is attended with much leſs 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 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 caſe 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 it's 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 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 ad-

[s] Litt. § 386.

[t] Monteſq. Sp. L. xi. 6.

miniſtration

miniſtration of juſtice, which ſecures both our perſons and our properties, is the great end of civil ſociety. But if that be entirely intruſted to the magiſtracy, a ſelect body of men, and thoſe generally ſelected by the prince or ſuch as enjoy the higheſt offices in the ſtate, their deciſions, in ſpite of their own natural integrity, will have frequently an involuntary bias towards thoſe of their own rank and dignity: it is not to be expected from human nature, that *the few* ſhould be always attentive to the intereſts and good of *the many*. On the other hand, if the power of judicature were placed at random in the hands of the multitude, their deciſions would be wild and capricious, and a new rule of action would be every day eſtabliſhed in our courts. It is wiſely therefore ordered, that the principles and axioms of law, which are general propoſitions, flowing from abſtracted reaſon, and not accommodated to times or to men, ſhould be depoſited in the breaſts of the judges, to be occaſionally applied to ſuch facts as come properly aſcertained before them. For here partiality can have little ſcope: the law is well known, and is the ſame for all ranks and degrees; it follows as a regular concluſion from the premiſes of fact pre-eſtabliſhed. But in ſettling and adjuſting a queſtion of fact, when intruſted to any ſingle magiſtrate, partiality and injuſtice have an ample field to range in; either by boldly aſſerting that to be proved which is not ſo, or by more artfully ſuppreſſing ſome circumſtances, ſtretching and warping others, and diſtinguiſhing away the remainder. Here therefore a competent number of ſenſible and upright jurymen, choſen by lot from among thoſe of the middle rank, will be found the beſt inveſtigators of truth, and the ſureſt guardians of public juſtice. For the moſt powerful individual in the ſtate will be cautious of committing any flagrant invaſion of another's right, when he knows that the fact of his oppreſſion muſt be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once the fact is aſcertained, the law muſt of courſe redreſs it. This therefore preſerves in the hands of the people that ſhare, which they ought to have in the adminiſtration

[380]

ſtration 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, 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 it's 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 it's rights; to reſtore it to it's antient dignity, if at all impaired by the different value of property, or otherwiſe deviated from 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.

[381]

[u] 2 Whitelocke of parl. 427. [w] Mod. Un. Hiſt. xxxiii. 22. [x] *Ibid.* 17.

YET,

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 through the expence and circuity of a court of equity, [382] 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

(23) Where one party is in poſſeſſion of papers or any ſpecies of written evidence material to the other, if notice is given him to produce them at the trial, upon his refuſal copies of them will be admitted; or if no copy has been made, any parol evidence of their contents will be received. The court and jury preſume in favour of ſuch evidence; becauſe, if it were not agreeable to the ſtrict truth, it would be corrected by the production of the originals. There is no difference with reſpect to this ſpecies of evidence between criminal and civil caſes. 2 *T. R.* 201.

time,

time, through the channel of a court of equity: but ſuch a practice has never yet been directly adopted [y] as the rule of a court of law (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 [384]

[y] See page 75.
[z] Stat. 13 Geo. III. c. 63.
[a] Stra. 177.
[b] See page 294.

(24) A court can compel the plaintiff to conſent to have a witneſs going abroad examined upon interrogatories, or to have an abſent witneſs examined under a commiſſion, by the power the judges have of putting off the trial; but they have no control in theſe inſtances over the defendant.

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].*

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 counties ſtill remains,

[c] This among a number of other inſtances, was the caſe of the iſſues directed by the houſe of lords in the cauſe between the Duke of Devonſhire and the miners of the county of Derby, *A. D.* 1762.

[d] *LL. Edw. Conf. c.* 32. Wilk. 203.

[e] See pag. 360.

for

for many beneficial purpoſes: but, as the king's courts have a juriſdiction co-extenſive with the kingdom, there ſurely can be no impropriety in ſometimes departing from the general rule, when the great ends of juſtice warrant and require an exception.

I HAVE ventured to mark theſe defects, that the juſt panegyric, which I have given on the trial by jury, might appear to be the reſult of ſober reflection, and not of enthuſiaſm or prejudice. But ſhould they, after all, continue unremedied and unſupplied, ſtill (with all 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; 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
[387] may however for certain cauſes be *ſuſpended*, or finally *arreſted*;

[a] Append. N° II. § 6.

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 ſurprize, inadvertence, or miſconduct, the party may have relief in the court above, by obtaining a new trial; or if, notwithſtanding the iſſue of fact be regularly decided, it appears that the complaint was either not actionable in itſelf, or not made with ſufficient preciſion and accuracy, the party may ſuperſede it, by arreſting or ſtaying the judgment.

1. CAUSES of *ſuſpending* the judgment by granting a *new trial*, 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 miſ-directed 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 (1).

[b] Law of *niſi prius*, 303,4.
[c] Comb. 357.
[d] 6 Mod. 22. Salk. 649.

(1) If the verdict of the jury be agreeable to equity and juſtice, the court will not grant a new trial, though there may have been an error in the admiſſion of evidence or in the direction of the judge. 4 *T. R.* 468.

And it will not be granted merely becauſe it has been diſcovered after the trial, that a witneſs examined was incompetent. 1 *T. R.* 717. Nor will it be granted on the ground of evidence ſuppoſed to have been diſcovered after the trial. And when the plaintiff recovers a verdict againſt the defendant, the defendant cannot

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
[388] new *venire*'s awarded, becauſe the jury had eat and drank without conſent of the judge, and becauſe the plaintiff had privately

[e] 24 *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.

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cannot become plaintiff in another action brought to recover back what he was obliged to pay by the former verdict, becauſe he was not prepared with his evidence at the trial, as this would lead to endleſs litigation. 7 *T. R.* 269. But exceſſive damages in all caſes, except in an action for adultery, are a ſufficient ground to grant a new trial. 5 *T. R.* 257. But where a new trial is granted upon that ground, the court will direct that the former verdict ſhall ſtand as a ſecurity for the damages given on the ſecond trial.

The court will grant any number of new trials in the ſame action, if the jury find verdicts contrary to the eſtabliſhed law.

A new trial may be granted on account of the miſconduct of the jury, as if they have referred to chance to determine the party for whom the verdict was given. But the courts will not hear any affidavit of ſuch conduct from the jury themſelves. 1 *T. R.* 11. It is generally ſaid, that there cannot be a new trial in penal actions and criminal proſecutions, when there is a verdict for the defendant. The principle of this being the great favour which the law ſhews to the liberty of the ſubject. But the rule does not extend to informations in the nature of *quo warranto;* as the object of theſe is now in general to try a right and not to puniſh an offence. 2 *T. R.* 484. Nor does it extend to an action upon a penal ſtatute, in which a verdict is given for the defendant in conſequence of the miſdirection of the judge. 4 *T. R.* 753.

In offences greater than miſdemeanors a new trial cannot be granted. In miſdemeanors, if the indictment is againſt ſeveral, and ſome are acquitted and ſome convicted, the court can grant a new trial againſt thoſe only who are convicted. 7 *T. R.* 638. If an iſſue is directed by a court of equity, the motion for a new trial muſt be made before that court.

given

given a paper to a juryman before he was ſworn. And upon theſe the chief juſtice, Glynn, in 1655, grounded the firſt precedent that is reported in our books[h] for granting a new trial upon account of *exceſſive damages* given by the jury: apprehending with reaſon, that notorious partiality in the jurors was a principal ſpecies of miſbehaviour. A few years before, a practice took riſe in the common pleas[i], of granting new trials upon the mere certificate of the judge, (unfortified by any report of the evidence), that the verdict had paſſed againſt his opinion; though chief juſtice Rolle (who allowed of new trials in caſe of miſbehaviour, ſurprize, 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 battle. Such a ſanction was probably thought

[h] Styl. 46. 6.
[i] *Ibid.* 138.
[k] 1 *Sid.* 235. Styl. *pract. Reg.* 310, 311. *edit.* 1657.
[l] Cro. Eliz. 616. Palm. 325. 1 Brownl. 207.
[m] 1 Sid. 235. 2 Lev. 140.
[n] 4 Burr. 395.
[o] *Ipſi regali inſtitutioni eleganter inſerta.* (Glanv. *l.* 2, *c.* 19.)

neceſſary, 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 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 aſſize, they deviſed a great variety of diſtinctions; by which an attaint might be avoided, and the verdict ſet to rights in a more temperate and diſpaſſionate method[p]. Thus if exceſſive damages were given, they were moderated by the diſcretion of the juſtices[q]. And if, either in that, or in any other inſtance, juſtice was not completely done, through the error of either the judge or the recognitors, it was remedied by *certificate of aſſize*, which was neither more nor leſs than a ſecond trial of the ſame cauſe by the ſame jury[r]. And, in mixed or perſonal actions, as treſpaſs and the like, (wherein no attaint 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

[p] Bract. l. 4. *tr.* 5. *c.* 4.
[q] *Ibid. tr.* 1. *c.* 19. § 8.
[r] *Ibid. tr.* 5. *c.* 6. § 2, F. N. B. 181.
[s] Inſt. 425.

could

could not be, they referred it to another examination[s]. When afterwards attaints, by ſeveral ſtatutes, were more univerſally extended, the judges frequently, even for the miſbehaviour of jurymen, inſtead of proſecuting the writ of attaint, awarded a ſecond trial: and ſubſequent reſolutions, for more than a century paſt, have ſo amplified the benefit of this remedy, that the attaint is now as obſelete as the trial by battel which it ſucceeded: and we ſhall probably ſee the revival of the one as ſoon as the revival of the other. And here I cannot but again admire[t] the wiſdom of ſuffering time to bring to perfection new remedies, more eaſy and beneficial to the ſubject; which, by degrees, from the experience and approbation of the people, ſuperſede the neceſſity or deſire of uſing or continuing the old.

If every verdict was final in the firſt inſtance, it would tend to deſtroy this valuable method of trial, and would drive away all cauſes of conſequence to be decided according to the forms of the imperial law, upon depoſitions in writing; which might be reviewed in a courſe of appeal. Cauſes of great importance, titles to land, and large queſtions of commercial property, come often to be tried by a jury, merely upon the general iſſue; where the facts are complicated and intricate, the evidence of great length and variety, and ſometimes contradicting each other; and where the nature of the diſpute very frequently introduces nice queſtions and ſubtilties of law. Either party may be 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

[s] *Si juratores erraverint, et juſticiarii ſecundum eorum dictum judicium pronuntiaverint, falſam faciunt pronuntiationem; et ideo ſequi non debent eorum dictum, ſed illud emendare tenentur per diligentem examinationem. Si autem dijudicare neſciant recurrendum erit ad majus judicium.* Bract. l. 4. *tr.* 5. *c.* 4. § 2.

[t] See pag. 268.

artful

artful impreſſions which have been made on their minds by learned and experienced advocates. The jury are to give their
[391] opinion *inſtanter;* that is, before they ſeparate, eat, or drink. And under theſe circumſtances the moſt intelligent and beſt intentioned men may bring in a verdict, which they themſelves upon cool deliberation would wiſh to reverſe.

NEXT to doing right, the great object in the adminiſtration of public juſtice ſhould be to give public ſatisfaction. If the verdict be liable to many objections and doubts in the 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 title 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

from what paſſed at the trial, it is taken from the judge's information; who uſually makes a ſpecial and minute report of the evidence. Counſel are heard on both ſides to impeach or eſtabliſh the verdict, and the court give their reaſons at large [392] 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
[393] 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 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. 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 an action on the caſe for an *aſſumpſit*: for, the original writ out of chancery being the foundation and warrant of the whole proceedings in the common pleas, if the declaration does not purſue the nature of the writ, the court's authority totally fails. Alſo, ſecondly, where the verdict materially differs from the pleadings and iſſue thereon; as if, in an action for words, it is laid in the declaration that the defendant ſaid, "the plaintiff *is* a bankrupt;" and the verdict finds ſpecially that he ſaid, "the plaintiff *will be* a bankrupt." Or, thirdly, if the caſe laid in the declaration is not ſufficient in point of law to found an action upon. And this is an inva-

[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.

riable rule with regard to arreſts of judgment upon matter of law, "that whatever is alleged in arreſt of judgment muſt be "ſuch matter, as would upon demurrer have been ſufficient "to overturn the action or plea." As if, on an action for ſlander in calling the plaintiff a Jew, the defendant denies the words, and iſſue is joined thereon; now, if a verdict be found for the plaintiff, that the words were actually ſpoken, whereby the fact is eſtabliſhed, ſtill the defendant may move in arreſt of judgment, that to call a man a Jew is not actionable: and, if the court be of that opinion, the judgment ſhall be arreſted, and never entered for the plaintiff. But the rule will not hold *e converſo*, "that every thing that may be "alleged as cauſe of demurrer will be good in arreſt of judg-"ment:" for if a declaration or plea omits to ſtate ſome particular circumſtance, without proving of which, at the trial, it is impoſſible to ſupport the action or defence, this omiſſion ſhall be aided by a verdict. As if, in an action of treſpaſs, the declaration doth not allege that the treſpaſs was committed on any certain day[w]; or if the defendant juſtifies, by preſcribing for a right of common for his cattle, and does not plead that his cattle were *levant* and *couchant* on the land[x]; though either of theſe defects might be good cauſe to demur to the declaration or plea, yet if the adverſe party omits to take advantage of ſuch omiſſion in due time, but takes iſſue, and has a verdict againſt him, theſe exceptions cannot after verdict be moved in arreſt of judgment. For the verdict aſcertains thoſe facts, which before from the inaccuracy of the pleadings might be dubious; ſince the law will not ſuppoſe, that a jury under the inſpection of a judge would find a verdict for the plaintiff or defendant, unleſs he had proved thoſe circumſtances, without which his general allegation is defective[y]. Exceptions therefore, that are moved in arreſt of judgment, muſt be much more material and glaring than ſuch as will maintain a demurrer: or, in other words, many inaccuracies and omiſſions, which would be fatal, if early obſerved, are cured by a ſubſequent verdict; and not ſuffered, in the laſt ſtage of a cauſe, to unravel the whole proceedings.

[w] Carth. 389. [x] Cro. Jac. 44. [y] 1 Mod. 292.

But if the thing omitted be eſſential to the action or defence, as if the plaintiff does not merely ſtate his title in a defective manner, but ſets forth a title that is totally defective in itſelf[z], or if to an action of debt the defendant pleads *not guilty* inſtead of *nil debet*[a], theſe cannot be cured by a verdict for the plaintiff in the firſt caſe, or for the defendant in the ſecond.

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].

