A

DIGEST

OF SELECT

BRITISH STATUTES,

COMPRISING THOSE WHICH,

ACCORDING TO THE REPORT

OF THE

JUDGES OF THE SUPREME COURT,

MADE TO THE LEGISLATURE,

APPEAR TO BE IN FORCE, IN PENNSYLVANIA;

WITH SOME OTHERS.

WITH NOTES AND ILLUSTRATIONS.

BY SAMUEL ROBERTS,

PRESIDENT OF THE COURTS OF COMMON PLEAS, OF THE FIFTH JUDICIAL DISTRICT OF PENNSYLVANIA.

PITTSBURGH,

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1817.

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DISTRICT OF PENNSYLVANIA, TO WIT:

****
SEAL.
****

BE IT REMEMBERED, That on the twenty-eighth day of January, in the forty-first year of the Independence of the United States of America, A. D. 1817, SAMUEL ROBERTS, *Esquire*, of the said district, hath deposited in this office the title of a book, the right whereof he claims as proprietor in the words following, to wit:

"A DIGEST OF SELECT BRITISH STATUTES, *comprising those which, according to the report of the judges of the supreme court, made to the legislature, appear to be in force, in Pennsylvania; with some others. With notes and illustrations.*—— *By* SAMUEL ROBERTS, *president of the courts of common pleas of the fifth judicial district of Pennsylvania.*"

In conformity to the act of Congress of the United States, entitled, "*An act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the time therein mentioned.*"—— And also to the act entitled, "*An act supplementary to an act, entitled, "An act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned,"* and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

D. CALDWELL,
Clerk of the District of Pennsylvania.

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A

TABLE

OF THE

STATUTES

REFERRING TO THE HEADS UNDER WHICH THEY ARE DIGESTED.

		PAGE.
MAGNA CHARTA.	9 Hen. III, cap. VII. *Dower.*	176
STAT. OF MERTON.	. . . . . cap. XXXIV. *Appeal.*	55
. . . . .	20 Hen. III, cap. I. *Dower.*	179
. . . .	. . . . . cap. II. *Estates for life.*	206
. . . . .	. . . . . cap. III. *Disseisin,* &c.	144
. . . . .	. . . . . cap. IX. *Bastard.*	90
STAT. de ANNO et DIE BISSEXTILI.	21 Hen. III, *Estates for life,* &c.	207
STAT. of MARLEBERGE.	52 Hen. III, cap. IV. *Distress.*	170
. . . . .	. . . . . cap. VIII. *Disseisin.*	146
. . . . .	. . . . . cap. XIII. *Essoin.*	196
. . . . .	. . . . . cap. XV. *Distress.*	171
. . . . .	. . . . . cap. XVII. *Guardian.*	312
☞	. . . . . cap. XXIII. *Account.*	9
. . . . .	. . . . . cap. XXIX. *Disseisin.*	147
STAT. of WESTM. I.	3 Edw. I, cap. IX. *Hue and cry.*	315
☞	. . . . . cap. XV. *Bail.*	75
. . . .	. . . . . cap. XL. *Voucher to warra.*	410
. . . . .	. . . . . cap. XLII. *Essoin.*	197
. . . . .	. . . . . cap. XLIII. *Essoin.*	197
. . . . .	. . . . . cap. XLIV. *Essoin.*	198
. . . . .	. . . . . cap. XLVII. *Infancy & Age.*	317
. . . . .	. . . . . cap. XLIX. *Dower.*	181
. . . . .	4 Edw. I, Stat. II. *Coroner.*	100

Digitized by Google

		PAGE.
STAT. of GLOUCESTER.	6 Ed. I, cap. I. *Damages & costs.*	107
. . .	. . . cap. II. *Infancy & age.*	319
. . .	. . . cap. III. *Estates for life.*	208
. . .	. . . cap. V. *Waste.*	417
. . .	. . . cap. VI. *Disseisin*, &c.	148
. . .	. . . cap. IX. *Appeal.*	61
. . .	. . . cap. X. *Essoin.*	198
. . .	. . . cap. XIII. *Waste.*	418
. . .	7 Ed. I, Stat. II. *Mortmain.*	348
STAT. of WESTM. II.	13 Ed. I, cap. I. *Estate Tail.*	202
. . .	13 Ed. I, Stat. 1, cap. III. *Disseisin*, &c.	149
. . . . .	Stat. 1, cap. IV. *Dower.*	182
. . . . .	Stat. 1, cap. VI. *Voucher to warra.*	412
. . . . .	Stat. 1, cap. VII. *Dower.*	185
. . . . .	Stat. 1, cap. XI. *Account.*	11
. . . . .	Stat. 1, cap. XII. *Appeal.*	61
. . . . .	Stat. 1, cap. XIV. *Waste.*	419
. . . . .	Stat. 1, cap XV. *Infancy and age.*	317
. . . . .	Stat. 1, cap. XVII. *Essoin.*	199
. . . . .	Stat. 1, cap. XX *Disseisin*, &c.	151
. . . . .	Stat. 1, cap. XXII. *Waste.*	420
. . . . .	Stat. 1, cap. XXIII. *Account.*	14
. . . . .	Stat. 1, cap. XXIV. *Disseisin*, &c.	157
. . . . .	Stat. 1, cap. XXV. *Disseisin*, &c.	152
. . . . .	Stat. 1, cap. XXVI. *Disseisin*, &c.	156
. . . . .	Stat. 1, cap. XXVII. *Essoin.*	199
. . . . .	Stat 1, cap. XXVIII. *Essoin.*	199
. . . . .	Stat. 1, cap XXX. *Jury.*	326
. . . . .	Stat. 1, cap. XXXI. *Bill of except.*	93
. . . . .	Stat. 1, cap. XXXII. *Mortmain.*	350
. . . . .	Stat. 1, cap. XXXIV. *Dower.*	186
. . . . .	Stat. 1, cap. XXXIX. *Sheriff.*	390
. . . . .	Stat. 1, cap. XL. *Infancy and age.*	321
. . . . .	Stat. 1, cap. XLV. *Execution.*	239
. . .	18 Ed. I, Stat 1, cap. III. *Mortmain.*	351
	18 Ed. I, Stat. 2, *Quo Warranto.*	380

Digitized by Google

			PAGE.
STAT. of W.	18 Ed. I, Stat. 3,	*Quo Warranto.*	382
	. . . Stat. 4,	*Fines.*	261
	20 Ed. I, Stat. 1,	*Voucher to warranty*	436
	. . . Stat. 2,	*Waste.*	421
	. . . Stat. 3,	*Voucher.*	413
	27 Ed. I, Stat. 1, cap. I.	*Fines.*	264
	28 Ed. I, Stat. 2,	*Appeal.*	62
	. . . Stat. 3, cap. XVI	*Sheriff.*	392
	33 Ed. I, Stat. 2,	*Conspiracy.*	96
	. . . Stat. 3,	*Conspiracy.*	96
	. . . Stat. 4,	*Jury.*	328
	. . . Stat. 6,	*Land.*	341
	34 Ed. I, Stat. 1,	*Disseisin*, &c.	159
STAT. of YORK.	12 Ed. II, Stat. 1, cap. I.	*Disseisin*, &c.	162
. . .	. . . Stat. 1, cap. IV.	*Nisi Prius.*	357
. . .	. . . Stat. 1, cap. V.	*Sheriff.*	392
. . .	. . . Stat. 2,	*Essoins.*	200
. . .	15 Ed. II,	*Fines.*	265
STAT. of NORTHAMP.	2 Ed. III, cap. XVI.	*Nisi Prius.*	357
. . .	. . . cap. XVII.	*Writ of deceit.*	423
	4 Ed. III, cap. II.	*Goal delivery.*	311
	. . . cap. VII.	*Exec. & Admin.*	248
	5 Ed. III, cap. X.	*Jury.*	333
	14 Ed. III, Stat. 1, cap. VI.	*Amendment.*	28
	. . . Stat. 1, cap. XVI.	*Nisi Prius.*	358
	. . . Stat. 1, cap. XVIII	*Vouch. to war.*	415
	25 Ed. III, Stat. 2,	*Alien.*	18
	. . . Stat. 5, cap. III.	*Jury.*	335
	. . . Stat. 5, cap. V.	*Exec. & Admin.*	249
	. . . Stat. 5, cap. XVI.	*Pleas & Plead.*	365
	28 Ed. III, cap. XIII.	*Jury.*	336
	31 Ed. III, Stat. 1, cap. XI.	*Exec. & Admin.*	250
	34 Ed. III, cap. I.	*Justices of the P.*	339
	. . . cap. VIII.	*Jury.*	333
	. . . cap. XVI.	*Fines.*	266
	38 Ed. III, Stat. 1, cap. XII.	*Jury.*	333
	50 Ed. III, cap. VI.	*Fraud.*	294

Digitized by Google

			PAGE.
STAT. of N.	1 Rich. II,	cap. ix. *See Appendix.*	434
	. . .	cap. xii. *Sheriff.*	393
☞	5 Rich. II,	cap. viii. *Forcible entry.*	283
	6 Rich. II, Stat. 1,	cap. iii. *Disseisin,* &c.	163
	8 Rich. II,	cap. iv. *Records.*	389
	9 Rich. II,	cap. iii. *Estates for life.*	209
	13 Rich. II, Stat. 1,	cap. xvii. *Estates for life.*	210
	15 Rich. II,	cap. ii. *Forcible entry.*	283
	. . .	cap. v. *Mortmain.*	351
	2 Hen. IV,	cap. vii. *Trial.*	396
	4 Hen. IV,	cap. vii. *Disseisin, &c.*	163
	5 Hen. IV,	cap. xiv. *Fines.*	267
	1 Hen. V,	cap. v. *Pleas & Plead.*	366
	9 Hen. V,	cap. iv. *Amendment.*	31
	4 Hen. VI,	cap. iii. *Amendment.*	32
	8 Hen. VI,	cap. ix. *Forcible entry.*	284
	. . .	cap. xii. *Amendment.*	33
	. . .	cap. xv. *Amendment.*	34
	. . .	cap. xxix. *Trial.*	397
	11 Hen. VI,	cap. ii. *Disseisin,* &c.	164
	. . .	cap. iii. *Disseisin,* &c.	165
	. . .	cap. v. *Waste.*	422
☞	23 Hen. VI,	cap. ix. *Bail.*	83
	1 Rich. III,	cap. vii. *Fines.*	268
	1 Hen. VII,	cap. i. *Coroner.*	102
	. . .	cap. iii. *Sheriff.*	396
	. . .	cap. iv. *Fraud.*	295
	. . .	cap. x. *Damages & costs*	107
	4 Hen. VII,	cap. xx. *Popular actions*	372
	. . .	cap. xxiv. *Fines.*	271
	11 Hen. VII,	cap. xii. *Damag. & costs*	116
	. . .	cap. xx. *Estates for life.*	211
	19 Hen. VII,	cap. xx. *Damag. & costs*	109
	5 Hen. VIII,	cap. vi, *Jury.*	337
	7 Hen. VIII,	cap. iv, *Damag. & costs*	117
	21 Hen. VIII,	cap. iii, *Disseisin,* &c.	166
	. . .	cap. v, *Exec. & Admin.*	250

Digitized by Google

			PAGE.
STAT. of N.	21 Hen. VIII,	cap. *VII, Larceny.*	342
	. . .	cap. *XV, Estates for life.*	214
	23 Hen. VIII,	cap. *X, Mortmain.*	353
	. . .	cap. *XV, Damag. & costs*	120
	24 Hen. VIII,	cap. *VIII, Dam. & costs.*	123
	27 Hen. VIII,	cap. *X, Uses & Trusts.*	404
	31 Hen. VIII,	cap. *I, Estates for life.*	217
	32 Hen. VIII,	cap. *V, Execution.*	241
	. . .	cap. *XXVIII, Es. for life*	219
	. . .	cap. *XXX, Amendment.*	35
	. . .	cap. *XXXII, Es. for life.*	224
	. . .	cap. *XXXIII, Disseisin.*	167
	. . .	cap. *XXXIV, Es. for life*	227
	. . .	cap. *XXXVI, Fines*	274
	. . .	cap. *XXXVII, Ex. & Ad.*	254
	37 Hen. VIII,	cap. *VIII, Indictment*	324
	2 & 3 Ed. VI,	cap. *XXIV, Trial*	401
	1 Mary, Sess. 2,	cap. *VII, Fines*	277
	1 & 2 P & M	cap. *XII, Distress*	171
	. . .	cap. *XIII, Bail*	77
	2 & 3 P & M	cap. *X, Bail*	81
	5 Elizabeth,	cap. *IX, Perjury*	359
	8 Elizabeth,	cap. *II, Damag: & costs*	125
	13 Elizabeth,	cap. *V, Fraud*	295
	14 Elizabeth,	cap. *VIII, Est: for life*	231
	18 Elizabeth,	cap. *XIV, Amendment*	37
	23 Elizabeth,	cap. *III, Fines*	278
	27 Elizabeth,	cap. *IV, Fraud*	298
	. . .	cap. *V, Pleas & Plead:*	367
	31 Elizabeth,	cap. *II, Fines*	281
	. . .	cap. *XI, Forcible entry*	288
	43 Elizabeth,	cap. *VIII, Ex: & Admin:*	256
	3 James I,	cap. *VIII, Execution*	245
	4 James I,	cap. *III, Dam: & costs*	129
	21 James I,	cap. *XIII, Amendment*	38
	. . .	cap. *XV, Forcible entry*	290
	. . .	cap. *XXIV, Execution*	246
	12 Charles II,	cap. *XXIV, Guardian*	312

Digitized by Google

			PAGE.
STAT. of N.	13 Charles II, Stat. 2,	cap. II, *Dam:* & *costs*	131
	16 & 17 Charles II,	cap. VIII, *Amendment*	39
	17 Charles II,	cap. VIII, *Pleas* & *Plead:*	369
	19 Charles II,	cap. VI, *Estates for life*	233
	29 Charles II,	cap. III, *Fraud*	304
	22 & 23 Charles II,	cap. IX, *Dam:* & *costs*	138
	30 Charles II,	cap. VII, *Ex:* & *Admin:*	258
	4 & 5 W & M	cap. XXI, *Pleas* & *Plead:*	370
☞	. . .	cap. XXIV, *Ex:* & *Adm:*	260
	8 & 9 William III,	cap. XI, *Dam:* & *costs*	139
	9 & 10 William III,	cap. XV, *Arbitration*	68
	10 & 11 William III,	cap. XVI, *Infancy* & *age*	322
	11 & 12 William III,	cap. VI, *Alien*	20
	3 & 4 Anne,	cap. IX, *Promis: Notes*	375
	4 Anne,	cap. XVI, *Amendment*	43
☞	7 Anne,	cap. V, *Alien*	22
	5 George I,	cap. XIII, *Amendment*	48
	7 George II,	cap. XX, *Mortgage*	345
	11 George II,	cap. XIX, *Estat. for life*	236

The Index hand (☞) denotes the Statutes which are not contained in the Report of the Judges.

7 JU 62

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PREFACE.

AS a number of British Statutes are in force in Pennsylvania, it frequently becomes necessary to refer to them; yet they are only to be found scattered through voluminous compilations, such as those of Ruffhead or Pickering: works which are contained in few of our law libraries.

The very small part of those expensive works which can be of the least utility to a lawyer in this country, furnishes a sufficient reason for their general exclusion.

Yet so desirable is it to possess those of the English Statutes which are in force here, that some gentlemen have sacrificed large sums of money, in obtaining the one or the other of these compilations: the important parts whereof, if separated from the mass of useless matter, might be procured at an inconsiderable expense.

Such a selection, accompanied with notes and illustrations, seems to be much desired by the gentlemen of the bar, whose opinions I have had an opportunity of knowing; and might, it is conceived, be useful to all concerned in the administration of justice.

The views of the legislature of Pennsylvania, in requiring—"The judges of the Supreme Court to examine and report, which of the English Statutes are in force in this Commonwealth;—and which of those Statutes, in their opinion, ought to be incorporated into the statute laws"—were doubtless laudable.

To render the system of laws certain, as practicable, to give the code a form, calculated to disseminate the knowledge of that system, as extensively as the nature of things admit, is praiseworthy in those to whom the law making power is confided.

In respect to the *means*, whereby an object so desirable may be best attained, difference of opinion is to be expected.

The learned judges, in their report on this subject, have proposed "Re-enacting the substance of these statutes, in language suitable to our present condition, which" (they observe) "might be attended with the additional advantage, of simplifying the statute law, by reducing into one, several statutes passed on the same subject."

With all that deference and respect, which is felt for the opinions of those with whom this proposal originated, I beg leave to state the objections, to which, in my mind, it appears liable.

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In the first place, it is truly spoken of as a work requiring considerable time and labour.* Of consequence great expense must be incurred, in compiling the work, and still greater, in the legislative investigation, which it must undergo.

It is true, *all these considerations combined*, ought to have no weight, if the plan be the *best* that could be devised; but if it be not the best, each of them ought to have great weight.

A revised code, on the plan proposed by the learned judges, must necessarily be the work of professional men. Now if we suppose them to have executed it with the greatest precision; and that it had passed both houses of the legislature, unaltered in substance, or in expression, and had become the law of the land:—What should we have obtained?—*A code of new laws; all of which would have to receive a* CONSTRUCTION.

If this be the case, great expense must be incurred, and the law rendered more uncertain than it now is, for the sake of giving it a more modern and fashionable dress.

On the other hand, if the statutes in force be published either from the original or an approved translation, where the original happens to be in a foreign language, the object of the legislature will be attained, with infinitely less trouble and expense: the law will be exhibited unaltered: the opinions of the sages of the law, who, in a series of judicial decisions, have fixed the construction of these statutes, will afford that *certainty* in respect to them, which no statute law obtains till after a lapse of many years.

We shall perceive WHAT THE LAW IS; and should any parts of it require revision, the legislature will have it in their power to make such alterations, from time to time, as to them may seem meet.

I am aware that there are times, when the revision of the statute law of a country may be expedient; and when the task however arduous ought to be undertaken. This state of things has occurred in England, where the statute book is overloaded with a mass of matter, useless, dangerous and perplexing. A number of their statutes being *obsolete;* others, having been enacted to suppress some temporary mischiefs, inflict penalties which, at the present day appear absurd and cruel; and which may on some occasion, be called from their obscurity, for the purpose of oppression.

The reformation of the English code of statutes, so far as to repeal obsolete and sometimes dangerous laws, as well as the reducing the different acts of parliament, which relate to the same subject, into one consistent statute, seems long since to have been considered a necessary work. It is recommended in the preamble to 5. Eliz. c. 4.† And by Lord Bacon's works, it appears that Lord Ch. justice Hobart, Mr. Sergeant Finch, Mr. Heanage Finch, Mr. Noye, Mr. Hackwell and Lord Bacon himself were employ-

* See Report of the judges.

† In relation to the statutes of labourers.

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ed for a considerable time in this very work, and that they had made some progress in it.

And king James I. in one of his speeches to parliament, expresses himself in the following terms:—"There be in the common law divers contrary reports and precedents; and this corruption doth likewise concern the statutes; in respect that there are divers cross and cuffing statutes, and some so penned, as that they may be taken in divers, yea contrary senses: and therefore I would wish both these statutes and reports, as well in the parliament as common law, to be once maturely reviewed, and reconciled; and that not only all contrarieties should be scraped out of our books, but even that such penal statutes, as were *made but for the use of the time*, (from breach whereof no man can be free) *which do not now agree with the condition of this our time, ought likewise to be left out of our books*, which, under a tyrannous, or avaricious king could not be endured; and this reformation might methinks, be made a worthy work, and well deserves a parliament to be sat of purpose for it."

A review of our own statute book is perhaps also requisite.

A new arrangement, indeed, of the whole body of the law, as in the time of *Justinian*, a code *Frederique*, or a code *Napoleon* may be compiled in a country where the laws emanate from the will of an individual, but must be attended with infinite difficulty, if it be at all practicable, in a community where every alteration of the law must receive the sanction of a legislature constituted like that of Great Britain, or our own.

After various unsuccessful efforts, what is called a "revised code," has been established in Virginia; and something of the kind has been attempted in New York.

The most practicable and rational mode of reforming the English code of statutes, appears to be that of Mr. Barrington, who proposes that two or more gentlemen of the law should be appointed, whose duty it should be, to make an annual report to the privy council, as likewise to the lord chancellor, the master of the rolls, and the twelve judges, of a certain number of statutes which should either be repealed, or reduced into one consistent act; and send as a schedule annexed to the report, a copy of such proposed statute. That, if approved of, laws might be passed conformable to the report.*

A method similar in substance might be pursued, in the reformation of our code of statutes.

In relation to the English statutes however, which are in force in Pennsylvania, all that appears to be desirable is that those that belong to the same subject should be brought together, or digested so as to exhibit a distinct and comprehensive view of the several matters to which they relate.—Such an arrangement is contemplated in this work.

* Observations on the stat. 413.

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This selection will not only embrace all the statutes referred to in the report of the judges, but also such others as it may be thought useful to possess, either because of doubts being entertained, or different opinions existing in respect to their being in force here, or on account of our having acts of assembly *in pari materia*.

Notwithstanding the reputation which the gentlemen who made the report have justly acquired, as profound lawyers, and men of science, it will readily be admitted, that the task assigned them was not of easy execution, even had time and leisure been allowed for performing it; but whoever is acquainted with the arduous official duties which the judges of the supreme court are bound to discharge, will be more disposed to admire the extraordinary labour and industry displayed in the execution of the work required, than to censure them for defects or omissions, should any such be discovered.

The report which they have submitted, is, doubtless, entitled to high respect and consideration, as containing the opinions of men who rank in the highest grade of the profession, and in the public confidence, but it ought to be carefully distinguished from a JUDICIAL DECISION; of the character of which it does not partake.

The distinguished characters who have made the report, it is confidently presumed, would not wish that it should be so considered; but on the contrary, that whenever the question comes judicially before them, whether a particular English statute, or any part of it, is or is not in force in Pennsylvania, they will hear without prejudice, whatever may be urged on either side; and without otherwise adverting to the circumstance whether such statute be comprised in the report or not, will be solicitous only to form a correct decision.

The opinion of the superior court, in any state, determines the law, in relation to questions JUDICIALLY decided. *Stare decisis* is a maxim, in adhering to which the public tranquillity is deeply interested. It being, in a certain degree, less important what the law is, than that it should be ascertained and known.

In respect to ascertaining the law, the judiciary have an arduous and sacred duty to fulfil. In the discharge of which every judge must feel the high responsibility which rests upon him. He must be sensible of the necessity of viewing the subject in all its bearings; and to enable him to do so must be anxious to hear the arguments of learned counsel, on both sides of the question; and that his opinion should be the result of careful research, and due reflection.

Such are the opinions which ought to ascertain the law: and a point thus settled should not be the subject of future litigation or argument.

On the other hand, an opinion delivered from the bench, on a point not judicially before the court, *is generally*, and *always ought to be* considered as a mere *obiter dictum*, which determines noth-

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ing; but leaves the point open to argument before the judge who uttered it, and elsewhere.

The *dictum* is simply an intimation of the present impression of the judge, upon a point which had not been argued before him; upon which he was not required to give an opinion; and which, it is not to be presumed, he had particularly investigated.

Had he heard the question argued; had his duty particularly required him to attend to such argument, and thoroughly to investigate the subject, his mind might have received a very different impression. Instances are not wanting, of the most learned and enlightened judges that ever graced any bench, declaring, that the arguments of counsel had effected an entire change in their opinions.

I shall more than once, in the course of this work, have occasion to notice the pernicious effects of allowing the *dictums* of judges, to establish the law.

As to the British statutes, in force here, a distinction is to be taken between those which were in existence prior to the settlement of Pennsylvania, as an English colony, and others which were enacted subsequent to that period.

Of the first class it is provided in the charter granted to William Penn, that the laws for the regulating and governing property, as well as for the descent and enjoyment of lands, and likewise as for the succession of goods and chattels, and likewise as to felonies, within the said province, shall be and continue the same as they shall be for the time being by the general course of the law in the kingdom of England, until the said laws shall be altered, by the said William Penn, his heirs, or assigns, and by the freemen of the said province, their delegates or deputies, or the greater part of them.

This provision in the charter, however, was not necessary for adopting the English laws in an English colony:—The general principle of colonization required their adoption.

The colonists retain all the rights which pertained to them prior to their emigration; and are subject to the same laws, so far as those laws are suitable to their situation. Of consequence the common law has always been in force in Pennsylvania; and also so much of the English statute law, enacted previous to the settlement as was convenient, and adapted to the circumstances of the country.* Shortly after the revolution an act of assembly was passed,† reviving the acts of assembly passed before the revolution; and declaring that the common law, and such of the statute laws of England, as have been heretofore in force shall be and continue in force: with certain exceptions specified in the act. These relate to the oaths of allegiance, to the king of England; the acknowledgment of any authority in the heirs, or devisees of William Penn, or any other person whomsoever as governor; the laws rel-

* 1. Dal. rep. 67.

† Act of 28th January, 1777—1 S 1. Laws 722. 1 Sm. Ed 429.

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ative to the number of members of assembly, the time of election, and the qualification of electors; the English statutes relating to treason, or misprison of treason and such laws and acts of assembly, as declared, ordered, or directed any thing inconsistent with the then existing constitution of the commonwealth.

In respect to English statutes, enacted subsequent to the settlement of Pennsylvania, and prior to the revolution, it is held that they do not extend here unless they have been recognized by acts of assembly, adjudication of courts or established usage.

A number of English statutes passed within that period have been introduced, and practised upon in Pennsylvania:—By constant and uninterrupted usage, they have become incorporated with our laws and have obtained a legal existence that cannot now be shaken, nor destroyed.*

In relation to the ancient English Statutes, it is observable, that they discover the rude state of society in which they were produced. They are generally destitute of precision and order; and not unfrequently appear to have been the offspring of some predominant influence, rather than the provisions made by an enlightened legislature.

The statute laws seem to have varied, as different interests prevailed.

The laws are not only loosely worded, but in many instances, the penal statutes provide no certain punishment or penalty; but only declare, that the offender *shall be punished at the king's pleasure*, or that he shall make *grievous ransom to the king*:—others are merely prohibitory or admonitory.

Although in the reign of Edward I, whom Sir Edward Coke calls the English *Justinian*, we find some in which perspicuity, combined with brevity, is observable; and which contain many wise provisions, yet the greater part of them are extremely defective.

Objections have been made in respect to the validity of several of the ancient statutes, in consequence of the *form* in which they are presented to us. It being contended that if, upon the face of the act, it appeared that it was enacted by the king with the assent of the *lords*, or by the king with the assent of the *commons*, it is not an act of parliament; inasmuch as it shews that the assent of the three branches was not had. But it is observed, that throughout the reign of Edward I, the assent of the commons is not once expressed in the enacting clauses; nor in any subsequent reign till that of Edward III, nor in any of the enacting clauses of 16th Richard II. And in the reign of Henry VI, till the 8th year, the assent of the commons is not mentioned in the enacting clauses.

The old statutes contain a preface, or prologue to the several articles, or chapters enacted in each session, entered seriatim on the roll, without a single break or punctuation:—all having reference to the preface, which declared the enacting authority.

* 1 Dal. 444.

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Indeed in early times, the influence of the commons was so inconsiderable, that their *assent* seems not to have been deemed necessary to the validity of a statute:—They appear rather in the characters of *petitioners*, than as a constituent branch of the legislature.

The translation made use of in this work is that of Ruffhead: which is not departed from in the text; but any supposed inaccuracies, as well as obscure expressions are noticed in the commentary.

As this compilation is not designed exclusively for the use of professional men, parts of it will be found to contain matter useless to them, which however may be necessary to others.

For the accommodation of those who may be unacquainted with the learned, or foreign languages, translations are given wherever necessary to the sense of the passage in the commentary.

NOTE. *The Statutes which the Judges of the Supreme Court have reported to be in force in Pennsylvania, and which they have recommended to be incorporated, in our laws, are distinguished by an asterisk* [*]. *Those which they have declared to be in force, but have deemed improper to be incorporated are noted by an obelisk* [†].

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A

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OF

SELECT

BRITISH STATUTES.

MAGNA CHARTA.

THE charters, emphatically styled the GREAT CHARTER and the CHARTER OF THE FOREST, are almost universally considered as the bulwark of English liberties; as the pole star to guide the legislature; and in fact, as forming the constitution of the country.[1]

If any of the provisions of these charters were convenient, and adapted to the circumstances of the people of Pennsylvania, they of course became a part of the law of Pennsylvania.[2]

Those charters are represented as having revived the Saxon laws of Edward the confessor; whose collection of laws, we are told, comprised as well the unwritten customs, as the laws and statutes made by the Saxon kings. To discover what those laws *were*, seems to be attended with more difficulty, than to ascertain what they *were not*.

That they were not *oppressive* may be inferred, from the attachment which the English nation entertained for them; and that they were unconnected with the feudal system appears probable.

The opinion entertained by judge Blackstone,[3] that the object of the charters was to revive the Saxon laws, if it be not absolutely refuted, at least its correctness is shown to be extremely questionable.

1. 1 Reeve's E. L. p. 231.

2. 1 Dallas 67.

3. Black. Law tracts p. XIII. Intro.

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At the time the charters were established, the great body of the people had very little weight in the government. It was not with *them* that the charters originated. This *capitularium*, or collection of laws was proposed by the Norman barons, or their descendants, who had the strongest inducements to wish for the continuance of the Norman and feudal law introduced with the conquest. "Half the kingdom was held by feudal tenures, under them: they were themselves the judges, having what the French call *haute* and *basse justice*. They expounded their own laws, the pleadings of which were likewise in their own tongue. The native English therefore, or their descendants, could not receive justice from courts so constituted, and which gave the barons, at the same time, every kind of influence and power. Whence then could arise the inducement to make it an express article that the Saxon laws should be restored? The introducing the feudal law, on the other hand, with its attendant vassalage, was insisted upon by their ancestors, who had incurred so considerable an expense and risk, when they embarked with William the first in his enterprise. Such adventurers had a right to claim their own terms.—In short, is it probable that having every thing in their power, they would insist upon restoring a law, by which every grant made to their ancestors (and from which their own power and influence at that time arose) should be rendered doubtful, or at least stripped of its greatest advantages and emoluments?"[4]

That they could have designed to introduce the Saxon laws, in exclusion of their own, is improbable, in the highest degree; and the idea indeed is confuted by the face of the instrument itself: the first six chapters whereof relate wholly to the ascertaining of the feudal services, and burthens arising from tenures; and many others relate incidentally to the same point. Now the most probable opinion seems to be that feudal tenures were wholly unknown to the Anglo-Saxon laws; or if known, that they existed in a very imperfect state.[5]

Though it is not believed that the object of the charter was to introduce the laws of Edward the confessor, yet the substance of many of the Anglo-Saxon institutions may have been introduced, with a view of tranquillizing the minds of the people, and inducing them more cheerfully to submit to a system, which, at that time, and for ages afterwards, grievously oppressed them.

A people are not easily detached from their ancient institutions; and however they may be coerced to a degree of submission, bordering on slavery itself, still some sacrifice to their prejudices and their feelings must be made by those in power.

The Norman conquest introduced into England a new system of laws. "The nature of landed property was entirely changed; the rules by which personal property was directed were modified; a new system of judicature was erected; new modes of redress

4. Barrington's observations on the Stat. p. 5.

5. 1 Reeve's English Law p. 8, 9.

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conceived; new forms of proceeding were devised; the rank and condition of individuals became entirely new; the whole constitution was altered; and after fluctuating on a singular policy, pregnant with the most opposite consequences of freedom and slavery, by degrees settled into peace and orderly government."[6]

Yet this change was not sudden; nor does it seem that it was considered safe to attempt it; for, with every disposition to effect it, we find the conqueror, in the fourth year of his reign, binding himself, by a solemn oath, to observe the good and approved laws of the kingdom, particularly those of Edward the confessor; subject nevertheless to such alterations and additions as he had made to them.

Though the alterations, by positive laws, were not great, yet by slow and imperceptible degrees, and indirect means, they became so considerable as entirely to change the constitution of the kingdom.[7]

Sensible of the attachment of the people to their ancient institutions, it is not improbable that some of their features may have been introduced into the charter.

It is however, an object rather of curiosity than of utility, to inquire whether those parts of the charter which relate to the liberties of the people, be derived from the Saxons or the Normans: the rights of the people are founded on a more rational and surer basis.

It is observable, that although the great charter is printed in all the editions of the statutes, as a law of 9 Hen. III. it is in fact a transcript from the parliament roll of 25 Edw. I. by whom it was, at that period confirmed. No notice had been taken of it in the preceding part of his reign; but at this time being engaged in an expedition into Flanders, his necessities, and some illegal and oppressive acts,[8] which had been the consequence of them, induced the barons and clergy to insist on this confirmation of the charter, which is tested by the prince of Wales (afterwards Edw. II.) who although, at that time but thirteen years of age, was regent of the kingdom.[9]

The charter consists of thirty-seven chapters, composing a rhapsody of ordinances, relating to things of so different a nature, that commentators have found considerable difficulty in reducing their observations upon it to any regular order.[0]

6. 1 Reeve's Eng. L. p. 28

7. 1 Reeve 31.

8. He had that year plundered all the monasteries in the kingdom; and caused the treasures found in them to be transported to London. *Fecit omnia regni monasteria persecutari, et pecuniam inventam Londonias asportari, fecitque coria et lanas arrestari.* Obs. on the Stat. 6.

9. The king afterwards sealed the confirmation with the great seal at Ghent, on the 5th Nov. 1297. Rymer Vol. I, part III, p. 189.

0. The method pursued by Mr. Reeve is calculated to afford as clear an exposition of *Magna Charta*, as any that I have seen. See 1 Reeve 232.

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Though the greater part of these ordinances are uninteresting, and many of them unintelligible to a modern reader; yet there are some provisions contained in them well deserving of notice, as they are incorporated into the constitution and laws of our country.

The XIV chapter declares—"How men of all sorts shall be amerced."—A freeman, says the statute, shall not be amerced for a small default, but after the manner of the default; and for a great default, according to the greatness thereof, saving to him his *contenement*, or countenance: with respect to a merchant, saving to him, in like manner, his merchandise, and to a villeyn (except he were the king's villeyn) his wainage: It also provides that amercements should be assessed by the oaths of honest and lawful men of the vicinage.

This chapter is supposed to have been declaratory of the common law; and in confirmation of this opinion it is remarked, that the law in relation to amercements is laid down by *Bracton*, in the words of *Magna charta*,[1] without taking notice of its depending upon that statute. And the same rule is laid down by *Glanville*, who wrote in the time of Henry II.—It means no more than that no man shall have a larger amercement imposed upon him than his circumstances will bear; saving to him, in the language of Glanville, his *contenementum*,[2] or countenance:—with respect to a *merchant* saving to him his merchandise; and to a *villeign*[3] (except the king's) his *wainage*.[4] From which provision it appears to have been the intention, that the amercements should not be the complete ruin of a man.

1. Bar. Obs. on the Stat. 13. Bracton lib. 3. cap. 1. fol. 116 b

2. "Saving to the freeholder his *contenement*, or *land*" says judge Blackstone, 4 Com. 378. *Contenement*, or *Countenance* signifies however a man's *circumstances in life*, 2 Inst. 28. "Abating a man's countenance" signifies (according to lord Bacon) *retrenching his mode of living*. See lord Bacon's works, 4to edit. vol. 2. p. 175. Obs. on the Stat. 12.

The *misrecordia regis* is explained by Glanville to be where one is amerced by twelve lawful men of the vicinage, so however *ne quid de suo honorabile tenemento amitat*. Glanville lib. 9. c. 11.—1 Reeve Eng. L. 157—8. Co. 39.b

3. *Villeins*, or *Villains*—A numerous class of people, in England, comprising perhaps the greater part of the inhabitants, who were held in a state of slavery, or vassalage, and denoted by this name. Hence arose the tenure by villainage, by which, it seems agreed, that more than one-half the lands in England were anciently held.

The services to be performed by these tenants were generally of the most laborious and sometimes of the most ludicrous kind. *Utpote die nativitatis domini coram eis saltare, buccas cum sonitu inflare, et ventris crepitum edere.* Struvii jurisp. feud. 541. In some manors, the lord had "*jus luxandæ coxæ sponsorum vassallorum.*"

The word "Villain" is derived (according to Voltaire) from "ville," a town.—The towns being occupied, in early times, by the lower classes of society:—the nobility residing in their castles. "*Villain vient de ville, parceque autrefois il 'y avoit de nobles, que les potideurs des chateaux.*" Anc. Hist.

4 Wainage [*Wainagium*] signifies what is necessary for the labourer and fermer, for the cultivation of his land; which the laws of most countries have favoured. The impounding beasts of the plough [*avaria carucæ*] is even *criminal* by the laws of Scotland. Obs. on the Stat 12.

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The necessity was doubtless felt of declaring and regulating the law more fully on this subject; to prevent the abuse of the *misrecordia*, or amercement at the pleasure of the king, which had become frequent and intolerable.

Various circumstances concur to shew the great extent of this grievance. It appears that the town of Aylesbury held lands, by the service of keeping the beasts distrained for the king's debts; and that the manor of Byker, in Northumberland, was likewise held by the same tenure.—We find the commons complaining that the king took from them whatever they had to eat or drink, that he took from the farmers their horses, carts, wine and victuals, at his pleasure.[5]

The representations on this subject, at length produced an order from the king to the barons of the exchequer, directing that the tenant should not be distrained for the debt of his lord, so long as the lord had any thing whereby he might be distrained.[6] Thus it appears that the tenant was not only oppressed for his own debts, but for those of his lord likewise.

Although this provision of the charter related to amercements, for misbehaviour, by the suitors in matters of civil right; yet the reasonableness of *fines*, in criminal cases has been determined with a view to it.[7]

The stat. 1 Will. and Mary stat. 2, c. 2, commonly called the bill of rights, has declared that—"excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."—The same provision is contained, nearly in the same words, in the constitution of the United States, and in the constitution of Pennsylvania; and such was the ancient common law.

Our laws have, on these points, guarded the citizens, as well as it was necessary, or perhaps practicable to protect the rights of freemen.

They establish, in every case, the *species* of punishment to be inflicted for every offence; which cannot be varied either by courts or juries. Although the degree or quantity of punishment is not, nor could it with propriety, in all cases, be ascertained by any invariable rule. Thus the law declares that an offence shall be punishable by *fine and imprisonment:*—as to the *species* of punishment it is fixed and determinate; but the quantity of the fine, or the duration of the imprisonment must frequently vary, from circumstances aggravating or mitigating the offence; from the condition of

5. "Quod rex (Scil. Henricus) quicquid "habuerint in esculentis et poculantis ra- "puit. Rusticorum enim equos, bigas, "vina, victualia ad libitum cepit." Obs. on the Stat. 12.

6. *Nullus rusticus distringatur pro debitis domini sui quamdiu dominus habuerit per quod distringi possit. Inquirendum est etiam qualiter magnates se gerunt versus homines suos; et si invenerint ipsos transgredientes, corrigant quatenus poterint.* Payne's Rec. vol. III. in pref.

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the parties; and from innumerable other considerations, that must be referred to the discretion of the court: which, however, is not arbitrary, but regulated by law.

In assessing a fine, the ability of the party to pay it is to be considered. Not that indigent offenders are to escape punishment, by reason of their inability to pay a fine; but, in respect to such persons, it becomes the duty of a court, in place of imposing a fine which might amount to perpetual imprisonment, to inflict corporal punishment, or a limited imprisonment.[8] Hence it is that fines are often denominated *ransoms;*[9] because the penalty must otherwise fall upon a man's *person*, unless it be redeemed, or ransomed by a pecuniary fine; according to the maxim—*qui non habet in crumena luat in corpore.*

The twenty-ninth chapter of the charter is thus entitled:—"*None shall be condemned without trial—Justice shall not be "sold, or deferred.*"[0]

No provisions of the great charter have been viewed by posterity with greater reverence than those contained in this chapter; which explicitly declares the protection which every man might expect from the laws of his country.

That part of the statute contained in these words *nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terræ*—has received various interpretations.—Lord Coke conceives *ibimus* to signify the process of the court *coram rege;* and the *mittemus* that of any court which derives its authority from a writ sent to it. In Ruffhead's statutes at large, the words are rendered "*nor will we pass upon him, nor condemn him.*" And this exposition of Lord Coke is given, by way of illustration.

The words "*per legale judicium parium suorum*" it has been commonly supposed referred to the trial by jury. And Sir William Blackstone, with many others have fallen into this error.[1]

8. 4 Blk. Com. 380.

9. Yet where *fine* and *ransom* are both mentioned in a statute, it is held that the ransom shall be treble, at least, to the fine. Gibb. Exch. c. 5.

0. The words in the original are, "*Nullus liber homo capiatur, vel imprisonetur, aut dissesiatur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exulet, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus nisi per legale judicium parium suorum vel per legem terræ. Nulli vendemus, nulli negabimus, aut defferemus rectum, vel justiciam.* See Blk. Law Tr. Mag. Ch. IX Hen. III. p. 71. 1 Ruff. 8.

1. 4 Blk. Com. 349. Wood's Inst. 610.

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The better opinion however seems to be, that the *judicium parium suorum* [judgment of his peers] had reference to the *comites*, or *barones* [earls, or barons]: And that the correct exposition of the sentence is,—*nor will we take possession of his effects, but by, the judgment of his peers, or by some legal process, adapted to the circumstances of the case.*[2] "The trial by jury, says Mr. Reeve,[3] was never spoken of in those days as *judicium;* much less *judicium parium.* We hear of *veredictum juramentum legalium hominum, jurati de vicineti* and the like, all expressive of some sworn truth, and of the persons who swore it, coming from the vicinage; whereas the *pares regni* gave *judgment;* and not upon oath; so did the *sectatores,* in the county and other courts, who were the *pares* [equals] of all the *liberi homines de comitatu* [free men of the county] and came from the body of the county, and not from the *vicinage.*

The trial by jury, or by twelve men sworn to speak the truth, may be considered as a novelty introduced by the Normans.[4]

For a long period after its introduction it bore but a distant resemblance to what it is at the present day. In its early stages it was in effect a trial by *witnesses:* the jury determined from their own knowledge, without any witnesses being adduced them; and as they came from the vicinage, they were supposed to be best capable of ascertaining the facts. If they declared that they knew nothing of the fact, others were put in their place, who did know it. If they were not *unanimous* the court exercised the power of *afforcing the assize,* as it was called, by adding others,[5] till twelve were found to be unanimous; or to compel the assize to agree by keeping them without meat, or drink, till they agreed. Another method was to enter the verdict of the major and lesser part of the jurors; and their judgment was given *ex dicto majoris partis juratorum.*[6]

2. About the time that *Magna Charta* was obtained in England, many provinces in France obtained charters, and concessions from their kings:—amongst the rest Normandy obtained one, which is called by *Boulainvilliers* the "French Magna Charta." There is in this charter a remarkable coincidence, in substance, and even in expression, with the 29th chapter of Magna Charta. It provides that all nobles shall be tried "*par leur pairs*" [by their peers]—and that all causes shall be determined "*par la loy de pays*" [by the law of the land]. These laws made so very near the same time, and by the same description of persons, viz. the powerful barons (it is remarked) seem to be expository of each other: And that the trial *Per Pares* in the 29th chapter of Magna Charta related to the trial of the barons by their peers. Obs. on the Stat. 26. Boulainvilliers, Etat de France, vol. III. p. 56.

3. 1 Eng. law, p.

4. 1 Reeve Eng. law, 83 to 88.

5. The adding of jurors must have been productive of great delay; and for this reason it probably gave place to the practice of afforcing the assize. Obs. on the Stat. 20.

6. See Bracton Tit.—*De Assiza nova depessina*—lib. IV. c. 19. p. 185.b

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It was many years after the reign of Edward I, when the *second*, now called the *petit* jury, began to be considered rather as judges of the presumption, arising from the finding of the presentors, and not as witnesses, that a kind of evidence used to be exhibited to them. The first evidence made use of in this way consisted of written papers, such as depositions, examinations, &c. this led by degrees to a sparing use of *viva voce* [oral] testimony. It was long before they thought it necessary to bring evidence into court, and it was still longer before they allowed the prisoner to disprove the indictment by any thing else than the twelve *jurati*. When he might be permitted to do so, it was considered as a high favor depending on the discretion of the court, which was granted or withheld, according as the charge had been made out by the prosecutors. The witnesses of the accused were never on oath, which naturally left a pretence for discrediting the testimony.

The institution of a grand jury probably took place sometime in the reign of Henry III. They were originally intended to give information from their own knowledge of offences committed in their precincts to the justices in eyre.

The latter part of this chapter, wherein the king declares that he will neither sell, deny or delay to any man, a due administration of the law, had become very necessary, to prevent abuses of the crown, with regard to the administration of justice, which had been carried to a shameful extent. "It was usual to pay a fine anciently for *delaying* law proceedings; this was sometimes extended to the defendant's life: sometimes fines were paid to *expedite* proceedings, and to *obtain right*. And in some cases the parties litigant offered part of what they were to recover, to the crown. Madox collects many instances of fines, *for the king's favor*, and there is a particular instance of the dean of London paying twenty marks, as a fine, to the king, that he might *assist him against the bishop in a lawsuit*.[7] The county of Norfolk (in the reign of Henry VI) paid an annual composition, at the exchequer, that they might be *fairly dealt with*."[8]

The framers of the constitution of Pennsylvania doubtless had in view this chapter of Magna Charta, when they provided that right and justice should be administered, without sale, denial, or delay. And that no one should be deprived of his life, liberty, or property, unless by the judgment of his *peers*] evidently intending the *trial by jury*] or the law of the land.[9]

7. To the disgrace of later times it is asserted that king Charles II. in appeals to the house of lords, used to go about whilst the cause was hearing, and solicit particular lords, for the appellant, or the respondent. See *Burnet's Hist.*

8. See Madox's Hist. of the Exchequer, p. 205. This county was always represented as litigious; and probably with a view to suppress litigation, the Stat. of H. VI. reduced the number of attornies allowed to practice in that county to eight. Ib.—Obs. on the Stat. 21.

9. It was probably a fortunate mistake, as regarded the liberties of the English nation, that the trial Per Pares [or by one's peers] should have been expounded to extend to the trial of all persons by a jury. *Obs. on the Stat. 26.*

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STATUTE OF MARLEBERGE.

a) 52 HEN. III. c. 23. A.D. 1267.

A Remedy against Accountants.—Fermors shall make no waste.

IT is provided also, that if bailiffs, who ought to make account to their lords, do withdraw themselves, and have no lands nor tenements, whereby they may be distrained;*a* then they shall be attached by their bodies, so that the sheriff, in whose bailiwick they may be found, shall cause them to come to make their account.

The writ of account (de computo) lies against one as guardian, bailiff, or receiver, to compel the defendant to exhibit and settle his accounts: It commands him to render a just account to the plaintiff, or to shew to the court, good cause to the contrary.[1]

By the ancient common law, this remedy was confined to the parties themselves, because they alone were presumed to be privy to the matters of account between them; and therefore the writ could not be sued out by executors. To this rule however there were some exceptions; for this remedy might be had by the executors of a *merchant per legem mercatoriam:*[2] so of the successors of a prior, for the body corporate never dieth;[3] and the king may maintain an action of account against the executors of any accountant.[4]

a The mischief before this statute appears to have been, that whereas the last process in an action of account was distress infinite, accountants who had no lands, or tenements whereby they might be distrained, frequently became vagrant, flying into secret places, and sometimes into foreign countries, whereby the plaintiffs became remediless.[5]

a) This Statute is not contained in the report of the judges; and yet the 6 Edward I. c. 5. by which this statute is enforced, is declared to be in force in Pennsylvania. See title WASTE.

1. Fitz. Nat. bre. 267.
2. 2 Inst. 404. Fitz. Nat. Br. 117 F. vide Ent. 75.
3. Ib.
4. As to the king charging one as his bailiff, see the earl of Devonshire's Case 11. Co. 89.a
5. 2 Inst. 143. Nat. Br. 117.b 1 Vin. Abr. (R) Account p. 166.

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b II. Also fermors, during their terms shall not make waste, **sale* nor exile of house, woods and men, nor of any thing belonging to the tenements, that they have to ferm, without special license had by writing of covenant, making mention, that they may do it; which thing if they do and thereof be convict, they shall yield full damage, and shall be punished by amerciament grievously.

Fitz. brief 791, 806.—Fitz. process 203.—Fitz. exigent 12.—1 Roll. 182.—2 Inst. 143. **Not in the original.* Mirror 320—5 Co. 18—Dyer f. 281—Fitz. Wast. 12, 22, 30, 32, 37, 42, 43, 46, 47, 48, 53, 68, 69, 76, 78, 82, 88—4 Co. 63. Rast. 689. 2 Inst. 144. Enforced by 6 Edw. I. stat 1. c. 5. which gives treble damages. See further 11 H. 6. c. 5. against whom waste is maintainable.

A writ founded on this statute is called a *monstravit de computo;* and authorised the attaching, or arresting the defendant's body, where he had no lands, or tenements.[6]

This is the first statute that authorised a *capias* in any case of civil injury without force.[7]

If the accountants had *any lands*, or tenements whereby they might be distrained, though not to the *value of the account*, they were exempted out of this statute, but such lands and tenements must be *for term of life at the least*, for by the words "*lands and tenements*," in the statute is intended an estate of freehold.[8]

If the accountant however have no lands or tenements, in the *county* where the writ is brought, the writ is good, notwithstanding he might have land in another county.[9]

The statute extends to a *receiver* as well as to a *bailiff*.[10]

b The second section of this statute relates entirely, to the subject of WASTE, and will be treated of under that head.

6. 2 Inst. 143, 4. The writ is mentioned in the Register, Fleta and other ancient books, and lies *in any county where the accountant may be found.* See 2 Inst. 143. Fitz. Nat. Br. 266. It is said however that this writ ought not to be granted but upon oath made in chancery.

7. 3 Black. Com. 281. Sayer's Law of Damages 42.

8. 1 Vin. Abr. 166. 2 Inst. 144.

9. ib. ib.

10. ib. ib.

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WESTMINSTER THE SECOND. A.D. 1285.

* 13 EDW. I. CHAP. XI.

a) *The masters remedy against their servants and other accountants.*

CONCERNING servants, bailiffs, chamberlains,[1] and all manner of receivers, which are bound to yield account, it is agreed and ordained, that when the masters of such servants do assign auditors to take their account, and they be found in arrearages upon the account, all things allowed which ought to be allowed, their bodies shall be arrested, and by the testimony of the auditors of the same account, shall be sent or delivered unto the next gaol of the king's in those parts;—(2) and shall be received of the sheriff or gaoler, and imprisoned in iron, under safe custody, and shall remain in the same prison at their own cost, until they shall have satisfied their master fully of the arrearages.(3) Nevertheless, if any person be-

This act was designed to extend, and render more efficient the remedy by action of account.

Every writ of account must be brought against one as BAILIFF, RECEIVER, or GUARDIAN; and it lieth not against one as servant, apprentice, comptroller, surveyor chamberlain, or the like, unless he be charged as bailiff or receiver.[2]

No man is bound to account, unless *by the act of law*, as guardian in soccage, or *by his own will*, as where he becomes a bailiff or receiver.[3]

[*All things being allowed, &c.*] By these words the plaintiff in a writ of account may be found in arrear to the accountant, in which case the auditors find, that the defendant is not in arrear; and that the plaintiff is in surplusage, to such an amount. And upon this finding an action of debt lies founded on the record of the auditors.[4]

[*Their bodies shall be arrested.*] We have observed that the statute of Marleberge authorised an arrest, in certain cases prior

a) *Lord*, or *master*, by which is to be understood the party to whom another is accountable, as his bailiff or the receiver of his monies: so by the word *servant* is not to be intended a menial or domestic, but one who being employed by, or for another, is accountable to him for monies received in such agency. 1 Inst. 172. 2 Inst. 379, 380.

1. Chamberlaines (*camerariis*) receivers were anciently so called from the usual places of deposit of monies received.
2. Co. Littl. 172a 90.a 2 Cro. 219, Fitz. Nat. Br. 118.—2 Inst. 379, 380.
3. 2 H. 4. 12b.—1 Vin. Abr. 141.
4. 2 Inst. 380.

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ing so committed to prison, do complain, that the auditors of his account have grieved him unjustly, charging him with receipts that he hath not received, or not allowing him expenses or reasonable disbursements, and can find friends that will undertake to bring him before the barons of the exchequer, he shall be delivered unto them; (4) and the sheriff (in whose prison he is kept) shall give knowledge unto his master, that he appear before the barons of the exchequer at a certain day, with the rolls and tallies by which he made his account; and in the presence of the barons, or the auditors that they shall assign him, the account shall be rehearsed, and justice shall be done to the parties, so that if he be found in arrearages he shall be committed to the *fleet* as above is said. (5) And if

to the settlement of the account, by the writ of *monstravit de compoto*.—The arrest authorised by this act took place after the settlement; and was in nature of an *execution*, founded on the judgment of the auditors. The commitment must be under the hands and seals of the auditors, and it is requisite that the commitment should be to the *next jail*, whether it be in the same county or not: for the statute, being in nature of a commission, must be strictly pursued.[5]

[*In iron, under safe custody.*] This was a severity not authorised by the common law; and even under this statute, it is held, that it could only be resorted to, when the safe-keeping of the prisoner required it.[6]

[*That the auditors have grieved him unjustly.*] As if he should alledge that they had charged him with receipts which never came to his hands, or had not allowed him reasonable disbursements and could find persons who would become *manucaptors* for him, and undertake to bring him before the barons of the exchequer, he was delivered to them, that he might prosecute his writ of *exparte talis* which writ is in nature of a commission, to the barons of the exchequer, who are the sovereign auditors of England. If by them he be found in arrear he shall be in execution again.[7]

This writ however, did not lie where a man prosecuted a *writ of account*, and the auditors assigned by the court made improper charges against the accountant, or refused the allowances which he was legally entitled to; but in such case the only remedy is by application to the court, who will grant such relief as the party may be entitled to.[8]

5. 2 Inst. 380.
6. 2 Inst. 381.
7. ib. 1 Vin. Abr. 168. Fitz. Nat. Br. 261a.
8. ib. tit. "writ of *exparte talis*." 2 Inst. 381.

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he flee, and will not give account willingly, as is contained elsewhere in other statutes, he shall be distrained to come before the justices to make his account, if he have whereof to be distrained.(6) And when he cometh to the court, auditors shall be assigned to take his account, before whom, if he be found in arrearages, and cannot pay the arrearages forthwith, he shall be committed to the gaol to be kept in manner aforesaid.(7) And if he flee, and it be returned to the sheriff that he cannot be found, exigents shall go against him from county to county, until he be outlawed, and such prisoner shall not be replevisable.(8) And let the sheriff or keeper of such gaol take heed, if it be within a franchise or without, that he do not suffer him to go out of prison by the common writ called *replegiare*, or by other means, without assent of his master;(9) and if he do, and thereof be convict, he shall be answerable to his master of the damages done to him by such his servant, according as it may be found by the country, and shall have his recovery by writ of debt.(10) And if the keeper of the gaol have not wherewith he may be justified, or not able to pay, his superior that committed the custody of the gaol unto him, shall be answerable by the same writ.

Co. Lit. 295a—2 Inst. 378—Fitz. accompt, 96, 109—Fitz. avowry, 220—Regist. 137—Rast. 14, &c. The accomptant's relief. Fitz. accompt, 23, 26, 47, 74, 106—52 H. 3. c. 23—29 Ed. 3. f. 5. An exigent against an accomptant 17 Ed. 3. f. 59.—Escape of an accomptant 1 R. 2. c. 12—7 H. 4. c. 4—2 Leon. 9—Fitz. det. 172—Fitz. Issu. 160. Bro. Det. 103—2 Bulltr. 321.

[*Auditors shall be assigned.*] After the judgment in a writ of account *quod computet* [that the defendant account] the court assign auditors to take the account, who are usually two of their own officers.[9]

[*If he flee, and it be returned, &c.*] Here process of *outlawry* is given, in account.[10]

[*By writ of debt.*] At the common law an action of *debt* for an escape could not be maintained, but the party was obliged to resort to a special action on the case for the injury sustained and such is the remedy at the present day for escapes of persons taken upon mesne process, or before judgment is obtained; but this act first gave the action of *debt* against the gaoler who let any one escape who was committed to prison for arrearages of account found by auditors. The statute 1 Richard II. c. 12[11] afterwards gave an

9. Lut. 48. Sav. 54. Br. jud. 17.
10. 2 Inst. 381.
11. 1 Ruff. 337—see also the statute in this collection.

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action of debt against the *warden of the fleet prison*, for escapes of persons committed in execution. Upon the equity of these two statutes it hasbeen held that if any gaoler or sheriff permits a debt-to escape or who is charged in execution for a sum certain, he is liable to an action of debt, at the suit[1][2] of the creditor for the sum so liquidated and ascertained.

WESTMINSTER THE SECOND. A.D. 1285.

* 13 EDWARD I. C. XXIII.

Executors may have a writ of account.

EXECUTORS from henceforth shall have a writ of account, and the same action and process in the same writ as the testator might have had if he had lived.

2 Inst. 404—Fitz. executors 97—4 Ed. 3. c. 7, which gives executors an action of trespass for wrong done to the testator. And 25 Ed. 3. st. 5. c. 5. extends it to executors of executors.

The inconvenience experienced, in consequence of executors not being enabled to sustain a writ of account, was removed by this statute. The statute 25 *Edw. III. c.* 5[1] extended the remedy to the executors of executors: the 31 *Edw. III.* c. 11[2] gave it to administrators. And by the 3 *Anne* c. 16[3] it may be brought against the executors and administrators of every guardian, bailiff and receiver, and by one joint-tenant or tenant in common, his executors and administrators against the other for receiving more than his share and against their executors and administrators.

In an action of account the defendant must be charged in his proper character. Thus a guardian, or bailiff[4] cannot be charged as a receiver; for a *receiver*[5] shall not be allowed his expenses,[6]

12. 2 Inst. 382. 3 Black. Com. 165. 11 Rep. 99. Cro. Eliz. 625.—8 Rep. 44b.—*Wittingham's case*—Plow. Com. 38a.

1. See the statute tit. "Executors and Administrators."

2. See this stat. under same head.

3. See the statute title Amendment.

4. A bailiff is one who hath administration and charge of lands, goods and chattels, to make the best benefit for the owner; against whom an action of account lies for the profits, which he hath raised, or, by his care and industry, reasonably might have raised, his reasonable charges and expenses being deducted. Co. Lit. 172.a

5. A *receiver* is one who merely receives money, for the use of another to render an account. Co. Lit. 172.a

6. This only applies to a mere receiver; for if he is put to trouble and expense, he shall be compensated. 10 mod. 23. *Bishop* v. *Eagle*.

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but guardians and bailiffs are entitled to an allowance for their trouble and expenses: yet where they become such of their own wrong, or depart from the authority given to them, they are not entitled to allowance, nor for losses, in consequence of negligence, or gross ignorance.[7]

A person may be charged as bailiff and receiver of several things in the same action.[8]

When one is charged as receiver, it is necessary to alledge by whose hands the money was received.[9]

The action of account will not lie against an infant; nor generally where there is no privity between the parties; as if the bailiff or receiver of A. make a deputy, A. shall not have account against the deputy.[10]

A son is employed and paid by his father, who is an agent; though the son be so employed to the full extent of the agency, yet he is only accountable to his father, who employed him, and not to his father's principal.[11]

In account *bail* is not of course, till after the first judgment; but it may be ordered.[12]

In this action there are but three pleas in bar. 1 *Ne unques son bailife, or receivor* [Never bailiff, or receiver] 2 *Plene computavit* [That he hath fully accounted] and 3 *A release*. Other matters must be pleaded before the auditors.[13]

The two judgments in account are distinct and independent; insomuch that, upon error, the latter judgment may be reversed and the first affirmed.[14]

Upon judgment *quod computet* being rendered, a *capias ad computandum* may be awarded, to bring the defendant in to account.[15]

After auditors are assigned by the court the defendant shall be committed till he find manucaptors *ad computandum*.[16] If defendant does not appear afterwards, a scire facias goes against the *manucaptors*.

7. Co. Lit. 172.a 1 Roll. 119, l. 10, 45. 1 Leon. 219.

8. Fitz. Nat. Br. Fit. Writ of account. 1 Roll. 119 l. 15.

9. However it may be as to a common receiver it is not necessary in an action by one partner against another. In such case if it be proved 1, That a partnership existed. 2, That defendant was the acting partner, and 3, That he received any part of the sum from any of the persons mentioned in the declaration, it is sufficient to entitle the plaintiff to the first judgment, *quod computet*. 1 Dal. Rep. 339. see 1 Inst. 172.a For monies received *ad merchandizandum*, a man ought to be charged as *bailiff*, Cro. Eliz. 83—4 Leon. 39. 2 Leo. 126—

10. Co. Lit. 172. 1 Roll. 117. l. 10. Fitz. Nat. Br. tit. *writ of account*.

11. 1 Fr. Vez. Rep. 292 Plumner v. May, 1 Vez. 426—2 Vez. 492.

12. 1 Cro. Pr. 29. 1 Bac. Abr. 209.

13. 3 Wils. 113, an *accord with satisfaction*, is a plea in bar. *For the pleadings at length in an action of account render* see 3 Wils. 75.

14. 2 Bac. Abr. 2 Str. 1055. Cas. temp. Hardw. 345. S. C.

15. Cro. El. 82, 806. 1 Leon. 87.

16. Co. Ent. 46. Lect. 48, 49, 60. Cro. Eliz. 82.

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He shall be bailed to appear *de die in diem*[17] before the auditors, and afterwards in court, and if he be found in arrear, that he pay or render himself.[18]

The auditors are invested with authority to convene the parties before them *de die in diem*, at any day, or place that they shall appoint, till the account is determined. The time by which the account is to be settled is prefixed by the court; but if it be of a long and confused nature, the court, on application, will enlarge the time. If either of the parties think that the auditors have done him injustice, he may apply to the court; and if the defendant denies any article, or demurs to any demand, it is to be tried and determined in court.[19]

After judgment *quod computet*, the defendent is precluded from alledging any matter as a defence before the auditors, which might have been pleaded to the action: neither can any thing be pleaded before auditors contrary to what was pleaded at bar and found by the verdict.[20]

Before the auditors the defendant may plead, and the plaintiff or defendant may join issue, or demur upon the pleadings, which shall be certified to the court and there tried or argued.[21]

Before the auditors he may plead that he has paid to the plaintiff or his order. That he has expended for plaintiff's maintenance; or accounted to the plaintiff himself; or that the thing charged was lost by inevitable accident; as that he was robbed without his default; that in a tempest the goods were necessarily cast into the sea; that the property was seized by a public enemy, &c.[22] Articles arising pending the suit, it is said, shall be taken into consideration by the auditors.

A guardian, bailiff, or receiver shall be allowed upon account all that may have been lost by unavoidable accident.[23]

As the first judgment should be *quod computet;* if the jury find for the plaintiff, and assess damages and costs; and judgment is entered accordingly; *fi. fa.* executed and money levied; the judgment and execution shall be set aside, on motion, and the money restored with costs.[24]

In this action both parties are actors, and either may bring on the cause to trial.[25]

If defendant refuses to account, judgment shall be that the plaintiff recover according to the value mentioned in the declaration.[26] So if he gives an imperfect account[27] and there is no need of a writ of inquiry for the value.[28]

17. *From day to day.*

18. Lut. 49, 60. Cro. Eliz. 82. 1 Com. Deg. 478.

19. Mod. 42—Br. Law. 24—Co. Ent. 46—2 Inst. 380—Andr. 19—1 Bac. Abr. 24.

20. 3 Wils. 73. Godfrey v. Saunders. Co. Eliz. 830.—1 Rol. Abr. 120. l. 7.

21. Lut. 50. 1 Com. Dig. 93.

22. 1 Rol. 87. Lut. 50. Cro. Eliz. 83, 84. Lut. 59.—Co. Lit. 89.b—4 Co. Rep. 84 a 1 Roll. ab. 124 l. 33.——The course is for the auditors, to certify the issues as well of law as of fact to the court, where they are decided; and the auditors regulate their final report by the result. Exceptions to the final report are irregular and of no effect. 5 Binney 433.

23. Co. Lit. 89.b

24. Hughes Burgess T. 10 & 11 Geo. II. Har. Cases in Br. 394.—And. 19.

25. 1 Peere Will. 263.

26. R. Cro. Eliz. 806.—Winch 5.

27. *Semb.* Lut. 63.

28. Lut. 63.—Cro. Eliz. 806.

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It is said in the English books, that the proceedings in this action being difficult, dilatory, and expensive, it is now seldom used; especially as the party has in general a more beneficial remedy by a special action of assumpsit, or an action for money had and received; or, where the matter is of an intricate nature, by resorting to a court of equity.[29]

The principal reason however, for the disuse of the action of account render, is the facility with which redress may be had in chancery, by filing a bill for discovery and account, in cases which might otherwise be the subject of this action.

As no court of chancery exists in Pennsylvania, it is conceived that, the action of account would afford, in a variety of instances, a remedy more convenient and effectual to the parties than those which are substituted for it; and as respects expediting the business of our courts, the consequence of its frequent adoption must have a beneficial effect.

All who are any way conversant with the proceedings of courts have witnessed the extreme difficulty, and the great consumption of time attending the investigation of intricate accounts exhibited to a jury.

Is it not probable that two accountants acting in the capacity of *auditors*, possessing the power with which the law invests them, and acting under the controul of the court, would adjust an intricate mercantile transaction in a shorter time, and more to the satisfaction of all concerned, in a private apartment, than could be done by a jury at the bar?

In the impressions which I entertain respecting the action of *account render* the utmost confidence is felt, as they appear to coincide with the opinion of one of the most profound lawyers, and able judges that ever dignified the bench.—"The necessity," (he observes) "of a liberal extension of the action of *account render* between joint partners, is apparent, not only from the nature of the case, but from this circumstance also, that the parties would otherwise be destitute of any means to arrive at justice. For the action on the case, though beneficially construed in modern practice, would certainly be inadequate; and we have no court of chancery to interpose an equitable jurisdiction."[30]

29. Bul. N. P. 127.—1 Tidd. Pr. 1.—1 Bac. Abr. tit. account F. p. 21, 20. where it is said "the action of account is now little used or understood."

30. See *James v. Brown* 1 Dallas Rep. 339.

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ALIEN.

* 25 EDWARD III. STAT. 2. A.D. 1350.

B) *Of those that be born beyond sea.*

(5) AND that all children inheritors, which from henceforth shall be born without the ligeance of the king, whose fathers and mothers at the time of their birth be and shall be at the faith and ligeance of the king of England, shall have and enjoy the same benefits and advantages, to have and bear the inheritance within the same ligeance, as the other inheritors aforesaid in time to come; so always that the mothers of such children do pass the sea by the licence and wills of their husbands.

The children of others born beyond the sea 42 Ed. III. c. 10—Denizen Br. 14—1 R. 3. f. 4—Dyer 224—Co. Lit. 8—4 Geo. II. c. 21.

