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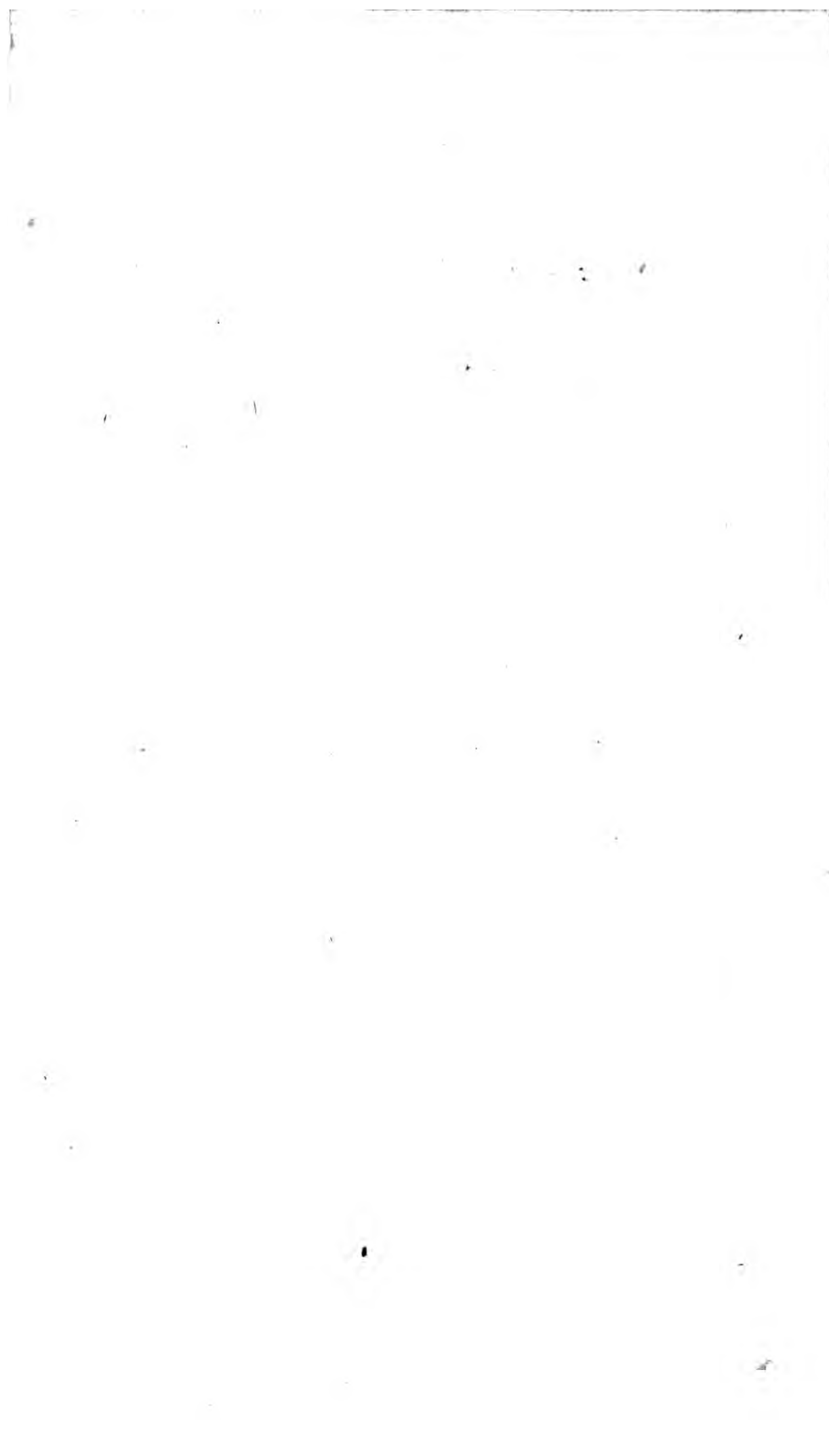


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46.

1403.







THE
BILL OF EXCEPTIONS.

THE
BILL OF EXCEPTIONS;

BEING

A SHORT ACCOUNT

OF

ITS ORIGIN AND NATURE,

SHOWING

BY WHOM AND TO WHOM A BILL OF EXCEPTIONS MAY BE TENDERED;
WHAT MAY BE THE SUBJECT OF IT; ITS FORM AND MODE OF
TENDERING IT; THE PROCEEDINGS UPON IT; AND
THE MODE OF ENFORCING THE STATUTE.



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THE
BILL OF EXCEPTIONS.

ITS ORIGIN.

BEFORE, and for some time after, the passing of the statute of Westminster 2, (13 Edw. I.), the pleadings in actions in the superior Courts were transacted *ore tenus* at the bar of the Court in the presence of the judges (*a*), in a somewhat similar manner, as it would seem, to that in which proceedings before magistrates are conducted at the present day, except perhaps that the former were transacted with more formality, gravity, and decorum than the latter.

If, during the progress of the cause, either party alleged any matter by way of plea, replication, or other pleading, which the Court thought insufficient, they at once overruled

(*a*) 2 Inst.; 2 Reeves, 344; Steph. Pl. 23, App. note 6.

it, and required the party to allege some other matter. In short, they gave judgment of *respondeat ouster*. This might occur several times in the course of the cause. The Court would sometimes overrule, one after the other, several matters successively alleged by either party, until at last some matter was pleaded which the Court thought fit to allow him to rest upon (*b*). So also, if either party objected to any proceeding in the course of the cause, or to the mode in which it was conducted, or to any act of the Court in relation to the proceedings, the Court at once decided on the sufficiency of the objection, and either allowed or disallowed it at their discretion.

The power which the Court then exercised seems to have been very similar, in substance and effect, to that exercised by the superior Courts at the present day in overruling or disallowing pleas or demurrers.

“ During this oral altercation a contemporaneous official minute in writing was drawn up by one of the officers of the Court

(*b*) See Instances, 2 Reeves's Hist. 344 *et seq.*

on a parchment roll, containing a transcript of all the different allegations of fact to the issue inclusive; and, in addition to this, it comprised a short notice of the nature of the action, the time of the appearance of the parties in Court, and the acts of the Court itself during the progress of the pleading. The official minute of the pleading and other proceedings thus made on the parchment roll was called the Record. As the suit proceeded, similar entries of the remaining incidents in the cause were from time to time continually made upon it, and, when complete, it was preserved as a perpetual intrinsic and exclusively admissible testimony of all the judicial transactions which it comprised (c)."

The record being thus the "exclusively admissible testimony of all the judicial transactions which it comprised," and being moreover the only foundation upon which a writ of error could be brought, no error in law could be assigned, except such as appeared upon the face of the record itself. However serious in its consequence to the

(c) See Steph. Pl. 25, 5th ed.

parties any error in law might in fact have been, if the record did not in some way disclose it, no writ of error could be brought in respect of such error, and the party injured was without redress.