IF judgment is not by ſome of theſe means arreſted within the firſt four days of the next term after the trial, it is then to be entered on the roll or record (2). Judgments are the ſen-

[z] Salk. 365.
[a] Cro. Eliz. 778.
[b] 2 Ventr. 196.
[c] Stra. 994.
[d] 4 Burr. 301, 302.
[e] Raym. 458. Salk. 579.

(2) A motion in arreſt of judgment may be made at any time before judgment is actually entered up. *Doug.* 746. Where judgment is arreſted each party pays his own coſts. *Cowp.* 407.

If a verdict is taken generally with entire damages, judgment may be arreſted if any one count in the declaration is bad: but if there is a general verdict of guilty upon an indictment conſiſting of ſeveral counts, and any one count is good, that is held to be ſufficient. *Doug.* 730.

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tence of the law, pronounced by the court upon the matter contained in the record; and are of four ſorts. Firſt, where the facts are confeſſed by the parties, and the law determined by the court; as in caſe of judgment upon *demurrer*: ſecondly, where the law is admitted by the parties, and the facts diſputed; as in caſe of judgment on a *verdict*: thirdly, where both the fact and the law ariſing thereon are admitted by the [396] 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 ſtile of the judgment is, not that it is decreed or reſolved by the court, for then the judgment might appear to be their own: but, "it is conſidered," *conſideratum eſt per curiam*, that the plaintiff do recover his damages, his debt, his poſſeſſion, and the like: which implies that the judgment is none of their own; but the act of law, pronounced and declared by the court, after due deliberation and inquiry.

ALL theſe ſpecies of judgments are either *interlocutory* or *final*. *Interlocutory* judgments are ſuch as are given in the middle of a cauſe, upon ſome plea, proceeding, or default, which is only intermediate, and does not finally determine or complete the ſuit. Of this nature are all judgments for the plaintiff upon pleas in abatement of the ſuit or action: in
[397] which it is conſidered by the court, that the defendant do anſwer over, *reſpondeat ouſter*; that is, put in a more ſubſtantial plea [f]. It is eaſy to obſerve, that the judgment here given is not final, but merely interlocutory; for there are afterwards farther proceedings to be had, when the defendant hath put in a better anſwer.

BUT the interlocutory judgments, moſt uſually ſpoken of, are thoſe incomplete judgments, whereby the *right* of the plaintiff is indeed eſtabliſhed, but the *quantum* of damages ſuſtained by him is not aſcertained; which is a matter that cannot be done without the intervention of a jury. As by the old Gothic conſtitution the cauſe was not completely finiſhed, till the *nembda* or jurors were called in "*ad executionem decretorum judicii, ad 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 acknowleges 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 men-

[f] 2 Saund. 30.

[g] Stiernhook, *de jure Goth. l.* 1. *c.* 4.

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tioned (by *nihil dicit*, *cognovit actionem*, or *non ſum informatus*) in an action of debt to be brought by the creditor againſt the debtor for the ſpecific ſum due: which judgment, when confeſſed, is abſolutely complete and binding (3); provided the ſame (as is alſo required in all other judgments) be regularly *docquetted*, that is, abſtracted and entered in a book, according to the directions of ſtatute 4 & 5 W. & M. c. 20. But, [398] 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 re-"cover 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 da-"mages, and return ſuch inquiſition into court." This pro-

(3) The perſon to whom this warrant of attorney is given has all the benefit of a judgment and execution againſt the debtor's perſon and property, without being delayed by any intermediate proceſs, as in the caſe of a regular ſuit. It is frequently given by a perſon arreſted upon condition of his diſcharge, and that longer time ſhall be allowed him for the payment of the debt, or that ſome other indulgence ſhall be ſhewn him. But to prevent perſons in this ſituation from being impoſed upon, no warrant of attorney to confeſs a judgment, given by a perſon arreſted upon meſne proceſs, ſhall be of any force, unleſs ſome attorney be preſent on behalf of the perſon in cuſtody, who ſhall explain the nature of the warrant, and ſubſcribe his name as a witneſs to it. 1 *Cromp. Prac.* 316.

If a warrant of attorney to confeſs a judgment is given unconditionally, or without delay of execution, judgment may be ſigned and execution may be taken out upon the ſame day it is given; and thus a debtor may give one creditor a preference to another, who has obtained judgment after a long litigation. 5 *T. R.* 235.

But if judgment is not entered within a year, the plaintiff muſt move the court for leave to enter up judgment upon an affidavit, ſtating, that the warrant has been duly executed, that the debt is unſatisfied, and that the party was living a ſhort time before. 1 *Cromp. Prac.* 316.

ceſs 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 (4).

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

(4) It has been ſaid, by C. J. Wilmot, that "this is an in-"queſt of office to inform the conſcience of the court, who, if they "pleaſe, may themſelves aſſeſs the damages." 3 *Wilſ.* 62. Hence a practice is now eſtabliſhed in the courts of king's bench and common pleas, in actions where judgment is recovered by default upon a bill of exchange or a promiſſory note, to refer it to the maſter or prothonotary to aſcertain what is due for principal, intereſt, and coſts, whoſe report ſuperſedes the neceſſity of a writ of inquiry. 4 *T. R.* 275. *H. Bl.* 541. But this practice is not yet adopted by the court of exchequer. 1 *Anſt.* 249. In caſes of difficulty and importance, the court will give leave to have the writ of inquiry executed before a judge at ſittings or *niſi prius*; and then the judge acts only as an aſſiſtant to the ſheriff. The number of the jurors ſworn upon this inqueſt need not be confined to twelve; for when a writ of inquiry was executed at the bar of the court of king's bench, in an action of *ſcandalum magnatum*, brought by the duke of York, (afterwards James the ſecond,) againſt Titus Oates, who had called him a traitor; fifteen were ſworn upon the jury, who gave all the damages laid in the declaration, *viz.* 100,000*l.* In that caſe the ſheriffs of Middleſex ſat in court, covered, at the table below the judges. 3 *St. Tr.* 987.

by

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 falſhood 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, nor [399] 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 a day, *eat inde ſine die*, that is, without any farther continuance or adjournment; the king's writ, commanding his attendance, being now fully ſatisfied, and his innocence publicly cleared [o].

THUS much for judgments; to which coſts are a neceſſary appendage; it being now as well the maxim of ours as of the civil law, that "*victus victori in expenſis condemnandus eſt* [p]:" though the common law did not profeſſedly allow any, the amercement of the vanquiſhed party being his only puniſhment. The firſt ſtatute which gave coſts, *eo nomine*, to the demandant in a real action was the ſtatute of Glouceſter

[h] 8 Rep. 40. 61.
[i] 8 Rep. 59. 11 Rep. 43. 5 Mod. 285. See append. N° 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.
[o] Appendix, N° III. § 6.
[p] *Cod.* 3. 1. 13.

6 Edw. I. c. 1. as did the ſtatute of Marlbridge 52 Hen. III. c. 6. to the defendant in one particular caſe, relative to wardſhip in chivalry; though in reality coſts were always conſidered and included in the *quantum* of damages, in ſuch actions where damages are given; and even now, coſts for the plaintiff are always entered on the roll as increaſe of damages by the court [q]. But, becauſe thoſe damages were frequently inadequate to the plaintiff's expenſes, the ſtatute of Glouceſter orders coſts to be alſo added; and farther directs, that the ſame rule ſhall hold place in all caſes where the party is to recover damages. And therefore in ſuch actions where no damages were then recoverable (as in *quare impedit*, in which da-
[400] mages were not given till the ſtatute of Weſtm. 2. 13 Edw. I.) no coſts are now allowed [r]; unleſs they have been expreſsly given by ſome ſubſequent ſtatute. The ſtatute 3 Hen. VII. c. 10. was the firſt which allowed any coſts on a writ of error. But no coſts were allowed the *defendant* in any ſhape, till the ſtatutes 23 Hen. VIII. c. 15. 4 Jac. I. c. 3. 8 & 9 W. III. c. 11. 4 & 5 Ann. c. 16. which very equitably gave the defendant, if he prevailed, the ſame coſts as the plaintiff would have had, in caſe he had recovered. Theſe coſts on both ſides are taxed and moderated by the prothonotary, or other proper officer of the court.

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. And it ſeems reaſonable to ſuppoſe, that the queen-conſort participates of the ſame privilege; for, in actions brought by her, ſhe was not at the common law obliged to find pledges of proſecution, nor could be amerced in caſe there was judgment againſt her [t]. In two other caſes an exemption alſo lies from paying coſts. Executors and adminiſtrators, when ſuing in the right of the deceaſed, ſhall pay

[q] Append. N° II. § 4.
[r] 10 Rep. 116.
[s] Stat. 24 Hen. VIII. c. 8.
[t] F. N. B. 101. Co. Litt. 133.

none:

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 (5). 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 their coſts[w]: though that practice is now diſuſed[x]. It ſeems however agreed, that a pauper may recover coſts, though [401] he pays none; for the counſel and clerks are bound to give their labour to *him*, but not to his antagoniſts[y]. To prevent alſo trifling and malicious actions, for words, for aſſault and battery, and for treſpaſs, it is enacted by ſtatutes 43 Eliz. c. 6. (6), 21 Jac. I. c. 16. and 22 & 23 Car. II. c. 9. § 136.

[u] Cro. Jac. 229. 1 Vent. 92.
[w] 1 Sid. 261. 7 Mod. 114.
[x] Salk. 506.
[y] 1 Equ. Caſ. abr. 125.

(5) If executors ſue as executors for money paid to their uſe after the teſtator's death, they ſhall pay coſts. 5 *T. R.* 234. When executors and adminiſtrators are defendants, they pay coſts, like other perſons. 2 *Cromp. Prac.* 476. Or wherever the cauſe of action ariſes in the time of the executor, as the converſion in the caſe of trover, the executor ſhall pay coſts, becauſe it is not neceſſary to bring the action in the character of executor. 7 *T. R.* 358. So an executor or adminiſtrator is liable to pay the coſts of a nonpros. 6 *T. R.* 654.

(6) The 43 Eliz. c. 6. enacts, that where the plaintiff in any perſonal action, except for any title or intereſt in lands, or for a battery, recovers leſs than 40*s.* he ſhall have no more coſts than damages, if the judge certifies that the debt or damages were under 40*s.* But if the judge does not grant ſuch a certificate to the defendant, the plaintiff recovers full coſts. Actions of treſpaſs *vi et armis*, as for beating a dog, are within the ſtatute. 3 *T. R.* 38. The certificate under this ſtatute may be granted after the trial.

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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, or that in treſpaſs the freehold or title of the land came chiefly in queſtion. 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.*

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.

[z] See pag. 214, 215.

This certificate is to reſtrain the coſts; but a certificate under the 22 & 23 Car. II. c. 9, is given in favour of the plaintiff to extend them from a ſum under 40*s.* to full coſts. If the defendant juſtifies the battery, the plaintiff ſhall have full coſts without the judge's certificate, though the damages are under 40*s.*; for it is held the admiſſion of the defendant precludes the neceſſity of the certificate. But a juſtification of the aſſault only will not be ſufficient for this purpoſe; for the judge muſt certify an actual battery. 3 *T. R.* 391. This certificate muſt be granted at the trial. 2 *Cromp. Prac.* 455.

In declarations for aſſault and battery, there is ſometimes a count for tearing the plaintiff's cloaths; and if this is ſtated as a ſubſtantive injury, and the jury find it to have been ſuch, and not to have happened in conſequence of the beating, the plaintiff will be entitled to full coſts (1 *T. R.* 656.); unleſs the judge ſhould aſſiſt the defendant under the 43 Eliz. c. 6. So in a treſpaſs upon land, the carrying away or *aſportavit* of any independent perſonal property will entitle the plaintiff to full coſts, unleſs the aſportation, as by digging and carrying away turves, is a mode or qualification of the treſpaſs upon the land. *Doug.* 780.

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 knowlege, 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 [403] aſſiſe (the 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

[a] Finch. L. 484.

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the iſſue ſhould be tried by a common jury or inqueſt, and not 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, ei-
[404] ther at common law or by ſtatute; becauſe that is determined by the grand aſſiſe, appealed to by the party himſelf, and now conſiſting of *ſixteen* jurors [i].

THE jury who are to try this falſe verdict muſt be twenty-four, and are called the grand jury; for the law wills not

[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. 4. 1. 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. 290. Flet. 5. 22. 7. Britt. 243. *b.* 12 Hen. VI. 6. Bro. *abr. t. attaint.* 42. 1 Roll. *Abr.* 280.

that

that the oath of one jury of twelve men ſhould be attainted or ſet aſide by an equal number, nor by leſs indeed than double the former[k]. If the matter in diſpute be of forty pounds value in perſonals, or of forty ſhillings a year in lands and tenements, then by ſtatute 15 Hen. VI. c. 5. each grand juror muſt have 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 knowlege, which never appeared in court. If the grand jury found the verdict a falſe one, the judgment by the common law was, that the jurors ſhould loſe their *liberam legem* and become for ever infamous; ſhould forfeit their goods and the profits of their lands; ſhould themſelves be impriſoned, and their wives and children thrown out of doors; ſhould have their houſes raſed, their trees extirpated, and their meadows ploughed; and that the plaintiff ſhould be reſtored to all that he loſt by reaſon of the unjuſt verdict. But as the ſeverity of this puniſhment had 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 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 com- [405]

[k] Bract. *l.* 4. *tr.* 5. *c.* 4. § 1. Flet. *l.* 5. *c.* 22. § 7.

[l] Finch. L. 486.

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mon law, at his election[m]; and in both of them may reverſe the former judgment. But the practice of ſetting aſide verdicts upon motion, and granting *new trials*, has ſo ſuperſeded the uſe of both ſorts of attaints, that I have obſerved very few inſtances of an attaint in our books, later than the ſixteenth century[n]. By the old Gothic conſtitution indeed, no certificate of a judge was allowed, in matters of evidence, to countervail the oath of the jury: but their verdict, however erroneous, was abſolutely final and concluſive. Yet there was a proceeding from whence our attaint may be derived. —If, upon a lawful trial before a ſuperior tribunal, the jury were found to have given a falſe verdict, they 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
[406] execution, or perhaps actually in execution, may be relieved upon good matter of diſcharge, which has happened ſince the judgment: as if the plaintiff hath given him a general releaſe; or if the defendant hath paid the debt to the plaintiff, without procuring ſatisfaction to be entered on the record. In theſe and the like caſes, wherein the defendant hath good matter to plead, but hath had no opportunity of pleading it, (either at the beginning of the ſuit, or *puis darrein continuance*, which, as was 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

[m] 3 Inſt. 164.

[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. 310.