The right of citizenship depends upon the municipal laws.—Every community has an equal right to establish such regulations upon this and all other subjects as by them may be deemed expedient or agreeable. Nations being free, independent and equal, each has a right to determine for itself in the administration of its affairs; and respecting the intrinsic justice of its regulations on this subject, other nations have no right to interfere. But a nation has no just power to establish any regulation tending to abridge the rights of other nations, or the imprescriptable rights of mankind. The one would derogate from the equality of nations, the other would violate the rights of nature. Both would be contrary to the natural or necessary law of nations.

With these restrictions however, it is the right of every nation to determine by what means any one shall become entitled to the quality of a citizen, or to admission in tothe body of the political society.

On this subject different nations have various regulations; as well in regard to the right of citizenship derivable from the place of nativity, as to the *naturalizing* of foreigners.

B) The first section of this statute contains merely the preamble which adverts to the confusion that had been the consequence of the late pestilence. The 2nd sect. notices that doubts had arisen whether children born beyond sea could inherit. The 3d sect. declares that the children of the king, wherever born shall inherit.—The 4th sect. naturalizes certain persons by name. The 5th sect. which is contained in the text, is the only part of the statute interesting to us. The 6th and last section provides for the trial of questions of bastards, of persons born beyond sea.

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"The natives or *indigines*," says Vattel,[1] "are those born in the country of parents who are citizens." These become citizens, it is believed in every community merely by their tacit consent.

By the laws of England, however, not only the children of *citizens*, but of aliens born within the British dominions become citizens, by birth, provided at the time of their birth their parents were under actual obedience to the king.[2] An alien is one who is born out of the dominions of the king.[3] To this latter rule however, there were some exceptions by the common law; and more have been introduced by statute. The children of ambassadors, born in a foreign country are not aliens, if their parents be english according to the common law.[4]

By the statute 25 Edward III. (in the text) provision is made, in favor of the children of subjects, born in foreign countries.—This provision of the law was probably designed to favor commerce; hence it has been attempted in the construction of it, to restrict its application to the children of merchants and of persons going and continuing abroad with license.[5] But a more enlarged and liberal construction appears to have prevailed even in early times.[6]

If an English merchant goes beyond sea, and takes an alien wife the issue shall inherit *him;* so if an English woman goes beyond sea and takes an alien husband the children shall inherit *her*.—For though the statute be in the *conjunctive*, yet it hath been construed in the *disjunctive*.[7] And the statute 7 Anne c. 5 § 3, [8] is calculated to remove all doubts on the subject. By 4 Geo. II. c. 21, the statute of 7 Anne is explained, to children whose fathers at their birth were natural subjects of Great Britain, but not to children whose fathers, at their birth, were attainted of high treason in England, or Ireland, or liable, on their return, to the penalties of treason or felony; or were in the service of any foreign state at enmity with Great Britain. By the statute of 13 Geo. III. persons born out of the allegiance, whose fathers (by the 4 Geo. II. explaining 7 Anne) are entitled to the rights of natural subjects, shall also be natural subjects.

A man may be admitted to a limited participation of the rights of citizenship, by being made a denizen, which in England may be obtained by the king's patent; or he may be naturalized and thus become a citizen, and be entitled to the full enjoyment of the rights of citizenship.—These rights however, in England can only be conferred by act of parliament.

The act of 12 and 13 Will. III. c. 2, declares that even persons so naturalized shall be debarred of certain privileges; and by the stat. 1 Geo. I. S. 2. c. 4, it is declared that from thenceforward,

1. Law of nations, book 1, c. 19.
2. 7 Co. 1 to 28 Calvin's case. 1. Bac. Abr. tit. *Alien* A. p. 77. Vattel b. 1. c. 19.
3. 7 Co. *Calvin's case.*—Cro. Eliz. 3. Sid. 198.
4. 7 Co. 18.
5. Lit. Rep. 47.—Ber. tit. denizen 6.—1 Bac. Abr. title Alien A.
6. Cro. Car. 601. *Bacon v Bacon* Lit. Rep. 22, 24—Sid. 198. Vent. 427.
7. 1 Bac. Abr. tit. Alien A.
8. See statute in the text.

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none shall be naturalized unless the bill contain a clause to declare that such persons should not be of the privy council; or a member of either house of parliament, or to take any office or place of trust, either civil or military, or to have any grant of lands, tenements or hereditaments from the crown to himself, or any in trust for him; and that no bill of naturalization shall be received in either house of parliament unless such clause be first inserted.[9]

The disadvantages of aliens are many:—by the common law they can neither hold lands by purchase, descent, dower, or guardianship. And as an alien is incapable of inheriting himself, so he cannot be inherited; nor can an inheritance be derived through him; as if the grandfather be born in England—the son an alien—the grandson born in England—the grandson cannot inherit the grandfather, because he must in such case represent the father who cannot be represented.[10] The eldest son an alien, the younger brother born in England shall inherit the father.[11]

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11 & 12 WILLIAM III. CAP. 6. A.D. 1700.

An Act to enable his Majesty's natural born subjects to inherit the estate of their ancestors, either lineal or collateral, notwithstanding their father or mother were aliens.

WHEREAS divers persons, born within the king's dominions, are disabled to inherit and make their titles by descent from their ancestors, by reason that their fathers or mothers, or some other ancestor (by whom they are to derive their descent) was an alien, and not born within the king's dominions: For remedy whereof, be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That all and every person or persons, being the kings natural born subject or subjects within any of the king's realms or dominions, shall and may hereafter lawfully inherit and be inheritable as heir or heirs to any honours, manors, lands, tenements or hereditaments, and make their pedigrees and titles by descent

9. But when any foreigner, distinguished by eminence of rank, or services, is naturalized, it is usual first to pass an act for the repeal of these statutes, in his favor, and then to pass an act of naturalization without any exception. See Harg. Co. Litt. 129.a note 1.

10. Co. Litt. 8.—Hard. 224.

11. ib.

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from any of their ancestors lineal or collateral, although the father and mother, or fathers or mothers, or other ancestor of such person or persons, by, from, through, or under whom he, she, or they shall or may make or derive their title or pedigree, were or was, or is or are, or shall be born out of the king's allegiance, and out of his majesty's realms and dominions, as freely, fully, and effectually, to all intents and purposes, as if such father or mother, or fathers or mothers, or other ancestor or ancestors, by, from, through, or under whom he, she, or they shall or may make or derive their title or pedigree, had been naturalized or natural born subjects, or subjects within the king's dominions; any law or custom to the contrary notwithstanding.

There was an extreme hardship in the law on this subject, as respected deriving an inheritance through an alien, and the stat. in the text provided a most desirable remedy.

An alien, however, although he cannot hold land by purchase, may lease a house for his habitation, for years, for the encouragement of commerce; but if he die, or depart the kingdom, before the lease expires, it goes to the king.[12]

An alien friend may maintain personal actions, but neither real nor mixt actions. And an alien enemy,[13] *residing in the kingdom*, with a safe conduct, or under the king's protection, may maintain a personal action.[14]

The captain of an enemy's ship has maintained an action upon a ransom bill.[15]

If an alien enemy bring a personal action, the defendant may plead in *abatement* or in bar that the plaintiff is an alien enemy.[16]

12. Co. Litt. 2.b *Contra* And. 25. N. Bendloe 36. And see in Cro. Car. 8. a case where administration to an intestate alien was granted to his nephews and nieces who were also aliens, and part of the estate consisted of leases for years. See also Harg. Co. Litt. 2. n. 8.

13. Whether a man be, at any particular time, an alien friend or alien enemy, depends not upon himself, but upon the government to which he belongs. Who shall be said to be an *alien enemy*, and how it shall be tried, see 9 Co. 31.—*That it shall be tried by the record if he be in amity or not, viz. a proclamation of war.* It is usual now on declaring war, to qualify it in the proclamation, by permitting the subjects of the enemy, resident in England, to continue so long as they peaceably demean themselves; whilst they so continue they are deemed *in effect*, alien friends. Harg. Co. Litt. 131.b note 1.—See also Bac. Abr. 83. Cro. Eliz. 142.—Owen 45. Salk 46, p. 12.

14. *Alter* of one commorant in his own country.—See Salk 46, p. 11. Wells and Williams Ld. Ray. 282. Fost. Cr. Law 186. But an alien enemy who has such protection must plead it. Farest. 150. Sylvestu's case Ld. Raym. 283 853. 2 Stra. 10 82.

15. 3. Bun. 1734. *Record v Bettenham.*

16. Co. Litt. 129. Lutw. 38. 3 Inst. Cl 16. *Alien enemy* is a good plea in bar to the action. 6 Term. Rep. 23. 35.

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7 ANNE CHAP. 5. A.D. 1708.

An Act for naturalizing foreign Protestants.

§ III. AND be itfurther enacted, by the authority aforesaid :— That the children of all natural born subjects, born out of the legiance of her majesty, her heirs and successors, shall be deemed adjudged and taken to be natural born subjects of the kingdom, to all intents, constructions and purposes whatsoever.

Children of natural born subjects born abroad, to be deemed natural born subjects:—explained by 4 *Geo.* 2 *c.* 21.[1]

Prior to the American revolution, the stat. 13 Geo. II. c. 7,[2] prescribed the general rule for naturalizing such foreign Protestants, and others therein mentioned, as were settled, or should settle in the colonies. An act of assembly was passed in 1742–3, extending, under certain formalities, the rights of naturalization to persons who, though not of the society called Quakers, conscientiously refused to take an oath.

On the establishment of the revolution, these provisions were superseded by a constitutional declaration in the old frame of government, by which every foreigner, of good character, coming to settle in Pennsylvania, having first taken the oath of allegiance, was enabled to purchase and hold real estates; and after one year's residence was invested with all the rights of a natural born citizen, except that he was not capable of being elected a member of the legislature, till after a residence of two years. During the continuance of the test laws, the same oath of allegiance was prescribed to aliens who wished to acquire, and to natives who wished to exercise the rights of citizenship; but when the test laws were abolished as to the inhabitants in general by the act of 13th March 1789,[3] a new test was therein prescribed to emigrants, referring to the constitutional provision on this subject.[4]

1. 6 Ruff. St. at large p. 339.
2. ib p. 384.
3. The act of 13th March, 1789, is extinct. Being intended merely to carry into effect the 42d section of the old constitution, when that which was the foundation, was done away, the superstructure was likewise virtually destroyed. See 4 St. Laws—Sm. Ed. 363—2 Dal.—Rep. 373—*U. S. v Villato.*
4. Some other acts were passed relative to foreigners, which are now no longer in force. An act of 11th Feb. 1789, made it lawful for any foreigner (from that time till 1st Jan. 1792) not being a subject of a state at war with the United States, to purchase and hold lands within this commonwealth. This act expired by its limitation but was revived, and continued for three years, by the act of 8th March, 1792. And by an act of 12th Feb. 1795, it was continued for two years longer when it was suffered to expire.

By an act of 11th April, 1799, it was declared lawful for aliens, not being the subjects of nations at war with the U. S. and *who had declared their intentions* to become citizens agreeable to the laws of the U. S. to purchase and hold lands within the commonwealth. The 2§. of the act provides that aliens who have already made any *bona fide* contract, or received any patent or conveyance for or on account of the purchase of any lands, shall take and hold the same.

This act was supplied and repealed by the act of 10th Feb. 1807.—4 St. Laws—Sm. Edition 368.

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By the constitution of the United States however, the power of naturalizing foreigners is vested EXCLUSIVELY,[5] in the legislature of the United States.

The § 8 of the first article of the constitution, declares that congress shall have power,—"*To establish an uniform rule of naturalization, throughout the United States.*"

To carry into effect this power several acts of congress have since been passed on that subject: all of which, preceding that of the 14th April, 1802,[6] are hereby repealed and supplied.

By that, and subsequent acts of congress, the terms upon which the right of citizenship may be obtained by any alien, being a free white person, are prescribed, and are as follow:

First. He shall have declared on oath before the supreme, superior, district, or circuit court,[7] of some one of the states, or territories, or before a circuit or district court of the United States, *three years at least before his admission,*[8] that it was, *bona fide,* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly, by name, the prince, potentate, state or sovereignty, whereof such alien may at the time, be a citizen or subject.

5. I am aware that it has been made a question whether a foreigner may not be permitted to become a citizen of a particular state without being a citizen of the U. S. If it be affirmed that *he cannot; and that the power of naturalizing is exclusively vested in the Federal Government,* the position, it is conceived, is clearly defensible, as well from the obvious import of the constitutional provision, as from judicial decisions, and the legislative construction which it has received.

The language of the constitution is so plain and clear, that it seems difficult to ascribe to it any meaning but the one.—*The rule of naturalization shall be uniform throughout the U. S.* That is to say, —There shall not be one rule in one state, and a different rule in another; *but one rule shall pervade the whole;* and *congress shall establish that rule.*

A different construction would produce some strange incongruities.

Thus, state citizenship would enable those who were aliens by the laws of the U. S. to participate in the election of members of the legislature of the U. S. and of the president. For, by the constitution, senators of the U. S. are to be chosen by the state legislatures; and to vote for members of the House of Representatives of the U. S. or electors of president of the U. S. a person need only possess "*the qualifications requisite for electors of the most numerous branch of the state legislature.*" Further, by the § 2 of the fourth article, "The citizens of each state shall be entitled to all the privileges and immunities of the several states." Of consequence, one state according to this doctrine, might make citizens for all the rest of the states, not only without their consent, but against it.

The doubt seems to have originated, in the case of *Collet v Collet* [2 Dal. re. 295] determined by the Circuit court U. S.—But that decision was predicated upon the supposed existence of the act of 13th March, 1789, which had in fact ceased to exist with the old frame of government. See the case of U. S. v Villato, 2 Dal. rep. 370. Various other judicial decisions impugn the doctrine laid down in Collet v Collet. And the acts of the legislature of Pennsylvania respecting aliens, evidence an opinion that the power of naturalizing belonged exclusively to the U. S.

6. Laws U. S. vol. 6. p.

7. By the § 3 of the act of 1802, it is declared that every court of record in any individual state, having common law jurisdiction, and a seal, and clerk or prothonotary, shall be considered as a district court within the meaning of the act; and every alien who may have been naturalized by such court shall enjoy the same rights and privileges as if he had been naturalized in a district or circuit court of the U. S.

8. See act 22d March, 1816. *post.*

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Secondly. He shall, at the time of his application to be admitted, declare on oath or affirmation, before some one of the courts aforesaid,—That he has resided within the United States five years at least, and within the state or territory. where such court is held, one year at least: that he will support the constitution of the United States; and that he doth absolutely and entirely renounce, &c. [*as in the declaration of intention*] which proceedings shall be recorded by the clerk of the court.

Thirdly. The applicant for naturalization must prove to the satisfaction of the court,—1. That he has declared his intention of becoming a citizen, in the manner required by law, at least three years prior to his application to be naturalized. 2. That he has resided within the limits and under the jurisdiction of the United States *five* years, and that during such residence, he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same. But the oath of the applicant shall, in no case be allowed to prove his residence.[9]

Fourthly. If the applicant shall have borne any hereditary title, or been any of the orders of nobility, he shall in addition to the above requisites make an express renunciation of his title, or order of nobility; which renunciation shall be recorded in the said court. But no alien, who is a native citizen, denizen, or subject of any state or sovereign with whom the U. S. shall be at war, at the time of his application, shall be then admitted to become a citizen of the U. S.[10]

By the § 2, it is further provided, That, in addition to the directions aforesaid, all free white persons being aliens, who may arrive in the United States after the passing of this act shall, in order to become citizens of the United States, make registry and obtain certificates, in the following manner, to wit: Every person desirous of becoming naturalized shall, if of the age of twenty-one years, make report of himself; or if under the age of twenty-one years, or held in service, shall be reported by his parent, guardian, master or mistress, to the clerk of the district court of the district where such alien or aliens shall arrive, or to some other court of record of the United States, or of either of the territorial districts of the same, or of a particular state; and such report shall ascertain the name, birth, place, age, nation and allegiance of each alien, together with the country whence he or she migrated, and the place of his or her intended settlement; and it shall be the duty of such clerk, on receiving such report, to record the same in his office, and to grant to the person making such report, and to each individual concerned therein, whenever he shall be required, a certificate under his hand and seal of office, of such report and registry; and for receiving and registering each report of an individual or family he shall receive fifty cents: and for each certifi-

9. See act 14th April 1802.

10. This is agreeable to the law of nations.—But see note 13, *infra*.

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cate granted pursuant to the act, to an individual or family, fifty cents; and such certificate shall be exhibited to the court by every alien, who may arrive in the United States, after the passing of that act, on his application to be naturalized, as evidence of the time of his arrival in the United States.[11]

By an act of 22d March, 1816, it is provided, That the certificate of report and registry, required as evidence of the time of arrival in the United States, according to the second section of the act of the fourteenth of April one thousand eight hundred and two, entitled "An act to establish an uniform rule of naturalization, and to repeal the act heretofore passed on this subject;" and also a certificate from the proper clerk or prothonotary, of the declaration of intention, made before a court aforesaid, and required as the first condition, according to the first section of the said act shall be exhibited by every alien, on his application to be admitted a citizen of the United States, in pursuance of the said act, who shall have arrived within the limits, and under the jurisdiction of the United States since the 18th day of June one thousand eight hundred and twelve, and shall each be recited at full length, in the record of the court admitting such alien; otherwise he shall not be deemed to have complied with the conditions requisite for becoming a citizen of the United States. And any pretended admission of an alien, who shall have arrived within the limits and under the jurisdiction of the United States since the said eighteenth day of June, one thousand eight hundred and twelve, to be a citizen after the promulgation of this act, without such recital of each certificate at full length, shall be of no validity or effect under the act aforesaid.

Sec. 2. Provides, That nothing herein contained shall be construed to exclude from admission to citizenship, any free white person who was residing within the limits and under the jurisdiction of the United States at any time between the eighteenth day of June, one thousand seven hundred and ninety eight, and the fourteenth day of April, one thousand eight hundred and two; and who having continued to reside therein without having made any declaration of intention before a court of record as aforesaid, may be entitled to become a citizen of the U. S. according to the act of twenty-sixth of March, one thousand eight hundred and four, entitled "An act in addition to an act, entitled "An act to establigh an uniform rule of naturalization, and to repeal the act heretofore passed on that subject." Whenever any person without a certificate of such declaration of intention shall make application to be admitted a citizen of the U. S. as aforesaid, it shall be proved to the satisfaction of the court, that the applicant was residing within the limits and under the jurisdiction of the U. S. before the fourteenth day of April one thousand eight hundred and two, and has continued to reside within the same, or he shall not be so admitted. And the residence of the applicant within the limits and

11. Act of 1802, § 2. Laws U. S. 5 vol.

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under the jurisdiction of the U. S. for at least five years immediately preceding the time of such application shall be proved by the oath or affirmation of citizens of the U. S. which citizens shall be named in the record as witnesses. And such continued residence within the limits and under the jurisdiction of the U. S. when satisfactorily proved, and the place or places where the applicant has resided for at least five years as aforesaid, shall be stated and set forth, together with the names of such citizens in the record of the court admitting the applicant; otherwise the same shall not entitle him to be considered and deemed a citizen of the United States.

The children of aliens, born within the U. S. are aliens; they do not acquire citizenship by birth;[12] but remain in the condition of their parents; however, the naturalization of the father naturalizes all his children, who are in their minority and dwelling within the United States. And if after a compliance with the first condition, i. e. declaring his intention to become a citizen, and having pursued the directions prescribed in the second section of the act of 1795, he should die, before he is actually naturalized, the widow and children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law.[13]

12. In this particular our laws differ from the English laws; but are more consistent with reason and the laws of nature. "It is presumed," says Vattel, "that every citizen, on entering into society, reserves to his children the right of their becoming members. The country of the fathers is that of the children; and they become true citizens by their tacit consent."—"In order to be of the country it is necessary, that a person be born of a father who is a citizen, for if he is born there of a stranger, *it will only be the place of his birth, and not his country.*" "By the laws of nature alone children follow the condition of their fathers, and enter into all their rights; the place of birth produces no change in this particular, and cannot of itself furnish any reason for taking from a child what nature has given him." *Law of Nations, B. 1. c. XIX.*

The English rule upon this subject seems to be irreconcilable with the first principles of the law of nations; and when considered in connexion with the doctrine of perpetual allegiance, and its consequences, is at variance with the most obvious rights of nature; and the best feelings of the human heart.

If a country be conquered by Great Britain, say a part of France, and, after a time, the french should repossess themselves of the country, and expel the invaders. *This consequence*, by the english law, would result, that all the children born in that country during the time that it was subject to Great Britain, would be *british subjects*, though born of French citizens [8 Co. Calvin's case, p. 22.] By the laws of France they would be french subjects, being the offspring of french citizens or subjects.

The unfortunate beings who might come into the world during such a period, would be claimed by two countries and would not dare to defend either. If in defence of the land of their fathers, they opposed Great Britain they would be guilty of high treason, because they happened to draw their first breath, in that country, whilst it was under the dominion of England.—If, on the other hand, they opposed France, they would be subjected to suffer as traitors, because being the offspring of french citizens, they follow the condition of their parents, and are french citizens or subjects.

13. 7 Laws U. S. 136. Upon this same principle, an act of congress was passed during the late war authorising british subjects who had declared their intention to become citizens of the United States to proceed to the accomplishment of their object. For although it is contrary to the law of nations to naturalize the subject of any hostile nation, yet the process of naturalization having commenced during a state of peace, the intervention of war was not permitted to arrest its progress.—See Laws U. S. act of 29th July, 1813, c. 35. Where a british subject had reported himself, and declared his intention of be-

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It is provided, That the right of citizenship shall not descend to persons whose fathers have never resided within the United States.[14] And also, that it shall never be conferred on any person *proscribed* by a state, or who has been legally convicted of having joined the enemy during the revolutionary war, without the consent of the state proscribing such person.[15]

Hence it appears, that the right of aliens to purchase property *unconditionally* in Pennsylvania, expired on the 12th February, 1797.[16]

By the act of 10th Feb. 1897,[17] alien friends, resident within Pennsylvania, are impowered to purchase and hold lands, tenements and hereditaments therein; provided that previous to such purchase they have declared their intentions to become citizens of the United States, agreeably to the laws of the United States; provided also that no such alien shall be competent to purchase and hold more than *five hundred* acres previous to his becoming a citizen of the United States.

By the act of 20th March, 1811,[18] purchases of real estate made by resident aliens, previous to declaring their intention to become citizens, and who since purchasing have become naturalized, are declared to be valid. This provision is extended to all such purchases made prior to the 22d March, 1814.[19]

The § 2 provides, That in all cases where aliens have purchased real estate, and sold the same to citizens of the United States, the sales shall be valid, and shall vest the title in the purchaser as effectually as if the said *aliens* had been citizens.

An act of 22d March, 1814,[20] declares that it shall be lawful for any alien who on the 18th June 1812, resided, and has since continued to reside in this commonwealth, and who is the subject of any sovereign or state, at war with the U. S. after having filed according to law, his intention to become a citizen of the U. S. to receive, hold and convey any lands not exceeding in quantity 200 acres, nor in value 20,000 dollars.

coming a citizen in the manner prescribed by the laws of the United States, but died before naturalization, it was decided that his children could not be naturalized in time of war. By Tilghman, Ch. J. and Brackenridge J.—J. Yates dissenting. *Binney.*

14. The question whether a british subject, born before the American revolution is capable of inheriting lands in the U. S. has undergone considerable discussion.

From an analogy to the principles laid down in Calvin's case, it was contended that such an one might inherit: the two countries being under one common sovereignty at the time of his birth. But it was decided by the supreme court of the U. S. that he was incapable of inheriting lands in the U. S. and they said that the doctrine maintained in Calvin's case would not apply. There the *antenatus* was born under the allegiance of the same sovereign, in whose dominions the inheritance was claimed, whereas in this case the British subject never owed allegiance to the government of the U. S.—4 Cranch 322. *Dawson's Lee* v. *Godfrey.* The same point has also been determined in the supreme court of Pennsylvania. 3 Binny 75. Lee of *Jackson* v. *Burns.* See also

15. Laws U. S. 6 vol. p. 74.

16. See note 4 *ante.*

17. 4 St. Laws, Sm. Ed. 362.

18. 5 St. Laws, Sm. Ed. 211.

19. By act 22d March, 1814.—11 St. Laws, part 2d, sess. 2, 180.

20. ib. ib.

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"An act to declare and regulate escheats" passed 23d February, 1791,[21] reciting that—"Whereas, it is proper that persons purchasing lands in this state may transmit their possessions to their children, relatives and friends who may still remain in, and be the subjects of foreign states," provides,—"That every person being a citizen or subject of any foreign state shall be able and capable in law, of taking by *devise* or *descent*, lands or real property, and of holding and disposing of the same, in as full and ample a manner as citizens may or can do."

It further enables all such persons to dispose of their goods and effects, by testament, donation or otherwise, and their representatives, in whatever place they may reside, shall receive the succession according to the laws of this commonwealth—provided that the act shall not be construed to prevent the sequestration of the real or personal estates of alien enemies during the continuance of a war.

AMENDMENT.

14 EDWARD III. CAP. 6. A.D. 1340.[1]

A record which is defective by misprision of a clerk, shall be amended.

ITEM it is assented, That by the misprision of a clerk in any place wheresoever it be, no process shall be annulled, or discontinued, by mistaking in writing one syllable, or one letter too much or too little;(2) but as soon as the things is perceived by challenge of the party, or in other manner, it shall be hastily

21. In a note in Carey and Bioren's edition, [3 vol. p. 298] it is said that this act has expired: Mr. Smith however, evidently inclines to the opinion that it is still in force. He remarks that there is no decision either impeaching or recognizing it. That the act is perfectly reconcilable with the case of Jackson's Lee v Burus [3 Binny 75] there the determination was that the right to inherit must exist *at the time of the descent cast*, which in that case was in the year 1784; and there is nothing retrospective in the act of 1791.—The word *purchase* if used in its technical sense by the legislature in subsequent acts might indeed render them so inconsistent with this act as to imply a repeal of it; [as purchase in legal acceptation, imports any acquisition of laws or tenements otherwise than by act of law, or by injury and wrong: of course one who obtains land by devise is a purchaser] but the learned editor is of opinion that the technical idea of the word purchase was not probably in contemplation of the legislature when they used it in subsequent acts. See the note on this subject, 4 St. Laws Sm. Ed. 367.

1. This was the first statute of amendment. It is worthy of remark, that from this period the statutes begin to assume a new and more regular form. The titles are generally in English, though the body of the statutes continued to be written in the norman french, or latin languages till the reign of Richard III.

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amended in due form, without giving advantage to the party that challengeth the same because of such misprision.

5 Co. 45.—8 Co. 157.—Bro. Amend. 9, 10, 18, 20, 24, 27, 32, 113. Explained by 9 H. 5. stat. 1. c. 4. See further 8 R. 2. c. 4.—1 H. 5. c. 5.—4 H. 6. c. 3.—8 H. 6. c. 12, 15.—10 H. 6. c. 4.—18 H. 6. c. 9.—5 El. c. 23.—27 El. c. 5.—And 4 Anne c. 16. What defects may be amended, and what not.

The numerous statutes of amendment and *jeofaile*,[2] which, from time to time, have been enacted, as well as other circumstances seem to countenance the inference that few amendments were authorised by the common law. It will be found, however, that many of the provisions of these statutes are merely declaratory of the existing law. A circumstance by no means unusual, in those early times, when it seems that even statutes of the greatest consequence were little known to the generality of the people.

The amendment of *form*, in such a way as to attain the real merits and justice of the case, is so congenial to the principles upon which all laws ought to be administered, that it would be a foul blot upon the common law; and a subject of regret to the admirers of that system, if it really countenanced the absurd strictness, which, at one period, prevailed on this subject.

That fastidious circumspection observable in the courts formerly, in relation to amendments, is attributable to the tyrannical persecution of the judges, carried on by Edw. I. about the eighteenth year of his reign, for the shameful purpose of replenishing his empty coffers.

So greatly were they alarmed at these severities, that through fear of being said to do wrong, they hesitated to do what was right. An apparent timidity but real sullenness took place in their minds, accompanied with such a narrowness of thinking, that every slip of the pleader became fatal to the cause of his client. Succeeding judges followed these absurd precedents to the great obstruction of justice and the ruin of suitors; who suffered no less from the inveterate obstinacy, and unreasonable strictness of courts, than they could have done from their iniquity and injustice.—After verdicts and judgments upon the merits, they were frequently reversed for slips of the pen and mis-spellings, and justice was perpetually entangled in a net of form. "The legislature" (judge Blackstone observes) "hath therefore been forced to interpose, by no less than *twelve* statutes to remedy these opprobrious niceties; and its endeavours have been of late so well seconded by judges of a more liberal cast, that this unseemly degree of strictness is almost entirely eradicated; and will probably in a

2. So called because when a pleader perceives any slip in the form of his proceedings and acknowledges such error (*Jeofaile*) he is at liberty by these statutes to amend it; which amendment is seldom actually made, but the benefit of the acts is attained by the court's overlooking the exception. 3 Blk. Com. 407.

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few years be no more remembered, than the learning of essoins and defaults, or the counter-pleas of voucher are at present."[3]

As the statutes of amendment and jeofaile do not extend to criminal cases, a fair opportunity has been afforded of ascertaining, by decisions of the enlightened and independent tribunals of modern times, the extent to which such amendments might be carried by the common law, which in respect to amendments, makes no distinction between criminal and civil suits. Upon a review of these decisions it will be readily perceived, that, according to the soundest and best established principles of the common law, amendments may be made to an extent that would have astonished and alarmed greatly, as well the bench as the bar, in ancient times.

The statute in the text authorises the amendment of a *letter*, or a *syllable;* and we are told, by lord Coke, that the statute was construed so favorably that the judges extended it to a WORD.[4] But they doubted whether they could make these amendments as well *after* judgment as *before;*[5] which occasioned the 9 *Hen. V.* c. 4. by which it is declared that the judges shall have the same power as well *after* as *before* judgment, as long as the record or process is before them; and this statute is confirmed by 4 *Hen. VI.* c. 3. with an exception that it shall not extend to process on outlawry or to records or processes in Wales. These statutes of 9 H. V. and 4 H. VI. gave power to amend *processes*, which the judges did not construe in a large, or liberal signification, so as to comprehend the *whole proceedings;* but confined it to the *mesne* process and *jury* process: Therefore to enlarge the authority of the courts the statutes of 8 H. VI. c. 12. and 8 H. 6. c. 15. were enacted. By these statutes power is given to amend as well *after* as *before* judgment as long as the record is before them.

As these statutes extended only to what the judges might interpret *misprision* [mistake or error] of their clerks and other officers, it was found by experience, that many just causes were overthrown in consequence of a want of *form* not aided by any of these statutes, though they were good in *substance:* wherefore for the further relief of suitors the 32 H. 8. cap. 30 was enacted.

3. 3 Blk. Com. 411.

4. 8 Co. 158a. It might be supposed that this was allowing themselves no extraordinary latitude of construction; especially as at this period, no one, not even the greatest clerks, could spell with any accuracy:—the same word in the same period is often spelt in a different manner, throughout the body of the ancient statutes. Accuracy of spelling, before the use of printing, was not to be expected, [Obs. on the stat. 193]—Yet it seems that such freedom with the statute was not taken unadvisedly, for we are informed that judge Thorp and sir Hugh Green went to the council, where twenty-four of the bishops and earls were assembled, and demanded of them who made the statute, if the word might be amended. And the archbishop said that it was a nice demand, and a vain question of them, if it might be amended, or not; for he said that it might be as well amended as if it were a letter, for if a letter or a syllable fail in a word, it is no word. And so Thorp said that it should be amended, for the lords who made the statute said, *their meaning was* that in all these cases the process should be amended. [39 E. 3. 21a.]

At that period it appears to have been usual for the judges to go to the parliament to find out the meaning of those who made the law. 11 H. 4. 70.

5. 8. Co. 157b.

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* 9 HENRY V. CAP. 4. A.D. 1421.

The justices may amend defaults in records, or process after judgment given.

ITEM, Whereas it was ordained and established in the statute made the fourteenth year of king EDWARD the third after the conquest, that for misprision of the clerk in any place wheresoever it be, the process of the plea should not be avoided nor discontinued, by mistaking in writing one letter or syllable too much or too little,(2) but as soon as the thing is perceived by challenge of the party, or in other manner, it should hastily be amended in a due form, without giving advantage to the party that challengeth the same because of such misprision;(3) the king our sovereign lord, considering the diversity of opinions which have been upon the said statute, and to put the thing in more open knowledge, hath declared and ordained at this time, by authority of this present parliament, that the justices before whom such plea or record is made, or shall be depending, as well by adjournment, as by way of error, or otherwise, shall have power and authority to amend such record and process, as afore is said, according to the form of the same statute, as well after judgment in any such plea, record, or process given, as before judgment given in any such plea, record, or process, as long as the same record and process is before them, in the same manner as the justices had power to amend such record and process before judgment given by force of the said statute made in the time of the said king EDWARD.(4.) And that this ordinance endure till the parliament that shall be first holden after the return of our sovereign lord the king into England, from beyond the sea.

Made perpetual by 4 *Hen.* 6. *c.* 3—8 *Hen.* 6. *cap.* 12, 15. *See further what defects are amendable* 10 *Hen.* 6. *cap.* 4—18 *Hen.* 6. *c.* 4—18 *Hen.* 6. *c.* 9—5 *Eliz. c.* 23—27 *Eliz. c.* 5—*And* 4 *Anne c.* 16—8 *R.* 2. *c.* 4. *Dyer* 342. 5 *Co.* 45.

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* 4 HENRY VI. c. 3. A.D. 1425.

Justices in certain cases may amend their records according to former statutes.

ITEM, Whereas at the parliament holden at *Westminster* the second day of May, the ninth year of the reign of king HENRY, father of our lord the king that now is, it was rehearsed, how that at the parliament holden at *Westminster* the XIV. year of king EDWARD the third, it was ordained by the authority of the said parliament, that for misprision of a clerk, in whatsoever place it be, no process or plea should be undone nor discontinued, by oversight in writing a letter or syllable too much or too little,(2) but as soon as the thing were perceived by challenge of the parties, or in other manner, it should be hastily amended in due form, without giving advantage to the party that challengeth the same because of such misprision;(3) the said late king HENRY, considering the diversities of opinions which men had upon the said statute, and to put the thing in more open knowledge, did declare and ordain, by authority of the said parliament holden the said ninth year, That the justices before whom such plea or record is made, or shall be depending, as well by adjournment as by way of error or otherwise, shall have power and authority to amend such record and process, as well after judgment given as before, by force of the said statute made in the time of the said king EDWARD, which ordinance should endure till the next parliament, which should be holden after the return of the said king HENRY the father into England from beyond the sea, and which now is determined by the death of the said late king HENRY the father:(4)— Our sovereign lord, by the advice and assent aforesaid, hath ordained and established, That the said statute and the effect of the same, made the said ninth year, shall hold strength, force, and effect, in every record and process of the same, as well after judgment given upon a verdict passed, as upon a matter in law pleaded, as a statute available and effectual in law to endure forever.(5) Provided always, That this statute do not extend to records and pro-

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cesses in the parts of *Wales*, nor to records and processes whereby any person is or shall be outlawed at any man's suit.

3 *Rich.* 2. *c.* 4.—1 *Hen.* 5. *c.* 5.—9 *Hen.* 5. *c.* 4.—5 *Co.* 45.—8 *Co.* 157. *Dyer* 260, 342.—*A confirmation of the stat. of* 14 *Ed.* 3 *stat.* 1. *c.* 6. *and* 9 *H.* 5. *c.* 4. *authorising justices to amend records. See further* 8 *H.* 6. *c.* 12 *and* 15.—10 *H.* 6. *c.* 4.—18 *H.* 6. *c.* 9.—5 *Eliz. c.* 23.—27 *Eliz. c.* 5. *and* 4 *Anne c.* 16. *what defects may be amended and what not.*

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* 8 HEN. VI. C. 12. A.D. 1429.(A

No judgment or record shall be reversed for any writ, process, &c. rased.

What defects in records may be amended by the judges, and what not.

ITEM, our lord the king hath ordained and established by the authority of this present parliament,—That for error assigned, or to be assigned, in any record, process, or warrant of attorney, original writ or judicial, panel or return, in any places of the same rased or interlined, or in any addition, substraction or diminution of words, letters, titles, or parcel of letters, found in any such record, process, warrant of attorney, writ, panel, or return, which rasings, interlinings, addition, substraction, or diminution, at the discretion of the king's judges of the courts and places, in which the said records or process by writ of error, or otherwise, be certified, do appear suspected, no judgment nor record, shall be reversed nor annulled.

II. And that the king's judges of the courts and places in which any record, process, word, plea, warrant of attorney, writ, panel, or return, which for the time shall be, shall have power to examine such records, process, words, pleas, warrants of attorney, writs, panels, or return, by them and their clerks, and to reform and amend (in affirmance of the judgments of such records and processes) all that which to them in their discretion seemeth to be misprision of the clerks in such record, processes, word, plea, warrant of attorney, writ, panel, and return;(2) except appeals,

A) Only the two first sections of this statute are in force. *See Report of the Judges.* The 3rd section relates to the imbezilling of a record of the courts of chancery, exchequer, B. R. or C. B. whereby any judgment shall be reversed —declaring the offence to be felony.— The 4th (and last) section relates to records inrolled in chancery.

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indictments of treason and of felonies, and the outlawries of the same, and the substance of the proper names, surnames, and additions left out in original writs and writs of exigent, according to the statute another time made the second year of king Henry father to our lord the king that now is, and in other writs containing proclamation;(3) so that by such misprision of the clerk no judgment shall be reversed nor annulled.(4) And if any record, process, writ, warrant of attorney, return, or panel be certified defective, otherwise than according to the writing which thereof remaineth in the treasury, courts, or places from whence they be certified, the parties in affirmance of the judgments of such record and process shall have advantage to alledge, that the same writing is variant from the said certificate, and that found and certified, the same variance shall be by the said judges reformed and amended according to the first writing.

No judgment nor record shall be reversed nor avoided for any writ, return, process, &c. rased or interlined. Dyer 105, 180, 225, 232, 260, 342. 5 Co. 45. 8 Co. 138.—Cro. Jac. 119. Cro. Car. 271. The judges may reform all defects in records which be misprision of the clerk. 14 Ed. 3. stat. 1 c. 6.—9 H. 5. c. 4.—4 H. 6. c. 3.—8 H. 6. c. 15.—4 Mod. 6, 247.—What defects in records may not be amended 27 El. c. 5.—1 H. 5. c. 5. See further 10 H. 6. c. 4—18 H. 6. c. 9—5 El. c. 23, & 4 Anne c. 16. what defects may be amended and what not.

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* 8 HEN. VI. CAP. 15. A.D. 1429.

The justices may in certain cases amend defaults in records.

ITEM, it is ordained and established, that the king's justices, before whom any misprision or default is or shall be found, be it in any records and processes which now be, or shall be, depending before them, as well by way of error as otherwise, or in the returns of the same, made or to be made, by sheriffs, coroners, bailiffs of franchises, or any other, by misprision of the clerks, or any of the said courts of the king, or by misprision of the sheriffs, undersheriffs, coroners, their clerks, or other officers, clerks, or other ministers whatsoever, in writing one letter or one syllable too much or too little, shall have power to amend such defaults and misprisions according to their discretion, and by examination thereof by the said justices to be taken where they shall think needful.(2) Provided that this statute do not extend to records and processes in the parts of *Wales*,(3) *nor to the processes and*

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records of outlawries of felonies and treasons, and the dependences thereof.

8 Co. 162.—1 Roll. 447.—Processes in Wales and outlawries. 14 Ed. 3. 8. 1. c. 6. —8 R. 2. c. 4.—1 H. 5. c. 5.—9 H. 5. st. 1. c. 4.—4 H. 6. c. 3.—8 H. 6. c. 12. See further 10 H. 6. c. 4.—18 H. 6. c. 9.—5 Eliz. c 23.—27 Eliz. c. 5.—And 4 Anne, c. 16.—What defects may be amended and what not.

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* 32 HENRY VIII. CAP. 30. A.D. 1540.

Mispleadings, Jeofails.(B

FORASMUCH as the party plaintiffs and demandants in all manner of actions and suits, as well real as personal, at the common law of this realm, before this time have been greatly delayed and hindered in their suits and demands, by reason of the crafty, subtle, and negligent pleadings of the plaintiffs or demandants, defendants or tenants, where any action or demand hath been sued, had or made, as well in ministring of their declarations and bars, as also in their replications, rejoinders, rebutters, joining of issues, and other pleadings, to the great hurry, delay and hindrance of the said plaintiffs or demandants, or to the vexation of the defendants or tenants;(2) insomuch that when the issues joined in the same actions between the parties to the same hath been tried and found by the verdict of twelve or more indifferent persons, for the said plaintiffs or demandants, or for the tenants or defendants, and the justices ready to give judgment for the said parties for whom the same issue was found, the same parties have been compelled by the course and order of the common law of this realm afore this time, to re-plead, and the said verdict, so given, as is afore rehearsed, to be taken as void and of none effect; sometime because the issues have been misjoined, and jeofail, and sometime by taking advantages of the parties own mispleading, or in the pursuing, mis-continuing or discontinuing of process of any of the parties, and for divers other causes, the which is

B) "This statute is in for ceexcept the 2d & 3d sections." *Report of the Judges.* The statute consists of but three sections. The 2d section declares when an attorney shall file his warrant in the court at Westminster under a certain penalty: and the 3d section subjects them to imprisonment for delinquency herein.

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thought as well a great slander to the said common law of this realm, and to the ministers of the same, as also a plain delay and hindrance unto the said parties, in that they should not have their judgments when the issue hath been found and tried as is afore said, to their costs and charges:(3) Be it therefore enacted by the king our sovereign lord, the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same,—That from henceforth if any issue be tried by the oath of twelve or more indifferent men, for the party plaintiff or demandant, or for the party of the tenant or defendant, in any manner of action or suit at the common law of this realm, in any of the king's courts of record, that then the justice or justices by whom judgment thereof ought to be given, shall proceed and give judgment in the same;(4) any mispleading, lack of colour, insufficient pleading of jeofail,(5) or any mis-continuance or discontinuance, or mis-conveying of process,(6) misjoining of the issue, lack of warrant of attorney for the party against whom the same issue shall happen to be tried,(7) or any other default or negligence of any of the parties, their counsellors or attorneys, had or made to the contrary notwithstanding;(8) and the said judgments thereof, so to be had and given, shall stand in full strength and force to all intents and purposes, according to the said verdict, without any reversal or undoing of the same by writ of error, or of false judgment, in like form as though no such default or negligence had never been had or committed.

This act extendeth to all writs of mandamus, &c. by 9 Ann. c. 20. § 7—14 Ed. III. st. 1. c. 6.—9 H. 5. c. 4.—4 H. 6. c. 3. and 8 H. 6. c. 12 & 15.—1 Roll. 86, 200, 303, 374. —2 Roll. 161, 168, 187, 368.—Stito 307.—2 Cro. 568.—The several inconveniencies which heretofore followed by delays in suits. Moor 574. pl. 790. pl. 623. pl. 852. pl. 867. pl. 1198.—1 Cro. 78.—Jones 140.—33 H. 8. c. 17.—Nels. V. 2. 943.—After an issue tried there shall be judgment given notwithstanding any jeofail or mispleading. Vin. V. 2. 325.—2 Saund. 318.—1 Salk. 177, 178.—1 Leon. 175, 238.—2 Leon. 195.—1 Bulst. 25.—2 Bulst. 66.—3 Bulst. 180, 301.—Godbolt 107. pl. 127.—Hob. 69.—5. Co. 36, 37, 43, 49.—11 Co. 7.—Bro. Repleader 40.—Dyer f. 284, 353, 367.—Cro. El. 131, 133, 153, 227, 257, 308, 339, 535.—Cro. Car. 90, 278. Continued by 33 H. 8. c. 17.—37 H. 8. c. 23.—Made perpetual by 2 & 3 Ed. 6. c. 32.—Further provided for by 18 El. c. 14.—21 Jac. 1. c. 13.—16 & 17 Car. 2. c. 8.—22 & 23 Car. 2. c. 4.—4 Ann. c. 16.—9 Ann. c. 20—and 5 Geo. 1. c. 13.

Notwithstanding this statute is much more extensive than those which preceded it, and greatly enlarged the authority of the judges in amendments in respect to *mistakes*, yet it remedied no *omission* but one, which was the party's own neglect in not filing his warrant, which circumstance the statute declared should not

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prejudice the right of the prevailing party *after verdict*. To remedy therefore the *omissions* which the prevailing party might have been guilty of, as well as those which might occur on the other side, the statute of 18 Elizabeth, cap. 14. was passed.

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* 18 ELIZABETH, CAP. XIV. A.D. 1576.

An act for reformation of Jeofails.

BE it enacted by the queen's most excellent majesty, the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, That if any verdict of twelve men or more shall be hereafter given in any action, suit, bill, plaint or demand, in any court of record, the judgment whereupon shall not be stayed or reversed by reason of any default in form, or lack of form, touching false *latin* or variance from the register, or other defaults in form, in any writ original or judicial, count, declaration, plaint, bill, suit or demand, or for want of any writ original or judicial, or by reason of any imperfect or insufficient return of any sheriff or other officer, or for want of any warrant of attorney, or by reason of any manner of default in process, upon or after any *aid prier* or *voucher*, nor any such record of judgment after verdict to be given hereafter, shall be reversed for any the defects or causes aforesaid; any law, statute or usage to the contrary notwithstanding.

II. Provided always, and be it further enacted by the authority aforesaid, That this act, or any thing therein contained, shall not extend to any writ, declaration or suit of appeal of felony or murder, nor to any indictment or presentment of felony, murder, treason or other matter, nor to any process upon any of them, nor to any writ, bill, action or information upon any popular or penal statute; any thing aforesaid to the contrary notwithstanding.

This act extended to writs of mandamus, &c. by 9 Ann. c. 20. § 7—14 Ed. 3. st. 1. c. 6—9 H. 5. c. 4—4 H. 6. c. 3. and 8 H. 6. c. 12 & 15. After verdict given in a court of record there shall be no stay of judgment, or reversing thereof for want of form, false latin, variance, &c. When an attorney shall deliver his warrant of record—1 Bulst. 130, 152—2 Bulst. 67—3 Bulst. 224, 228, 301—Moor 402. pl. 535. pl. 657—1 Leon. 30, 175, 329—2 Leon. 74—March 121—Savil 37, 130—1 Roll. 22, 295, 348—2 Roll. 124, 161, 168, 247, 255, 265, 382—Godbolt 107, pl. 127—Goldbu. 126, 188—Hob. 49, 64, 70—Jones 301—5 Co. 35, 36, 37, 41—8 Co. 163—Cro. El. 57, 339, 574—Cro. Jac. 188, 236, 674—Cro. Car. 92, 223, 278, 282, 295—Hob. 38. Further provided for 21 Jac. 1. c. 13—16 & 17 Car. 2. c. 8—4 Ann. c. 16—9 Ann. c. 20—And see further 5 Geo. 1. c. 13—Nels. V. 2. 943—Vin. V. 2. 328, &c.

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None of these statutes were extended to any except the superior courts, but the subsequent statutes extend to all courts of record; and remedy several defects and omissions, not included in the former.

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* 21 JAMES I. CAP. XIII. A.D. 1623.

An act for the further reformation of Jeofails.

WHEREAS in the two and thirtieth year of the reign of king Henry the eighth, of famous memory, a good and profitable law, intitled, *An act concerning mispleading, jeofails, and attornies*, was made and enacted;(2) And likewise another good and profitable law was made in the eighteenth year of the reign of our late sovereign lady queen Elizabeth, intitled, *An act for reformation of jeofails*;(3) by which laws many delays of judgments were prevented, and yet notwithstanding many things have and daily do fall out, not yet provided for, nor remedied by the laws beforementioned.

II. Be it therefore enacted by the authority of this present parliament, That if any verdict of twelve men or more shall hereafter be given for the plaintiff or demandant, or for the defendant or tenant, bailiff in assize, vouchee, pray in aid, or tenant by receipt, in any action, suit, bill, plaint or demand in any court of record, the judgment thereupon shall not be stayed or reversed by reason of any variance in form only between the original writ or bill, and the declaration, plaint or demand;(2) or for lack of any averment of any life or lives of any person or persons, so as upon examination the said person be proved to be in life;(3) or by reason that the *venire facias*, *habeas corpora*, or *distringas* is awarded to a wrong officer, upon any insufficient suggestion;(4) or by reason the *visne* is in some part misawarded or sued out of more places, or of fewer places, than it ought to be, so as some one place be right named;(5) or by reason that any of the jury which tried the said issue is misnamed, either in the surname or addition, in any of the said writs, or in any return upon any of the said writs, so as upon examination it be proved to be the same man that was meant to be returned;(6) or by reason that there is no return upon any of

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the said writs, so as a panel of the names of jurors be returned and annexed to the said writ;(7) or for that the sheriff's name or other officer's name having the return thereof, is not set to the return of any such writ, so as upon examination it be proved that the said writ was returned by the sheriff or under-sheriff, or any such other officer;(8) or by reason that the plaintiff in an *ejectione firmæ*, or in any personal action or suit, (being an infant under the age of one and twenty years) did appear by attorney therein, and the verdict pass for him; any law, custom or usage to the contrary notwithstanding.

III. Provided always, and be it further enacted, That this act, or any thing therein contained, shall not extend to any writ, declaration or suit of appeal of felony or murther,(2) nor to any indictment or presentment of felony, murther or treason, nor to any process upon any of them,(3) nor to any writ, bill, action or information upon any popular or penal statute; any thing therein contained to the contrary notwithstanding. 5 Geo. I. c. 13.

14 Ed. 3. stat. 1. c. 6—9 H. 5. c. 4. This act extended to writs of mandamus, &c. by 9 Anne, c. 20, sect. 7. The defects of the statutes of 32 H. 8. c. 30. and 18 El. c. 14—Godbolt 382. pl. 469, 437. pl. 502. Divers jeofails in suits of law prevented and reformed—4 Ann. c. 16—Cro. Car. 165, 189, 203, 278, 312, 480—Aleyn 64—Nels. V. 2. 943. Certain cases excepted, see 16 & 17 Car. 2. c. 8.

The preceding statutes being extended only to the superior courts: this and the subsequent statutes extended to all courts of record; and remedy several defects and omissions not included in the former.

The chief design of this statute was to help any mistake in the jury process; but there were several things still to be supplied; and several others to be adjudged *form*, which were always construed to be matters of *substance*, and consequently not aided by the former acts. Hence arose the statute of 16 & 17 Car. II. c. 8.[1]

1. Gil Hist. of C. B. 91.

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* 16 & 17 CHARLES II. CAP. 8. A.D. 1664.

An act to prevent arrests in judgment, and superseding executions.

WHEREAS great delay, trouble and vexation, hath been and still is occasioned to the people of this realm, as well by arresting and reversing of judgments, as by staying executions by writs of

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error and supersedeas:(2) For remedy thereof, Be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in the present parliament assembled, and by the authority of the same, That if any verdict of twelve men shall be given in any action, suit, bill or demand, to be commenced from and after the five and twentieth day of March, which shall be in the year of our Lord one thousand six hundred sixty and five, in any of his majesty's courts of record at *Westminster*, or in the courts of record in the counties Palatine of *Chester*, *Lancaster* or *Durham*, or in his majesty's courts of the great sessions in any of the twelve shires of *Wales;* judgment thereupon shall not be stayed or reversed, for default in form or lack of form;(3) or by reason that there are not pledges, or but one pledge to prosecute, returned upon the original writ;(4) or because the name of the sheriff is not returned upon such original writ;(5) or for default of entering pledges upon any bill or declaration; (6) or for default of alledging the bringing into court of any bond, bill, indenture, or other deed whatsoever mentioned in the declaration, or other pleading;(7) or for default of allegation of the bringing into court of letters testamentary or letters of administration;(8) or by reason of the omission of *vi & armis*, or *contra pacem*;(9) or for or by reason of the mistaking of the christian name or surname of the plaintiff or defendant, demandant or tenant, sum or sums of money, day, month or year, by the clerk in any bill, declaration or pleading, where the right name, surname, sum, day, month or year, in any writ, plaint, roll or record preceeding, or in the same roll or record where the mistake is committed, is or are once truly and rightly alledged, whereunto the plaintiff might have demurred and shewn the same for cause;(10) nor for want of the averment of *hoc paratus est verificare*;(11) or for *hoc paratus est verificare per recordum*;(12) or for not alledging *prout patet per recordum*;(13) or for that there is no right *venue*, so as the cause were tried by a jury of the proper county or place where the action is laid:(14) nor any judgment after verdict, confession by *cognovit actionem*, or *relicta verificatone*, shall be reversed for want of *misericordia*, or *capiatur*;(15) or by reason that a *capiatur* is entered for a *misericordia*, or a *misericordia* is entered where a capiatur ought to have been entered;(16) nor for that *ideo concessum est per curiam* is

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entered for *Ideo consideratum est per curiam*;(17) nor for that the increase of costs after a verdict in any action, or upon a non-suit in replevin, are not entered to be at the request of the party for whom the judgment is given;(18) nor by reason that the costs in any judgment whatsoever are not entered to be by consent of the plaintiff;(19) but that all such omissions, variances, defects, and all other matters of like nature, not being against the right of the matter of the suit, nor whereby the issue or trial are altered, shall be amended by the justices or other judges of the courts where such judgments are or shall be given, or whereunto the record is or shall be removed by writ of error.

II. Provided always, and be it further enacted by the authority aforesaid, That this act, or any thing therein contained, shall not extend to any writ, declaration or suit of appeal of felony or murder, nor to any indictment or presentment of felony, murder, treason or other matter, nor to any process upon any of them;(2) nor to any writ, bill, action or information upon any penal statute, other than concerning customs and subsidies of tonnage and poundage; any thing in this act contained to the contrary thereof in any wise notwithstanding.

III. And be it further enacted by the authority aforesaid, That from and after the twentieth day of March in the year of our Lord one thousand six hundred sixty and four, no execution shall be stayed in any of the aforesaid courts by writ of error or *supersedeas* thereupon, after verdict and judgment thereupon, in any action personal whatsoever, unless a recognizance with condition according to the statute made in the third year of the reign of our late sovereign lord king James, shall be first acknowledged in the court where such judgment shall be given:(2) And further, That in writs of error to be brought upon any judgment after verdict in any writ of dower, or in any action of *ejectione firmæ*, no execution shall be thereupon or thereby stayed, unless the plaintiff or plaintiffs in such writ of error shall be bound unto the plaintiff in such writ of dower, or action of *ejectione firmæ*, in such reasonable sum as the court to which such writ of error shall be directed shall think fit, with condition, that if the judgment shall be affirmed in the said writ of error, or that the said writ of error be discontinued in default of the plaintiff or plaintiffs therein, or that

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the said plaintiff or plaintiffs be non-suit in such writs of error, that then the said plaintiff or plaintiffs shall pay such costs, damages, and sum and sums of money, as shall be awarded upon or after such judgment affirmed, discontinuance or non-suit had.

IV. And to the end that the same sum and sums and damages may be ascertained, it is further enacted, That the court wherein such execution ought to be granted upon such affirmation, discontinuance or non-suit, shall issue a writ to enquire as well of the mesne profits as of the damages by any waste committed after the first judgment in dower or in *ejectione firmæ;* and upon the return thereof, judgment shall be given, and execution awarded for such mesne profits and damages, and also for costs of suit.

V. Provided, That this act, nor any thing therein contained, shall not extend to any writ of error to be brought by any executor or administrator;(2) nor unto any action popular, nor unto any other action which is or hereafter shall be brought upon any penal law or statute (except actions of debt for not setting forth of tithes;)(3) nor to any indictment, presentment, inquisition, information or appeal; any thing herein before expressed to the contrary thereof in any wise notwithstanding.

VI. Provided always, That this act shall continue in force for three years, and to the end of the next session of parliament after the expiration of the said three years, and no longer. [Made perpetual by 22 & 23 Car. 2. c. 4.]

This act extended to writs of mandamus, &c. by 9 Anne, c. 20. § 7. In what court and cases judgment after verdict shall not be stayed for default of form in pleading.—1 Mod. 198—Salk. 37, 38—Mod. cases in law 198, 356. Further provisions of this kind, 4 Anne, c. 16—5 Geo. 1. c. 13. In what cases execution shall not be stayed by writ of error, but upon recognizances entered according to 3 J. 1. c. 8—Carthew 121—3 Leo. 275.

This statute is called by judge Twisden the *omnipotent act.*[7]

An actual amendment is never made upon this act, but the benefit of it is attained by the court's overlooking the exception.—The aforegoing statutes being chiefly calculated to aid imperfections after verdict, and the statute 27 Eliz. c. 5.[8] aiding defects in form only on a general demurrer, it was thought advisable to enlarge the authority of the courts further in favor of suitors; wherefore the statute of 4 Ann. c. 16. was enacted.

7. 1 Vent. 200.

8. See stat. of 27 Eliz. cap. 8. under tit. *Demurrer.*

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* 4 ANNE, CAP. XVI. A.D. 1705.

An act for the amendment of the law, and the better advancement of justice.

FOR the amendment of the law in several particulars, and for the easier, speedier, and better advancement of justice,—Be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same,—That from and after the first day of *Trinity* term, which shall be in the year of our Lord one thousand seven hundred and six, where any demurrer shall be joined, and entered in any action or suit in any court of record within this realm, the judges shall proceed and give judgment, according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, or defect in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding whatsoever, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer, as causes of the same, notwithstanding that such imperfection, omission, or defect might have heretofore been taken to be matter of substance, and not aided by the statute made in the twenty-seventh year of queen ELIZABETH, intitled, *An act for the furtherance of justice in case of demurrer and pleadings*, so as sufficient matter appear in the said pleadings, upon which the court may give judgment according to the very right of the cause; and therefore from and after the said first day of *Trinity* term, no advantage or exception shall be taken of or for an immaterial traverse; or of or for the default of entering pledges upon any bill or declaration; or of or for the default of alledging the bringing into the court any bond, bill, indenture, or other deed whatsoever mentioned in the declaration or other pleading; or of or for the default of alledging of the bringing into court letters testamentary, or letters of administration; or of or for the omission of *vi et armis* & *contra pacem*, or either of them; or of or for the want of averment of *hoc paratus est verificare*, or, *hoc paratus est verificare per recordum*; or of or for not alledging *prout patet per recordum*, but the court shall give judgment according to the very right of the cause as aforesaid, without regarding any such imper-

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fections, omissions and defects, or any other matter of like nature, except the same shall be specially and particularly set down and shewn for cause of demurrer.

II. And be it further enacted by the authority aforesaid, That from and after the said first day of *Trinity* term, all the statutes of jeofails shall be extended to judgments which shall at any time afterwards be entered upon confession, *nihil dicit*, or *non sum informatus*, in any court of record; and no such judgment shall be reversed, nor any judgment upon any writ of enquiry of damages executed thereon be stayed or reversed, for or by reason of any imperfection, omission, defect, matter or thing whatsoever, which would have been aided and cured by any of the said statutes of jeofails in case a verdict of twelve men had been given in the said action or suit, so as there be an original writ or bill, and warrants of attorney duly filed according to the law as is now used.

III. Provided always, and be it enacted by the authority aforesaid, That the attorney for the plaintiff, or demandant in any action or suit, shall file his warrant of attorney with the proper officer of the court where the cause is depending the same term he declares; and the attorney for the defendant or tenant shall file his warrant of attorney as aforesaid, the same term he appears, under the penalties inflicted upon attornies by any former law for default of filing their warrants of attorney.

IV. And be it further enacted by the authority aforesaid, That from and after the said first day of *Trinity* term, it shall and may be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin, in any court of record, with the leave of the same court, to plead as many several matters thereto, as he shall think necessary for his defence.

V. Provided nevertheless, That if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or if a verdict shall be found upon any issue in the said cause for the plaintiff or demandant, costs shall be also given in like manner, unless the judge, who tried the said issue, shall certify, that the said defendant, or tenant, or plaintiff in replevin, had a probable cause to plead such matter which upon the said issue shall be found against him.

VI. And whereas great delays do frequently happen in trials,

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by reason of challenges to the arrays of panels of jurors, and to the polls, for default of hundredors: For prevention thereof for the future, be it enacted by the authority aforesaid, That from and after the said first day of *Trinity* term, every *venire facias* for the trial of any issue, in any action or suit, in any of her majesty's courts of record at *Westminster*, shall be awarded of the body of the proper county where such issue is triable.

VII. Provided always, and be it enacted by the authority aforesaid, That nothing in this act before contained shall extend to any writ, declaration, or suit of appeal of felony or murder, or to any indictment or presentment of treason, felony or murder, or other matter, or to any process upon any of them, or to any writ, bill, action or information upon any penal statute.

VIII. And be it further enacted by the authority aforesaid, That from and after the said first day of *Trinity* term, in any actions brought in any of her majesty's courts of record at *Westminster*, where it shall appear to the court in which such actions are depending, that it will be proper and necessary, that the jurors who are to try the issues in any such actions, should have the view of the messuages, lands, or place in question, in order to their better understanding the evidence that will be given upon the trials of such issues, in every such case the respective courts in which such actions shall be depending, may order special writs of *distringas* or *habeas corpora* to issue, by which the sheriff, or such other officer to whom the said writs shall be directed, shall be commanded to have six out of the first twelve of the jurors named in such writs, or some greater number of them, at the place in question, some convenient time before the trial, who then and there shall have the matters in question shewn to them by two persons in the said writs named, to be appointed by the court; and the said sheriff or other officer, who is to execute the said writs shall, by a special return upon the same, certify that the view hath been had according to the command of the said writs.

IX. And be it further enacted by the authority aforesaid, That from and after the said first day of *trinity* term, all grants or conveyances thereafter to be made, by fine or otherwise, of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual, to all intents and purposes, without any attornment of the tenants of any such

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manors, or of the land out of which such rent shall be issuing, or of the particular tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made.

X. Provided nevertheless, That no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor or conusor, or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the conusee or grantee.

XI. And be it further enacted by the authority aforesaid, That from and after the said first day of *trinity* term, no dilatory plea, shall be received in any court of record, unless the party offering such plea, do, by affidavit, prove the truth thereof, or shew some probable matter to the court to induce them to believe that the fact of such dilatory plea is true.

XII. And be it further enacted by the authority aforesaid, That from and after the said first day of *trinity* term, where any action of debt shall be brought upon any single bill, or where action of debt, or *scire facias*, shall be brought upon any judgment, if the defendant hath paid the money due upon such bill or judgment, such payment shall and may be pleaded in bar of such action or suit, and where an action of debt is brought upon any bond which hath a condition or defeazance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors or administrators, have, before the action brought, paid to the obligee, his executors or administrators, the principal and interest due by the defeazance or condition of such bond, though such payment was not made strictly according to the condition or defeazance; yet it shall and may nevertheless be pleaded in bar of such action, and shall be as effectual a bar thereof, as if the money had been paid at the day and place according to the condition or defeazance, and had been so pleaded.

XIII. And be it further enacted by the authority aforesaid, That if at any time, pending an action upon any such bond with a penalty, the defendant shall bring into the court where the action shall be depending, all the principal money, and interest due on such bond, and also all such costs as have been expended in any suit or suits in law or equity upon such bond, the said money, so

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brought in, shall be deemed and taken to be in full satisfaction and discharge of the said bond, and the court shall and may give judgment to discharge every such defendant of and from the same accordingly.[1]

XX. And be it enacted by the authority aforesaid, That if any person or persons shall be arrested from and after the said first day of *trinity* term, by any writ, bill, or process, issuing out of any of her majesty's courts of record at *Westminster*, at the suit of any common person, and the sheriff or other officer taketh bail from such person, against whom such writ, bill, or process is taken out, the sheriff or other officer, at the request and costs of the plaintiff in such action or suit, or his lawful attorney, shall assign to the plaintiff in such action the bail bond, or other security taken from such bail, by endorsing the same, and attesting it under his hand and seal in the presence of two or more credible witnesses, which may be done without any stamp; provided the assignment so endorsed be duly stampt before any action be brought thereupon; and if the said bail bond or assignment, or other security taken for bail be forfeited, the plaintiff in such action, after such assignment made, may bring an action and suit thereupon in his own name, and the court where the action is brought, may, by rule or rules of the same court, give such relief to the plaintiff and defendant in the original action, and to the bail, upon the said bond or other security taken from such bail, as is agreeable to justice and reason, and that such rule or rules of the said court shall have the nature and effect of a defeazance to such bail bond, or other security for bail.

XXVII. And be it enacted by the authority aforesaid, That from and after the said first day of *trinity* term, actions of account shall and may be brought and maintained against the exe-

1. "The first 13 sections, and the 20th and 27th sections of the stat. of 4 Anne c. 16, are in force." *Report of the Judges.* The statute consists of 27 sections. The § XIV. relates to the proof of *nuncupative wills.* The § XV. provides that declarations of uses, trusts, &c. of fines and recoveries shall not be affected by the statute of frauds, 29 Car. 2. c. 3. The XVI. declares that no claim, or entry, shall be of force to avoid a fine levied with proclamations, &c. unless an action be commenced in one year after such entry. The XVII. and XVIII. sections relate to actions for seamans' wages, and the XIX. section provides that where cause of action arises against one who is beyond sea the statute of limitation shall not begin to run, till the return of such person. A provision, in substance the same, with that contained in the § V. of our act of limitations. 1 St. Laws, Sm. Ed. 77.

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cutors and administrators of every guardian, bailiff, and receiver; and also by one joint-tenant, and tenant in common, his executors and administrators, against the other, as bailiff for receiving more than comes to his just share or proportion, and against the executor and administrator of such joint-tenant, or tenant in common; and the auditors appointed by the court, where such action shall be depending, shall be and are hereby impowered to administer an oath, and examine the parties touching the matters in question, and for their pains and trouble in auditing and taking such account, have such allowance as the court shall adjudge to be reasonable, to be paid by the party on whose side the balance of the account shall appear to be.

By 9 Anne, c. 20. § 7, this statute is extended to writs of mandamus and informations in nature of quo warranto.

The statutes prior to 4 Anne being chiefly calculated to aid imperfections *after verdict*, and the statute 27 Eliz. c. 5.[2] aiding defects in form only on a *general demurrer*, it was thought advisable to enlarge the authority of the courts further in favor of suitors, and therefore this statute was passed.

By 9 Anne, c. 20,[3] this, and all the statutes of jeofails, are extended to writs of *mandamus*, and informations in nature of a *quo warranto*.

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* 5 GEORGE I. CAP. XIII. A.D. 1718.

An act for the amendment of writs of error; and for the further preventing the arresting or reversing of judgments after verdict.

I. WHEREAS great delay of justice hath of late years been occasioned by defective writs of error, which, as the law now stands, are not amendable:—For remedy thereof, be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That all writs of error, wherein there shall be any variance from the original record, or other defect, may and shall be amended and made agreeable to such record, by the respective courts where

2. See the stat. 27 Eliz. c. 5. under the head of *Pleas & Pleadings*.

3. 4 Ruff. 210.

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such writ or writs of error shall be made returnable; and that where any verdict hath been or shall be given in any action, suit, bill, plaint, or demand, in any of his majesty's courts of record at *Westminster*, or in any other court of record within *England* or *Wales*, the judgment thereupon shall not be stayed or reversed for any defect or fault, either in form or substance, in any bill, writ original or judicial, or for any variance in such writs from the declaration or other proceedings.