The record was drawn up under the direction of the Court, and it was under their exclusive control. The parties had no power of themselves to cause any entry on it to be made, and consequently it was in the power of the Court to exclude therefrom such matters as they might consider unnecessary to be entered, however important an entry of them might be to the parties. Before the record was on parchment, it was entirely in the breast of the Court (*d*), and it was from thence transferred to the parchment roll, its final resting place.

The practice of the Court was not in general to allow any entry to be made of any matter overruled or disallowed by them, or any statement of the fact of its having been overruled or disallowed. The reasons for this practice might be, the complete convic-

(*d*) 3 Blacks. Comm. 406.

tion at which they had arrived of the utter frivolity of the matter disallowed, before they disallowed it; the laudable desire not to incumber the record with unnecessary matter; and their anxiety to prevent delay and vexation, which might possibly be occasioned by increasing the number of entries on the record, and thus enlarging the foundations for a writ of error. The proceedings of which entry was made were those of which the Court finally approved, and upon which the parties, in consequence of such approval, were compelled to rely (*e*). They could not insist upon resting their case on what might seem to them the best ground, nor could they, without the Court's approval and sanction, shape it their own way, and stand or fall by what is generally considered the most satisfactory, though it is not always the most successful, opinion, namely, their own.

From what has been above stated, it will be seen that the Court had the power in many instances of depriving the party of his writ of error. They might decide errone-

(*e*) See 2 Reeves's Hist. 347.

ously, and prevent their error from being rectified. They not only possessed the power, or were subject to the liability, of committing error, which seems to be an inseparable accident of all Courts, but they also possessed the highly objectionable, because unnecessary and mischievous, power of preventing their error from being revised ; a power which no sound judge would ever wish to possess, but, possessing it, which no judge could fail occasionally to exercise.

It may be easily supposed that the existence of such an arbitrary power, and one so necessarily liable to abuse, would be productive of much injustice, and could not fail to become, in course of time, an intolerable grievance ; and this even upon the assumption, and surely not a very extravagant one, that the judges were actuated by the best motives.

But whatever might have been the motives of the judges, however well intentioned their conduct, the fact is beyond all question, that, in exercising their discretionary power, they created an intolerable grievance. To

such a height had the mischief at length arisen, that the legislature, at a time when legislation was a much more laborious and difficult operation than at the present day, were obliged to interfere to repress it; and accordingly it is found amongst the catalogue of evils which the statute of Westminster the 2nd was passed to remedy.

The course which the legislature adopted evinced that they well understood the grievance and its cause, before they attempted to remedy it. Their remedy was as simple as it was effectual. It was exactly commensurate to the evil to which it was applied, and fully adequate to repress it, without introducing any unnecessary alteration of the existing system, or occasioning any countervailing mischief. They simply removed the cause of the grievance. This cause was, the absolute and sole power of the judges of excluding from the record such matters overruled or disallowed by them as the parties might consider valid, and might wish to rely on. It was not the existence of the Court's power to overrule or disallow those

matters at their discretion ; that was a necessary and salutary power : it was the power to shut out further inquiry, to render *their* own decisions final and conclusive, *which* was the occasion of the mischief. This power the legislature entirely abolished, and in a manner which, at the same time that it afforded the most effectual remedy to the suitor, was consistent with the dignity of the Court, and with the highest respect for the judges, unless such dignity is founded on an assumption, and such respect on a concession, of their infallibility.

The means devised by the legislature for remedying the mischief was in substance this : The party whose pleading was overruled, or exception disallowed, was himself to write a statement of the facts, and to require the Court to put their seals to it, which, if the statement was correct, they were bound, and were to be compellable to do. This statement, so sealed, was ultimately to form part of the record, and as such was of course liable to the revision of a Court of Error.

This written statement is called a “ Bill of Exceptions.”

It will be observed, that the legislature did not direct that the Court itself should enter the matter on the record, a course which might have, in some measure, derogated from its dignity, and might, in some instances at least, have been offensive to the judges; but they directed the party who dissented from the opinion expressed by the Court, himself to state the ground of his complaint, and the judges to attest its truth and correctness, a proceeding necessary to secure its authenticity; and this statement was to be taken by the Court above as part of the record. By this means the judges were preserved from the annoyance of themselves recording a decision whose soundness was already denied, and which was to be submitted to the revision of a Court of Error, and at the same time “ the stable and authentic quality” of the record was unimpaired.

Such was the origin of the Bill of Exceptions; and it is proposed to show, as briefly

as possible, its nature, and the course of proceedings upon it.

The 31st chapter of the statute of Westminster 2 (13 Edw. 1), which creates the Bill of Exceptions, enacts, that when “any one impleaded before any of the justices alleges an exception, and prays that the justices will allow it, if they will not allow it, if he who alleged the exception writes that exception, and prays the justices to put their seals to it for a witness, the justices shall put their seals to it. And if one will not, another of the company shall. And if upon complaint made of the justices, our lord the king cause the record to come before him, and if that exception be not found in the roll, and the plaintiff show the written exception with the seal of a justice put thereto, the justice shall be commanded to appear at a certain day, either to confess or deny his seal. And if the justice cannot deny his seal, they shall proceed to judgment according to that exception as it ought to be allowed or disallowed.”

In construing this statute it is necessary

to bear constantly in mind the difference between ancient and modern acts of parliament. The former expressed the intention of the legislature in as few, the latter conceal it in as many, words as possible. In those every word is fraught with meaning: in these there is "an infinite deal of nothing." In the ancient acts the intention of the legislature was clear, and the courts generally endeavoured to give it full effect: in the modern acts the intention is very frequently undiscoverable, and the courts have been compelled to confine themselves to a literal interpretation, and to the arduous but almost hopeless task of avoiding absurd consequences. The importance of this distinction between ancient and modern statutes with reference to their construction, is adverted to by Bullar, J., in *Bradley v. Clark* (*f*), where he says, "With regard to the construction of statutes according to the intention of the legislature, we must remember that there is an essential difference between the expounding of modern and ancient acts of parlia-

(*f*) 5 T. R. 201.

ment. In early times the legislature used (and I believe it was a wise course to take) to pass laws in general and in few terms; they were left to the courts of law to be construed so as to reach all the cases within the mischief to be remedied. But in modern times great care has been taken to mention the particular cases in the contemplation of the legislature, and therefore the Courts are not permitted to take the same liberty in construing them as they did in expounding the ancient statutes (*g*).”

The ancient statutes being framed with some reference to the antecedent state of the law, and generally with a view to restrain some excess or supply some deficiency in it, the courts were enabled, in putting a construction on them, to avail themselves of the knowledge they already possessed, and to ascertain the full scope and spirit of the enactment, and to carry out the intention of the legislature.

(*g*) See also per Coleridge J. in *Gwynne v. Burnell*, 1 S. N. R. 739.