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of the plaintiff. It is a writ directed to the court, ſtating that the complaint of the defendant hath been heard, *audita querela defendentis*, and then ſetting out the matter of the complaint, it at length enjoins the court to call the parties before them, and, having heard their allegations and proofs, to cauſe juſtice to be done between them[r]. It alſo lies for bail, when judgment is obtained againſt them by *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[s], 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[t] lies for ſome ſuppoſed miſtake in the proceedings of a court of record; for to amend errors in a baſe court, not of record, a writ of *falſe judgment* lies[u]. 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. [407]

FORMERLY the ſuitors were much perplexed by writs of error brought upon very ſlight and trivial grounds, as miſ-

[r] Finch. L. 488. F. N. B. 102.
[s] 1 Roll. Abr. 308.
[s] Lord Raym. 439.
[t] Append. No III. § 6.
[u] Finch. L. 484.

ſpellings and other miſtakes of the clerks, all which might be amended at the common law, while all the proceedings were in *paper*[w]; for they were then conſidered as only in *fieri*, and therefore ſubject to the control of the courts. But, when once the record was made up, it was formerly held, that by the common law no amendment could be permitted, unleſs within the very term in which the judicial act ſo recorded was done: for during the term the record is in the breaſt of the court; but afterwards it admitted of no alteration[x]. But now the courts are become more liberal; and, where juſtice requires it, will allow of amendments at any time while the ſuit is depending, notwithſtanding the record be made up, and the term be paſt. For they at preſent conſider the proceedings as in *fieri*, till judgment is given; and therefore that, till then they have power to permit amendments by the common law: but when judgment is once given and inrolled, 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 acknowleges ſuch error (*jeo faile*), he is at liberty by thoſe ſtatutes to amend it; which amendment is ſeldom actually made, but the benefit
[408] of the acts is attained by the court's overlooking the exception[z]. Theſe ſtatutes are many in number, and the proviſions in them too minute to be here taken notice of, otherwiſe than by referring to the ſtatutes themſelves[a]; by which all trifling exceptions are ſo thoroughly guarded againſt, that writs of error cannot now be maintained, but for ſome material miſtake aſſigned.

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*,

[w] 4 Burr. 1099.
[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.

if a ſlip was perceived and objected to by the oppoſite party or the court, the pleader inſtantly acknowleged 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 conſuetudine, "qui cadit a ſyllaba cadit a tota cauſa.*" The judgments were entered up immediately by the clerks and officers of the court; and, if any 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 ſhould be a warranty for their own "wrong, nor that they may raſe their rolls, nor amend them, "nor record them contrary to their original enrolment." The whole of which, taken together, amounts to this, that a record ſurreptitiouſly or erroneouſly made up, to ſtifle or pervert the truth, ſhould not be a ſanction for error; and that a record, originally made up according to the truth of the caſe, ſhould not afterwards by any private raſure or amendment be altered to any ſiniſter purpoſe.

BUT when afterwards king Edward, on his return from his French dominions in the ſeventeenth year of his reign, after upwards of three years abſence, found it neceſſary (or convenient, in order to repleniſh his exchequer) to proſecute

[b] Brit. *præm.* 2, 3.

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 ſeverity of which proceedings ſeems ſo to have alarmed
[410] the ſucceeding judges, that, through a fear of being ſaid to do wrong, they heſitated at doing what was right. As it was ſo hazardous to alter a record duly made up, even from compaſſionate motives, (as happened in Hengham's caſe,

[c] *Judicia perverterunt, et in aliis 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; 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. Dugd. 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 an hundred years afterwards, about the end of the fourteenth century. (*Encyclopedie.* tit. *horloge.* 6 Rym. *Fœd.* 590. Derham's Artif. Clockmaker. 91.)

which

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 inrolment 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 miſentries, 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] 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

[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.*"

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 waiving 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 eſſoins 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 ſuperior court after verdict, he that brings the writ, or that is plaintiff in error, muſt (except in ſome peculiar caſes) find ſubſtantial pledges of proſecution, or bail [m]; to prevent delays by frivolous pretences to appeal; and for ſecuring payment of coſts and damages, which are now payable by the vanquiſhed party in all, except a few particular inſtances, by virtue of the ſeveral ſtatutes recited in the margin [n].

A WRIT of error lies from the inferior courts of record in England into the king's bench [o], and not into the common

[k] Styl. 207.
[l] 8 Rep. 156, &c.
[m] Stat. 3 Jac. I. c. 8. 13 Car. II. c. 2. 16 & 17 Car. II. c. 8. 19 Geo. III. c. 70.
[n] 3 Hen. VII. c. 10. 13 Car. II. c. 2. 8 & 9 W. III. c. 11. 4 and 5 Ann. c. 16.
[o] See chap. 4.

pleas[p]. Alſo from the king's bench in Ireland to the king's bench in England (1). 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 (2): and from thence it lies to the houſe of peers. From proceedings in the king's bench, in debt, detinue, covenant, account, caſe, ejectment, or treſpaſs, originally begun therein by bill, (except where the king is party,) it lies to the exchequer chamber, before the juſtices of the common pleas, and barons of the exchequer; and from thence alſo to the houſe of lords[q]; but where the proceedings in the king's bench do not firſt commence therein by bill, but by original writ ſued out of chancery[r], this takes the caſe out of the general rule laid down by the ſtatute[s]; ſo that the writ of error then lies, without [*411] 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.

[p] Finch. L. 480. Dyer. 250.
[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.

(1) This appeal is taken away by 23 Geo. III. c. 28. See 1 vol. p. 104. n. 14.

(2) The 31 Edw. III. c. 12. directs, that the chancellor and treaſurer ſhall take to their aſſiſtance the judges of the other courts, and *autres ſages come lour ſemblera*. But it is the practice for the two chief juſtices alone to ſit in this court of error. 1 *T. R.* 511.

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 to the ſheriff, but to the biſhop or archbiſhop, and requiring him to admit and inſtitute the clerk of the plaintiff.

IN other actions, where the judgment is that ſomething in ſpecial be done or rendered by the defendant, then, in order
[413] to compel him ſo to do, and to ſee the judgment executed, a

[a] Append. N° II. § 4. [b] Finch. L. 470.

ſpecial

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]. 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]. 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 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, 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.

[c] Comb. 10.
[d] See pag. 150.
[e] *Ibid.* 149.
[f] 2 Leon. 174.
[g] 1 Roll. Abr. 737. Raſt. Entr. 215.
[h] Bro. Abr. *t. Damages.* 29.
[i] Keilw. 64.

1. THE

1. THE firſt of theſe ſpecies of execution, is by writ of *capias ad ſatisfaciendum* [j]; which addition diſtinguiſhes it from the former *capias*, *ad reſpondendum*, which lies to compel an appearance at the beginning of a ſuit. And, properly ſpeaking, this cannot be ſued out againſt any but ſuch as were liable to be taken upon the former *capias* [k]. The intent of it is, to impriſon the body of the debtor till ſatisfaction be made for the debt, coſts, and damages: it therefore doth not lie againſt any privileged perſons, peers or members of parliament, nor againſt executors or adminiſtrators, nor againſt ſuch other perſons as could not be originally held to bail. And ſir Edward Coke alſo gives us a ſingular inſtance [l], where a defendant in 14 Edw. III. was diſcharged from a *capias* becauſe he was of ſo advanced an age, *quod poenam impriſonamenti ſubire non poteſt*. If an action be brought againſt an huſband and wife for the debt of the wife, when ſole, and the plaintiff recovers judgment, the *capias* ſhall iſſue to take both 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 huſband only: which is one of the many great privileges of Engliſh wives (1).

[j] Append. N° III. § 7.
[k] 3 Rep. 12. Moor. 767.
[l] 1 Inſt. 289.
[m] Moor. 704.
[n] Cro. Jac. 323.
[o] *Ibid.* 513.

(1) Where both huſband and wife are arreſted upon meſne proceſs, the court will diſcharge the wife upon motion and proof of the marriage on common bail, unleſs it is for a debt contracted ſince her marriage, and ſhe has repreſented herſelf to be ſingle; in which caſe the court will not aſſiſt her, but will leave her to plead her coverture. 5 *T. R.* 194. And where, after judgment againſt huſband and wife, they are both rendered in diſcharge of bail, ſhe ſhall be diſcharged; for they are then in the ſame ſituation as if bail had never been put in for them. 3 *Wilſ.* 124.

THE

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 [415] 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(2). Eſcapes are either voluntary, or

[p] See page 279.

(2) The object of impriſonment for debt is not intended for the puniſhment of the debtor, but to compel him to diſcharge the debt out of property, ſuch as money in the funds, or debts due to him, which cannot be reached by any legal proceſs.

But execution by impriſonment is conſidered ſo far a ſatisfaction of the debt, that if the creditor releaſes the debtor from confinement he cannot afterwards have recourſe to any other remedy.

negligent. Voluntary are ſuch as are by the expreſs conſent of the keeper; after which he never can retake his priſoner again [q], (though the plaintiff may retake him at any time [r],) but the ſheriff muſt anſwer for the debt. Negligent eſcapes are where the priſoner eſcapes without his keeper's knowlege or conſent; and then upon freſh purſuit the defendant may be retaken, and the ſheriff ſhall be excuſed, if he has him again before any action brought againſt himſelf for the eſcape [s]. A reſcue of a priſoner *in execution*, either going to gaol or in gaol, or a breach of priſon, will not excuſe the ſheriff from being guilty of and anſwering for the eſcape; for he ought to have ſufficient force to keep him, ſince he may command the power of the county [t]. But by ſtatute 32 Geo. II. c. 28. if a defendant, charged in execution for any debt not exceeding 100*l.* will ſurrender all his effects
[416] to his creditors (except his apparel, bedding, and tools of his trade, not amounting in the whole to the value of 10*l.*), and will make oath of his punctual compliance with the ſtatute, the priſoner may be diſcharged, unleſs the creditor inſiſts on detaining him; in which caſe he ſhall allow him 2*s.* 4*d. per* week, to be paid on the firſt day of every week, and on failure of regular payment the priſoner ſhall be diſcharged. Yet the creditor may at any future time have execution againſt the lands and goods of ſuch defendant, though never more againſt his perſon. And, on the other hand, the creditors may, as in 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

[q] 3 Rep. 52. 1 Sid. 330.
[r] Stat. 8 & 9 W. III. c. 27.
[s] F. N. B. 130.
[t] Cro. Jac. 419.

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remedy. In the 2d vol. p. 480. n. (15), it is ſaid, that it has been held in the court of chancery that a creditor who had his debtor in execution might diſcharge him, and take out a commiſſion of bankrupt againſt him; but ſince that note was printed, the contrary was decided by the court of king's bench, and that in ſuch a caſe the execution was a ſatisfaction of the debt. *Cohen* v. *Cunningham*, *H.* 1799.

of

of all his effects for their benefit; whereupon he is alſo entitled to the like diſcharge of his perſon (3).

IF a *capias ad ſatisfaciendum* is ſued out, and a *non eſt inventus* is returned thereon, the plaintiff may ſue out a proceſs againſt the bail, if any were given: who, we may remember, ſtipulated in this triple alternative; that the defendant ſhould, if condemned in the ſuit, ſatisfy the plaintiff his debt and coſts; or, that he ſhould ſurrender himſelf a priſoner; or, that they would pay it for him: as therefore the two former branches of the alternative are neither of them complied with, the latter muſt immediately take place[u]. In order to which a writ of *ſcire facias* may be ſued out againſt the bail, commanding them to ſhew cauſe why the [417] plaintiff ſhould not have execution againſt them for his debt and damages: and on ſuch writ, if they ſhew no ſufficient cauſe, or the defendant does not ſurrender himſelf on the day of the return, or of ſhewing cauſe, (for afterwards is not ſufficient,) the plaintiff may have judgment againſt the bail, and take out a writ of *capias ad ſatisfaciendum*, or other proceſs of execution againſt them.

[u] Lutw. 1269—1273.

(3) The creditors who can compel the ſurrender of the debtor's effects, and who are to have the benefit of it, are only thoſe who have charged him in execution. This ſtatute the 32 Geo. II. c. 28. is generally called the lords' act: By the 26 Geo. III. c. 44. the proviſions of it were extended to 200*l.*, and by the 33 Geo. III. c. 5. they have been ſtill further enlarged to 300*l.* By the 37 Geo. III. c. 85. one creditor ſhall agree in writing, in order to detain ſuch a debtor, to make him a weekly allowance of 3*s.* 6*d.*; and where two or more ſhall agree to detain him, they ſhall pay him what the court ſhall direct, not exceeding 2*s.* a-week each. See the clauſes of the act in 2 *Burn*, tit. *Gaol.*

The priſoner ſhall never afterwards be liable to be arreſted on any action for the ſame debt, unleſs convicted of perjury. But a priſoner, to have the benefit of this act, muſt petition the court from which the proceſs iſſued, upon which he ſhall be in cuſtody, before the end of the firſt term after he is arreſted, unleſs he afterwards ſhews his neglect aroſe from ignorance or miſtake.

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: 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](4). If part only of the 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 of this writ; the remedy by *elegit*, which takes
[418] poſſeſſion of the lands themſelves, being much more effectual. But of this ſpecies is a writ of execution proper only to ec-

[w] Append. No III. § 7.
[x] 5 Rep. 92.
[y] Palm. 54.
[z] 8 Rep. 171.
[a] Stat. 8 Ann. c. 14.
[b] 1 Roll. Abr. 904. Cro. Eliz. 344.
[c] Finch. L. 471.

(4) But the landlord muſt make a demand of the rent due before the goods are removed, or he cannot have the benefit of the ſtatute. 1 *Str.* 97. If the ſheriff in levying an execution has any doubt whether the goods ſhewn him are the property of the defendant, he may ſummon a jury, and if the jury find them to be the defendant's property, the ſheriff is indemniſied. 4 *T. R.* 633.

cleſiaſtics; which is given when the ſheriff, upon a common writ of execution ſued, returns that the defendant is a beneficed clerk, not having any lay fee. In this caſe a writ goes to the biſhop of the dioceſe, in the nature of a *levari* or *fieri facias*[d], to levy the debt and damage *de bonis eccleſiaſticis*, which are not to be touched by lay hands: and thereupon the biſhop ſends out a *ſequeſtration* of the profits of the clerk's benefice, directed to the churchwardens, to collect the ſame and pay them to the plaintiff, till the full ſum be raiſed[e].