II. Provided nevertheless, That nothing in this act contained shall extend, or be construed to extend, to any appeal of felony or murder, or to any process upon any indictment, presentment or information, of or for any offence or misdemeanor whatsoever.

Concerning error refer to 31 Ed. 3. st. 1. c. 12—9 R. 2. c. 3—3 H. 7 c. 10—27 El. c. 8—31 El. c. 1—3 J. I. c. 8. Not to extend to appeals of felony, &c. 13 Car. 2. c. 2—16 Car. 2. c. 2—16 & 17 Car. 2. c. 8—20 Car. 2. c. 4—10 & 11 Will. c. 14—4 Anne c. 16.

Notwithstanding the great enlargement of the power of the judges, by preceding statutes, in amending writs, processes, &c. yet none of them were thought to extend to *writs of error*; and the rather because such amendment would not be in *affirmance* of the judgment; but it being found that defective writs of error occasioned great delay of justice, the 5 Geo. I. c. 13. was intended to remedy the inconvenience.

By the § VI. of an act of this commonwealth, entitled, "An act to regulate arbitrations and proceedings in courts of justice,"[4] it is declared,—"That in all cases where any suit has been brought in any court of record within this commonwealth, the same shall not be set aside for informality, if it appear that the process has issued in the name of the commonwealth, against the defendant for monies owing or due, or for damages by trespass, or otherwise, as the case may be, that said process was served on the defendant by the proper officer, and in due time, nor any plaintiff non-suited for informality in any statement or declaration filed, or by reason of any informality in entering a plea; but when, in the opinion of the court, such informality will affect the merits of the case in controversy, the plaintiff shall be permitted to amend his declaration or statement, and the defendant may alter his plea or defence on or before the trial of the cause; and if by such alteration or amendment, the adverse party is taken by surprise, the trial shall be postponed until the next court, and the oath or affirmation to be administered to jurors, shall be in the form following, *viz.* "I, A. B. do swear (or affirm as the case may be) that I will well and truly try the issue joined between C. D. plaintiff and E. F. defendant, and a true verdict give according to the evidence, un-

4. Act of 21st March, 1806.—4 St. Laws, Sm. Ed. 329—Purdon's abr. 263.

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less dismissed by the court, or the cause withdrawn by the parties."

This act does not vary the law on the subject of amendment, except it be as to the *time* when an amendment may be made: permitting it to be made on the trial. In other respects it does not sanction amendments which were authorised by law, at the time of its passage. It relates entirely to amendments *before verdict*, and of course is not co-extensive with the statutes of amendment and jeofails. Further it provides merely, as it is said all the statutes of jeofails do,[5] for the amendment of FORM. Amendments therefore in matter of substance can only be made at such *times* and in such *manner* as was permitted prior to the act.

Matter of *form* is such matter of course, as the clerk may supply without any information of the party.[6] As the year or day in a transitory action.[7] Every thing shall be said to be *form without which*, or independent of which, the right of action appears to the court.[8]

At the common law all mistakes were amendable during the same term. Formerly when the pleadings were *ore tenus*, at the bar of the court, if any error was perceived in them it was presently amended.[9] When the pleadings afterwards came to be in paper, it was considered but reasonable that the parties should have the like indulgence.[10] For whilst all the proceedings were in paper they were considered as only *in fieri;* and therefore subject to the controul of the court; but when once the record was made up it was formerly held, that no amendment could be permitted: of course amendments could only take place within the very term in which the error occurred; for during the term the record is in the breast of the court, but afterwards it admitted of no alteration.[11]

In latter times however courts have become more liberal, and, where justice requires it, will allow amendments *at any time while the suit is depending*, notwithstanding the record be made up. They now consider all the proceedings as *in fieri* till *judgment* is rendered; and till then they are empowered by the common law, to permit amendments to be made, as well in matters of *form* as of *substance*.[12]

Amendments at the common law depend much upon legal discretion. In relation to them it is observed by Lord Hardwicke—"That these amendments are hardly reducible to any certain rules, though it were to be wished that they could be, since they have been so much extended. In amendments before trial it is no rule that there can be *something to amend by;* after judgment it may be more necessary. In many cases errors in law occasioned by the mistake of the pleader have been amended. There is

5. Doug. 62.
6. R 5 Co. 35, '6.
7. Lat. 165, 1 Com. Dig. 339.
8. Hobb. 333.
9. 1 Stra. 11—10 Mod. 88.
10. 1 Salk 47—3 Salk 31—Tidd Pr. 652.
11. Co. Litt. 160.
12. 3 Blk. Com. 407.

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no authority for making it a certain rule, to tie up the hands of the court in making amendments, that *no trial be lost;* for the preparation for an argument, or demurrer must usually occasion that delay. Indeed the rule that where the faultiness of the plea is wilful, the party injured may have it amended, though the other may not, is a true one. And it is a strong *inducement* for the court to grant an amendment, where the party would otherwise lose his action though it is no *rule.*"[13]

Whilst the proceedings are in paper the court on motion, or a judge at his chambers, will amend the declaration,[14] plea,[15] replication,[16] &c. in *form* or in *substance,* upon proper and equitable terms. The court however will always take care, that if one party obtains leave to amend, the *other* party shall not be prejudiced, nor delayed thereby.[17]

The declaration may be amended, in form or in substance, even after a plea in abatement,[18] or of *nul tiel record.*[19]

In the case of *Owens* v. *Dubois,* T. 38 Geo. III. the plaintiff was allowed to amend his declaration, on payment of costs, by altering the defendant's name, after a plea of *misnomer* in abatement, and even after two terms had elapsed, and notwithstanding the defendant was in custody.[20]

In a *qui tam* action for usury, the court allowed the declaration to be amended by *altering the date of the notes.* Notwithstanding it was objected that here issue was joined and entered on the roll. That many terms had elapsed since the commencement of the action. [2 Burr 1098.]

In debt upon a bail bond, the memorandum was of Trinity term, the assignment appeared to be in November following, and it being moved to amend, the court said they could not amend as it stood, but gave leave to file a new bill of *Middlesex* term with a special memorandum, which was done, and then there was an amendment upon payment of costs.[21]

Formerly the plaintiff was not allowed to add a new count to his declaration, under pretence of amending it, after plea pleaded, or after the second term from the return of the writ; and a new right of action was considered in this respect as a new count.[22] But by modern practice the plaintiff may amend his declaration, by adding a new count, after plea pleaded, and even after two terms have elapsed on payment of costs.[23]

The plaintiffs declared as *executors* on a promise to their testator, and issue was joined on the plea of the statute of limitations, and afterwards the plaintiff moved to amend by *laying the*

13. Cases in B. R. temp. Hardw. 42.
14. 1 Wils. 7.
15. 1 Wils. 223.
16. 1 Wils. 76.
17. 2 Burr. 756.
18. 1 Salk. 50—1 Ld. Raymond 669. s. c. cases temp. Hardw. 44—But see 1 Salk. 2 Ld. Ray. 859, 1307 *contra.*
19. 1 Wils. 87—7 Term. Rep. 447—But see 1 Salk. 52—6 Mod. 263, 310—*semble contra.* See also *Collins* v *Gibbs,* 2 Burr. 899.
20. 7 Term. Rep. 698.
21. Stra. 583—Russel *v* Martin and Thorpe.
22. 1 Wils. 149—Say. Rep. 97, 151, 234.
23. 1 Wils. 149—Say. Rep. 235, '6.

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promise to be made to themselves, and it was allowed on payment of costs, and the defendant to plead *de novo*.[24] Against the amendment it was insisted that it would alter the nature of the action; but this was denied by the court, who said that although it varies the defence, it only makes the case agree with plaintiff's evidence. But the amendment in this case was under peculiar circumstances; had it not been allowed the action would have been barred by the running of the statute of limitations.[25] Upon the same ground leave was given to change the *venue* from *London* to *Middlesex*, as the plaintiff would otherwise be too late to bring another action; but the court observed, that upon a penal statute they would not probably interpose, but this being a remedial law the amendment must be made.[26] Yet in an information for killing a hare, it being three months since the fact was done; and had the amendment been refused the defendant would have escaped the prosecution, leave was given to amend.[27] Upon the same principle an amendment was allowed in altering the *demise* in a declaration of ejectment where the case was so circumstanced that the plaintiff would have been barred of a fine if he had been put to bring a new ejectment; an entry had been made to avoid the fine and the demise was laid *before* instead of *after* the entry.[28]

The court refused to allow a *notice of set-off* to be amended, observing that notices of this kind are like notices of trial, which never are amended, but they gave the defendant leave to withdraw his plea and plead *non assumpsit*, *de novo* with a new notice of set-off.[29]

Declarations in actions on bail bonds may be amended, as well as any other declarations. The court may have refused, in some instances, to grant leave to amend writs of *scire facias* against bail, where by such amendment the bail might be deprived of the advantage of surrendering his principal, as perhaps they might likewise do in case of a faulty *scire facias* quashed.[30]

A declaration in debt on a recognizance of bail, was amended after argument on demurrer and *ulterius concilium* ordered, upon payment of costs.[31]

After two terms the court refused leave to amend, by adding two counts to the declaration, observing that it was a rule not to allow such amendment after two terms.[32] In this case however

24. *Ex'rs. of the duke of Marlborough* v *Wigmore*—Stra. 890—1 Barnard 408—Fitz. 193—1 Tidd Prac 653—1 Wils. 149—Say. Rep. 235, '6.

25. S. C. Cited by Yates & Aston Js.—Burr 2449—who said leave was given because otherwise the action would have been lost.

26. *Cooke* v *Shone*—Barnes 12, 448—Prac. Reg. 20—Vin. Abr. Sup. 1, 196.

27. Howell *qui tam* v James—East. 20 Geo. 2—1 Wils 163.

28. Lee of Hardiman v Pelkington et al.—4 Burr. 2447.

29. 2 Barnes, &c. [See notes.]

30. Hodgson A. V. C. v Mitchell—East. 33 Geo. II—Barnes 26.

31. Davie v Atkinson—E. 13 Geo. II—Prac. Reg. 19—see also Mich. 7 Geo. II. Stra. 954. 686.

32. 1 Wils. 149—Mich. 20 Geo. II.

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the defendant was in actual custody; and that was the third term he had been so.

But in a later case, though the court said that such was the general rule; yet as the plaintiff might discontinue, to save the trouble of a new action, they permitted the amendment, on payment of costs, of plea and application.[33]

The plaintiff in a penal action having carried the record down to trial, at the summer assizes, discovered that he had made a mistake, in the manner of charging the offence in the declaration, he therefore withdrew the record, and in *Hil. term* following moved to amend; this was opposed, because the time limited for suing was expired. But the court was of opinion that the plaintiff had not been guilty of any unnecessary delay, for which reason, and because the amendment prayed did not go to the length of introducing *a new charge* against the defendant, they allowed the rule to be made absolute.[34] In Jones *qui tam* v. Ross the supreme court of Pa. allowed the plaintiff to amend his declaration, at the term appointed for the trial of the cause, but said that the defendant would be entitled to an imparlance and costs. [2 Dal. Rep. 143.]

Where a party has mistaken his action; or where the amendment, by varying the counts, or the adding new ones, would introduce *a new cause of action* the court will not allow an amendment.[35]

In assumpsit leave was given to strike out of the declaration 800*l.* and to insert 8000*l.*[36] But after verdict the amount of the damages stated in the declaration cannot be increased. For the court have no power to increase the party's demand.[37]

After a demurrer has been argued, the court will sometimes give leave to withdraw it, and plead or reply *de novo*, in which case an amendment will be allowed. But this is altogether discretionary with the court; and it is not usual to amend after a demurrer has been argued, and the opinion of the court is known: and Wright J. said that it would certainly be improper to give plaintiff leave to withdraw his demurrer under such circumstances, in an action against *bail*, whom the court are always inclined to favor.[38]

The reason of the rule not permitting a new count to be added after the second term, is not applicable to pleas, replications, &c. which may be amended at any time, so long as they are in paper. Thus where a defendant had pleaded two pleas, in *Hilary* term; at *Trinity* following after issue joined leave was given to amend

33. Gauvay v Stevens—East. 21 G. 2—Barnes 19.

34. Cope v Marshall—Trin. 28 & 29 G. II—Sayer 234—Harman v Lane—Hil. 13 G. 2—Prac. Reg. 20—Barnes 12, 448.

35. Cope v Marshall—Trin. 28 & 29 Geo. 2—Sayer 234.

36.

37. Ray v Lister—Hill. 12 Geo. II—And. 351.

38. 2 Stra. 646—1 Barnard K. B. 213, 220—Saund. 202—Stra. 735, 954, 976—Cases temp. Hard. 42 s. c.—1 Burr. 321—Doug. 330, 620—1 East. 372—Barnes 9, 21, 25. But after the court had given their opinion on the argument, an amendment was denied. 1 East. 391—and see 2 Bos. & Pul. 482—3 Bos. & Pul. 11, 18—see also Say. Rep. 116, 17, 316—1 East. 135, 372—2 Burr. 756.

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his two pleas, and to add a third upon payment of costs.[39] So a plaintiff has been allowed to amend, by withdrawing his replication, and replying *de novo*, after a lapse of many terms.[40]

The statutes relate exclusively to amendments of the *record*. The statutes 14 *Edw. III. st.* 1. c. 6—9 *H. V. st.* 1. c. 4—4 *H. VI.* c. 3—8 *H. VI.* c. 12. and 8 *H.* 6. c. 15. are, properly speaking, the only statutes of amendments: the rest, beginning with 32 H. VIII. c. 30. are statutes of *jeofails*.[41]

It is a general rule, in order to amend upon these statutes, that there must be *something to amend by*. In conformity with this rule it has been held, that the original writ or bill is amendable by the instructions given to the officer, as by the attorney's precipe;[42] the declaration by the bill or writ;[43] the pleadings subsequent to the declaration by the proper book, or draft under counsel's hand; the *nisi prius* roll, by the plea-roll;[44] the verdict, whether general or special, by the plea-roll, memory, or notes of the judge,[45] or notes of the associate, or clerk of assize; and if the verdict be special, by the notes of counsel,[46] or even by an affidavit of what was proved upon the trial; the judgment shall be amended by the verdict;[47] and the writ of execution by the judgment[48] or by the award of it on the roll.

The amendment may be made in any stage of the proceedings; and those things which are amendable *before* error brought, are amendable *afterwards*, so long as diminution may be alledged, and a *certiorari* awarded.[49] But neither at the common law, nor under any of the statutes, will an amendment be allowed which will change the nature of the action from what it was at its inception. It never was intended to confound the boundaries of actions, and to enable a plaintiff to call his action what he pleased at first, and afterwards to assume a different ground.[50]

After error brought in B. R. on a judgment of the court of common pleas, the amendment may be made either in the one court or the other. If it be made in the court below a *certiorari* may be had, on alledging diminution to bring up the record in its amended state; or if the clerk of the treasury of the common pleas attend with the record in B. R. that the court will on mo-

39. 1 Wils. 223.

40. 1 Say. Rep. 172—2 Burr. 756—Alder v Chip.

41. 1 Salk. 51—1 Tidd Pr. 660—See Willes 122.

42. 8 Co. 161—1 Ld. Ray. 564—1 Salk. 49—Barnes 3, 11, 16, 24, 26—1 Dallas 197.

43. 1 Stra. 583—2 Stra. 954, 1151, 1162, 1271—Say. Rep. 294—1 Tidd P. 660.

44. 8 Co. 161.b—Palm. 404—Latch 58, 86—Cro. Car. 144—1 Salk. 50, 88—2 Ld. Ray. 895, S. C.

45. Cro. Eliz. 258—2 Stra. 846—1 Barnard K. B. 213, 220, S. C.

46. 1 Ld. Ray. 133—Cro. Car. 338—Gil. C. P. 139, 140—1 Vin. Sup. 215, 216—Buller's N. P. 320, c. 6—2 Str.—1 Wils. 33—Doug. 376, 673, 722, 745—3 Term. R. 659, 749.

47. Cro. Car. 145—1 Salk. 47, '8—Ld. Ray. 138, 335—1 Salk. 53—Barnard K. B. 191—Gil. C. P. 139, 140—but see 2 Term. Rep. 281.

48. 1 Stra. 514—8 Mod. 49 S. C.

49. 2 Stra. 787—3 Term. Rep. 349, 657—2 Bos. & Pul. 336—Say. Rep. 12—2 Black. Rep. 836—2 Term. Rep. 737.

50. 8 Co. 162.a—W. Jones 9—3 Term. Rep. 349, 659, 749—7 Term. Rep. 474, 703—and see 1 Salk. 269, Cases *temp.* Hardw. 119, for the time of awarding a *certiorari*.

51. Savignac v Roome M. 35 Geo. 3—6 Term. Rep. B. R. 125.

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tion, order the transcript to be amended. And this latter way of amending the transcript is the course of the court, to save a *certiorari;* or if the record be right in the court below, upon diminution alledged the party may have a *certiorari* of common right, to bring it up. Upon error brought in the exchequer chamber, on a judgment of B. R. the course is somewhat different, as the court of common pleas is supposed to send the very record, but B. R. only sends a transcript. When the record in such case is amended, it is either certified into the exchequer chamber, upon diminution alledged, or upon carrying the record there, by the clerk of the treasury of B. R. the justices and barons will order the transcript to be amended, or it may be brought back and amended in B. R. by the original record. Upon an amendment after error brought, it was not formerly usual to allow the plaintiff his costs of a writ of error; but it is now settled that they shall be allowed, provided the amendment be made after final judgment, and the plaintiff after notice of the amendment, do not proceed further; but if the amendment be made before final judgment or the plaintiff in error proceed after notice of the amendment, he shall not be allowed costs. And where amendments are made upon a writ of error, after verdict, &c. by virtue of the statute of jeofails, no costs are given; for the construction of these statutes has been to give judgment for the party upon the writ of error as if the amendments had been made.

APPEAL.

† 9 HENRY III. CAP. XXXIV. A.D. 1225.

In what only case a woman shall have an appeal of death.

No man shall be taken or imprisoned upon the appeal of a woman for the death of any other, than of her husband.

Bro. appeal 5, 17, 60, 68, 104, 112—Rast. Ent. 43.

In every well regulated society the punishments of crimes and misdemeanors is taken out of the hands of individuals, and belongs exclusively to the government; far from countenancing private feuds, or the animosities of individuals, the object of the public law is to suppress them. That the laws on the subject of *appeal*, which originated in a state of semi-barbarism; and were countenanced in later times, in consequence of the corruption of at least one branch of the government, should be in force at the present day in Pennsylvania would unquestionably afford a subject of deep regret.

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An appeal is the party's private action, seeking *revenge*, for the injury done him, and at the same time prosecuting for the public offence.

The right of *appeal* is predicated on the idea, that crimes might be commuted, by a pecuniary satisfaction, paid to the injured party, or his nearest relative; and it was considered that in this way the most enormous offences might be expiated.[1] Judge Blackstone derives the custom from the ancient Germans; amongst whom, according to Tacitus, "*luitur homicidium certo armentorum ac pecorum numero; recipitque satisfactionem universa domus.*" It is highly probable too that such was the Irish Brehon law; the Saxon law, and may at the present day be the law of the Ottoman empire.[2] It would perhaps be easy to trace this custom to very remote ages: But all that seems necessary to say is, that such a custom commonly prevails amongst savages, or men not far removed from the state of savage life, and is at the present day perhaps as well understood by the Indians of our own country as it was by the ancient german nations.

Though these appeals were in the nature of prosecutions for some atrocious injury, by which an individual suffered; yet in England it was anciently permitted, that one subject might appeal another of *high treason;* and so late as 1631 a trial by battel was awarded in the court of chivalry, on an appeal of treason.[3] Such appeals however are done away by statute; and all that remained after those statutes, were appeals of felony, or mayhem.[4] An appeal of felony may be brought for crimes committed against the parties themselves or their relations; those against the parties themselves are mayhem, rape, larciny and arson, and for such injuries the parties injured may support this private process. The only crime against one's relations for which an appeal can be brought, is that of homicide by murder, or manslaughter; this can only be brought by the wife for the death of her husband, or by the next heir male for the death of his ancestor. Which heirship by an ordinance of Hen. I. was confined to the four nearest degrees in blood. But if the heir be accused of the murder, the one next in succession shall have the appeal; so in case the wife be accused of the murder, the heir may prosecute an appeal against her.

For the right of the injured to prosecute by appeal was not more tenaciously maintained, than that of the accused to wage *battel.*

If the heir entitled to an appeal should die pending the appeal, or even without having commenced it, the better opinion seems to be, that no one could prosecute it.[5]

Appeals are local actions, and must be tried in the county

1. 4 Black. Com. 313—Tac. *de mor. & Germ.* c. 21.
2. 4 Blk. 313—Lady M. W. Montague 1 42.
3. By Donald Lord Rae v David Ramsey—Hushw. vol. 2, part 2, p. 112.
4. 4 Black. Com. 314—1 Hale P. C. 449.
5. 2 Hawk. P. C. 166.

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where the offence was committed.[6] But in case of larciny, if the thief flee into another county and carry the goods with him, he may be indicted in either.[7]

The writ of appeal is an original issuing out of chancery, returnable into the *king's bench only*.[8]

The utmost certainty is required in the declaration describing the offence—appropriate technical words must be used in it.

It must, in an appeal of death, describe the part of the body wherein the wound was given; the breadth and depth of the wound.[9]

By the statute of Glouster[10] 6 Edw. 1. c. 9.(4) it is provided, "That no appeal shall be abated so soon as they have been heretofore; but if the appealor declare the deed, the year, the day, the hour, the time of the king, and the town where the deed was done,[11] *and with what weapon he was slain*, the appeal shall stand in effect (5) and shall not be abated for default of fresh suit if the party shall sue within the year and day after the deed done."[12]

As to pleas, it is a good bar to an appeal that the woman who appeals was never lawfully married; that A. B. is heir and not the appellant. Auterfois *convict* of manslaughter is a good plea in an appeal of murder.[13] A *retraxit* of an appeal is a good bar to another for the same offence; and as also of a non-suit; and according to some opinions a discontinuance *after appearance*. So is a release of all manner of actions, or of all actions criminal, or of all actions concerning pleas of the crown, or of all appeals, or of all demands. *Secus* of a release of all *personal actions:* an appeal being an action of a higher nature.

6. Dyer 38.

7. 1 Bac. Abr. 125—2 Hawk. P. C. 168.

8. 1 Bac. Abr. Tit. Appeal G. 126.

9. 2 Hawk. 8. C. 177—1 Bare lib. tit. Appeal (H.)

10. The statute of Glouster is not contained in the report of the judges, but, so far as it relates to appeals, it seems to be equally in force with any other statute on the subject.

11. The words printed in italics are not in the original. See 1 Ruff. 67.

12. In the time of Edw. III. the limitation contained in this statute was considered to extend to all appeals. St. Pl. c. 62 (B.) c. 12—Fitz. Corone 184. But since that period it has been always held that the limitation extends to appeals of death, and not to other appeals. 2 Vin. Abr. 538, tit. Appeal (G.) Thus an appeal of robbery may be brought by the party robbed *twenty years after the offence*. 4 Le. 16 pl. 58—Trin. 26 Eliz. B. R. Doylie's case. But in this as in all other cases of appeal the common law requires there must be fresh suit made by the appellant, i. e. due diligence must be used to apprehend the offender Br. Appeal pl. 23. cites 7 H. 4, 43—St. Pl. Cr. 62 b. lib. 2. c. 12. See Hale P. C. 185—2 Hawk. P. C. 168.

13. It was usual for the court to delay the calling a convict to *judgment* to hinder him from praying his clergy (especially if an appeal was depending) in order to make him liable to the appeal. And in the time of James II. it was determined by all the judges that the court might do so. 1 Vin. Sup. 267. But the contrary seems to be fully settled in the case of Armstrong v. Lisle, 1 Salk. 63—wherein it was adjudged that a conviction of manslaughter and the prayer of clergy thereupon may be pleaded in bar of an appeal of murder. The delay of the court in not calling a man to judgment shall not deprive himself of so high a privilege.—See Hob. 289—Hawk. P. C. B. 2 c. 36 § 14—Burr. 2301.

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An appeal being a vindictive action, the proceedings are on the *civil side* of the court [B. R.] and not on the criminal, though the defendants are pursued not only *criminally* but *capitally*.[14]

All appeals must be prosecuted in *person* and not by *attorney*; and if the plaintiff appears by attorney where he ought not, &c. this is a discontinuance:—But it is said that where there is no wager of battail, it may be prosecuted by attorney, for which there must be a special warrant of attorney filed.[15] An infant appellant shall prosecute by *guardian*.

At the common law a woman might have prosecuted an appeal of the death of any of her ancestors to whom she was heir; which was attended with this inconvenience, that when a woman prosecuted, the appellee lost his right of defending himself by *combat*.[16] Hence the statute in the text 9 H. 3. c. 34. restrains this right to an appeal of the death of her husband: and Bracton, an almost cotemporary expositor of this statute, confines it to the death of her husband *inter brachia*[17] *sua interfecti—si de visu loquatur*.

By the words of the statute of Westminster 2. 13 Edw. 1. c. 12. (in the text) it appears that before that statute the defendant being duly acquitted should recover his damages, but that is to be understood in a writ of conspiracy wherein he should recover damages for satisfaction in regard of the infamy, imprisonment, and vexation done to him, and further that the parties convicted should be fined to the king and imprisoned, which lord Coke says he had read to have began in this sort before the reign of H. 1.—They who plotted or compassed the death of a man under pretext of law by bringing of false appeals, or preferring untrue indictments against the innocent of felony, who being duly acquitted, both the appellant and his abettors were to suffer death. But king H. 1. by authority of parliament, did mitigate the severity of this ancient law (lest men should be deterred and afraid to accuse:) and did ordain that if the delinquents were convicted at the suit of the party they should make satisfaction, and be fined and imprisoned; but if they were convicted by judgment at the suit of the king (whom they pretended to intitle to the forfeiture) then they should lose the freedom of the law; they should be so infamous as never to be witnesses, or to be of any jury; that they should never come in or near the king's court, but make their attornies, that they, their wives and their children should be cast out of their houses, and their houses prostrated, their trees eradicated and subverted, their meadows ploughed up and wasted, every thing to be destroyed which nourished or comforted them in respect

14. Burr. 2643. The appellee in an appeal of death is entitled to have over of the writ which is by the secondary's reading it. Burr. 2793.

15. 2 Vin. Abr. Appeal (Aa.) 1 Selk. 62—Burr 2798—Smith widow v. Tayloe.

16. Obs. on the Stat. 23.

17. By *inter brachia* in these ancient authors is to be *understood* the wife which the deceased had lawfully in his possession at the time of his death. She must be his wife both of *right* and *in possession*. 2 Inst. 68, 317—St. P. C. 59—2 Vin. Abr. 525.

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to the villainy and shame done to the delinquent, all against nature and order, for that the delinquent sought the blood of the innocent under pretex and colour of law; and this in latter books is called a villainous judgment; all which, in case of conspiracy, remain a constant law to this day. But this act doth give the party a speedier remedy for his satisfaction than he had before; as hereafter shall appear.[18]

The statute 28 Edw. III. st. 2. (in the text) relates to appeals by *approvers*. An *approver (Probator)* is one who being indicted of treason or felony for which he is in prison, confesses the indictment; and being sworn to reveal all the treasons and felonies he knows, enters, before a coroner, his appeal against all his partners in the crime within the realm.[19]

All persons may be approvers, except peers, persons attainted of treason or felony, persons outlawed, infants, women, persons in holy orders, or those who are *non compos mentis*.[20]

It is at the election of the appellee either to put himself on the country, or to wage battle with the approver. So if several be appealed by one approver, he is compellable at their election to wage battle with each of them in succession. If the appellee or appellees be vanquished the approver shall have his pardon *ex debito justiciæ*. On the other hand, if the approver be vanquished he shall receive judgment to be hanged upon his own confession; for the condition of his pardon has failed.[21]

It is purely in the discretion of the court to permit the approver thus to appeal or not. And when allowed a great degree of strictness and nicety was required therein. Yet more mischief, it is observed by sir Matthew Hale, hath arisen to good men by these kind of approvements upon false and malicious accusations of desperate villains, than benefit to the public by the discovery and conviction of real offenders. Hence this mode of prosecution is now, and long hath been totally disused in England, though it seems not to have been expressly abolished by any statute.[22] It was never in use in Pennsylvania.

As a substitute for the mode of prosecuting by an approver, several statutes have provided in relation to the offences of coining, robbery, burglary, house-breaking, horse-stealing and larceny to the value of five shillings from shops, ware-houses, stables and coach-houses, that if such offender being out of prison, shall discover two or more persons, who have committed the like offences so that they may be convicted thereof, he shall in case of burglary or house-breaking receive a reward of 40*l.* and in general be entitled to a pardon of all capital offences, murder and treason excepted; and of them also in case of coining.[23]

18. 2 Inst. 383.

19. H. H. P. C. 192—3 Inst. 129—St. Pl. Cr. 142—2 Hale P. C. 225.

20. 3 Inst. 125—H. H. P. C. 19—Que. as to women, and see 2 Hawk. 205.

21.

22. 4 Black. Com. 330—Obs. on the Stat. 135—2 Hale P. C. c. 29.

23. See 4 & 5 W. & M. c. 8.—3 Ruff. 517—6 & 7 Will. III. c. 17, § 12—3 Ruff. 587—10 & 11 Will. III. c. 23, § 5—4 Ruff. 27—5 Anne c. 31, § 4—4 Ruff. 265.

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Judge Blackstone observes[24] that all the *good*, whatever it may be, that could be expected from this method of *approvement* is fully provided for by these statutes; and he might have added all the *evils* likewise, without fear of being contradicted.

A most judicious commentator on penal laws,[25] after censuring this pernicious mode of prosecution, which he remarks hath been gradually discouraged and disused, though never prohibited by law, notices as a subject of regret that certain modern acts of parliament[26] have in some degree unwarily revived this dangerous doctrine by the frequent offers of reward and pardons to capital felons, on discovery and conviction of their accomplices: "The price of blood should in no case receive the legislative sanction."

Appeals of every description are out of use in England as the reasons for prosecuting them no longer exist.

Formerly it was necessary to prosecute an appeal of larceny in order to obtain restitution of the stolen goods; for where the conviction was upon an indictment such restitution could not be had at the common law—but the statute of 21 H. VIII. c. 11.[27] has superceded the necessity of appeals of larceny: giving a writ of restitution.

Lord ch. just. Holt, no doubt had in view this abuse of power, and the means of restraining it when he pronounces an appeal to be a *noble prosecution, and a true badge of english liberties.*[28]

The times however when pardons were sold, and capital punishments commuted for money, have long since passed away.

The last prosecution by appeal that I recollect to have met with in the english books is that of *Smith, widow v. Tayloe*, which occurred in the 11th year of Geo. II. which case sir I. Burrows has exhibited in a lengthy report, rather as a subject of curiosity than of practical utility.[29]

No appeal ever was prosecuted in Pennsylvania. Indeed if the rule that "the colonists retain all the rights which pertained to them at the time of their emigration; and are subject to the same laws, so far (and so far only) as they are *suitable to their new situation*," be a true one, it may perhaps well be questioned whether any part of the common, or statute law of England relating to appeals is, or ever was in force in Pennsylvania.

24. 4 Black. 350.
25. See Eden Prin. P. L. 190.
26. Of these statutes see note 23 ante —and 6 Geo. 1. c. 23—5 Ruff. 326—8 Geo. II. c. 20—6 Ruff. 191—and 29 Geo. II. c. 30—7 Ruff.
27. See this statute in the text. Tit. TRIAL.
28. 2 Viners' Abr. 525—see 2 Inst. 12—12 Mod. 375—Stout v. Fowler.
29. Burr. Rep. 2798.

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6 EDWARD I. CAP. IX. A.D. 1278.

One person killing another in his own defence, or by misfortune. An appeal of murther.

THE king commandeth that no writ shall be granted out of the chancery for the death of a man to enquire whether a man did kill another by misfortune, or in his own defence, or in other manner without felony;(2) but he shall be put in prison until the coming of the justices in eyre, or justices assigned to the goal-delivery, and shall put himself upon the county before them for good and evil:(3) In case it be found by the country, that he did it in his defence, or by misfortune, then by the report of the justices to the king, the king shall take him to his grace, if it please him.(4) It is provided also, that no appeal shall be abated, so soon as they have been heretofore; but if the appellor declare the deed, the year, the day, the hour, the time of the king and the town where the deed was done **and with what weapon he was slain*, the appeal shall stand in effect,(5) and shall not be abated for default of fresh suit, if the party shall sue within the year and the day after the deed done.

9 Ed. 3. st. 1. c. 26—3 Ed. 1. c. 11—2 Inst. 314—Kel. fo. 53, 108—Wood's Inst. 628—Bulsts. 80. See 2 Ed. 3. c. 2. and 14 Ed. 3. st. 1. c. 15. in what cases the king's pardon shall be granted. And see the 28 Ed. 3. c. 9. which orders that no writ shall be directed to a sheriff to charge an inquest to indict any.

* *Not in the original.* Regist. 134, 300.

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13 EDWARD I. CAP. XII. A.D. 1285.

The appellant being acquitted, the appellor and abetters shall be punished. There shall be no essoin for the appellor.

FORASMUCH as many, through malice intending to grieve other, do procure false appeals to be made of homicides and other felonies by appellors, having nothing to satisfy the king for their false appeal, nor the parties appealed for their damages;(2) it is ordained, That when any, being appealed of felony surmised upon him, doth acquit himself in the king's court in due manner, either at the suit of the appellor, or of our lord the king, the justices, before whom the appeal shall be heard and determined, shall punish the

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appellor by a year's imprisonment, and the appellors shall nevertheless restore to the parties appealed their damages, according to the discretion of the justices, having respect to the imprisonment or arrestment that the party appealed hath sustained by reason of such appeals, and to the infamy that they have incurred by the imprisonment or otherwise, and shall nevertheless make a grevious fine unto the king.(3) And if peradventure such appellor be not able to recompence the damages, it shall be inquired by whose abetment or malice the appeal was commenced, if the party appealed desire it;(4) and if it be found by the same inquest, that any man is abettor through malice, at the suit of the party appealed, he shall be distrained by a judicial writ to come before the justices;(5) and if he be lawfully convict of such malicious abetment, he shall be punished by imprisonment and restitution of damages, as before is said of the appellor.(6) And from henceforth in appeal of the death of a man there shall no essoin lie for the appellor, in whatsoever court the appeal shall hap to be determined.

The punishment of an appellor for a false appeal, 12 Co. 126—Hob. 98—Fitz. damage 77—Fitz. Coron 12, 77, 98, 386—11 Co. 77. See 1 Ed. 3. st. 1 c. 7. *which directs inquiry to be made of gaolers who compel prisoners to appeal, and* 14 Ed. 3d. st. 1. c. 10, *which makes it felony in such gaoler.* Regist. 56. Inquiry of abettors, 12 Co. 125—Cro. El. 223, 71—14 H. 7. 2—26 H. 8. 3—Dyer 120, 131—8 H. 5. 6—8 Ed. 4. 3. No essoin for the appellor. *See postea ch. 17, 27, 28 for essoin.* Regist. 184—2 Inst. 383.

† 28 EDWARD I. STAT. 2. A.D. 1300.

What process shall be awarded against those that be appealed by approvors.

WHEREAS certain justices of late were assigned to take assises in all shires of the realm, and also to deliver the goals of the same shires at every of their comings after the taking of such assises, as more plainly is contained in a statute made by the king thereupon;(2) our lord the king, at his parliament holden at *Westminster*, the eight and twentieth year of his reign, for more sure observation of his peace, and felonies to be more quickly punished, and prisoners to be sooner delivered, hath granted, ordained, and provided, That whosoever be appealed by aprovors, being in

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prisons which the same justices do deliver, (and wheresoever in our realm that such appellees be dwelling*) that immediately it shall be commanded to the sheriff, in whose bailiwick the parties so appealed be commorant or may be found, by the king's writ, under the testimony of the same justices, that he do take such persons appealed, and cause them to be brought unto the goal, where the appealors be kept that appealed them, and they shall answer there before the same justices.(3) And if they that be appealed will put themselves upon the country, it shall be commanded in like manner by a judicial writ, from the same justices to the sheriff in whose liberty the felonies were done, of which they were appealed, that he shall cause an enquest of the country to come before the same justices, unto the same place where the appealors be kept, at a certain day.(4) And the sheriffs and others (in whose keeping such appealors be detained) shall receive without contradiction those that be appealed by such provors, when the parties appealed be taken in the form abovesaid, and brought unto the same appealors.

27 Ed. 1. stat. 1. c. 3—2 H. 7. f. 3—Fitz. Coron. 221, 322, 387, 440, 441, 443, 456, 460. * Add *or lurking*. Rast. 42. *See further concerning appeals*, 1 H. 4. c. 14—8 H. 6. c. 10—10 H. 6. c. 6—3 H. 7. c. 1—2 & 3 Ed. 6. c. 24.

ARBITRATION.

* 9 & 10 WILLIAM III. CAP XV. A.D. 1698.

An act for determining differences by arbitration.

WHEREAS it hath been found by experience, that references made by rule of court have contributed much to the ease of the subject, in the determining of controversies, because the parties become thereby obliged to submit to the award of the arbitrators, under the penalty of imprisonment for their contempt in case they refuse submission: Now, for promoting trade, and rendering the awards of arbitrators the more effectual in all cases, for the final determination of controversies referred to them by merchants and traders, or others, concerning matters of account or trade or other matters: Be it enacted by the king's most excellent majesty, by

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and with the advice and consent of the lords spiritual and temporal and commons, in parliament assembled, and by the authority of the same, That from and after the eleventh day of *May* which shall be in the year of our Lord one thousand six hundred ninety-eight, it shall and may be lawful for all merchants and traders, and others desiring to end any controversy, suit or quarrel, controversies, suits or quarrels, for which there is no other remedy but by personal action or suit in equity, by arbitration, to agree that their submission of their suit to the award or umpirage of any person or persons should be made a rule of any of his majesty's courts of record which the parties shall choose, and to insert such their agreement in their submission, or the condition of the bond or promise whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons, which agreement being so made and inserted in their submission or promise, or condition of their respective bonds, shall or may, upon producing an affidavit thereof made by the witnesses thereunto, or any one of them, in the court of which the same is agreed to be made a rule, and reading and filing the said affidavit in court, be entered of record in such court, and a rule shall thereupon be made by the said court, that the parties shall submit to, and finally be concluded by the arbitration or umpirage, which shall be made concerning them by the arbitrators or umpire, pursuant to such submission; and in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court, when he is a suitor or defendent in such court, and the court, on motion, shall issue process accordingly, which process shall not be stopped or delayed in its execution, by any order, rule, command or process of any other court, either of law or equity, unless it shall be made appear on oath, to such court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration or umpirage was procured by corruption, or other undue means.

II. And be it further enacted by the authority aforesaid, That any arbitration or umpirage procured by corruption or undue means, shall be judged and esteemed void and of none effect, and be accordingly set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court

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where the rule is made for submission to such arbitration or umpirage before the last day of the next term after such arbitration or umpirage made and published to the parties; any thing in this act contained to the contrary notwithstanding.

Vin. v. 3, 40, &c.---Dan. v. 1, 513, &c.

Arbitration is where the parties to a controversy submit a matter in dispute concerning property, or personal *wrong*, to the decision of one or more persons as arbitrators.

This subject is not necessarily connected with a law-suit, as arbitrations frequently take place when no suit is depending.

When two are appointed by the parties it is usual to agree that they shall have power, in case of disagreement, to call in another person as *umpire*, to whose judgment it is then referred. The decision of the arbitrator, or arbitrators, is called an *award*.

There are *five* species of awards in Pennsylvania. *First*, those made by mutual consent, in pursuance of arbitration bonds entered into out of court; *secondly*, those which are made in a cause depending in court, by rule of the court before trial: which are awards at common law; *thirdly*, those which are made under a rule of court by virtue of the statute in the text 9 & 10 Will. III. c. 15; *fourthly*, awards made in pursuance of the act of assembly of 1705; and *fifthly*, those made under the act of 1810, entitled "*An act regulating arbitrations.*"[1]

The act of 1705 provides—"That in all cases where the plaintiff and defendant having accounts to produce one against another, shall, by themselves, or attornies or agents, consent to a rule of court for referring the adjustment thereof to certain persons, mutually chosen by them, in open court, the award or report of such referees being made according to the submission of the parties, and *approved of by the court*, and entered on the record or roll, shall have the same effect, and shall be deemed and taken to be as available in law as a verdict given by twelve men; and the party to whom any sum or sums of money are thereby awarded to be paid, shall have judgment, or a *scire facias*, for the recovery thereof, as the case may require, and as is herein before directed concerning sums found and settled by jury, any law or usage to the contrary of this act, in any wise notwithstanding."[2]

Real estates as well as personal chattels may be the subject of a submission even in England; and it may be safely affirmed that where the parties might by their own act transfer real property, or exercise any acts of ownership with respect to it, they may refer any dispute concerning it to the decision of a third person, who may order the same acts to be done which the parties themselves might do by their own agreement: therefore when we are told that an arbitrator cannot make an award of freehold; that he can-

1. 1 Dal. 314—5 St. Laws 131. 2. 1 St. Laws, Sm. Ed. 50.

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not award the freehold of one man to another, or that partition cannot be by an award; we are to understand these expressions to mean no more than that land cannot be transferred, or a division made of it by the mere words of the award; but it is necessary that the award should order such acts to be done as would, if done by the voluntary agreement of the parties, amount to a proper transfer or partition at law.[3]

The submission is the authority given by the contending parties, to the arbitrators to determine their grievances; and being a contract, or agreement, must not be taken strictly, but largely according to the intent of the parties submitting.

Debt on a common arbitration bond, in which the time for the arbitrator to make his award was limited. The declaration stated that the time was afterwards, by the mutual consent of the parties enlarged, within which enlarged time the award was made. Ld. Kenyon, Ch. J. said, that the question was not then to be discussed whether the party had not *some remedy*, but whether his remedy lay on the bond? and he held that it did not. By the bond he was bound to abide by the award under a penalty if made within a given time; but that penalty could never be extended to an award made after that time, under a new agreement. To which opinion the other judges assenting, judgment was given for the defendant.[4]

Criminal causes are not arbitrable, because it is the interest of the community that criminals should be punished; and if such submissions should be by bond, the obligation is *void*, and the parties may be punished for entering into such bond.

The arbitrators being judges of the party's own choosing, he shall not come and say they have done him injustice, and put the court to examine it; *aliter* where they exceed their authority.[6] But awards have been frequently set aside, especially in equity, where the arbitrators have appeared to have been mistaken; or have been guilty of corruption, or partiality; as if they have an interest in the thing in controversy.[7]

The statute in the text does not extend to a submission by rule of court.[8]

The intent of the act was to put submissions where no cause was depending, upon the same footing with those where there was a cause depending; and it is only declaratory of what the law was before in the latter case.[9]

A submission of all matters in variance *between the parties in the cause*, is not confined to the subject matter in the particular action then depending: but will extend to cross demands between the parties, though not pleaded by way of set-off, and the costs being to abide the event will make no difference. But a reference

3. 1 Vin. Sup. 283—Kyd's Award 38.
4. Brown v Goodman, East. 29 Geo. 3, 3 *Term Rep.* 592.
6. Salk. 75 pl. 11.
7. 2 Vern. 251.
8. Stra. 301—2 Burr. 701.
9. 2 Burr. 701.

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of all matters in difference *in the cause between the parties* is confined solely to the matters in dispute in the particular action.[10] It is observed that this distinction is too refined for the general understanding of mankind, and that it would be better that the terms of reference in the former case should be "all matters in difference in the cause," omitting the words "*between the parties*," and in the latter a reference of "all matters in difference between the parties"—omitting the words "*in the cause.*"[11]

In case of a submission of all matters in variance between partners, the arbitrators may award a dissolution of the partnership.[12] When a reference is made to three, or any two of them, an award made by two is good, provided the third had notice of the meeting, &c. but not otherwise. The award must be made within the time limited, unless it be enlarged by consent of the parties.[13] If the submission be by bond, an agreement to enlarge the time may be made a rule of court, and in such case an attachment will be granted for not performing the award.[14]

Where arbitrators are empowered to choose an umpire, they may elect one before they enter upon the examination of the matter referred to them; and this seems to be the fairest way of choosing an umpire.[15]

If an award be grossly unreasonable it will be set aside; as where they awarded 495*l.* sterling against one of the parties for calling the other, who was a butcher, a "bankrupt knave," *to repair his honor*, as they called it.[16]

All matters in difference being referred to the award of two arbitrators, or in case of their disagreement, of an umpire, the arbitrators regularly heard all the evidence, but disagreeing, stated this evidence to the umpire, on which he made his award without re-examining the witnesses. *After he had made the award*, the party against whom it was made applied to him to hear the evidence himself, and on his refusing, moved the court to set aside the award, but the court thought that as no application was made to the umpire to examine the witnesses *before* he had made his award, the rule should be discharged with costs.[17]

When the arbitrators choose an umpire their power is determined, for the arbitrators and the umpire are not to have concurrent jurisdiction; yet if they join in the award it is surplussage and will not vitiate.[18] It is to be understood, however, that

10. 2 Term. Rep. 645—2 Tidd's Pr. 746.

11. Smith v Miller, 30 Geo. III. 3 Term. Rep. 626.

12. Green v Waring 7. 4 Geo. III. Blackst. 475.

13. Willes 215—Barnes 57—2 Tidd's Pr. 749.

14. 8 Term. Rep. 87.

15. Doyley v Petslow 7. 28, 29 Geo. II. Sayer 221—S. P. Roe *ex dem.* Wood v Doe M. 29 Geo. III. 2 Term. Rep. 644—1 Vin. Sup. 290—see 1 Bac. Abr. 138 and the authorities there cited.

16. 3 Cha. Rep. 76—2 Vern. 251—see Vern. 157.

17. Hall v Lawrence, 32 Geo. III. 4 Term. Rep. B. R. 589. But this doctrine has been denied in two cases determined in the Supreme court. See *Falconer v Montgomery*, 4 Dal. 232, and *Passmore v Bayard.*

18. 1 Bac. Abr. 138—Soulsby v Hodgson E 4 Geo. III. Black. 463.

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where the arbitrators choose an umpire, within the time limited for making their award, it is no relinquishment of the arbitration, but a prudent provision in case they should disagree; and therefore an award made by them at any time before their time is expired is good, and an award by the umpire in that time is void.[19]

Awards must be *certain*, *mutual*, and *final*; but certainty to a common intent is sufficient.[20] An award may be good in part and bad in part, provided the latter be unconnected with the former.[21] Though the award be final as to all matters referred and decided upon, yet upon a reference of all matters in difference between the parties, an award does not preclude the plaintiff from suing for a cause of action, existing against the defendant at the time of the reference, upon proof that the subject-matter of such action was not laid before the arbitrators, nor included in the matters referred.[22]

The power of awarding *costs* is necessarily consequent to the authority conferred upon the arbitrator of determining the cause; and the reason why a provision is frequently inserted that the costs shall abide the event of the award, is, that the arbitrator may not have it in his power to withhold costs from the party who is in the right: But it is to be considered as a restriction of a power which he would necessarily have of allowing costs at his election.[23] Where costs are directed to abide the *event*, that must be understood to mean the legal event. Thus, where a sum under forty shillings is awarded for an assault and battery, the plaintiff shall recover no more costs than damages; the award of the arbitrator not being tantamount to a judge's certificate under 22 & 23 Car. II. c. 9.[24]

An arbitrator cannot award any other than the common costs as between party and party, unless he be expressly authorised.[25] Neither can he delegate the power of taxing them to any other than the proper officer. And in cases where the law prohibits the recovery of costs they cannot be awarded.

In order to proceed by attachment to enforce the award, there must be personal notice of it and a demand of the money, or other thing awarded.[26]

After demand and refusal the court will grant a rule for an attachment *nisi*, which they will afterwards make absolute, on affidavit of service, if no sufficient cause be shewn to the contrary.[27]

The mode of setting aside an award is by application to the court, founded on some objection to its legality, appearing on the

19. Roll. Abr. 261—Cro. Car. 263—2 Saund. 132—Bay. 206—Lut. 444—Salk. 70 pl. 2 p. *Holt contra*—see 2 Mod. 169—Ld. Raymond 222, 671—12 Mod. 120, 512—2 Barnes 53.

20. 1 Saund. 337—Kyd on Awards—1 Burr. 274—and see 7 Term. Rep. 76.

21. Willes 62, 66, 253.

22. 4 Term. Rep. 146—but see Willes 268—7 Mod. 349—oct. ed. S. C.

23. 2 Term. Rep. 641—but see Willes 62.

24. 3 Term. Rep. 138.

25. Cowp. 127.

26. 1 Salk. 83—12 Mod. 257, 312 p. Ld. Kenyon E. 35 Geo. III—1 Bos. & Pul. 394.

27. 2 Tidd Prac. 760.

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face of the award itself, or from reasons given by the arbitrators in support of it;[28] or else on an affidavit of some irregularity, as want of notice of the meeting;[29] or collusion, or gross misbehaviour of the arbitrators;[30] and every ground of relief in equity against an award is equally open in the courts of law in England.[31] Therefore wherever a plain error appears either in *law*, or in *fact*, the court will make it an object of enquiry.[32] Whether such mistake be apparent on the face of the award, or is otherwise established the award will be set aside in Pennsylvania; yet reports of referees are not to be shaken by captious objections, if the substantial rules of justice are not violated. In this kind of tribunal there necessarily must be a very great latitude, as to the kind of evidence which may be received: Books and papers are inspected and examined, without regard to their being such as would be strictly evidence in a court of law; the parties frequently unassisted by counsel are permitted to relate their own stories. Courts will not set aside a report because papers not formally, or legally proved, or hearsay evidence had been admitted. The referees occupy the office both of judge and jurymen; their discretion therefore must be much relied on, and as they are generally unacquainted with the artificial rules of law, they must be guided principally by their own reason.[33]

Arbitrations under the act of 1705 differ, in many particulars, from references to common law, which indeed have fallen into disuse in Pennsylvania; insomuch that although there is nothing in the rule usually entered, to distinguish it from a reference at common law; and it might appear, from the face of it, to be the one, or the other, yet it is always presumed to be a reference under the act.[34]

In respect to the appointment of referees, though the words of the act are "chosen in open court;" and it is said in the case of *Shippen's Lee v. Bush*,[35] that the referees will not be appointed but in the presence of both *parties*; by which must be understood either of being personally present, or represented in court by an attorney or agent;[37] yet an agreement in writing will supersede the necessity of such presence. And if the agreement to refer be made in vacation, and filed in the prothonotary's office, the authority of the arbitrators is complete, and their award will be recognized by the court, in the same manner as if the choice had conformed with the letter of the act.

The means of procuring relief, when an award is improperly made, is by filing exceptions to the report, except where they arise on the face of it, and depend upon construction of law, in which case there is no such necessity.[38] The submission under

28. 3 East. 18.
29. 1 Salk. 71—but see 3 Atk. 529.
30. 3 Atk. 529—2 Burr. 701.
31. 3 Burr. 1258.
32. 2 Vern. 705—1 Vern. 157—3 Atk. 494—but see also 1 Dall. 315.
33. 1 Dall. Rep. 161, 174.
35. Kyd on Awards 34.b
36. 1 Dallas 251.
37. Kyd on Awards 34—*Sanners v. Belabrega*, 1 Dal. 164.
38. 1 Dal. Rep. 131.

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the act of 1705 authorises a report *into office*, or a report to the *next term*, or it is *general*. When the report is to be made into *office*, the referees may file it in the prothonotary's office in vacation; upon its being so filed, a judgment *nisi* is entered upon it, if the report admits of a judgment; and unless exceptions are filed within four days after *notice* to the party, the judgment becomes absolute, and execution may issue.[39]

Where the referees are authorised to report to the *next term*, they must file their report during the next term. If it be filed on, or before, the first Saturday, it is upon that day read, in open court, a judgment *nisi* entered thereon; and unless exceptions thereto are filed within four days afterwards, excluding Sundays, the judgment becomes absolute. If filed after the first Saturday the party is entitled to four days, to enter his exceptions after *notice* of such filing.

When the submission is *general*, the report is made to a term, and is proceeded on as in the last case.

In submissions of the first and last kind, the arbitrators are not limited as to time, but may report at any term, or in any vacation till the rule is rescinded.—In a submission of the second kind, the rule expires by its own limitation, at the next term after it is entered, and the authority of the arbitrators terminates at that time,[40] unless the referees are not appointed until after that term, and then the relation of the phrase is to the time of their appointment.[41]

The exceptions, being analagous to those in support of a motion for a new trial, must not only be filed within four days, but must be accompanied by affidavit as to the facts not appearing on the face of the proceedings.[42] If the four days elapse without exceptions, the award of the referees, like a verdict under similar circumstances, cannot afterwards be impeached.

Under a rule of reference in Pennsylvania it is usual to examine the arbitrators,—for the purpose of ascertaining the grounds, on which they made their award.[43]

The act of assembly gives an award the same effect as a verdict of a jury, when made according to the submission, and *approved of by the court.*

In respect to compelling the performance of an award, the act of assembly declares, that the party to whom any *sum or sums of money* are awarded to be paid shall have judgment, or a *scire facias* for the recovery thereof, as the case may require, and as in the same act is directed concerning sums found and settled by a jury. This clause refers to the first section of the act, whereby a jury is authorised, in certain cases, where the defendant, under

39. *Shewall v Wykoff*, 1 Dal. 312.
40. *Abbot v Pinebia*, 1 Dal. 349.
41. *Hart & als. v James*, 1 Dal. 355.
42. *Buckley v Durant*, 1 Dal. 129—Kyd on Awards 180.a This is regulated by the practice of the courts which in this particular seems to be uniform throughout the state.
43. Kyd on Awards 333, 380.i—See the case of *Kingston v Kincaid et al.* determined in the circuit court of the U. S.

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the plea of payment, by virtue of a *set-off*, turns the balance against the plaintiff, to give a verdict for the former, certifying at the same time, in what sum the plaintiff is indebted to him; which then becomes a debt of record; for the recovery whereof the defendant shall have a *scire facias*, and have execution for the same, together with the costs of that action.

Though the intent of law seems to be to prevent circuity of action, in cases where there have been *mutual dealings*, between the parties; yet as the benefit of the kind of arbitration, introduced by this act has been carried far beyond such cases, it appears manifestly proper that the remedy given thereby, for enforcing the award, should be equally extended, where it may be applicable. Hence it is presumable, that in all cases, where money is awarded to a defendant, though it were even in an action of trespass for an assault and battery, the remedy by *scire facias* might be had.

It may safely be affirmed to be the law of Pennsylvania on this subject, that if the referees award *money to be paid to the plaintiff*, performance is to be compelled by entering a judgment, and issuing an execution thereon. If *money is awarded to be paid to the defendant*, he may sue out a *scire facias*, which leads to the same result. If the award be generally for the defendant, that nothing is due, he signs a judgment, as upon a verdict of the same kind.[44]

An award in *ejectment* is enforced, by a judgment and execution.[45]

Thus far the means of compelling the performance of an award are simple, and in perfect harmony with the other parts of the system, in which awards are placed upon the same footing with *verdicts*.

But there are other cases in which considerable difficulties have arisen, in respect to the means of enforcing an award. It is the constant practice to refer actions of *trover*, *replevin*, *trespass quare clausum fregit*, &c. In trespass *quare clausum fregit*, with the plea of *liberum tenementum*, if, *all matters in variance between the parties* being referred, the referees direct a line to be run between the parties, so as to leave the land in controversy in possession of the plaintiff, how is the award to be enforced?—Such an award has been confirmed by the court.[46] How is an award under this act to be enforced which orders one thing to be done by the plaintiff, and another by the defendant? That the remedy pointed out in the act is altogether inapplicable there can be no doubt.

And although the remedy by *attachment*, would be effectual, yet it has been much doubted whether it could legally be applied.

The right to proceed by attachment has in one instance been asserted by the court;[47] in another it has been denied; and in a

44. Kyd on Awards 326.b
45. Ib. ib.
46. Ib. ib.
47. *Kunkle v Kunkle*, 1 Dal. 364—see also the case of *Dunning v Carothers*—cited in Calhoun's Lec. v Dunning, 4 Dal. 120, and *Levegey v Gorgas et al.* in the supreme court, 4 Dal. 71.

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third instance an objection to the use of it was accompanied, by the declaration of one of the most experienced and accurate members of the Philadelphia bar, that it had never been known to the Pennsylvania practice.[48]

The weight of the cases however may be considered in favor of the *attachment*. If by the liberal construction which the act has received, the remedy prescribed in it has become inadequate to the distribution of complete justice between the parties, the resorting to a new remedy appears to be a natural consequence of extending the law to cases not within the letter of it. And we may therefore consider an attachment to be a means of compelling the performance of an award where a judgment and execution would not afford a complete remedy.[49]

With a view to facilitate arbitration, without professional aid, and in cases not depending in court, the legislature of Pennsylvania in 1806[50] passed "An act to regulate arbitrations and proceedings in courts of justice:" all that is material to this head is contained in the first four sections of that act.

The principal features of this act are these—

1. The award made in *writing* under a written agreement filed in the prothonotary's office, after proof thereof by a *subscribing witness*, is equally available with an award made under a rule of court.

2. An amicable action may be entered in vacation, by the parties themselves, who may then agree to the usual rule of reference.

3. It is required that the award shall be made under the hands and seals of the arbitrators or a majority of them, otherwise it is no award under that law.

4. The daily pay of the arbitrators is fixed, taxable as costs; and they are bound to serve under the penalty of two dollars for every neglect or refusal to attend at the time and place appointed for the meeting. The arbitrators seem to be placed on much the same footing with jurors; and, upon a strict construction of the law, it does not appear how any one chosen can, without incurring the penalty, avoid serving as an arbitrator, in *any* extrajudicial reference agreed to by *writing* unless he can offer the excuses recognized by law.

5. The party who does not attend the arbitrators upon the day appointed becomes liable to pay the costs incurred that day, unless his excuse will justify a postponement; notwithstanding the arbitrators can by certain implication proceed without him, or the party may elect to waive his presence altogether.

An act of assembly entitled "An act regulating arbitrations"[51] has introduced a species of arbitration before that time unknown to our laws, and regulated by rules peculiar to itself. It provides

48. *Buckley v Durant*, 1 Dal. 129, 130. See *Craig v Williams*, 1 Dal. 313, wherein the court adopt a principle which confirms the first exception in Buckley v Durant—see also Addison's Rep. 225.

49. See 6 Binney's Rep.

50. 4 State Laws, Sm. Ed. 326-7.

51. 5 State Laws, Sm. Ed. 131.

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that in all civil suits pending, or that may thereafter be brought, either party, or his agent or attorney, may enter at the prothonotary's office, at any time after the entry of such suits or actions (excepting appeals to the register's court, or issues directed by the said court) a rule of reference, wherein the party shall state his determination to have arbitrators chosen, on a day certain, to be mentioned therein not exceeding thirty days thereafter, for the trial of all matters in variance between the parties; which rule shall be entered by the prothonotary, and certain proceedings pointed out in this act shall be had thereon.

1. The rule must be entered thirty days previous to the first day of the third term after the action brought.

2. When the commonwealth shall be a party, the attorney general or his deputy shall attend to the suit.

3. The §2 of the act prescribes the method of nominating arbitrators and choosing an umpire.

4. The arbitrators are to be resident in the proper county, and are not compellable to serve on more than ten trials in any one year.

5. The parties may fix the time and place of meeting, or if they should not agree upon it, the prothonotary shall fix it.

6. The party entering the rule shall serve it on each arbitrator under a certain penalty.

7. Where an arbitrator or arbitrators do not attend, the vacancy shall be supplied by the parties if they can agree, or if not by the other arbitrators.

8. The arbitrators shall be sworn, or affirmed. They shall have power to call on either party for books, papers and documents: To adjourn from time to time: Their award signed by them, or a majority of them, shall be transmitted to the prothonotary within 7 days;—who shall enter it on his docket; and from the time of such entry it shall have the effect of a judgment and operate as a lien upon real estate.

9. Either party dissatisfied may *appeal*, under the following restrictions—*viz.* 1. The appellant or his agent shall swear or affirm, that it is not for delay such appeal is entered, but because he firmly believes injustice hath been done to the appellant. 2. The appeal shall be entered as well as the recognizance of bail, with the prothonotary: or upon failure to make such entry, an execution, or such other process as may be necessary to carry the judgment into effect shall be issued. 3. A regulation in respect to the stay of execution is established. 4. No appeal is to be allowed until the appellant shall have paid the costs accrued; and on the trial of the appeal the appellant shall not be permitted to produce any books, papers or documents which he may have withheld from the arbitrators.

10. If the plaintiff be the appellant he shall by himself, his agent or attorney, with one or more sureties, be bound in a recognizance on condition that if he shall not recover, in the event of the suit, a sum greater or a judgment more favorable than the report of the

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arbitrators, he shall pay all costs that shall accrue in consequence of the appeal, and one dollar per day for each and every day lost by the defendant in attending to such appeal, which costs shall be taxed and recovered as in other cases.

11. The costs to be paid by an appellant as required, shall, nevertheless, be taxed in the appellant's bill, and recovered of the adverse party in all cases where, in the event of the suit, the appellant is entitled to costs.

12. If the defendant appeal, he shall by himself, his agent or attorney, produce one or more sufficient sureties, who shall enter into recognizance in nature of special bail, on condition that if the plaintiff, in the event of the suit, shall obtain a judgment for a sum equal to or greater, or a judgment as favorable, or more so, than the arbitrators report, the defendant shall pay all costs accruing in consequence of the appeal, together with the sum or value of the thing or property awarded by the arbitrators, with one dollar for each and every day that shall be lost by the plaintiff in attending to such appeal, or in default surrender, &c. Executors and administrators may have an appeal as is allowable in other cases.

13. The prothonotary, an alderman, a justice of the peace, or either of the arbitrators may issue subpœnas, and if necessary *attachments* to compel the attendance of witnesses.

14. If a majority of the arbitrators shall not attend on the day appointed for the meeting, vacancies shall be supplied by the nomination of the parties, or if they cannot agree, by the arbitrators.

15. An attempt by either of the parties to corrupt or influence an arbitrator, subjects the delinquent to the forfeiture of twenty-five dollars.

16. Rules to take depositions to be entered by the prothonotary, on application of either party.

17. Arbitrators may punish contempts and disorderly behaviour in their presence by fine. They are to receive one dollar per day in case they make a report; but unless the same be made and transmitted to the prothonotary within seven days they are entitled to no compensation; and they are subjected to a penalty for neglecting or refusing to serve.

This act is, in its provisions, so novel, and its date is so recent, that an established construction of it is not to be expected.

It may perhaps be stated generally that where the *appeal* would furnish a remedy, that is the only mode of redress; and that the party who omits to seek such redress shall obtain no other. But where the appeal affords no remedy the court will apply one, if it be in their power.—They will take care that the tribunal be duly organized; but as to any errors in its proceedings, these are the subject of appeal only.

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BAIL.

c)3 EDWARD I. CAP. XV. A.D. 1275.

Which prisoners be mainpernable, and which not. The penalty for unlawful bailment.

AND forasmuch as sheriffs, and others, which have taken and kept in prison persons detected of felony, and incontinent have let out by replevin such as were not replevisable, and have kept in prison such as were replevisable, because they would gain of the one party, and grieve the other;(2) and forasmuch as before this time it was not determined which persons were replevisable, and which not, but only those that were taken for the death of man, or by commandment of the king, or of his justices, or for the forest;(3) it is provided, and by the king commanded, that such prisoners as before were outlawed, and they which have abjured the realm, provors, and such as be taken with the manour, and those which have broken the king's prison, thieves openly defamed and known, and such as be appealed by provors, so long as the provors be living (if they be not of good name) and such as be taken for house-burning feloniously done, or for false money, or for counterfeiting the king's seal, or persons excommunicate, taken at the request of the bishop, or for manifest offences, or for treason touching the king himself, shall be in no wise replevisable by the common writ, nor without writ:(4) But such as be indicted of larceny, by enquests taken before sheriffs or bailiffs, by their office, or of light suspicion, or for petty larceny that amounteth not above the value of XII*d.* if they were not guilty of some other larceny aforetime, or guilty of receipt of felons, or of commandment, or force, or of aid in felony done; or guilty of some other trespass, for which one ought not to lose life nor member, and a man appealed by a provor after the death of the provor, (if he be no common thief, nor defamed) shall from thenceforth be let out

c) This statute is omitted in the report of the judges, probably by accident: For if the statute of 1 & 2 Ph. & Mary c. 13. be in force it would seem that the 3 *Ed.* 1. *c.* 15. which is said to be the pattern prescribed by the statute of *Philip & Mary* for the direction of justices of peace in relation to bail, should be in force likewise, except indeed such parts as have only a local application. See Vin. Sup. 448—2 Hawk. P. C. c. 13. § 63.

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by sufficient surety, whereof the sheriff will be answerable and that without giving ought of their goods.(5) And if the sheriff, or any other, let any go at large by surety, that is not replevisable, if he be sheriff or constable, or any other bailiff of fee, which hath keeping of prisons, and thereof be attainted, he shall lose his fee and office for ever.(6) And if the under-sheriff, constable, or bailiff of such as have fee for keeping of prisons, do it contrary to the will of his lord, or any other bailiff being not of fee, they shall have three years imprisonment, and make fine at the king's pleasure.(7) And if any withhold prisoners replevisable, after that they have offered sufficient surety, he shall pay a grievious amercement to the king;(8) and if he take any reward for the deliverance of such, he shall pay double to the prisoner, and also shall be in the great mercy of the king.

What sort of offenders be not mainpernable. 1 Roll. 134, 192, 268—Bro. mainprise 11, 56, 78—Fitz. mainprise 1, 39, 40—Bro. mainprise 54, 57, 59, 60, 75, 78, 91—11 Co. 29—Bro. main. 6, 9, 19, 22, 30, 48, 50, 51, 53, 58, 63, 64, 73, 91, 93, 97.—What sort of offenders be mainpernable—2 Bulstr. 328—3 Bulstr. 113. Enforced by 27 Ed. I. st. 1. c. 3. See 3 H. 7. c. 3. giving power to justices of peace to let prisoners to bail. And 1 & 2 Ph. & M. c. 13 giving further directions to such justices.—Likewise 31 Car. 2. c. 2. § 7. for bailing persons committed for treason or felony, and not indicted next term. The penalty for detaining a prisoner that is mainpernable—2 Inst. 184.

In criminal cases bail is to be allowed wherever it appears doubtful, whether the accused be guilty of the offence or not.—And it is a general rule, that the judge who has cognizance of the crime may, if he thinks proper, admit the person accused to bail.[1]

To refuse or delay to bail, one who is bailable, is an offence against the liberty of the subject, in any magistrate, by the common law, as well as by the statute of Westminster 1. 3 Ed. 1. c. 15. (in the text) and the *habeas corpus* act.[2] And lest the intention of the law should be frustrated by the justices requiring bail to a greater amount than the nature of the case demands, it is expressly declared by the bill of rights—1 *Will. & Mary, st.* 2. *c.* 1. and by the § XIII. of the IX. article of the constitution of Pennsylvania, that excessive bail shall not be required; though what bail shall be called excessive bail must be left to the courts to determine, taking into view all the circumstances of the case. On the other hand, if a magistrate should take insufficient bail, he is fineable if the prisoner doth not appear.[3]

1. 2 Inst. 189—2 Hawe. P. C. 93.