In *Heydon's case* (*h*), it was resolved by the court of Exchequer, "that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law)," four things are to be discerned and considered :

1. What was the common law before the making of the act ?
2. What was the mischief and defect for which the common law did not provide ?
3. What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth ?
4. The true reason of the remedy ?

And then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for "continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the act *pro bono publico*."

(*h*) 3 Rep. 7 b.

To apply these rules to the statute now under consideration.

That the common law and the mischief resulting from it were such as has been before stated, is to be collected from the statute itself (*i*), and from the fact of its being passed at a time when the legislature did not affect to redress imaginary grievances. And they are expressly stated so to have been in Lord Coke's commentary on the statute, "which has been uncontradicted to the present day (*k*)."

"At the common law, before the making of this act," says Lord Coke, "a man might have had a writ of error for an error in law, either in *redditione judicii*, in *redditione executionis*, or in *processu*, &c., and this error in law must be apparent in the record, for the writ of error saith, *quia in recordo et processu*, &c., *error intervenit manifestus*, &c. Or for error in fact, by alleging matter out

(*i*) See per Tindal, C. J., in *Morrell v. Martin*, 4 S. N. R. 313, 314.

(*k*) Per Tindal, C. J., in *Strother v. Hutchinson*, 4 Bing. N. C. 89.

of the record, as death of either party, &c. before judgment. Now the mischief before this statute was, that when the demandant or plaintiff, or the tenant or defendant, did offer to allege any exception, (as in those days they did *ore tenus* at the bar,) praying the justices to allow it, and the justices overruling it so as it was never entered of record, this the party could not assign for error, because it neither appeared within the record nor was any error in fact, but in law, and so the party grieved was without remedy, for whose relief this statute was made (*l*).” And the same venerable judge in *Dowman’s case*(*m*) says the statute was passed “to prevent precipitation of judges in overruling *ex improviso* questions in law, for it is a good rule in the ninth chapter of Judges, ‘consider, consult, and then give judgment.’”

From the above will be collected the state of the common law before the statute, and the mischief it was passed to remove. The

(*l*) 2 Inst. 426 ; see also 2 Reeves’s Hist. 188, 189 ; Bac. Abr. “Bill of Exceptions.”

(*m*) 9 Rep. 13 b.

remedy enacted by the statute will be considered in the following order:—

1. Who is entitled to tender a bill of exceptions.
2. To whom it may be tendered.
3. What may be the subject of it.
4. Of its form, the mode of tendering it, and the proceedings upon it.
5. The mode of enforcing the statute.

1. *Who is entitled to tender a Bill of Exceptions.*

The general rule to be deduced from the statute itself, according to the principles of construction above laid down, would seem to be, that every person who is entitled to make the exception and is injured by its disallowance, is entitled to the remedy. Whoever is a party grieved within the scope of the act, is a party entitled to the means of redress it affords. This rule is perhaps too general to be of much practical utility. But although it may be subject to exceptions, there would be danger of a narrower one failing to comprehend the full spirit of the statute.

Lord Coke lays it down that the act extends "as well to the demandant or plaintiff as to the tenant or defendant in all actions real, personal, and mixt; and regularly it extendeth not to a stranger to the record, which is not to come in lieu of the tenant. For example, if the bailiff of a franchise demand conusans, and the justices overrule the same, he cannot pray the justice to inseal a bill, because he is no party to the record, but yet one that offereth to be received and is denied, albeit he be none of the parties to the writ, yet because he is privy in estate, and to be *in loco tenentis*, he shall have the benefit of this act; and so it is of the vouchee, though he be no party to the writ, because he is *in loco tenentis*."

In *Marston v. Fox* (*n*), both the plaintiff and defendant tendered cross bills of exception to the ruling of the judge.

2. *To whom a Bill of Exceptions may be tendered.*

Construed literally, the statute would only extend to the Court of Common Pleas, the

(*n*) 8 A. & E. 14.

term "justices," as used in it, being peculiarly appropriate to denote the judges of that Court. Construed according to its spirit, and so as to suppress the mischief and advance the remedy, it extends to every Court whose proceedings are according to the course of the common law.

Whoever has power to create the mischief is liable to afford the remedy. Whenever and wherever a judge can overrule any pleading, or disallow any matter of exception, within the scope of the act, and by such overruling or disallowance exclude it from the record, then and there a bill of exceptions may be tendered to him, and if it is true, he is bound to seal it. It seems impossible to admit that a judge can under any circumstances occasion the grievance the statute was passed to remove, and at the same time to deny that he is liable to afford the party grieved the means of redress given by the statute. The latter proposition seems a necessary consequence of the former. The remedy must be co-extensive with the mischief, unless violence would be done to the statute

by giving it that effect. And there can be no doubt that the burthen of proof lies upon those who would maintain that any judge can, in any manner, at any time, or in any place, perpetrate the injury the statute was intended to remove, and yet avoid the liability to afford redress for such injury; that he can restore the state of things antecedent to the statute, decide erroneously and prevent his decision from being reviewed, and by one and the same act commit error and render it irremediable.

Supposing a case to exist, in which any Court, whose proceedings are according to the course of the common law, or any judge of such Court, can overrule or disallow any matter, and prevent it from appearing on the record, when, but for such overruling or disallowance, it would have appeared on the record, upon what ground can it be supported?

It cannot be that the statute authorizes such a case expressly, for it contains no exception of any sort or kind. It is not a *casus omissus*, for the statute does not attempt to

enumerate the particular cases to which it was to extend. It must then be a case not coming within the principle of the statute. But its principle is to prevent the absolute exclusion from the record of matters overruled or disallowed which would otherwise appear on it. And the supposed case is one of such absolute exclusion from the record of such matters,—a case clearly within the mischief. Upon what construction, therefore, can it be withdrawn from the remedy? Not merely is the presumption against such a construction, and the burthen of supporting it upon those who maintain it; but it will require the strongest and most conclusive reasons—reasons which “bear no hinge, nor loop, to hang a doubt on”—to establish its validity.

Upon this subject Lord Coke says, “Albeit the letter of this branch seemeth to extend to the justices of the Common Pleas only by reason of these words, ‘and if the king upon complaint made of the justices cause the record to come before him (which is by writ of error into the King’s Bench),’ yet that

is put but for an example; and this act extendeth not only to all other courts of record (for upon judgments given in them a writ of error lieth in the King's Bench), but to the county court, the hundred and court baron, for therein the judges were more likely to err, and albeit of judgments given in them a writ of error lieth not, but a writ of false judgment in the Court of C. P., yet the case being in the same or greater mischief, the purview of this statute doth extend to those inferior courts(o)."

This part of Lord Coke's commentary is confirmed by the very highest judicial authority. "Taking the statute to the letter," says Tindal, C. J. (p), "no bill of exceptions, would lie into the King's Bench or the Exchequer; yet according to every day's practice, it lies in both, and when we see that in these instances the commentary on the statute has been held the law of the land, we may extend it also to the hundred and county courts. For it is not a loose expression, thrown out at random by the great commen-

(o) 2 Inst. 427.