4. THE fourth ſpecies of execution is by the writ of *elegit*; which is a judicial writ given by the ſtatute Weſtm. 2 13 Edw. I. c. 18. either upon a judgment for a debt, or damages; or upon the forfeiture of a recognizance taken in the king's court. By the common law a man could only have ſatisfaction of goods, chattels, and the preſent profits of lands, by the two laſt mentioned writs of *fieri facias*, or *levari facias*; but not the poſſeſſion of the lands themſelves; which was a natural conſequence of the feodal principles, which prohibited the alienation, and of courſe the incumbring of the fief with the debts of the owner. And, when the reſtriction of alienation began to wear away, the conſequence ſtill continued; and no creditor could take the poſſeſſion of lands, but only levy the growing profits: ſo that, if the defendant aliened his lands, the plaintiff was ouſted of his remedy. The ſtatute therefore granted this writ, (called an *elegit*, becauſe it is in the choice or election of the plaintiff whether he will ſue out this writ or one of the former,) by which the defendant's goods and chattels are not ſold, but only appraiſed; and all of them (except oxen and beaſts of the plough) are delivered to the plaintiff, at ſuch reaſonable appraiſement and price, in part of ſatisfaction of his debt. If the goods are not ſufficient, then the moiety or one half of his freehold lands, which he had at the time of the judgment given[f], whether held in his own name, or by any other in truſt for him[g], are alſo to be delivered to the plaintiff; to hold, till out of the rents and profits thereof the debt [419]

[d] *Regiſtr. orig.* 300 *judic.* 22. 2 Inſt 4.
[e] 2 Burn. eccl. law. 329.
[f] 2 Inſt. 395.
[g] Stat. 29 Car. II. c. 3.

be

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 defendant cannot be taken: but, if execution can only be had of the goods, becauſe there are no lands, and ſuch goods are not ſufficient to pay the debt, a *capias ad ſatisfaciendum* may then be had after the *elegit*; for ſuch *elegit* is in this caſe no more in effect than a *fieri facias* [j]. So that body and goods may be taken in execution, or land and goods; but not body and land too, upon any judgment between ſubject and ſubject in the courſe of the common law. But

5. UPON ſome proſecutions given by ſtatute; as in the caſe of recognizances or debts acknowleged on ſtatute mer-
[420] chant, or ſtatutes ſtaple (purſuant to the ſtatutes 13 Edw. I. *de mercatoribus*, and 27 Edw. III. c. 9.); upon forfeiture of

[h] Book II. ch. 10. [i] 1 Roll. Abr. 888. [j] Hob. 58.

theſe

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 intitled 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] (5). 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 alienes for a valuable conſideration, the land ſhall be liable to the king's debt, even in the hands of a *bona fide* purchaſor; though the debt due to the king was contracted by the vendor many years after the alienation[n]. Whereas judgment between ſubject and ſubject related, even at common law, no farther back than the firſt day of the term in which they were recovered, in reſpect of the lands of the debtor; and did not bind his goods and chattels, but from the date of the writ of execution: and now, by the ſtatute of frauds, 29 Car. II. c. 3. the judgment ſhall not bind the land in the hands of a *bona* [421]

[k] F. N. B. 131.
[l] 3 Rep. 12.
[m] Stat 33 Hen. VIII. c. 39. § 74.
[n] 10 Rep. 55, 56.

(5) If goods are taken in execution by the ſheriff on a *fieri facias* againſt the king's debtor, and before they are ſold, an extent at the king's ſuit iſſues upon a bond given to the crown, which extent bears date or *teſte* after the delivery of the *fieri facias* to the ſheriff, the execution upon the *fieri facias* ſhall be completed, and ſhall not be defeated by the extent. 4 *T. R.* 402.

fide purchaſor, but only from the day of actually ſigning the ſame; which is directed by the ſtatute to be punctually entered on the record: nor ſhall the writ of execution bind the goods in the hands of a ſtranger, or a purchaſor[o], but only from the actual delivery of the writ to the ſheriff or other officer, who is therefore ordered to endorſe on the back of it the day of his receiving the ſame.

THESE are the methods which the law of England has pointed out for the execution of judgments: and when the plaintiff's demand is ſatisfied, either by the voluntary payment of the defendant, or by this compulſory proceſs, or otherwiſe, ſatisfaction ought to be entered on the record, that the defendant may not be liable to be hereafter haraſſed a ſecond time on the ſame account. But all theſe writs of execution muſt be ſued out within a year and a day after the judgment is entered; 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
[422] 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 view of remedies by ſuit or action in courts: and therein have contemplated, firſt, the nature and ſpecies of courts, inſtituted for the redreſs of injuries in general; and then have ſhewn in what particular courts application muſt be made for the re-

[o] Skin. 257. [p] Co. Litt. 290.

dreſs

dreſs of particular 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 it's 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, [423] 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 indiſputable fixing the latter by a diligent and impartial trial; in correcting ſuch errors as may have ariſen in either of thoſe modes of deciſion, from accident, miſtake, or ſurprize; and in finally enforcing the judgment, when nothing can be alleged to impeach it;—this anxiety to maintain and reſtore to every individual the 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 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 knowlege, 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
[424] 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 deſart, we may then enjoy the ſame diſpatch of cauſes that is ſo highly extolled in ſome foreign countries. But common ſenſe and a little experience will convince us, that more time and circumſpection are requiſite in cauſes, where the ſuitors have valuable and permanent rights to loſe, than where their property is trivial and precarious, and what the law gives them to-day, may be ſeiſed by their prince to-morrow. In Turkey, ſays Monteſquieu [r], where little regard is ſhewn to the lives or fortunes

[q] See pag. 327.

[r] Sp. L. b. 6. ch. 2.

of the ſubject, all cauſes are quickly decided: the baſha, on a ſummary hearing, orders which party he pleaſes to be baſtinadoed, and then ſends them about their buſineſs. But in free ſtates the trouble, expenſe, and delays of judicial proceedings are the price that every ſubject pays for his liberty: and in all governments, he adds, the formalities of law increaſe, in proportion to the value which is ſet on the honour, the fortune, the liberty, and life of the ſubject.

FROM theſe principles it might reaſonably follow, that the Engliſh courts ſhould be more ſubject to delays than thoſe of other nations; as they ſet a greater value on life, on liberty, and on property. But it is our peculiar felicity to enjoy the advantage, and yet to be exempted from a proportionable ſhare of the burthen. For the courſe of the civil law, to which moſt other nations conform their practice, is much more tedious than ours; for proof of which I need only appeal to the ſuitors of thoſe courts in England, where the practice of the Roman law is allowed in it's full extent. And particularly in France, not only our Forteſque [s] accuſes (on his own knowlege) 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 [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.

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 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 trials 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.

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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, acknowleged 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 its infant tenants, was totally extinguiſhed in every feodal view; but

[a] pag. 45. 50. 78.

[b] pag. 50, &c.

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 (1): and, from all proceedings relative thereto, an appeal lies to the houſe of lords. The court of exchequer can only appoint a guardian *ad litem*, to manage the defence of the infant if a ſuit be commenced againſt him; a power which is incident to the juriſdiction of every court of juſtice [d]: but when the intereſt of a minor comes before the court judicially, in the progreſs of a cauſe, or upon a bill for that purpoſe filed, either tribunal indiſcriminately will take care of the property of the infant.

2. As to *idiots and lunatics*: the king himſelf uſed formerly to commit the cuſtody of them to proper committees, in every particular caſe; but now, to avoid ſolicitations and the very ſhadow of undue partiality, a warrant is iſſued by the king [e] under his royal ſign manual to the chancellor or keeper of his ſeal, to perform this office for him: and, if he acts improperly in granting ſuch cuſtodies, the complaint muſt be made to the king himſelf in council [f] (2). 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. And therefore, whenever it

[c] F. N. B. 27.

[d] Cro. Jac. 641. 2 Lev. 163. T. Jones, 90.

[e] See book I. ch. 8.

[f] 3 P. Wms. 108. See Reg. Br. 267.

(1) And the court of chancery will appoint a guardian to an infant, and allow him a ſuitable maintenance, on a petition, though there is no cauſe depending. *Ex parte Kent*, 3 *Bro. Chan. Rep.* 88. *Ex parte Salter*, *Ibid.* 500. *Ex parte Whitfield*, 2 *Atk.* 315.

(2) See 1 vol. 303. n. (5).

is

is neceſſary, the attorney-general, at the relation of ſome informant, (who is uſually called the *relator*,) files *ex officio* an information in the court of chancery to have the charity properly eſtabliſhed. By ſtatute alſo 43 Eliz. c. 4. authority is given to the lord chancellor or lord keeper, and to the chancellor of the duchy of Lancaſter, reſpectively, to grant commiſſions under their ſeveral ſeals, to inquire into any abuſes [428] of charitable donations, and rectify the ſame by decree; which may be reviewed in the reſpective courts of the ſeveral chancellors, upon exceptions taken thereto. But, though this is done in the petty bag office in the court of chancery, becauſe the commiſſion is there returned, it is not a proceeding at common law, but treated as an original cauſe in the court of equity. The evidence below is not taken down in writing, and the reſpondent in his anſwer to the exceptions may allege what new matter he pleaſes; upon which they go to proof, and examine witneſſes in writing upon all the matters in iſſue: and the court may decree the reſpondent to pay all the coſts, though no ſuch authority is given by the ſtatute. And, as it is thus conſidered as an original cauſe throughout, an appeal lies of courſe from the chancellor's decree to the houſe of peers [g], notwithſtanding any looſe opinions to the contrary [h].

4. By the ſeveral ſtatutes relating to *bankrupts*, a ſummary juriſdiction is given to the chancellor, in many matters conſequential or previous to the commiſſions thereby directed to be iſſued; from which the ſtatutes give no appeal (3).

On the other hand, the juriſdiction of the court of chancery doth not extend to ſome cauſes, wherein relief may be

[g] Duke's char. uſes, 62. 128. Corporation of Burford v. Lenthal. *Canc.* 9 May 1743.

[h] 2 Vern. 118.

(3) The ſummary juriſdiction of the court of equity, in caſes of Bankrupt, muſt be perſonally exerciſed by the chancellor, lord-keeper, or the lords commiſſioners of the great ſeal. 2 *Woodd.* 400.

had

had in the exchequer. No information can be brought, in chancery, for ſuch miſtaken charities, as are given to the king by the ſtatutes for ſuppreſſing ſuperſtitious uſes. Nor can chancery give any relief againſt the king, or direct any act to be done by him, or make any decree diſpoſing of or affecting his property; not even in caſes where he is a royal truſtee[i] (4). Such cauſes muſt be determined in the court of exchequer, as a court of revenue; which alone has power
[429] over the king's treaſure, and the officers employed in its management: unleſs where it properly belongs to the duchy court of Lancaſter, which hath alſo a ſimilar juriſdiction as a court of revenue; and, like the other, conſiſts of both a court of law and a court of equity.

IN all other matters, what is ſaid of the court of equity in chancery will be equally applicable to the other courts of equity. Whatever difference there may be in the forms of practice, it ariſes from the different conſtitution of their offi-

[i] Huggins *v.* York Buildings' Company. *Canc.* 24 Oct. 1740. Reeve *v.* Attorney-general. *Canc.* 27 *Nov.* 1741. Lightboun *v.* Attorney-general. *Canc.* 2 May, 1743.

(4) "Where the rights of the crown are concerned, if they "extend only to the ſuperintendance of a public truſt, as in the "caſe of a charity, the king's attorney-general may be made a "party to ſuſtain thoſe rights; and in other caſes where the "crown is not in poſſeſſion, a title veſted in it is not impeached, "and its rights only incidentally concerned; it has generally been "conſidered, that the king's attorney-general may be made a "party in reſpect of thoſe rights, and the practice has been ac-"cordingly. (1 *P. Wms.* 445.) But where the crown is in "poſſeſſion, or any title is veſted in it which the ſuit ſeeks to di-"veſt, or its rights are the immediate and ſole object of the ſuit, "the application muſt be to the king, by petition of right, (Reeve "againſt Attorney-general, mentioned in Penn *v.* lord Baltimore, "1 *Veſ.* 445, 446.) upon which, however, the crown may refer "it to the chancellor to do right, and may direct that the attorney-"general ſhall be made a party to a ſuit for that purpoſe. The "queen has alſo the ſame prerogative. (2 *Roll. Abr.* 213.)" *Mitf. Treat. on Pleadings in Chan.*

cers: 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 its true and genuine meaning, is the ſoul and ſpirit of all law: *poſitive* law is conſtrued, and *rational* law is made, by it. In this, equity is ſynonymous to juſtice; in that, to the true ſenſe and ſound interpretation of the rule. But the very terms of a court of *equity*, and a court of *law*, as contraſted to each other, are apt to confound and miſlead us: as if the one judged without equity, and the other was not bound by any law. Whereas every definition or illuſtration to be met with, which now draws a line between the two juriſdictions, by ſetting law and equity in oppoſition to each other, will be found either totally erroneous, or erroneous to a certain 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,

[k] Vol. I. introd. § 2 & 3. *ad calc.*
[l] Lord Kaims, princ. of equit. 44.
[m] See Vol. II. ch. 23. pag 378.

ſhall

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 *writ* 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, "*hoc quidem per quam durum eſt, ſed ita lex ſcripta eſt.*"

2. IT is ſaid [r], 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 laws all caſes cannot be foreſeen; or, if foreſeen, cannot be expreſſed: ſome will ariſe that will fall within the meaning, though not within the words, of the legiſlator; and others, which may fall within the letter, may be contrary to his meaning, though not expreſsly excepted. Theſe caſes, thus out of the letter, are often ſaid to be within the equity, of an act of parliament; and ſo caſes within the letter are ſaid to be without 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 [s] 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 [illegible] rule of interpreting laws,

[n] See vol. II. ch. 15. pag. [illegible]
ch. 23. pag. 377.
[o] *Ibid.* ch. 14. pag. [illegible]
[p] *Ibid.* pag. 227. [illegible] See pag. 300.
[q] *Ff.* 40. 9. 12.
[r] Lord Kaims. pr[illegible]
[s] *de aequitate.*

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 ſenſe in a ſingle title.

3. AGAIN, it hath been ſaid [u], that *fraud*, *accident*, and *truſt* are the proper and peculiar objects of a court of equity. But every kind of *fraud* is equally cognizable, and equally reverted to, in a court of law: and ſome frauds are cognizable only there; as fraud in obtaining a deviſe of lands, which is always ſent out of the equity courts to be there determined. Many *accidents* are alſo ſupplied in a court of law; as, loſs of deeds, miſtakes in receipts or accounts, wrong payments, deaths which make it impoſſible to perform a condition literally, and a multitude of other contingencies, and many cannot be relieved even in a court of equity; as if by accident a recovery is ill ſuffered, a deviſe ill executed, a contingent remainder deſtroyed, or a power of [illegible] omitted in a family ſettlement. A technical *truſt*, [illegible] created by the limitation of a ſecond uſe, was [illegible] the courts of equity, in the manner formerly [illegible] and this ſpecies of truſts, extended by inference [illegible] tion, have ever ſince remained as a kind of [illegible] courts. But there are other truſts, which [illegible] a court of law: as depoſits, and all manner [illegible] and eſpecially that implied contract, ſo [illegible] uſeful, of having undertaken to account [illegible] to another's uſe [x], which is the ground [illegible] caſe almoſt as univerſally remedial as [illegible]

4. ONCE more; it has been ſaid [illegible] not bound by rules or precedents [illegible] of the judge [y], founded on the [illegible]

[u] 1 Rol. Abr. 374. 4 Inſt. 84. [illegible]

[illegible] 1.