2. The English habeas corpus act is the 31st Car. II. c. 2. which is not in force here; but we have an act containing in substance the same provisions; passed the 18th February, 1785—2 St. Laws Sm. Ed. 275.

3. 2 Hawk. P. C. 89.

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By the § XIV. of the IX. article of our constitution it is provided—"That all prisoners shall be bailable, by sufficient sureties, unless for capital offences, when the proof is evident or the presumption great."

The statute 3 *Ed.* 1. *c.* 15. beginning with lesser offences, it is held does not extend to the judges of the superior courts.

The statute declares generally that those imprisoned for the death of a man have always been taken to be irreplevisable, without making a distinction between such homicide as is malicious, and that which happens by mis-adventure, or in self-defence. And agreeable to the statute of Glocester c. 9. all persons taken for the death of a man, are excepted out of the writ *de homine replegiando*. And although the superior courts are not restrained by these statutes, yet they have always been cautious of bailing persons imprisoned for any homicide, except in some special cases.[4]

In considering that part of the purview of the statute Westminster 1. c. 15. which designates certain persons who are not replevisable, there appears to be two sorts. 1st. Such as are excluded from the benefit of being bailed, in respect to the *notoriety* of their offence. 2d. Such as are excluded from it, by the *heinousness of the crime* alledged against them.

As to those who are excluded from being bailed from the *notoriety* of their offence, there are two kinds. 1st. Those who, by an express or implied judgment, sentence or conviction, or their own confession, appear to be guilty. 2d. Those who are under violent presumptions of guilt: For examples of these see 2 Hawk. P. C. c. 15. § 40, 41, 42, 43, 44, 45, and the numerous authorities there referred to.

Of those who are excluded by the purview of the said statute from the benefit of being bailed, in respect to the heinousness of the crime alledged against them, there are four kinds. 1st. Those who are taken for *arson*. 2d. Those who are taken for *false money*. 3d. Those who are taken for falsifying the king's seal. 4th. Those who are taken for treason which touches the king himself.

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* 1 & 2 PHILIP & MARY, CAP. XIII. A.D. 1554.(b)

An act touching bailment of persons.

II. For reformation whereof, be it ordained and enacted by the king and queen's majesties, the lords spiritual and temporal,

4. 2 Hawk. P. C. c. 15. § 33, 34, and vide 5 H. 7. c. 1.

b) This statute contains seven sections. The first section recites the mischief which existed, and rendered a further regulation by statute necessary. The provisions contained in the 6th & 7th sections are local and have no application in this country. The other sections are declared to be in force here and are contained in the text.

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and the commons, in this present parliament assembled, and by authority of the same, That from and after the first day of *April* next coming, no justice or justices of peace shall let to bail or mainprise, any such person or persons, which for any offence or offences by them or any of them committed, be declared not to be replevised or bailed, or be forbidden to be replevised or bailed by the statute of *Westminster primer*, made in the parliament holden in the third year of the reign of king *Edward* the first.

III. And furthermore, That any person or persons arrested for manslaughter or felony, or suspicion of manslaughter or felony, being bailable by the law, shall after the said first day of *April*, be let to bail or mainprise by any justices of peace, if it be not in open sessions, except it be by two justices of peace at least, whereof one be of the *quorum*, and the same justices to be present together at the time of the said bailment or mainprise;(2) which bailment or mainprise they shall certify in writing subscribed or signed with their own hands, at the next general goal-delivery to be holden within the county where the said person or persons shall be arrested or suspected.

IV. And that the said justices, or one of them being of the *quorum*, when any such prisoner is brought before them for any manslaughter or felony, before any bailment or mainprise, shall take the examination of the said prisoner, and information of them that bring him, of the fact and circumstances thereof, and the same, or as much thereof as shall be material to prove the felony, shall put in writing before they make the same bailment;(2) which said examination, together with the said bailment, the said justices shall certify at the next general goal-delivery to be holden within the limits of their commission.

V. And that every coroner, upon any inquisition before him found whereby any person or persons shall be indicted for murder or manslaughter, or as accessary or accessaries to the same before the murder or manslaughter committed shall put in writing the effect of the evidence given to the jury before him, being material;(2) And as well the said justices as the said coroner, shall have authority by this act to bind all such by recognizance or obligation, as do declare any thing material to prove the said murder or manslaughter, offences or felonies, or to be accessary or accessaries to the same as is aforesaid to appear at the next general goal-delivery to be

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holden within the county, city or town corporate, where the trial thereof shall be, then and there to give evidence against the party so indicted at the time of his trial;(3) and shall certify as well the same evidence as such bond or bonds in writing, as he shall take, together with the inquisition or indictment before him taken and found, at or before the time of his said trial thereof to be had or made :(4) And likewise the said justices shall certify all and every such bond taken before them, in like manner as before is said of bailments and examination :(5) And in case any justice of peace of *quorum*, or coroner, shall after the said first day of *April* offend in any thing contrary to the true intent and meaning of this present act, that then the justices of goal-delivery of the shire, city, town or place where such offence shall happen to be committed, upon due proof thereof by examination before them, shall for every such offence set such fine on every of the same justices of peace and coroner, as the same justices of goal-delivery shall think meet, and shall estreat the same, as other fines and amercements assessed before justices of goal-delivery ought to be.

None shall be let to bail which be forbidden to be bailed by the stat. 3 Ed. I. c. 15.—3 Bust. 113.—The justices duty in bailment of a prisoner; extended to such as shall be committed for manslaughter, &c. 2 & 3 Ph. & M. c. 10. in examination of him and others, and certifying thereof, 2 & 3 Ph. & Mary c. 10. The penalty of any justice of peace or coroner omitting his duty—*see* 25 *Geo.* 2. *c.* 29. *coroners may be removed for wilful neglect.*

The statute of 1 *&* 2 *Philip & Mary c.* 13. (in the text) introduces further regulations on this subject.

Upon the whole, the general rule appears to be, that those who are qualified to try the accused on the charge alledged against him, may in their discretion bail him. Thus we find that in England, the justices of the peace are authorised to bail persons charged with offences cognizable in the sessions before such justices.—And the court of king's bench, or any judge thereof in vacation, may bail for any crime whatsoever; be it treason, murder or any other offence. The wisdom of the law, in this respect, is evident. To permit bail to be taken commonly, for such enormous crimes, would have a tendency to defeat public justice: yet cases may occur, though perhaps they rarely do, in which it would be extremely hard to confine a man in prison, though accused even of the highest crime. The law, therefore, has invested one court, and one only, with a discretionary power of bailing in all cases: except that even this high jurisdiction cannot admit to bail, persons committed by either house of parliament, during the ses-

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sion; nor those who are committed for a contempt of any of the superior courts of justice.[1]

In Pennsylvania we have a constitutional provision on this subject, as well as several regulations by acts of the legislature.—The § XIV. of the IX article of the constitution declares, "That all prisoners shall be bailable, by sufficient sureties, unless for capital offences, when the proof is evident, or presumption great; and the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion, or invasion, the public safety may require it."

By the act of 1705,[2] all prisoners shall be bailable, by one or more of the judges, or justices, *who have cognizance of the fact*, unless for such offences as are or shall be made felonies of death.

By the act of 31st March, 1718,[3] which is said to be the basis of our criminal law, the following offences were declared to be capital:—High treason, (including all those treasons which respect the coin,) pettit treason, murder, rape, the crime against nature, malicious maiming, manslaughter by stabbing, witchcraft and conjuration, arson,[4] and every other felony (larceny excepted) upon a second conviction. At subsequent periods counterfeiting and uttering counterfeit bills of credit,[5] and counterfeiting any current gold or silver coin[6] were made capital felonies. And the crime of arson was extended so as to include the burning of certain public buildings. All these crimes were capital at the revolution. As soon as the revolution was effected, it was made an article of the constitution, that the penal laws should be reformed; that punishments should be rendered in some cases less sanguinary, and in general, more proportionate to the crimes. In conformity with this constitutional provision, the legislature commenced the reformation of the penal code in 1786, when the crime against nature, robbery, and burglary, became punishable by imprisonment at hard labour, instead of death. The offenders however were only bailable, as in all capital crimes, before a judge of the supreme court, and were only triable in that court, or at a court of over and terminer held by the judge thereof in the proper county. The amelioration of our penal code, thus commenced, has been prosecuted from time to time by the legislature, till at length, by the act of 22d April, 1794,[7] capital punishments are entirely abolished, except in the case of murder of the first degree. In altering the punishment, however, of crimes heretofore capital, the legislature have taken care to provide that the prisoner should be entitled to the same rights of challenge, and that the courts of over and terminer alone should have cognizance of such high crimes.[8] By the § 5 of the Vth article of the existing constitution

1. 4 Black. Com. 299.
2. 1 St. Laws, Sm. Ed. 56.
3. Ib. 105.
4. Such was the construction of the act; and one Hunt was executed under it—But afterwards, this being held to be a felony within clergy, this benefit was taken away by the act of 1767.
5. 1 St. Laws, Sm. Ed. c. 684.
6. 1 St. Laws, Sm. Ed. 272.
7. 3 St. Laws, Sm. Ed. 189.
8. 3 St. Laws, Sm. Ed. 190.

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of Pennsylvania it is provided, that—"The judges of the courts of common pleas in each county shall, by virtue of their offices, be justices of oyer and terminer and general goal delivery for the trial of capital and other offenders therein; and any two of the said judges, the president being one, shall be a quorum." By a necessary consequence those judges, when holding a court of oyer and terminer, are empowered to bail for any crime whatsoever.—And the presidents of the courts of common pleas, in vacation, have been invested with the same powers which formerly belonged exclusively to the judges of the supreme court, in respect to admitting to bail persons accused of any crime which was formerly capital.

Persons charged with the lesser offences, such as larceny, assaults and batteries, and generally all offences cognizable in courts of quarter sessions, may be admitted to bail by any associate judge of the common pleas, or a justice of the peace.

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* 2 & 3 PHILIP & MARY, CAP. X. A.D. 1555.

An act to take examinations of prisoner suspected of any manslaughter or felony.

WHERE in the last parliament holden at Westminster, amongst other things it was enacted, That such justices of the peace as have authority to bail any prisoners brought before them for any manslaughter or felony, before any bailment or mainprise, should take the examination of the said prisoner, and information of them that bring him, of the fact and circumstances thereof, and the same, or as much thereof as shall be material to prove the felony, shall put in writing before they make the same bailment;(2) which said examination, together with the said bailment, the said justices shall certify at the next general goal-delivery to be holden within the limits of their commission, as by the same act more plainly is contained, and may appear:

II. And forasmuch as the said act doth not extend to such prisoners as shall be brought before any justices of peace for manslaughter or felony, and by such justice shall be committed to ward for the suspicion of such manslaughter or felony, and not bailed, in which case the examination of such prisoner, and of such as shall bring him, is as necessary, or rather more than where such prisoner shall be let to bail or mainprise:(2) Be it, therefore, enacted by the authority of this present parliament, That from

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henceforth such justice or justices before whom any person shall be brought for manslaughter or felony, or for suspicion thereof, before he or they shall commit or send such prisoner to ward, shall take the examination of such prisoner, and information of those that bring him, of the fact and circumstance thereof, and the same, or as much thereof as shall be material to prove the felony, shall put in writing within two days after the said examination;(3) and the same shall certify in such manner and form, and at such time, as they should and ought to do, if such prisoner so committed or sent to ward had been bailed, or let to mainprise, upon such pain as in the said former act is limited and appointed for not taking or not certifying such examinations as in the former act is expressed.(4) And be it further enacted, That the said justices shall have authority by this act, to bind all such by recognizance or obligation, as do declare any thing material to prove the said manslaughter or felony against such prisoner as shall be so committed to ward, to appear at the next general goal-delivery to be holden within the county, city, or town corporate where the trial of the said manslaughter or felony shall be, then and there to give evidence against the party;(5) and that the said justices shall certify the said bonds taken before them in like manner as they should and ought to certify the bonds mentioned in the said former act, upon pain as in the said former act is mentioned, for not certifying such bonds as by the said former act is limited and appointed to be certified.

Binding of the accusers to give evidence against the prisoner. *See* 31 *Car.* 2. § 7. *for bailing persons committed for treason or felony, and not indicted the next term.*

The statute 2 & 3 Philip & Mary, c. 10. (in the text) was the first authority given for the examination of a felon, in the english law.[1] At the common law *nemo tenebatur prodere seipsum:* proof of the crime was not to be wrung from the criminal himself, but to be obtained by other means, and other men.

According to this statute, it is the duty of every justice, before whom a prisoner, charged with felony, or any homicide is brought, immediately to examine the circumstances of the crime alledged; and to take, in writing, the examination of such prisoner, as well as the information of those who bring him.

If upon such examination it shall appear, that no such crime was committed, or that the suspicion, which had been entertained of the prisoner, was wholly groundless, in such case, and in such only, it is lawful to discharge him. Otherwise he must either be

1. 4 Black. Com. 296.

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committed to prison, or admitted to bail. If it be a charge cognizable in the sessions, a justice of the peace ought to bail the prisoner, if sufficient sureties be offered. But if the prisoner be charged with a crime, for which he can only be tried at a court of oyer and terminer, the justice, after taking his examination, must commit him to prison, from whence he may be brought upon a writ of *habeas corpus*, before a court having cognizance of the offence, or in vacation before a judge of the supreme court, or a president of the courts of common pleas, and bailed.

BAIL, IN CIVIL CAUSES.

23 HENRY VI. CAP. 9. A.D. 1444.(D

The sheriffs and bailiffs fees, and duties in several cases.

(5) AND that the said sheriffs, and all other officers and ministers aforesaid, shall let out of prison all manner of persons by them or any of them arrested, or being in their custody, by force of any writ, bill, or warrant, in any action personal, or by cause of indictment of trespass, upon reasonable sureties of sufficient persons, having sufficient within the counties, where such person be so let to bail or mainprise, to keep their days in such place as the said writs, bills or warrants shall require.(7) And that no sheriff, nor any of the officers or ministers aforesaid, shall take or cause to be taken, or make, any obligation for any cause aforesaid, or by colour of their office, but only to themselves, of any person, nor by any person which shall be in their ward by the course of the law, but by the name of their office, and upon condition written, that the said prisoners shall appear at the day mentioned in the said writ, bill or warrant, and in such places as the said writs, bills or warrants shall require.(11) And that all sheriffs, under-sheriffs, clerks, bailiffs, goalers, coroners, stewards,

D) This statute is omitted in the Report of the Judges; yet the § 20 of the statute 4 Anne c. 16. which directs the sheriff to assign such bail bond, is reported to be in force and is recommended to be incorporated.

It is said (in Buller's Nisi Prius 224) that the statute 23 Hen. 6. c. 10. relative to sheriff's bonds, is a *private* law, yet the 4 Anne c. 16. § 20. having enabled the sheriff to assign such bond, the court must take notice of the law that enables him to take such bond. But it has been determined that the statute of Hen. VI. is a *general* law, independent of the statute of Anne; for though it is said to relate to officers of a certain description, yet all the king's subjects are included in it, for it gives all of them a liberty of being bailed; but whatever doubt there might have been before the passing of the 4th of Anne that statute removes it, and unquestionably makes it a general law. Samuel v Evans, Trin. 28 Geo. III.—2 Term Rep. B. R. 569.

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bailiffs of franchises, or any other officers or ministers, which do contrary to this ordinance in any point of the same, shall lose to the party in this behalf indamaged, or grieved, his treble damages.(14) And if the said sheriffs return, upon any person, *cepi corpus* or *reddidit se*, that they shall be chargeable to have the bodies of the said persons, at the days of the returns of the said writs, bills, or warrants, in such form as they were before the making of this act.

What persons may be bailed and what not. Latch. 23, 143. Plow. f. 60. Carthew 300. 1 Mod. 227. Dyer f. 25.

Before this statute the sheriff was not *obliged* to bail one arrested on mesne process, unless he sued out a writ of *mainprise*;[1] though he might have taken bail of his own accord.

This arbitrary power, which sheriffs possessed, of bailing, or refusing to bail, produced great extortion and oppression. Hence the necessity of the statute in the text, by which the sheriff, who arrests any one upon mesne process in a civil suit, is not only authorised, but *obliged* to take a bail bond, if sufficient surety be offered, otherwise he subjects himself to the action of the party aggrieved.[2]

The statute has two branches, *first*, as respects the persons to be admitted to bail; and *secondly*, as to the form of the security.

Upon the first branch of the statute it hath been determined that the sheriff hath no authority to take a bail bond, for the appearance of persons arrested by virtue of process issuing upon an *indictment*, found at the quarter sessions for a misdemeanor. But a recognizance ought to be taken.[3]

Neither can the sheriff take bail, on an attachment for a contempt.[4]

Although the words of the statute seem to be confined to persons arrested and in *actual custody*, yet it hath been holden, that the arrest need not be stated in an action upon the bail bond; and that if stated it is not traversable;[5] for it would be of mischevious consequence, if a bail bond taken courteously, without exposing the party to an arrest, were not as effectual as if he had been actually arrested. It appears, indeed, from a case in Sayer's Re-

1. The chief difference between *bail* and *mainprise* is, that a man's main-pernors are barely his sureties, and cannot imprison him themselves, to secure his appearance, as his bail may, who are looked upon as his jailers, to whose custody he is committed; and they may therefore take him up, even on *Sunday*, and confine him till the next day, and then render him. 6 Mon. 231—7 Mod. 77, 85, 98—Ld. Ray. 206—12 Mod. 275, 318, 606-7, 667.

2. Cro. Eliz. 76—Cro. Car. 196—2 Mod. 31—1 Leon. 189.

3. 4 Term. Rep. 505.

4. Cro. Car. 309—Com. Rep. 264—1 Stra. 479—Barns' 64. But he may take bail on attachment out of Chancery on *masne process*. Sty. Rep. 212, 234—2 Vent. 337—2 Salk. 608—1 Ld. Raymond 722—2 Black. Rep. 955. *Aliter* after a decree. Gil. Rep. 84—Pres. Cha. 331—and see 1 Eq. Cas. Abr. 351.

5. 1 Stra 444, 643—but see Noy. *semble contra* and Say. Rep. 116.

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ports,[6] that the issuing of the process may be traversed. But this does not seem to impugn the doctrine herein before laid down. For it is one thing whether any process authorising an arrest existed, and another whether the sheriff holding such process had taken the bond without actually arresting the defendant.

If a bail bond be tendered, with sufficient sureties, and the sheriff refuse to accept it, and liberate the defendant, he is liable to a special action on the case.[7]

The clause in the statute which requires reasonable sureties, was introduced for the benefit of the sheriff; and therefore though he may insist on two sureties, yet he may take a bond with one only.[8] And for the same reason the plaintiff cannot support an action against him, for taking sureties that are insufficient, or do not reside within the county.[9]

The second branch of the statute requires a security by *bond*. There are no set form of words for these bonds, if in substance they appear to be according to the design of the writ it is sufficient.[10] To render them valid, however, three things are required. 1. That bond be made to the sheriff himself. 2. That it be made to him by his name of office. 3. That it be conditioned for the defendant's appearance at the return of the writ, if it be not made to him by his name of office, or if it be single, without any condition at all, or with an impossible condition, or if the condition be not for the defendant's appearance, or if it be for that, and also for something else, it is void by the statute.[11]

An undertaking in writing to put in good bail on or before the return of the writ, or to surrender the body of the defendant to one of the officers of the sheriff, or in default to pay debt and costs, is void; and no suit can be sustained upon it.[12]

If the defect appear on the face of the declaration, or upon *oyer*, the defendant may demurr; otherwise he must take advantage of it by pleading; and when it appears in any part of the record, whether by pleading or otherwise he may move in arrest of judgment.[13]

If the bond be good in substance, it cannot be avoided for any trifling informality, or variance of the condition from the writ, in the description of the plea, or of the time or place of appearance. The statute only requires a bond conditioned for the defendant's appearance, and the description of the plea is mere surplussage.[14] Accordingly, where the sheriff upon an original writ

6. Page 116.

7. Gil. P. c. 20—Cro. Car. 196—W. Jones 226—1 Sid. 22—2 Mod. 31, 84, 180—2 Vent. 96—6 Term. Rep. 255.

8. 10 Cro. 100b—Cro. Eliz. 624, 808, 852, 862—1 Vin. Sup. Cook v Brockhurst—5 Geo. II.—Fortescue 369.

9. Cro. Eliz. 624. 808, 852, 862—Noy. 89—1 Sid. 96—2 Saund. 59—1 Mod. 227, 239—2 Mod. 83, 177—but see 1 Ld. Ray. 425—1 Salk. 99, S. C.—6 Mod. 122, *semb. contra.*

10. Shuttleworth v Pilkington, Trin. 14 Geo. II. Stra. 1155.

11. Cro. Eliz. 862—Dyer 119, 120—10 Co. 100—Fortescue 368—1 Vin. Abr. Sup. 393.

12. Rogers v Reeves, 1 Term. Rep. R. R. 418.

13. 2 Term. Rep. 569.

14. Cro. Jac. 286—2 Leo. 123—2 Show. 51—T. Jones 137—Mod. 122—10 Mod. 327—but see 2 Leo. 177.

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in a plea of trespass *on the case on promises*, took a bail bond conditioned for the defendant's appearance to answer the plaintiff in a plea of *trespass*, the court held it to be valid.[15] Where one arrested is suffered to go at large without bail, it seems the sheriff is not liable to an action, provided he have the defendant at the return of the writ.[16] But if he have him not then, or should afterwards suffer him to go at large without lawful authority, he is, in either case, liable to an action.[17]

Where an action is brought against the sheriff he must plead the statute: and cannot take advantage of it otherwise.[18]

If an action be brought against the sheriff for an escape, he may it seems defeat it, by putting in bail to the original action, of the term in which the writ was returnable, though after the expiration of the time allowed for putting it in.[19] In order to prevent this, the plaintiff should oppose the justification of bail if put in. And in a late case where the bail had been permitted to justify, without opposition, the court set aside the rule for the allowance of bail, on payment of the costs of justification.[20]

The sheriff may return, that one arrested on mesne process was *rescued*, as he was going to prison.[21] Upon such return the plaintiff has a triple remedy against the rescuers, viz. By attachment, action on the case, or indictment.[22] Such return being of itself a conviction, the court will grant an attachment in the first instance.[23] But an attachment will not be granted on affidavit merely, without such return.[24] As the return of the sheriff is not traversable, it is said that the court will proceed to punish the rescuers, without going through the ordinary course of examining them on interrogatories.[25] But where a defendant was brought up upon an attachment charged with rescuing one, arrested on a warrant for obstructing excise officers, it was declared to be the invariable practice of the court, to put the defendant to answer interrogatories, though he did not deny the charge in the affidavits, unless the prosecutor waived putting them.[26] Upon such attachment the courts fine according to their discretion, taking into consideration the circumstances of the case.[27]

If special bail be not put in, and perfected in due time, the bail bond becomes forfeited; and the plaintiff may either take an assignment of it, or proceed against the sheriff, to compel him to return the writ, and bring in the body of the defendant.[28] An

15. 6 Term. Rep. 702.
16. 2 Bos. & Pul. 35—2 Term. Rep. 172.
17. Gil. C. P. 22—2 Mod. 178—Noy. 39—2 Term. Rep. 174.
18. 1 Sid. 22, 349—Moore 428—Cro. Eliz. 460—1 Vent. 85—1 Mod. 33, 57—1 Tidd's Pr. 207.
19. 1 Esp. *Nisi Prius* 87—2 Bos. & Puler 35, 246.
20. See *Bosenquent v Simpson*, E. 42 Geo. III.
21. 1 Roll. Rep. 441—1 Stra. 435—5 Bur. 2814.
22. Cases *temp.* Hard. 112—see also 5 Com. Dig. 438—Tit. *Rescous.*
23. Say. Rep. 121—2 Salk. 586—4 Burr. 2129—1 Stra. 624.
24. 1 Stra. 531—2 Salk. 586.
25. 4 Burr. 2129—but see 2 Salk. 586.
26. 5 Terms Rep. 362.
27. 1 Stra. 642—1 Tidd's Pr. 209.
28. Gil. P. C. f. Bail p. 17.

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assignment is usually accepted where the bail below is considered sufficient; and it seems the plaintiff may take it, even after a rule to bring in the body.[29] By the acceptance of such assignment he discharges the sheriff, and if the same bail be put in above, the plaintiff cannot except against them.[30] The bail bond may be assigned before it is forfeited, though it cannot be put in suit till afterwards.[31]

The irregularities which cause the proceedings on a bail bond to be set aside are various.[32] But the court will not order the bail bond to be delivered up to be cancelled, on the ground of a *misnomer*.[33] Where the proceedings are regular they may be *stayed* upon terms, in order that there may be a trial on the original action.

If the defendant surrender himself to the sheriff, before the return of the writ, the bail bond may be given up to be cancelled; after which the plaintiff can obtain no assignment of it; nor can he rule the sheriff, or bring an action against him for not assigning it.[34] But it is optional in the sheriff whether he will accept the surrender in discharge of the bail bond, before the return of the writ.[35]

On a surrender by the special bail, though without justifying, and after the period for justifying had expired, the court will stay proceedings on payment of costs.[36]

Should the plaintiff be dissatisfied with the bail to the sheriff, he ought to rule him to return the writ. Though this rule cannot be had after an assignment of the bail bond, if it be valid, yet if the bond be void it is otherwise.

If, at the request of the plaintiff or his agent, a special bailiff had been appointed to arrest the defendant, the sheriff cannot be ruled to return the writ; yet he is responsible for the safe custody of the defendant after the arrest made.[37]

A rule to return the writ must be *personally* served.[38] The writ should regularly be returned by the sheriff, on the day on which the rule for returning it expires; and in default the plaintiff may move for an attachment the next day.[39]

By an act of assembly of the 3d of April, 1809,[40] the court may make rules on sheriffs for the return of any writ or writs; for the payment of money received on any execution, or process; and for the production of the body, after a return of *cepi corpus*, to an execution, or in default thereof for the payment of debt and costs, and compel obedience to said rules of attachment; provided that,

29. *Callaway v Spencer*, E. 42 Geo. III.—6 Terms. Rep. 753—7 Terms. Rep. 122—8 T. Rep. 456—see 1 Bos. & Pul. 325.
30. 1 Tidd's Prac. 222, 245.
31. Barnes 77.
32. See 4 Term. Rep. 176.
33. 2 Bos. & Pul. 109—3 Term. Rep. 572.
34. See note 29, *ante*.
35. 1 East. Rep. 382.
36. 5 Term. Rep. 401, 534—7 Term. Rep. 297, 529, and see 8 Term. Rep. 822.
37. 8 Term. Rep. 505, and see 2 Esp. Co. N. Pr. 591.
38. Doug. 420—3 Term. Rep. 351.
39. 4 Term. Rep. 496.
40. 5 St. Laws, Sm. Ed. 56.

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as to those out of office, application be made for such purpose within *one year* after the termination of their said offices respectively.

When a sheriff is fined for a contempt, he is liable, in like manner as his bail upon a bail bond, to the payment of what is really due to the plaintiff, though beyond the sum sworn to and costs, to the full extent of the *penalty* of the bond.[41] Where the money is thus paid, an action is usually brought by the sheriff or his officer, on the bail bond, or if none be taken, an action for money paid.[42]

The court will not assist a sheriff by staying proceedings in an action for an escape, or setting aside an attachment, where he has been guilty of a breach of duty, in discharging defendant out of custody upon his own undertaking to appear and put in bail, instead of taking a bail bond.[43]

Where bail *justify*, it is necessary that they should swear that they are house-keepers, or freeholders, and respectively worth double the sum sworn to, after all their debts are paid, or exclusive of all debts or demands, due from them to any person or persons whatsoever.[44]

In an action on a bail bond the defendants are not to be held to special bail, for this would be bail *in infinitum*.

In actions for uncertain damages, or where, from the nature of the case, proof cannot be exhibited of the amount of the plaintiff's demand, there shall be common bail only, unless by special order of the court, or a judge in vacation; as in *trespass, assault, battery, conspiracy, false imprisonment, slander, covenant* (unless it be for the payment of money) in *account*, till judgment *quod computet*, in *penal actions*, in actions *qui tam;* in actions on *bail bonds*, and on *replevin* bonds, in actions against heirs, executors or administrators, unless in special cases, where it appears that they have wasted the goods, in which case they may be held to *special bail;* but not on the bare suggestion of a *devastavit*, without an *affidavit*.[45]

According to the English practice, no writ in any such case can be marked for bail without an order previously made. In Pennsylvania, however, a different practice has obtained, which nevertheless leads to the same result. Wherever in a case of this kind the circumstances are such that it may be fairly presumed that the court, or a judge, in the exercise of the legal discretion confided to them, would require bail, it is usual in the first instance to mark the writ for bail in a certain sum; and the defendant may, upon s

41. 7 Term. Rep. 370—8 Term. Rep. 28—1 Hen. Black. 233, 543, C. P. But he is not liable beyond the penalty of the bond: 3 East. 604, and see Doug. 464, where *Buller*, justice, seemed to consider, that when the sheriff should come to purge the contempt, it would be competent for the court to moderate the punishment, and not impose a fine to the amount of the whole debt, though in order to proportion it to the actual damages, he thought they must be ascertained by a jury.

42. 1 Esp. Cas. *Ni. Pri.* 383—but see the case of *Rogers v Reeves*, 1 T. R. 418.

43. 7 Term. Rep. 109, 239—See 4 Term. Rep. 352.

44. 1 Tidd's Practice 225.

45. 1 Leo. 39—Carth. 264—1 Mod. 16—see further on this subject, 1 Crom. Pr. 29, 30.

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citation to shew cause of action, oblige the plaintiff to exhibit the grounds upon which he claims bail; and the court, or a judge in vacation, will determine whether special bail ought to be given; and if required will fix the amount of such bail.

Whether the english practice, or our own in this particular is to be preferred, may perhaps be questionable. According to the former, the order is made on an exparte hearing; whereas by the latter the parties are confronted. Where a previous order is requisite, opportunities may be afforded to elude justice; yet, on the other hand, some temporary inconveniences may arise from allowing bail to be required without such order. But perhaps wanton abuses are seldom to be apprehended, where redress may so speedily be obtained, and where the consequence of such abuses may be serious to the authors.

In all actions where special bail is not necessary, the english practice authorized by statute, is for the sheriff or proper officer, to serve the defendant personally, with a copy of the writ or process, and with notice in writing to appear by himself or his attorney in court to defend the action, which in effect reduces it to a mere summons.

In pursuance of this notice, the defendant may have his appearance recorded; but if he neglects so to do, the plaintiff is authorized to enter an appearance for him.[46] According to our practice, where bail is not requirable, the writ is to be indorsed "*No bail required.*" In which case the sheriff, or his officer, shall serve the defendant with a copy of the writ, as in the case of a summons; and the defendant, on such service, and in all cases where common bail is ordered by a judge, shall subscribe a note with these or the like words, "*I hereby empower the prothonotary to enter my appearance in this action;*" which subscription shall be tested by the officer who serves the writ; and the note so subscribed and tested, being filed, together with the writ, the prothonotary shall accordingly enter an appearance for the defendant, and the plaintiff may proceed as if special bail were entered.

The writ may be served on the return day, even after the rising of the court.[47]

In Pennsylvania freeholders are not to be arrested, but shall be sued by summons, unless the plaintiff make it appear, *by affidavit*, that the defendant has signified his intention of going to sea, or removing out of the state, or lurks in secret places; or has refused or neglected, on demand, to give either real, or personal security, for the debt, or to appear without process, and enter special bail, or has suffered himself to be arrested, and judgment entered against him, or made over his lands and chattels to others, or suffered them to be attached, &c. or that his estate is mortgaged, alienated, intailed, or liable to judgments; or that he has not been resident in the state for two years.—And freeholders illegally ar-

46. 3 Black. Com. 287—1 Tidd's Pr. 214—2 Burr. 812—1 Term. Rep. 192—2 Wils. 372.

47. 1 Tidd's Practice 147.

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rested, may abate the writs with costs.[48] But every privileged person must claim his privilege in a proper time, and in a proper manner, for the court are not bound judicially to notice a right of privilege, nor to grant it unless it be claimed.[49]

Bail is of course in all actions on contract, where the debt or damages are liquidated. Here also the english practice varies from ours. According to their practice, regulated by statute, there must be an affidavit of the debt filed *before* the writ is issued, and the sum sworn to is indorsed on the writ. Whereas our practice requires no such previous affidavit; but upon a citation to shew cause of action, proof of a subsisting debt will be required; such proof at least as will convince the judge, that there is good cause of action.[50] The *quantum* of bail will depend upon the proof exhibited. If it should fail to convince the judge that bail ought to be required, the defendant will be discharged, on common bail, whatever may be the species of action.

Proceedings in the bail bond suit were staid at the third term of the original action, upon paying costs, entering special bail, and giving the plaintiff a judgment in the original.[51]

In an action of trespass against the officers of a militia court martial for imprisoning the plaintiff, bail was refused, it not appearing that they exercised their power, whether legally, or illegally assumed, with oppression.[52]

BASTARD.

* 20 HENRY III. CAP. IX. A.D. 1235.

He is a bastard that is born before the marriage of his parents.

To the king's writ of bastardy, whether one being born before matrimony may inherit in like manner as he that is born after matrimony, all the bishops answered, that they would not, nor could not, answer to it; because it was directly against the common order of the church.—(2) And all the bishops instanced the lords, that they would consent, that all such as were born before matrimony should be legitimate, as well as they that be born after matrimony, as to the succession of inheritance, forasmuch as the

48. 5 State Laws, index 37. Where it is desired to hold a freeholder to bail, it is usual to serve him with a notice requiring him to enter special bail at a certain time, and if the requisition should not be complied with a capias may issue, and the defendant may be held to special bail. See Jack v Shoemaker, 3 Bin. 280.

49. Gyer's Lee v Irwin, 4 Dal. 107.

50. See Rules of Court. *Jack v Shoemaker*. 3 Binney's Rep. 280.

51. 4 Binney 344.

52. *Duffield v Smith*, 6 Binney 302.

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church accepteth such for legitimate. And all the earls and barons, with one voice, answered, that they would not change the laws of the realm, which hitherto have been used and approved.a

Fitz. Bastardy 21, 22, 25, 27, 28, 30, 33—1 H. 6. 3—11 H. 4. 84—39 Ed. 3. 14—44 Ed. 3. 12—12 Co. 72—2 Ins. 96.

a Et ideo dominus rex habet consilium suum sub qua forma procedendum est ad inquisitionem in curia sua de talibus sic natis.

This statute is in affirmance of the common law, as appears upon the face of it.

By the civil law, those who are born before marriage are legitimate, by the subsequent intermarriage of their parents;—and the canonist early adopted this law, alledging that the subsequent marriage takes away the preceding guilt, and shews a consent from the beginning.[1]

But by the common law, as we find it laid down in the earliest writers,—"All persons born out of lawful matrimony are bastards."[2]

Glanville remarks, that by the canons and roman law,[3] a person born before the intermarriage of his father and his mother was deemed a lawful heir;—yet, that by the law and custom of the realm of England, he was not to be received as heir, or to hold any inheritance.

Where one claimed as heir, and it was objected that he was not heir, not being born in lawful wedlock, the plea ceased in the king's court; and a writ issued to the arch-bishop, or bishop, commanding him to make inquiry respecting the marriage, and to signify to the king, or his justices, his judgment thereon. The writ stated the grounds upon which the allegation of bastardy rested, —namely, that *he was born before the marriage of his mother*, with a view to oblige the ecclesiastical court to answer whether he was born before, or after marriage.

The controversy on this subject continued for many years, between the clergy and the common lawyers, about the legitimacy of children born before wedlock, and at length resulted in this statute; which contains the substance of the controversy, and the decision upon it:—A decision which was probably required at an inauspicious moment, for the clergy.

1. It seems that the bishop of London, about this time wrote a treatise, to shew the propriety and necessity of introducing the civil law into England; and that the same innovation being attempted, by the duke of Suffolk, in the time of Henry VI. induced Fortescue to write his treatise "*De laudibus legum Angliæ.*" It was one of the articles of impeachment against cardinal Woolsey,—"*Quod ipse intendebat finaliter antequipimas anglicanas leges penitus subvertere, et hoc regnum Angliæ, et ejusdem regni populum dictis legibus civilibus, et canonibus subjugare.*" Obs. on the Stat. 38.

2. Glanville [who wrote about the year 1187] l. 7, c. 13, 14—47 Ed. 3. 14.b—11 H. 4. 81—Brac. l. 5. fol. 416—see 1 Reeve's England 117, 118.

3. Alluding to a law of Justinian, adopted in a constitution made in the time of *Pope Alexander III.* about 30 years before Glanville wrote. Reeve 118.

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Notwithstanding however the positive declaration contained in this statute, it would seem that the question of *natus ante matrimonium*, was not yet put at rest, for the same year the king found it necessary to convene a council consisting of several bishops and lords, and it was agreed by them all, that whenever the issue of *natus ante matrimonium* arose in the king's courts, the plea should be transmitted to the ordinary; and an inquisition being made in precise words,—"*Whether such a person was born before, or after matrimony,*"[4]—he should send his answer to the king's courts in the same words, without any cavil.[5]

The strenuous opposition of the barons to the introduction of this humane provision of the civil laws, in favor of the innocent, Mr. Barrington ascribes to the circumstance of the proposal originating with a poicterine favorite of the king. The sturdy barons not approving of the proposer, rejected the proposal, *una voce.—You are a foreigner, and shall not introduce foreign laws, be they good or bad.*[6]

This conjecture appears the more probable, as these same barons, who on this occasion affect to be so tenacious of the ancient laws and customs of the kingdom, attempted, during the sitting of this very parliament or council, to introduce a most tyrannical innovation in favor of themselves:—No less than this, that if any offence was committed in their parks, or ponds,[7] the offender should be sent to their *own prisons*, and tried undoubtedly in their own courts. The king however had the firmness to refuse his assent.[8]

Anciently the child of a married woman was presumed to be legitimate, if her husband was within the four seas; which at that period encompassed the british dominions.[9] But this absurd doctrine is long since exploded. In modern times, although children born within marriage, are still presumed to be legitimate, till the contrary appear, yet to overturn this presumption in this, as in all other cases, a probable evidence is sufficient. The law is so laid down in the case of *Pendrell v Pendrell*, determined in the 5th year of George II. and has ever since been considered as settled.[10]

4. *Utrum talis natus sit ante matrimonium, vel post.*

5. 1 Reeve Eng. law 464. After the passing of the statute, they seem no longer to have inserted in the writ of *natus ante matrimonium*, the words "*et quoniam hujusmodi inquisitio pertinet adforum ecclesiasticum.* ib.

6. Observations on the stat. 38.

It is observable that in those countries in Europe which are supposed to have adopted the civil law, this part of it has been received under certain qualifications. Thus, by the ancient law of Spain, the legitimation of children, by the marriage of their parents subsequent to their birth, is confined to the case of a *batchelor* marrying a *spinster*. [Barrington on the stat. 38.] So by the laws of Scotland, the subsequent marriage is considered as having been entered into when the child was begotten; and therefore it is necessarily confined to the case of such a woman whom the father, at that period might have married. 1 Reeve Eng. law 266.

7. *Vivarium* is the word in the original, which is translated *pond.* Spelman says, *parci & warennæ nostræ sub vivariorum appellatione sæpe veniunt.* Barrington 36.

8. ib.—1 Reeve Eng. law 266.

9. 2 Stra. 925—6 Binney Rep. 286.

10. 2 Stra. 925—6 Binny 286—Resp. v Shepherd—Bull. N. P. 113—3 Wil. Rep. 275—Vide also 2 Stra. 1076—also Lomax v Holemdon, 2 Stra. 940—*trial at bar.*

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The child of a married woman may be proved to be a bastard, by other evidence, than that of the impossibility of the husband's access.[11]

Where the husband and wife live together, although a person may be convicted of fornication with the wife, yet the law presumes the children to be legitimate; unless indeed the husband be impotent; but where they live a separate, the question of legitimacy is proper to be submitted to jury under all the circumstances of the case.[12] And where they are *legally* separated from bed and board, the presumption is against the legitimacy.

The rule that a bastard is *nullius filius*, applies only to cases of inheritance.[13]

The wife is a good witness, *ex necessitate rei*, to prove the criminal intercourse; but she is no witness to prove that her husband had no access.[14]

The time during which the putative father of a bastard child shall be ordered to maintain it, is entirely within the discretion of the sessions, who are not bound by any practice that may have been adopted by themselves, or other courts upon the subject.[15]

BILL OF EXCEPTIONS.

* 13 EDWARD I. CAP. XXXI. A.D. 1285.

An exception to a plea shall be sealed by the justices.

WHEN one that is impleaded before any of the justices, doth alledge an exception, praying that the justices will allow it, which if they will not allow, if he that alledged the exception do write the same exception, and require that the justices will put to their seals for a witness, the justices shall so do; and if one will not, another of the company shall.(2) And if the king, upon complaint made of the justices, cause the record to come before him, and the same exception be not found in the roll, and the plaintiff shew the the exception written, with the seal of a justice put to, the justice shall be commanded that he appear at a certain day, either to confess or deny his seal.(3) And if the justice cannot deny his seal,

11. *Goodright ex dem. Tomson v Saul et al.*—4 Term. Rep. B. R. 56.
12. 6 Binny Rep. 288.
13. *Per Buller J. Rex v The inhabitants of Hadnel*—1 Term. Rep. B. R. 101.
14. See 6 Binny 283—*The Commonwealth v Shepherd*—and the cases there cited.
15. *Addis v The Commonwealth*—4 Binny's Rep. 541.

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they shall proceed to judgment according to the same exception, as it ought to be allowed or disallowed.

9 Co. 13—Kelyng. 15—2 Inst. 426—Regist. 182.

At the common law a writ of error might be had, either for an error apparent on the record, or for an error in fact, where either party died before judgment; but it lay not for an error in law, not appearing in the record; and of course where the plaintiff, or defendant alledged any thing, *ore tenus*, which was overruled by the judge; this could not be assigned for error, as it did not appear on the record, and not being an error in *fact*, but in *law*, the party was remediless.

Wherefore the statute in the text was enacted.

It has been doubted whether this statute extends to any criminal cases;[1] and the better opinion seems to be that it does not.[2] That no bill of exceptions is allowable in cases of treason or felony appears to be agreed.[3]

In 1 Leon. 5. it was allowed in an indictment for a trespass; and in 1 Vent. 336. in an information in nature of a *quo warranto*.

A bill of exceptions is founded on some objection in point of law, to the opinion and direction of the court, either as to the competency of witnesses, the admissibility of evidence, or the legal effect of it, or a challenge, or some matter of law arising upon facts not denied, in which either party is over-ruled by the court.[4]

If such bill be tendered, and the exceptions are truly stated in it, the judges ought to set their seal in testimony, that such exceptions were taken at the trial; but if the bill contain matters false, or untruly stated, or matters wherein the party was not over-ruled, the judges ought to refuse to affix their seals. A bill of exceptions is not to draw the whole matter into examination again; it is only for a single point; and the truth of it can never be controverted, after the bill is sealed; for the adverse party is precluded from averring the contrary, or supplying an omission in it.[5] If the judges refuse to sign the bill, the party grieved may have a writ founded on the statute, commanding the same to be done *juxta formam statuti*.[6]

The nature of the thing requires that the exception should be reduced to writing, when taken and disallowed, like a special verdict, or a demurrer to evidence: It is not necessary indeed that the bill should be drawn up in form, but the substance must be reduced to writing while the thing is transacting.[7]

1. See 1 Bac. Abr. 325, tit. *Bill of Exceptions*, and the cases referred to. Willes 535—Bul. N. P. 316.
2. 2 Hawk. P. C. 602.
3. Sid. 84—Sir H. Owen's case,—Leo. 68—Keb. 324—Ray. 486—Kelynge 15, resolved.
4. 1 Salk. 284—3 Term. Rep. 27—Show. 120—Cro. Car. 341—1 Black. Rep. 555—3 Burr. 1693—Cowp. 16—2 Black. Rep. 929—Bul. N. P. 316.
5. 2 Tidd's Prac. 788.
6. 2 Inst. 426—Bul. N. P. 316.
7. Salk. 288—Sir T. Ray. 405—Bul. N. P. 316.

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If the exception be not stated in writing, and tendered at the trial, it is *waived*, and the party shall not resort back to his exception, after a verdict against him. For perhaps if he had stood upon his exception, the other party need not have put the cause upon that point, but might have offered other testimony.[8]

A bill of exceptions to the charge of the court may be tendered at any time before the jury have delivered their verdict in open court.[9]

A bill of exceptions lies to the opinion of the court of common pleas, upon the trial of a feigned issue from the register's court.[10] But does not lie to the opinion of the court in receiving or rejecting testimony on a motion for summary relief.[11] Neither is the refusal of the court to order a new trial a ground for a bill of exceptions.[12] If the judge in his charge expresses an opinion upon facts, which opinion is not warranted by the evidence, the remedy is by a motion for a new trial, and not by a bill of exceptions.[13] No advantage can be taken by bill of exceptions of an erroneous opinion on a point of law immaterial to the issue; but the plaintiff in error, may assign error in an opinion on any point material to the issue, appearing on the bill of exceptions, although it was not particularised in stating the exceptions below.[14]

As a bill of exceptions is only to be made use of upon a writ of error, there can be no bill of exceptions where a writ of error will not lie.[15] Although *ex rigore juris* the party shall have no advantage of his bill of exceptions, but on a writ of error; yet the court B. R. has sometimes, to prevent delay and expense, examined the matter before judgment.[16]

A bill of exceptions may be either tacked to the record or not: If it be not tacked to the record, it is necessary to set out the whole of the proceedings previous to the trial; but otherwise it begins with the proceedings after issue joined.[17]

8. 1 Salk. 288—2 Tidd's Pr. 788.
9. *Jones v The Insurance Co. of N. A.* 1 Binney 38.
10. *Vansant v Boilsau*, 1 Bin. 444.
11. *Shortz v Quigley*, 1 Bin. 222.
12. *Burd v Lee of Dansdale*, 2 Bin. 80.
13. *Girard v Gettig*, 2 Bin. 234.
14. *The Phanix Insurance Company v Pratt*, 2 Bin. 308.
15. 1 Salk. 284. *Rex v Inhab. Preston*, Hil. 9 Geo. II.—Buller N. P. 316—1 Blk. Rep. 679—Cowp. 501, & see 2 Leo. 236.
16. 2 Leo. 236.
17. See 2 Tidd's Pra. 788. For the manner of stating the exception. 1 Lutw. 984—1 Salk. 284—3 Term. Rep. 27.—For the form of a bill of exception, either separate, or attached to the record, see *Buller's N. P.* 317, 318. For precedents of a bill of exceptions, as to the legal effect of the *whole* of the evidence, see Brownl. 129, *Money et al. v Leach*.—Buller's N P. 317—and *Fabrigus v Mostyn*—IX. Stat. Fr. 187—and for a precedent of a bill of exceptions as to the legal effect of evidence, in support of a particular fact, see Brownl. 131.

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CONSPIRACY.

* 33 EDWARD I. STAT. 2. A.D. 1304.(E

Who be conspirators, and who be champertors.

CONSPIRATORS be they that do confeder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indite, or cause to indite,(2) or falsely to move or maintain pleas;(3) and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved;(4) and such as retain men in the country with liveries or fees for to maintain their malicious enterprises; and this extendeth as well to the takers as to the givers. (6) This ordinance and final definition of conspirators was made and accorded by the king and his council in his parliament the thirty-third year of his reign.

20 Hen. 7. f. 11—Fitz. Barre, 4—Kel. 81—Fitz. Consp. 2, 4, 5, 10, 13, 14, 15, 16, 19, 21, 22, 25—8 Co. 37. V. N. B. 56—F. N. B. 117. H.—Rast. 122—2 Inst. 562—3 Inst. 143.

* 33 EDWARD I. STAT. 3. A.D. 1305.(F

The punishment of such as commit champerty.

(4) OUR lord the king, at the information of *Gilbert Rowbery*,a clerk of his council, hath commanded, That whosoever will complain himself of conspirators, inventors, and maintainors of false quarrels, and partakers thereof, and brokers of debates, that *Gilbert Thornton* shall cause them to be attached by his writ, that they be before our sovereign lord the king, to answer unto the plaintiffs by this writ following:

II. The king to the sheriff greeting.—We command you, that if A. of, &c. make you secure of prosecuting his claim, then put by

E) That part only of this statute is in force which relates to conspirators, and from that is to be excepted what relates to "*stewards or bailiffs of great lords.*" *Report of the Judges.*

F) "That part only of this statute is in force which relates to conspirators." *Report of the Judges.*

a This Gilbert Rowbery who framed the writ of conspiracy, was one of the judges of the court of K. B. 2 Inst. 562.

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gage and safe pledges G. of, &c. so that he be before us in the octave of St. John the Baptist, wheresoever we shall then be in England, to answer the aforesaid A. in a plea of trespass and conspiracy, according to the form of our ordinance in such case provided, so that the said A. may reasonably show that he thereupon ought to answer to him, and have you there the names of the pledges and this writ. Witness, &c.

The statute in the text purports to give a definition of conspiracy.[1] That each of the offences comprehended in that definition were conspiracies at the common law, there can be no doubt; but so likewise were others not comprised in the definition. This statute has always been held to be in affirmance of the common law: It creates no new offence; and, unfortunately, it gives but an imperfect definition of that which existed. It is a statute of the description referred to, by the learned author of *Observations on the ancient statutes*, when he remarks that—"The common law hath been weakened, by the legislature's making declarations against offences, which were criminal *by the common law, when properly understood.*"

Acts of parliament it is probable were not unfrequently drawn by those who had not a legal education. But, however this might be, they were intended to *make* provision, or to *inforce* the laws against some prevalent grievance. We find, from the history of those times, that the offence of *champerty* had arisen to so alarming a height, as to require the utmost exertion of the legislature to repress it. It is provided against in the statute of Westminster the 1. c. xxv.[2] The *statute* 13 *Edward* 1. c. 3.[3] subjected the champertor to three years' imprisonment. These, with other statutory provisions, were inadequate to the suppression of an offence which in those days had grown so rank; but which at the present day is only known by report: a prosecution of this kind never having taken place in latter times.[4]

And in respect to conspiracies, 'tis probable that the several kinds comprehended in the definition given in the act were those which at that period chiefly prevailed. But the great change which the lapse of ages has produced in the habits, manners, and pursuits of the people, has occasioned a corresponding change in the offences which infest society. Hence the impracticability of declaring by statute any particular branch of the common law.—Such is the variety of occurrences which from time to time take place in society: crimes and offences are so infinitely diversified

1. The last section gives a definition of *Champerty;* but there appears no original text to warrant this which is found in the english edition of the statutes. It seems probable that it was added by some reader to explain what followed: the next statute being entitled the statute of *Champerty.* 2 Reeve Eng. law 243.
2. 1 Ruff. 50.
3. Ib. 150.
4. Obs. on the Stat. 137.

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that no legislative provision could anticipate them, or sufficiently guard against them: but the common law affords ample provision. It abounds with *principles*, which, in their application, are calculated to attain and establish every right, and to redress every wrong, in a state of society. It is a system founded in reason, matured and corrected by constant investigation and the decisions of learned men through a succession of ages.

A conspiracy at the common law is defined to be, "*A confederacy of two or more, by indirect means,*[5] *to injure an individual, or to do any act which is unlawful, or prejudicial to the community.*"[6]

This is an indictable offence; and the party injured is entitled to redress by an action of *conspiracy*, or by a special action on the case, which has now become the usual civil remedy for injuries of this kind.

All conspiracies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law; all such combinations are illegal, though the subject matter of them may be lawful.[7]—And although the conspirators were not previously acquainted, they are equally culpable if they concur in doing the acts.[8]

Every unlawful conspiracy or confederacy is punishable, although it be not executed: The conspirators may be indicted though they do nothing but conspire together.[9] The law punishes the coadjunction, confederacy, or false alliance, in order to prevent the unlawful act.[10] In conspiracies to prejudice individuals the gist of the offence is the unlawful conspiracy to injure a man.[11] Whether a conspiracy be to charge a temporal or ecclesiastical offence on an innocent person it is the same thing.[12]

In many cases of conspiracy, the *means* employed have a semblance of being *lawful*. They are frequently such as would be lawful in an individual. For instance,—every person has a right to employ, or to decline employing any particular mechanic; and to advise and persuade others not to employ him, is no offence.—But if persons combine and confederate together for the purpose of ruining and impoverishing an individual, by preventing others from employing him, this would be unlawful and indictable.

In the case of *Rex v Waddington*[13] the charge was for engrossing and forestalling hops; and it was held that upon general principles this was an indictable offence at the common law, being immoral and tending to the public detriment.

The case of the *Cock lane ghost*[14] was a conspiracy to injure another, by a mere phantom, which could have no reality.

5. By "*indirect means*" is to be understood subdolous, unfair means, tending to the injury of the party however consequentially collaterally.

6. 4 Blac. Com. (Christ. notes) 136 n. 4—9 Co. 56.—Stubbs Cr. Cir. 156.—1 Hawk. c. 22. § 2.

7. 1 Hawk. 348.

8. 1 Hawk. 348.

9. 9 Co. 56.

10. 2 Inst.

11. Rex v Ripsal, 3 Bur. 1320—see Doh. C. c. 140.

12. 1 Salk. 174—2 Ld. Ray. 1167—Ld. Ray. Ent. 53.

13. 1 East's Rep. 147—4 Black. Com. 158-9—see also 4 Dumf. & East 202.

14. Black. Rep. 348.

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The case of the *King v Kineberly & Mary North*, shews that conspiracy itself is an offence, though no other act be done than that of conspiracy merely.[15]

An indictment has been maintained for a *conspiracy* by *indirect means* to impoverish one H. Booth, and to deprive him of the exercise of his trade as a *taylor*.[16]

Several were indicted for a conspiracy to ruin a *card maker*, by causing grease to be put into the paste, whereby the cards were spoiled.[17]

The *King v Sir Francis B. Delaval et al.* depends upon the same principles of *private injury* and *public police and morality*.[18]

In respect to the punishment, it was more or less severe, according to the nature of the conspiracy. According to *Hawkins*, when a conspiracy was formed to accuse one of some matter which might touch his life, the conspirators were, in former times, subjected to that horrible punishment called the *villanous judgment;*[19] which has become obsolete, no such judgment having been pronounced for some ages; but instead thereof in such cases, and wherever the conspiracy is accompanied with the *crimen falsi*, it is subjected to an infamous punishment, including the pillory,[20] and the person is disqualified from giving evidence in a court of justice. But where the confederacy is unaccompanied with that crime, and is only calculated to prejudice a third person, or the public, the punishment is merely fine and imprisonment, without any such disqualification, or infamy.

The action on the case, in nature of a writ of conspiracy, in modern times, has been substituted for the writ of conspiracy, the difference however between the one and the other is considerable.

In criminal cases, if the matter be in itself indictable, the circumstance of its being effected by conspiracy, will enhance the guilt, so in civil cases, if the injury be effected by conspiracy, the case becomes thereby aggravated.

A writ of conspiracy lies where *two or more*, by malice or covin, conspire to indict another falsely, who is acquitted; but if only one person labour the indictment, conspiracy does not lie, but an action on the case, in nature of a writ of conspiracy.[21]

An action for malicious prosecution requires both malice and want of probable cause.[22]

Case in nature of a writ of conspiracy, lies for any thing that

15. 1 Leo. 62.

16. Cr. Cir. Assistant—see also *Macklin's* case C. c. 159—and the case of the *Journeymen Cordwainers*, tried at New York in 1810—and two other cases of the like kind, the one tried at Philadelphia in 1806, and the other at Pittsburgh in 1815.

17. *The King v Cope.*

18. 3 Burr. 1434.

19. By the *villanous* judgment the convicts were subjected to lose their *liberum legem*, whereby they were discredited and disabled as jurors or witnesses: to forfeit their goods and chattels and lands for life, to have those lands wasted, their houses razed, their trees rooted up, and their bodies committed to prison.

20. 4 Black. Com. 137.

21. Fitz. Nat. Br. Tit. "Writ of Conspiracy," 2 Buls. 271.

22. Farmer v Darling M. 7 Geo. III. 4 Burr. 1971.

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endangers a man's life or liberty, or that prejudices his reputation.[23]

It lies for a malicious conspiracy, to cause a tavern to be reputed a brothel.[24]

So for procuring a civil action to be brought against another maliciously to vex him.[25]

So for causing one to be arrested without cause.[26]

In an action for a conspiracy, it is necessary that the writ be "*conspiratione inter eos habita*;"[27] but in an action on the case, in nature of a writ of conspiracy, these words are not necessary, nor perhaps even proper.[28]

As well in the action on the case in nature of a writ of conspiracy, as in a writ of conspiracy, the declaration must suppose the facts done by the defendants to be false and malicious.

23. 2 Salk. 14.
24. R. 2 Mod. Ca. 215.
25. F. N. Br. Tit. "Writ of Conspiracy," Ray. 176—2 Inst. 144—1 Salk. 14—Oro. El. 628.
26. 1 Com. Dig. 164.
27. Reg. 134
28 1 Sand. 229, 230—1 Com. Dig. 159.

CORONER.

* 4 EDWARD I. STAT. 2. A.D. 1276.(1

Concerning the duty of a Coroner.
Of what things a coroner shall inquire.

A CORONER of our lord the king ought to inquire of these things, **if he be certified by the king's bailiffs, or other honest men of the country: First*, he shall go to the place where any be slain or suddenly dead or wounded, or where houses are broken, [*or where treasure is said to be found*] and shall forthwith command four of the next towns, or five or six, to appear before him in such a place; (2) and when they are come thither, the coroner, upon the oath of them, shall inquire in this manner, that is to wit, If †they know where the person was slain, whether it were in any house, field, bed, tavern, or company, and ‡who were there: Likewise it is to

1) This statute is in force, except those parts which relate to the coroners' duty in the following points, viz. making enquiry as to the property of any person, or seizing the property of any person—treasure that is found—appeal of rape, or wounds, or any other appeals, deodands—and wrecks of the sea—and also except that part which provides, that land shall remain in the king's hands until the lords of the fee have made fine of it. *Report of the Judges.*

9 Hen. 3. c. 17—3 Ed. I. c. 10. **Instead of the words in italics*, read *first when coroners are commanded by the king's bailiffs, or by honest men of the county, they shall go*, &c. †Add *if it concerns a man slain, whether they know*, &c. ‡Add *if any and who*, &c.

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be inquired, who were ‖culpable either of the act, or of the force, and who were present, either men or women, and of what age soever they be (if they can speak, or have any discretion;)(3) and how many soever be found culpable by inquisition in any of the manners aforesaid, they shall be taken and delivered to the sheriff, and shall be committed to the gaol;(4) and such as he founden, and be not culpable shall be attached until the coming of the justices, and their names shall be written ¶*in rolls.*(5) If it fortune any such man be slain, §*which is found in the fields or in the woods*, first, it is to be inquired, whether he were slain **_in the same place_**, or not;(6) and if he were brought and laid there, they shall do so much as they can to follow their steps that brought the body thither, ††*whether he were brought upon a horse, or in a cart*;(7) It shall be inquired also, if the dead person were known, or else a stranger, and where he lay the night before;(11) and immediately upon these things being inquired, the bodies of such persons being dead or slain, shall be buried.

II. In like manner it is to be inquired of them that be drowned, or suddenly dead, and after ‡‡*such bodies are to be seen*, whether they were so drowned or slain, or strangled by the sign of a cord tied streight about their necks, or about any of their members, or upon any other hurt found upon their bodies, whereupon they shall proceed in the form abovesaid;(2) and if they were not slain, then ought the coroner to attach the finders, and all other in the company.(7) Upon appeal of wounds and such like, especially if the wounds be mortal, the parties appealed shall be taken immediately and kept until it be known perfectly, whether he that is hurt shall recover, or not;(8) and if he die, the ¶¶*defendant* shall be kept; and if §§*he* recover health, ‖‖*they* shall be attached by four or six pledges, after as the wound is great or small.(9) If it be for a maim, he shall find ‡*no less than* four pledges; if it be for a small wound ‡‡two pledges shall suffice.(10) Also all wounds ought to be viewed, the length, breadth, and deepness, and with what weapons, ‖‖ and in what part of the body the wound or hurt is, and

‖Add *and in what manner culpable.* ¶For *in rolls*, read *in the rolls of the coroners.* §Read *in the fields or woods and be there found*, &c. **Read *there.* ††Read *or of the horse which brought him or cart, if perchance he was brought upon a horse or cart.* ‡‡Read *it is to be seen of such bodies*, &c. Appeals of wounds or maim—Rast. 45. ¶¶For *defendant*, read *offenders.* §§Read *if the parties hurt.* ‖‖Read *the offenders.* ‡For *no less than*, read *more than.* ‡‡Add *without maihem.* ‖‖Add *the wound is given.*

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how many be culpable, ‖‖*and how many wounds there be, and who gave the wound*;(11) all which things must be enrolled in the roll of the coroners.(15) If any be suspected of the death of any man being in danger of life, he shall be taken and imprisoned, as before is said.(16) In like manner huy shall be levied for all murthers, burglaries, and for men slain or in peril to be slain, as otherwhere is used in *England*, and all shall follow the huy and steps, as near as can be; and he that doth not, and is convict thereupon, shall be attached to be afore the justices of the goal, &c.

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* 3 HENRY VII. CAP. 1. A.D. 1486.‡

The authority of the court of Star-chamber. Where one inquest shall inquire of the concealment of another. A coroner's duty after a murder committed. A justice of the peace shall certify his recognizances, &c.

(6) ITEM, the king, remembering how murders and slaying of his subjects daily do increase in this land, the occasions whereof be divers; one, That men in towns where such murders hap to fall and be done, will not attach the murderer, where the law of the land is, That if any man be slain in the day, and the felon not taken, the township where the death or murder is done, shall be amerced;(7) and if any man be wounded in peril of death, the party that so wounded should be arrested, and put in surety, till perfect knowledge be had, whether he so hurt should live or die: (8) and the coroner, upon the view of the body dead, should inquire of him or them that had done that death or murder, of their abettors and consentors, and who was present when the death or murder was done, whether man or woman,(9) and the names of them that were present, and so found, to inrol and certify;(10) which law, by negligence, is disused, and thereby great boldness is given to slayers and murderers;(11) and over this it is used, that within the year and a day after any death or murder had or done, the felony should not be determined at the king's suit, for saving of the party's suit, wherein the party is oftentimes slow, and also

‡ Only those parts of this statute are numbers from 6 to 19, both inclusive, and in force, which are distinguished by the by the number 26. *Report of the Judges.*

‖‖Read *and if there are many wounds, who gave each particular wound.*—*See* 28 *Ed.* 3. *c.* 6. *for election of coroners.* 3 *H.* 7. *c.* 1. *which inflicts penalty on coroners being remiss. And* 1 *H.* 8. *c.* 7—1 *& 2 P. & M. c.* 13. §5—25 *Geo.* 2. *c.* 29. *which contain further regulations respecting coroners.*

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agreed with, and by the end of the year all is forgotten, which is another occasion of murder.(12) And also he that will sue any appeal, must sue in proper person, which suit is long and costly, that it maketh the party appellant weary to sue.(13) For reformation of the premisses, the king our sovereign lord, by the assent of the lords spiritual and temporal, and the commons, in the said parliament assembled, and by authority of the same, will that every coroner exercise and do his office according to the law, as is afore rehearsed;(14) and that if any man be slain or murdered, and thereof the slayers, murderers, abettors, maintainers and comforters of the same, be indicted, that the same slayers and murderers, and all other accessaries of the same, be arraigned and determined of the same felony and murder, at any time, at the king's suit, within the year after the same felony and murder done, and not tarry the year and day, for any appeal to be taken for the same felony or murder;(15) and if it happen any person named as principal or accessary, to be acquitted of any such murder at the king's suit, within the year and day, that then the same justices afore whom he is acquitted, shall not suffer him to go at large, but either to remit him again to the prison, or else to let him to bail, after their discretion, till that year and day be passed;(16) and if it fortune the same felons or murderers, and accessaries so arraigned, or any of them, to be acquit, or the principal of the said felony, or any of them, to be attainted, the wife, or next heir to him so slain, as shall require, may take and have their appeal of the same death and murder within the year and day after the same felony and murder done, against the said persons so arraigned and acquit, and all other their accessaries, or against the accessaries of the said principal, or any of them so attainted, or against the said principals so attainted, if they be on live, and the benefit of his clergy thereof before not had:(17) and that the appellant have such and like advantage, as if the said acquittal or attainder had not been, the said acquittal or attainder notwithstanding;(18) and over that the wife, or heir of the said person so slain or murdered, as the case shall require, may commence their appeal in proper person, at any time within the year after the said felony done, before the sheriff and coroners of the county where the said felony or murder was done, or before the king in his bench, or justices of goal-delivery;—(26) And also it is ordain-

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ed by the same authority, That every justice of peace within this realm, that shall take any recognizance for the keeping of the peace, that the same justices do certify, send or bring the same recognizance at the next sessions of peace where he is or hath been justice, that the party so bound may be called.

A murderer indicted shall be presently arraigned at the king's suit. 3 Inst. 131, 213. A murderer indicted and acquitted shall not be set at liberty. 3 Mod. 156—1 Salk. 63—Kelyng. 25. *See further for the duty of coroners* 1 & 2 *P. & M. c.* 13. *sect.* 5—*and see further concerning murder*, 1 *Ed.* 6. *c.* 12—1 *Jac.* 1. *c.* 8—21 *Jac.* 1. *c.* 27—2 *Geo.* 2. *c.* 21, & 25 *Geo.* 2. *c.* 37.

The office of coroner was in ancient times of much greater dignity and importance than at present; no one under the degree of a knight was elegible to it; and he was invested with powers which no longer pertain to that office.

His office and power still continue to be judicial and ministerial.

He is called coroner, because his duties related chiefly to pleas of the crown.

In the construction of the statute in the text (4 Ed. 1. st. 2) commonly called the statute *De officio coronatoris*, the following points seem to be agreed on:—That the statute being wholly directory, and in affirmance of the common law, the coroner is not thereby restrained from any branch of his power, nor excused from any part of his duty, not mentioned in it, which was incident to his office before; and therefore, though the statute mentions only inquiries of the death of persons slain, drowned or suddenly dead, yet the coroner ought also to inquire of the death of those who die in prison.[1]

An inquisition of death, by the oaths of lawful men of the county, is[2] sufficient without saying they were of the next towns, so[3] that it appears at what place, and by what jurors, by name, it was taken, and that such jurors were sworn.

The reason for bringing the jurors from the circumjacent towns is sufficiently explained by what has already been observed in respect to jurors at the period when this statute was enacted:[4] in after times the same reason did not apply, they were equally competent to investigate the subject, if taken from any part of the county. At the present day they are selected and summoned by the coroner himself or his deputies.

The subjects of inquiry for the coroner's inquest are cases of sudden and violent deaths, whether they take place from the visitation of God, by misfortune, as if sudden death ensue in consequence of a fall or other casualty; or by *suicide*; or by the hand

1. 2 Hawk. P. C. c. 47—Fitz. Com. 421—3 Inst. 52, 91—Bro. Coron. 168—L. P. c. 51.