(p) In *Strother v. Hutchinson*, 4 Bing. N. C. 89.

tator, but his mind was evidently at work on the point. He gives as a reason for extending the bill of exceptions to those Courts their greater liability to error; and he anticipates the objection that a writ of error does not lie, by adding, and albeit of judgments given in them a writ of error lieth not, but a writ of false judgment in the Court of Common Pleas; yet the case being in the same or greater mischief, the purview of this statute doth extend to those inferior Courts.

“ When we see the authority of so great a writer not only uncontradicted, but adopted in all the digests and text books, we can scarcely err if we adhere to his opinions.”

At the time the statute was passed, the Court of Common Pleas was the principal Court of original jurisdiction over suits between party and party; and as it was to those suits the remedy was to apply, it was sufficient for the legislature to mention that Court by way of example. The mischief and the remedy being clearly expressed, and the reason of the remedy easily ascertainable, it was unnecessary, after laying down a general

principle, to run the risk of restraining it by an enumeration of the particulars it was intended to include. If the statute had been drawn on the principle upon which modern acts of parliament are constructed, it would most likely have contained a sweeping enactment, which might have comprehended the intention of the legislature, and almost any intention whatever; and, in addition thereto, it would have introduced an enumeration of all the Courts in existence, from the *aula regis* to the Court of *pie poudre*. And if from accident or ignorance any one had been omitted, the construction would have been either that the legislature, for some inscrutable reason, had intended the omission, or that it was a *casus omissus*, and therefore not to be supplied by construction.

In one case (*q*) it was resolved, that a bill of exceptions would not lie in the King's Bench upon a trial at bar, because of those words in the statute, "and if upon complaint made of the justices, our lord the king cause the record to come before him." The words

(*q*) *Rex v. Smith*, 2 Show. R. 287.

coram domino rege being in their ordinary sense indicative of the Court of King's Bench; and the reason alleged for this resolution was, that the act could not mean that they were to overrule themselves, which would seem to be a better reason for doubting the soundness of the conclusion than for supporting it; since it would seem rather to prove that the words relied upon were not to be taken in their confined sense, than that a bill of exceptions would not lie to the King's Bench. However, this resolution, which was contrary to prior cases (*r*), did not prevail. The Courts were not restrained by any such *literal* difficulty from making a construction which would suppress the mischief and advance the remedy, and add force and life to the cure and remedy according to the true intent of the makers of the act *pro bono publico*; and accordingly it was settled that a bill of exceptions would lie on a trial at bar in the King's Bench (*s*). The object of the legis-

(*r*) *Enfield v. Hill*, 2 Lev. 236; *City of London v. Unfree Merchants*, 2 Show. R. 146.

(*s*) See *per* Lord Hardwicke in *Rex v. Preston-on-*

lature was too clear to be mistaken. The mischief was the exclusion of an appeal by writ of error—the remedy, to allow it; and so long as there was any Court of appeal to which the error might be remanded by writ of error, the Courts could not fail to repudiate any narrow construction which, by perversely understanding words in one sense, notwithstanding they were clearly used in another, would continue the mischief and suppress the remedy.

The statute extends to every Court of civil jurisdiction whose proceedings are according to the course of the common law, as,

The King's Bench (*t*).

The Common Pleas.

The Exchequer (*u*).

the-Hill, Burr. S. C. 77; 2 Stra. 1040; Ca. temp. Hardw. 249, S. C.

(*t*) 2 Inst. *ubi supra*; see *per* Lord Hardwicke, *ubi supra*; *per* Tindal, C. J., in *Strother v. Hutchinson*, *ubi supra*; *City of London v. Unfree Merchants*, 2 Show. R. 146; *Enfield v. Hall*, 2 Lev. 236; *Bridgman v. Holt*, Show. P. C. 122; *Skinner*, 354, S. C.

(*u*) *Per* Lord Hardwicke, *ubi supra*; *per* Tindal, C. J., *ubi supra*; *Rutter v. Chapman*, 8 M. & W. 13.

The Lord Keeper, when exercising his common law jurisdiction, as in *sci. fa.* to repeal a patent (*x*).

The Court of Great Sessions in Wales (*y*).

The Court of Common Pleas at Lancaster (*z*); at Durham (*a*).

The County Court (*b*).

The Court of the Sheriff of London (*c*).

It does not, however, extend to Courts whose proceedings are not according to the course of the common law, as the Court of Quarter Sessions (*d*).

(*x*) *Hunsdon v. Miller*, T. T. 12 Ann. cited in *Rex v. Inhabitants of Preston*, Ca. temp. Hardw. 249.

(*y*) *Cort v. Bishop of St. David's*, Cro. Car. 341; *Davies v. Pierce*, 2 T. R. 125.

(*z*) *Goode v. Harrison*, 5 B. & A. 147.

(*a*) *Culley v. Doe*, 11 A. & E. 1008.

(*b*) *Strother v. Hutchinson*, 3 N. C. 89.

(*c*) Reg. 182.

(*d*) *Rex v. Inhabitants of Preston*, Ca. temp. Hardw. 249.

A bill of exceptions has been tendered to a judge sitting at chambers.

In *Tucker v. Sleigh* a summons was taken out to set aside a demurrer to the replication as frivolous. The matter was argued by counsel before the chief baron

3. *What may be the subject of a Bill of Exceptions.*

“ I take the rule to be,” says Lord Redes-
(Pollock) at chambers, and his lordship made an order. The counsel for the defendant, when his lordship was about to make the order, stated that before his lordship made the order, he wished to inform him of the course the defendant intended to pursue. He said that the defendant was desirous to place the point of the validity of the demurrer on record, that he might be in a position to bring the matter before a Court of error, if advised to do so. That he, the learned counsel for the defendant, had considered the matter, and that the conclusion he had come to was, that the only mode of getting the matter on the record was by tendering to his lordship a bill of exceptions, under the statute of Westminster 2 (13 Edw. I. c. 31), and that a bill of exceptions had accordingly been prepared. He then produced the bill of exceptions engrossed on parchment, and handed it to his lordship to seal. This the chief baron wholly refused to do, saying that a bill of exceptions could not be tendered to a judge sitting at chambers; that his decision was conclusive; that the jurisdiction at chambers was a perfect tyranny. He at the same time added, that if the Court of Common Pleas (where the cause was depending) should be of opinion that he ought to have sealed the bill of exceptions, he would seal it *tunc pro nunc*. The learned

dale (e), “ that wherever any matter is capable of being brought upon the record, and the Court refuses to allow it to be so brought, and this refusal does not in its nature come upon the record, though if the thing were allowed that matter would appear on the record, this is the subject of a bill of exceptions, and all the cases cited to me are of this description. For instance, a party applies to have evidence received, the judge refuses it; there the evidence, if admitted, might appear on the record, but the refusal to admit it cannot appear on the record; so in the case of oyer prayed of challenge to jurors, and other cases which might be put. So that I conceive the construction, the

counsel for the defendant then offered to show to his lordship the authorities upon which the proceeding was founded; but the chief baron refused to entertain the matter at all. The defendant’s counsel then said that perhaps his lordship would be good enough to look at the bill, in order to see that it was truly and correctly stated. This also his lordship refused to do, and the parties then retired.—*Law Times*, 8 August, 1846.