[illegible] Book II. ch. 20.

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 per quam durum eſt, ſed ita lex ſcripta eſt.*"

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[n] See vol. II. ch. 15. pag. 243, 244. ch. 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.
[t] *de aequitate.* § 3.

whether

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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 parti-

[u] 1 Rol. Abr. 374. 4 Inſt. 84. 10 Mod. 1.

[w] Book II. ch. 20.

[x] See pag. 163.

[y] This is ſtated by Mr. Selden (Table-talk, tit. equity) with more pleaſantry

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
[435] debt or loan itſelf to be "the juſt and true intent" for which the obligation was given, their narrow-minded ſucceſſors ſtill adhered wilfully and technically to the letter of the antient precedents, and refuſed to conſider the payment of principal, intereſt, and coſts, as a full ſatisfaction of the bond. At the ſame time more liberal men, who ſate in the courts of equity, conſtrued the inſtrument, according to 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 exe-

[1] See Vol. II. pag. 456.

cuted,

cuted, to have ſaved the forfeiture in a court of law, as well as in a court of equity. And the inconvenience as well as injuſtice, of putting different conſtructions in different courts upon one and the ſame tranſaction, obliged the parliament at length to interfere, and to direct by the ſtatutes 4 & 5 Ann. c. 16. and 7 Geo. II. c. 20. that, in the caſes of bonds and mortgages, what had long been the practice of the courts of equity ſhould alſo for the future be univerſally followed in the courts of law; wherein it had before theſe ſtatutes in ſome degree obtained a footing [j].

AGAIN; neither a court of equity nor of law can vary men's wills or agreements, or (in other words) make wills or agreements for them. Both are to underſtand them truly, and therefore both of them uniformly. One court ought not to extend, nor the other abridge, a lawful proviſion deliberately ſettled by the parties, contrary to its juſt intent. A court of equity, no more then 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.

THE rules of deciſion are in both courts equally appoſite [436] 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 equity. In matters of poſitive right, both courts muſt ſubmit to and follow thoſe antient and invariable maxims "*quae 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

[j] 2 Keb. 553. 555. Salk. 597. 6 Mod. 11. 66. 101.

[k] 2 Atk. 239.

[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.*)

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 governs both ſpecies of courts, wherein (it may be aſked) does their eſſential difference conſiſt? It principally conſiſts in the different modes of adminiſtering juſtice in each; in the mode of proof, the mode of trial, and the mode of relief. Upon theſe, and upon two other accidental grounds of juriſdiction, which were formerly driven into thoſe courts by narrow deciſions of the courts of law, *viz.* the true conſtructions of ſecurities for money lent, and the form and ef-
[437] fect of a truſt or ſecond uſe; upon theſe main pillars hath been gradually erected that ſtructure of juriſprudence, which prevails in our courts of equity, and is inwardly bottomed upon the ſame ſubſtantial foundations as the legal ſyſtem which hath hitherto been delineated in theſe commentaries; however different they may appear in their outward form, from the different taſte of their architects.

1. AND, firſt, as to the mode of *proof*. When facts, or their leading circumſtances, reſt only in the knowlege of the party, a court of equity applies itſelf to his conſcience, and

[m] See vol. I. page 253.
[n] Ricord *v.* Bettenham. Tr. 5 Geo. III. B. R.
[o] See vol. I. page 75. vol. II. page 459. 461. 467.
[p] See vol. II. page 513.
[q] *Ibid.* 504.
[r] *Ibid.* 463.

(6) By the 22 Geo. III. c. 25. all contracts for the ranſom of a captured ſhip, or the goods on board, are rendered abſolutely void.

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 knowlege of the party, which, though concealed, are binding in conſcience; and all judgments at law, obtained through ſuch fraud or concealment. And this, not by impeaching or reverſing the judgment itſelf, but by prohibiting [438] 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 obtained at all.

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

[s] 1 Chan. Caſ. 57.
[t] 2 P. Wms. 145.
[u] 2 Chan. Caſ. 152.
[w] 1 Equ. Caſ. abr. 367.
[x] 2 Vern. 277.
[y] 2 Vern. 638.
[z] 2 Chan. Caſ. 46.
[a] 3 P. Wms. 148. Year-book, 22 *Edw. W.* 37. *pl.* 21.

witneſſes are abroad, or ſhortly to leave the kingdom; or if witneſſes reſiding at home are aged or infirm; any of theſe caſes lays a ground for a court of equity to grant a commiſſion to examine them, and (in conſequence) (7) to exerciſe the ſame juriſdiction, which might have been exerciſed at law, if the witneſſes could probably attend.

3. WITH reſpect to the mode of *relief*. The want of a more ſpecific remedy, than can be obtained in the courts of law, gives a concurrent juriſdiction to a court of equity in a great variety of caſes. To inſtance in executory agreements. A court of equity will compel them to be carried into ſtrict execution [b], unleſs where it is improper or impoſſible; inſtead of giving damages for their non-performance. And hence a fiction is eſtabliſhed, that what ought to be done ſhall be conſidered as being actually done [c], and ſhall relate back to the time when it ought to have been done originally: and this fiction is ſo cloſely purſued through all its conſequences, that it neceſſarily branches out into many rules of juriſprudence, which form a certain regular ſyſtem. So, of waſte, and other ſimilar injuries, a court of equity takes a concurrent cognizance, in order to prevent them by injunction [d]. Over queſtions that may be tried at law, in a great multiplicity of actions, a court of equity aſſumes a juriſ-
[439] diction, to prevent the expenſe and vexation of endleſs litiga-

[b] Equ. Caſ. abr. 16. [c] 3 P. Wms. 215. [d] 1 Ch. Rep. 14. 2 Chan. Caſ. 32.

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(7) It is not correct, that where a court of equity will grant a commiſſion to examine witneſſes, whoſe attendance cannot be procured to give teſtimony in a court of common law, it will in ſuch caſe alſo grant relief. For though it is very uſual to file a bill praying a diſcovery, and that a commiſſion may be iſſued to examine witneſſes who live abroad, no doubt can be entertained that if the bill proceeded to pray relief, and that relief was ſuch as a court of law was fully competent to adminiſter, a demurrer to the bill would hold, unleſs it was a caſe where the courts exerciſe a concurrent juriſdiction.

tions

tions and ſuits[e]. In various kinds of frauds it aſſumes a concurrent[f] juriſdiction, not only for the ſake of a diſcovery, but of a more extenſive and ſpecific relief: as by ſetting aſide fraudulent deeds[g], decreeing re-conveyances[h], or directing an abſolute conveyance merely to ſtand as a ſecurity[i]. And thus, laſtly, for the ſake of a more beneficial and complete relief by decreeing a ſale of lands[k], a court of equity holds plea of all debts, incumbrances, and charges, that may affect it or iſſue thereout.

4. THE true conſtruction of *ſecurities* for money lent is another fountain of juriſdiction in courts of equity. When they held the penalty of a bond to be the form, and that in ſubſtance it was only as a pledge to ſecure the repayment of the ſum *bona fide* advanced, with a proper compenſation for the uſe, they laid the foundation of a regular ſeries of 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.

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, by a regular poſitive ſyſtem eſtabliſhed in the courts of equity, [440]

[e] 1 Vern. 308. Prec. Chan. 261. 1 P. Wms. 672. Stra. 404.
[f] 2 P. Wms. 156.
[g] 1 Vern. 32. 1 P. Wms. 239.
[h] 1 Vern. 237.
[i] 2 Vern. 84.
[k] 1 Equ. Caſ. abr. 337.
[l] 2 P. Wms. 645, 668, 669.

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 [m] page; and which have been implicitly received and handed down by ſubſequent compilers, without attending to thoſe gradual acceſſions and derelictions, by which in the courſe of a century this mighty river hath imperceptibly ſhifted it's channel. Lambard in particular, in the reign of queen Elizabeth, lays it down [n]; that "equity ſhould not be appealed unto, "but only in rare and extraordinary matters: and that a "good chancellor will not arrogate authority in every com-"plaint that ſhall be brought before him, upon whatſoever "ſuggeſtion: and thereby both overthrow the authority of "the courts of common law, and bring upon men ſuch a "confuſion and uncertainty, as hardly any man ſhould know "how or how long to hold his own aſſured to him." And certainly, if a court of equity were ſtill at ſea, and floated upon the occaſional opinion which the judge who happened to preſide might entertain of conſcience in every particular caſe, the inconvenience, that would ariſe from this uncertainty, would be a worſe evil than any hardſhip that could follow from rules too ſtrict and inflexible. 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

[441] ſcience, which cannot be attained without ſtudy and expe-

[m] See page 433.
[n] *Archeion.* 71. 73.
[o] 2 P. Wms. 685, 686.
[p] See page 54, 55, 56.

rience,

rience, 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 or 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 laws has not ſcrupled to follow even that equity, which was laid down by the clerical chancellors. Every one, who is converſant in our ancient books, knows that many valuable improvements in the ſtate of our tenures (eſpecially in leaſeholds [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 the one hand, the juſtice of our courts of law from being that harſh and illiberal rule, which [442] 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

[q] Gilbert of ejectment 2. [r] 2 Bac. Abr. 160. [s] See pag. 200.
[t] Bro. *Abr. t. tenant per copie.* 10 Litt. § 77.

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 com-"mon law," relief is therefore prayed at the chancellor's hands, and alſo proceſs of *ſubpoena* againſt the defendant, to compel him to anſwer upon oath to all the matter charged in the bill. And, if it be to quiet the poſſeſſion of lands, to ſtay waſte, or to ſtop proceedings at law, an injunction is alſo prayed, in the nature of an *interdictum* by the civil law, commanding the defendant to ceaſe.

THIS bill muſt call all neceſſary parties, however remotely concerned in intereſt, before the court; otherwiſe no decree can be made to bind them; and muſt be ſigned by counſel, as a certificate of 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
[443] law [s]. The maſter is to examine the propriety of the bill: and, if he reports it ſcandalous or impertinent, ſuch matter muſt be ſtruck out, and the defendant ſhall have his coſts;

[s] Smith's commonw. b. 2. c. 12.

which

which ought of right to be paid by the counſel who ſigned the bill.

WHEN the bill is filed in the office of the ſix clerks, (who originally were all in orders; and therefore, when the conſtitution of the court began to alter, a law[t] was made to permit them to marry,) when, I ſay, the bill is thus filed, if an injunction be prayed therein, it may be had at various ſtages of the cauſe, according to the circumſtances of the caſe (8). 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

[t] Stat. 14 & 15 Hen. VIII c. 8.

(8) An injunction in the court of exchequer ſtays all further proceedings, in whatever ſtage the cauſe may be; but in chancery, if a declaration be delivered, the party may proceed to judgment notwithſtanding an injunction, and execution is only ſtayed; but if no declaration has been delivered, all proceedings at law are reſtrained. 3 *Woodd.* 411.

the rules of the court, and plead, demur, or anſwer to the bill, he is then ſaid to be in *contempt*; and the reſpective proceſſes of contempt are in ſucceſſive order awarded againſt him. The firſt of which is an *attachment*, which is a writ
[444] in the nature of a *capias*, directed to the ſheriff, and commanding him to attach, or take up, the defendant, and bring him into court. If the ſheriff returns that the defendant *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 it's 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.

[u] page 50. [v] 1 Vern. 421.

In-

If the defendant is taken upon any of this proceſs, he is to be committed to the fleet, or other priſon, till he puts in his appearance, or anſwer, or performs whatever elſe this proceſs is iſſued to enforce, and alſo clears his contempts by [445] 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 of contempts during the progreſs of the cauſe, if the parties in any point refuſe or neglect to obey the order of court.

The proceſs againſt a body corporate is by *diſtringas*, to 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.

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

[w] 18 Rym. *Fœd.* 195.

royal

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*.

[446] 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

[x] *En ceſt court de chauncerie, home ne ſerra prejudice par ſon miſpleadying ou pur defaut de forme, mes ſolonque le veryte del matter, car il doit agarder ſolonque conſciens, et nemi ex rigore juris.* (*Dyverſite des courts. edit* 1534. *fol.* 296, 297. BIO. *Abr. t. juriſdiction.* 50.)

a peer

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 of it the preſent kind of purgation, by the ſingle oath of the party himſelf, was introduced. This oath was made uſe of in the ſpiritual courts, as well in criminal caſes of eccleſiaſtical cognizance, as in matters of civil right; and it was then uſually denominated the oath *ex officio*: whereof the high commiſſion court in particular made a moſt extravagant and illegal uſe; forming a court of inquiſition, in which all perſons were obliged to anſwer, in caſes of bare ſuſpicion, if the commiſſioners thought proper to proceed againſt them *ex officio* for any ſuppoſed eccleſiaſtical enormities. But when the high commiſſion court was aboliſhed by ſtatute 16 Car. I. c. 11. this oath *ex officio* was aboliſhed with it; and it is alſo enacted by ſtatute 13 Car. II. ſt. 1. c. 12. "that it ſhall "not be lawful for any biſhop or eccleſiaſtical judge to "tender to any perſon the oath *ex officio*, or any other oath "whereby the party may be charged or compelled to confeſs, "accuſe, or purge himſelf of any *criminal* matter." But this does not extend to oaths in a civil ſuit, and therefore it is ſtill the practice, both in the ſpiritual courts and in equity, to demand the perſonal anſwer of the party himſelf upon oath. Yet if in the bill any queſtion be put, that tends to the diſcovery of any crime, the defendant may thereupon demur, as was before obſerved, and may refuſe to anſwer.