2. 1 Sid. 204—Keb. 727, 744 *cont.* Lutw. 166—Teph. 210—Co. Ent. 364.

3. Cro. Eliz. 31—2 Hawk. P. C. 47.

4. See *ante* pages 7, 8. The statute evidently contemplates a decision of the jury derived from their own knowledge of facts.

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of another, whether by murder, manslaughter, in self defence, or by accident;[5] and also of all those who die in prison.[6]

It is clearly agreed, that the inquest must be taken *on the view of the dead body*, and an inquest taken otherwise, by a coroner, is void; therefore, where the body cannot be found, or is so far decayed, that a view can be of no service, no inquisition can be taken by the coroner.[7]

If the body be buried[8] before the coroner comes, he ought to take it up, and take his view thereof, within any reasonable time after such interment; but if he should take an inquest after a body hath been so long buried, that it may reasonably be presumed that the view of it could be of no manner of use for the information of the jurors, the court into which the inquisition is returned, will, in their discretion, refuse to receive or file it, upon affidavit of the whole circumstances of the proceeding. Yet the court refused in one case to quash an indictment taken a year after the body had been buried, for *factum valet, quod fieri non debet.*[10]

It is not necessary that the inquisition be taken at the very same place where the body was viewed; and it hath been resolved, that an inquisition taken at D. on the view of the body lying dead at L. may be good.[11]

The jury must be sworn, and charged by the coroner, to enquire upon view of the body, how the party came by his death, whether by murder or by misfortune, or *felo de se.* If slain, it is to be enquired where slain, by whom, and by what means, or instrument; whether slain in the place where the body lies, or not; of what length, depth and breadth are the wounds; in what part of the body inflicted, and generally concerning all the circumstances of the party's death.[12] The inquest are also to enquire of all accessaries *before* the fact, but they cannot enquire of accessaries *after* the fact. If persons who are found guilty by the inquest be taken, the coroner may and must commit them to the sheriff, who is to confine them in prison. And by the statute 1 *& 2 Philip & Mary c.* 13,[13] the coroner is to take the examinations against the principals and accessaries *before* the fact, and put them in writing, and bind over the witnesses by recoguizance to the next goal-delivery, and then to return the inquisition, examinations, and recognizances.[14]

5. 2 Hale P. C. c. 8. p. 62.

6. Although the prisoner should die a natural death, the jailer ought to send for the coroner to enquire, for it may be possibly presumed that the prisoner died by the ill-usage of the jailer. 2 Hale P. C. 57.

7. 2 Hawk. P. C. c. 9. § 23. p. 77—F. Coron. 107—and if an inquisition without view of the body be taken, he may take a second, *super visum corporis*, for the first was absolutely void. 2 Hale P. C. 59, 59.

8. It is indictable as a *misdemeanor*, to bury one who dies a violent death, before the coroner has sat upon him. Salk. 377—7 Mod. 13—2 Hawk. P. C. 78.

10. 2 Hawk. c. 9. § 24. p. 78—*Rex v Causey*, Hil. 3 Geo. 1—Stra. 22.

11. Lat. 116—2 Hawk. P. C. c. 9. § 25. p. 78—see Poph. 209.

12. 2 Hawk. P. C. c. 9—Kielw. 61—1 Bac. Abr. coroner C.

13. See the statute tit. BAIL ante. p. 78.

14. 2 Hale H. P. C. 64.

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The coroner's inquest must hear all the evidence offered to them on oath, whether against, or in favor of the accused, for it is not so much an accusation or indictment, as an inquest of office, and therefore, the difference in the penning of the act of 1 & 2 P. & M. c. 13, touching the examinations taken by the justices of the peace and the coroner, is observable: The justices of the peace are to put in writing the information against the felon, of the fact and circumstances thereof, *or so much thereof as shall be material to prove the felony;* but the coroner is to put in writing *the effect of the evidence given to the jury before him, being material,* without saying *so much as is material to prove the felony,* but the *whole* evidence given, whether to prove, or disprove the felony.[15]

As to the coroner's duties further in relation to the prosecution of offenders:—Formerly if the persons found guilty as principals, or accessaries, before the coroner's inquest were not found, the coroner might proceed to *outlawry* against them at the common law, by process of *capias* to the sheriff; and if they were returned *non inventi*, then they were demanded at five counties and outlawed.[16] And although now the coroner cannot proceed to outlawry, yet it is still his duty to use prompt measures for apprehending persons so charged, for which purpose he may direct his warrant to the sheriff for arresting and securing them, and by the express provision of the 4 Ed. 1. s. 2. he may not only make process, but make *hue and cry*[17] after them.[18]

The coroner being the proper officer to take inquisitions *super visum corporis*, his attendance for this purpose ought to be procured if practicable, and therefore notice ought to be given to him. If, however, he should omit to take an inquisition of an untimely death, it may be done by justices of goal-delivery, oyer and terminer, or justices of the peace, but it must be done openly, and if it be done secretly it may be quashed.[19]

The *ministerial* office of the coroner is only as a substitute for the sheriff. For when just exception is taken to the sheriff, for suspicion of partiality, as that he is interested in the suit, or of kindred to either the plaintiff or defendant, the process must be awarded to the coroner, in place of the sheriff, to be executed.[20] And his duties in relation to the execution, and return of such process are precisely the same with those of the sheriff in other cases.

15. 1 Hale P. C. 61, 157. c. CXXII.
16. 2 Hale's P. C. 64—Cromp. Inst. 226.
17. See tit. HUE AND CRY *infra*.
18. 2 Hale P. C. 88, 107—He is a conservator of the peace, in relation to all felonies, and can command the felons to be apprehended, though he can take no inquisition concerning any, but the death of a man. ib. He may cause manslayers to be arrested before the inquisition be taken, for many times the inquest are so long in their enquiry that the offenders may escape, if the coroner stays till the inquisition be delivered. 2 Hale P. C. 107.
19. 2 Hawk. P. C. 79—1 Burr. Rep. 17.
20. 1 Black. Com. 349.

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DAMAGES AND COSTS.

* 6 EDWARD I. CAP. I. A.D. 1278.

Several actions wherein damages shall be recovered.

WHEREAS heretofore damages were not awarded in assises of *novel disseisin*, but only against the disseisors:(2) it is provided, that if the disseisors do aliene the lands, and have not whereof there may be damages levied, that they to whose hand such tenements shall come, shall be charged with the damages, so that every one shall answer for his time.(3) It is provided also, That the disseisee shall recover damages in a writ of entry, upon *novel disseisin* against him that is found tenant after the disseisor.(4) It is provided also, that where before this time damages were not awarded in a plea of *Mortdauncestor* (but in case where the land was recovered against the chief lord) that from henceforth damages shall be awarded in all cases where a man recovereth by assise of *Mortdauncestor*, as before is said in assise of *novel disseisin*;(5) And likewise damages shall be recovered in writs of *cosinage, aiel & besaiel.*

II. And whereas before time damages were not taxed, but to the value of the issues of the land;(2) it is provided, That the demandant may recover against the tenant the costs of his writ purchased, together with the damages aforesaid.(3) And this act shall hold place in all cases where the party is to recover damages.(4) And every person from henceforth shall be compelled to render damages, where the land is recovered against him upon his own intrusion, or his own act.

The alience of a disseisor shall be charged with damages. Fitz. damage, 14, 43, 56, 68, 82, 95, 101, 102, 104, 108, 110, 121, 123, 127, 129—Hob. 95—Gobbolt 112—Damages in Mortdauncestor—Co. Lit. 10, 11a—Dyer f. 370—Fitz. damage, 6, 19, 97. Damages in cosinage, aiel, besaiel. Where damages shall be recovered, there costs also—2 Ins. 283.

* 3 HENRY VII. CAP. X. A.D. 1486.

Costs, &c. awarded to the plaintiff, where the defendant sueth a writ of error.

ITEM, That where oftentimes plaintiff or demandant, plaintiffs or demandants, that have judgment to recover, be delayed of exe-

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cution, for that the defendant or tenant, defendants or tenants, against whom judgment is given, or other that be bound by the said judgment, sueth a writ or writs of error to adnul and reverse the said judgment, to the intent only to delay execution of the said judgment:(2) It is enacted, ordained, and established, by the advice of the lords spiritual and temporal, and at the prayer of the commons, in the said parliament assembled, and by authority of the same, That if any such defendant or tenant, defendants or tenants, or of any other that shall be bound by the said judgment, sue, afore execution had, any writ of error to reverse any such judgment, in delaying of execution,(3) that then if the same judgment be affirmed good in the said writ of error, and not erroneous, or that the said writ of error be discontinued in the default of the party, or that any person or persons that sueth writ or writs of error, be non-suited in the same, that then the said person or persons, against whom the said writ of error is sued, shall recover his costs and damage for his delay and wrongful vexation in the same, by discretion of the justice afore whom the said writ of error is sued.

31 *Ed.* 3. *stat.* 1 *c.* 12—1 Salk. 205—Mod. cases in law 314—Dyer 77—Cro. El. 538, 659—Cro. Car. 145—19 H. 7. c. 20—Salk. 205—Raym. 134—Co. pla. f. 2, 24 162, 292 —*Confirmed by* 19 *H.* 7. c. 20—*and see* 13 *Car. II. stat.* 2. *c.* 2. *sect.* 9. *which gives double costs on affirmance after verdict; and* 4 *Anne c.* 16 *sect.* 25. *which provides further for costs on quashing writ of error.*

Every action which is brought for an injury to a private person, is called a *civil* one; of which there are three kinds, *real*, *mixed*, and *personal:* It is the essence of a real action, that only a real thing can be recovered therein; for wherever damages, which are a pecuniary recompense for an injury, and consequently a personal thing, are recoverable in the same action wherein a real thing may be recovered, the action is distinguished by the name of a *mixed* action. And therefore, where in a real action damages are given by statute, the action immediately ceases to be a real one, and becomes from that time a mixed action.[1]

Damages are recoverable in every *personal* action at the common law.

In an action for entry *sur novel disseisin*, no damages are recoverable, at the common law: The statute of Gloscester, in the text, enables the person disseised[2] to recover damages in a writ of *sur novel disseisin* against the disseisor.

1. Sayer's Dams. 6.

2. Wrongfully turned out of the seisin or possession of land.

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The heir of the disseisee may recover damages against the disseisor, under that clause of the statute which declares, "That every person shall from henceforth be compelled to render damages where land is recovered against him upon his own intrusion, or his own act." But such heir cannot recover damages against the *alienee* of the disseisor; for the alienee came into possession, neither by his own intrusion, nor his own act.[3]

Notwithstanding the words of the statute of Gloscester are, "*him who is found tenant after the disseisor*," it has been holden, that the tenant who came into possession of the land after the disseisor, *by act of law*, as by descent, is not answerable; it being a maxim of law, that *actus legis nemini est damnosus*. Yet if such tenant take the profits he is answerable for damages: because the taking of the profits, which of right belong to the disseisee, was a tortious act.[4]

In an action of entry *sur novel disseisin*, brought against any tenant who is liable to render damages, damages may be recovered for the whole period from the time of the disseisin; it not being enacted in this clause of the statute, as it is in that which gives damages in an assise of *novel disseisin*, "That every one shall answer for his time."[5] But in this action the heir of the disseisee can only recover against the disseisor's tenant, who may be liable to damages, from the death of the disseisee.

In an action of entry *sur novel disseisin*, if a writ of inquiry be awarded, damages can only be assessed to the time of awarding it, and if there be a verdict, damages can only be assessed to the time of finding it.[6]

This statute, after reciting that before this time damages were not awarded in a plea of *Mort D'ancestor*, except the tenement was recovered against the chief lord, it is enacted, "That from henceforth damages shall be awarded in every case where a man recovereth in an assise of *Mort D'ancestor* in the same manner as is before said in an assise of *novel disseisin*.[7]

In actions of *cosinage*, or of *aiel*, or *besaiel*, damages are not recoverable at the common law, but the statute of *Gloscester* gives damages in these actions, and in any one of them the demandant may recover damages from the death of his immediate ancestor.[8]

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* 19 HENRY VII. CAP. XX. A.D. 1503.

Writs of Error.

PRAYEN the commons in this present parliament assembled, That where at a parliament holden at *Westminster*, in the third year of

3. 2 Inst. 286—Sayer's Dams. 14.
4. 2 Inst. 286—Sayer's Dams. 15.
5. 2 Inst. 286—Saver's Dams. 15.
6. 10 Rep. 117—Pilford's case—1 Bro. Dams. 14.
7. Sayer's Damages, p. 18.
8. Sayer's Damages 21.

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the reign of our sovereign lord the king that now is, by the advice of the lords spiritual and temporal, and the commons, in the same parliament assembled, and by authority of the same, it was enacted, ordained and established, among other things, That if any defendant or tenant, defendants or tenants, or any other that shall be bound by any judgment, sue, afore execution had, any writ of error to reverse any such judgment, in delaying of execution of the party,(2) that then if the same judgment be affirmed good in the said writ of error, and not erroneous, or that the said writ of error be discontinued in the default of the party, or the person or persons that sueth the writ or writs of error be non-suited in the same, that then the said person or persons, against whom the said writ of error is so sued, shall recover his costs and damages for his delay and wrongful vexation in the same, by discretion of the justices afore whom the said writ of error is sued:(3) Which act, or ordinance, hath not been as yet duly put in execution, by reason whereof, as well plaintiffs as demandants, in divers actions by them sued sith the making of the said statute, have been oftentimes delayed of their execution, to their great and importable hurt, loss, and charges:(4) Wherefore the king our sovereign lord, by the advice of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of he same, ordaineth, establisheth, and enacteth, That the said act made the third year of his reign, concerning the premises, be good and effectual, and that from henceforth it be duly put in execution.

See further, 13 *Car.* 2. *st.* 2. *c.* 2. 9. *which gives double damages on affirmance after verdict: and* 4 *Anne c.* 16. *sect.* 25. *which provides further for costs on quashing writ of error.*

No damages were recoverable at the common law in an action of error. They were given by statute 3 *Hen. VII. c.* 10. in the text.

Damages are not recoverable under this statute, in an action of error commenced after execution.[1]

Damages are recoverable in error, under this statute, although not recoverable in the original action.[2]

1. Cro. Jas. 636—*Eardley v Farnack*—Sayer's Damages 95.

2. Stra. 1034—Ferguson v Rawlinson, Hil. 11 Geo. II.—Sayer's Dams. 100.

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In error, where the judgment is affirmed, the defendant is entitled to recover damages.[3]

By the statute of Westminster 2, 13 *Edw.* 1. c. 26.[4] double damages are recoverable upon a writ of *re-disseisin*. In an action of dower *unde nihil habet*, the statute of Morton, 20 *H.* 3. c, 1.[5] entitles the widow to recover in damages, the value of her dower from the time of the death of her husband. In *waste* treble damages are recoverable, by the statute of Gloscester, 6 *Ed.* 1. c. 5.

In actions upon the *case*, *trespass*, *replevin*, &c. the damages recoverable at the common law are *single*, and proportioned to the injury sustained; but *double* or *treble* damages are sometimes given by statute, in cases where *single* damages only were before recoverable, as upon the statute of 8 *H. VI.* c. 9. for a forcible entry;[6] and upon the 2 & 3 William & Mary Siss. 1. c. 5. for rescuing a distress for rent.[7] So upon the act of assembly upon the same subject, *treble* damages and costs of suit are recoverable for any pound breach, or rescue of goods distrained.

In an action of *debt*, for a penalty, the damages, at the common law, are merely *nominal*.[8] But where an action is brought on a bond for the non-performance of covenants, the jury, upon the trial, or a writ of inquiry, are by virtue of the statute 8 & 9 *Will. III.* c. 11. (in the text) to assess, not only the ordinary damages and costs of suit, but also damages for such of the breaches as the plaintiff proves; and the judgment shall be entered in the common form, which shall afterwards remain as a security to the plaintiff against future breaches. In an action on a charter party, the damages may be recovered beyond the amount of the penalty.[9]

In such action the charterer may recover, not only the damage he himself sustained, but also the damage occasioned to goods belonging to a person whom the charterer let in.[10] And the charterer may recover, from the ship owner, the whole amount of the loss occasioned by *unseaworthiness*, notwithstanding the underwriters had, without dispute, paid part of the loss; that part being recoverable back, by the underwriters, as a payment by mistake.[11]

When the precise sum is not the essence of the agreement, the *quantum* of damages may be assessed by the jury; but where the precise sum is liquidated and fixed, by the agreement of the parties, *that sum* is the ascertained damage, and the jury are confined to it: that alone is the measure of damages.[12] There is a difference between covenants *in general*, and covenants *secured by a penalty, or forfeiture*; in the *latter* case the obligee has his elec-

3. Bishop of Lon. v Mercers' Comp. Hil. 5 Geo. II.—Stra. 931.

4. See the statute under tit. DISSEISIN, &c.

5. See title DOWER.

6. See the stat. under the title FORCIBLE ENTRY. Bro. Dam. pl. 70—10 Co. 115b—Co. Lit. 257b—2 Inst. 289—Cro. Eliz. 582.

7. See the stat. under title DISTRESS—Carth. 321—1 Salk. 205—1 Ld. Ray. 19, 342—Skin. 555—Holt. 172, S. C.—1 State Laws, Sm. Ed. 370.

8. 6 Term. Rep. 303—but see 2 Term. Rep. 388—7 ib. 446.

9. 1 Black. Rep. 395, & see Burr. 1346.

10. 6 Binney's Rep. 228.

11. 6 Binney's Rep. 228.

12. *Lowe v Peers*, 4 Burr. 2225, and see 2 Bos. & Pul. 346—2 Com. Dig. 526.

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tion; he may either bring an action of debt for the penalty and recover *that*, after which he cannot resort to the *covenant*, because the penalty is to be a satisfaction for the whole; or if he does *not* choose to go for the *penalty*, he may proceed on the *covenant* and recover *more*, or *less*, than the penalty, *toties quoties*.

Upon this distinction they proceed in courts of *equity*. They will relieve against a penalty upon a *compensation;* but where the covenant is to pay a particular *liquidated* sum, a court of equity can *not* make a new covenant for a man; nor is there any room for *compensation* or *relief*. Thus, in leases containing a *covenant against ploughing up meadow*, if the covenant be "*not to plough*," and there be a *penalty*, a court of equity will *relieve against such penalty*, or will even go further than that, in order to preserve the substance of the agreement; but if the agreement be worded "to pay 5*l. an acre for every acre ploughed up*," there is no *alternative—no room for any relief* against it; *no compensation;* it is the substance of the agreement.[13]

Where a declaration consists of several counts, the jury may either assess *entire* damages, on the whole or part of the declaration, or they may assess *several* damages on the different counts. If *entire* damages be assessed, and any one, or more of the counts be bad, or inconsistent, judgment may be arrested; because it must in general be intended, that some of the damages were assessed upon those counts.[14] This defect may, in some cases, be cured; where the evidence given at the trial applied only to such of the counts as are good and consistent, a general verdict may be altered from the notes of the judge, and entered only on those counts;[15] but if any evidence applied to the bad, or inconsistent counts, the *postea* cannot be amended. Thus, in an action for *words*, where some actionable words are laid, and some not actionable, in different counts, and evidence given of both sets of words and a general verdict; it cannot be amended, because it would be impossible for the judge to say, on which of the counts the jury had found the damages, or how they had apportioned them.[16] If in a penal action, there be a verdict for the plaintiff, with one penalty generally, and the plaintiff apply it to one count, he cannot afterwards apply it to another, although the former be had in law, and although the evidence would have warranted the verdict in any other count.[17]

When there is judgment by default as to part, and an issue upon another part; or where, in an action against several defendants, some of them let judgment go by default, and others plead

13. 4 Burr. 2225—In the case of *Hicks v Goats*, 2 Roll. Abr. 703, it is said that the gist of the action of covenant is damages, &c. This case Ld. Mansfield declares is irr. concileable with any principles of law or equity.

14. Say. Dam. 132—10 Rep. 130—Cro. Eliz. 560—Cro. Jac. 115—but see the distinction taken in Willes 442.

15. 1 Bos. & Pul. 329.

16. 1 Willes 443—Doug. 376, 722—1 Term. Rep 542—6 Term. Rep. 694—See also Sayer's Dam. 133, 134, and the cases cited.

17. 3 Term. Rep. 448—but see 3 Burr. 1237, *semb. contra.*

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to issue, a special *venire* ought to be awarded, as well to try the issue, as to enquire of the damages, *tam ad triandum quam inquirendum*, and the jury who try the issue shall assess the damages for the whole, or against all the defendants.[18] But if a declaration in *trespass* contain two counts, and the defendant plead to one, and suffer judgment by default on the other, and on the trial of the first plaintiff prove but one act of trespass, which is covered by the second count, he is not entitled to a verdict on the first count.[19] Where there are several defendants, some of whom suffer judgment to go by default, and others plead to issue, and are acquitted at the trial, the jury shall, in some instances, assess the damages against those who let judgment go by default, and in others they shall not. In actions upon *contract as covenant, assumpsit*, &c. the plea of one defendant generally enures to the benefit of all;[20] for the contract being entire, the plaintiff must succeed upon it against all, or none, of the defendants: of consequence, if one of them takes issue and it be found for him, plaintiff cannot recover any damages against those who suffered judgment by default. In actions of *tort*, as *trespass*, &c. where the wrong is joint and several, the distinction seems to depend upon the *plea*, under which a trial against one of the defendants is had: if it be such as shews the plaintiff could have no cause of action against any of the defendants, a verdict in favor of the one defendant will operate to the benefit of all of them; and the plaintiff can recover nothing against those who let judgment go by default;[21] but it is otherwise where the plea merely operates, in discharge of the party pleading it; for a verdict in his favor will not prevent the recovery of damages and final judgment against the other defendants.[22]

In case there be a *demurrer* to part, and an issue upon another part, or where there are several defendants, some of whom *demurr* and others plead to issue, if the issue be tried before the demurrer is argued, the jury shall assess the damages for the whole, or against all the defendants; but the damages so assessed are said to be *contingent*, depending upon the fate of the demurrer.[23]

Where there are several defendants who sever in pleading, damages shall be assessed against all, by the jury who try the first issue; with a *cessat executio*, and, to the damages so assessed, the other defendants who may be found guilty, shall be contributory.[24] Upon a recovery in an action for a *tort* against two defendants, if the plaintiff should levy the whole damages on one of them, that one cannot recover a moiety against the other, for his contribution: but it is otherwise in an action founded on contract,

18. 11 Co. 5—2 Bos. & Pul. 163.
19. 7 Term. Rep. 727.
20. 1 Leo. 63—1 Sid. 76—1 Kib. 284—Cas. Pr. C. B. 107—3 Term. Rep. 662—2 Tidd's Pr. 803.
21. 2 Ld. Ray. 1372—1 Stra. 610—8 Mod. 217.
22. 2 Stra. 1108, 1222.
23. 11 Co. 5—For the force of an entry *unica taxatio* see 2 Tidd's Pr. 671.
24. 11 Co. 5.

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as *assumpsit*. Where defendants join in pleading, the damages cannot be severed. But in such case if some be found guilty of the whole trespass, and others of a part only, several damages may be assessed.

On the trial of an issue, if the jury neglect to assess damages, where damages are recoverable, in general, the verdict is void.[25] Yet there are some cases, where such verdict may be rendered good, by the act of the plaintiff; and others where the defect may be supplied, by a writ of inquiry.[26] Thus, where damages are not the only thing to be recovered, as in actions of *debt*, *annuity*, &c. an omission to assess them will be remedied, by the plaintiffs entering a release of the damages.[27] So where in an action of trespass against several, who join in pleading, the jury assess several damages, it shall be aided by a release, or *nolle prosequi* against all but one defendant.[28] The cases where the defect may be supplied by writ of enquiry, seem to be where the matter, omitted to be enquired of by the jury, doth not go to the point in issue, or a necessary consequence thereof, but is merely collateral. Where the parties being at issue in assumpsit, there was a demurrer upon the evidence, and the jury in consequence discharged, as is usual; after the demurrer was determined in favor of the plaintiff, a writ of enquiry of damages was awarded; for notwithstanding the jury might have assessed the damages *conditionally*, yet the court said that it might as well be done by a writ of enquiry, after the demurrer is determined.[29]

Suffering judgment to go by default is an implied confession of the action, and such judgment is either *final* or *interlocutory*. In an action of debt it is *final*, inasmuch as it admits the very demand, which the plaintiff has made in his declaration;[30] but if the action sounds only in damages, as *assumpsit*, *covenant*, *trespass*, *trover*, &c. judgment is *interlocutory*, because the *quantum* of damages is still to be ascertained by the jury before final judgment can be obtained.[31] The judgment in these actions, when rendered on *demurrer*, or *nul tiel record* pleaded, is also interlocutory.[32]

The statute 8 & 9 *Will.* 3. c. 11. (in the text) was made in favor of defendants; and is highly remedial, being calculated to protect them against the payment of more money than is justly due; and to obviate the necessity of resorting to a court of equity, to resist an unconscientious demand, of the whole penalty, in cases where small damages merely have accrued.[33] The construction of this statute has been no less liberal, than its design. Where the covenants are contained in the condition of a bond, they are con-

25. 2 Com. Dig. 621.
26. 10 Co. 118, *Chevney's case.*
27. 11 Co. 56.
28. Carth. 21—2 Com. Dig. Dam. E. 3. p. 626—11 Co. 7—Cro. Car. 192—1 Wills. 30.
29. Cro. Car. 143—1 Tidd's Pr. 516.
30. Yet in *debt* after judgment by default, there may be a writ of enquiry to recover interest by way of damages for the detention of the debt—7 T. R. 446—8 T. R. 395—1 East. 436.
31. 1 Crom. Pr. 279.
32. Tidd's Pr. 508.
33. 5 Term. Rep. 636.

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sidered to be equally within the statute, as if in a different instrument.[34] It is held to be *compulsory*, on a plaintiff to proceed in the method the statute prescribes.[35]

But the provisions of this statute extend not to bonds conditioned for the payment of money, (which are provided for by 4 Anne c. 16.) nor to *bail bonds*.[36] Although in cases where the statute applies, judgment is signed for the penalty at a common law; yet it only stands as a security for the damages ascertained.[37] After judgment signed, plaintiff must proceed on the statute by suggesting breaches on the roll, of which defendants ought to have a copy, and notice of enquiry.[38]

The writ of enquiry of damages is a mere inquest of office, to satisfy the conscience of the court; who, if they please, may themselves assess the damages.[39] And where the *quantum* of damages depends entirely on figures, and may as well be ascertained by an individual, as by a jury, it will be referred to the proper officer of the court to make the calculation, and to ascertain what is due to the plaintiff.[40] In actions upon *promissory notes* and *bills of exchange*, it is accordingly the practice, in place of executing a writ of enquiry, to apply to the court for a rule to show cause, why it should not be referred to the master, to see what is due for principal and interest, and why final judgment should not be signed for such sum, without executing a writ of enquiry; which rule is made absolute, on an affidavit of service, unless good cause be shewn to the contrary.[41] A similar rule may be obtained in actions of *covenant* for the payment of a sum certain, or on an *award*.[42] But wherever the *quantum* of damages depends not upon figures alone, such order will not be made. It has been refused in an action of debt on a bill of exchange.[43] Such reference cannot be had in assumpsit for a sum certain due on an agreement; nor in an action on a bottomry bond.[44]

The want of a writ of enquiry is aided by the statute of *jeofails*.[45]

In ancient times the courts exercised the power of *abridging*, and of *increasing* the damages, according to their discretion.—At the present day, the power of *abridging* the damages is not exercised in any case; nor has that of *increasing* the damages been exercised for many years, except in an action for a corporal hurt.[46]

Where double or treble damages are given by the statute, to a plaintiff, he must take care in declaring, to bring his case within the statute.[47]

34. 2 Burr. 772, 820—2 Black. Rep. 843—Doug. 519—1 Com. Rep. 376—see further 1 Esp. N. P. 156—1 Saund. 58—2 Wils. 377—Say. Dam. 67—Cowp. 357.

35. 2 Burr. 820—5 Term. Rep. 528, 636—8 Term. Rep. 126—see also 1 Esp. N. P. 277.

36. 2 Bos. & Pul. 446.

37. 2 Burr. 825—Cowp, 357.

38. 1 Tidd's Pr. 511.

39. See 1 H. Black. 542.

40. 8 Term. Rep. 648—4 T. R. 493.

41. 4 Term. Rep. 275, and see 1 H. Black. 252, 529, 541—2 Bos. & Pul. 55.

42. Doug. 316—8 Term. Rep. 326, 410.

43. 8 Term. Rep. 395—4 T. R. 493—5 T. R. 87—Cro. Eliz. 536—Cro. Jac. 617.

44. H. 37 Geo. III.—Palm v Nicholson, E 38 G. III see 7 T. R. 473.

45. 2 Stra. 878, 1077.

46. Say. Dam. 173.

47. Ld. Ray. 342—Say. Dam. 249.

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The jury who try the issue may assess the treble damages, but if they neglect to do so, the court may award the treble damages or a writ of enquiry for assessing them.[48] Where the jury gave 20*l.* it was awarded by the court that besides the damages so assessed by the jury, the plaintiff should recover 40*l.* more.[49]

Where treble damages are given to a defendant, and the jury omit to assess them, a writ of enquiry will be awarded, as a foundation for which a proper suggestion ought to be entered upon the *postea*.[50]

* 11 HENRY VII. CAP. XII. A.D. 1494.

A mean to help and speed poor persons in their suits.

PRAYEN the commons in this present parliament assembled, That where the king our sovereign lord, of his most gracious disposition, willeth and intendeth indifferent justice to be had and ministered, according to his common laws, to all his true subjects, as well to the poor as rich, which poor subjects be not of ability nor power to sue according to the laws of this land, for the redress of injuries and wrongs to them daily done, as well concerning their persons and their inheritance, as other causes:(2) For remedy whereof, in the behalf of the poor persons of this land, not able to sue for their remedy after the course of the common law; be it ordained and enacted by your highness, and by the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, That every poor person or persons, which have, or hereafter shall have cause of action or actions against any person or persons within this realm, shall have, by the discretion of the chancellor of this realm for the time being, writ or writs original, and writs of *subpœna*, according to the nature of their causes, therefor nothing paying to your highness for the seals of the same, nor to any person for the writing of the same writ and writs to be hereafter sued;(3) and that the said chancellor for the time being, shall assign such of the clerks which shall do and use the making and writing of the same writs, to write the same ready to be sealed, and also learned counsel and attornies for the same, without any reward taken therefore:(4) and after the said writ or writs be returned, if it be afore the king in

48. Say. Dam. 244.
49. Bro. Dam. pl. 70—Say. Dam. 244.
50. *Burnet v Hart*, East. 28 Geo. II. in B. R. Say. Dam. 244.

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his bench, the justices there shall assign to the same poor person or persons, counsel learned, by their discretions, which shall give their counsels, nothing taking for the same:(5) And likewise the justices shall appoint attorney and attornies for the same poor person or persons, and all other officers requisite and necessary to be had for the speed of the said suits to be had and made, which shall do their duties without any reward for their counsels, help, and business in the same:(6) And the same law and order shall be observed and kept of all such suits to be made afore the king's justices of his common place, and barons of his exchequer, and all other justices in the courts of record where any such suits shall be.

See 2 *Geo.* 2. *c.* 28. *s.* 8. *declaring what persons sued by* capias *may defend in* forma pauperis.

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* 7 HENRY VIII. CAP. IV. A.D. 1515.(G

An act concerning avowries for rents and services.

WHEREAS divers, as well noblemen as other the king's subjects, have suffered recoveries against them of divers their manors, lordships, lands, and tenements, for the performance of their wills, or for the surety of their wives' jointures, or for the jointure of their sons and heirs apparent, and their wives, or of any other person or persons, according to their covenants and agreements,(2) and those persons that so have recovered the said manors by the course of the common law, had no remedy, nor may have, to compel the fermors, freeholders, and tenants, which held of the same manors by rents, services, or customs, to atturn to them;(3) nor could by the order of the law attain to the said rents, services, or customs (if they were denied) by distress or action, without they could once attain to the possession of the same rents, services, and customs, by paying or doing the said rents, services, or customs, by the same freeholders, fermors, and tenants;(4) which to do, divers and many of them have oftentimes refused, and yet do, to the great offence and charge of their conscience, not only to the disheritance of the said recoverers, but also in breaking of the last wills of them

(G) This statute is in force except those parts which relate to writs of quare impedit and advowsons. *Report of the Judges.*

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against whom such recovery is had, and also to the disheritance of the said husband and wife, or other to whose use the same recovery was so had.

II. Be it therefore enacted by this present parliament, and by authority of the same, That the recoverers in all such recoveries, their heirs and assigns, may from henceforth distrain for the foresaid rents, services, and customs, so being due and unpaid, and make avowry, or justify the same, as those persons against whom the said recovery is, should have done if the said recovery had not been had;(2) and also have like remedy for the recovering of the said rents, services, and customs by avowry;(3) *and also a quare impedit for the said advowson, if any disturbance be made;* as those persons against whom the said recoveries were had, might or should have had by the course of the common law afore the said recovery, if any such rents, services, or customs had been denied them, or any such disturbance had been had in their times.

III. And also, that every avowant, and every other person or persons that make avowry, conisance or knowledge, or justify, as baily to any other person or persons in any *replegiari*, or second deliverance for any rent, custom, or service, if their avowry, conisance, or justification be found for them, or the plaintiffs in the said actions otherwise barred, shall recover their damages and costs that they have sustained, as the plaintiff should have done, if they had recovered in the said replevins.

Recoverers have no remedy by the common law to recover their rents or presentations. Dyer 31, 141—Bro. Mesne 24—Vaughan 48. The avowant in replegiari shall recover his damages and costs of suit. *Cro. Eliz.* 257, 329—*Cro. Car.* 498—2 Cro. 520—19 H. 8. c. 11—Bro. Damages 8—2 Roll. 140. *Further provided for* 21 H. 8. c. 19—*and see* 11 *Geo.* 2. c. 19, *for preventing frauds by tenants.*

Costs are either *interlocutory* or *final*, the former being such as are awarded on interlocutory matters arising in the course of the suit; the latter are such as depend on the final event of the suit.

At the common law, a plaintiff had no right to costs, but it was usual for the justices in *eyre* in their *iters*, to make a compensation to a plaintiff who had obtained a verdict for the expenses sustained in carrying on his suit; and the damages were so assessed as to cover those expenses.[1]

It is frequently, though erroneously, said that the statute of Gloscester was the first that gave costs; but they are given by the statute of *Marleberge* c. 6.

1. Say. Costs 1—2 Inst. 288—Gil. H. C. P. 266.

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The statute of Gloscester, after giving costs in certain actions therein named, declares, generally, that they shall be recovered wherever damages are recovered.

Though the statute only mentions the costs of the writ, the construction has been, that it extends to all the costs of the suit.[2]—But the statute does not extend to *real* actions, *scire facias*, *prohibition*, &c. where no damages were recoverable at the common law.[3] It appears to be settled that under this statute the plaintiff is entitled to costs in all cases where damages are given by statute to the party grieved, although costs be not mentioned in such statute.[4]

The statute of 8 & 9 Will. III. c. 11. gives costs in certain cases wherein they were not before recoverable.

The general right of the plaintiff to costs, established by the statute of Gloscester has been altered, restrained and modified by subsequent statutes.[5]

Thus, by the § 4 of the act of limitations, passed 27 March, 1713,[6] it is enacted, "*That in all actions upon the case for slanderous words, to be sued or prosecuted by any person or persons, in any court within this province, if the jury upon trial of the issue in such action, or the jury that shall enquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed do amount to, without any further increase of the same; any law or usage to the contrary notwithstanding.*"

This section is copied from the § VI. of the 21 *Jac.* 1 c. 16. and has received the same construction.

It is settled that the statute does not extend to slander of title, for that is not so properly a slander as a cause of damage.[7]—Neither does it extend to any case where the words are not actionable, where the special damage is the *gist* of the action;[8] though where the words are actionable in themselves, a *special damage*, will not take the case out of the statute.[9]

The statute applies to a writ of *inquiry* as well as a trial where the damages are under forty shillings.[10]

2. 2 Inst. 288—Say Costs 4.

3. 1 Comb. 20.

4. 2 Wils. 91—Barnes 151, S. C.—3 Burr. 1728—Say. Costs 18—1 Term. Rep. 71—6 T. R. 355—7 Term. Rep. 267—but see Cowp. 367, 8. But it is otherwise where the penalty is given to a common informer. Buller's N. P. 33.

5. Several of these being local, it would be neither necessary nor useful to notice them particularly.—*See* the statutes relative to the courts of requests and courts of conscience.

6. 1 Sm. State Laws 77.

7. Cro. Car. 141, *Law v. Harwood*—Leo. 82—Palin. 530—Jones 196—Stra. 645.

8. 2 Stra. 936—1 Bac. Abr. 515.

9. 2 Ld. Ray. 1588—2 Stra. 936, S. C.—Willes 438—Barnes 132, 142—3 Burr. 1688—2 Black. Rep. 1062—Say. Costs 25—Case Pr. 137 contra. In assenting to this proposition, and yielding to the weight of authorities, judge Blackstone remarks, I cannot so well reconcile it to my own mind, that, *ceteris paribus*, the plaintiff shall recover full costs if the words be *innocent*, but not so if they be highly *scandalous*. *Collins v Gillard*, 2 Black. 1662. 10. 2 Stra. 934.

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It has been held that by the statute, the power of the judges is taken away as to giving costs *de incremento*, where the damages are under 40 shillings, but that although the court cannot increase the costs, yet the jury are not *bound by the statute*, and therefore they may give *ten pounds costs*, where they give but *ten pence damages*.[11]

This construction took place at a period when a subtle distinction was more valued than a sound argument; and the discrimination between the powers of the court and jury, tending in a great degree to defeat the salutary provision of this statute, is characteristic of the times.

The law upon this point seems to have been considered as settled ever since the case of *Browne v Gibbons*, reported in Salk. 207, and to that case we are constantly referred as if it were the leading decision on the subject; yet the question determined by the court in that case was of a different kind altogether; and, as reported by Lord Raymond, it don't appear that a word was said upon this point. But in Salkeld, the reporter adds, in a *note*, That *Richardson* said that in Mich. 5 Car. 1. C. B. it has been decided by all the judges of B. R. and C. B. that although the court be bound by the statute, yet the *jury* is not. Though the court can't increase the costs, yet the jury may give 10*l.* costs and but 10*d.* damages. We are not informed in what case this decision of the judges took place. No better ground is afforded for this singular doctrine, than a vague report from memory of what had been decided. Yet this, it seems, has been sufficient to establish it in England, and our own courts have applied the same construction to the act of assembly. There is evidently a disposition, however, at the present day, so far as adjudged cases will admit, to restrain the power which juries were permitted to assume, of dispensing with positive provisions of a law.[12]

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* 23 HENRY VIII. CAP. XV. A.D. 1531.

An act that the plaintiff, being non-suited, shall yield damages to the defendants in actions personal, by the discretion of the justices.

BE it enacted by the king our sovereign lord, and the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, That if any person or persons, at any time after the feast of the *purification* of our lady, in the twenty-third year of the reign of our sovereign lord king HENRY the eighth, commence or sue in any court of re-

11. Salk. 207—1 Bac. Abr. 514.

12. See the case of *Steward v Harkins*, 3 Binney's Rep. 321.

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cord, or elsewhere in any other court, any action, bill, or plaint, of trespass upon the statute of king RICHARD the second, made in the fifth year of his reign, for entries into lands and tenements, where none entry is given by the law,(2) or any action, bill, or plaint of debt or covenant, upon any especialty made to the plaintiff or plaintiffs,(3) or upon any contract supposed to be made between the plaintiff or plaintiffs, and any other person or persons, (4) or any action, bill, or plaint of detinue of any goods or chattels, whereof the plaintiff or plaintiffs shall suppose that the property belongeth to them, or to any of them,(5) or any action, bill, or plaint of account, in which the plaintiff or plaintiffs suppose the defendant or defendants to be their bailiff or bailiffs, receiver or receivers of their manor, mese, money, or goods, to yield account, (6) or any action, bill, or plaint upon the case, or upon any statute, for any offence or wrong personal, immediately supposed to be done to the plaintiff or plaintiffs,(7) and the plaintiff or plaintiffs in any such kind of action, bill, or plaint, after appearance of the defendant or defendants, be non-suited, or that any verdict happen to pass, by lawful trial, against the plaintiff or plaintiffs in any such action, bill, or plaint, that then the defendant or defendants in every such action, bill, or plaint, shall have judgment to recover his costs against every such plaintiff or plaintiffs;(8) and that to be assessed and taxed by the discretion of the judge or judges of the court where any such action, bill, or plaint shall be commenced, sued, or taken;(9) and also, that every defendant in such action, bill, or plaint, shall have such process and execution for the recovery and having of his costs against the plaintiff or plaintiffs (2) as the same plaintiff or plaintiffs should or might have had against the defendant or defendants, in case that judgment had been given for the part of the said plaintiff or plaintiffs, in any such action, bill, or plaint.

II. Provided always, That all and every such poor person or persons, being plaintiff or plaintiffs in any of the said actions, bills, or plaints, which at the commencement of their suits or actions, be admitted by discretion of the judge or judges where such suits or actions shall be pursued or taken, to have their process and counsel of charity, without any money or fee paying for the same, shall not be compelled to pay any costs by virtue and force

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of this statute, but shall suffer other punishment, as by the discretion of the justices or judge, afore whom such suits shall depend, shall be thought reasonable; any thing afore rehearsed to the contrary hereof notwithstanding.

Hutt. 22, 69, 78—1 Roll. 63—2 Roll. 213—Hetley 146—5 Rich. 2. s. 1. c. 7—8 El. c. 2—2 Inst. 651—Cro. El. 177, 300, 465, 503—*Cro. Car.* 542—3 Bulst. 248—Moor 625, pl. 857—Br. Costs 23—3 Leon. 92—1 Salk. 207—Hob. 219—2 Leon. 9, 52. Further provision relating hereto, 4 Jac. 1. c. 3—Mod. cases in law 344—Dyer f. 32, 371—Bro. Costs 23. He that sueth in Forma pauperis shall be otherwise punished, 1 Roll. 88. *Further provisions concerning costs*, 24 *H.* 8. *c.* 8—33 *H.* 8. *c.* 39. *sect.* 54—8 *El. c.* 2—18 *El. c.* 5—43 *El. c.* 6—4 *Jac.* 1. *c.* 3—7 *Jac.* 1. *c.* 5—21 *Jac.* 1. *c.* 16—16 *Car.* 1. *c.* 15—13 *Car.* 2. *st.* 2. *c.* 2—4 & 5 *Will. & Mary c.* 23—8 *Will.* 3. *c.* 11—11 & 12 *Will.* 3. *c.* 9—4 *Anne c.* 16, *and* 14 *Geo.* 2. *c.* 17.

Thus although where in actions of slander, a jury or referees find damages under 40*s.* and a sum certain for costs, or award "*full costs*," courts, *yielding to adjudged cases*, will sustain the verdict, or award; yet they will go no further, and where the jury, or referees award a sum under forty shillings, *with costs*, it is held the plaintiff is entitled to no more costs than damages.[13]

The right of a plaintiff to costs is further restrained by the statute 22 & 23 *Car.* 2. *c.* 9.[14] by which, in actions of trespass, assault and battery, the certificate of the judge that a battery was sufficiently proved, or that the title of the land was chiefly in question, is rendered necessary to entitle a plaintiff to costs, where the damages are under forty shillings.

Notwithstanding the general word *trespass*, and the more general words *other personal actions*, are contained in the statute, the construction has been, that it only extends to actions of trespass *quare clausum fregit*, and actions of assault and battery. And the reason assigned is, that it was not the intention of the statute to prevent the recovery of full costs in any action, except such wherein it was possible for the judge, before whom the cause was tried, to certify that a battery was sufficiently proved; or that the freehold, or title of the land, was chiefly in question.[15]

Where the damages found upon a *writ of enquiry*, do not amount to forty shillings, the plaintiff is not prevented by this statute from recovering full costs; because it is confined expressly to the case of damages found by a jury, *at the trial of a cause:* In this particular it differs from the statute of 21 *Jac.* 1. *c.* 16.

Action for an assault and battery, and tearing plaintiff's cloths and wearing apparel, damages under 40*s.* plaintiff shall recover no more costs than damages. And *per Gould*, J. The first and best determination on this subject, is in 3 *Keb.*—but that has been open

13. 3 Binney's Rep. 321. So if the report should be for such damages, *with costs of suit*, it is conceived the plaintiff would be entitled to no more costs than damages: *Costs, and costs of suit* being convertible terms.

14. See the statute in the text.

15. Ray. 45, 195—Gilb. H. C. P. 212—2 Barnes 109—Stra. 577—Say. Costs 29.

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to a great deal of subtle reasoning, and distinction: Yet, I think that the construction which best answers the intention of the legislature, and puts a stop to all frivolous actions, by restraining more costs than damages from being allowed, in the cases specified. If, therefore, the declaration states the tearing of the clothes to be done at the same time with the beating, the court will construe it so as to accomplish the object of the statute, and will hold the tearing to be a part of the same act, and a consequence of the battery. It was well determined in Walker's case, 4 Co. 41.b *ad tunc et ibidem* united and coupled all together.[17]

In trespass for breaking plaintiff's close, and impounding his cattle, there shall be *full costs;* for the impounding his cattle is an injury to his personal property, in which no right of freehold can come in question.[18]

In an action for breaking the windows of plaintiff's house, upon the general issue pleaded, plaintiff obtained a verdict under 40*s*. The court were clearly of opinion, that this case came within the *statute of* 22 *&* 23 *Car.* 11. *c.* 9. and *Lawrence* J. added, that upon this record the defendant might have given *liberum tenementum* in evidence, and shewn that it was his own house, and consequently that the title might have come in question.[19]

This subject, relating to the recovery of *full* costs, or the not obtaining any *more costs than damages*, is very clearly explained by lord chief baron *Gilbert*, in delivering the opinion of the court of *exchequer*, in the case of *Reeves v Butler*, H. 12 Geo. 1. Where he compares and interprets the several statutes upon which cases of this kind depended; and vindicates the reasoning and resolutions of the judges upon 22, 23 Car. 2. c. 9. § ult. Amongst the modern resolutions which he mentions, he reports the case of *Blunt v Miller* (as he calls the defendant) in the very same words with *sir John Strange;* excepting a gross mis-print of "*decreed*" instead of "*denied*," and a year's antedate of the time.[20]

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† 24 HENRY VIII. CAP. VIII. A.D. 1532.

An act where defendants shall not recover any costs.

BECAUSE as well many recognizances, obligations, indentures, and other specialties, as also many contracts heretofore have been taken and made between divers persons, being of the king's most

17. M. 30 Geo. III.—1 H. Black. 291, S. P.—*Lockwood v Stannard*—Hil. 34 Geo. III.—5 Term. Rep. K. B. 482. See also 1 Term. Rep. K. B. 655.

18. 3 Mod. 31—see also Stra. 534—*Keen v Whisler*, Stra. 551—*Thompson v Berry*, Gil. Rep. 197.

19. *Adlem v Grinaway*, E. 35 Geo. 3, 6 Term. Rep. K. B. 281. So of an action for mesne profits, 6 Term. Rep. 593. See also 3 Burr. 1284.

20. *M.* 11 *Geo.* 1. *Gilb. Eq. cases* 195 to 200—3 Burr. 1284.

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honourable council, and others his subjects, and by and between other persons, to the use and behoof of our said sovereign lord the king, for great sums of money, then being to his grace due, and for his provisions, and other causes;(2) for which debts, actions by the laws of this realm, be to be commenced, sued and prosecuted to the king's use, by and in the name and names of the person or persons to whom the said recognizances, obligations and other specialties were made, or by those to whom the said contracts were made:(3) Be it therefore ordained and enacted by authority of this present parliament, That albeit that the plaintiff or plaintiffs be, or shall be non-suited in any whatsoever action, suit, bill, or plaint, commenced, or to be commenced, sued, or to be sued, to the use of our said sovereign lord the king, his heirs or successors, kings of *England*, or that it shall happen any verdict to pass against any such plaintiff or plaintiffs, in any action, suit, bill, or plaint, sued or to be sued, to the king's use; the defendant or defendants shall not recover any costs against any such plaintiff or plaintiffs; any act or statute made in this present parliament, or any other thing to the contrary being in any wise notwithstanding.

23 H. 8, c. 15. *See further in what cases costs are given*, 33 *H.* 8, *c.* 39, *sect.* 54—8 *El. c.* 2—18 *El. c.* 5—43 *El. c.* 6—4 *Jac.* 1, *c.* 3—7 *Jac.* 1, *c.* 5—21 *Jac.* 1, *c.* 16—16 *Car.* 1, *c.* 15—13 *Car.* 2, *st.* 2, *c.* 2—4 *&* 5 *W. & M. c.* 23—8 *W.* 3, *c.* 11—11 *&* 12 *W.* 3, *c.* 9—4 *Anne c.* 16, *and* 14 *Geo.* 2, *c.* 17.

There are certain cases, however, in which the restraint put upon the general right of the plaintiff to costs, by the 22 *&* 23 *Car. II. c.* 9, may be taken off, by a certificate upon the 8 *&* 9 *Will. III. c.* 11.[21]

According to the construction of the former statute, the judges could not certify in any action of trespass *quare clausum fregit*, unless the freehold, or title to the land were in question. A consequence of this construction was, that the plaintiff in an action of trespass *quare clausum fregit*, could not recover full costs, for any trespass, *however wilful or malicious soever it might be*, if the damages were under forty shillings, unless the defendant had insisted on a title to the land. The inconvenience being found very great, occasioned the provision contained in the § 4 of the statute of 8 *&* 9 *Will. III.* c. 11. Under that statute, the plaintiff is entitled to a certificate, wherever the trespass appears to have been wilfully and maliciously committed.[22] If it appears that where a

21. See the statute in the text.

22. 6 Mod. 153—*Dover v. Smith*—Say Dam. 60.

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trespass, however trifling, is committed, after notice, the judge is bound to certify under the statute 8 & 9 *Will. III. c.* 11, § 4.[23]

A certificate granted *after* the trial is void, not being warranted by the statute, the granting of a certificate being thereby confined to the time of trying a cause; it must be given *at the trial*, in open court.[24]

In the statute of *Gloucester*, no provision is made for the costs of a defendant in any case: an omission which could not arise from mistake; but probably from the circumstance, that such costs were at that time, and long after, too inconsiderable to attract the notice of the legislature. The fact is, that no provision was made for the costs of a defendant, from the time of making the statute of Gloucester until the 23d year of Henry VIII.[25] except in an action of replevin, and a suit upon a writ of error; in the former of which cases, the defendant is to be considered as an actor, and in the latter, the provision is virtually for the plaintiff in the original action; it being for the costs, he is subjected to the writ of error.[26]

The 23 *Henry VIII. c.* 15, particularises the actions wherein a defendant shall recover costs; but the statute 4 Jac. 1, c. 3,[27] reciting that 23 *Henry* 8, c. 15, had been found to be a very beneficial law, extends the provisions of that statute to every action wherein a plaintiff or demandant may recover costs.

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* 8 ELIZABETH, CAP. II. A.D. 1565.(H

An act for the avoiding of wrongful vexation touching the writ of Latitat.

WHERE divers persons, of their malicious minds, and without any just cause, do many times cause and procure others of the queen's majesty's loving subjects, to be very much molested and troubled by attachments and arrests made of their bodies, as well by process of *Latitat*, *Alias* and *Pluries capias*, sued out of the court commonly called the king's bench, as also by plaint, bill, or other suit, in the court commonly called the marshalsea, and within the city of *London*, and other cities, towns corporate, and places where any liberty or privilege is to hold pleas of debt, trespass,

23. *Reynolds v Edwards*, Mich. 35 Geo. III. 6 T. R. K. B. 11.

24. *Ford v Pae*, 2 Wils. 21.

25. A period of 243 years. See the statute in the text. It had been provided by the stat. of Marleberge, c. 6, that the defendant in a writ of right of ward should recover costs if the suit were malicious.

26. Say. Costs 70.

27. See the statute in the text.

H) "Only the 1st, 2d, 4th and 5th sections of this statute are in force." *Report of the Judges.*

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and other personal actions and suits;(2) And when the parties that be arrested or attached, are brought forth to answer to such actions and suits as should be objected against them, then many times there is no declaration or matter laid against the parties so arrested or attached, whereunto they may make any answer;(3) and so the party arrested is very maliciously put to great charges and expenses, without any just or reasonable cause: And yet, nevertheless, hitherto, by order of the law, the party so grieved and vexed could never have any costs or damages to him to be judged or awarded for the said unjust vexation and trouble:

II. For remedy whereof, Be it enacted and ordained by the authority of this present parliament, That when and as often as any person and persons, after the first day of *January* next coming, shall sue forth, or by any means cause or procure to be sued forth, of the said court commonly called the king's bench, any of the writs or process before mentioned, against any person or persons which, upon the same writ or writs, shall happen to be arrested, or which shall appear upon the return of any of the said writs or process,(2) and shall put in his or their bail or bails to answer such suit as shall be objected against him, according to the common order of the court;(3) that then, in every such case, if the party or parties at whose suit, means, or procurement, the same writ, writs or process was obtained or sued forth, do not within three days next after such bail had and taken, put into the same court, his or their declaration against the same party or parties against whom such writ or process hath been or shall be sued;(4) or if, after declaration had and put into the same court, the plaintiff in such case shall not prosecute the same with effect, but shall willingly and apparently to the same court, suffer his or their said suit to be delayed;(5) or shall, after declaration so had, suffer the same suit to be discontinued, or otherwise shall be non-suit in the same;(6) that then, in every such case, the judges of the said court for the time being, shall, by their discretions, from time to time, as they shall see or perceive any such default to be in the party or parties at whose suit, means, or procurement such writ or process was sued forth, award and judge to every such person and persons so arrested, vexed, molested, or troubled by such writs or suit, his and their costs, damages and charges by any means sustained by occasion of any such writs, process, arrests or suits,

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taken, sued or had against him, to be paid by such person or persons that so doth or shall cause or procure any such writs or process to be sued forth, as is aforesaid.

IV. And if any person or persons, at any time after the said first day of *January* shall, by any way or mean, maliciously, or for vexation and trouble, cause or procure any other person or persons to be arrested, or attached to answer in any the courts or places aforesaid, at the suit or in the name of any person or persons, where indeed there is no such person or persons known, or without the assent, consent, or agreement of such person or persons, at whose suit or in whose name such arrest or attachment is or shall be so had and procured, that then every such person and persons, that shall so cause or procure any such arrest or attachment of any other person or persons to be had or made for vexation or trouble, as is aforesaid, and shall thereof be convicted or lawfully accused by indictment, presentment, or by the testimony of two sufficient witnesses or more, or other due proof, shall, for every such offence by him or them committed, done or procured, have and suffer imprisonment of his or their body or bodies by the space of six months, without bail or mainprise:(2) And before he or they shall be delivered out of prison, shall pay unto the party or parties so arrested or attached by his or their means or procurement, treble the costs, charges, damages, and expenses that he or they shall be put unto by reason or occasion of such arrest or attachment so had;(3) and shall also forfeit and pay unto such person or persons, in whose name or at whose suit he or they shall so procure such arrest or attachment to be had or made, if then there shall be any such person known, the sum of ten pounds for every such offence.

V. And be it further enacted by the authority aforesaid, That every person and persons, to whom any costs, charges, damages, forfeiture or payment of any sum or sums of money, by authority of this act, shall be awarded, judged or forfeited, shall and may at all times hereafter have his or their remedy for the recovery thereof, by action of debt, bill, or plaint, in any court of record, against such person or persons, their heirs, executors or administrators, as should or ought to pay the same by virtue or force of this act; in which action, bill, or plaint, no essoin, protection, or

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wager of law shall be admitted or allowed to any the defendant or defendants in the same.

23 H. 8, c. 15. The defendant shall recover costs and damages where the plaintiff doth delay or discontinue his suit, or is non-suit, &c. 1 Roll. 371—*Cro. El.* 236. Costs, damages and charges shall be awarded where the plaintiff doth delay his suit, doth discontinue, or is non-suit in the king's bench, 23 H. 8, c. 15—4 Jac. 1, c. 3—Cro. El. 69—Cro. Jac. 111. The penalty for arresting of any person at the suit of another, not knowing thereof, Cro. Jac. 188—Lutw. 166. *See further in what cases costs are given.* 18 *El. c.* 5—43 *El. c.* 6—4 *Jac.* 1, *c.* 3—7 *Jac.* 1, *c.* 5—21 *Jac.* 1, *c.* 16—16 *Car.* 1, *c.* 15—13 *Car.* 2, *st.* 2, *c.* 2—23 *Car.* 2, *c.* 9, § 136—4 *& 5 Will. & M. c.* 23—8 *Will.* 3, *c.* 11—11 *& 12 Will.* 3, *c.* 9—4 *Anne c.* 16, *and* 14 *Geo.* 2, *c.* 17.

The statute of 8 & 9 Will. III. (in the text) entitles a defendant to costs, in case there be judgment for him upon a *demurrer*. And the 4 *Anne* c. 16,[28] § 25, for the sake of preventing of vexation, from suing out defective writs of error, gives costs to the defendant in error, upon quashing the writ.

The statutes very equitably give to a defendant who prevails, the same costs as the plaintiff would have had, in case he had recovered.

The true construction of the statute of 8 *&* 9 *Will. III. c.* 11, is, that the right to recover costs must be reciprocal: that a defendant succeeding is only entitled to costs in cases wherein the plaintiff would have been entitled to costs, in case of a recovery.[29]

The 8 *Eliz. c.* 2, (in the text) entitles a defendant to costs in case the plaintiff does not declare in due time, or should discontinue, or become non-suit.

Four persons having been arrested, by virtue of a writ of *Latitat*, three of them put in bail; and for want of a declaration in time, each of them signed judgment of *non-pros.* Upon a motion to set aside the judgments for irregularity, the court had at first some doubt whether they ought not to have all *joined in signing one judgment;* but the judgments were afterwards holden to be regular; because the 8 *Eliz. c.* 2, gives costs to every person who has been so unjustly vexed.[30]

A plaintiff may be *non-prossed*, at any stage of the suit, for non-compliance with the rules and orders of the court,—as for not declaring in the limited time,—not replying to the defendant's plea,—not surrejoining to his rejoinder,—not entering the issue when served with a rule within the time, for that purpose allowed, &c.[31]

28. See the statute in the text, p. 43. The § 25, which is reported not to be in force in Pennsylvania, is contained in the words following—"And for the preventing great vexation, from suing out defective writs of error; be it enacted by the authority aforesaid, That upon the quashing any writ of error, to be sued out after the said first day of *Trinity* term, for variance from the original record or other defect, the defendants, in such error, shall recover against the plaintiff or plaintiffs issuing out such writ, his costs, as he should have had if the judgment had been affirmed; and to be recovered in the same manner."

29. *Thomas v Lloyd*, 1 Salk. 194—Ld. Ray. 136, 992—Comb. 482—12 Mod. 195—6 Vin. Abr. 339, pl. 5—see also *Thrale et al. v The Bishop of London et al.* Mich. 31 Geo. III. 1 H. Black. 530—where the *anonymous case* determined in 11 Anne, Rep. Ca. Pract. C. B. is denied.

30. Vin. Tit. Costs, 341, pl. 14—Say. Costs 81.

31. Crom. K. B. & C. P. 250.

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A *non-pros* is in the nature of a final judgment, and is signed in the same manner.

By an act of assembly of Pennsylvania, entitled, "*An act to prevent inconveniencies arising from delays of causes, after issue joined,*" it is declared, "That where any issue shall be joined, in any action, in any court, and plaintiff shall neglect to bring such issue on, to be tried, according to the course and practice of the said courts, respectively, the judges of the said courts, respectively, at any time after such neglect, upon motion made in open court, due notice having been given thereof, in open court, the preceding term, to give the like judgment for the defendant, in every such action, as in cases of non-suit, unless the said judges shall, upon just cause, and reasonable terms, allow any further time for the trial of such issue: and if the plaintiff shall neglect to try such issue, within the time so allowed, then the judges shall proceed to give such judgment as aforesaid; which shall be of like force and effect as judgments upon non-suit, and of no other force or effect; and costs shall be awarded to the defendant, in any action or suit where he would, upon non-suit, be entitled to the same, and in no other action or suit whatsoever.[32]

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* 4 JAMES I. CAP. III. A.D. 1606.

An act to give costs to the defendant upon a non-suit of the plaintiff, or verdict against him.

WHEREAS, in the three and twentieth year of the reign of king *Henry* the eighth, of famous memory, a good and profitable law was made, whereby it was enacted, that in cases where the plaintiff in any action, bill, or plaint, of debt, trespass upon the case, detinue, account, and in some other actions therein especially mentioned, should become non-suit, or a verdict should be had against the said plaintiff; that then in such cases the defendant should have judgment to recover his costs against every such plaintiff, as by the said law appeareth: Which law hath been found to be very good and beneficial for the commonwealth, and thereby many hath been discouraged from bringing frivolous and unjust suits, because such parties are to make recompence to the parties unjustly vexed, for the said unjust vexations.

II. And forasmuch as actions of trespass, and actions of *ejectiones firmæ*, and many other actions, real and personal, are within

32. 1 St. Laws, Sm. Ed. 274.

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the said mischief, as the said other actions were at the common law, and yet were omitted out of the provision of the said law:(2) For remedy whereof, Be it enacted by the king's most excellent majesty, the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, That if any person or persons, at any time after the end of this present session of parliament, shall commence or sue in any court of record, or in any other court, any action, bill, or plaint of trespass, *ejectione firmæ*, or any other action whatsoever, wherein the plaintiff or demandant might have costs (if in case judgment should be given for him) and the plaintiff or plaintiffs, demandant or demandants, in any such action, bill, or plaint, after appearance of the defendant or defendants, be non-suited, or that any verdict happen to pass, by any lawful trial, against the plaintiff or plaintiffs, demandant or demandants, in any such action, bill, or plaint, that then the defendant and defendants, in every such action, bill, or plaint, shall have judgment to recover his costs against every such plaintiff and plaintiffs, demandant and demandants,(3) to be assessed, taxed and levied in manner and form as costs in the said recited actions are to be assessed, taxed and levied in and by the said law of the three and twentieth year of king *Henry* the eighth. Coke Ent. 29.

Cases wherein, by the statute made 23 H. 8, c. 15, the defendant shall recover his costs, Hetley 146—1 Bulstr. 189—2 Bulst. 261—3 Bulst. 248. Several cases wherein the defendant shall recover his costs against the plaintiff, 8 Eliz. c. 2—2 Roll. 75, 87, 213—Hob. 219—Hut. 16, 22—March 24—Cro. Jac. 229—*Cro. Car.* 29—23 *H.* 8, *c.* 15. *In what cases costs are given, see further,* 7 *Jac.* 1, *c.* 5—21 *Jac.* 1, *c.* 16—16 *Car.* 1, *c.* 15—13 *Car.* 2, *st.* 2, *c.* 2—23 *Car.* 2, *c.* 9, § 136—4 *& 5 Will. & Mary c.* 23—8 *Will.* 3, *c.* 11—11 *& 12 W.* 3, *c.* 9—4 *Anne c.* 16, *and* 14 *Geo.* 2, *c.* 17.

The title of this act is precisely the same with that of 14 *Geo. II. c.* 17, from which indeed the act appears to have been chiefly copied.[1] The only material difference between the english statute, and ours, seems to be in respect to the *notice*, to be given to a plaintiff. The statute provides that *due notice* of such intended motion shall be given to the plaintiff; whereas the act of assembly requires that due notice should have been given in open court the *preceding term;* hence, a difference of practice has necessarily arisen in this particular. The english practice is to serve the plaintiff with notice, that, at a particular time, a motion for a *non-suit* will be made, and upon proof of the service of such notice, and affidavit of the state of the proceedings, a *rule nisi* for judg-

1. See 6 Ruff. Stat. 417—1 Crom. Pr. 51. The statute of 14 Geo. II. was enacted in the year 1741—and our act was passed 21 Feby. 1767—1 St. Laws, Sm. Ed 271.

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* 13 CHARLES II. STAT. II. CAP. II. A.D. 1661.

An act for prevention of vexations and oppressions by arrests, and of delays in suits of law.

WHEREAS, by the ancient and fundamental laws of this realm, in case where any person is sued, impleaded, or arrested, by any writ, bill, or process issuing out of any of his majesty's courts of record at *Westminster*, in any common plea, at the suit of any common person, the true cause of action ought to be set forth and particularly expressed in such writ, bill, or process, whereby the defendant may have certain knowledge of the cause of the suit, and the officer who shall execute such writ, bill, or process, may know how to take security for the appearance of the defendant to the same, and the sureties for such appearances may rightly understand for what cause they become engaged;(2) and whereas there is a great complaint of the people of this realm, that for divers years now last past, very many of his majesty's good subjects have been arrested upon general writs of trespass, *quare clausum fregit*, bills of *Middlesex*, *Latitats*, and other like writs issued out of the courts of the king's bench and common pleas, not expressing any particular or certain cause of action, and thereupon kept prisoners for a long time for want of bail, bonds with sureties for

ment, unless cause is shewn, may be made out for the next day; which will be made absolute of course, if no sufficient cause be shewn to the contrary.[2] But with us, a term's notice being required, the course is to obtain, *on motion*, a rule for trial at the next term, or *non-pross*, which will be made absolute, unless sufficient cause to the contrary be then shewn.

In other respects, the construction which the english statute hath received, is not dissimilar to that which has been applied to our act of assembly: Neither does there appear to be much difference in the practice which has obtained under the one and the other.

In general a slight cause is deemed sufficient to induce the court to enlarge the rule, even in a *qui tam* action, if the plaintiff will undertake *peremptorily* to try at the next sittings or assises.[3] It is usual to put off the trial only to the next term: But where there is no probability of the defendant's being ready to try till a more distant time, he may apply to put off the trial till that time.[4]

Judgment, as in case of *non-suit*, cannot otherwise be obtained, than upon motion made in open court.[5]

2. 1 Crom. Pr. 252—2 Tidd's Pr. 705.
3. 7 Term. 178—1 East. 554.
4. 2 Tidd's Pr. 706.
5. 2 Tidd's Pr. 701-2—*M'Kegg Crawford*, 1 Dal. 347.

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appearances having been demanded in so great sums, that few or none have dared to be security for the appearances of such persons so arrested and imprisoned, although in truth there hath been little or no cause of action;(3) and oftentimes there are no such persons who are named plaintiffs, but those arrests have been many times procured by malicious persons, to vex and oppress the defendants, or to force from them unreasonable and unjust compositions for obtaining their liberty; and by such evil practices many men have been, and are daily undone, and destroyed in their estates, without possibility of having reparation, the actors employed in such practices having been (for the most part) poor and lurking persons, and their acting so secret, that it hath been found very difficult to make true discoveries or proof thereof:

II. For remedy and prevention of which so great growing evils and mischiefs, and also for discouraging all frivolous and unjust suits, and causeless arrests for the future;(2) Be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That from and after the twelfth day of *February*, in the year of our Lord one thousand six hundred sixty and one, no person or per-

The "*course* and *practice*" of the court referred to in the statute is that which before regulated the trial by *proviso;* and as the defendant could not have had such trial, until the plaintiff had been guilty of laches, nor until after the issue was entered on record, so neither till then is he entitled to judgment as in a case of a non-suit.[6]

A rule to try, or *non-pross*, is in force from the time it is taken, until the cause is concluded, notwithstanding it may have been once tried during the existence of the rule, or continued at the instance of the defendant.[7]

By an act of the 30th March, 1812,[8] entitled, "*An act for the facilitating the due administration of justice*," "That when a cause at issue shall be regularly set down for trial in any court of record within this commonwealth, either by the plaintiff or the defendant, and the plaintiff is not ready for trial, when the cause is called up in its order, the court, on motion of the defendant, may order a non-suit to be entered, without previously granting a rule to try or non-pross, unless the plaintiff shall adduce such rea-

6. 2 Tidd's Pr. 703-4. The time within which issues ought to be tried, depend on the rules of courts.