(e) See *Lessee of Lanlor v. Murray*, 1 Sch. & Lef. 82.

most extended that can be given to the statute, is, that every matter which would or might be on the record if allowed, shall be brought on the record if disallowed by bill of exceptions; no case goes beyond this construction."

Lord Coke lays it down (*f*), that the act extends "not only to all pleas dilatory and peremptory, and to prayers to be received oyer of any record or deed and the like, but also to all challenges of any jurors, and any material evidence given to any jury, which by the Court is overruled."

The statute "is not confined," says Chief Justice Tindal (*g*), "to errors in directing the jury, but it extends to any directions in the course of a cause, in which the judge may be mistaken: as in improperly allowing or refusing a challenge of the jury; refusing a demurrer to evidence (*h*); or refusing to receive a party who prays to be received as vouchee: those, and others, are

(*f*) 2 Inst. 427.

(*g*) In *Strother v. Hutchinson*, 4 Bing. N. C. 90.

(*h*) *Cort v. Bishop of St. David's*, Cro. Car. 842.

important points in the conduct of a cause, independently of the direction to the jury, which are all the subject of a bill of exceptions." (i)

The following instances of the subject-matter of a bill of exceptions are to be found in the books :

Disallowing a challenge to the array (*k*).

Refusing to inquire whether a return was made by the proper party (*l*).

Disallowing a plea in bar (*m*).

Disallowing a plea in abatement (*n*).

Disallowing a challenge to the polls (*o*).

Refusing to allow matter pleaded in abatement, to be pleaded in bar (*p*).

(i) See also 1 Jenk. Cent. 64; 2 Jenk. Cent. 33; Bac. Abr. "Bill of Exceptions;" Show. P. C. 120; Bull. N. P. 316.

(*k*) 9 Lib. Ass. pl. 8; *Lord Paget and Bishop of Coventry's case*, 1 Leon. 5.

(*l*) 11 Hen. 4, 52, 65, 92.

(*m*) 2 Edw. 4, 6 b.

(*n*) 2 Edw. 4, 53.

(*o*) 21 Edw. 4, 12 b; *Sir John Barkley v. Phillips*, Dy. 231 b.

(*p*) 5 Hen. 7, 40.

Refusing a view (*q*).

Improper reception of evidence at nisi prius (*r*).

On trial at bar (*s*).

Improper rejection of evidence (*t*).

Ruling evidence to be sufficient (*u*).

Directing a nonsuit (*x*).

Disallowing a demurrer to evidence (*y*).

Misdirection (*z*).

(*q*) 10 Hen. 7, 8.

(*r*) 27 Hen. 8, 24, 25; *Thurston v. Slatford*, 1 Salk. 284; *Searle v. Lord Barrington*, 2 Stra. 827; *Bishop of Meath v. Lord Belfield*, 1 Wils. 215; *Mostyn v. Fabrigas*, Cowp. 161; *Marston v. Fox*, 8 A. & E. 14; *Lord Trimlestown v. Kemmis*, 9 Cl. & Fin. 749; cum multis aliis.

(*s*) *Enfield v. Hall*, 2 Lev. 237; *Davies v. Lowndes*, 4 Bing. N. C. 478.

(*t*) *City of London v. Unfree Merchants*, 2 Show. R. 146; *Symmers v. Regem*, Cowp. 489; *Anon.* 7 Mod. 53; *Strode v. Palmer*, Lill. Ent. 250; *Lord Trimlestown v. Kemmis*, *ubi supra*.

(*u*) *Phillips v. Bateman*, 16 East, 362; *Thurston v. Slatford*, 1 Lutw. 905; Brownl. Ent. 129.

(*x*) *Strother v. Hutchinson*, 4 Bing. N. C. 83.

(*y*) *Cort v. Bishop of St. David's*, Cro. Car. 341.

(*z*) *Chichester v. Philips*, Sir T. Raym. 404; *Davenport v. Tyrrel*, 1 W. Black. 675; *Culley v. Doe*, 11

Refusing to direct the jury to find a special verdict (*a*).

Refusing to receive a replication, or to allow it to be entered on the record (*b*).

In the *Lessee of Lawlor v. Murray* (*c*), Lord Redesdale expressed an opinion that the allowance by the Court of an amendment of one of its own records, could not be made the subject of a bill of exceptions.

4. *Of the form of the Bill of Exceptions, the mode of tendering it, and the proceedings upon it.*

The bill of exceptions should set forth so much of the proceedings as is necessary to show at what stage of the cause the exception was taken, and to render the precise nature of the exception, and the mode of its disallowance, perfectly clear and intelligible. If it is tacked to the record, it may commence by showing at what stage of the proceedings

A. & E. 1008; *Rutter v. Chapman*, 8 M. & W. 13; *Lord Trimlestown v. Kemmis*, 9 Cl. & Fin. 749.

(*a*) Brownl. Ent. 135.

(*b*) *Rous v. Wright*, Brownl. Ent. 136.

(*c*) 1 Scho. & Lef. 75.

the exception was taken, and then set out the exception itself (*d*). If not tacked to the record, it must set out the whole of the proceedings from the commencement of the action down to the sealing of the bill by the judge (*e*).

It would seem that in strictness the bill of exceptions ought to be ingrossed on parchment and tendered to the judge during the course of the trial or other proceeding out of which the exception arises, and that it ought to be then sealed (*f*). “Though no time be appointed by this act when the justices shall put their seals, the party must pray the same before judgment; but if they deny it, then may they be commanded after judgment to put their seals, and then the putting of their seals after judgment shall be sufficient (*g*).”

(*d*) See Bull. N. P. 319, 320.

(*e*) See Bull. N. P. 317, 318, 319; Lee's Dict. Bill of Exceptions, where see the forms. See forms, Brownl. Ent. 129, 131, 134, 136; 1 Lutw. 905; Lilly's Ent. 248, 249, &c.; Tidd's Forms, 326.

(*f*) See per Cur. in *Gardner v. Baillie*, 1 Bos. & Pul. 33; Lilly's Pr. Reg. 232; Shower's P. C. 115.

(*g*) 2 Inst. 427.

The usual practice is to reduce to writing the substance of the exception at the time it is taken, and it is then signed by the counsel on each side, and the bill of exceptions is afterwards drawn up in form and tendered to the judge to affix his seal (*h*). It must however be reduced into writing at the time it is taken and disallowed, or the benefit of the exception will be lost (*i*). If the exception is truly and correctly stated, the judge is bound to seal it (*k*). If untruly stated he may refuse to do so (*l*). It seems a writ of error should not be issued before the bill of exceptions is sealed, or it may be held a waiver of the exception (*m*).