If the defendant lives within twenty miles of London, he muſt be ſworn before one of the maſters of the court: if farther off, there may be a *dedimus poteſtatem* or commiſſion to take his anſwer in the country, where the commiſſioners adminiſter him the uſual oath; and then, the anſwer being

ſealed

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, and muſt either deny or confeſs all the
[448] material parts of the bill; or it may confeſs and avoid, that is, juſtify or palliate the facts. If one of theſe is not done, the anſwer may be excepted to for inſufficiency, and the defendant be compelled to put in a more ſufficient anſwer. A defendant cannot pray any thing in this his anſwer, but to be diſmiſſed the court: if he has any relief to pray againſt the plaintiff, he muſt do it by an original bill of his own, which is called a *croſs-bill.*

AFTER anſwer put in, the plaintiff upon payment of coſts may amend his bill, either by adding new parties, or new matter, or both, upon the new lights given him by the defendant; and the defendant is obliged to anſwer afreſh to ſuch amended bill. But this muſt be before the plaintiff has replied to the defendant's anſwer, whereby the cauſe is at iſſue; for afterwards (9), if new matter ariſes, which did not exiſt before, he muſt ſet it forth by a *ſupplemental bill.* There may be alſo a bill of *revivor*, when the ſuit is abated by the death of any of the parties; in order to ſet the proceedings again in motion, without which they remain at a ſtand. And there is likewiſe a bill of *interpleader;* where a perſon who owes a debt or rent to one of the parties in ſuit, but, till the determination of it, he knows not to which, deſires that they may interplead, that he may be ſafe in the payment. In this laſt caſe it is uſual to order the money to be paid into court, for the benefit of ſuch of the parties, to whom upon hearing the court ſhall decree it to be due. But this depends upon circumſtances; and the plaintiff muſt alſo annex an

(9) Where new matter ariſes after filing the bill, it cannot be introduced into the ſuit by amending the original bill, though iſſue is not joined, but muſt be ſtated in a ſupplemental bill. 3 *Atk.* 217. 1 *Atk.* 291.

affidavit

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, 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.

[y] Omichund v. Barker. Atk. 21.

The

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 *ſubpœna*, as in the courts of common law, to appear and ſubmit to examination. And when their depoſitions are taken, they are tranſmitted to the court with the ſame care that the anſwer of a defendant is ſent.

[450] IF witneſſes to a diſputable fact are old and infirm, it is very uſual to file a bill to perpetuate the teſtimony of thoſe witneſſes, although no ſuit is depending; for, it may be, a man's antagoniſt only waits for the death of ſome of them to begin his ſuit. This is moſt frequent when lands are deviſed by will away from the heir at law; and the deviſee, in order to perpetuate the teſtimony of the witneſſes to ſuch will, exhibits a bill in chancery againſt the heir, and ſets forth the will *verbatim* therein, ſuggeſting that the heir is inclined to diſpute its validity: and then, the defendant having anſwered, they proceed to iſſue as in other caſes, and examine the witneſſes to the will; after which the cauſe is at an end, without proceeding to any decree, no relief being prayed by the bill: but the heir is entitled to his coſts, even though he conteſts the will. This is what is uſually meant by proving a will in chancery.

WHEN all the witneſſes are examined, then, and not before, the depoſitions may be publiſhed, by a rule to paſs publication; after which they are open for the inſpection of all the parties, and copies may be taken of them. The cauſe is then ripe to be ſet down for hearing, which may be done at the procurement of the plaintiff, or defendant, before either the lord chancellor or the maſter of the rolls, according to the diſcretion of the clerk in court, regulated by the nature and importance of the ſuit, and the arrear of cauſes depending before each of them reſpectively. Concerning the authority of the maſter of the rolls to hear and determine cauſes, and his general power in the court of chancery, there were (not many

many years ſince) divers queſtions and diſputes very warmly agitated; to quiet which it was declared by ſtatute 3 Geo. II. ch. 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 inrolled, till the ſame are ſigned by his lordſhip. Either party may be *ſubpoena'd* to hear judgment on the day ſo fixed for the hearing: and then, if the plaintiff [451] does not attend, his bill is diſmiſſed with coſts; or, if the defendant makes default, a decree will be made againſt him, which will be final, unleſs he pays the plaintiff's coſt of attendance, and ſhews good cauſe to the contrary on a day appointed by the court. A plaintiff's bill may alſo at any time be diſmiſſed for want of proſecution, which is in the nature of a nonſuit at law, if he ſuffers three terms to elapſe without moving forward in the cauſe.

WHEN there are croſs cauſes, on a croſs bill filed by the defendant againſt the plaintiff in the original cauſe, they are generally contrived to be brought on together, that the ſame hearing and the ſame decree may ſerve for both of them. The method of hearing cauſes in court is uſually this. The parties on both ſides appearing by their counſel, the plaintiff's bill is firſt opened, or briefly abridged, and the defendant's anſwer alſo, by the junior counſel on each ſide: after which the plaintiff's leading counſel ſtates the caſe and the matters in iſſue, and the points of equity ariſing therefrom: and then ſuch depoſitions as are called for by the plaintiff are read by one of the ſix clerks, and the plaintiff may alſo read ſuch part of the defendant's anſwer, as he thinks material or convenient[z]: and after this the reſt of the counſel for the plaintiff make their obſervations and arguments. Then the defendant's counſel go through the ſame proceſs for him, except that they may not read any part of his anſwer; and the coun-

[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.

ſel 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 (9). 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 ap-
[452] pear more or leſs favourable to the party vanquiſhed. And yet the ſtatute 15 Henry VI. c. 4. ſeems expreſsly to direct, that as well damages as coſts ſhall be given to the defendant, if wrongfully vexed in this court.

THE chancellor's decree is either *interlocutory* or final. It very ſeldom happens that the firſt decree can be final, or conclude the cauſe; for, if any matter of fact is ſtrongly controverted, this court is ſo ſenſible of the deficiency of trial by written depoſitions, that it will not bind the parties thereby, but uſually directs the matter to be tried by jury; eſpecially ſuch important facts as the validity of a will, or whether A is the heir at law to B, or the exiſtence of a *modus decimandi* or real and immemorial compoſition for tithes. But, as no jury can be ſummoned to attend this court, the fact is uſually directed to be tried at the bar of the court of king's bench or at the aſſizes, upon a *feigned iſſue*. For (in order to bring it there, and have the point in diſpute, and that only, put in iſſue) an action is brought, wherein the plaintiff by a fiction declares that he laid a wager of 5 *l.* with the defendant, that A was heir at law to B; and then avers that he is ſo; and therefore demands the 5 *l.* The defendant admits the feigned wager, but avers that A is not the heir to B; and there-

(9) It is not now the practice for the regiſtrar to read the minutes of the decree openly in court; but any party to the ſuit may procure a copy of them, and if there is any miſtake, may move to have them amended. But after a decree has been formally drawn up and entered, no errors in it can be rectified on motion, or by any other proceeding than rehearing the cauſe.

upon

upon that iſſue is joined, which is directed out of chancery to be tried: and thus the verdict of the jurors at law determines the fact in the court of equity. Theſe feigned iſſues ſeem borrowed from the *ſponſio judicialis* of the Romans [a]: and are alſo frequently uſed in the courts of law, by conſent of the parties, to determine ſome diſputed rights without the formality of pleading, and thereby to ſave much time and expenſe in the deciſion of a cauſe (10).

So likewiſe, if a queſtion of mere law ariſes in the courſe of a cauſe, as whether by the words of a will an eſtate for life or in tail is created, or whether a future intereſt deviſed by a teſtator ſhall operate as a remainder or an executory deviſe, it is [453] 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 (11); wherein all the material facts

[a] *Nota eſt ſponſio judicialis: ſpondeſne "quingentos ſi meus ſit? ſpondeo, ſi tuus "ſit. Et tu quoque ſpondeſne quingentos, "ni tuus ſit? ſpondeo, ni meus ſit." Vide* Heinec. *Antiquitat. l.* 3. *t.* 16. § 3. & Sigon. *de judiciis. l.* 21. *p.* 466. *citat ibid.*

(10) The conſent of the court ought alſo to be previouſly obtained, for a trial of a feigned iſſue without ſuch conſent is a contempt, which will authoriſe the court to order the proceedings to be ſtayed. 4 *T. R.* 402.

(11) In a late caſe, the maſter of the rolls ſitting for the lord chancellor, directed a caſe for the opinion of the court of king's bench, ſaying, he thought he had authority ſo to do when ſitting for the lord chancellor, though not when ſitting at the rolls. (*Horton* v. *Whitaker*, 2 *Bro. Chan. Ca.* 88.) When a caſe is heard before the maſter of the rolls ſitting in his own court, on which he wiſhes to have the opinion of a court of law, he directs an action to be commenced by the parties in a court of law in ſuch form, that the queſtion on which he has a doubt may be decided in that ſuit, and ſuſpends his decree till the court of law has given its judgment. The court of exchequer is both a court of law and a court of equity (*vide ante* 43.); therefore if a queſtion of mere law ariſes in the courſe of the exerciſe of its equitable juriſdiction, the barons will decide upon it in that ſuit, without referring it to another juriſdiction.

are admitted, and the point of law is ſubmitted to their deciſion: who thereupon hear it ſolemnly argued by counſel on both ſides, and certify their opinion to the chancellor. And upon ſuch certificate the decree is uſually founded.

ANOTHER thing alſo retards the completion of decrees. Frequently long accounts are to be ſettled, incumbrances and debts to be inquired into, and a hundred little facts to be cleared up, before a decree can do full and ſufficient juſtice Theſe matters are always by the decree on the firſt hearing referred to a maſter in chancery to examine; which examinations frequently laſt for years: and then he is to report the fact, as it appears to him, to the court. This report may be excepted to, diſproved, and 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 inforced (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
[454] ſuch as have been concerned in the cauſe, certifying that they apprehend the cauſe is proper to be reheard. And upon the rehearing all the evidence taken in the cauſe, whether read before or not, is now admitted to be read; becauſe it is the decree of the chancellor himſelf, who only now ſits to hear reaſons why it ſhould not be enrolled and perfected; at which time all omiſſions of either evidence or argument may

[b] Stat. 3 Geo. II. c. 30, See p. 450.

be

be ſupplied [c]. But, after the decree is once ſigned and enrolled, it cannot be reheard or rectified, but by bill of review, or by appeal to the houſe of lords.

A BILL of *review* may be had upon apparent error in judgment, appearing on the face of the decree; or, by ſpecial leave of the court, upon oath made of the diſcovery of new matter or evidence, which could not poſſibly be had or uſed at the time when the decree paſſed. But no new evidence or matter then in the knowlege of the parties, and which might have been uſed before, ſhall be a ſufficient ground for a bill of review.

AN *appeal* to parliament, that is, to the houſe of lords, is the dernier reſort of the ſubject who thinks himſelf aggrieved by an interlocutory order or final determination in this court: and it is *effected* by petition to the houſe of peers, and not by *writ of error*, as upon judgments at common law. This juriſdiction is ſaid [d] to have begun in 18 Jac. I. and it is certain, that the firſt petition, which appears in the records of parliament, was preferred in that year [e]; and that the firſt which was heard and determined (though the name of appeal was then a novelty) was preſented in a few months after [f]: both levelled againſt the lord chancellor Bacon for corruption, and other miſbehaviour. It was afterwards warmly controverted by the houſe of commons in the reign of Charles the ſecond [g]. But this diſpute is now at reſt [h]; it being obvious to the reaſon of all mankind, that, when the courts of equity became principal tribunals for deciding cauſes of property, a reviſion of their decrees (by way of appeal) became equally neceſſary, as a writ of error from the judgment of a court of law. And, upon the ſame principle, from decrees of the chancellor relating to the commiſſioners for the diſſolution of chauntries, *&c.* under the ſtatute 37 Hen. VIII. c. 4. (as well as for charitable uſes under the ſtatute 43 Eliz. c. 4.) [455]

[c] Gilb. Rep. 151, 152.
[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. 1.

an appeal to the king in parliament was always unqueſtionably allowed [l]. But no new evidence is admitted in the houſe of lords upon any account; this being a diſtinct juriſdiction [k]: which differs it very conſiderably from thoſe inſtances, wherein the ſame juriſdiction reviſes and corrects its own acts, as in rehearings and bills of review. For it is a practice unknown to our law, (though conſtantly followed in the ſpiritual courts,) when a ſuperior court is reviewing the ſentence of an inferior, to examine the juſtice of the former decree by evidence that was never produced below. And thus much for the general method of proceeding in the courts of equity.

[l] 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, { John Doe. Richard Roe.

§ 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.

N° I. ing. **Becauſe** by the complaint of William Kent eſquire perſonally preſent at my county court, to wit, on Monday the ſixth day of September in the thirtieth year of the reign of our lord GEORGE the ſecond by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and ſo forth, at Oxford in the ſhirehouſe there holden, I am informed, that although he himſelf the writ of our ſaid lord the king of right patent directed to Willoughby earl of Abingdon, for this that he ſhould hold full right to the ſaid William Kent of one meſſuage and twenty acres of land with the appurtenances in Dorcheſter within my ſaid county, of which Richard Allen 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 fifth 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

mandant, 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. N° I.

§ 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 whereupon he complains that the aforeſaid Richard unjuſtly deforces him. And unleſs he ſhall ſo do, and if the ſaid William ſhall give you ſecurity of proſecuting his claim, then ſummon by good ſummoners the ſaid Richard, that he appear before our juſtices at Weſtminſter on the morrow of All Souls, to 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.

Pledges of Proſecution, { John Doe, Rich. Roe. } Summoners of the within-named Richard, { John Den. Rich. Fen. } Sheriff's Return.

§ 5. *The*

N° I.

§ 5. *The Record, with Award of Battel.*

Pleas at Weſtminſter before ſir John Willis knight, and his brethren, juſtices of the bench of the lord the king at Weſtminſter, of the term of ſaint Michael in the thirtieth year of the reign of the lord GEORGE the ſecond, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, &c.

Writ. Oxon, 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 whereupon** 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.]

Dominus remiſit curiam.

Count.

Eſplees.

Defence. **And** the ſaid Richard Allen, by Peter Jones his attorney, comes and defends the right of the ſaid William Kent, and his ſeiſin, when [and where it ſhall 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

Wager of Battel.

Replication.

* N. B. The clauſes between hooks, in this and the ſubſequent numbers of the appendix, are uſually no otherwiſe expreſſed in the records than by an *&c.*

right

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 Read 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 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.

No I.

Joinder of Battel.

Gages given.

Award of Battel. Pledges.

Continuance.

Champions appear.

And

N° I.

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 puriſication 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.*

Adjournment to *Tothill Field.*

Demandant nonſuit.

Final judgment, for the Tenant.

§ 6. *Trial by the grand Aſſiſe.*

Defence.

——— 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 demandeth them. **And** he tenders here in court ſix ſhillings and eight-pence to the uſe of the lord the now king, *&c.* for

Miſe.

Tender of the *Demi-mark.*

N° I.

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 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 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 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 Stuart, Bartholomew Norton, and Henry Davis, eſquires, John Porter, Chriſtopher Ball, Benjamin Robinſon, Lewis Long, William Kirby, gentlemen, good and lawful men of the county aforeſaid, who neither are of kin to the ſaid William Kent nor to the ſaid Richard Allen, to make recognition of the grand 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

Summons of the knights.