7. 1 Dallas 410—3 Binney's Rep. 413, *Thurston v Murray.*

8. 5 St. Laws, Sm. Ed. 361.

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sons, who shall happen to be arrested by any sheriff, under-sheriff, coroner, steward, or bailiff of any franchise or liberty, or by any other officer, minister, under-bailiff, or other person or persons whatsoever, within this realm, having or pretending to have authority or warrant in that behalf, by force or colour of any writ, bill, or process issuing, or to be issuing, out of his majesty's said courts of the king's bench and common pleas, or either of them, in which said writ, bill, or process, the certainty and true cause of action is not expressed particularly, and for which the defendant or defendants in such writ, bill, or process named, is or are bailable by the statute in that behalf made in the three and twentieth year of the reign of the late king *Henry* the sixth, shall be forced or compelled to give security, or to enter into bond with sureties, for the appearances of such person or persons so arrested, at the day and place in the said writ, bill or process specified or contained, in any penalty or sum or sums of money, exceeding the sum of forty pounds of lawful money of *England*, to be conditioned for such appearances;(3) and that all sheriffs and other officers and ministers aforesaid, shall let to bail and deliver out of prison, and from their and every of their custodies respectively, all and every person and persons whatsoever, by them or any of them ar-

sons for postponing the said cause as would have been a sufficient ground for postponement if the application therefor had been made on behalf of the defendant."

The ordering a *non-suit* is authorised only in causes at issue *regularly* set down for trial. To ascertain the regularity, some criterion must necessarily be resorted to; and the rules of courts seem to be the only one which the legislature could have had in view. The "course of practice" of the courts is expressly referred to in the act of 1767—and indeed in the act in question, we find the motion for a non-suit is authorised only "*when the cause is called up in its order*," evidently referring to the list of causes set down for trial, under the rules of the court, and to authorise a defendant to insert a cause on such list, he must have a rule for trial by proviso. The chief advantage given by this act, seems to be that of preventing a plaintiff who had regularly set down his cause for trial, from continuing it without sufficient cause shewn, although he had been guilty of no previous laches, which would have authorised a proviso rule, or a rule for trial or non-pross.

The statute of 23 Henry 8, c. 15, (in the text) is scarcely, if at all, known, in practice in Pennsylvania. However, as it is in force, and recommended to be incorporated, it will be proper to offer some remarks upon it.

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tested upon any such writ, bill, or process, wherein the certainty and true cause of action is not particularly expressed, upon security in the sum of forty pounds and no more, given for appearance of such person or persons so arrested, unto the said sheriff or officer aforesaid, according to the said statute in the said three and twentieth year of the reign of the said late king *Henry* the sixth, in that behalf made and provided.

III. And be it further enacted by the authority aforesaid, That upon appearance to be entered in the term wherein such writ, bill, or process is returnable, with the respective officer in that behalf, for the said person or persons, by attorney or attornies, in the said respective courts from whence the said writ, bill, or process issued, unto such writ, bill, or process, the bond or bonds so given for appearance thereto, be and are hereby satisfied and discharged; (2) and that after such appearance so entered, no amerciaments be set or estreated upon or against any sheriff or other officer aforesaid, or any other person whatsoever, concerning the want of such appearance; (3) and unless the plaintiff or plaintiffs in any such writ, bill, or process named, shall put into the court from whence such writ, bill, or process did issue, his or their bill or declaration against the person or persons so arrested, in some per-

This act, commonly known by the name of the *pauper act*, was calculated to protect the lower classes of the subjects, for which it is said this king deserves the honorable title of "*The poor man's king*." Rendering the lower classes of the people more independent, and free from the oppression of the rich and powerful, by a natural consequence produced a greater degree of freedom and independence in the house of commons; and it appears that, in the last year of this king's reign, *sir Thomas Moore* opposed, with success, a subsidy in the lower house of parliament, which, perhaps, is the first instance of opposition made, by a member of that house, to a measure of the crown.[9]

It has been doubted whether the unrestrained indulgence, to sue in *forma pauperis*, be not dangerous. "To enable one to commence a litigation without expense, is tempting the resentments of man, with too easy a gratification; and the defendant in such a suit is left in an unequal contest."[10] It was, unquestionably, intended to induce caution and circumspection, in the exercise of

9. Obs. on the Statutes 342. The king in the latter part of his life, however, had employed less honorable means of reducing his powerful subjects, by transferring their wealth into his own coffers. His great panegyrist, *lord Bacon*, admits that he was too much inclined "*to the left hand*, in order to reap forfeitures."

10. 4 Reeve's Eng. law 142.

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sonal action, or *ejectione firmæ* of lands or tenements, before the end of the term next following after appearsnce, that then a non-suit, for want of a declaration, may be entered against the said plaintiff or plaintiffs, in the said courts respectively;(4) and that every defendant in every such writ, bill, or process named, shall or may have judgment to recover costs against every such plaintiff or plaintiffs, to be assessed, taxed and levied in such manner, and according as it is provided by the statute for costs, made in the three and twentieth year of the reign of the late king *Henry* the eighth; any former or other act, statute, ordinance, law, custom, order, course or usage of either of the said courts, to the contrary thereof heretofore had, made, admitted, or used in any wise notwithstanding.

IV. Provided always, That this act, nor any clause or thing herein before specified or contained, shall not extend, nor be construed or taken to extend, unto any arrests hereafter to be made upon or by virtue of any writ of *capias utlagatum*, attachment upon rescous, or attachment upon any contempt, or of any attachment of privilege at the suit of any privileged person, or of any other attachment for contempt whatsoever, issuing or to be issuing out of either of the said courts, although there be no particular certainty of the cause

this right, by the provision in the 23 *Henry VIII.* c. 15, That a pauper failing in his suit shall be punished, at the discretion of the judges. Hence it is said, in some of the books, that the unsuccessful pauper shall have his election to pay the costs, or be whipped; and judge *Blackstone* says such punishment was formerly inflicted.[11] It does not appear, however, that a pauper was ever so punished. On a motion to whip a pauper, who had been non-suited, *Holt*, Ch. J. observed—"There is no officer for that purpose, nor did I ever know it done."[12]

The defendant in a civil action, is never allowed to *defend* it, as a pauper.[13]

In order to be admitted to sue in *forma pauperis*, according to the modern practice, it is necessary that the plaintiff should swear, that he is not worth five pounds, after all his debts are paid, except his wearing apparel and the subject matter of the suit.[14]

Such admission formerly could not take place out of court; but now, upon *petition* to the chief justice, accompanied with the proper *affidavit*, and supported by counsel's opinion, of his cause

11. 3 Black. Com. 400—see 1 Sid. 261—7 Mod. 114—1 Bac. Abr. 522.
12. 2 Salk. 506 pl. 1.
13. 1 Tidd's Pr. 67—Hul. Costs 220.
14. Obs. on the Statutes 349—1 Tidd's Pr. 67. But see Lilly Prac. Reg. where the sum is said to be 10*l*.

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of action expressed or contained in the said writs;(2) but that nevertheless, no sheriff or under-sheriff, nor any of the officers and ministers aforesaid, shall discharge any person or persons taken upon any writ of *capias utlagatum* out of custody, without a lawful *supersedeas* first had and received for the same:(3) And that upon the said writs of attachments, such lawful course be taken for security for appearance therein, as hath been heretofore used: any thing herein before expressed to the contrary thereof in any wise notwithstanding.

VIII. And whereas, by an act of parliament, made in the third year of the reign of our late sovereign lord king *James* of blessed memory, a very good law was made for avoiding unnecessary delays of execution, whereby it is enacted, That no execution shall be stayed or delayed upon or by any writ of error, or *supersedeas* thereupon to be sued, for the reversing of any judgment to be given in any action or bill of debt, upon any single bond for debt, or upon any obligation with condition for payment of money only, or upon any action or bill of debt for rent, or upon any contract sued in any of his highness courts of record at *Westminster*, or in the counties palatine of *Chester*, *Lancaster*, or *Durham*, or in his highness courts of great sessions in any of the twelve shires of *Wales*, unless such person or persons, in whose name or names such writ of error shall be brought, with two sufficient sureties,

of action, he may be admitted out of court. An admission to sue in *forma pauperis* may take place at the commencement of the suit, or at any time whilst it is pending; and in either case he shall pay no costs from the beginning.[15]

Upon being so admitted, an attorney and counsel shall be assigned him, pursuant to the statute; and he shall be permitted to carry on the proceedings *gratis*, without paying fees to the officers of the court, unless in the event of his recovering more than five pounds; but in such case they shall be paid their court-fees and for passing the record, &c.[16]

By the statute 5 *Will. & Mary* c. 21, § 14, paupers are permitted to carry on the proceedings without using any stamps.

Neither a verdict against him, nor a non-suit, will subject him to the payment of costs to the defendant.[17]

If a plaintiff, suing in *forma pauperis*, should give notice of trial and not proceed pursuant to it, or should be guilty of other im-

15. *Oats v Holiday*, Trin. 22 Geo. II. B. R.—Say. Costs 90—Tidd's Pr. 67—3 Wils. 24.

16. 1 Tidd's Pr. 67.

17. 1 Tidd's Pr. 67.

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such as the court wherein such judgment is or shall be given, shall allow of, shall first, before such stay made, or *supersedeas* to be awarded, be bound to the party for whom any such judgment was or should be given, by recognizance to be acknowledged in the same court, in double the sum adjudged to be recovered by the said former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay (if the said judgment shall be affirmed) all and singular the debts, damages and costs adjudged or to be adjudged upon the former judgment, and all costs and damages to be also awarded for the same delaying of execution; which law hath been found by experience to be very good and beneficial to the commonwealth:(2) And forasmuch as divers other cases within the same mischiefs, by delays and staying of execution by writs of error, and *supersedeas* thereupon are not provided for by the said statute: For further remedy against delays and staying of executions in the several actions hereafter specified:

IX. Be it further enacted and ordained by the authority aforesaid, That from and after the twentieth day of *January*, in the year of our Lord one thousand six hundred sixty and one, no execution shall be stayed in any of the courts aforesaid, by any writ or writs of error, or *supersedeas* thereupon, after any verdict and judgment thereupon obtained, in any action of debt grounded upon the statute made in the second year of the reign of the late king *Edward* the sixth, for not setting forth of tithes, nor in any action upon the case upon any promise for payment of money, ac-

proper conduct, the court will order him to be dispaupered, but until this be done they will not make any rule about costs.[18]

The proceedings in a second action brought by a pauper, will not be stayed until the costs of a non-suit in a prior one for the same cause be paid, unless the pauper's conduct should appear to have been vexatious; nor, if he should succeed in the second action, will the court deduct the costs of the first out of those recovered in the second.[19] But a person liable to the costs of a non-suit, will not be permitted to prosecute a second suit, for the same cause, in *forma pauperis*, till the costs in the first suit are paid.

18. 1 Lilly Pr. Reg. 851—2 Salk. 506—1 Stra. 420—2 Stra. 878, 982, 1122—3 Wils. 24—1 Bos. & Pul. 40—but see Cas. Pr. C. B. 47—Prac. Reg. 405—1 Stra. 440, where it is said that in order to prevent a pauper from being vexatious, the court will not suffer him to try his cause until he has paid costs for not having proceeded to trial.

19. 2 Stra. 878, 883, 891—3 Wils. 24—*Hutton v Colboys*, E. 35 G. o. 3—but see 2 T. R. 511—Tidd's Pr. 69.

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tions *sur trover*, actions of covenant, detinue and trespass, unless such recognizance, and in such manner, as by the said recited former act is directed, shall be first acknowledged in the said court where such judgment is given.

X. And be it also enacted by the authority aforesaid, That if any person or persons, after the said day, shall sue or prosecute any writ or writs of error, for reversal of any judgment whatsoever, given after any verdict in any of the courts aforesaid, and the said judgment shall afterwards be affirmed, then every such person or persons shall pay unto the defendant or defendants in the said writ or writs of error, his or their double costs, to be assessed by the court where such writ of error shall be depending, for the delaying of execution.

XI. Provided nevertheless, That this act, nor any thing therein contained, shall not extend to any action popular, nor unto any other action which is or hereafter shall be brought upon any penal law or statute, (except debt for not setting out tithes as aforesaid) nor to any indictment, presentment, inquisition, information or appeal; any thing herein before expressed to the contrary thereof notwithstanding.

In what actions executions may be stayed (by writ of error) by this statute—2 & 3 Ed. 6, c. 13—1 Lev. 260.

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22 & 23 CHARLES II. CAP. IX. (STAT. 2, CAP. 5.) A.D. 1670.

An act for laying impositions on proceedings at law.

(149.) CXXXVI. AND for prevention of trivial and vexatious suits in law, whereby many good subjects of this realm have been and are daily undone, contrary to intention of an act made in the

Though a pauper is not liable to pay costs, he is entitled to recover them from his adversary; for although he is at no costs, or but small costs, still the counsel and clerks do not give their services to the defendant, but to the *pauper*.[21]

Yet where a *pauper* had a decree in chancery to recover costs, the court declared it to be unreasonable, that any one should have more costs than he was out of pocket; and therefore ordered, the plaintiff and his solicitor to make oath before the master, and what they swore they had paid, or were to pay, was to be allowed them, but no more.[22]

21. 1 Bos. & Pul. 39—Eg. Abr. 125—1 Bac. Abr. 522.

22. Proceed. Chan. 219.

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three and fortieth year of queen *Elizabeth*, for avoiding of infinite numbers of small and trifling suits, commenced in the courts of *Westminster*;(2) Be it further enacted, for making the said law effectual, That from and after the first of *May* aforesaid, in all actions of trespass, assault and battery, and other personal actions, wherein the judge, at the trial of the cause, shall not find and certify under his hand upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration, was chiefly in question, the plaintiff in such action, in case the jury shall find the damages to be under the value of forty shillings, shall not recover or obtain more costs of suit than the damages so found shall amount unto:(3) And if any more costs in any such action shall be awarded, the judgment shall be void, and the defendant is hereby acquitted of and from the same, and may have his action against the plaintiff for such vexatious suit, and recover his damages and costs of such his suit, in any of the said courts of record.

43 Eliz. c. 6—Mod. cases in law 371—1 Salk. 193, 206, 208—Ray. 487, 488—3 Mod. 39—2 Vent. 36, 48.

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8 & 9 WILLIAM III. CAP. XI. A.D. 1697.

An act for the better preventing frivolous and vexatious suits.

For relief of his majesty's good subjects against causeless and unjust suits, and for the better enabling them to recover their just rights: Be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That from and after the five and twentieth day of *March*, which shall be in the year of our Lord one thousand six hundred ninety and seven, where several persons shall be made defendants to any action or plaint of trespass, assault, false imprisonment, or *ejectione firmæ*, and any one or more of them shall be, upon the trial thereof, acquitted by verdict, every person or persons so acquitted, shall have any recover his costs of suit, in like manner as if a verdict had been given against the plaintiff or plaintiffs, and acquitted all the defendants; unless the judge, be-

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fore whom such cause shall be tried, shall immediately after the trial thereof, in open court, certify upon the record under his hand, that there was a reasonable cause for the making such person or persons a defendant or defendants to such action or plaint.

II. And forasmuch as for want of a sufficient provision by law for the payment of costs of suit, divers evil disposed persons are encouraged to bring frivolous and vexatious actions, and others to neglect the due payment of their debts: Be it further enacted by the authority aforesaid, That if at any time from and after the said five and twentieth day of *March*, any person or persons shall commence or prosecute in any court of record, any action, plaint, or suit, wherein, upon any demurrer, either by plaintiff or defendant, demandant or tenant, judgment shall be given by the court against such plaintiff or demandant, or if at any time after judgment given for the defendant in any such action, plaint, or suit, the plaintiff or demandant shall sue any writ or writs of error, to adnul the said judgment, and the said judgment shall afterwards be affirmed to be good, or the said writ of error shall be discontinued, or the plaintiff shall be non-suit therein, the defendant or tenant, in every such action, plaint, suit, or writ of error, shall have judgment to recover his costs, against every such plaintiff or plaintiffs, demandant or demandants, and have execution for the same, by *capias ad satisfaciendum*, *fieri facias*, or *elegit*.

III. And be it further enacted by the authority aforesaid, That from and after the said five and twentieth day of *March*, in all actions of waste, and actions of debt upon the statute of not setting forth of tithes, wherein the single value or damage found by the jury shall not exceed the sum of twenty nobles, and in all suits upon any writ or writs of *scire facias*, and suits upon prohibitions, the plaintiff obtaining judgment, or any award of execution after plea pleaded, or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become non-suit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same in like manner as aforesaid.

IV. And for the preventing of wilful and malicious trespasses, be it further enacted, That in all actions of trespass, to be commenced or prosecuted, from and after the said five and twentieth day of *March*, one thousand six hundred ninety and seven,

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in any of his majesty's courts of record at *Westminster*, wherein at the trial of the cause, it shall appear, and be certified by the judge, under his hand, upon the back of the record, that the trespass upon which any defendant shall be found guilty, was wilful and malicious, the plaintiff shall recover not only his damages, but his full costs of suit; any former law to the contrary notwithstanding.

V. Provided always, That nothing herein contained shall be construed to alter the laws in being as to executors or administrators, in such cases where they are not at present liable to the payment of costs of suit.

VI. And be it further enacted, That in all actions to be commenced in any court of record, from and after the said five and twentieth day of *March*, one thousand six hundred ninety and seven, if any plaintiff happen to die after an interlocutory judgment, and before a final judgment obtained therein, the said action shall not abate by reason thereof, if such action might be originally prosecuted or maintained by the executors or administrators of such plaintiff; and if the defendant die after such interlocutory judgment, and before final judgment therein obtained, the said action shall not abate, if such action might be originally prosecuted or maintained against the executors or administrators of such defendant; and the plaintiff, or if he be dead after such interlocutory judgment, his executors or administrators, shall and may have a *scire facias* against the defendant, if living after such interlocutory judgment, or if he died after, then against his executors or administrators, to shew cause why damages in such action should not be assessed and recovered by him or them; and if such defendant, his executors or administrators, shall appear at the return of such writ, and not shew or alledge any matter sufficient to arrest the final judgment, or being returned, warned, or upon two writs of *scire facias*, it be returned that the defendant, his executors or administrators, had nothing whereby to be summoned, or could not be found in the county, shall make default, that thereupon a writ of inquiry of damages shall be awarded, which being executed and returned, judgment final shall be given for the said plaintiff, his executors or administrators, prosecuting such writ or writs of *scire facias*, against such defendant, his executors or administrators respectively.

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VII. And be it further enacted by the authority aforesaid, That if there be two or more plaintiffs or defendants, and one or more of them should die, if the cause of such action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs, against the surviving defendant or defendants.

VIII. And be it further enacted, That in all actions which, from and after the said five and twentieth day of *March*, one thousand six hundred ninety and seven, shall be commenced or prosecuted in any of his majesty's courts of record, upon any bond or bonds, or upon any penal sum, for non-performance of any covenants or agreements in any indenture, deed, or writing contained, the plaintiff or plaintiffs may assign as many breaches as he or they shall think fit, and the jury, upon trial of such action or actions, shall and may assess, not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages of such of the said breaches so to be assigned, as the plaintiff, upon the trial of the issues, shall prove to have been broken, and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions; and if judgment shall be given for the plaintiff on a demurrer, or by confession, or *nihil dicit*, the plaintiff upon the roll, may suggest as many breaches of the covenants or agreements as he shall think fit, upon which shall issue a writ to the sheriff of that county where the action shall be brought, to summon a jury to appear before the justice or justices of assise, or *nisi prius*, of that county, to enquire of the truth of every one of those breaches, and to assess the damages that the plaintiff shall have sustained thereby; in which writ it shall be commanded to the said justices or justice of assise, or *nisi prius*, that he or they shall make return thereof to the court from whence the same shall issue, at the time in such writ mentioned; and in case the defendant or defendants, after such judgment entered, and before any execution executed, shall pay unto the court where the action shall be brought, to the use of the plaintiff or plaintiffs, or his or their executors or administrators, such damages so to be assessed by reason of all or any of the breaches of such covenants,

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together with the costs of suit, a stay of execution of the said judgment shall be entered upon record; or if by reason of an execution executed, the plaintiff or plaintiffs, or his or their executors or administrators, shall be fully paid or satisfied, all such damages so to be assessed, together with his or their costs of suit, and all reasonable charges and expenses for executing the said execution, the body, lands, or goods of the defendant, shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record; but notwithstanding in each case judgment shall remain, continue, and be, as a further security to answer to the plaintiff or plaintiffs, and his or their executors and administrators, such damages as shall or may be sustained for further breach of any covenant or covenants in the same indenture, deed, or writing contained, upon which the plaintiff or plaintiffs may have a *scire facias* upon the said judgment against the defendant, or against his heir, terre-tenants, or his executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively, to shew cause why execution shall not be had or awarded upon the said judgment, upon which there shall be the like proceeding as was in the action of debt upon the said bond or obligation, for assessing of damages upon trial of issues joined upon such breaches, or inquiry thereof upon a writ to be awarded in manner as aforesaid; and that upon payment or satisfaction in manner as aforesaid, of such future damages, costs and charges, as aforesaid, all further proceedings on the said judgment are again to be stayed, and so *toties quoties*, and the defendant, his body, lands, or goods, shall be discharged out of execution, as aforesaid.

Defendant on judgment given for him, &c. to recover costs—1 Salk. 194—1 *Ld. Raym.* 383. Plaintiff, &c. may have a scire facias against the defendant—Mod. cases in law 115, 366. On execution a final judgment to be given—1 Salk. 352. *In what cases costs are given, see further* 11 *&* 12 *Will.* 3, *c.* 9—4 *Anne c.* 16, *&* 14 *Geo.* 3, *c.* 17.

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DISSEISIN AND WRITS OF ENTRY AND ASSISE.

STATUTE OF MERTON.

* 20 HENRY III. CAP. III. A.D. 1235.

Enquiry and punishment of redisseisen.

ALSO if any be disseised of their freehold, and before the justices in eyre have recovered seisin by assise of *novel disseisin*, or by confession of them which did the disseisin, and the desseisee hath seisin delivered by the sheriff, if the same disseisors, after the circuit of the justices, or in the mean time, have disseised the same plaintiff of the same freehold, and thereof be convict, they shall be forthwith taken and committed, and kept in the king's prison, until the king hath discharged them by fine, or by some other mean.(2) And this is the form how such convict persons, shall be punished;* when the plaintiffs come into the court of our lord the king, they shall have the king's writ directed to the sheriff, in which must be contained the plaint of disseisin, framed upon the disseisin.(3) And then it shall be commanded to the sheriff, that

* Add "*that is to say,*" when, &c.

A *disseisin* is where a man enters into any lands or tenements, where his entry is not congeable, and *ousts* him who hath the freehold.[1] It differs from an *abatement*, which is the entrance of a stranger, into lands of which the ancestor died seised, before the heir has entered;[2] so that, in the latter case, there is not an actual *ouster* committed of the *person* who was seised of the freehold, as there is in the case of a *disseisin*; but the entry of the person who had the freehold is merely *prevented*. In like manner a disseisin differs from an *intrusion*, which is where the ancestor dies seised of any estate of inheritance, expectant on an estate for life, and then the tenant for life dies;—and between the death of such tenant and the entry of the heir, a stranger interposes, intrudes, and gets possession of the freehold:—so that this is rather a *prevention* of the heir's entry, than an actual *ouster* of him from his freehold.

1. Co. Litt. 153,b 191.a
2. Finch. L. 10, p. 132—3 Black. Com. 167, 196—Litt. § 279—Co. Litt. 181, 277 —2 Bac. Abr. tit. *Disseisin*, Ap. 97.

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he, taking with him, the keepers of the pleas of the king's crown, and other lawful knights, in his proper person, shall go unto the land or pasture, where the plaint hath been made, and that he make before them, by the first jurors, and other neighbours and lawful men, diligent inquisition thereof; and if they find him disseised again (as before is said,) then let him do according to the provision aforementioned; but if it be found otherwise, the plaintiff shall be amerced, and the other shall go quit;(4) neither shall the sheriff execute any such plaint without special commandment of the king.(5) In the same manner shall be done to them that have recovered their seisin by assise of mortdauncestor;(6) and so shall it be of all lands and tenements recovered in the king's court of enquests, if they be disseised after by the first deforceors, against whom they have recovered any wise by enquest.

18 H. 8. 1—11 H. 4. 6—Fitz. Redisseisin 6, 8, 9—7 H. 7. 4—Co. Litt. 154a—2 Inst. 82—Hob. 96—Enforced and amended by 52 H. 3, c. 8—2 Bulst. 93—13 Edw. 1, stat. 1, c. 25, 26, *which gives double damages against redisseisors*—Mirror 317—Rast. Ent. 548.

To constitute a disseisin, there must be a *tortious* entry into the land, and an *expulsion* of the tenant.[3]

At this period *disseisin* was considered in a very large sense, and much beyond the idea to which it was at first applied. Not only where the owner, or his family, or agent, were unjustly and violently, without judgment of law, ejected from the freehold, but also where one had left his possession on business, and upon his return was denied admission, by one, who during his absence, had taken possession, this was a *disseisin*. To obstruct one in the free use of his freehold, was a disseisin. Making an improper use of an easement, was a disseisin. So it was likewise, where a person in seisin for life, or for years, or as guardian, or otherwise infeoffed another, to the prejudice of the right owner; or if one distrained for services not due, or exceeded the bounds of a reasonable distress. In short, if one claimed to partake with the right owner, or raised an unjust contention against him, it was considered a disseisin of the freehold.[4]

They distinguished between violent disseisins, and those that were effected without violence. *Bracton* notices two kinds of

3. See the case of Taylor *ex dim.* Atkyns, Esq. v Horde et al. 1 Burr. from p. 60 to 127, where the doctrine relative to disseisins is elaborately discussed. In that case we find the distinction clearly pointed out, between an *actual* disseisin, and a disseisin by *election;* where the party elected to consider himself dissoised, for the sake of trying the title. When the easy specific remedy was by *assise*, where the entry was not taken away, the injured owner might, for his benefit, elect to consider the wrong as a *disseisin*. So since an *ejectment* has become the easy specific remedy, he may elect to call the wrong a dispossession. ib.

4. *Bracton*, tit. De assisa nove dis. l. 3, p. 3, p. 161, 162—1 Reeve Eng. law 321.

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STATUTE OF MERTON.

*52 HENRY III. CAP. VIII. A.D. 1267.

The punishment of those which commit redisseisin.

THEY which be taken and imprisoned for *redisseisin*, shall not be delivered without special commandment of our lord the king, and shall make fine with our lord the king, for their trespass. And if it be found, that the sheriff delivereth any contrary to this ordinance, he shall be grievously amerced therefore; and nevertheless, they which are so delivered by the sheriff, without the king's commandment, shall be grievously punished for their trespass.

1 H. 8. f. 1—2 Inst. 114—Rast. 10, 548—V. N. B. 108—F. N. B. 188, 189—20 H. 3, c. 3—Regist. 206. *Enforced and extended by* 13 *Ed.* 1, *st.* 1, *c.* 26, *which gives double damages.*

force,—the *vis simplex*, and the *vis armata*,—the latter species of force was said to be employed when the disseisor armed himself with any kind of weapons, whether he used them or not, for the terror of them might be supposed to have operated, so as to make the disseisin seem to have been *cum armis*. The other kind of force was considered to be employed wherever a person took the law in his own hands, in obtaining the possession.[5]

The law not only allowed, but enjoined it as a duty upon, the disseisee to regain the possession by force, and to expel the wrong doer; in which, at his request, the sheriff might assist, though not bound *ex-officio* to interfere. But this was to be done without loss of time, whilst the injury was recent.[6] If the disseisee had neglected to avail himself, within proper time, of this privilege which the law afforded him to recover his possession by his own act, he was then to have recourse to legal process, to effect such recovery.

The method of recovering seisin, or *mere possession*, seems to be founded on the policy of preserving peace and quiet in matters of property. As *seisin* was *prima facia* evidence of *right*, the law would not allow it to be violated, on pretence of any better right; and had provided many ways to vindicate the seisin, sometimes in opposition to the mere right.

In saxon times the right of property seems to have been recoverable only by *a writ of right*, as the right of *possession* was recovered by a writ of *entry*.[7]

5. Defined by *Bracton* to be *quotiens quis, quòd sibi videri putat, non per judicem reposcit.* ib.

6. The expulsion was to take place *incontinenter, fugavante disseisina et maleficio. Bracton* 162.

7. 3 Black. Com. 184—Gil. Ten. 42—2 Inst. 313.

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STATUTE OF MARLEBRIDGE.

* 52 HENRY III. CAP. XXIX. A.D. 1267.

In what case a writ of entrie sur disseisin in the post doth lie.

It is provided also,—That if those alienations (whereupon a writ of entry was wont to be granted) hap to be made in so many degrees, that by reason thereof the same writ cannot be made in the form beforetimes used, the plaintiffs shall have a writ to recover their seisin, without making mention of the degrees, into whose hands soever the same shall happen to come by such alienations, and that by an original writ, to be provided therefor by the council of our lord the king.

Fitz. Cui in vita 23—Fitzh. entrie 9, 11, 49, 56—Fitzh. Brief 438, 469, 693, 812—Co. Litt. 238,b 239a—2 Ins. 253—Regist. 228—Fitzh. N. B. 191, D. K. 192, 201, 203—Rast. 283.

After the conquest, the business being drawn to the king's courts where alone process issued from term to term, in place of being returnable at the end of every three weeks, as it had theretofore been in the county courts, the proceedings in writs of entry were found to be extremely dilatory, being at least four times as slow as in former times. Hence the *assise* was invented[8] to do justice to the people in their proper counties, by the king's judges, and to determine the matter at once. After this remedy was furnished, the writ of *entry*, which retained its old process, fell into disuse, and at length became obsolete, in all cases where writs of assise would lie.[9] This new process was sometimes called a writ of entry in the nature of an assise, probably because both actions being of the same nature, a writ of assise was a bar to a writ of entry, and *vice versa*.

As a writ of entry is a real action, in which the title of the tenant is *disproved*, by shewing the *unlawful commencement* of his possession, so an *assise* is a real action, in which the title of the demandant is *proved*, merely by his or his ancestor's possession.

Writs of assise were applicable only to two species of injury by *ouster*, namely, to cases of abatement and those of *novel disseisin*.

The application of the assise to cases of *abatement*, seems to be particularly intended for the protection of heirs against the intrusion of their lords, upon the death of the ancestor last *seised*.[10]

8. 3 Black. Com. 184—Gil. Ten. 43.—The invention of it is attributed to Glanville, who was chief justice to Hen. II.

9. Gil. Ten. 43, 44.

10. 1 Reeve 178.

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STATUTE OF GLOUCESTER.

* 6 EDWARD I. CAP. VI. A.D. 1278.

Where divers heirs shall have one assise of Mortdauncestor.

IT is provided also, That if a man die, having many heirs, of whom one is son or daughter, brother or sister, nephew or niece, and the other be of a further degree, all the heirs shall recover from henceforth by a writ of *Mortdauncestor*.

Fitz. Joinder in act 11, 31, 34, 35, 36—Co. Inst. 161a—2 Inst. 307. *See* 13 *Ed.* 1, *c.* 20, *where, in writ of cosinage, &c. tenant may plead that plaintiff is not next heir.*

This chapter of the statute of Gloucester [6 Ed. 1, c. 6] is said, by Ld. Coke,* to be in affirmance of the common law.

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 was by assise of *mort d'ancestor*;[11] But if it occurred upon the death of a grand-father, or grand-mother, the redress was by writ of *ayle*, or *de avo*: if on the death of the great-grand-father, then a writ of *besayle*, or *de pro avo*, was appropriate. If, however, it mounts one degree higher, to the tresayle, or grand-father's grand-father, or if the abatement took place upon the death of a collateral relation (other than before mentioned,) then the writ is called a writ of *cosinage*, or *de consanguineo*.

All these are *ancestral* writs, being of the same nature, the same points were investigated; yet they differed in form, and Ld. Coke tells us that the writs of ail, besail, and cosinage, are not writs of assise, but writs of *præcipe quod reddat*; that, like other writs of this class, they are *categorical*, and contain a direct affirmation, asserting the title of the demandant; whereas the writs of assise are *hypothetical*, the demandant affirming nothing, but proposing an inquiry whether certain points be so.[12]

An *assise* is *festinum remedium*,[13] and to be arraigned on the day the writ is returnable, on which day the demandant is to count, and the tenant to appear and plead instantly, unless the court should allow him an imparlance, which it is said could not be done without shewing good cause.[14]

* 2 Inst. 307.

11. Or "the death of one's ancestor."

12. 2 Inst. 392—3 Black. Com. 186—Fitz. N. B. tit. Writ of *Assise and Mortdauncestor* 151, and tit. Writ of *Cosinage* 508.

13. It is so called—1. Because the tenant shall not be *essoined*. 2. He shall not cast a protection. 3. Nor pray in aid, but of the king. 4. Nor vouch any stranger except he be present and will forthwith enter into warranty; so of receit. 5. The parole shall not demurr for the non-age of the plaintiff or defendant. 8 Co. 50—Booth 262—See 3 Mod. 273—Salk. 82.

14. 1 Rac. Abr. 160—Styles Regis. 98—Salk. 83, pl. 2.

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13 EDWARD I. CAP. III. A.D. 1285.

A cui in vita for the wife. Where a wife, or he in reversion, shall be received.

In case when a man doth lose by default the land which was the right of his wife, it was very hard that the wife, after the death of her husband, had none other recovery but by a writ of right;(2) wherefore our lord the king hath ordained,—That a woman, after the death of her husband, shall recover by a writ of entry (whereto she could not disagree during his life) which shall be pleaded in form underwritten.(3) If the tenant do except against the demand of the wife, that he entered by judgment, and it be found, that his entry was by default, whereto the tenant of necessity must make answer, if it be demanded of him, then he shall be compelled to make further answer, and to shew his right according to the form of the writ that he purchased before against the husband and the wife.(4) And if he can verify that he hath **or had* right in the land demanded, the woman shall gain nothing by her writ; which thing, if he cannot shew, the woman shall recover the land in demand;(5) This being observed, that if the husband absent himself, and will not defend his wife's right, or against his wife's

**Not in the original.*

From what we learn of the rude state of society at this early period, it may well be presumed, that a resort to force, in place of an appeal to the laws, and even in opposition to legal adjudications, was by no means uncommon: With a view to cases of the latter description, it would seem that the statute in the text was framed.

"The writ of *redisseisin*," says Fitzherbert,[15] "lieth where a man doth recover by assise of *novel disseisin*, land, rent, or common and the like, and is put in possession thereof by verdict, and afterwards he is disseised of the same land, rent, &c. *by him by whom he was disseised before;* then he shall have this writ upon the statute of *Merton*, c. 3." This writ, as well as the *post-disseisin*, was *vicontiel*, being directed to the sheriff (vice comiti) and not to be returned to any superior court, till finally executed by him.

The writ recites the recovery in the writ of assise of *novel disseisin*, and states that the same *disseisor* had *again* disseised the party—wherefore the sheriff is commanded that he take with him

15. Nat. Br. tit. *Writ of Redisseisin*, p. 436.

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consent will render the land, if the wife do come before judgment, ready to answer the demandant, and to defend her right, the wife shall be admitted.(6) Likewise, if tenant in dower, tenant by the law of the land, or otherwise for the term of life, or by gift, where the reversion is reversed, do make default, or will give up; the heirs, and they unto whom the reversion belongeth, shall be admitted to their answer if they come before judgment;(7) and if, upon †*such* default, or surrender, judgment hap to be given, then the heirs, or they unto whom the reversion belongeth after the death of such tenants, shall have their recovery by writ of entry (8) in which like process shall be observed as is aforesaid in case where the husband loseth his wife's land by default.(9) And so in the cases aforesaid, two actions do concur, one between the demandant and tenant, and another between the tenant shewing his right, and the demandant.

A cui in vita for the wife, where her deceased husband lost by default—Regist. 232—2 Inst. 341—6 Co. 8—8 Co. 72—26 H. 8. 2—Fitz. *cui in vita* 7, 8, 9, 10, 11, 14, 16, 17, 19, 20, 22, 26, 28, 30, 32, 34—Co. Lit. 352,b 353,a 355,a 356,a—Dyer 298, 315, 341—Fitz. Resceit, 1, 3, 5, 6, 9, 11, 12, 19, 27, 30, 32, 139—10 Co. 44—5 Ed. 3. 61—Cro. Car. 43. *See* 32 *H.* 8, *c.* 28, *which provides that the husband's act only of the wife's land shall not prejudice her or her heirs.* Where the wife shall be received upon the husband's default—Keilw. 128. The receipt of him in the reversion. *Ingressus ad communem legem*—Regist. 133. †*Not in the original.*

the *keepers of the pleas of the crown*,[16] and twelve, as well knights as other free and lawful men, as well of those who were of the first jury as others, and go in his proper person to the land, &c. and by their oath diligently make inquisition thereof; and if he should find that the complainant had been *again* unjustly disseised by the same disseisor, then he should *imprison* the disseisor, and cause the disseisee to be re-seised of the land, &c.—and further, should cause the damages, which the disseisee had sustained by the re-disseisin, to be taxed by the oath of the aforesaid twelve, and to be levied, without delay, of the goods and chattels of the disseisor.[17]

If the sheriff omitted to execute the writ, an *alias* and a *pluries* issued, and if it was not then done, an *attachment* against him was awarded to the coroners, &c. and upon the same distress infinite.[18]

If the party, after being put into possession, were again disseised, by the same *disseisor*, the seisin might be again restored by the writ of *post-disseisin*, which recited the recovery in the writ of assise of novel disseisin, and caused the party to be re-instated in his seisin of the land.

16. The coroners were anciently so called. 4 Inst. 271—Stra. P. C. 48, 49.

17. Fitz. N. B. 436.

18. Fitz. N. B. 437.

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* 13 EDWARD I. CAP. XX. A.D. 1285.

The tenant's answer in a writ of cosinage, aiel *and* besaiel.

WHEREAS, that justices in a plea of *mortdauncestor*, have used to admit the answer of the tenant, that the plaintiff is not next heir of the same ancestor, by whose death he demanded the land, and is ready to enquire the same by assise;(2) it is agreed, That in writs of *cosinage*, *aiel* and *besaiel*, which be of the same nature, his answer shall be admitted and enquired, and according to the same inquisition they shall proceed to judgment.

The remedies by *writ of entry* or *assise* are actions merely *possessory*, as has been remarked; serving only to regain that possession whereof the demandant, or his ancestors, had been unjustly deprived by the tenant of the freehold; or those under whom he claims. But these actions decide nothing as to the *right of property;* only restoring the demandant to that state or situation in which he, or his ancestor was before the unlawful dispossession was committed. By a recovery in these possessory actions, the right of property, or ownership, was not prejudiced; for if the dispossessor had any legal claim to the land, he was at liberty to assert it.[19] The *possession* might be in one, the *right of possession* in another, and the *right of property* in a third person, or in either of the others;—but if a person in *actual possession*, had not the *right of possession*, he could not retain the possession, although the *right of property* might be in him. In such case he was obliged to surrender up the possession, and resort to a *writ of right*.

During the life of the disseisor, no writ of entry lay for the disseisin, but only an assise of novel disseisin, the assise might be brought against him and his alienee both; and if the disseisor could not pay all the damages, the alienee must.[20] If the disseisor aliened and died, or if he died, and the land descended to his heir, the disseisee or his heir might have a *writ* of entry in the *per*. The writ alledged that the tenant had not entry but *by* (or *after*) A, who had unjustly disseised the demandant or his ancestor. But if the disseisor aliened and died, and the alienee aliened to another person: or if the disseisor died, and his heir entered, and aliened the land, and died, or died and the land descended to his heirs, then the disseisee, or his heir, was to have a writ of entry in the *per* and *cui*:—in which writ it was alledged that the tenant

19. 3 Black. Com. 180.

20. 3 Reeve's Eng. Law 34. By the common law damages were only recoverable against the disseisor himself; but the statute of Gloucestor [6 *Ed.* 1, *c.* 1, infra] provided that if the disseisor alien the land, and have not whereof damages may be levied, they to whose hands the land shall come, shall be charged with the damages, so that every one shall answer for his time. 2 Reeve, 147.—Sayer's Damages 9.

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* 13 EDWARD I. CAP. XXV. A.D. 1285.

* *Of what things an assise shall lie. Certificate of assise. Attachment in an assise.*

FORASMUCH as there is no writ in the chancery whereby plaintiffs can have so speedy remedy, as by a writ of *novel disseisin*; (2) our lord the king, willing that justice may be speedily ministered, and that delays in pleas may be taken away or abridged, granteth that a writ of *novel disseisin* shall hold place in more cases than it hath done heretofore; (5) and as before times it hath lien and holden place in common of pasture, so shall it from henceforth hold place in common of turf-land, fishing, and such like commons, which any man hath appendant to freehold, or without freehold by special deed, at the least for term of life. (7) And if, by the death of the parties, remedy happen to fail by that writ, then remedy shall be obtained by a writ of entry. (8) And albeit that above mention is made of some cases wherein a writ of *novel disseisin* held no place before, let no man think therefore that this writ lieth not now where it hath lien before. (9) And though some have doubted whether a remedy be had by this writ in cases where one feedeth in the several of another, let it be had for certain, that

had not entry but *by*, or *after* B, *to whom* A (who had unjustly disseised the demandant, or his ancestor) had demised it.[21]

Here it will be observed, that the first alienation or descent makes the *first*[22] degree, which is called the *per*;—a second alienation, or descent, makes another degree, called the *per* and *cui*.—These degrees thus state the original wrong, and the title of the tenant who claims under such wrong. If more than two degrees, i. e. two alienations or descents, were past, no writ of entry lay at the common law.[23]

There were five other events which put a writ out of the degrees, namely, *intrusion*, *election*, *judgment*, *disseisin upon disseisin*, and escheat.[24]

Intrusion occurred when the disseisor died seised, and a stranger *abated*.

An *election* was when the disseisor was a man of religion, and died, and his successor entered. The entry of the successor could

21. 3 Crom. Dig. 180—3 Reeve 34—Finch L. 274.

22. Some make the *first* degree to consist in the original wrong—the *second* in the *per*—and the *third* in the *per & cui*. See Finch L. 273 [90b]—Booth of real actions 172. But the difference is not material.

23. 3 Black. Com. 181.

24. 3 Reeve 35.

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a good and a sure remedy is given in that case by the said writ. (10) And let them which be named disseisors, beware from henceforth that they alledge not false exceptions, whereby the taking of the assise may be deferred, saying, that another time an assise of the same land passed between the same parties, or saying, and falsely, that a writ of more high nature hangeth between the same parties for the same land, and upon these and like matter do vouch rolls or records to warrantry, to the end, that by the same vouching they may take away the vesture, and receive the rents and other profits, to the great damage of the plaintiff.(11) And where before none other pain was limited against him that falsely had alledged such untrue exceptions, but only that after such false surmises disproved the assise should pass;(12) our lord the king, to whom such false exceptions be odious, hath ordained, That if any being named disseisor, do personally alledge the execution at the day to him given (if he fail of the warrantry that he hath vouched) he shall be adjudged for a disseisor, without taking of the assise, and shall restore the damages before inquired of, or to be inquired after, to the double, and shall, nevertheless, have a year's imprisonment for his falsehood:(13) And if that exception be alledged by a bailiff, the taking of the assise shall not be delay-

never be supposed congeable by the predecessor, so that such successor should be adjudged in of his predecessor, the same as a son is by his father.

As to *judgment*, where one entered in consequence of a recovery had against the disseisor, neither the writ of entry in the *per* or the *per* and *cui*, could lie against the tenant, because he entered neither by descent nor purchase.[25]

Neither could either of those writs be maintained by the disseisee or his heir, where the first disseisor had been disseised and died. For the second disseisor neither entered by descent nor feoffment.

The law was the same in respect to *escheats;* for if the disseisor died without heirs—or after having been attainted of felony, these writs could not be maintained against the lord who entered, as into his *escheat.*

The provision made by the statute in the text, concerning the writ of entry, was a great improvement of judicial proceedings.—

25. There were, however, some cases where a *judgment* did not put the case out of the degrees, as where the heir of an *abator*, having been ousted by a stranger, recovers the land. For the recovery puts the issue in his first estate, i. e. in the same descent in which he was at the death of his father.

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ed therefore, nor the judgment upon the restitution of the lands and damages.(14) Yet, nevertheless, that if the master of such a bailiff, that was absent, come after before the same justices that took the assise, and offer to prove, by record or rolls, that another time an assise passed between the same parties of the same land, or that the plaintiff at another time did withdraw his suit in a like writ, or that a plea hangeth by a writ of more high nature, a writ of *venire facias* shall be granted unto him to cause the same record to be brought; and when he hath the same, and the justices do perceive, that the record so shewed by him, would have been so available before the judgment, that the plaintiff, by force of the same, should have been barred of his action, the justices shall presently cause the party to be warned, that first recovered, that he appear at a certain day, at the which the defendant shall have again his seisin and damages (if he before paid any by the first judgment given,) *which shall be restored him to the double, as before is said.(15) And also he that first recovered shall be punished by imprisonment, according to the discretion of the justices. (16) In the same manner, if the defendant, against whom the assise passed in his absence, shew any deeds, or releases, upon the making whereof the jury were not examined, nor could be examined, because there was no mention made of them in pleading, and

It had been a considerable check upon the application of the writ of entry, that it was confined to the degrees; but as it was a very general remedy, and capable of further extension, it was, with a view of extending the remedy provided by this statute, that if the alienations were so many degrees removed, that a writ would not lie in the *per* and *cui*, still the complainant should have a writ to recover his seisin, without mentioning the degrees, into whose hands soever the land might come by alienation:—a new writ was in consequence formed, called a writ of entry in the *post*;[26]—because, instead of specifying the particular steps by which the alienation had happened, it is said generally, that *post* (after) such alienation, &c.

This new writ, from its indefinite nature, was applicable to almost every possible case of ouster of the freehold, and tended to make the writ of entry a still more general remedy.

Before the making of this statute, if a man had aliened a freehold which he had of his wife, she might, after his death, have

26. A man shall not have a writ of entry in the *post* where he may have it within the degrees, in the *per & cui*. By stat. 3 Ed. 1, c. 40—Fitz. N. B. 444.

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by probability might be ignorant of the making of those writings; the justices, upon the sight of those writings, shall cause the party to be warned that recovered, that he appear at a certain day, and shall cause the jurors of the same assise to come;(17) and if he shall verify those writings to be true, by the verdict of the jurors, or by inrollment, he that purchased the assise contrary to his own deed, shall be punished by the pain aforesaid.

Of what things an assise of novel disseisin will lie. Regist. 196, &c.—2 Inst. 408—8 Co. 45—Fitz. Ass. 138—Fitz. Avowry 142—Assises of common, Regist. 197—Fitz. Ass. 61, 94, 111, 134, 167, 210, 316, 330, 439, 452—Fitz. Ass. 395—Fitz. Brief. 790—Bro. Elegit 26—Bro. Disseisin 86, 105—Rast. 67. Assise where one doth feed in another's several. 11 H. 4. 84—Hob. 95. The penalty for failing of an exception pleaded. 11 H. 4, f. 49—22 Ed. 3, f. 4—30 Ed. 3, f. 12—Fitz. Record 32—Bro. Covert 35—1 Roll. 91—Keilw. 131, 132. In what case a certificate of assise doth lie Fitz. Ass. 5, 123—Fitz. Certificate 2, 3, 4, 7, 8, 10—F. N. B. 181, &c.—Rast. 110—Regist. 200. *Add *together with the damages* he had, after the first judgment given, which, &c. 17 Ed. 3, f. 28—12 H. 4, f. 9—7 H. 4, f. 45—Fitz. Ass. 412.—*See further concerning assises, 7 Rich. 2, c. 10—1 H. 4, c. 8—6 H. 6, c. 2—11 H. 6, c. 2, and 21 H. 8, c. 3.*

maintained a writ of entry called a *cui in vita*, to recover it back.[27] It was thought reasonable that she should have a like remedy where the land was lost by the husband's default, instead of being driven to her *writ of right*, wherefore a remedy was given by this statute; which, according to *sir Edward Coke*, relates merely to estates in fee-simple; and tenant in tail and tenant for life are out of the statute, for neither of them could maintain a *writ of right;* but a remedy is afforded to them by a writ of *de quod ei deforceat*, which is given by the statute of *Westminster* 2, *cap.* 4,[28] where tenant in tail, tenant in dower, or by courtesy, or for term of life, lose their lands by default, in a *præcipe quod reddat* brought against them. And yet, if the husband and wife seised in right of the wife for term of her life, lose in a *præcipe quod reddat*, by default, and the husband die, the wife shall have a *cui in vita*, otherwise she would be remediless, for this is as it were a demise made by the husband; and she could not have a *quod ei deforceat.*[29] The usual defence in a *cui in vita*, where the husband had aliened the land, was, that the wife on such a day appeared personally in the king's court, and there, of her free will and consent, granted and confirmed the gift made by the husband. In other words, this was a plea of a fine.[30]

27. Which writ is in the following form: *Præcipe, &c. quod, &c. reddat talè quæ fuit uxor talis, &c. quam clamat esse jus et hereditatem suum; & in quam prædictus talis non habet ingressum nisi per præd. quondam virum suum, qui illad ei dimisit* CUI IPSA IN VITÆ SUA CONTRADICERE NON POTUIT, &c. 1 Reeve 394.

28. See the statute, tit. DOWER *infra*.

29. 2 Inst. 343—Fitz. N. B. tit. Writ *de quod ei deforceat*—and tit. *Cui in vita*—see also 2 Reeve's E. L. 190.

30. 1 Reeve's Eng. Law 151, 191.

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* 13 EDWARD I. CAP. XXVI. A.D. 1285.

Who may bring a writ of redisseisin, and the punishment of the offender therein.

In writs of redisseisin, from henceforth, double damages shall be awarded, and the redisseisors shall not be *repleviable* hereafter by the common writ.(2) And like as in the statute of *Merton*, the same writ was provided for such as were disseised after they had recovered by assise of *novel disseisin*, of *mortdauncestor*, or other jurates;(3) even so from henceforth the same writ shall further hold place for them that shall recover by default, reddition, or otherwise, without recognition of assises or jurates.

2 Inst. 416—15 H. 7, f. 8—Co. Lit. 154—20 H. 3, c. 3—52 H. 3, c. 8—Rast. 548.

If the husband refused to defend an action brought for the wife's land, she might, upon her prayer, be received to defend her right.

At the common law, any alienation made by the husband of the wife's land, whether by *feoffment*, *fine* or *recovery*, was a discontinuance, and after his death she was put to her *cui in vita* to reinstate herself; but now, by the statute of 32 *H.* 8, *c.* 28, it is provided, *That no fine levied by the husband alone, of lands being the freehold and inheritance of the wife, shall in any wise be or make a* DISCONTINUANCE, *or be otherwise prejudicial to her or her heirs, but that the wife and her heirs shall and may lawfully enter into the said lands, according to their rights and titles therein.*[32]

The mischief before the statute of 13 *Ed.* 1, *c.* 20, (in the text) was that in writs of *aiel*, *besaiel*, and *cosinage*, the tenant was not admitted to plead [as he might in a writ of *mortdauncestor*] that the demandant *was not next heir* to him upon whose dying seised the writ was conceived, but he must shew *who was his next heir*, which the present act rendered unnecessary; and allowed him to plead generally, that the demandant was not heir.[33]

At the common law, there were but two forms of the writs of assise of *novel disseisin:*—either an assise *de libero tenemento* or *de communia pasturæ*. The former lay of houses, land, rent, or other things in *render;* but for all profits *apprender*, which consisted in *capiendo*. *colligendo*, *habendo*, *recipiendo* and *exercendo*, an assise did not lie; but a *quod permittat*, in which there was great delay, and those who had but an estate for life could not maintain that writ. But the statute of *Westminster* 2, cap. 25, in the text, gives a speedy remedy by assise in lieu of the *quod per-*

32. 2 Inst. 681. 33. 2 Inst. 399.

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13 EDWARD I. CAP. XXIV. A.D. 1285.(H

A writ of nuisance of a house, &c. levied and aliened to another. A quod permittat *and* juris utrum *for a parson of a church. In like cases like writs be grantable.*

In cases whereas a writ is granted out of the chancery for the fact of another, the plaintiffs from henceforth shall not depart from the king's court without remedy, because the land is transferred from one to another. (2) And in the register of the chancery there is no special writ found in this case, as of a house, a wall, a market, but the writ is granted against him that levied the nuisance. (3) And if the house, wall, or such like, be aliened to another, the writ shall not be denied; but from henceforth, where in one case a writ is granted, in like case, **when like remedy faileth*, the writ shall be made as hath been used before:

mittat, so that the said profits were taken *in certo loco*.[34] But an assise does not lie for a *way* over certain land; but a *quod permittat*, for it is an easement; but it would be otherwise if it were appertenant to the land.[35]

The redress afforded by these writs, under the statute of *Merton*, was far from being effectual in repressing injuries of this sort, inasmuch as that statute only extended to redisseisins upon recoveries in assise of *novel disseisin* by *verdict*, and to post-disseisins where recovery was had in assise of *novel disseisin*—mort-dauncestor, or *juris utrum*, or in those actions alone which pass by *juries and verdicts*.[36]

The remedy was rendered more efficient by the statute of Westminster the second, 18 *Ed.* 1, c. 26.

This statute is additional in several points:

1. Where the statute of *Merton* gave but *single* damages, the act gives *double* damages, both in the *redisseisin*, and in the *post* disseisin: The jury are to give single damages, and the court are to double them.

2. Redisseisors are not to be replevied by the common writ, as they might have been before this statute.

3. Whereas the statute of *Merton* extends only to redisseisins upon recoveries in *novel disseisin* and *post disseisin*, by *verdict*, this statute extends to recoveries by default, reddition, *aut alio modo* as upon demurrer,[37] &c.

H) "This statute is in force, except those parts which relate to ecclesiastical persons." *Report of the Judges.*

34. 2 Inst. 411—1 Bac. Abr. 161.

35. 8 Co. 46—34 Ass. 13—2 Inst. 413, 414.

36. 2 Inst. 417—Fitz. Nat. Br. 439.

37. 2 Inst. 416, 417.

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(4) *Questus est nobis A. quod D. injuste, &c. levavit domum murum mercatum, & alia quæ sunt ad nocumentum, &c.*

(5) And if such things levied be aliened from one to another, the writ shall be thus:

Questus est nobis A. quod B. & C. levaverunt, &c.

II. (3) And whensoever from henceforth it shall fortune in the chancery, that in one case a writ is found, and in like case falling under like law, and requiring like remedy, is found none, the clerks of the chancery shall agree in making the writ;(4) or †the plaintiffs may adjourn it until the next parliament, and let the cases be written in which they cannot agree, and let them refer themselves until the next parliament, by consent of men learned in the law, a writ shall be made, lest it might happen after that the court should long time fail to minister justice unto complainants.

A writ of nuisance—Rast. 405—2 Inst. 404—Rast. 441—6 Rich. 2, st. 1, c. 3—*in which courts writs of nuisance, called vicontiels, shall be pursued*, 9 Co. 55. *Read *requiring like remedy.* †or adjourn the plaintiffs. Rast. 419—Coke pla. 399—14 *Ed.* 3, *c.* 17, *gives juris utrum to parson or vicar*—Rast. 123—Fitz. Entry 3, 7, 8, 10, 61, 64, 67, 68, 69, 74—Co. Lit. 54.b

Nuisances are *public* or *private*. A public or common nuisance is defined to be *an offence against the public, either by doing a thing, which tends to the annoyance of all the citizens; or by neglecting to do a thing which the common good requires.*[1] These are objects of public prosecution by indictment. Private nuisances are—*any thing done to the hurt or annoyance* of the lands, tenements and hereditaments of another.[2] These are not the objects of public prosecution, but are left to be redressed by the private actions of the parties aggrieved.

As well *common* as *private* nuisances may be abated, pulled down, removed, or destroyed by individuals, without resorting to legal process. The former, as they affect the community at large, may be abated by any individual, and private nuisances may be abated by the mere act of the party annoyed by it. For which purpose he may justify entering upon the land of another, whereon the nuisance is erected and pulling down and destroying such nuisance.[3]

Before the making of the statute of *Westminster* 2, in the text, an assise of nuisance only lay against the individual himself who levied or did the nuisance, and did not lie against any person to whom he had aliened the tenements whereon the nuisance was

1. 1 Hawk. P. C. 360.
2. 3 Black. 216.
3. 1 Hawk. P. C. tit. Nusance—1 Bac. Abr. N. Nusances (C) p. 687—2 Inst. 405.

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34 EDWARD I. STAT. I. A.D. 1306.(1

The statute De conjunctim feoffatis.

Jointenancy pleaded in abatement of a writ, &c.

THE king unto all to whom these, &c. Greeting. It is no new thing, that among divers establishments of laws, which we have ordained in our own time, upon the great and heinous mischiefs that happen in writs of *novel disseisin* chiefly above other, we have devised more speedy remedy in those writs than was before. (2) And forasmuch as it chanceth many times in assises of *novel disseisin*, that the tenant doth except against the plaintiff, that he holdeth the tenements in demand jointly with his wife, not named in the writ, and sometime with a stranger not named in the writ, and sheweth forth a deed testifying the same, and demandeth judgment of the writ; (3) it is agreed and ordained, That if the plaintiff will offer to aver by assise, that the day of his writ purchased, he that alledged the exception was sole tenant, so that neither his wife, nor any other, had any thing in the said lands, then the justices, before whom the assise is arraigned, shall retain the same deed safely in their keeping (until the assise be tried between them thereupon) as that which is in a sort denied. (4) And

situated, and in such case the person annoyed by the nuisance to his *quod permittat prosternere;* which being in the nature of a writ of right was subject to great delay.[4]

To remedy this inconvenience this statute was enacted; and it is said to deserve particular notice, as having a very extensive influence on the course of legal remedies in succeeding terms. It not only applies a remedy in the particular case which has been noticed, but provides generally, in order that justice might no longer be delayed for want of legal remedies, that when a writ was granted in one case, and a thing happened in *consimili casu*, and needed a similar remedy, a writ should be devised accordingly: permitting the writs to be varied as the cases differed.[5] This enlargement of the powers of the clerks in chancery, of adopting the forms of writs to particular cases, or of framing new writs in *consimili casu*, was afterwards used to great advantage in the administration of justice.

1) "This statute is in force, except those parts which relate to '*juris utrum*' and '*indicavit*'." *Report of the Judges.*

4. 2 Inst. 405—3 Black. Com. 231.

5. 2 Reeve's E. Law 262—2 Inst. 407

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they shall let the party absent to understand by our writ, under their testimony, and also to the joint-tenant that is present, of whom the deed maketh mention, that he be present at a certain day with the other tenant, to answer unto the party plaintiff, as well upon the exception alledged, as of the lands demanded and put in view, if it seem expedient for him; (5) at which day, if both that are named tenants do come in, and do justify the same feoffment, they shall answer and maintain the exception alledged by one of them, and further shall answer unto the assise as though the original writ had been purchased against both of them jointly. (6) And if it be proved by assise, that the exception was alledged maliciously, to delay the plaintiff of his right, so that they held not the same land jointly the day of the writ purchased, then albeit the same assise do pass for the tenants, and against the plaintiff, yet they that alledge the exception, shall be punished by one year's imprisonment, whence they shall not be delivered without a grevious fine. (7) And let the justices be well advised, That from henceforth they do not allow an exception alledged by the bailiffs of any such tenants. (8) But if he that alledged the exception absent himself at his day, and the other that is named joint-tenant do appear, although he that doth appear, doth disavow the same

Amongst the many new writs to which this permission gave rise was one emphatically stiled a writ of entry in *consimili casu*. By the statute of *Gloucestor*, where a tenant in dower had aliened in fee, the reversioner was entitled to a writ of entry *in casu proviso*, as it was usually called: now the alienation of a tenant, by the curtesy or other tenant for life, was thought to be in *consimili casu;* and upon that idea such a writ was framed for the reversioner or remainderman.[6]

The design of the statute *de conjunctim feoffatis*, was to prevent the delay occasioned by tenants in *novel disseisin* and other writs, pleading that some one else was jointly seised with them.[7] Where such a plea was pleaded and grounded upon a deed, the plaintiff might offer to aver by the assise, that at the day of the writ purchased the tenant was *sole seised;* and in such case the justices might retain the deed in their keeping till the assise had tried it, and as well the tenant as the person alledged to be joined with him, were to be warned to appear and answer to the assise at a

6. 2 Reeve's E. L. 204—2 Inst. 407—Fitz. Brev. tit. "Writ of entry *in consimili casu*," p. 474.

7. 2 Reeve's Eng. Law 243.

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deed, and say that he hath nothing in the foresaid tenements; nevertheless the assise shall pass against the tenant that is absent by his default. (9) And if it be found by assise, that they were not jointly enfeoffed the day of the writ purchased, and likewise that the tenant against whom the writ was purchased, or another named in the writ, did disseise the plaintiff, then having regard to the exception that was falsely and maliciously alledged to the hurt of the party, and to the disseisin that they made, the party plaintiff, shall recover his seisin and double damages, and they that alledge the false exception shall have the punishment aforesaid. (10) But if neither of the tenants do come at the day, then upon their default the assise shall pass against them. (11) And if it be found thereby, that the same exception was lawfully and truly alledged, and that they which alledged it were jointly seised before the plaintiff purchased his writ against them, the assise shall pass no further, but the writ shall be abated. (12) The same shall be observed, if both or one only do appear, if it be found by assise that the exception aforesaid was truly alledged, as before is said. (13) In the same order it is established and agreed, That in assises of *mortdauncestor* and *juris utrum*, at the first day that the parties appear in court, if the tenant alledge the foresaid exception against the demandant, shewing a deed thereupon, and the demandant will offer to aver by the assise or jury, that at the day of his writ purchased, he that alledged the exception was sole tenant, from thence the same process and manner of proceeding shall be used in assises of *mortdauncestor* and writs of *juris utrum*, as before is ordained in assises of *novel disseisin*, and like punishment shall be inflicted upon the offenders and those that be convict. (14) In other writs whereby tenements are demanded, such process shall be made, that if at the first day that the parties appear in court,

certain day; as though the original writ had been brought against both: If the plea was found to be *false*, and for *delay*, then, notwithstanding the assise passed for the tenants, yet he who alledged the plea was subjected to suffer a year's imprisonment, and a heavy fine. It prohibited such plea from being pleaded by a bailiff, who, in those days, was in some cases allowed to put in a plea for his principal. If the allegation that they were joint-tenants, was found to be true, the writ was abated; and so it was in writs of mortdauncestor, *juris utrum*, and other real actions.

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the tenant doth alledge the foresaid exception of a joint feoffment, and the demandant will offer to aver by the country, that the day of the writ purchased, he that alledged the exception was sole tenant, then the same process and manner of proceeding shall be observed betwixt the parties until a jury have passed between them thereupon. (15) And if it be found by the jury, that the same exception was truly alledged, then the writ of the demandant shall abate; (16) and if it be founden by the jury, that the same exception was falsely alledged, and to the hindrance of the party, then the demandant shall recover his seisin of the tenements in demand, and the tenant shall be punished by the pain above limited in assises of *novel disseisin* as to the imprisonment, and as to the damages, according to the discretion of the justices. (17) And we will and grant, That this statute shall take his effect the morrow after the feast of saint *Peter ad vincula* next coming. (20) In witness of which thing we have caused these our letters to be patent, I myself being witness at *Westminster*.—Given the seven and twentieth day of the month of *May*, the four and thirtieth year of our reign.

13 Ed. 1, stat. 1, c. 25—Fitz. Brief. 757—2 Inst. 524—Hob. 95. A *scire facias* awarded to the jointenant—Fitz. Process 49, 158—Fitz. Brief. 762—2 Inst. 364, 365.

STATUTE OF YORK.

12 EDWARD II. STAT. I. CAP. I. A.D. 1318.

Tenants in assise of novel disseisin *may make atturnies.*

First, for divers mischiefs that have been because tenants in assise of *novel disseisin* might not make atturnies heretofore: (2) it is agreed that the tenants in assise of *novel disseisin* from henceforth may make atturnies. (3) Yet the king intendeth not hereby that the tenants and defendants in assises of *novel disseisin* should not plead by bailiffs, if they will, as they have used to do heretofore.

At the common law, the parties to a suit, whether plaintiff or defendant, demandant or tenant, appeared in their proper per-

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sons. The statute of Westminster 1, c. 42, seems to have been the first which authorised the tenant to constitute an attorney, to appear for him.[8]

It is said that before the statute *Westminster* 2, c. 10,[9] all attornies were made by letters patent under the great seal, commanding the justices to admit the person to be an attorney to such a one. Since that period several statutes have been passed on that subject, of which the statute in the text, 12 *Edward* 2, *st.* 1, c. 1, is one.

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* 6 RICHARD II. STAT. I. CAP. III. A.D. 1382.(K

In which courts writs of nusance called vicontiels, *shall be pursued.*

ITEM, it is accorded and ordained, That all writs of nusances, commonly called *vicontiels*, shall be from henceforth made at the election of the plaintiff, in the nature of old times used, or else in the nature of assises determinable before the king's justices of the one bench or the other, or before the justices of assise to be taken in the county of the place assigned or to be assigned.

13 Ed. 1, stat. 1, c. 24.

Vincontiel writs were not returnable. They were directed to the sheriff, commanding him to hear the plaint, and to cause justice to be done thereupon between the parties.

The statute of 6 Rich. II. c. 3, in the text, gave the plaintiff his election, either to sue out a vicontiel writ, or to have one returnable into the king's bench or common pleas.

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* 4 HENRY IV. CAP. VII. A.D. 1402.

The disseisee shall have an assise against the disseisor taking the profits.

ITEM, whereas in the statute made the first year of king RICHARD II. it was ordained, That where several persons did disseise other of their freehold, and make feoffment to divers people, as

8. See the stat. *infra*, tit. *Essoin*—2 Inst. 248.

9. 1 Ruff. statutes 89. The statute is not contained in the report. See 1 Bac. Abr. 184—Fitz. Nat. Br. tit. *Dedimus potestatem de attornato faciendo*, p. 59.