The bill of exceptions when sealed is carried with the record into the court of error (*n*),

(*h*) See Lee's Dict. Bill of Exceptions; *Williams v. Taylor*, 6 Bing. 512.

(*i*) *Wright v. Sharp*, Salk. 288.

(*k*) 3 Black. Com. 372; 2 Inst. 427.

(*l*) *Duchess of Grafton v. Holt*, Skin. 354; Show. P. C. 129.

(*m*) *Dillon v. Doe d. Parker*, 1 Bing. 17; see however *Williams v. Taylor*, 6 Bing. 512.

(*n*) 1 Black. 675; 2 Stra. 826.

the court below not being competent to entertain it (*o*). Indeed it forms no part of the record in the Court below (*p*): though an opinion seems at one time to have been entertained, that the Court below might decide on the matter of the exception on motion in arrest of judgment (*q*). A writ of sci. fa. then issues directed to the judge who sealed the bill, commanding him to acknowledge or deny his seal (*r*), in obedience to which he appears in the Court of error and acknowledges or denies his seal (*s*); if he acknowledges it, the bill then becomes part of the record, and error is assigned on the exception. If the party grieved be dead, his heir or executors, &c., according to the case, shall

(*o*) *Symmers v. Regem*, Cowp. 486, 501; *Davenport v. Tyrrel*, 1 Black. 675; *per* Lord Hardwicke, *Rex v. Inhabitants of Preston*, Ca. temp. Hardw. 249. This is otherwise in Ireland by 28 Geo. III. c. 31 (Irish).

(*p*) *Gardner v. Baillie*, 1 Bos. & Pull. 33.

(*q*) See *Enfield v. Hall*, 2 Lev. 236; *Symmers v. Regem*, Cowp. 489.

(*r*) See form, 3 Burr. 1693; Rast. Ent. 293 b.

(*s*) See *Money v. Leach*, 3 Burr. 1692.

have a writ of error upon the bill of exceptions (*t*).

It seems that upon this writ of error the plaintiff in error is confined to the matter contained in the bill of exceptions (*u*).

In *Marston v. Fox* (*x*), where the plaintiff and defendant tendered cross bills of exceptions, the judgment was brought up by three separate writs of error; one was sued out by the defendant below to bring up the judgment, which was given for the plaintiff, without argument on the special verdict; and each party brought up his own bill of exceptions by a writ of error sued out by himself (*y*).

If the judge denies his seal, the plaintiff in error may take issue thereupon and prove

(*t*) 2 Inst. 427.

(*u*) 2 Inst. 427. See *per* Tindal, C. J., in *Lord Trimlestown v. Kemmis*, 9 Cl. & Fin. 771.

(*x*) 8 A. & E. 14.

(*y*) See Brownl. Ent. 131; 1 Lutw. 905; Lilly's Ent. 275; see the form of assignment of error, 10 Wentw. 7; and the whole record in error, *Thurston v. Slatford*, 1 Lutw. 905.

it by witnesses (z). If a judge should die before he has acknowledged his seal, a sci. fa. lies to his executor or administrator to acknowledge or deny it (a).

If the ground of the bill of exceptions be the misdirection of the Court, or the rejection of evidence, and the Court of error allow the exception, they will award a *venire de novo* (b).

5. *The Mode of enforcing the Statute.*

If the judge refuses to seal the bill of exceptions, there are two modes of proceeding against him,—the one by a writ founded on the statute commanding him to put his seal to the bill; the other by an action against him on the statute.

The first course is, by issuing a writ grounded on the statute, commanding the

(z) 2 Inst. 428.

(a) Ibid.

(b) *Davies v. Lowndes*, 4 Bing. N. C. 478; *Davies v. Pierce*, 2 T. R. 125; *per Tindal, C. J.*, in *Lord Trimles-
towne v. Kemmis*, 9 Cl. & Fin. 772.

judge, if the matters sealed in the bill are as therein stated, to put his seal to it (*c*).

Upon this the judge either seals the bill or refuses.

If he refuses, and the ground of his refusal be that the matters are not truly stated in the bill, he may make a return to that effect to the writ; which return, if true, is a sufficient answer: if false, he is liable to an action for a false return, and after a recovery in such action the party is entitled to a peremptory writ, commanding him to seal the bill (*d*).

Lord Coke, in his comment upon this part of the statute, says, "Here is an express commandment given to the justices, and yet if one refuse, and any of the other inseale the bill, it sufficeth; but if they all refuse, it is a contempt in them all, for it lieth not in the power of the justices that denied to perform the purview of this act, to take advantage of their own wrong; and the party

(*c*) 2 Inst. 427. See the form of this writ in the Register, 182.

(*d*) See Show. P. C. 122.

grieved may have a writ grounded upon this statute, to the justices, commanding them to put their seals *juxta formam statuti et hoc sub periculo quod incumbit nullatenus omit-tatis.*"

In the Year Book, 11 Hen. IV. pl. 25, there is the following note: "Et nota, that in such case (sc. disobedience on the part of the judge to this act), anno Regis Richardi II. tertio, it was commanded by writ to the justices, that they should seal a bill made by the party, or else to make a record of the exceptions, so that they might be certified in Court."

In *Bridgman v. Holt* (e), it was urged by counsel, in arguing on behalf of the judges who had refused to seal a bill of exceptions because the matters were not truly stated therein, that "by the statute of Westm. 2, cap. 31, in case the judge refuses, then a writ to command him which is to issue out of Chancery, *quod apponat sigillum suum*, and then a writ to own or deny his seal.

"By 2 Inst. 426, the party grieved by the

(e) Show. P. C. 122.

denial may have a writ upon the statute, commanding the same to be done *juxta formam statuti* (*f*), there's the form of the writ set out at large. It recites a surmise of an exception taken and overruled; and it follows *vobis præcipimus quod si ita est, tunc sigilla vestra apponatis. Si ita*—'tis conditional, if the bill be true and duly tendered, then this writ; and if it be returned, *quod non ita est*, then an action for a false return, and thereupon the surmise will be tried: and if found to be so, damages: and upon such a recovery a peremptory writ commanding the same: That the law is thus seems plain; though no precedent can be shown of such a writ, 'tis only for this reason, because no judge did ever refuse to seal a bill of exceptions; and none was ever refused, because none was ever tendered like to this, so artificial and groundless."

In the case of the *Lessee of Lawlor v. Murray* (*g*), such a writ was actually issued,

(*f*) Reg. 182; Fitz. Nat. Brev. 21, and 11 Hen. IV. 52, 65,

(*g*) 1 Sch. & Lef. 75.

and in obedience to it the judges of the King's Bench in Ireland affixed their seals to a bill of exceptions which had been before tendered to them, and which they had refused to seal; and although the Lord Chancellor afterwards superseded the writ, because it had been made out by the cursitor instead of the clerk of the crown, he did not deny the existence of this mode of enforcing obedience to the statute.