Return.

Election of the recognitors.

Venire facias.

N° I.

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 certain of them, to wit, Charles Stephens, Randal Wheler, Toby Cox, Thomas Munday, Charles Price, knights, Daniel Prince, Roger Lucas, William Day, James Harris, Peter Payne, Robert Quin, Henry Davis, John Porter, Chriſtopher Ball, Lewis Long, and William Kirby, being elected, tried, and ſworn, upon their oath ſay, that the ſaid William Kent hath more right to have the tenements aforeſaid with the appurtenances to him and his heirs, as he demandeth the ſame, than the ſaid Richard Allen to hold the ſame as he now holdeth them, according as the ſaid William Kent by his writ aforeſaid hath ſuppoſed. **Therefore it is conſidered,** that the ſaid William Kent do recover his ſeiſin againſt the ſaid Richard Allen of the tenements aforeſaid with the appurtenances, to him and his heirs, quit of the ſaid Richard Allen and his heirs, for ever: and the ſaid Richard Allen, in mercy, *&c.*

Recognitors ſworn.

Verdict for the Demandant.

Judgment.

N° II.

N° II.

Proceedings on an Action of Treſpaſs in EJECTMENT, *by Original, in the* King's Bench.

§ 1. *The Original Writ.*

GEORGE the ſecond, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and ſo forth; to the ſheriff of Berkſhire, greeting. If Richard Smith ſhall give you ſecurity of proſecuting his claim, then put by gage and ſafe pledges William Stiles, late of Newbury, gentleman, ſo that he be before us on the morrow of All-Souls, whereſoever we ſhall then be in England, to 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. *Si fecerit te ſecurum.*

Pledges of proſecution, { John Doe. Richard Roe.

The within-named William Stiles is attached by pledges, { John Den. Richard Fen. Sheriff's Return.

§ 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.

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, Declaration.

N° II. ſuage, with the appurtenances, in Sutton in the county aforeſaid, which John Rogers eſquire demiſed to the ſaid Richard Smith for a term which is not yet expired, and ejected him from his ſaid farm, and other wrongs to him did, to the great damage of the ſaid Richard, and againſt the peace of the lord the king, &c. And whereupon the ſaid Richard by Robert Martin his attorney complains, that whereas the ſaid John Rogers, on the firſt day of October in the twenty-ninth year of the reign of the lord the king that now is, at Sutton aforeſaid, had demiſed to the ſame Richard the tenement aforeſaid, with the appurtenances, to have and to hold the ſaid tenement, with the appurtenances, to the ſaid Richard and his aſſigns, from the feaſt of ſaint Michael the archangel then laſt paſt, to the end and term of five years from thence next following and fully to be complete and ended, by virtue of which demiſe the ſaid Richard entered into the ſaid tenement, with the appurtenances, and was thereof poſſeſſed; and, the ſaid Richard being ſo poſſeſſed thereof, the ſaid William afterwards, that is to ſay, on the ſaid firſt day of October in the ſaid twenty-ninth year, with force and arms, that is to ſay, with ſwords, ſtaves, and knives, entered into the ſaid tenement, with the appurtenances, which the ſaid John Rogers demiſed to the ſaid Richard in form aforeſaid for the term aforeſaid, which is not yet expired, and ejected the ſaid Richard out of his ſaid farm, and other wrongs to him did, to the great damage of the ſaid Richard, and againſt the peace of the ſaid lord the king; whereby the ſaid Richard ſaith, that he is injured and damaged to the value of twenty pounds. And thereupon he brings ſuit, &c.

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,

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. N° II.

Your loving friend,

William Stiles.

5 *January*, 1756.

§ 3. *The Rule of Court.*

Hilary *Term, in the twenty-ninth Year of King* GEORGE *the ſecond.*

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

Smith againſt Stiles; for one meſſuage with the appurtenances in Sutton, on the demiſe of John Rogers.

N° II. 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 Smith, of a plea, wherefore with force and arms he entered into one meſſuage, with the appurtenances, in Sutton, which John Rogers eſquire hath demiſed to the ſaid Richard for a term which is not yet expired, and ejected him from his ſaid farm, and other wrongs to him did, to the great damage of the ſaid Richard, and againſt the peace of the lord the king that now is.

Declaration, or count.

And whereupon the ſaid Richard by Robert Martin his attorney complains, that whereas the ſaid John Rogers on the firſt day of October in the twenty-ninth year of the reign of the lord the king that now is, at Sutton aforeſaid, had demiſed to the ſame Richard the tenement aforeſaid, with the appurtenances, to have and to hold the ſaid tenement, with the appurtenances, to the ſaid Richard and his aſſigns, from the feaſt of ſaint Michael the archangel then laſt paſt, to the end and term of five years from thence next following and fully to be complete and ended; by virtue of which demiſe the ſaid Richard entered into the ſaid tenement, with the appurtenances, and was thereof poſſeſſed: and, the ſaid Richard being ſo poſſeſſed thereof, the ſaid 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

N° III.

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 no wiſe guilty of the treſpaſs and ejectment aforeſaid, as the ſaid Richard above complains againſt him; and thereof he puts himſelf upon the country: and the ſaid Richard doth likewiſe the ſame; **Wherefore** let a jury come thereupon before the lord the king, on the octave of the purification of the bleſſed virgin Mary, wheresoever he ſhall then be in England; who neither [are of kin to the ſaid Richard, nor to the ſaid George;] to recognize [whether the ſaid George be guilty of the treſpaſs and ejectment aforeſaid:] becauſe as well [the ſaid George, as the ſaid Richard, between whom the difference is, have put themſelves on the ſaid jury.] The ſame day is there given to the parties aforeſaid. **Afterwards** the proceſs therein, being continued between the ſaid parties of the plea aforeſaid by the jury, is put between them in reſpite, before the lord the king, until the day of Eaſter in fifteen days, wheresoever the ſaid lord the king ſhall then be in England; unleſs the juſtices of the lord the king aſſigned to take aſſiſes in the county aforeſaid, ſhall have come before that time, to wit, on Monday the eighth day of March, at Reading in the ſaid county by the form of the ſtatute [in that caſe provided], by reaſon of the default of the jurors, [ſummoned to appear as aforeſaid.] At which day before the lord the king, at Weſtminſter, come the parties aforeſaid by their attorneys aforeſaid; and the aforeſaid juſtices of aſſiſe, before whom [the jury aforeſaid came,] ſent here their record before them, had in theſe words, to wit: **Afterwards**, at the day and place within contained, before Heneage Legger eſquire, one of the barons of the exchequer of the lord the king; and ſir John Eardley Wilmot, knight, one of the juſtices of the

Defence.

Plea, not guilty.

Iſſue.

Venire awarded.

Reſpite, for default of jurors.

Niſi prius.

Poſtea.

N° III.

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 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 impa-

Tales de circumſtantibus.

Verdict for the plaintiff.

Motion in arreſt of judgment.

nelled. And, becauſe the court of the lord the king here is not yet adviſed of giving their judgment of and upon the premiſes, therefore day thereof is given as well to the ſaid Richard Smith as the ſaid George Saunders, before the lord the king, until the morrow of the Aſcenſion of our Lord, whereſoever the ſaid lord the king ſhall then be in England, to hear their judgment of and upon the premiſes, for that the court of the lord the king is not yet adviſed thereof. At which day before the lord the king at Weſtminſter, come the parties aforeſaid by their attorneys aforeſaid: upon which, the record and matters aforeſaid having been ſeen, and by the court of the lord the king now here fully underſtood, and all and ſingular the premiſes having been examined, and mature deliberation being had thereupon, for that it ſeems to the court of the lord the king now here that the verdict aforeſaid is in no wiſe inſufficient or erroneous, and that the ſame ought not to be quaſhed, and that no new trial ought to be had of the iſſue aforeſaid, **Therefore it is conſidered**, that the ſaid Richard do recover againſt the ſaid George his term yet to come, of and in the ſaid tenements, with the appurtenances, and the ſaid damages aſſeſſed by the ſaid jury in form aforeſaid, and alſo twenty-ſeven pounds ſix ſhillings and eight pence for his coſts and charges aforeſaid, by the court of the lord the king here awarded to the ſaid Richard, with his aſſent, by way of increaſe; which ſaid damages in the whole amount to twenty-nine pounds ſeven Shillings and eight pence. "And let the ſaid George be taken, [until he maketh fine to the "lord the king]." * **And hereupon** the ſaid Richard by his attorney aforeſaid prayeth a writ of the lord the king, to be directed to the ſheriff of the county aforeſaid, to cauſe him to have poſſeſſion of his term aforeſaid yet to come, of and in the tenements aforeſaid, with the appurtenances: and it is granted unto him, returnable before the lord the king on the morrow of the holy Trinity, whereſoever he ſhall then be in England. At which day before the lord the king, at Weſtminſter, cometh the ſaid Richard by his attorney aforeſaid; and the ſheriff, that is to ſay, ſir Thomas Reeve, knight, now ſendeth, that he by virtue of the writ aforeſaid to him directed, on the ninth day of June laſt paſt, did cauſe

N° III.

Continuance.

Opinion of the court.

Judgment for the Plaintiff.

Coſts.

Capiatur pro fine.

Writ of poſſeſſion,

and return.

* Now omitted. See page 398.

N° III. 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.

N° III.

Proceedings on an Action of DEBT *in the Court of* Common Pleas; *removed into the* King's Bench *by Writ of* ERROR.

§ 1. *Original.*

Præcipe. GEORGE the ſecond, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and ſo forth; to the ſheriff of Oxfordſhire, greeting. **Command** Charles Long, late of Burford, gentleman, that juſtly and without delay he render to William Burton two hundred pounds, which he owes him and unjuſtly detains, as he ſaith. And unleſs he ſhall ſo do, and if the ſaid William ſhall make you ſecure of proſecuting his claim, then ſummon by good ſummoners the aforeſaid Charles, that he be before our juſtices, at Weſtminſter, on the octave of ſaint Hilary, to 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.

Sheriff's return. Pledges of proſecution { John Doe. Richard Doe. } Summoners of the within-named Charles Long, { Roger Morris. Henry Johnſon. }

§ 2. *Proceſs.*

Attachment. GEORGE the ſecond, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and ſo forth; to

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 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. N° III. *Pone.*

The within-named Charles Long is attached by Pledges, } Edward Leigh. Robert Tanner. Sheriff's return.

GEORGE the ſecond, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and ſo forth; to the ſheriff of Oxfordſhire, greeting. **We** command you, that you diſtrein Charles Long, late of Burford, 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. *Diſtringas.*

The within-named Charles Long hath nothing in my bailiwick, whereby he may be diſtreined. Sheriff's return. *Nihil.*

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 *Capias ad reſpondendum.*

N° III. 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.

Non eſt inventus. Teſtatum capias. GEORGE the ſecond, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and ſo forth; to the ſheriff of 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.

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 at the day and place within contained, according as by this writ it is commanded me.

" *Or, upon the Return of* Non eſt inventus *upon the firſt* Ca-
" pias, *the Plaintiff may ſue out an* Alias *and a* Pluries,
" *and then proceed to Outlawry; thus:*

" GEORGE

N° III.

" GEORGE the ſecond, by the grace of God of Great
" Britain, France, and Ireland king, defender of the faith, and ſo
" forth; to the ſheriff of Oxfordſhire, greeting. We command
" you as formerly we commanded you, that you take Charles
" Long, late of Burford, gentleman, if he may be found in
" your bailiwick, and him ſafely keep, ſo that you may have
" his body before our juſtices at Weſtminſter, on the morrow
" of the holy Trinity, to anſwer to William Burton, gentleman,
" of a plea, that he render to him two hundred pounds, which
" he owes him and unjuſtly detains, as he ſaith. And have you
" there then this writ. Witneſs ſir John Willes, knight, at
" Weſtminſter, the ſeventh day of May, in the twenty-eighth
" year of our reign.

" *Alias capias.*

" The within-named Charles Long is not found in my baili-
" wick.

" Sheriff's return. " *Non eſt inventus.* " *Pluries capias.*

" GEORGE the ſecond, by the grace of God of Great
" Britain, France, and Ireland king, defender of the faith, and
" ſo forth; to the ſheriff of Oxfordſhire, greeting. We com-
" mand you, as we have more than once commanded you, that
" you take Charles Long, late of Burford, gentleman, if he
" may be found in your bailiwick, and him ſafely keep, ſo that
" you may have his body before our juſtices at Weſtminſter,
" from the day of the holy Trinity in three weeks, to anſwer to
" William Burton, gentleman, of a plea, that he render to him
" two 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.

" The within-named Charles Long is not found in my baili-
" wick.

" Sheriff's return. *Non eſt inventus.*

" 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 com-
" mand

" *Exigi facias.*

N° III. " mand 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 Eng-
" land, 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 Weſt-
" minſter, 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. " By virtue of this writ to me directed, at my county court
" held at Oxford, in the county of Oxford, on Thurſday the
" *Primo exactus.* " 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:
" *Secundo exactus.* " 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 ap-
" *Tertio exactus.* " pear: 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
" *Quarto exactus.* " 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,
" *Quinto exactus.* " and did not appear: and at my county court held at Oxford
" aforeſaid, on Thurſday the ſixteenth day of October in the
" year aforeſaid, the ſaid Charles Long was required the fifth
" time, and did not appear: therefore the ſaid Charles Long, by
" *Ideo utlagatus.* " the judgment of the Coroners of the ſaid lord the king, of the
" county aforeſaid, according to the law and cuſtom of the king-
" dom of England, is outlawed.

" GEORGE

No III.

" GEORGE the ſecond, by the grace of God of Great " Britain, France, and Ireland king, defender of the faith, and " ſo forth; to the ſheriff of Oxfordſhire, greeting. Whereas " by our writ we have lately commanded you that you ſhould " cauſe Charles Long, late of Burford, gentleman, to be re- " quired 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 Weſtmin- " ſter, on the morrow of All Souls to anſwer to William Bur- " ton, gentleman, of a plea, that he render to him two hun- " dred pounds, which he owes him and unjuſtly detains, as he " ſaith: Therefore we command you, by virtue of the ſtatute " in the thirty-firſt year of the lady Elizabeth late queen of " England made and provided, that you cauſe the ſaid Charles " Long to be proclaimed upon three ſeveral days according to " the form of that ſtatute; (whereof one proclamation ſhall be " made at or near the moſt uſual door of the church of the pa- " riſh wherein he inhabits) that he render himſelf unto you; " ſo that you may have his body before our juſtices at Weſtmin- " ſter at the day aforeſaid to anſwer the ſaid William Burton " of the plea aforeſaid. And have you there then this writ. " Witneſs ſir John Willes, knight, at Weſtminſter, the " eighteenth day of June, in the twenty-eighth year of our " reign.