K) "So much of this statute is in force, as gives the plaintiff an election to have a writ of nusance, in nature of an assise." *Report of the Judges.*

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well to have maintenance, as also to make the disseisees to be ignorant, against whom they ought to take their writ; (2) that the disseisees in such case might take their writ against them which thereof shall take the profits, so that the disseisees commence their suit within the year next after the disseisin; (3) and the same ordinance should hold place in every other action of plea where such feoffments be made by fraud or collusion, to have their recovery against such feoffers, if they thereof take the profits: (4) Our said lord the king, thinking the said statute to be very mischievious and prejudicial to his people, because of the shortness of the time, by the assent of the said lords, and at the request of the commons aforesaid, hath ordained and stablished, That such disseisees shall have their action against the first disseisor, during the life of the same disseisor, so that such disseisor thereof take the profits at the time of the suit commenced. (5) And as to other writs in plea of land, the demandant shall commence his suit within the year, against him which is tenant of the freehold at the time of the action accrued to him, so that such tenant thereof take the profits at the time of such suit commenced, notwithstanding the said statute.

1 Rich. 2, c. 9—Explained by 11 H. 6, c. 3—*Altered by* 1 H. 7, c. 1—4 H. 7, c. 4—27 H. 8, c. 10.

The intention of this statute was, further to extend the benefits of the writ of novel disseisin.

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* 11 HENRY VI. CAP. II. A.D. 1433.

The penalty where a sheriff is named a disseisor in an assise.

ITEM, whereas several persons do oftentimes sue assises of *novel disseisin* before justices, assigned against divers persons, and by craft and collusion, to have their writs of their said assises directed to the coroners of the counties where their tenements be, to make execution of the said writs, do name in their said assises the sheriff of the same county one of the disseisors, where he is not, neither ever was disseisor or tenant of the tenements in demand, whereby oftentimes the said assises be awarded by the default of

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the tenants which have no knowledge of those assises, for that they found not any assise against them in the file of the sheriff, nor have any suspicion of any such assise taken against the sheriff and them; (2) Our lord the king, willing in this case to provide remedy, of the assent and authority aforesaid, hath ordained, That in all such assises purchased, at this time depending, or hereafter to be purchased, between any persons whatsoever they be, before any such justices, in which assises any such sheriff is named disseisor, if the tenants in the said assises or any of them will aver, that the said sheriff is not, nor ever was, disseisor, nor tenant of the tenements in demand, but was named disseisor by collusion, the averment shall be received. (3) And if it be found by the said assise, that the said sheriff is not, nor ever was, disseisor nor tenant of the tenements in demand, but was named disseisor by collusion, then the said justices shall cause to be abated and quashed the said writs purchased, or to be purchased in the form abovesaid; (4) and that the plaintiffs or plaintiff be in the grievous mercy of the king.

The statute of 11 *Hen. VI. c.* 2, in the text, pretty clearly explains the mischief designed to be remedied by it. The practice of naming the sheriff a disseisor, with a view to have the process directed to the coroner, and thereby to mislead the tenant in possession, and prevent him from making any defence, although he might have a just and legal one, doubtless required legislative animadversion.

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* 11 HENRY VI. CAP. III. A.D. 1433.

An assise, &c. maintainable against the pernor of the profits.

ITEM, whereas by a statute made the fourth year of the reign of king HENRY, grandfather of our lord the king that now is, amongst other things it was ordained, That the disseisees shall have their actions against the disseisors during the lives of the disseisors, so that such disseisors thereof take the profits at the time of the suit commenced, as in the said statute is contained more at large. The which statute, according to the opinion of many, hath been intended in writs of assise of *novel disseisin* only, and as great mischief it is to the parties demandants in other writs

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sued and grounded upon *novel disseisin*, as in assise. (2) Wherefore our lord the king, willing all manner of opinions and doubts in that behalf to cease, hath ordained by the assent and authority aforesaid, That in all manner of writs grounded upon *novel disseisin*, the disseisees shall have their recoveries, if they will, by such writs, against the disseisors or their feoffees, as well as they shall have in assise of *novel disseisin*, so that the same disseisors, or their feoffees, against whom the writ shall be brought, thereof take the profits at the time of the writ purchased, notwithstanding any gifts or feoffments made to other persons for to delay the demandants.

1 Rich. 2, c. 9. Further provided for by 1 H. 7, c. 1—27 H. 8, c. 10.

This statute sufficiently explains itself. The object of it is to remove doubts and extend the remedy.

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* 21 HENRY VIII. CAP. III. A.D. 1529.

Plaintiffs in assise may abridge their plaints.

FORASMUCH as assises, which have been thought the most speedy remedy, be now, by occasion of pleading of many bars to moieties and parts of the lands put in view and plaint, greatly delayed for difficulties and division of pleading; and one cause thereof is, because the plaintiffs in every assise in such pleas to moieties and parties, cannot by the law abridge their plaints: (2) For remedy whereof be it enacted, That the plaintiff in every assise from henceforth may at his pleasure sever and abridge his plaint, of any part or parts whereunto any bar is pleaded by moiety, in like manner as he or they might do in case the pleas in bar had been made and divided to any certainty or number of acres in the plaint; and that the plaint for the residue of the part or parts of the land not abridged, shall be and stand good and effectual in the law. Qua quidem billa perlecta, et ad plenum intellecta, per dictum dom' regem ex assensu & auctoritat' parliamenti predicti taliter est responsum. *Imperfect on the roll.*

Dyer 61, 63, 88, 132—8 H. 7, f. 22—Fitz. Plaint 47, 11, 19.

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This is a further extension of the remedies by *assise*, by allowing plaintiffs to sever and abridge their plaints.

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* 32 HENRY VIII. CAP. XXXIII. A.D. 1540.

An act that wrongful disseisin is no descent in law.

WHERE divers persons of their insatiable minds have heretofore by strength, and without title, entered into manors, lands, tenements and other hereditaments, and wrongfully disseised the rightful owners and possessors thereof, and so being seised by disseisin, have thereof died seised, by reason of which dying seised, the disseisee, or such other persons as before such descent might have lawfully entered into the said manors, lands, and tenements, were and be thereby clearly excluded of their entry into the said manors, lands, and tenements, and put to their action for their remedy and recovery therein, to their great costs and charges; (2) for reformation whereof, be it enacted by the authority of this present parliament, That the dying seised hereafter of any such disseisor, of or in any manors, lands, tenements, or other hereditaments, having no right or title therein, shall not be taken or deemed from henceforth any such descent in the law, for to toll or take away the entry of any such person or persons, or their heirs, which, at the time of the same descent, had good and lawful title of entry into the said manors, lands, tenements, or hereditaments, except that such disseisor hath had the peaceable possession of such manors, lands, tenements, or hereditaments whereof he shall so die seised, by the space of five years next after the disseisin therein by him committed, without entry or continual claim by or of such person or persons as have lawful title thereunto.

13 Co. 6—1 Brownl. 131— *Vin. V.* 9, 79—Five years possession in the disseisor before his death. Dyer f. 219—Co. Lit. 238, 256a—Plowd. 47—Hob. 243—4 Anne c. 16.

The provision made by this statute was just and equitable:—Whilst on the one hand it declares, that the entry of the disseisee should not be tolled or taken away, in a recent disseisin, by the death of the disseisor, on the other, it does not permit an entry to be made, on the heir, where the disseisor had been seised of the premises five years before his death.

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Writs of *entry* and of *assise*, are so far antiquated as to be out of use in England, in the prosecution of adverse suits for the recovery of lands.[10]

The *forms*, indeed, derived from the law relative to writs of entry, vouching to warranty, &c. serve as a basis for common recoveries; but these are no longer used in Pennsylvania, the legislature having very wisely commuted this expensive and intricate mode of conveyance, for one which is intelligible to all.

A common recovery is a judgment, obtained in a fictitious suit brought against the tenant of the freehold, in consequence of a default made by the person last vouched to warranty, in such suit. The origin of common recoveries and the occasion of introducing them, Mr. Pigott tells us, has been much controverted amongst the learned. The most probable account seems to be, that they were originally the fruit of ecclesiastical ingenuity, designed to elude the statutes of *mortmain*. The religious houses, when prohibited from purchasing, used to set up a fictitious title to lands, which the owner had agreed to give, or sell to them, and upon an action brought by the religious houses to recover the lands, the person so agreeing to give or sell made no defence, and thus a collusive recovery was had.

The statute of Westminster the second, 13 *Edw.* 1, c. 32, put a stop to these practices; and in consequence feigned recoveries appear to have fallen into disuse, for a considerable time.

They were afterwards revived, and in modern times are used as a *mere form of conveyance*, allowed under certain circumstances of form and ceremony, to *tenants in tail in possession generally;* and to tenants in tail in remainder, *with the consent of the owner of the first estate for life*, to dispose of the estate at their pleasure, either by investing the fee simple in themselves, or transferring it to others.[11]

Though it has the form of a suit at law, the whole transaction is one *common assurance;* and the recoveror is a *creature and instrument* of the tenant in tail, for whose benefit the recovery is suffered.[12]

The mischiefs arising *form* the statute *de donis* doubtless were great; and, as the legislature could not be prevailed on to repeal it, these fictitious recoveries to elude it, were sanctioned. That they were in direct contravention of the express words and clear meaning of a subsisting law, cannot be denied.

However, as the law is now established by legal adjudications, corroborated indirectly by legislative declarations, that a tenant in tail in possession, or a tenant in tail in remainder, with the consent of the tenant in the freehold, may dispose of the estate; there seems to be no good reason to prevent him from doing *directly*, that which may be effected by an expensive and almost unintelligible process, of which, if we except the judges and counsel, the *actores fabulæ* understand nothing.

12. *Taylor v Horde*, 1 Burr. 60.

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The abolition of this absurd mode of conveyance has long been desired and recommended in England, where the only objection seems to be, that thereby certain officers, and patentees, would lose the fees to which they are entitled, upon passing common recoveries.[13]

By an act of assembly of the 16th January, 1799, entitled, "*An act to facilitate the barring of entails*,"[14] it is declared, That any person or persons seised of any estate tail, in possession, reversion, or remainder, shall have full power to grant, bargain, sell and convey, any lands, tenements or hereditaments, whereof he, she, or they shall be so seised, by such manner and form of conveyance or assurance as any person seised of an estate in fee simple may or can convey such estate: Provided, that in all conveyances and assurances made by virtue of that act, the grantor shall state it to be his intention thereby to debar any estate tail in possession, reversion, or remainder, that he has in the lands, tenements or hereditaments, so intended to be granted. And the act further provides, that every conveyance or assurance made by virtue thereof, being first proved or acknowledged agreeably to law, shall, *in open court on motion*, be entered on the records of the supreme court, or of the court of common pleas, for the county in which the lands or tenements so granted lie, in the manner commonly used with respect to sheriffs' deeds, and shall also be *recorded within six months*, next after the execution of the said conveyance or assurance, in the county where the lands or tenements so granted shall lie.

The act further empowers persons, who have heretofore irregularly conveyed entailed estates, to confirm such estates to the purchasers; provided that *at the time* of such irregular conveyance, the grantor could have barred the entail, by any mode of common recovery, or by any ways and means whatsoever.

13. Obs. on the Stat. 23.

14. 3 State Laws, Sm. Ed. 338.

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DISTRESS.

STATUTE OF MARLEBERGE.[1]

* 52 HENRY III. CAP. IV. A.D. 1267.

A distress shall not be driven out of the county. And it shall be reasonable.

None from henceforth shall cause any distress that he hath taken, to be driven out of the county where it was taken; (2) and if one neighbour do so to another of his own authority, and without judgment, he shall make fine, (as above is said) as for a thing done against the peace: (3) Nevertheless, if the lord presume so to do against his tenant, he shall be greviously punished by amerciament. (4) Moreover, distresses shall be reasonable, and not too great. (5) And he that taketh great and unreasonable distresses, shall be greviously amerced for the excess of such distresses.

Fitz. Bar. 120, 275—29 Ed. 3, c. 25, N. 13. *This seems to be a mistaken reference, there being no statute in* 29 *Ed.* 3. *Kel.* 50—*Enforced by* 3 Ed. 1, c. 16—*Enforced and amended by* 1 *& 2 P. & M. c.* 12. Distresses shall be reasonable. *Enforced by* 28 Ed 1, s. 3, c. 12—2 Inst. 106—*see the references to cap.* 1.

It appears that in those days, the most high-handed oppressions had been carried on by the barons, and other powerful men; who, refusing to submit themselves to the laws, and contemning an appeal to them, gratified their revenge,[2] their avarice, and their caprice, without restraint.

It had been long felt, as a grievance, that distresses were most oppressively used; and if complaint was made of the oppression, the barons insisted upon determining the complaint against their own officers, in their own courts, and would not permit the king's courts to hold cognizance. Those powers which they had failed to obtain when the statute of *Merton* was passed,[3] they usurped during the troubles which succeeded that period.

The first and third chapters of this statute provide for the punishment of those who make an unlawful distress; and the act in text contains very salutary provisions on the subject of distresses, where they lawfully might be made.

1. The statute of Marleberge is the last that was made in the long reign of Henry III. It consists of XXXIX. chapters, and contains many judicious regulations. Barrington on the Stat. 48.

2. 52 Henry III. c. 1. *Edictum de Kenilworth.*

3. A.D 1236. Thirty-one years prior to the passing of the act in the text. *Obs. on the Stat.* 48.

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At the common law, a man might have driven, or carried a distress whither he pleased, which was very mischevious;—because, if cattle were taken, the owner was bound to *find* them, and to give them sustenance if impounded in a pound overt; and yet, when they were *esloined* into another county, by common intendment, he could have no knowledge where they were, and of course might frequently be unable to replevy them.[4]

Though the act speaks of *driving* a distress, which would seem to refer to living animals, yet it extends to the distraining of any goods and chattels whatever.[5]

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* 52 HENRY III. CAP. XV. A.D. 1267.

In what places distresses shall not be taken.

It shall be lawful for no man from henceforth, for any manner of cause, to take distresses out of his fee, nor in the king's highway, nor in the common street, but only to the king or his officers having special authority to do the same.

8 Co. 60—7 H. 7. 1—22 Ed. 4. 49—Fitz. Barr 281—Fitz. Trespass 188—Fitz. Brief 511, 842—Fitz. Avowry 87, 232—2 Inst. 133—Rast. 226—Regist. 98, 183—9 Ed. 2, st. 1, c. 9—2 Inst. 131—Cro. Eliz. 710.

The first branch of this statute is in affirmance of the common law; according to which, no subject[6] can regularly distrain out of his fee and seigniory. If he should do so the tenant may either have an action of trespass, at the common law, or an action upon this statute.[7] Yet, if either after distress made, or after the lord comes to distrain, the cattle should be driven out of his fee, by the tenant, they may be taken any where.[8]

The second branch of the statute prohibits the taking of distresses in the public highways, which perhaps never was lawful; unless indeed the cattle had been driven there by the tenant, to avoid the distress.

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* 1 & 2 PHILIP & MARY. CAP. XII. A.D. 1554.

An act for the impounding of distresses.(L

For the avoiding of grevious vexations, exactions, troubles and disorder in taking of distresses, and impounding of cattle, (2) Be

4. 2 Inst. 106—Gil. Dist. 22.
5. ib. ib.
6. The king, by his prerogative, might distrain out of his fee and seigniory.
7. 2 Inst. 131.
8. *Gil. Distresses* 10—*2 Inst.* 131.
L) "Only the first section of this statute is in force." *Report of the Judges.*

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it enacted by the authority of this present parliament, That from and after the first day of *April* next coming, no distress of cattle shall be driven out of the hundred, rape, wapentake or lathe where such distress is or shall be taken, except that it be to a pound overt within the same shire, not above three miles distant from the place where the said distress is taken: (3) And that no cattle or other goods distrained or taken by way of distress for any manner of cause at one time, shall be impounded in several places, whereby the owner or owners of such distress shall be constrained to sue several replevies for the delivery of the said distress, so taken at one time; (4) upon pain every person offending contrary to this act, shall forfeit to the party grieved, for every such offence, an hundred shillings, and treble damages.

Where distresses taken shall be impounded—52 H. 3, c. 4—3 Ed. 1, c. 16—Cok. Ent. 43—Rast. 164—Cro. El. 480, 646—March 56—2 Leon. 52—Moor 453—Goldsb. 100, pl. 5, 145, pl. 64—*Dyer* 237, pl. 33. *See* 2 *Will & Mary sess.* 1, *c.* 5—8 *Anne c.* 14—11 *Geo.* 2, *c.* 19, *containing further directions concerning distresses.*

This statute was designed for the benefit of tenants, that they might know where to find and replevy the distress. Subsequent regulations, which have been made on this subject, will be noticed hereafter.

The law of distress is a subject of great use and importance, and deserves particular notice.

A distress, *districtio*, is "The taking a personal chattel out of the hands of the wrong doer, into the possession of the party injured, to procure a satisfaction for the wrong committed."[9]

There are several causes for which a distress may be taken.

1. The most usual is the non-payment of *rent:* By the common law, distresses were incident to every *rent-service*, and by particular reservation to *rent-charges* also, but not to *rent-seck*,[10] till the 4 *Geo. II. c.* 28, extended the remedy to all rents alike, and thereby abolished all material difference between them. That statute does not extend to Pennsylvania, but the act of assembly of 1772 makes provision equally effectual on this subject; permitting the distress and sale of goods "for any rent reserved and due upon any demise, lease or contract whatsoever.[11]

9. Gil. Distresses 1—3 Black. Com. 6. The *thing itself* taken by this process, as well as the *process*, is frequently called a *distress*.

10. 2 Black. Com. 42—3 Black. Com. 6. *Rent-service* is so called because it hath some corporeal service incident to it. A *rent-charge* is where the owner of the rent hath no further interest, or reversion expectant in the land. As where one conveys the fee simple, reserving a certain rent, and adds to the deed a covenant or clause of distress, the land in such case is liable to distress, not of common right, but by virtue of the clause in the deed. If a rent is reserved by deed, but without a clause of distress, it is called *rent-seck*, *redditus siccus*, or barren rent.

11. 1 State Laws, Sm. Ed. 376.

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2. Distresses might be made by the common law, for neglecting to do suit at the lord's court, or withholding certain personal services.

3. For amercements in a court leet, a distress was of common right.

These two latter causes of distress could not exist in Pennsylvania.

4. Another injury for which a distress might be taken is, where a man finds beasts of a stranger wandering on his grounds, *damage feasant;* that is doing him damage by treading down, or otherwise destroying or injuring his grain, grass, or the like; in which case the owner of the soil may distrain them, till satisfaction be made for the injury sustained.

5. Lastly, for several duties and penalties inflicted by statute, remedy by distress and sale is given; as for non-payment of taxes, &c.[12] These distresses were analogous to the common law process of execution, by seizing and selling the goods of the debtor under a writ of *fieri facias.*

Secondly; as to the things which may be distrained. The general rule is, that all personal chattels are liable to be distrained.—Yet to this rule there are exceptions: certain articles being protected and exempted from being distrained. As,—

1. Things wherein no one can have an absolute, or valuable property;—e. g. dogs, cats, and animals *feræ naturæ*, can't be distrained for rent. But when the reason of the rule ceases it no longer applies, for deer kept in a private inclosure, for sale or profit, may be distrained for rent.[13]

2. Any thing in the personal use and occupation of a man is, for the time privileged and protected from a distress, as an ax or spade, with which one is labouring,—a horse, whilst a man is riding him. Some have thought that horses drawing a cart loaded with corn, though one be riding in the cart, may be distrained for rent, and for that purpose severed from the cart, if the person distraining does not choose to take the cart and corn, as well as the horses, all of which it seems are equally liable to the distress.[14] And it is said in some of the books, that a horse *damage feasant* may be distrained although a rider be upon him; but the law appears to be otherwise. Such a distress would be clearly illegal.[15]

3. There are certain things, the property of strangers, privileged from distress, for the sake of trade and commerce; as cloth at a tailor's, a horse at a smith's shop, a horse at a public inn, &c. cannot be distrained for rent due by the persons having the tem-

12. See 3 St. Laws, Sm. Ed. 398, 399—3 Black. Com. 7.

13. 3 Black. Com. 8.

14. See 2 Keb. 529, 596—1 Sid. 422, 440, in which latter book the reporter makes a query whether the man's being on the cart should not privilege the whole team. Harg. Co. Lit. 48.a

15. *Storey v Robinson et al.* 6 Durn. & East 138—1 Roll. Abr. 664, pl. 4. and the case of 7 E. 3. Fitz. Abr. *Avowry*, 199. Harg. Co. Lit. 47.a n. 12, and 486, n. 13. The error seems to have arisen from that fountain of errors, the dictums of judges. It was an extra-judicial opinion of Ld. Ch. J. *Kelyng* in 1 *Sid.* 440, and has been adopted by Sir Will. Blackstone (3 Com. 8) and others.

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porary charge and custody of such property. But it would seem that a person's chariot, standing at a common *livery stable*, is liable to be distrained for rent due from the keeper of the stable.[16]

But, generally speaking, whatever goods and chattels are found on the premises, whether they belong to the tenant or to a stranger, are liable to be distrained for rent; otherwise a door would be open to infinite frauds upon the landlord.

In relation to the beasts of a stranger found upon the land, a distinction is to be observed, if they came there with the consent of the owner they are liable to be distrained, but if they got upon the land against his consent, they are not distrainable, till after they have been *levant and couchant (levantes et cubantes)* on the land, which in general is held to be one night at the least, nor even then are they distrainable, unless, on notice, the owner neglects to remove them, if they got upon the land in consequence of the insufficiency of the fence. On the other hand, if they came upon the land through the default of their owner, as by breaking a sufficient fence, they are distrainable, immediately as they enter upon the land.[17]

4. Some other things are privileged by the ancient common law, as the tools and utensils of a man's trade,—beasts of the plough, and sheep.[18] But as such things may be taken in execution for debt, so they may be for distresses authorised by statute, which partake of the nature of executions. The reason they were privileged seems to have been, that as the distress at the common law was merely held in pledge, to enforce the payment of the rent, and not taken as a satisfaction for its non-payment, the very end of the distress would be counteracted, by depriving the party of the instruments, and means of paying it.

5. By the common law nothing could be distrained for rent, which could not be rendered again in as good plight, as when distrained; for the distress being only in the nature of a pledge, or security, ought to be restored in the same plight, when the debt is paid. Therefore sheaves of corn, &c. could not be distrained.—But by the act of 21st March, 1772,[19] it is declared, that any cattle or stock of the tenant, feeding and depasturing upon all, or any part of the premises demised, and also all sorts of corn and grass, hops, roots, pulse, or other produce whatsoever, which shall be growing thereon, may be seized as a distress for rent arrear, and sold towards satisfaction of the same; and the purchaser of such corn or other produce, shall have free egress and regress to and from the same when growing, to repair the fences from time to time, and when ripe, to cut, gather, make, cure, and lay up and thresh, and after to carry the same away, in the same manner as

16. See the case of *Francis v Wyatt*, 3 Burr. 1498, where this subject is very fully and ably discussed; and in which the court, after hearing two arguments, appeared strongly inclined to support the distress. Harg. Co. Lit. 48,b n. 14.

17. Harg. Co. Lit. 47,a n. 3.

18. 3 Black. Com. 9.

19. 1 State Laws, Sm. Ed. 371-2.

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the tenant might have legally done had such distress never been made.

6. Lastly, things attached to the freehold cannot be distrained, as windows, doors, mill-stones and the like.

Neither are such things liable to be distrained if detached from the freehold, for a temporary purpose, as the sash of a window to be cleaned or repaired, or a mill-stone, thrown out for the purpose of being picked.[20]

The law of distresses for rent is greatly altered from what it was at common law. A distress is no longer taken as a pledge, *to enforce the payment*, but as a satisfaction for the *non-payment* of rent.

Such distresses must be made in the day time, on the demised premises, or upon commons appendant, or appurtenant thereto, unless where the property has been clandestinely removed therefrom, to prevent the landlord from distraining, in which case he is empowered,[21] at any time within thirty days, to distrain the chattels so removed, wherever they may be found; unless the same should have been sold *bona fide*, and for a valuable consideration, to one not party to the fraud, before such seizure.

The distress may be made by the landlord himself, or he may empower any individual to make it as his bailiff. The agency of a constable, or other peace officer, is not necessary till the time when the goods are to be appraised.

The whole rent due ought to be distrained for at once; and not a part at one time and a part at another; but if a distress made for the whole, turns out to be insufficient, either from the circumstance of not finding a sufficient distress on the premises, or mistaking the value of the property seized, a second distress may be made, to supply the deficiency.

A distress must be made for the precise sum due; and the landlord cannot add *interest*, to the arrears of the rent.[22] Yet in an action of covenant for rent, the jury are at liberty to give *interest*, as they may upon an open account, where, by the usual course of dealing, or by express agreement, a certain time is fixed for payment.[23]

Notice of the *taking*, with the *cause of the distress*, must (at the time of making it) be left at the mansion house, or other most notorious part of the premises charged with the rent; and if the owner of the goods shall not replevy the same, within *five* days, the person distraining may, with the assistance of a sheriff or constable, cause the distress to be appraised by two reputable freeholders; and such sheriff or constable may, after six days public no-

20. Gil. Distresses 13. For this reason corn growing could not be distrained till authorised by the statute 11 *Geo. II. c.* 19, in England, and in Pennsylvania by the act of 1772.

21. By the act of 1772, § 5. These provisions in the § V. and § VI. of the act are nearly copied from the stat. 11 *Geo.* 2, c. 19.

22. *Bautleon v Smith*, 2 Binney's Rep. 153.

23. 6 Binney's Rep. 159—*Obermyer v Nichols.*

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tice, sell the same for the best price that can be gotten therefor; and if there be any overplus after satisfying the rent, and the charges of the distress, appraisement and sale, the same shall remain in the sheriff's or constable's hands, for the owner's use.

If distress be made when no rent is in arrear, the tenant shall recover in damages double the value of the goods distrained, and full costs.[24]

If a distress be *excessive*, the remedy is by special action on the statute of *Marlebridge*.[25]

If a distress be driven out of the county, the party grieved shall have a suit founded on the statute 1 & 2 P. & M. to recover the penalty.[26]

By the act of 6 *April*, 1802, purchasers at sheriff's sale, after receiving a deed, shall be considered as landlords, of tenants holding under the defendants in the execution. If the tenant shall not, within three months after demand made, give security to such purchaser, for the mesne profits and rents, that may accrue after such notice, until the suit for the recovery of the possession be determined, the purchaser may proceed by distress, for the recovery of such mesne profits or rent.

24. 3 St. Laws, Sm. Ed. 371.
25. 3 Black. Com. 12.
26. 1 Com. Dig. 229.

DOWER.

* 9 HENRY III. CAP. VII. A.D. 1225.(M

A widow shall have her marriage, inheritance, and quarentine. The king's widow, &c.

A WIDOW, after the death of her husband, incontinent, and without any difficulty, shall have her marriage, and her inheritance, (2) and shall give nothing for her dower, her marriage, or her inheritance, which her husband and she held the day of the death of her husband, (3) and she shall tarry in the chief house of her husband by forty days after the death of her husband, within which days her dower shall be assigned her (if it were not assigned her before) or that the house be a castle; (4) and if she depart from the castle, then a competent house shall be forthwith provided for her, in the which she may honestly dwell, until her

M) "That part only of this statute is in force which provides, that a widow shall tarry in the chief house of her husband forty days after her husband's death, within which days her dower shall be assigned her." *Report of the Judges.*

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dower be to her assigned, as it is aforesaid; and she shall have, in the mean time, her reasonable estovers of the common; (5) and for her dower shall be assigned unto her the third part of all the lands of her husband, which were his during coverture, except she were endowed of less at the church-door. (6) No widow shall be distrained to marry herself:* nevertheless, she shall find surety, that she shall not marry without our license and assent (if she hold of us) nor without the assent of the lord, if she hold of another.

Hobart 153—Dyer f. 76—Plow. 32—Brb. Dower 101—Regist. fol. 175—Co. Lit. 32b—2 Inst. 16—19 H. 6, f. 14. See 17 Ed. 2, c. 4, *for the oath of widows who hold in capite, not to marry without the king's licence.* *Add *while she chooses to live single.* Fitz. Dower 194, 196. *Enforced and amended by* 20 *H.* 3, c. 1, *which gives damages to the widows who are deforced of their dowers.*

This chapter of Magna Charta appears to be chiefly in affirmance of the common law; and was probably designed to prevent the abuses which had prevailed in respect to the assignment of dower; and possibly to enlarge the right.

Dower was intended for the sustenance of the widow, and the nurture and education of the younger children. In those days women very seldom had any personal estates, to entitle them to a *jointure* upon the marriage; and even where they might be entitled to some small portion, it seems to have been contrary to the customs of the northern nations for the husband to receive it.[1]—Amongst the Feudists the rule was, *Non uxor marito, sed uxori maritus affert;* and the reason was that the husband, and the eldest son of the family, being brought up in military exercise, the wife and youngest sons tilled and improved the lands, and found provisions for the army, in their expeditions, and having the third part in labour, she had the third part of the feud for the maintenance of herself and her younger children, during her life.[2]

This legal provision for the maintenance of the wife, became the more necessary, inasmuch as the husband was usually incapable of providing for her: the personal estates of the richest being, at that period, very inconsiderable; and before *trusts* were invented he could give her nothing during his life-time; nor could he provide for her by will; as lands could not be devised previous to the statute of Hen. 8.[3]

"*Marriage.*" In Ruffhead's edition, this is the translation given for "*maritagium,*" which is the word used in the original: this, however, is not the true import of the word. In Domesday book *dower* is called *maritagium*[4] It properly signifies, *a portion of land given in consideration of the marriage.* Such gifts usu-

1. "*Apud Gothos non mulier viro, sed vir mulieri dotem assignat, neconjux ob magnitudinem dotis insolescens, aliquando ex placida consorte protervа evadat, atque in maritum dominari conten-dit.*" Olaus Magn. Goth. Hist. p. 235—Barring. on the stat. 9.
2. Spel. tit. Dowrium 175.
3. Co. Lit. 32 b *in notis.*
4. Co. Lit. 32 b

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ally were made by some relative of the wife, to the husband with his wife, or to both of them; as *tali viro et uxori suæ, et eorum heredibus*, or *alicui mulieri ad se maritandum*: The gift might be made either before, or at the time of, or after the marriage contract.[5] In case of issue born alive, the donation remained to the husband during his life, and then reverted to the donor, unless by the terms of the gift it were to descend to the heirs of the donee; but if there were no issue born alive, the land reverted to the donor immediately on the death of the wife.[6]

Maritagium was of two kinds: it was free, or not free, *liberum*, or *servitio obligatum*. The words *in liberum maritagium*, in frank marriage, are technical and cannot be supplied by words equipollent; they create an estate of inheritance in the donees, who were free from all secular services belonging to the lord of the fee, as to perform no service down to the heir inclusive, and the fourth degree.

These gifts *in maritagium* corresponded in some degree with the *dower* of the Civilians, which signified the portion which the wife brought to her husband, either in land or personal estate; of which he had the usufruct during his life, without any power however to aliene the land, and although he might transfer the personal property; and upon the dissolution of the marriage contract, either by the death of the husband or divorce, the whole reverted to the wife.[7] Donations *inter sponsum et sponsam propter nuptias* began about the time of *Constantine*, and were made *before* marriage; but by the Justinian constitution they were good *after* marriage, and were gifts from the husband to the wife, which upon the dissolution of the marriage came back to the husband, as the dower did to the wife.[8]

The quarentine of the widow was declared, or perhaps first established, by this statute. For according to the old law before the conquest, it would seem that the widow was to continue in her husband's house a whole year after his death, (the *annus luctus* mentioned in the Danish and Swedish laws) within which time her dower was to be assigned, and if she married before the year expired, she forfeited her dower, and whatever her husband had left her.

Two reasons are assigned for the allowance of the widow's quarentine, the one is, to prevent the imposition of a suppositious child; a deceit, as it is called, not unfrequently practised in those times, as may be inferred from the old writ *de ventre inspiciendo*.[9] Another and perhaps a better reason is, a compliance with decency and decorum upon so melancholy an occasion; that widows, who at such time are supposed to be under great affliction, may not be compelled to appear abroad and struggle for a maintenance.

5. 1 Reeve 122, 297.
6. 1 Reeve 122, 297.
7. Vin. 249—Honorius 114, 115—Corvin l. 23, tit. 3.
8. Vin. 245—Inst. of Imp. law 43, 117, 118, 119.
9. Obs. on the Stat. 19.

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During her quarentine she shall have reasonable estovers, by which is meant sustenance of the property of her husband; in other words, she is for that period to be supplied with all necessaries. If she be ousted of her quarentine, she is entitled to a writ *de quarentena habenda*, directed to the sheriff, which gives him a commission to make process against the defendant, returnable in two or three days, and put her in possession.[10]

On the other hand, if she voluntarily abandon the house, she cannot return, although within forty days; so she loses her quarentine if she marries within the time.

It would have been useless to insert in the text the latter clause of this statute, which provides, that widows shall not be distrained to marry, &c. were it not that this furnishes additional evidence, that the explanation given to the first part of the statute by Sir Edw. Coke[11] is incorrect. A widow might indeed have her *maritagium* or land held in frank marriage; but she could not "*marry where she pleased, without any assent of her lord;*" but must obtain such consent, for which the lord took care to be well paid.[12]

10. 2 Inst. 17—Hughes Com. on Orig. Writs 194—Co. Lit. 34b—Fitz. N. B.
11. 2 Inst. 16.
12. Obs. on the Stat.

STATUTE OF MERTON.‡

* 20 HENRY III. CAP. I. A.D. 1235.

A woman shall recover damages in a writ of dower.

FIRST, Of widows which after the death of their husbands are deforced of their dowers, and cannot have their dowers or quarentine without plea, whosoever deforce them of their dowers or quarentine of the lands, whereof their husbands died seised, and that the same widows after shall recover by plea; (2) they that be

‡ Though called a *statute*, this, like many others in this century, seems to be merely an *ordinance*: the consent of the *commons* being wanting. According to *Elfinge* the distinction is this: "What begun in the *commons* was only termed a *petition* (for they had no power to ordain) and what begun in the *lords* was styled an *ordinance*. *Actus parliamenti* was an act made by the lords and commons; and it became *statutum* when it received the king's consent." Elfinge p. 26—Bar. 35.

It is called the statute of *Merton* from the parliament or rather council sitting at the priory of Merton in Surrey, which, according to Dugdale, belonged to the *canones regulares*. 2 Inst. 79—Barrington 35—see 1 Reeve's E. L. 260.

Notwithstanding some of the priories might have had very large and spacious houses, yet it is not probable that there could have been accommodation for what is now called a parliament, with the intervention of the *commons*. Bar. 35.

In all the ancient palaces of the kings of England, there was a large room or hall for the accommodation of what was then called a parliament, and which went by the name of the *parliament chamber*.

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convict of such wrongful deforcement, shall yield damages to the same widows; that is to say, the value of the whole dower to them belonging, from the time of the death of their husbands unto the day that the said widows, by judgment of our court, have recovered seisin of their dower, &c. (3) and the deforcers nevertheless shall be amerced at the king's pleasure.

Dyer 284, pl. 33—4 Co. 80—14 H. 8, c. 25—38 E. 3. 13—11 H. 4. 39—Fitz. Dower 24, 46, 59, 73—Fitz. Damage 10, 83, 119—3 Bulst. 278—V. N. B. fol. 7—Bast. Ent. 22—Co. Lit. 32b—2 Inst. 80—9 H. 3, *st.* 1, *c.* 7. *See* 51 *H.* 3, *st.* 3—35 *H.* 3, *c.* 12—32 *H.* 8, *c.* 21—16 *Car.* 2, *c.* 6, *assigning days in dower.* 13 *Ed.* 1, *st.* 1, *c.* 4, *for the recovery of dower notwithstanding a feigned recovery against the husband by default.* 13 *Ed.* 1, *c.* 34, *for the loss of dower by adultery.* 27 *H.* 8, *c.* 10, § 6, *for barring dower by jointure.* 1 *Ed* 6, *c.* 12, § 17, *securing dower notwithstanding the treason or felony of the husband.* 5 *& 6 Ed.* 6, *c.* 11, § 13, *altering the foregoing.* 3 *Jac.* 1, *c.* 5, § 13, *barring popish recusants from dower. And* 4 *W. & M. c.* 16, § 5, *securing dower to widow of mortgagor.*

We have seen that by *magna charta* it was provided, that widows should give nothing for their dower; and further to secure a prompt assignment of dower, it was by this statute declared, that whosoever should deforce them of their dower should yield damages to the value of the dower, *from the time of the death of the husband*: They were also to be in *misrecordia regis.*[13]

Damages are not recoverable either at the common law or under any statute in a *writ of right of dower;*[14] but in an action of dower, *unde nihil habet*, by this statute, damages are recoverable.

It is necessary to the entitling of a widow to *damages*, that she should make a demand of dower, previous to the bringing of an action of dower *unde nihil habet;*[15] otherwise, as the statute of Merton only gives damages *where a widow cannot have her dower without plea*, the heir may plead in bar of damages, that he has always been ready to assign dower.[16] To which the widow may reply a *demand*, and if issue be joined upon the replication, and it be found for her, she will be entitled to damages.[17] A demand *in pais* before good testimony is sufficient.[18]

There are in a writ of dower *unde nihil habet* the words *ultra reprisas;* and a deduction therefore ought to be made for land taxes, repairs and chief rents.[19]

Notwithstanding the rule, that in a mixed action the damages in a writ of enquiry ought only to be assessed to the time of awarding the writ, yet in an action of dower *unde nihil habet* it seems damages shall be assessed to the time of the inquisition.[20]

It is necessary in this action, that the jury should find that the husband died seised; and for want of such finding, a judgment for damages was reversed.[21]

13. 1 Reeve's Eng. Law 262.
14. Sayer's Damages 23—1 Inst. 32.
15. Sayer's Damages 23—1 Inst. 34.
16. 1 Inst. 24—Say. Dam. 25, 26.
17. Say. 25, 26.
18. 2 Bac. Abr. 149.
19. 2 Barnes Notes 191. *Peurice v. Peurice*—Say. 26.
20. 10 Rep. 117—Say. 27—1 Leon. 56.
21. 2 Bac. Abr. 149.

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The heir, upon the return of the summons (but not afterwards) may plead *tout temps prist*. The feofee of the heir cannot plead *tout temps prist*, because he had not the land all the time since the death of the ancestor, and therefore she shall recover the mesne profits and damages against him; and if he hath not provided his indemnity and recompense against the heir, it is his own folly.[22]

Damages in dower *unde nihil habet*, are like damages in trespass, which die with the party, and if the tenant dies before judgment for the damages, the judgment for the dower remains as at the common law.[23]

If the widow recover, and thereupon error be brought and judgment obtained, and after which she sues out a writ of enquiry of damages, and before damages are actually assessed, the tenant dies, the damages are lost. A *scire facias* against the executor or administrator is not maintainable.[24]

To entitle the widow to damages, 'tis necessary the jury should find the husband died seised. If the husband seised in fee aliens and takes back an estate for life, the wife shall recover dower, but no damages; because his dying seised was only of an estate of freehold; but if he had made a lease for years only, rendering rent, she shall recover a third part of the reversion with a third part of the rent, and damages.[25]

If dower be assigned to the widow, in consequence of a decree of a court of equity, she is not entitled to damages, for the statute gives damages only where a widow cannot have her dower without plea.[26]

It is demandable of the heir though he be within age and should have a guardian. *Not assigning dower* upon request, is a refusal in law, so as to entitle the widow to damages.[27]

22. 2 Bac. Abr. 149—1 Inst. 32 b
23. 1 Leo. 38—*Atway v Roberts*—3 Leo. 275—Say. 28.
24. 1 Leo. 38—*Atway v Roberts*—3 Leo. 275—Say. 28.
25. Co. Lit. 32b in notis &c.
26. 1 inst. 35.—Say. Dam. 24.
27. 3 Leo 409—2 Bac. Abr. (Dower I.) p. 159 *in notis*.

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* 3 EDWARD I. CAP. XLIX. A.D. 1275.

STATUTE OF WESTMINSTER THE FIRST.

The tenant's plea in a writ of dower.

In a writ of dower, called *unde nihil habet*, the writ shall not abate by the exception of the tenant, because she hath received her dower of another man before her writ purchased, unless he can shew that she hath received part of her dower of himself, and in the same town, before the writ purchased.

2 Inst. 261—Regist. 170, 171—Fitz. Vouchier 136—Fitz. Dower 75, 76, 86, 89, 114—Kel. 128. *See* 13 *Ed.* 1, c. 4. *where wife is endowable of lands recovered against the husband by covin, &c. See also* 4 & 5 *W.* & *M.* c. 16, *for securing dower to widows of mortgagor.*

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At the common law, if a woman had accepted any part of her dower, though never so small, of any one tenant, in any one county or town, she had no other remedy for the residue, but by a writ of right of dower; for if she brought a writ of dower *unde nihil habet*, it was a good plea in abatement, that she had had accepted such a part of such a tenant, in such a town or county, which being a great mischief to the women, is remedied by this statute, which provides that it shall be no plea in abatement, to say that she hath received part of her dower of any other person, before the writ purchased; and this extends as well to guardian in chivalry, as to the tenant of the land, because such guardian is to render her dower.[23]

23. 2 Inst. 261—Brac. lib. 4, fol. 311, b ¶ 15.

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* 13 EDWARD I. STAT. I. CAP. IV. A.D. 1285.(x)

STATUTE OF WESTMINSTER THE SECOND.

Where the wife shall be endowable of lands recovered against her husband. Where the heir may avoid a dower recovered. A remedy for particular tenants losing by default.

In case where the husband, being impleaded for land, giveth up the land demanded unto his adversary by covin; after the death of the husband, the justices shall award the wife her dower, if it be demanded by writ. (2) But in case where the husband loseth the land in demand by default, if the wife, after the death of her husband, demandeth her dower, it hath been proved, that some justices have awarded unto the woman her dower, notwithstanding the default which her husband made, other justices being of the contrary opinion, and judging otherwise. To the intent that from henceforth such ambiguity shall be taken away, it is thus ordained in certain, That in both cases the woman demanding her dower shall be heard. (3) And if it be alledged against her, that her husband lost the land, whereof the dower is demanded by judgment, whereby she ought not to have dower, and then it be enquired by what judgment, and it be found that it was by default, whereunto the tenant must answer; then it behooveth the tenant to answer further and to shew that he had right, and hath in the

(x) This statute is in force, except that part which relates to proceedings in a writ of right. *Report of the Judges.*

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foresaid land, according to the form of the writ that the tenant before purchased against the husband. (4) And if he can shew that the husband of such wife had no right in the lands, nor any other but he that holdeth them, the tenant shall go quit, and the wife shall recover nothing of her dower; which thing if he cannot shew, the wife shall recover her dower. (5) And so in these cases and in certain other following, that is to say, When the wife, being endowed, loseth her dower by default and tenants in free marriage, by the law of *England*, or for term of life, or in feetail, divers actions do concur for such tenants, when they must demand their land lost by default: (6) And when it is come to that point, that the tenants must be compelled to shew their right, they cannot make answer without them to whom the reversion of right belongeth; therefore it is granted unto them to vouch to warranty, as if they were tenants, if they have a warranty. (7) And when the warrantor hath warranted, the plea shall pass between him that is seised and the warrantor, according to the tenor of the writ that the tenant purchased there, and by which he recovered by default; (8) and so from many actions at length they shall resort to one judgment, which is this, That the demandants shall recover their demand, or the tenants shall go quit. (12) And where sometime it chanceth that a woman, not having right to demand dower, the heir being within age, doth purchase a writ of dower against a guardian, and the guardian endoweth the woman by favour, or maketh default, or by collusion defendeth the plea so faintly, whereby the woman is awarded her dower in prejudice of the heir; (13) it is provided, That the heir, when he cometh to full age, shall have an action to demand the seisin of his ancestor against such woman, like as he should have against any other deforcor; yet so that the woman shall have her exception saved against the demandant, to shew that she had right to her dower, which if she can shew, she shall go quit and retain her dower, and the heir shall be grievously amerced, according to the discretion of the justices; and if not, the heir shall recover his demand, &c. (14) In like manner the woman shall be aided, if the heir or any other do implead her for her dower, or if she lose her dower by default, in which case the default shall not be so prejudicial to her, but that she shall recover her dower, if she have right thereto, and she shall have this writ:

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II. *Præcipe A. quod juste, &c. reddat B. quæ fuit uxor F. tantam terram cum pertinentiis in C. quam clamat esse rationabilem dotem suam, vel de rationabili dote sua, et quod prædictus A. ei deforceat, &c.* (2) And to this writ the tenant shall have his exception, to shew that she had no right to be endowed; which if he can verify, he shall go quit; if not, the woman shall recover the land whereof she was endowed before. (3) And whereas before time, if a man had lost his land by default, he had none other recovery than by a writ of right, which was not maintainable by any that could not claim by meer right, as tenants for term of life, in free marriage, or in tail, in which estates a reversion is reserved; (4) it is provided, That from henceforth their default shall not be so prejudicial, but that they may recover their estate by another writ than by a writ of right, if they have right. (5) For land in free marriage, lost by default, such a writ shall be made:

Præcipe A. quod juste, &c. reddat B. manerium de D. cum pertinentiis, quod clamat esse jus et maritagium suum, et quod A. ei injuste deforceat.

(6) Likewise of land for term of life, lost by default, this writ shall be made:

Præcipe A. quod juste, et sine dilatione, &c. reddat B. manerium de D. cum pertinentiis, quod clamat tenere ad terminum vitæ suæ, et quod prædictus A. ei deforceat. Likewise,

(7) *Quod clamat tenere sibi, et hæredibus de corpore suæ legitime procreatis, et quod prædictus A. ei deforceat.*

The wife shall be endowable, though the land be recovered against her husband by covin, or by default. 2 Inst. 347—14 H. 4, f. 31—50 Ed. 3, f. 7. *See* 4 & 5 *W. & M. c.* 16, § 5, *securing dower to widow of mortgagor.* Fitz. Dower 80, 140, 173. A remedy for tenants for life, &c. which do lose their land by default. Fitz. Voucher 46, 59, 159, 165, 186, 261, 275, 276, 309—11 Co. 62—Hob. 299. A woman's dower recovered against her by default. 6 Co. 8—Co. Lit. 131,b 354,b 355,a 356.a Quod ei deforceat for tenants in frank marriage. For tenant for life or in tail. Fitz. Quod ei deforceat 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 17—Cro. Car. 445—F. N. B. 155b—Regist. 171,b 230—Rast. 491.

The mischief before this act was, that women were barred of their dower, in consequence of feigned recoveries had against the husbands by default. This statute enables them to obtain their dower notwithstanding such recovery. Indeed before this statute, if in an action of dower, the tenant pleaded a recovery against the husband in bar, the demandant might reply that it was obtained by fraud, or by collusion, or by consent of the husband: but if it

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were by default without covin, the better opinion was that it barred the woman.[1]

* 13 EDWARD I. STAT. I. CAP. VII. A.D. 1285.

Admeasurement of dower for the guardian and the heir, and the process therein.

A WRIT of *admeasurement of dower* shall be from henceforth granted to a guardian; (2) neither shall the heir, when he cometh to full age, be barred by the suit of such a guardian, that sueth against the tenant in dower feignedly, and by collusion, but that he may admeasure the dower after, as it ought to be admeasured by the law of *England*. (3) And as well in this writ as in a writ of *admeasurement of pasture*, more speedy process shall be awarded than hath been used hitherto; (4) so that when it is come unto the great distress, days shall be given, within which two counties may be holden, at the which open proclamation shall be made, that the defendant shall come in at the day contained in the writ, to answer to the plaintiff; at which day, if he come in, the plea shall pass between them; (5) and if he do not come, and the proclamation be testified by the sheriff in manner abovesaid, upon his default they shall make admeasurement.

Process in a writ of admeasurement of dower or pasture—Fitz. Admeasure 3, 4, 5, 9, 10, 13, 17—7 Ed. 4. 22—18 Ed. 3. 30—Regist. 171, 297—2 Inst. 367.

The writ of *admeasurement of dower* lies at the common law, when the heir within age, or his guardian, assigns to the widow more land in dower than she ought to have. It might be maintained by the heir when he attained his full age, or as some have said, during his minority, where he himself had made assignment. But as the law stood before this statute, if the heir within age assigned dower *before the guardian in chivalry entered*, the guardian could not compel an admeasurement thereof. It was therefore now enacted, that a writ of admeasurement of dower should be granted to a guardian; and in case he prosecuted the writ collusively, the heir was not thereby barred from causing it to be admeasured, when he attained his majority.[2]

1. 2 Inst. 349. B. tit. *Admeasurement of dower* p. 348—
2. Co. Lit. 39a—2 Inst. 367—Fitz. N. 2 Bac. Abr. *Dower* (K) 151.

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If the guardian assigneth more dower than he ought, and he die, his heir shall have a writ of admeasurement.[3]

The writ of admeasurement of dower is *vicontiel*.[4]

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* 13 EDWARD I. STAT. I. CAP. XXXIV. A.D. 1285.(o

It is felony to commit rape. A married woman elopeth with an advouterer. The penalty for carrying a nun from her house.

It is provided, That if a wife willingly leave her husband, and go away, and continue with her advouterer, she shall be barred forever of action to demand her dower, that she ought to have of her husband's lands, if she be convict thereupon, except that her husband willingly, and without coercion of the church, reconcile her, and suffer her to dwell with him; in which case she shall be restored to her action.

If a wife elope with an advouterer, she shall forfeit her dower—1 Inst. 32—Regist. 57—2 Roll. 247—9 Ed. 4, f. 26—Pro. Coron. 203—Dyer 256—Fitz. Dower, 41, 72, 94, 119, 153—Fitz. Act. sur le stat. 12, 37.

At the common law elopement was no bar to dower, although a divorce *a mensa et thora causa adulterii* had been obtained.[5]

The words of the statute are in the conjunctive, "*si sponte reliquerit, et abierit, et moretur*, &c. yet she shall lose her dower, though she be carried off forcibly, if she remain willingly with the adulterer.[6]

It is not necessary that she should reside with the adulterer, in order to bar her of dower, under this statute.

3. 2 Inst. 367.

4. Fitz. N. B. 348.

5. Co. Litt. 33b—2 Inst. 433.

o) "That part only of this statute is in force, which enacts, that, 'if a wife willingly leave her husband and go away, and continue with her advouterer, she shall be barred forever of action to demand her dower that she ought to have of her husband's lands, if she be convicted thereupon, except that her husband willingly reconcile her, and suffer her to dwell with him, in which case she shall be restored to her action.'" *Report of the Judges.*

6. 2 Inst. 433—Vide Dyer 107. *A precedent of such an elopement pleaded, and issue taken upon the reconciliation of the husband, and there held that the husband cannot give in evidence any elopement but that pleaded.* See also, *The singular grant of John Cancoys, transferring his wife to one W. Paynel, set forth in the replication of the demandant to the plea of elopement.* It was held that the grant was void. 2 Inst. 433.

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Dower is that portion of the lands and tenements of the husband, to which, at his death, the wife is entitled, to hold for the term of her life.

To the consummation of dower three things are necessary; *viz.* 1, *Marriage*—2, *seisin*—and, 3, *death of the husband.*[7] The seisin may be either in *deed*, or in *law*. But of a seisin for an instant, as a vehicle of conveyance, a woman shall not be endowed.[8]

There are *five* species of dower mentioned by Littleton.[9] 1. By the *common law*. 2. By *custom of particular places*. 3. *Ad ostium ecclesiæ*. 4. *Ex assensu patris*. And, 5. *De la pluis beale*. This latter species of dower, being a consequence of the military tenures, was abolished with them.[10] Dower, by the common law, will be more particularly noticed hereafter. By *custom* of particular places in England, a woman might be endowed of the *whole*, of a *moiety*, or of but a *fourth-part*, of the husband's lands.[11]—Dower *ad ostium ecclesiæ*, or at the church door, was anciently the most usual kind of dower. It was made at the time of the marriage ceremony: When the husband (being of full age) openly declared the quantity and certainty of the lands, which his wife should have. He could not, in the times of feudal rigor, endow her with more than a third part of his lands, though she might be endowed with less.[12] The dower *ex assensu patris* (with the assent of the father) is a species of dower *ad ostium ecclesiæ*. It was made upon the like occasion, and at the same place, by a son, who upon his marriage, endows his wife, with his father's consent, of a parcel of his father's lands.[13] The two latter kinds of dower were considered preferable to dower at the common law, which was to be assigned to her by the heir, or his guardian, whereas the others being expressly designated and set apart by the husband in his life time, the widow might enter upon the lands without any assignment. It was formerly held that this specific endowment could not be evaded. But in the time of Edw. IV. we find it laid down by Littleton, that a woman might be endowed *ad ostium ecclesiæ* with more than a third part of her husband's lands, and of whatever she might be so endowed, she might after her husband's death elect to accept or refuse such dower, and claim her dower at the common law. This state of uncertainty is supposed to be the reason that those specific dowers ad ostium ecclesiæ and ex assensu patris, have fallen into disuse.[14]

By the *common law* the widow was dowable of one third part of such estates of inheritance, whereof the husband was seised *at the time of the marriage* and of none other.[15] But the statute 9 *H. III. c.* 7, would seem to have extended the right of dower, to all such lands as the husband was seised of *at any time during the coverture*.[16] Notwithstanding this provision however, the claim

7. Co. Litt. 31.
8. Co. Litt. 31—see 2 Black. Com. 132—Cro. Eliz. 503.
9. Co. Litt. 31, 32, 33, 34, 35.
10. ib. 39.b
11. ib. 38.b
12. 1 Reeve Eng. Law. 100.
13. 3 Black. Com. 133.
14. 2 Black. Com. 135.
15. 1 Reeve's Eng. Law 100—Glanv. l. 6, c. 1.
16. 1 Reeve's Eng. Law 212. This part of the statute is not reported to be in force:—Possibly it was overlooked.

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of dower was still held to be limited to the freehold of which the husband was seised at the time of the espousals.[17] And so the law appears to have been considered till the 13th year of Edw. I. Between that period and the latter part of the reign of Edw. III. a different doctrine prevailed: how it originated is not ascertained; but it became thoroughly established that the wife was entitled to be endowed of the third part of such lands or tenements of which her husband was *at any time during the coverture, seised in fee-simple, fee-tail-general, or as heir in special tail; and such is the law at the present day.*[18]

If the lands and tenements be susceptible of division, a third part shall be allotted to her by metes and bounds: if they cannot be divided still she shall be endowed in a special and certain manner, as if a mill; she shall have the third toll-dish, or the whole mill every third month; so she shall have the third part of the profits of a fair or office, &c.[19]

Generally speaking, she is entitled to be endowed according to the value of the lands, at the time her husband's interest therein ceased; whether by feoffment in his life time, or by his death.

But herein a distinction is to be taken, between improvements collateral to the land, as *buildings;* and those which arise from *cultivation;* and as to the latter, between the improved value in the hands of a *feoffee* of the husband, or in the hands of the *heir*. To collateral improvements she has no claim; but, if the land will admit of division, she shall be endowed of the third part, *salvis ædificiis;* and it is said, if such buildings enhance the value of the circumjacent lands, of which she is endowable, that she shall not recover damages;[20] and if the lands so improved will not admit of division, she shall be endowed of a third of the value, exclusive of the improvements.

As to improvements arising from *cultivation*, it seems she will not be benefitted by those which may have been made by the feoffee of her husband; but ought to recover the land according to the value at the time of the feoffment, or at least not exceeding such value; for the heir is not bound to warrant, except according to the value at the time of the feoffment; and it would not be reasonable that the widow should recover more against the feoffee than he could recover in value.[21]

But it would be otherwise if the *heir* should improve the value, by cultivation. As if the land be *marsh*, at the death of the husband; and the heir, by his industry, makes it good meadow, the widow shall have one third of the land, in its improved state.[22] For it was the duty of the heir to have assigned dower presently

17. Bracton, pursuing the idea of *Glanville*, defines dower to be *the third part of all the lands and tenements, which a man had in his demesne, and in fee, of which he could endow his wife, on the day of the espousals.* Brac. l. 2, c. 39, p. 92, ¶ 2.

18. 3 Reeve Eng. Law 332, 3—Co. Lit. 31.

19. Co. Lit. 32.b

20. Hughes' Com. on orig. writs c. 39, p. 196.

21. Harg. Co. Lit. *in notis*—Hal. MSS.

22. Hughes' Com. on orig. writs 196—Harg. Co. Lit. 32a—2 Inst. 81.

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on the death of his ancestor; and it was his own folly to improve lands which he wrongfully withheld from the widow.

If the land be *impaired in value*, in the time of the heir, the widow shall be endowed according to the value, as it was at the death of her husband; unless the delapidations were voluntarily by the heir, in which case she shall recompense herself in damages against him.[23]

Yet if the feoffee of the husband pull down houses, or otherwise voluntarily impair the value of the property in the life time of the husband, the widow has no remedy, because the destruction took place before her title was consummate.[24]

The remedy for dower was either by *writ of right of dower*, or by writ of dower *unde nihil habet:* It became necessary to have recourse to the former when she had a part of her dower from the same tenant in the same ville.[25]

The writ of dower *unde nihil habet*, is in common use at present. It is a writ of right, in its nature; and lies in all cases (with the exception above noticed) where dower is withheld.[26]

Dower may be barred in several ways. 1. By *elopement*, as has been remarked, under the statute, 13 *Ed.* 1, *st.* 1, *c.* 34. 2. By divorce, *a vinculo matrimonii*. 3. Aliening the land for a greater estate than the dowager hath therein, is a cause of forfeiture by the statute of Gloucester c. 7. The provisions whereof are amended and enforced by 11 Hen. VII. c. 20.[28] 4. *Alienage* is also a bar to dower. On this latter subject a case of considerable difficulty occurred in New York. John Kelly, a native of Ireland, removed to New York in 1760, where he continued to reside till his death in 1798. He left a wife in *Ireland* at the time he removed from that country, having been married in 1750: his wife was a native of Ireland, and never left that country, but continued a subject of the king of Great Britain. It was held by the Supreme court that the wife of Kelly, being an alien, could recover dower of those lands only of which Kelly was seised before the American revolution, or the 4th July, 1776; and not of those which he acquired after that period. From this opinion of the Ch. Justice one of the associate judges dissented, and held that she might recover dower of all the lands, of which the husband was seised at any time during the coverture.

Radcliff, Just. observed, "In general the severance or revolutions of empire ought not to affect the rights of individuals with regard to property, and I consider it not material whether the right be contingent or absolute. It is sufficient that it had a commencement or inception, and actually attached to a specific subject. Had Kelly, previous to July '76, returned to Ireland, and never become a citizen of the United States, his rights to the lands

23. 2 Bac. Abr. tit. *Dower* B. 5, p. 129.
24. 2 Bac. Abr. tit. *Dower* B. 5, p. 129—Perkins 329.
25. Fitz. N. B. 16, c. 3—Black. Com. 183—2 Inst. 261—Reg. 3.
26. Fitz. N. B. 346—3 Black. Com. 183.
28. See the stat *infra*, tit. *Estates for life*, &c.

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here vested, previous to that period, would not have been impaired by the revolution. And if so, it would seem equally reasonable that the contingent right of the wife should not be affected. Why should the alien husband acquire by the revolution a greater power over the estate, merely because his wife was an alien also?"

Although the right of Kelly to land acquired previous to the revolution, would remain, yet his ability to acquire a title to more land here would have been done away, in consequence of his being an alien. And if he being an alien could acquire nothing, would not the same reason exclude the wife from obtaining any interest in lands here? This appears so obvious, that the judges who conceived she might acquire an interest in lands here, to which her husband obtained title, would not consider her as an alien, but maintained that *her residence in Ireland, in legal construction, must be dictated by her husband, and that her domcil constructively is that of her husband.*[29]

5. Another, and the most usual in England, is by a *jointure*, which is defined to be, "A competent livelihood of freehold for the wife of lands and tenements, to take effect in profit or possession, presently after the death of the husband, for the life of the wife at least." 6. A woman may also be barred of dower by levying a *fine*, or suffering a *common recovery* of the lands during the coverture. 7. In Pennsylvania, a woman may be barred of her dower by joining her husband in a deed of conveyance of the land.[31]

A *custom* prevailed in Pennsylvania from a very early period, perhaps from its first settlement as a province, for the husband and wife to join in a deed of conveyance; and such joint deeds of conveyance were, according to the custom, valid even to transfer the estate of the wife, and of course they must have been sufficient *a fortiori* to extinguish her claim to dower in the lands of the husband. Such deeds were sometimes acknowledged before a justice of the peace, who examined the woman separate and apart from her husband, and certified such examination under his hand and seal.[32] But such separate examination seems not to have been deemed essential, for in *Lloyd's Lee v Taylor*,[33] it is stated to be the constant usage of the province, for femes covert to convey *their estates, by joining their husbands in a deed without an acknowledgement, or separate examination.*

Conveyances by fine seem to have been almost unknown. It appears by the case of *Davis v Turner*, determined in 1764, that but two *fines* had ever been levied in Pennsylvania, and it is said, *arguedo*, that they probably could not be levied at an early period for want of skill. There might have been other reasons. The british statutes on this subject were in force; but the *rules of court*,

29. 2 Johnstone's Rep. 29—*Kelly widow v Harrison*—vide ante, tit. *Alien*, p. 18.

31. By the act of 4th April, 1797, dower may also be barred, by the acceptance of lands devised to a woman, by the husband, although it were not expressed in the will that such devise shall be in satisfaction of dower. St. Laws.

32. *Davy & Ux. v Turner*, 1 Dal. 11.

33. 1 Dal. 17.

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which in England had moulded this mode of conveyance in such a way as to subserve the ends of justice and expedience, were not adopted by our courts.

Doubts, however, have been entertained as to the legality of transfering the estates of inheritance of the wife, in the way that has been mentioned. Hence the legislature were induced to pass the act of 24 February, 1770.[34] The obvious intent of which appears to be, to prescribe a method of conveying the estates of *femes covert* merely. The first section recites the custom which had prevailed, and confirms conveyances theretofore made in pursuance of it. The words of the second section are—"II. And in order to establish a mode, by which husband and wife may hereafter convey the estate of the wife, *Be it enacted*, That where any husband and wife shall hereafter incline to dispose of and convey *the estate of the wife, or her right of, in, or to any lands, tenements, or hereditaments whatsoever*, it shall and may be lawful to and for the said husband and wife to make, seal, deliver, and execute any grant, bargain and sale, lease, release, feoffment, deed, conveyance, or assurance in the law whatsoever, for the lands, tenements and hereditaments, intended to be by them passed and conveyed, and, after such execution, to appear before one of the judges of the Supreme Court, or before any justice of the county court of Common Pleas of and for the county where such lands, tenements or hereditaments shall lie, and to acknowledge the said deed or conveyance; which judge or justice shall, and he is hereby authorised and required to take such acknowledgment, in doing whereof he shall examine the wife separate and apart from her husband, and shall read or otherwise make known, the full contents of such deed or conveyance to the said wife; and if, upon such separate examination, she shall declare that she did voluntarily, and of her own free will and accord, seal, and as her act and deed, deliver the said deed or conveyance, without any coercion or compulsion of her said husband, every such deed or conveyance shall be, and the same is hereby declared to be, good and valid in law, to all intents and purposes, as if the said wife had been sole, and not covert, at the time of such sealing and delivery, any law, usage and custom to the contrary in any wise notwithstanding." This language is so explicit that it seems not easy to conceive how, without a departure from the plain meaning of words, the act can be applied to conveyances of estates of the husband. Can it be that the words "*estate of the wife, or her right of, in, and to any lands,*" were intended to comprehend her claim to dower in the lands of her husband? To attribute such a meaning to them seems to be refining too much in the construction of an act of the legislature; and departing from the ordinary import of language. What is this claim to dower in Pennsylvania during the life time of the husband? *A mere contingent interest*, not depending solely on survivorship, but liable to be defeated, at his pleasure, by acts in

34. 1 State Laws, Sm. Ed. 307.

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his life time, or by occurrences which may take place after his death. If the husband *mortgage* the lands without her concurrence, the claim to dower is defeated.[35] If after the husband's death, the lands be sold under an order of the orphans' court, for the payment of debts, there can be no claim to dower.[36] So a sale by an executor, to whom lands are devised, for the payment of debts, bars the widow's dower.[37]

It was formerly held in England, that a married woman did not bar her right to dower by joining her husband in a *fine;* because until the death of the husband she had not even a right of action;[38] but it has since been held that she is thereby barred from claiming her dower out of the lands comprised in the fine, *because she having nothing in the lands in her own right*, her joining her husband in a fine of them could be for no other purpose than that of barring her from claiming dower.[39]

It has, however, been made a question, upon which a considerable diversity of opinion has prevailed, whether this act is confined to conveyances of the *inheritance* of the wife, or embraces also conveyances of the lands of the husband, wherein she might have a claim to dower.

Another and a very important question has arisen as to the form of the acknowledgment of deeds under this act.

The first case on this subject, in the supreme court, was that of *Watson v Bailey*,[40] which came before the court on an appeal from the decision of Ch. Just. Tilghman, at a circuit court in Lancaster county. This was a bargain and sale of the wife's land, executed by the husband and wife, who, on the day on which the deed was executed, appeared before a judge of the common pleas, who indorsed upon the deed the following certificate, "Lancaster county, ss. Personally appeared before me the subscriber, one of the justices of the court of common pleas for the county aforesaid, the within named James Mercer and Margaret his wife, and acknowledged the above written indenture to be their act and deed, and desired the same might be recorded. *She, the said Margaret, being of full age and by me examined apart.* In testimony whereof I have hereunto set my hand and seal this 20th day of May, A.D. 1785."

The chief justice held that the acknowledgment was defective, and that therefore it did not pass the estate of the wife. And he refused to admit parol evidence of the declarations of the wife, that she had executed the deed voluntarily, and that if that was not sufficient, she would execute and acknowledge it over again, or do any other act to make the deed good.

35. 2 Dal 127.
36. 2 Dal. 127, *Scott v Crosdale.*
37. 2 Dal. 127.
38. 10 Co. Rep. 49b—Glan. lib. 11, c. 3.
39. 1 Cruise on Fines 184.
40. 1 Binney Rep. 470. This case was decided by judges *Yates and Smith.*—Judge Brackenridge, though in court, took no part in the cause, having on the circuit ruled the point differently from the chief justice.

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The next case was that of *Kirk v Dean*,[41] which came before the court on a case stated to be considered as a special verdict, by which it appeared that the husband and wife by deed conveyed the premises, being the estate of the husband, *but the wife never acknowledged the deed.*

In this case the opinion of the chief justice, in which Brackenridge, J. concurred, was, that the right of dower of the wife was unimpaired by the deed which she did not acknowledge. And such was the decision, contrary to the opinion of Yates, J. who adhered to the opinion which he had formerly given;[42] in which the late judge Smith had entirely concurred, that the act applied only to conveyances of the estate of inheritance of the wife.[43]

The case of *M'Intire's Lee v Ward*,[44] is the next in order, where the acknowledgment was made in the state of Maryland, where the parties then resided. The certificate indorsed was in the following words:—"Baltimore county, sst. On the 17 day of February, 1779, before us the subscribers, two of the justices of the peace for said county, came *William Neill* and *Isabella* his wife, and acknowledged the within indenture of bargain and sale to be their act and deed, according to the true intent and meaning thereof; and the *lands* and *premises therein mentioned* to be bargained and sold, with all and every the appurtenances, to be the right, title, interest, estate, and property of the within named *Samuel Todd*, his heir and assigns forever. And the said *Isabella* being by us privately examined apart from her said husband, and out of his hearing, acknowledged that she joined in the execution of the within deed of bargain and sale of her own free and voluntary will and accord, without being thereto compelled or induced by any fear, threats or ill-usage of her said husband, or through fear of his displeasure. Acknowledged before JAMES COLHOON, PETER SHEPHERD."