In the course of delivering his opinion in that case, he laid down, that this writ upon the statute could not issue without a special order from the person holding the great seal; but the reasons which he alleged as grounds for that opinion seem to be neither satisfactory nor conclusive; and if he is to be taken to mean, as it would seem he did mean, that the writ is a discretionary one, that it is *ex gratiâ* and not *ex debito justitiæ*, there are strong grounds for doubting the soundness of his opinion.

As to the remedy by action on the statute.

The statute is imperative and remedial.

It expressly commands the judges to do a specific act for the benefit of an individual. It is not a mere general direction to them to perform a certain act or to observe a certain line of conduct towards the public generally, but it imposes upon them a definite and certain duty in relation to a certain particular individual, namely, the party whose exception is disallowed. The statute says, that "if he who alleges the exception writes it and prays the justices to put their seals to it for a witness, they *shall* put their seals to it, and if one will not, another of the company *shall*." This positive command creates a right in the party making the exception to have the seal of the judge affixed to it; and it imposes a corresponding liability on the judge to affix it for such party's benefit.

To enforce this specific right, the party injured by its denial or infringement is entitled to bring his action. This remedy is given him both by the statute of Westminster itself, and by the general law of the land. That the statute itself gives a remedy by action seems clear.

The 50th cap. of the statute of Westm. 2, enacts, "Moreover, concerning the statutes provided where the law faileth, and for remedie lest suitors coming to the King's Court should depart from thence without remedy, they shall have writs provided in their cases."

Upon this chapter Lord Coke has this comment: "*Ad remedia*, that is, when any the statutes made in this parliament provided remedy for the party grieved, he shall have an action grounded upon this act for his relief therein (*h*)."

In Com. Dig. "Action upon Statute," it is laid down that "an action upon the statute lies for the party grieved upon every remedial branch of the statute of Westm. 2, for his relief."

In *The Rioters' case* (*i*), the Lord Keeper (Sir Francis North) refused to grant a writ under this statute, commanding the chief justice of the King's Bench to seal a bill of exceptions, in the case of the Lord Gray and others, who were convicted for a riot in London, saying, that if the parties "had wrong

(*h*) 2 Inst. 486.

(*i*) 1 Vern. 175.

done them, they might right themselves by an action on the case."

It will be observed, that this was a *criminal* proceeding, and the weight of opinion preponderates against the statute extending to criminal proceedings (*k*).

But there can be no doubt that, without any express enactment creating a right of action on this particular statute, the party grieved is entitled by the general law to his action on the statute for a violation of this part of its provisions.

Magna Charta (*l*) enacts, "*Nulli vendemus, nulli negabimus, aut differemus, justitiam vel rectum*" (*m*). And upon this statute Lord Coke makes the following comments :

" Every act of parliament made against any injury, mischief, or grievance doth either

(*k*) See per Lord Hardwicke, in *Rex v. Inhabitants of Preston*, Ca. temp. Hardw. ; Bac. Abr. " Bill of Exceptions."

(*l*) 9 Hen. III. cap. 29.

(*m*) See a recent instance of the application of this enactment, by Tindal, C. J., in *Grant*, q. t. v. *Ridley*, 6 N. S. R. 180.

expressly or impliedly give a remedy to the party wronged or grieved (*n*)."

And again: "Every subject of this realm, for injury done to him *in bonis, terris, vel persona*, by any other subject, be he ecclesiastical or temporal, free or bond man or woman, old or young, or be he outlawed, excommunicated, or any other, without exception, may take his remedy by the course of the law, and have justice and right for the injury done to him freely without sale, fully without any denial, and speedily without delay (*o*)."

And again: "And it is to be observed, that if any man be grieved contrary to the purview of this act, he may, as hath been said, for his relief therein, have an action upon this statute, albeit no action be expressly given, which in this and many other like cases upon the branches of Magna Charta, is worthy of observation."

So in his comment on the statute of Marlebridge (*p*): "When any act doth prohibit

(*n*) 2 Inst. 55.

(*p*) 2 Inst. 218.

(*o*) 2 Inst. 56.

any wrong or vexation, though no action be particularly named in the act, yet the party grieved shall have an action grounded upon this statute.”

And again: “ Whensoever any thing is prohibited by a statute, the party grieved shall have his action upon the statute (*q*).”

So in the case of *The Marshalsea* (*r*): “ It is likewise to be observed, that when any statute prohibits any thing, &c., if any one implead another, although it be in course of a legal proceeding, yet the party grieved shall have an action upon the statute against the party who sues against the statute, although the words of the statute do not give any action to the party ; but that is a consequent and a thing implied in every thing prohibited by any statute ; and this appears by the said book of 7 Hen. VI. 30 b, 31 a.”

So in the case of *Bridgeman v. Holt*, before mentioned, it was laid down by the counsel, in arguing on behalf of the judges, that “ in all cases of statute laws which do either prohibit or command the doing of a

(*q*) 2 Inst. 131.

(*r*) 10 Rep. 75 a.

thing for the advantage of any person, such person, if injured by a disobedience to that law, is entitled to an action, though the statute does not in express terms give one" (s).

These authorities prove clearly the *right* of the party grieved, by disobedience to the statute, to his action against the judge who disobeys it, and they necessarily imply a corresponding *liability* in the judge to such action. But the books do not leave this liability to *implication*; they go further, and furnish what may be esteemed a *direct* authority for such liability. They approach the subject from the other side, and afford *direct* arguments for the *liability*, and thus prove the corresponding *right* by necessary implication.

The judges of the Court of King's Bench in the case of *Bridgeman v. Holt* (t), insisted upon this very liability to an action on

(s) See also Com. Dig. "Action upon Statute," (A 1), (A 2), (A 4), (C), (F); Bac. Abr. "Actions on the Case," "Statute" (K); the judgment of Holt, C. J. in *Ashby v. White*, Ld. Raym. 938; 1 Smith's L. C. 119.

(t) Show. P. C. 111.

this statute at the suit of the party grieved, as their birthright and privilege ; and it was contended on their behalf, that one at least of the proper remedies upon this statute was an action against them founded upon it.

In that case, an assise was brought in the Court of King's Bench against *Rowland Holt*, Esq. (brother of C. J. Holt), and others, for the office of chief clerk, for inrolling of pleas in the Court of King's Bench ; and in the course of the trial, which was at bar, after the evidence on both sides had been given, it being strong for the defendants, the Court proposed a nonsuit to the plaintiff's counsel, which they refused, but prayed the Court to direct the jury, whereupon the Court briefly summed up the evidence, and left the whole matter to the jury, and a verdict was found for the defendants. Upon this verdict the counsel for the plaintiff prayed leave to bring in a bill of exceptions, and they produced in Court, and tendered to the three puisne judges who tried the cause, to be sealed, a parchment writing in form of such a bill, which, after a recital of the de-

claration and issue in the cause, proceeded to allege the evidence produced by the plaintiff, and that the justices refused to allow, admit, and receive the allegations and matters given in evidence, as sufficient to prove the plaintiff's title, by reason whereof the jury found for the defendants, and prayed that the justices would put their seals to it according to the statute of Westminster 2, cap. 31. Upon reading this bill, the judges refused to seal it, on the ground that the allegations it contained were false.