" Writ of proclamation.

" By virtue of this writ to me directed, at my county court " held at Oxford, in the county of Oxford, on Thurſday the twen- " ty-ſixth day of June, in the twenty-ninth year of the reign of " the lord the king within-written, I cauſed to be proclaimed " the firſt time; and at the general quarter ſeſſions of the peace, " held at Oxford aforeſaid, on Tueſday the fifteenth day of July " in the year aforeſaid, I cauſed to be proclaimed the ſecond " time; and at the moſt uſual door of the church of Burford " within-written, on Sunday the third day of Auguſt in the year " aforeſaid, immediately after divine ſervice, one month at the " leaſt before the within-named Charles Long was required the " fifth

" Sheriff's return. " *Procla- mari feci.*

No 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 utlagatum.* " 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 com- " mand 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 re- " turned 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 No- " vember 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 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 " Middleſex 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

* Note, that § 3, and 4, are the uſual method of proceſs, to compel an appearance in the courts of *king's bench* and *exchequer*; in which the practice of thoſe courts does principally differ from that of the court of *common pleas*; the ſubſequent ſtages of proceedings being nearly alike in them all.

" keep,

N° III.

" 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 " *ac etiam*
" Charles, for two hundred pounds of debt, according to the " in debt.
" 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 baili- " Sheriff's
" wick. " return;
" *Non eſt*
" *inventus.*
" *Latitat.*

" GEORGE the ſecond, by the grace of God of Great
" Britain, France, and Ireland king, defender of the faith, and
" ſo forth; to the ſheriff of Berkſhire, greeting. Whereas
" we lately commanded our ſheriff of Middleſex that he ſhould
" take Charles Long, late of Burford in the county of Oxford,
" if he might be found in his bailiwick, and him ſafely keep,
" ſo that he might be before us at Weſtminſter, at a certain day
" now paſt, to anſwer unto William Burton, gentleman, of a
" plea of treſpaſs; [and alſo to a bill of the ſaid William " *Ac etiam.*
" 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 re-
" turned to us that the aforeſaid Charles was not found in his
" bailiwick; whereupon on the behalf of the aforeſaid William
" in our court before us it is ſufficiently atteſted, that the afore-
" ſaid 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 " Sheriff's
" of the within-named Charles Long; which I have ready at the " return.
" day

N° III. " day and place within-contained according as by this writ it is
" commanded me.

" *Cepi corpus.*

" § 4. *Writ of* Quo minus *in the Exchequer.*

" GEORGE the ſecond, by the grace of God of Great
" Britain, France, and Ireland king, defender of the faith, and
" ſo forth; to the ſheriff of Berkſhire, greeting. We com-
" mand you, that you omit not by reaſon of any liberty of your
" county, but that you enter the ſame, and take Charles Long,
" late of Burford in the county of Oxford, gentleman, whereſo-
" ever he ſhall be found in your bailiwick, and him ſafely keep,
" ſo that you may have his body before the barons of our exche-
" quer 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 de-
" tains, 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 Weſt-
" minſter, the ſixth day of May, in the twenty-eighth 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 Barons within-written, according as within it is com-
" manded me."

§ 5. *Special Bail; on the Arreſt of the Defendant, purſuant to the* Teſtatum Capias, *in page* xiv.

Bail bond to the ſheriff.

Know all men by theſe preſents, that we Charles Long of Burford in the county of Oxford, gentlemen, Peter Hamond of Bix in the ſaid county, yeoman, and Edward Thomlinſon of Woodſtock in the ſaid county, innholder, are held and firmly bound to Chriſtopher Jones, eſquire, ſheriff of the county of Berks,

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. N° III.

The condition of this obligation is ſuch, that if the above-bounden Charles Long do appear before the juſtices of our ſovereign lord the king at Weſtminſter, on the morrow of the holy Trinity, to anſwer William Burton, gentleman, of a plea of debt of two hundred pounds, then this obligation ſhall be void and of none effect, or elſe ſhall be and remain in full force and virtue.

Sealed, and delivered, being firſt duly ſtamped, in the preſence of
Henry Shaw.
Timothy Griffith.

Charles Long. (L. S.)
Peter Hamond. (L. S.)
Edward Thomlinſon. (L. S.)

You Charles Long do acknowlege to owe unto the plaintiff four hundred pounds, and you John Roſe and Peter Hamond do ſeverally acknowlege to owe unto the ſame perſon the ſum of two hundred pounds a-piece, to be levied upon your ſeveral goods and chattels, lands and tenements, **upon condition** that, if the defendant be condemned in the action, he ſhall pay the condemnation, or render himſelf a priſoner in the Fleet for the ſame; and, if he fail ſo to do, you John Roſe and Peter Hamond do undertake to do it for him. Recognizance of bail, before the commiſſioner.

Trinity

N° III.

Trinity Term, 28 GEO. II.

Bail piece.

Berks, } On a *Teſtatum Capias* from Oxfordſhire againſt
to wit. } 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:

The bail are, John Roſe, of Witney in the county of Oxford, eſquire. Peter Hamond, of Bix in the ſaid county, yeoman.

Richard Price, attorney for the defendant.

The party himſelf in £400.
Each of the bail in £200.

Taken and acknowleged 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.

§ 6. *The Record, as removed by Writ of* ERROR.

Writ of error.

The lord the king hath given in charge to his truſty and beloved ſir John Willes, knight, his writ cloſed in theſe words: **GEORGE** the ſecond, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and ſo forth; to our truſty and beloved ſir John Willes, knight, greeting. **Becauſe** in the record, and proceſs, and alſo in the giving of judgment, of the plaint which was in our court before you, and your fellows, our juſtices of the bench, by our writ, between William Burton, gentleman, and Charles Long, late of Burford in

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. N° III.

The record and proceſs, whereof in the ſaid writ mention above is made, follow in theſe words, to wit: Chief juſtice's return.

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. The record.

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 unjuſtly detains, [as he ſaith.] **And whereupon** the ſaid William, by Thomas Gough his attorney, complains, that whereas on the firſt day of December, in the year of our Lord one thouſand ſeven hundred and fifty-four, at Banbury in this county, the ſaid Charles by his writing obligatory did acknowlege 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 Writ. Declaration, or count, on a bond.

N° III.

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 obligation is ſuch, that if the "above bounden Charles Long, his heirs, executors, and ad- "miniſtrators, and every of them, ſhall and do from time to "time, and at all times hereafter, well and truly ſtand to, obey, "obſerve, fulfil, and keep, the award, arbitrament, order, "rule, judgment, final end, and determination, of David Stiles, "of Woodſtock in the ſaid county, clerk, and Henry Bacon, "of Woodſtock, aforeſaid, gentleman, (arbitrators indifferently "nominated and choſen by and between the ſaid Charles Long "and the abovenamed 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 par- "ties, for any matter, cauſe, or thing, from the beginning of "the world until the day of the date hereof,) which the ſaid "arbitrators ſhall make and publiſh, of or in the premiſes, in "writing under their hands and ſeals, or otherwiſe by word of "mouth, in the preſence of two credible witneſſes, on or before "the firſt day of January next enſuing the date hereof; then "this obligation to be void and of none effect, or elſe to be "and remain in full force and virtue." Which being read and heard, the ſaid Charles prays leave to imparl therein here until the octave of the holy Trinity; and it is granted unto him. The ſame day is given to the ſaid William Burton here, &c. At which day, to wit, on the octave of the holy Trinity, here come

Profert in curia.

Defence.

Oyer prayed of the bond, and condition, *viz.* to perform an award.

Imparlance.

Continuance.

No III.

come as well the ſaid William Burton as the ſaid Charles Long, by their attorneys aforeſaid: and hereupon the ſaid William prays that the ſaid Charles may anſwer to his writ and count aforeſaid. And the aforeſaid Charles defends the force and injury, when, &c. and ſaith, that the ſaid William ought not to have or maintain his ſaid action againſt him; becauſe he ſaith, that the ſaid David Stiles and Henry Bacon, the arbitrators beforenamed in the ſaid condition, did not make any ſuch award, arbitrament, order, rule, judgment, final end, or determination, of or in the premiſes above ſpecified in the ſaid condition, on or before the firſt day of January, in the condition aforeſaid above mentioned, according to the form and effect of the ſaid condition: and this he is ready to verify. Wherefore he prays judgment, whether the ſaid William ought to have or maintain his ſaid action thereof againſt him [and that he may go thereof without a day.] And the aforeſaid William ſaith, that, for any thing above alleged by the ſaid Charles in pleadings, he ought not to be 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

Plea; No ſuch award.

Replication, ſetting forth an award.

Proteſtando

N° III.

to, obeyed, obſerved, fulfilled, and kept) for further plea therein he ſaith, that the ſaid Charles the ſaid ſeventy-five pounds to the ſaid William hath not hitherto paid: and this he is ready to verify. Wherefore he prays judgment, and his debt aforeſaid, together with his damages occaſioned by the detention of the ſaid debt, to be adjudged unto him, &c. And the aforeſaid Charles ſaith, that the plea aforeſaid, by him the ſaid William in manner and form aforeſaid above in his replication pleaded, and the matter in the ſame contained, are in no wiſe ſufficient in law for the ſaid William to have or maintain his action aforeſaid thereupon againſt him the ſaid Charles; to which the ſaid Charles hath no neceſſity, neither is he obliged by the law of the land, in any manner to anſwer: and this he is ready to verify. Wherefore, for want of a ſufficient replication in this behalf, the ſaid Charles, as aforeſaid, prays judgment, and that the 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

Demurrer.

Cauſes of demurrer.

Joinder in demurrer.

Continuances.

come as well the ſaid Charles as the ſaid William, by their ſaid attorneys; and becauſe the ſaid juſtices here will farther adviſe themſelves of and upon the premiſes before they give judgment thereupon, a day is farther given to the parties aforeſaid here until the octave of ſaint Hilary, to hear their judgment thereupon, for that the ſaid juſtices here are not yet adviſed thereof. At which day here come as well the ſaid William Burton as the ſaid Charles Long, by their ſaid attorneys. **Wherefore,** the record and matters aforeſaid having been ſeen, and by the juſtices here fully underſtood, and all and ſingular the premiſes being examined, and mature deliberation being had thereupon; for that it ſeems to the ſaid juſtices here, that the ſaid plea of the ſaid William Burton before in his replication pleaded, and the matter therein contained, are not ſufficient in law, to have and maintain the action of the aforeſaid William againſt the aforeſaid Charles: **therefore it is conſidered,** that the aforeſaid William take nothing by his writ aforeſaid, but that he and his pledges of proſecuting, to wit, John Doe and Richard Roe, be in mercy for his falſe complaint; and that the aforeſaid Charles go thereof without a day, *&c.* **And it is farther conſidered,** that the aforeſaid Charles do recover againſt the aforeſaid William eleven pounds and ſeven ſhillings, for his coſts and charges by him about his defence in this behalf ſuſtained, adjudged by the court here to the ſaid Charles with his conſent, according to the form of the ſtatute in that caſe made and provided: and that the aforeſaid Charles may have execution thereof, *&c.*

Opinion of the court.

Replication inſufficient.

Judgment for the defendant.

Quærens nihil capiat per breve.

Amercement.

Coſts.

Execution.

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, whereby the law of the land judgment would have been given for the ſaid William Burton againſt the ſaid Charles Long: and this he is ready to verify. **And** the ſaid William prays the writ of the ſaid lord the king, to warn the ſaid Charles Long to be before the ſaid lord the king, to hear the record and proceſs aforeſaid: and it is granted unto him: by which the ſheriff aforeſaid is commanded

General Error aſſigned.

Writ of *Scire facias*, to hear errors.

that

N° III.

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:

Sheriff's return; *Scire feci.*

Error aſſigned afreſh.

Rejoinder; *In nullo eſt erratum.*

Continuance.

Whereupon

Whereupon, as well the record and proceſs aforeſaid, and the judgment thereupon given, as the matters aforeſaid by the ſaid William above for error aſſigned, being ſeen, and by the court of the lord the king here being fully underſtood, and mature deliberation being thereupon had, for that it appears to the court of the lord the king here, that in the record and proceſs aforeſaid, and alſo in the giving of the judgment aforeſaid, it is manifeſtly erred, **therefore it is conſidered**, that the judgment aforeſaid, for the error aforeſaid, and others, in the record and proceſs aforeſaid, be reverſed, annulled, and entirely for nothing eſteemed; and that the aforeſaid William recover againſt the aforeſaid Charles his debt aforeſaid, and alſo fifty pounds for his damages which he hath ſuſtained, as well on occaſion of the detention of the ſaid debt, as for his coſts and charges unto which he hath been put about his ſuit in this behalf, to the ſaid William with his conſent by the court of the lord the king here adjudged. And the ſaid Charles in mercy.

N° III.

Opinion of the court.

Judgment of the *common pleas* reverſed.

Judgment for the plaintiff.

Coſts.

Defendant amerced.

§ 7. *Proceſs of Execution.*

GEORGE the ſecond, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and ſo forth, to the ſheriff of Oxfordſhire, greeting. We command you, that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him ſafely keep, ſo that you may have his body before us in three weeks from the day of the holy Trinity, whereſoever we ſhall then be in England, to ſatisfy William Burton, for two hundred pounds debt, which the ſaid William Burton hath lately recovered againſt him in our court before us, and alſo fifty pounds, which were adjudged in our ſaid court before us to the ſaid William Burton, for his damages which he hath ſuſtained, as well by occaſion of the detention of the ſaid debt, as for his coſts and charges to which he hath been put about his ſuit in this behalf, whereof the ſaid Charles Long is convicted, as it appears to us of record: and have you there then this writ. Witneſs ſir Thomas Deniſon *, knight, at Weſtminſter, the nineteenth day of June, in the twenty-ninth year of our reign.

Writ of *capias ad ſatisfaciendum*.

* The ſenior puiſnè juſtice; there being no chief juſtice that term.

By

N° III.

Sheriff's return; *Capi Corpus.*

By virtue of this writ to me directed, I have taken the body of the within-named Charles Long; which I have ready 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 damage which he hath ſuſtained, as well by occaſion of the detention of his ſaid debt, as for his coſts and charges to which he hath been put about his ſuit in this behalf, whereof the ſaid Charles Long is convicted, as it appears to us of record; and have that money before us in three weeks from the day of the holy Trinity, whereſoever we ſhall then be in England, to render to the ſaid William of his debt and damages aforeſaid: and have there then this writ. Witneſs ſir Thomas Deniſon, knight, at Weſtminſter, the nineteenth day of June, in the twenty-ninth year of our reign.

Sheriff's return; *Fieri feci.*

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.

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