Upon this the plaintiffs brought a writ of error in parliament, and presented a petition to the Lords, praying them to be pleased to order the said judges, or some of them, to seal the said bill of exceptions, to the end that the said case might (as by law it ought) come entirely before their lordships for judgment.

The judges were ordered by the lords to put in their answer in writing to this petition, which they did. And in their answer they alleged, amongst other things,

“ That if the pretended bill was duly ten-

dered to these respondents, and was such as they were bound to seal, these respondents are answerable only for it by the course of the common law in an action to be brought on that statute, which ought to be tried by a jury of twelve honest and lawful men of England, by the course of the common law, and not in any other manner.

“ And the respondents further show, and humbly offer to your lordships’ consideration, that the petition is a complaint in the nature of an original suit, charging those respondents with a crime of a very high nature, in acting contrary to the duty of their office, and so altogether improper for your lordships’ examination or consideration, not being any more triable by your lordships, than every information or action for breach of any statute law is ; all which matters are by the common law, and justice of the land of common right, to be tried by a jury.

“ And the petition is wholly of a new nature, and without any example or precedent, being to compel judges, who are by the law of the land to act according to their own

judgments, without any constraint or compulsion whatsoever, and trenches upon all men's rights and liberties, tending manifestly to destroy all trials by jury.

“ And it is further manifest, that this complaint is utterly improper for your lordships' examination, for that your lordships cannot apply the proper and only remedy which the law hath given the party in this case, which is by awarding damages to the party injured (if any injury be done), for these are only to be assessed by a jury. And they, these respondents, are so far from apprehending they have done any wrong to the petitioners in this matter, that they humbly offer, with your lordships' leave, to wave any privilege they have as assistants to this honourable house, and appear gratis to any suit that shall be brought against them in Westminster Hall, touching the matter complained of in the petition.

“ And they further humbly show to your lordships, that by a statute made in the 25th of Edw. III. cap. 4, it is enacted, ‘ That from thenceforth none shall be taken by petition

or suggestion to the king or his council, unless by indictment or presentment of good and lawful people of the neighbourhood, or by process by writ original at common law, and that none shall be put out of his franchise or freehold but by the course of the common law.' And by another statute in the 28th Edw. III. c. 3, it is expressly provided, 'that no man shall be put to answer without presentment before justices, or matter of record, or due process and original writ according to the old law of the land.'

“ And the respondents further say, that inasmuch as the petition is a complaint in the nature of an original cause for a supposed breach of an act of parliament, which breach (if any be) is only examinable and triable by the course of the common law, and cannot be so in any other manner, and is in the example of it dangerous to the rights and liberties of all men, and tends to the subversion of all trials by juries, these respondents conceive themselves bound in duty (with regard to their offices and in conscience to the oaths they have taken) to crave the benefit

of defending themselves touching the matter complained of in the petition by the due and known course of the common law, and to rely upon the aforesaid statutes and the common right they have of freeborn people of England in bar of the petitioners any further proceeding upon the said petition, and humbly pray to be dismissed from the same."

Then it was after debate ordered, that counsel should be heard at the bar of the house on the said petition.

In the course of their argument, the counsel for the judges urged "that Magna Charta was made for them as well as for others;—that if they offend against any rule of the common law or particular statute, whether in their personal behaviour or as judges, they are triable only by their peers."

That by this proceeding by way of petition, "the judges lose the benefit of that legal trial by a jury of their peers, which is their fence and protection against power, art, or surprise, the best for indifference and discovery of truth."

The right of the party grieved to his action,

and the liability thereto of the judge, seem therefore to be unquestionable.

There are, however, but few authorities to be met with on this subject, and the reason seems to be that the judges themselves have been anxious to give the fullest effect to the statute; and there are instances of their suggesting to counsel to tender a bill of exceptions, where they have refused to allow some matter insisted upon by either party to be entered on the record.

Thus, in 5 Hen. VII. fol. 40, a tenant pleaded the same plea in bar as in abatement. The Court disallowed it, saying however, "Make a bill, and we will seal it."

In 10 Hen. VII. fol. 8, a view was demanded. The Court refused it, but offered to seal a bill of exceptions, and ultimately allowed the demand and refusal to be entered on the record. In *Lord Paget v. The Bishop of Coventry's* case (*u*), the Court, in order to expedite the trial, delivered to the defendant's counsel a bill sealed to save him

(*u*) 1 Leon. 5.

the advantage of a challenge to the array to which the other side had demurred.

In 2 Edw. IV. fol. 6 b, a release to a tenant at will by his lessor was pleaded in assize, and disallowed by the Court; “And Gennei and other apprentices for the defendant prayed that the plea might be entered.” *Mark*—“No, it shall not; but make a bill, and we will seal it.”

21 Edw. IV. fol. 53. Debt on an obligation of I. of D. Defendant pleaded that there were two D.’s in the same county, and neither without addition. Brian disallowed the plea, on the ground that defendant was estopped by his deed in which he was described of D. only. *Brigges*—“We pray you to seal a bill of our exception.” *Brian*—“Make your bill, and I will seal it with my own seal.”

These instances show that the judges have endeavoured to carry out the spirit of the statute (x).

(x) In modern practice also, it is not unusual for the judge before whom the cause is tried himself to suggest to counsel to tender a bill of exceptions, where any

They also show very clearly that the common law before the statute, and the mischief to be remedied by the statute, were such as above described.

From the above account of the origin and nature of the bill of exceptions, it is evident, that to afford a remedy for the improper rejection or reception of evidence, or the misdirection or other misconduct of a judge *at nisi prius*, was neither the primary nor principal object of its creation ; but that it was devised and intended to afford the parties a security from the effects of the precipitation, however laudable its motive and object, the possible ignorance, and the accidental or other error of the Court :—that the regulation of the trial by jury was but one, and that not the largest, of its original functions ;—that its operation extended over the whole field of errors in law ;—and that its object was to leave no part of that field unexplorable by a Court of Error,—an object it was fully adequate to attain. We have also seen, that matter of doubt or difficulty occurs in the course of the trial of sufficient importance to justify that course.

no Court of original jurisdiction, proceeding according to the course of the common law, is too high for it to reach,—none so low as to escape from its operation; and although, from the mode in which the judges have carried out the spirit of the statute, the grievance it was passed to remedy has almost become mere matter of history, it is well to know that such a remedy still exists, and that the statute is still applicable to all cases falling within “the same or greater mischief.”