In this case it was contended on the authority of *Watson's Lee v Bailey*,[45] that a certificate of the acknowledgment must set forth that *the contents of the deed were made known to the wife.* But the court overruled the objections, and said it was not necessary that the form of words of the act of 24th *February*, 1770, in relation to acknowledgments by *femes covert*, should be used by the magistrate; it is sufficient if the directions of the act are substantially complied with; and therefore if it appears from the whole certificate, that the contents of the deed were known to the wife, it is as effectual as if the magistrate had certified that he read, or otherwise made known to her. Hence if it is said that she acknowledged the premises "within mentioned," or the like, to be the right, &c. of the grantee, it is good.

The last decision reported on this subject, is that of *Shaller v Brand*.[46]

41. 2 Bin. Rep. 341.
42.
43.
44. 5 Binney's Rep. 228.
45. 1 Bin. Rep. 470.
46. 6 Bin. Rep. 445.

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In that case the certificate was, that the grantors appeared "and severally acknowledged the said indenture as their act and deed, and desired that the same might be recorded as such; she, the said *Catharine*, being of full age, separate and apart from her said husband by me examined, and the full contents made known to her, *voluntarily consenting thereto.*" The court held that the certificate of acknowledgment was sufficient: and the chief justice observed, "We have always declared, that it was sufficient if the law was *substantially* complied with; and on any other principle of construction the peace of the county would be seriously affected, as the certificates of acknowledgments of deeds, have generally been drawn by persons who were either ignorant of, or disregarded the words of the act of assembly." And *Yates, J.* in delivering his opinion in this case says, "if a rigid pursuance of the form prescribed in the act be absolutely necessary (to bar dower) I have no scruple in saying that *nineteen* deeds out of *twenty*, which I have met with, since the passing of that law, would be found miserably defective."

Brackenridge, J. observes,—"Had it been a new case, I would have taken one of the extremes, either that a certificate of the acknowledgment as evidence need not specify more than *that it was acknowledged*, or that it should pursue the words of the act of assembly, in form as well as substance. For between these two there will be much room for litigation, as to what shall be considered *substance.*"

"*Iliacos intra muros peccatur et extra.*"

"In consideration of a *communis error*, if it was one, and that estates were holden where certificates of *acknowledgment* fell short of a recital of the words of the act of assembly, which I take to have been *directory* to the officer, I would have held it good. I would have thought that a certificate that the writing had been acknowledged by the *feme covert* in *due form of law*, as was the case in *Watson v Bailey*, or *according to the act of assembly in that case made and provided*, was sufficient, I would have applied the maxim, *omnia rite et solemniter acta præsumuntur.* The officer is presumed to obey his instructions and to do his duty."

That the act was *directory* to the officer seems evident from the words of it. And to require that a certificate of the acknowledgment should set forth all that the act requires to be done by the officer, would form a striking contrast with the construction which the english courts have put upon the statute *de modo levandi fines.* Which, like our act of 1770, was passed to protect the inheritances of married women.

The common notion of a fine's owing its efficacy in barring married women, to their secret examination by the judges, or commissioners, is incorrect.[47] A married woman might appoint her husband, as her attorney, to levy a fine for her, from which it may be concluded that the private examination of a married woman was

47. Harg. Co. Litt. 121,a n. 1—Cruise on Fines 181.

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not a necessary circumstance at common law, and was possibly first prescribed by the statute *de modo levandi fines.*[48] This statute requires "that the examination should be had in the presence of at least four of the justices of the bench, and not *otherwise.*" "And if a woman covert be one of the parties, then she must be first examined by four of the said justices, and if she doth not assent thereto the fine shall not be levied."

This statute is directory to the judges who take the examination, and the concord or acknowledgment of the fine never sets forth the private examination, but simply states "*that the said A. B. and H. his wife, have acknowledged the aforesaid tenements to be the right of C. D. as those which,* &c."[49] And if those entrusted to take the examination, should so far disregard their duty as to allow a married woman to acknowledge a fine without being examined, it will bind both her and her heirs forever.[50]

The fact that a person has been admitted to levy a fine being once upon record, such person is presumed to be free from all legal defects and disabilities, against which legal presumption no averment can be received.[51]

The *concord*, or acknowledgment of a fine, is analogous to the certificate of acknowledgment under our act of assembly.[52]

The statute required that the parties should appear personally in court, that the judges might have an opportunity of examining their age and capacity. But the great inconvenience of obliging old and infirm persons to travel from the most remote parts of the kingdom to *Westminster*, occasioned what is called the statute of *Carlisle*, 15 Ed. II.[53] In consequence of which, upon a suggestion of infirmity, which is seldom true, but made to save the trouble and expense of travelling, a special commission issues out of chancery, directed to certain commissioners, to take and certify the acknowledgment of the parties. Though the statute directs that the acknowledgment shall be taken by two of the justices, or by one of them attended by an *abbot*, or *knight*, yet writs of *dedimus potestatem*, were frequently directed to persons of inferior quality, from whence abuses arose which gave rise to a rule of court *Pach* 43 *Eliz.* which restricted the taking of such acknowledgments by some of the justices of the one bench or the other, or barons of the exchequer, or sergeant at law, or knight who was of the quorum. Yet custom has so far prevailed against the positive provisions, as well of the statute as the rule, that although a knight is usually named in the writs of *dedimus potestatem*, yet he is seldom one of those who take the acknowledgment of fines.

48. See the statute under tit. FINES—Cruise on *Fines* 181-2.

49. 2 Black. Com. Append. 17.

50. Cruise on Fines 100—3 Atk. 712—2 Inst. 515.

51. 1 Cruise on Fines 100.

52. By the custom of London and several other cities, a married woman may bar herself by a deed enrolled, on which she is privately examined; and this custom was confirmed in the reign of Hen. 8, by a positive statute. Boh. Priv. Lon. —Bro. tit. Custom pl. 39—*Idem* tit. Fait. Inroll. pl. 15—34, 35 Hen. 8, c. 22—1 Cruise on Fines 182.

53. See the statute tit. *Fines.*

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The authority is usually delegated to private persons, who it may be supposed are, not unfrequently, equally ignorant of their duty, and careless in the discharge of it.

With a view to greater circumspection in taking the acknowledgment, several rules of court have been made, one the 13 *Geo.* 1, requiring that some one present at the acknowledgment, should appear in court and testify in relation to it. But this being attended with inconvenience, a rule made H. 17 Geo. 2, substituted an affidavit for a *viva voce* examination. And further provision as to the substance of the affidavit, was made H. 26 & 27 Geo. 2. Yet where fines have been acknowledged out of the kingdom, the judges have remitted the strictness of these rules. And probably these rules would never have been made, had the examinations of married women been taken only before the judges of the superior courts, or even before any judicial magistrate. As our act declares what shall be *done*, but not what shall be *certified*, by the judge or other magistrate who takes the examination, if it be required that he should *certify* that he had discharged one part of his duty, there seems to be no good reason why he should not be equally obliged to certify that he had discharged his duty in every particular. That he should not be obliged to certify (as the rule of *H.* 17 *Geo.* 2, obliges the commissioners to attest) that the parties were of *full age* and *competent understanding*. For surely the rights of infants, and of persons *non compotes mentis*, are no less entitled to protection than those of married women.

ESSOIN.

† 52 HENRY III. CAP. XIII. A.D. 1267.

After issue joined there shall be but one essoin, or one default.

And it is to be known, after that a man hath put himself upon any enquest, the which hath or must pass in such manner of writs, he shall have but one essoin, or one default; so that if he come not at the day given to him by the essoin, or make default the second day, then the enquest shall be taken by his default, and according to the same enquest they shall proceed to judgment. (2) And if such enquest be taken in the county, before the sheriff or coroners, it shall be returned unto the king's justices at a certain day; and if the party defendant come not at that day, then, upon his default, another day shall be assigned to him after the discretion of the justices; and it shall be commanded to the sheriff,

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**that he cause him to come* to hear the judgment, if he will, according to the enquest; at which day, if he come not, upon his default they shall proceed to judgment. In like manner it shall be done, if he come not at the day given unto him by his essoin.

* For *that he cause him to come*, read *that he cause him to come at that day—see c. 20 & 3 Ed. 1, c. 42, 43, 44—6 Ed. 1, c. 8 & 10—13 Ed. 1, st. 1, c. 17, 27 & 28—12 Ed. 2, st. 2—5 Ed. 3, cap. 6—9 Ed. 3, cap. 3, for further regulations of essoins.*

The mischief before this statute was the great delays to which plaintiffs were subjected in personal actions; and this statute was meant to afford a remedy.

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† 3 EDWARD I. CAP. XLII. A.D. 1275.

Certain actions wherein after appearance the tenant shall not be essoined.

FORASMUCH as in a writ of *assise*, *attaints*, and *juris utrum*, the jurors been often troubled by reason of the essoins of tenants; it is provided, That after the tenant hath once appeared in the court, he shall be no more essoined, but shall make his attorney to sue for him, if he will; and if not, the assise or jury shall be taken through his default.

Fitz. Essoin 52, 55, 56, 63, 64—52 H. 3, c. 13 & 20. *See* 13 *Ed.* 1, *st.* 1, *c.* 27 & 28, *which takes essoin from demandants also.* 2 Inst. 248. *Likewise* 6 *Ed.* 1, *c.* 8 & 10—13 *Ed.* 1, *c.* 17—12 *Ed.* 2, *st.* 2—5 *Ed.* 3, *c.* 6—9 *Ed.* 3, *c.* 3, *for further regulations of essoins.*

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† 3 EDWARD I. CAP. XLIII. A.D. 1275.

There shall be no fourcher by essoin.

FORASMUCH as demandants be oftentimes delayed of their right, by reason that many parceners be tenants, of which none may be compelled to answer without the other, (2) or there may be many jointly enfeoffed (where none knoweth his several) and such tenants oftentimes fourch by essoin, so that every of them hath a several essoin; it is provided, That from henceforth such tenants shall not have essoin, but at one day, no more than one sole tenant

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should have; so that from henceforth they shall no more fourch, but only shall have one essoin.

Hob. 8, 46—Fitz. Essoin 82, 119—Fitz. Foubher 3, 4, 10, 13, 14—Bro. Foucher 28—2 Inst. 250. *Confirmed by* 6 Ed. 1, st. 1, c. 10, *and extended to where a man and his wife are impleaded.*

† 3 EDWARD. I. CAP. XLIV. A.D. 1275.

In what case essoin ultra mare *shall not be allowed.*

FORASMUCH as divers persons cause themselves falsely to be essoined, (for being over the sea) when indeed they were within the realm the day of the summons; it is provided from henceforth, That this essoin be not always allowed, if the demandant will challenge it and will be ready to aver that he was in *England* the day of summons and three weeks after; (2) but shall be adjourned in this form: That if the demandant be ready to a certain day, by averment of the country, or otherwise as the court shall award, to prove that the tenant was within the four seas the day that he was summoned, and three weeks after, so that he might be reasonably warned by the summons, the essoin shall be turned into a default; (3) and that is to be understood only before justices.

2 Inst. 151. *See the references to the foregoing chapters.*

† 6 EDWARD I. CAP. X. A.D. 1278.

The husband and wife being impleaded, shall not fourch by essoin.

WHEREAS it is contained in the statute of the king that now is, that two parceners, or two that hold in common, may not fourch by essoin, after that they have once appeared in the court: (2) It is provided, That the same be observed and kept, where a man and his wife be impleaded in the king's court.

Fitz. Essoin 5, 62—52 H. 3, c. 13 & 20—3 Ed. 1, c. 43 & 44—2 Inst 320. *See* 13 *Ed.* 1, *c.* 17—12 *Ed.* 2, *stat.* 2—5 *Ed.* 3, *c.* 6, *for further regulations of essoins.*

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† 13 EDWARD I. CAP. XVII. A.D. 1285.

In what case essoin De malo lecti *doth lie, and where not.*

In the circuit of the justices an essoin *de malo lecti* shall not be from henceforth allowed for lands in the same shire, unless he that caused himself to be essoined be sick indeed; (2) for if the demandant except, that the tenant is not sick, nor in such plight but that he may come before the justices, his exception shall be admitted. (3) And if it can be so proved by enquest, the essoin shall be turned to a default. (4) And from henceforth such essoin shall not lie in a writ of right between two claiming by one descent.

Fitz. Essoin 176, 186, 187, 188, 189, 190, 192, 193, 194, 196, 197—52 H. 3, c. 18 & 20—3 Ed. 1, c. 42, 43 & 44—6 Ed. 1, c. 10—Regist. 8. *See* 12 *Ed.* 2, *stat.* 2—5 *Ed.* 3, c. 6—*and* 9 *Ed.* 3, *stat.* 1, c. 3, *for further regulations of essoins.*

† 13 EDWARD I. CAP. XXVII. A.D. 1285.

Essoin after inquest, but none after day given prece partium.

After any hath put himself to an inquest, an essoin shall be allowed him at the next day; (2) but all the other days following, the taking of the inquest shall not be delayed by the essoin, whether he were essoined before or no; (3) neither shall any essoin be allowed after day given *prece partium*, in case where the parties consent to come without essoin.

2 Inst. 417—Fitz. Essoin 15, 81, 83, 130—Dyer 224, 824—Bro. Parl. 5—Rast. 297.

13 EDWARD I. CAP. XXVIII. A.D. 1285.

In certain actions, after appearance there shall be no essoin.

Whereas by the statute of *Westminster* the first, it was provided, That after the tenants have once appeared in the court, no essoin shall be allowed them in writs of assises; (2) In like manner it shall be from henceforth observed against the demandants.

Fitz. Essoin 65, 66, 68, 69, 78, 149—2 Inst. 418—Stat. Westm. 1, 3 Ed. 1, c. 42, 43, & 44—Rast. 316. *See further concerning essoins*, 13 *Ed.* 1, c. 17—12 *Ed.* 2, *st.* 2—5 *Ed.* 3, c. 6.

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† 12 EDWARD II. STAT. II. A.D. 1318.

THE STATUTE OF ESSOINS.

Several cases wherein essoins do not lie.

HERE is declared how many ways essoins may be challenged, and in what cases essoins do lie, and in what not; that is to say, an essoin lieth not where the land is taken into the king's hands. (2) Essoin lieth not where the party is distrained by his land.* (3) Essoin lieth not where any judgment is given thereupon, †*if the jurors do come.* (4) *Essoin lieth not where the party was seen in the court.* (5) Essoin of *ultra mare* lieth not where another time the party hath been essoined *de malo veniendi.* (6) It lieth not where the party hath essoined himself another day. (7) It lieth not where the sheriff was commanded to make the party to appear. (8) Essoin *de servitio regis* lieth not where the party is a woman, unless she be nurse, a midwife, or commanded by writ *ad ventrem inspiciendum.* (9) ‡*It lieth not in a writ of dower, because it seemeth to be but a deceit and a delay of right.* (10) It lieth not for that the plaintiff hath not found pledges to prosecute the suit. (11) ‖*It lieth not where the attorney was essoined.* (12) It lieth not where the party hath an attorney in his suit. (13) It lieth not where the essoignor confesseth that he is not in our lord the king's service. (14) It lieth not where the summons is not returned, or the party not attached, for that the sheriff hath returned *non est inventus.* (15) It lieth not where the party another time was essoined *de servitio regis*, that is to wit, such a day, and now he hath put in his warrant. (16) ¶*It lieth not where he was resummoned in assise of mortdauncestor, or darrein presentment.* (17) It lieth not because such a one is not named in the writ. (18) It lieth not where the sheriff hath a precept to *distrain the party to come by his lands and goods.*** (19) It lieth not where the bishop was commanded to cause the party to appear. (20) It lieth not for that the term is passed. (21) And it is to be noted, that an essoin *de servitio domini regis* is allowed after the *grand cape*, *pety cape*, and after distresses taken upon the lands and goods.

*Add *and chattels.* †*Not in the original.* ‡*Not in the original.* ‖*Not in the original.* ¶Note, *The order is transposed in the translation.* **Read *to attach him.* 52 H. 3, c. 13 & 20—3 Ed. 1, c. 42, 43 & 44—6 Ed. 1, c. 10—13 Ed. 1, c. 27

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& 28—Fitz. Essoin 3, 11, 40, 42, 99, 135, 153—Fitz. Essoin 5, 7, 36—Cro. Car. 341—Fitz. Essoin 15, 25, 30, 31, 52, 57—Fitz. Essoin 9, 114—Fitz. Essoin 1, 138—Fitz. Essoin 2, 61, 85—Fitz. Ess. 120—52 H. 3, c. 13, 19]—3 Ed. 1, c. 42, 43—6 Ed. 1, st. 1, c. 10—13 Ed. 1, st. 1, c. 12, 17, 27, 28—Regist. 8—Rast. 316, &c. *See* 9 *Ed.* 3, *st.* 1, *c.* 3, *in debt against divers executors, they shall not fourch by essoin.*]Read *c.* 20.

These statutes have for their object the same that was intended by 3 Ed. 1, c. 40, respecting vouching to warranty and counter pleading of voucher, namely, to prevent delays in the prosecution of suits.

An exoine *(essoin)* in legal acceptance is an *excuse* of a default, by reason of some impediment or disturbance which prevents the attendance of the plaintiff or the defendant, at the day appointed. It is the same which the civilians call *excusatio.*[1]

It lies in *real* or *mixed* actions for either the demandant or tenant; and although it was considered an abuse, they were also allowed, in personal actions, for the plaintiff or defendant. The causes of excuse called essoins are of five kinds—1. *De servitio regis.* 2. *In terram sanctam.* 3. *Ultra mare.* 4. *De malo lecti.* 5. *De malo veniendi,*—which last was called the *common* essoin.

In all these, except the common essoin, the tenant or defendant ought to verify it by affidavit: and where the party alledged that he was in the service of the king, it was necessary that he should, on the day to which the proceedings were adjourned, produce a warrant under the great seal, testifying that he was so employed.[2]

In all these essoins, except the common essoin, the delay was very great, the party casting them being allowed no less than a year and a day.[3]

In the common essoin *de malo veniendi*, or that the party had been detained by sickness on the road, day was given till the *fifth return* after the essoin cast.

A *fourcher* by essoin, or an essoining *simul et vicissim*, was an instance in which the delay of essoins was carried to an infinite length. As when a præcipe was brought against two, or more tenants, and after each had one essoin, which was due to them, they further delayed the demandant by alternate successive essoins. Which was called *fourcher*, an uncouth word signifying to divide; because the tenants divide themselves in delay of the demandant, by essoins and appearances interchangeably.[4]

Essoins were considered as great a grievance in judicial proceedings as vouching to warranty.

The learning upon both subjects may gratify curiosity, rather than serve any useful purpose, as these have long been considered obsolete parts of the english jurisprudence.[5]

1. 2 Inst. 125.
2. ib. 314.
3. ib. 137, 252.
4. 2 Inst. 250—2 Reeve E. Law 122.
5. 2 Reeve 123.

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ESTATE TAIL.

* 13 EDWARD I. STAT. I. CAP. I. A.D. 1285.(r

STATUTE OF WESTMINSTER THE SECOND.

In gifts in tail the donor's will shall be observed. The form of a formedon.

FIRST, concerning lands that many times are given upon condition, that is to wit, Where any giveth his land to any man and his wife, and to the heirs begotten of the bodies of the same man and his wife, with such condition expressed, that if the same man and his wife die without heirs of their bodies between them begotten, the land so given shall revert to the giver or his heir. (2) In case also where one giveth lands in free marriage, which gift hath a condition annexed, though it be not expressed in the deed of gift, which is this, That if the husband and wife die without heir of their bodies begotten, the land so given shall revert to the giver or his heir. (3) In case also where one giveth land to another, and the heirs of his body issuing; it seemed very hard, and yet seemeth to the givers and their heirs, that their will being expressed in the gift, was not heretofore, nor yet is observed. (4) In all the cases aforesaid, after issue begotten and born between them (to whom the lands were given under such condition) heretofore such feoffees had power to alien the land so given, and to disherit their issue of the land, contrary to the minds of the givers, and contrary to the form expressed in the gift. (5) And further, When the issue of such feoffee is failing, the land so given ought to return to the giver, or his heir, by form of the gift expressed in the deed, though the issue (if any were) had died: (6) Yet by the deed and feoffment of them (to whom land was so given upon condition) the donors have heretofore been barred of their reversion, *which was directly repugnant to the form of the gift.

r) "This statute is in force, except such part as has been altered by an act of assembly passed 27th January, 1749, (old style) entitled 'An act for barring estates tail,' and another act passed 16th January, 1799, entitled 'An act to facilitate the barring of entails'." *Report of the Judges.*

*Add *of the same tenements.*

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II. Wherefore our lord the king, perceiving how necessary and expedient it should be to provide remedy in the aforesaid cases, hath ordained, That the will of the giver, according to the form in the deed of gift manifestly expressed, shall be from henceforth observed; so that they to whom the land was given under such condition, shall have no power to aliene the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver or his heirs, if issue fail, (†*whereas* there is no issue at all) or if any issue be and fail by death, or heir of the body of such issue failing. (2) Neither shall the second husband of any such woman, from henceforth, have any thing in the land so given upon condition, after the death of his wife, by the law of *England*, nor the issue of the second husband and wife shall succeed in the inheritance, but immediately after the death of the husband and wife (to whom the land was so given) it shall come to their issue, or return unto the giver, or his heir, as before is said.

III. And forasmuch as in a new case new remedy must be provided, this manner of writ shall be granted to the party that will purchase it:

(2) *Præcipe A. quod juste, &c. reddat E. manerium de F. cum suis pertinentiis, quod C. dedit tali viro et tali mulieri, et heredibus de ipsis viro et mulieri exeuntibus.*

Or thus:

(3) *Quod C. dedit tali viro in liberum maritagium cum tali mulieri, et quod post mortem prædictorum viri et mulieris, prædicto B. filio eorundem viri et mulieris descendere debeat per formam donationis prædictæ, ut dicet, &c.* (4) Vel, *Quod C. dedit tali et heredibus de corpore suo exeuntibus, et quod post mortem illius talis, prædicto B. filio prædicti talis descendere debeat per formam, &c.*

IV. The writ whereby the giver shall recover (where issue faileth) is common enough in the chancery; (2) and it is to wit, That this statute shall hold place touching alienation of land contrary to the form of the gift hereafter to be made, and shall not extend to gifts made before. (3) And if a fine be levied hereafter upon such lands it shall be void in the law; (4) neither shall the heirs,

†For *whereas* read *in that.*

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or such as the reversion belongeth unto, though they be of full age, within *England*, and out of prison, need to make their claim. *Altered by* 32 *H.* 8. 36.

Several sorts of gifts of lands in tail. 1 Leon. 212—1 Roll. 48, 153, 158, 333, 357, 385—2 Roll. 429—Godbolt 308, 367, pl. 458—Vaughan 365—Latch. 67—Savil 67, 88—7 Co. 33—Fitz. Tail 11, 12, 13, 14, 16, 17, 18, 21, 22, 23—Co. Lit. 18,b 19,a 24,a 223,b 224,a—12 Co. 81—Fitz. Formed 61, 65—Fitz. Tail 9, 10—Fitz. Tail 15. In gifts in tail the donor's will shall be observed. Hob. 293—Fitz. Garranty 16, 46, 57, 59—3 Co. 85—Fitz. Formed 1, 27, 33, 35, 52, 54, 59, 62, 64—Fitz. Dower 87—8 Co. 8—5, 14—7, 32, 33—8, 35, 86, 166—9, 105—11, 72—Co. Litt. 327,b. Formedon in descender—Regist. 238—Co. pla. 317, 338, 341—Dyer 216, 247—Fitz. Fines 125—Fitz. Formed 5, 6, 7, 11, 12, 22, 30, 42, 44, 46, 47, 49. A fine shall not bar the heir in tail—8 H. 4, f. 8—Fitz. continued claim 9.

The act in the text, commonly called the statute *de donis conditionibus*, if it did not introduce, at least established *estates tail*.[1] The statute was probably occasioned by the subtle finesse of construction, to which the judges had given way, in order to shorten the duration of *conditional fees* at the common law, which were restrained to some particular heirs exclusive of others;[2] as the heirs *of a man's body*, by which only his lineal descendants were admitted, in exclusion of collateral heirs; or to the heirs *male of his body*, in exclusion not only of collaterals, but of lineal females also.

The estates were considered as fee simple, on condition that the donee had issue capable of inheriting under the donation.—After the birth of such issue, the estate of the donee in consequence of the condition being performed, became absolute, at least for three purposes. 1. To enable the donee to aliene the land, and thereby to bar his own issue, as well as the donor's interest in the reversion. 2. To subject the estate to forfeiture for treason, to which it was not liable, before the birth of issue, except for the life of the donee. 3. To empower him to charge the land with rents, commons and other incumbrances, so as to bind his issue. But if he did not in fact aliene the land, the course of descent was not altered, by the performance of the condition; and in such case upon failure of issue, the land, according to the terms of the gift, must have reverted to the donor, upon the death of the donee.[3]

For this reason it was usual for the donees of these conditional estates, to aliene them as soon as they had performed the condition, by having issue, and immediately to repurchase the lands, which gave them a fee simple absolute, that would descend to the heirs general, according to the course of the common law.

1. Obs. on the Stat. 1—Co. Lit. 19.
2. *Donatio stricta*, &c. 2 Black. 110.
3. See Co. Lit. 19—2 Inst. 333. According to Mr. Reeve, the condition being once satisfied, by the birth of issue capable of inheriting, upon their failure all the donee's heirs without distinction were entitled to inherit—1 Reeve E. L. 294.

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The nobility, however, who wished to perpetuate their estates in their own families, in order to put a stop to the practice which had obtained, of defeating those conditional fees, procured the statute *de donis conditionalibus* to be enacted.

The mischiefs which gave rise to the statute are enumerated in the first section of it. To remove which it is ordained that,—"*the will of the giver, according to the form in the deed of gift, manifestly expressed, shall be observed.*"

The object of this famous statute appears to have been, to secure the then possessors of land, in the power of making dispositions which were to endure to all eternity. And the construction put upon it, by courts, for many years after it was made was well calculated to support the principle of the statute, and to carry the intention of it into full effect.

They held that the donee should no longer have a *fee conditional*, as before the statute, but that the fee should be *entalle*, cut or divided, and that he should have a *fœdum talliatum*, or *fee-tail*.

Shortly after the statute, the judges had gone very far in pursuing its intention, for they not only cut a fee-tail out of a fee-simple, but they again divided the fee-tail. Thus, where one took lands by purchase, to him and his wife and their issue lawfully begotten, the purchasers had only an estate for their *lives*, and in *fee* to their issue: If they had no issue, the *fee* remained in the donors, till they had issue; and in case they never had issue, or the issue failed, the land reverted to the donor.[4]

The writ given by this statute was in after times called a *formedon in the descender*.[5] No writ of *formedon in the reverter* is given by the statute, but it is noticed therein, that such writ, whereby the donor might recover when issue fails, was common enough in chancery. A *formedon in the remainder* is not given by any statute, but seems to be founded on the equity of the statute *de donis*.[6]

As to what may be entailed under the statute *de donis*. It is observed by sir Edward Coke, that the word "*tenement*" (*tenementa*) is the only word used in the act, which he expounds to comprehend not only all corporeal hereditaments, but also all incorporeal hereditaments, which savor of the reality, i. e. those which issue out of corporeal ones, or which concern or are annexed to, or may be exercised within the same; as rents, estovers, commons or the like; and also offices and dignities which concern lands, or have relation to fixed and certain places. But mere personal chattels cannot be entailed. Neither can offices which relate to them; nor can an *annuity* which charges only the person of the grantor. The grantee, of such office or annuity, if limited to him and the heirs of his body, hath a fee conditional at the common law, as before the statute.

4. 2 Reeve E. Law 166.
5. 2 Reeve E. L. 167. See also Harg. *in the remainder*. Co. Lit. 19, a n. 3.
6. Fitz. N. B. tit. *Writ of Formedon*

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Estates tail are either *general* or *special*. To the first, *all* the heirs of a man's body are inheritable. *Tail-special* is where the gift does not extend to all the heirs of the donee's body; but is restrained to certain descriptions of them: as to those of the donee and A. M. his wife; or to a man and a woman unmarried and the heirs of their two bodies, for by the apparent possibility to marry, they have an estate tail in them presently.

Estates in *general* as well as *special* tail are further diversified by the sexes of the issue inheritable, as the one or the other species of estates tail may be either tail-*male*, or tail-*female*.

Estates in *frank marriage*, which have already been noticed, were another species of entailed estates.[7]

The principal incidents to a tenancy in tail are—1. That he is not punishable for *waste*. 2. That his wife shall be endowed of the estate tail.[8] 3. That the husband of a female tenant in tail may be tenant by the curtesy. 4. That it may be barred by a fine or recovery,[9] or by lineal warranty descending with assets.

This statute, by establishing perpetuities, was well calculated to increase the power of the great barons, and to give them an undue preponderance in the government. And it was found impossible for the crown to obtain a repeal of it, in the house of lords. It is therefore probable that the judges had an *intimation* (not of an uncommon kind in those times) that they must be *astutia*, as it is called, to render the statute of no effect.[10]

To these causes may be attributed the application of common recoveries,[11] in the twelfth year of Edw. IV. which the judges at that time openly declared to be a bar of estates tail.

7. See *ante* p. 177, 178.
8. Provided generally that her issue might have inherited—see Har. Co. Litt. 31,b 40.b
9. Or it may be barred in Pennsylvania by deed acknowledged in court. *See ante* p. 109.
10. Obs. on the Stat. 92.
11. See *ante* p. 168.

ESTATES FOR LIFE AND YEARS.

* 20 HENRY III. CAP. II. A.D. 1235.

Widows may bequeath the crop of their lands.

ALSO from henceforth widows may bequeath the crop of their ground, as well of their dowers, as of other lands and tenements, saving to the lords of the fee, all such services as be due for their dowers and other tenements.

Kel. 125—Fitz. Bar. 149—2 Inst. 80.

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It had been doubted whether, as a widow received her dower in the condition the land happened to be at the time of her husband's death, she should not leave it in like manner to the reversioner in the condition it might be at her death. The statute removed this doubt, and provided in favor of widows that they might bequeath the crop of their lands held in dower, as well as that upon their other land.—

And if they do not devise the crop, their executors or administrators shall have it; and it is said they may retain the land, till they can reasonably carry the corn out of it; and this it is supposed gave occasion to the query whether the executors should not pay rent.[1]

But if the husband sow the land, his executors shall have the *emblements*, and not the widow. Yet, if the heir assign dower to her of land sown by the husband, she shall have the crop.[2]

THE STATUTE *DE ANNO ET DIE BISSEXTILI.*

21 HENRY III. A.D. 1236.

The day of the leap-year, and the day before shall be holden for one day.

THE king unto his justices of the bench, greeting. Know ye, that where within our realm of England, it was doubted of the year and day that was wont to be assigned unto sick persons be impleaded, when and from what day of the year going before unto another day of the year following, the year and day in a leap-year ought to be taken and reckoned how long it was:

II. We therefore, willing that a conformity be observed in this behalf every where within our realm, and to avoid all danger from such as be in plea, have provided, and by the counsel of our faithful subjects, have ordained, That, to take away from henceforth all doubt and ambiguity, that might arise hereupon, the day increasing in the leap-year shall be accounted for one year, so that because of that day none shall be prejudiced that is impleaded, but it shall be taken and reckoned of the same month wherein it groweth; and that day, and the day next going before, shall be accounted for one day. And therefore we do command you, that from henceforth you do cause this to be published afore you, and be observed. Witness myself at Westminster, &c.

1. See Harg. Co. Lit. 55,b note 3— Vin. Abr. tit. *Emblements* pl. 15, and Keilw. 125—Hal. *MSS.* 2 Inst. 80, 82.— Com. Dig. *Biens* G. 2. See further *Tkele v Arnold*, 5 Jac. C. B. 2. Dyer 316—2 Inst. 81.

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The obvious intent of this statute was to produce an uniformity in the division, and calculation of time.—By declaring the increasing day in the leap-year, together with the preceding day should be accounted for one day only, the year was made to consist of 365 days invariably.[3]

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* 6 EDWARD I. CAP. III. A.D. 1278.

An alienation of land by the tenant by the curtesy with warranty shall be void.

It is established also, That if a man aliene a tenement, that he holdeth by the law of *England*, his son shall not be barred by the deed of his father (from whom no heritage to him descended) to demand and recover by writ of *Mortdauncestor*, of the seisin of his mother, although the deed of his father doth mention, that he and his heirs be bound to warranty. (2) And if any heritage descend to him of his father's side, then he shall be barred for the value of the heritage that is to him descended. (3) And if in time after any heritage descend to him by the same father, then shall the tenant recover against him of the seisin of his mother by a judicial writ that shall issue out of the rolls of the justices, before whom the plea was pleaded, to resummon his warranty, as before hath been done in cases where the warrantor cometh into the court saying, That nothing descended from him by whose deed he is vouched. (4) And in like manner the issue of the son shall recover by writ of *cosinage*, *aiel*, and *basaiel*. (5) Likewise in like manner the heir of the wife shall not be barred of his action after the death of his father and mother, by the deed of his father, if he demand by action the inheritance of his mother by a writ of entry, which his father did aliene in the time of his mother, whereof no fine is levied in the king's court.

Vaughan 366—Stat 4 & 5 Anne, c. 16—Bro. Formedon 73—5 Co. 80—8 Co. 52—Co. Lit. 365, 306, 381,a 382,a 383,a. b.—Dyer f. 148—Fitz. Garranty 5—9 Co. 26—Fitz. Cui in vita, 7, 8. See 32 H. 8, c. 28, *with regard to leases made by tenant in fee, &c. in right of their wives.* Keilw. 104,b 124, 125.—2 Inst. 292.

Before this statute, an heir on the part of the mother, was barred of the inheritance by the warranty of the tenant by the curtesy, whose heir he was, although there were no assets descending

3. Vide Bracton, tit. *De Essoniis*, cap. 13, 12.

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from such ancestor; but this act provides, that without assets the warranty shall be no bar.[1] By the equity of this statute the warranty of tenant in tail is no bar, unless there be assets in fee simple descended.[2] The assets must respect the essential quality of the inheritance whereof the heir is to be barred; and that is, that it be a local possessory and certain inheritance, as lands, rents, commons and the like, of the yearly value of the inheritance barred. Therefore, neither an annuity which is a personal inheritance, lying in action, nor any right of action of inheritance is an heritage within this statute, till it be reduced into possession.

The intent of the makers of this act was, that the warranty of the tenant by the curtesy should not be a bar to the heir of his wife, unless such tenant left assets sufficient. But the warranty of the tenant by the curtesy, with assets, is a good plea in bar of the heir of the mother.[3]

Where assets have not descended at the time the land is claimed, and therefore the land be recovered; yet, if they afterwards descend, the tenant shall have a *scire facias* to recover the assets, in place of the land.[4]

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* 9 RICHARD II. CAP. III. A.D. 1385.(q)

A writ of error or attaint maintainable by him in the reversion.

ITEM, it is accorded and assented, That if the tenant for term of life, tenant in dower, tenant by the curtesy of *England*, or tenant in tail after possibility of issue extinct, be impleaded, and plead to an inquest, and lose by the oath of twelve, or by default, or in other manner, that he to whom the reversion of the tenements so lost doth appertain at the time of such judgment given, his heirs or successors, shall have an action by writ of attaint, to attaint the same oath, if they will assign the same oath to be false, and also by writ of error if error be found in the record of such judgment, as well in the life of such tenants that so do lose, as after their death. And if such judgment erroneous be reversed, or such false oath be found, that the tenant which did lose by the first judgment, if he be in life, shall be restored to his possession of the tenements so lost, with the issues in the mean time, and the par-

1. 2 Inst. 291.
2. 2 Inst. 293.
3. 2 Inst. 293.
4. 2 Inst. 294.

q) "So much only of this statute is in force, as gives a writ of error to him in reversion." *Report of the Judges.*

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ty pursuing, to the arrearages of the rent; if any be due of the same tenements. And if such tenant be dead at the time of the judgment given upon such writs of attaint and of error, that restitution of the said tenements be made to the party pursuing, with the issues after the death of the said tenant, together with the arrearages of the rent, if any to him were due in the life of the said tenant.

II. Provided nevertheless, That although the tenant which so did lose by the first judgment be in life, and the party pursuing will alledge that the same tenant was of covin, and of assent of the demandant which recovered, that such tenements ought to be lost, that restitution of the same tenements be made to the same party pursuing, with the issues and arrearages, as afore is said, saving to such tenant his action by writ of *scire facias*, out of the same judgment so reversed or given, or writ of attaint, if he will traverse the covin and assent aforesaid, and otherwise not.

He in the reversion shall have an attaint or writ of error upon a false verdict found, or an erroneous judgment given against the particular tenant—2 Bulst. 247—3 Ed. 1, c. 38—1 Ed. 3, st. 1, c. 6—5 Ed. 3, c. 6 & 7—28 Ed. 3, c. 8—34 Ed. 3, c. 7. *See* 11 *H.* 6, *c.* 4—15 *H.* 6, *c.* 5—18 *H.* 6, *c.* 2—11 *H.* 7, *c.* 21 *&* 24—19 *H* 7, *c.* 3—23 *H.* 8, *c.* 3, *and* 37 *H.* 8, *c.* 5, *for further regulations and extensions of attaints.*

* 13 RICHARD II. STAT. I. CAP. XVII. A.D. 1389.

Where he in the reversion may be received in a suit commenced against the particular tenant.

ITEM, Because that when tenants for term of life, tenants in dower, or by the law of *England*, or in tail, after possibility of issue extinct, be impleaded, they be often of the covin of the demandants, that the tenements demanded against them shall be recovered, and they will not pray in aid, nor vouch to warranty them in the reversion, but plead in chief such a plea whereby they know well the tenement shall be lost, in the adhesion of them in the reversion; (2) it is accorded and assented, That if any such tenant be impleaded, and he in the reversion come into the court, and prayeth to be received to defend his right at the day that the tenant pleadeth to the action, or before, he shall be received to plead in chief to the action, without taking any delay by voucher, aid prayer, nonage, or any other delay whatsoever,

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(3) so that after such receipt he shall have no manner delay by protection, essoin of the king's service, common essoin, nor any other delay whatsoever, but that the business shall be hasted in as much as it may be by the law; (4) and that days of grace be given by the discretion of the judges, between the demandant and him that is received in such case, without giving the common day in plea of land, if the demandant will not assent, to the intent that the demandants be not too much delayed, because they must plead with two adversaries; (5) and in the right of pleas that be now depending in such case, they in the reversion shall be received in the manner aforesaid, at the next day that the parties have in court, although the same parties have pleaded in chief before this time.

II. Provided always, That they in the reversion, which pray to be received, as before is said, shall find surety of the issues of the tenements demanded for the time that the same demandants be delayed, after the said plea determined, between the demandants and tenants, if the judgment pass for the demandant, against them in the reversion aforesaid, as well where the receipt is counter-pleaded, as where it is granted.

Fitz. Reseeit 70, 71, 73, 83, 84, 85, 94, 98, 100, 103, 187, 190, 191—2 Leon. 62. He that prayeth to be received, shall find surety of the issues of the land in demand. Fitz. Reseeit 76, 80, 91—20 Ed. 1, stat. 3.

* 11 HENRY VII. CAP. XX. A.D. 1494.

Certain alienations made by the wife, of the lands of her deceased husband, shall be void.

FOR certain reasonable considerations be it ordained, enacted, and established by the king our sovereign lord, and by the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, That if any woman which hath had, or hereafter shall have, any estate in dower, or for term of life, or in tail, jointly with her husband, or only to herself, or to her use, in any manors, lands, tenements, or other hereditaments of the inheritance or purchase of her husband, or given to the said husband and wife in tail, or for term of life,

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by any of the ancestors of the said husband, or by any other person seised to the use of the said husband, or of his ancestors, and have or shall hereafter, being sole, or with any other after taken husband discontinued or discontinue, aliened, released, or confirmed, aliene, release, or confirm with warranty, or by covin suffered or suffer any recovery of the same against them, or any of them, or any other seised to their use, or to the use of either of them, after the form aforesaid, that all such recoveries, discontinuances, alienations, releases, confirmations and warranties so had and made, and from henceforth to be had and made, be utterly void and of non effect: (2) And that it shall be lawful to every person and persons, to whom the interest, title, or inheritance, after the decease of the said women, of the said manors, lands, and tenements, or other hereditaments, being discontinued, aliened, and suffered to be recovered, after the first day of *December* next coming, in the form aforesaid, should appertain, to enter into all and every of the premises, and peaceably to possess and enjoy the same, in such manner and form as he or they should have done, if no such discontinuance, warranty, nor recovery had been had nor made. (3) And over this be it ordained and enacted by the said authority, That if any of the said husbands and women, or any other seised, or that shall be seised, to the use of them of the estate afore specified, after the said first day of *December*, do make, or cause to be made, or suffer any such discontinuance, alienations, warranties, or recoveries in form aforesaid, that then it shall be lawful to the person or persons to whom the said manors, lands, or tenements should or ought to belong after the decease of the said women, to enter into the same, and them to possess and enjoy, according to such title and interest as they should have had in the same, if the same women had been dead, no discontinuance, warranty, nor recovery had, as against the said husband during his life, if the said discontinuance, alienation, warranties, and recoveries be hereafter had by or against the same husbands and women during the coverture and espousal betwixt them. (4) Provided alway, That the said women, after the decease of their said husbands, may re-enter into the same manors, lands, and tenements, and them to enjoy according to their first estate in the same. (5) And over this be it ordained and enacted by the said authority, That if the said women at the time of such

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discontinuance, alienations, recoveries, warranties, after the said first day of *December*, in form aforesaid, to be had and made of any of the premises, be sole, that then she shall be barred and excluded of her title and interest in the same from thenceforth; (6) and that the person and persons to whom the title, interest, and possession of the same should belong after the decease of the said women, shall immediately after the said discontinuances, alienations, warranties, and recoveries, enter into the same manors, lands, tenements, and other hereditaments, and them to possess and enjoy, according to his or their title in the same. (7) Provided also, That this act extend not to avoid any recovery, discontinuance, or warranty after the form aforesaid, afore this time had, made, and suffered, but only where the said husband and woman, or either of them now being alive, or any other to their use, now have entries and title to the said manors, lands, tenements, or other hereditaments, aliened, discontinued, or suffered to be recovered after the form aforesaid, and thereof now taking the issues and profits, or any other person or persons to their use. (8) Provided also, That this act extend not to any such recovery or discontinuance to be had where the heirs next inheritable to the said woman, (9) or he or they that next after the death of the same woman should have estate of inheritance in the same manors, lands, or tenements, be assenting or agreeable to the said recoveries, where the same assent and agreement is of record, or inrolled. (10) Provided also, That it shall be lawful to every such woman being sole, or married after the death of her first husband, to give, sell, or make discontinuance of any such lands for term of her life only, after the course and use of the common law before the making of this present act.

Hob. 239—1 Leon. 261—2 Leon. 168—2 And. 44—2 Roll. 417—3 Co. 58—5 Co. 80—Bro. Judg. 118, 153—Co. Lit. 326,b 365, 366, 381—Cro. El. 2, 4, 34, 131, 513, 514—Cro. Jac. 174, 621—3 Mod. 33—4 Mod. 85. Upon the recovery or alienation of the woman, he in the reversion may enter—2 And. 31—1 Co. 102—3 Co. 50, 58—4 Co. 3—Dyer 111, 146, 248, 340, 354, 362—Hob. 341. A woman covert bound but during her husband's life—2 Bulst. 42. A woman may alien her land for the term of her life only—6 Ed. 1, stat. 1, c. 7—*enforced and explained by* 32 *H.* 8, *c.* 36.—*And see further* 23 *El. c.* 3, *and* 4 *Anne c.* 16.

A discontinuance of an estate in lands, signifies such an alienation made or suffered by a tenant in tail, or by one who is seized in *auter droit*, whereby the issue in tail, or the heir, or those in

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* 21 HENRY VIII. CAP. XV. A.D. 1529.

Fermors shall enjoy their leases against recoveries by feigned titles, &c.

WHERE afore this time divers persons have made leases of their manors, lands, tenements, and other hereditaments, sometime by their indentures, and sometime without writings, to other persons for term of years, taking of them great fines for the incomes of the said leases; and and after the same leasors, their heirs, or assigns, have caused and suffered recoveries to be had against them in the court of our sovereign lord the king, and in other lords courts, upon feigned and untrue titles, by craft or covin, to put the same termers from their said terms; (2) and after such recoveries had, the same recoverees, by reason of such recoveries and judgments, have entered into the same manors, lands, tenements and other hereditaments so to ferm letten, and thereof have expulsed the said fermers, contrary to their said leases, covenants, and agreements; (3) and because it was doubted to some persons, whether the said termers might falsify such recoveries, or not:

II. Be it, therefore, enacted by the king our sovereign lord, by the assent of the lords spiritual and temporal, and the commons,

reversion or remainder cannot enter, but are driven to their action.[1]

In its usual acceptation, a *discontinuance* signifies the effect of alienations made by husbands seized *juris uxoris;* by ecclesiastics seized *juris ecclesiæ;* or by tenants in tail.[2]

Before the statute 11 H. 7, (in the text) the alienation of a woman seized of an estate in dower, or of any estate of the gift of her husband, or of any of his ancesters, were said to be a discontinuance. And before the 32 H. VIII. c. 31, and 14 El. c. 8, recoveries suffered by tenants for life, or by tenants by the curtesy, or tenants in tail, after the possibility of issue extinct, or even by the feofee of tenant for years, worked a *discontinuance.*[3]

There is a material difference between the situation or title of the alienee of any person whose alienation worked a discontinuance, and the situation of the heir, or alienee of a disseisor.—These immediately claim under a person coming in by wrongful title, and their estates, though not defeasible by entry, are immediately defeasible by action. But the alienee of one whose aliena-

1. Harg. Co. Lit. 325,a—2 Bac. Abr. 87.
2. ib.
3. See *sir Will. Pelham's* case, 1 Rep. 14—Harg. Co. Lit. 325,a n. 1.

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in the present parliament assembled, and by the authority of the same, That all such termers shall and may falsify for his term only, such recoveries, as well heretofore had, as hereafter to be had, in such wise and form as a tenant of a freehold shall and may do by the course of the common law, where such tenant of freehold was neither privy nor party to the same recovery.

III. And that the same termers, their executors and assigns, notwithstanding such recoveries so had, shall retain, hold, and enjoy their said terms, according to their said leases, against all such recoverees, their heirs and assigns, as they should or might have done against the said lessors if such recovery had not been had or suffered; and that the said recoverers, their heirs, and assigns, after such recovery so had, (2) shall have like remedy against the said termers, their executors or assigns, by avowry or action of debt, for the rents and services reserved upon the same leases being due after the same recoveries; (3) and also like actions against them for waste done, after the same recoveries so had; in like manner and form, as the same leasors should or might have had, if the same recoveries had never been had.

IV. And also be it further enacted by the authority aforesaid, That no manner of statute of the staple, statute merchant, nor

tion is said to work a discontinuance, claims by a person having a lawful estate, and the estate of the alienee is unimpeachable during the life of the discontinuor.[4]

At the common law, if there was a term for years, and the tenant of the freehold suffered a common recovery by covin, it was a good bar to the termor; for not having the freehold he could not falsify the recovery; so that his term and interest in the land was lost, and his only remedy was an action of covenant against the lessor. His possession, therefore, or rather his interest, was absolutely *lost*, not merely *interrupted*.' Even after the statute of *Gloucester*[5] and the 21 *Hen.* 8, *c.* 15, which preserved the interest of a termor, for years, against a common recovery, as the possession of the termor for years, is considered as the possession of him who has the next estate of freehold, the recovery is never said to discontinue the estate of the termor for years; the expression discontinuance being applied solely to these cases where the freehold is divested.[6]

4. See *sir Will. Pelham's* case, 1 Rep. 14.—Harg. Co. Lit. 325.a n. 1.

5. See the statute *ante*, tit. Damages & Costs, p. 107.

6. Harg. Co. Lit. 325.b

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execution by *elegit* be hereafter avoided, or in anywise made frustrate, by means of any such feigned recovery; (2) but that all persons having any lands, tenements, or other hereditaments in execution, or being intitled to have execution of any manors, lands or tenements by any such means, shall have, by force of this statute, like remedy to avoid and falsify the same recoveries, as before is ordained and provided for the lease for term of years.

13 Co. 6—1 Roll. 443—3 Bulst. 245, 248—11 Co. 33—2 Leon. 65. Tenant for term of years may falsify a feigned recovery had against him in the reversion—6 Ed. 1, st. 1, c. 11. No statute or execution by elegit, shall be avoided by a feigned recovery—Co. Lit. 104,b.

An estate for *years* is a contract for the possession of lands or tenements, for some determinate period. If the lease be but for half a year, a quarter, or any less time, the lessee is considered as a tenant for years, and is so stiled in legal proceedings.

Such estates, in early times, were extremely precarious, being originally granted to mere farmers, or husbandmen, who rendered to the owner of the freehold some equivalent in money, provisions, or other rent. With a view of encouraging such tenants, they had a permanent interest granted to them. Their possession, however, was esteemed of so little consequence, that they seemed to be considered rather as the bailiffs, or servants of their lords, accountable for the profits of the land, at a fixed price, than as having any property of their own.

According to the ancient law, their estates, it is said, could not endure for a longer term than forty years.[7] There is no doubt, however, but that such estates might, at any time, be defeated by a common recovery, suffered by the tenant of the freehold. But by the statute 21 *Hen. VIII. c.* 15, the *fermor* or *termor* being the person entitled to a term of years, was protected against those fictitious recoveries; and his interest was thereby rendered secure and permanent; and leases for years being found convenient, for family settlements and mortgages, they were introduced to a very considerable extent.[8]

An estate which must expire at a period certain, and *prefixed*, is an estate for years.

7. If such a law ever existed, it was either antiquated, or disregarded so early as the reign of Rich. II. in which several instances are found of leases for a much longer period. Harg. Co. Lit. 46,a—2 Black. Com. 142.

8. 3 Bac. Abr. 296.

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* 31 HENRY VIII. CAP. I. A.D. 1539.

For joint tenants and tenants in common.

FORASMUCH as by the common law of this realm divers of the king's subjects, being seised of manors, lands, tenements and hereditaments, as joint tenants, or as tenants in common with other, of any estate of inheritance, in their own rights, or in the right of their wives, by purchase, descent, or otherwise, and every of them so being joint tenants, or tenants in common, have like right, title, interest and possession in the same manors, lands, tenements, and hereditaments, for their parts or portions jointly, or in common undividedly together with others; (2) and none of them by the law doth or may know their several parts or portions in the same, or that that is his or theirs, by itself undivided, and cannot by the laws of this realm otherwise occupy or take the profits of the same, or make any severance, division or partition thereof, without either of their mutual assents and consents; (3) by reason whereof divers and many of them, being so jointly and undividedly seised of the said manors, lands, tenements and hereditaments oftentimes do, of their perverse, and covetous and malicious minds and wills, against all right, justice, equity, and good conscience, by strength and power, not only cut and fallen down all the woods and trees growing upon the same, but also have extirped, subverted, pulled down, and destroyed all the houses, edifices and buildings, meadows, pastures, commons, and the whole commodities of the same, and have taken and converted them to their own uses and behoofs, to the open wrong and disherison and against the minds and wills of others holding the same manors, lands, tenements and hereditaments, jointly or in common with them, and they have been always without assured remedy for the same.

II. Be it therefore enacted by the king our most dread sovereign lord, by the assent of the lords spiritual and temporal, and by the commons, in this present parliament assembled, That all joint tenants and tenants in common that now be, or hereafter shall be, of any estate or estates of inheritance in their own rights, or in the right of their wives, of any manors, lands, tenements or hereditaments within this realm of *England*, *Wales*, or the marches of the same, shall and may be coacted and compelled, by virtue of

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this present act, to make partition between them of all such manors, lands, tenements and hereditaments, as they now hold, or hereafter shall hold, as joint tenants or tenants in common, by writ *De participatione facienda*, in that case to be devised in the king our sovereign lord's court of chancery, in like manner and form as co-parceners by the common law of this realm have been and are compellable to do, and the same writ to be pursued at the common law. 2 Bulst. 114.

III. Provided alway, and be it enacted, That every of the said joint tenants or tenants in common, and their heirs, after such partition made, shall and may have aid of the other of their heirs, to the intent to dereign the warranty paramount, and to recover for the rate, as is used between co-parceners after partition made by the order of the common law; any thing in this act contained to the contrary notwithstanding.

Godbolt 84, pl. 97. Several inconveniencies ensuing by holding lands jointly, or in common, being undivided. Keilw. 208,b 211,b—*Vin. Abr. V.* 14, 470 *to* 539—*Wood P.* 1, 187. Extended to joint tenants, &c. for life or years by 32 H. 8, c. 32—Co. pl. f. 410—Raymond 249—Dyer 128, 350,b—Bro. Partit. 38, 42—Cro. El. 759—*Cro. Car.* 44. Every of the joint tenants and tenants in common shall have aid of the other. Hob. 179—6 Co. 12. *See further* 32 *H.* 8, *c.* 32—8 *&* 9 *W.* 3, *c.* 31, *&* 7 *Anne c.* 18.

By the common law, joint tenants and tenants in common were not compellable to make partition. The inconvenience which was felt, in consequence of the one joint tenant, or tenant in common, occupying the whole land, or receiving the whole profits, induced the legislature to pass the act in the text, which gives a writ of partition to joint tenants and tenants in common of *estates of inheritance.* And the statute 32 *H. VIII. c.* 32,[9] gives the like remedy to joint tenants and tenants in common for life or years.

Before these statutes, the writ of partition was confined to co-parceners; and although one co-parcener might maintain it against the alienee of another, or against a tenant by the curtesy, yet neither the one nor the other of these could maintain such writ against a co-parcener.

But by force of these statutes, the alienee of one parcener may have a writ of partition against the other: because they are *tenants in common.*[10] So a *tenant by the curtesy* shall have a writ of partition, upon the statute 32 *H. VIII. c.* 32, for although he is neither joint tenant nor tenant in common, yet being in equal mischief with those to whom the statute gives this remedy, he is within the equity of it.[11]

9. See the statute in the text.
10. Co. Lit. 175.a
11. Co. Lit. 175.b

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* 32 HENRY VIII. XXVIII. A.D. 1540.(R

Lessees to enjoy the farm against the tenants in tail.

WHERE great number of the king's subjects have heretofore taken leases of lands, tenements and other hereditaments, for term of years, and divers of them for term of lives, and have given and paid great fines and great sums for the same, and also have been at great costs and charges, as well in and about great reparations and buildings upon their said ferms, as otherwise concerning their said ferms; (2) yet notwithstanding the said fermors, after the deaths or resignations of their lessors, have been and be daily, with great cruelty, expulsed and put out of their said ferms and takings, by the heirs or successors of their said lessors, or by such persons as have interest therein after the deaths or resignations of their said lessors, by reason of privy gifts of entail, or for that the lessors had nothing in the lands, tenements or other hereditaments so letten, at the time of the leases thereof made, but only in the right of their wives, or such other like cause, to the great impoverishment, and in manner utter undoing of the said fermors: (3) For reformation whereof, be it ordained, established and enacted by the king our sovereign lord, the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, That all leases hereafter to be made of any manors, lands, tenements, or other hereditaments, by writing indented under seal for term of years, or for term of life, by any person or persons being of full age of twenty-one years, having any estate of inheritance either in fee-simple or fee-tail, in their own right, or in the right of their churches or wives, or jointly with their wives, of any estate of inheritance made before the coverture or after, shall be good and effectual in the law against the lessors, their wives, heirs and successors, and every of them, according to such estate as is comprised and specified in every such indenture of lease, in like manner and form as the same

R) "This statute is in force except the IV. V. & VIII. sections." *Report of the Judges.*

The statute consists of eight sections. The § 4 is local: it relates to the number of farms which a man may hold; and to leases by ecclesiastical persons. The § V. contains a confirmation of leases made before the statute by certain persons and upon certain conditions. And the § VIII. respects leases made by ecclesiastical persons attainted of high treason.

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should have been, if the lessors thereof, and every of them, at the time of the making of such leases, had been lawfully seised of the same lands, tenements and hereditaments comprised in such indenture, of a good, perfect and pure estate of fee-simple thereof to their own only uses."

II. Provided always, That this act, or any thing contained, shall not extend to any leases to be made of any manors, lands, tenements or hereditaments, being in the hands of any fermor or fermors by virtue of any old lease, unless the same old lease be expired, surrendered or ended within one year next after the making of the said new lease; (2) nor shall extend to any grant to be made of any reversion of any manors, lands, tenements or hereditaments, (3) nor to any lease of any manors, lands, tenements or hereditaments which have not most commonly been letten to ferm, or occupied by the fermors thereof, by the space of twenty years next before such lease thereof made; (4) nor to any lease to be made without impeachment of waste, (5) nor to any lease to be made above the number of twenty-one years, or three lives, at the most, from the day of making thereof; (6) and that upon every such lease there to be reserved yearly during the same lease, due and payable to the lessors, their heirs and successors, to whom the same lands should have come after the deaths of the lessors, if no such lease had been thereof made, and to whom the reversion thereof shall appertain, according to their estates and interests, so much yearly ferm or rent, or more, as hath been most accustomably yielden or paid for the manors, lands, tenements and hereditaments so to be letten within twenty years next before such lease thereof made; (7. and that every such person and persons, to whom the reversion of such manors, lands, tenements or hereditaments so to be letten shall appertain, as is aforesaid, after the deaths of such lessors or their heirs, shall and may have such like remedy and advantage, to all intents and purposes, against the lessees thereof, their executors and assigns, as the same lessor should or might have had against the same lessees. (8) So that if the lessor were seised of any special estate tail of the same hereditaments at the time of such lease, that the issue or heir of that special estate shall have the reversion, rents and services reserved upon such lease after the death of the said lessor, as the lessor himself might or ought to have had if he had lived.

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III. Provided always, That the wife be made party to every such lease which hereafter shall be made by her husband of any manors, lands, tenements or hereditaments, being the inheritance of the wife; (2) and that every such lease be made by indenture in the name of the husband and his wife, and she to seal to the same; (3) and that the ferm and rent be reserved to the husband and to the wife, and to the heirs of the wife, according to her estate of inheritance in the same; (4) and that the husband shall not in any wise aliene, discharge, grant, or give away the same rent reserved, nor any part thereof, longer than during the coverture, without it be by fine levied by the said husband and wife; (5) but that the same rent shall remain, descend, revert or come after the death of such husband, unto such person or persons and their heirs, in such manner and sort as the lands so leased should have done, if no such lease had been thereof made.

VI. And moreover, for certain consideration, be it enacted by authority aforesaid, That no fine, feoffment, or other act or acts hereafter to be made, suffered or done by the husband only, of any manors, lands, tenements or hereditaments, being the inheritance or freehold of his wife, during the coverture between them, shall in any wise be or make any discontinuance thereof, or be prejudicial or hurtful to the said wife or to her heirs, or to such as shall have right, title or interest to the same by the death of such wife or wives; (2) but that the same wife and her heirs, and such other to whom such right shall appertain after her decease, shall and may then lawfully enter into all such manors, lands, tenements and hereditaments, according to their rights and titles therein; any such fine, feoffment or other act to the contrary notwithstanding; fines levied by the husband and wife (whereunto the said wife is party and privy) only except.

VII. Provided furthermore, That this clause or act extend not to give any liberty to any such wife, or to her heirs, for to avoid any lease hereafter to be made of any the inheritance of the wife by her husband and her for term of one and twenty years, or under, or any her inheritance for term of three lives at the uttermost, whereupon as much yearly rent or more is or shall be reserved, and yearly payable during the same lease, as was at any time therefore yielden or paid within twenty years next before

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making of any such lease, according to the tenor of this present act; any thing therein contained to the contrary notwithstanding.

Leases made by tenants in fee or fee-tail, in the right of their wives or churches, which be good, which void—2 Roll. 169, 332, 403, 404—Savil 85—Hutton 84—1 Leon. 59, 148—3 Leon. 156. Leases made by tenant in tail, or by him which is seised in the right of his wife, or church, &c.—1 Leo. 112—Cro Jac. 173—8 Co. 34—10 Co. 60—Bro. Accept f. 9—Dyer 51, 363—Co. Lit. 44—Hob. 204—*Cro. El.* 875—34 H. 8, c. 20—Cro. El. 5, 330 Special observations of leases to be made by tenant in tail, or of the wife's lands—Raym. 165—1 Sid. 416—Dyer 115, 246, 271, 279, 301—5 Co. 2, 5—2 Roll. 402—5 Co. 6—Cro. El. 602—Cro. Car. 22, 44—Latch. 257—Bridgm. 29—Moor 759. pl. 1050—Hob. 324. Leases made by husband and wife of the wife's lands—3 Leon 132—Jones 60—Hutt. 84—1 Roll. 159, 163—Latch. 45. The husband's only act of the wife's land shall not prejudice her or her heirs. Explained by 34 & 35 H. 8, c. 22—6 Ed. 1, c. 3—13 Ed. 1, st. 1, c. 3 & 40—Moor 58, pl. 164—Moor 872, pl. 1215—2 Inst. 681—Hob. 243, 261—Dyer 72, 264, 368—Co. Lit. 326—2 Roll. 410. 491, 499. Leases made by the husband and the wife, of the inheritance of the wife—God. 102, pl. 119. *See further concerning leases,* 1 *El. c.* 19—13 *El. c.* 10 *&* 20—14 *El. c.* 11 *&* 14—18 *El. c.* 6—43 *El. c.* 9, *and* 29 *Geo.* 2, *c.* 31.

If a husband, seised of lands in right of his wife, makes a lease by deed reserving rent, though such lease may be avoided by her after the death of her husband, yet if, instead of shewing her dissent, she accept rent becoming due after his death, the lease thereby becomes absolute and irrevocable. So if the wife had joined the husband in a lease for years, by indenture of her lands, she might after his death, either affirm it by acceptance of rent, or dissent to and avoid it by bringing trespass, &c. in the same manner as if she had been no party thereto.[12] But a *parol* lease by the husband or by the husband and wife, of the wife's lands determines absolutely by his death, so that no acceptance of rent or other act done by the wife will prevent its avoidance.[13]

The statute of 32 Hen. VIII. in the text, hath made an alteration in the common law, and enables all husbands seised of lands in right of their wives, to make leases for twenty-one years, or three lives; *observing the directions* therein mentioned; and such leases to bind the wives and their heirs; so that they cannot now, after the husband's death, avoid leases as they might have done at the common law. Yet, if the directions of the statute are not observed, the leases are avoidable as they would have been before it was enacted.

This is the only statute that gives directions concerning leases by tenant in tail, or by husbands seised of lands in right of their wives. There are several rules necessary to be observed in order to make a good lease under this statute. *First*, The leases to be

12. Co. Lit. 45,b—Plow. 137—Cro. Jac. 332, 563, 617—Cro. Car. 165—Cro. Eliz. 769.

13. Cro. El. 656—Cro. Jac. 563—Dyer 91, 146—Leon. 192, 204—2 Bac. Abr. 306.

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made by virtue thereof must be by *indenture.*[14] *Secondly*, The next rule relates to the time when such leases are to commence. The statute requires that they are to begin "*from the day* of the making."[15] *Thirdly*, If there be an old lease in being, it must be

14. That is to say, it must be a deed of two or more parts; but the circumstance of indenting the parchment, although it was formerly deemed essential, (Co. Lit. 143,b 229,a) yet at the present day it is considered immaterial, and might even be done in court, therefore no exception is now taken to so trifling an omission. 3 Bac. Abr. 336, *note*.

The like good sense which overlooks a *form*, when it no longer answers any useful purpose, has marked the decisions of our courts, so far as they have gone, in respect to sealed instruments, executed by individuals.

In ancient times the *seal* gave authenticity to the deed, and designated the person who executed it. Every freeman, and even the more substantial villains, had their distinct particular seals, with such devices impressed thereon as they respectively thought fit to distinguish themselves by. [2 *Black. Com.* 306.]—"Besides the principal seal to a deed, there was sometimes a counter-seal, being the private seal of the party. If a man had not his own seal, or if his own seal was not well known, he would use that of another; and sometimes for the better security he would use both his own, and that of some other better known."—1 *Reeve Eng. L.* 89. When about the reign of Richard I. coats of arms were introduced into seals, a more settled and known distinction was afforded.

The use of seals is derived from the Normans; the Saxons made use of the sign of the cross in attesting their charters; and antiquarians seem to be agreed, that the word *sigillum*, which often occurs in saxon charters, did not mean a seal of wax, but was used synonimously for *signum*, and denoted the sign of the cross and other symbols made use of in those times. 1 *Reeve Eng. Law* 11, 88. The signing of deeds was not deemed essential, and might well be dispensed with:—it was indeed from the very general inability to write that sealing was used; and when, in consequence of the progress of learning, the reason for the use of sealing ceased, yet the practice still continued; and to the present day it is usual, in the attestation of deeds, to use the words "*Sealed and Delivered*," omitting the word "*Signed*," though the signing is now essential, and the *sealing* no longer affords any proof of the authenticity of a deed, nor in any way designates or identifies the person who executes it. Hence, in Pennsylvania, it has been held that an ink seal, or any scrawl, may supply the place of a wax seal. Now, to be consistent with that decision, our courts must necessarily place sealing upon precisely the same footing with *indenting*. If the decision that a scrawl may supply the place of a seal means any thing, it imports that the seal is a useless formality: whence it is fairly inferrable, that where the instrument, on the face of it purports to be the deed of the party, and is delivered as such, it shall be considered as his deed.

Suppose a writing purporting to be an indenture, of two or more parts, concluding as usual, "*In testimony whereof the parties to these presents have hereunto interchangeably set their hands and seals.*" The several parts corresponding *verbatim et literatim* with each other; simultaneously executed; and the subscribing witnesses to each part attesting that the same was sealed and delivered, as the deed of the parties in their presence,—and it should so happen that in one of the parts the scrawl to supply the place of a seal were omitted. Is it possible to conceive that such omission should invalidate the deed! Ought not a court to permit such an omission to be supplied, even on the trial, as they would permit the omission of indenting to be supplied?

The distinction between deeds, and other written instruments, is perhaps too well established to be shaken. Let it then remain. But let the discrimination depend upon the intention of the parties, manifested in the instrument itself; place the distinction on a footing which may consist with common sense, and not upon the puerile consideration whether a scrawl be inserted, or omitted, after the name of the person who, in the execution of the instrument, declares that he executes it as his deed.

15. *Date* and *day of the date*, Ld Hale observes, are the same in point of computation, but in point of interest *date* is taken *inclusive; day of the date*, exclusive in many cases. *Hal MSS. Harg. Co. Lit.* 46.b A lease having no date, or a void, or impossible date, shall begin from the delivery, for there is no other certain *indicium* of the time of their taking effect. ib.—2 *Co.* 5—2 *Inst.* 674—*Hob.* 140.

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surrendered, or expired, or ended within a year of the making of the new lease, and the surrender must be absolute and not conditional. *Fourthly*, There must not be a double lease in being at one time, as if a lease for years be made according to the statute, he in the reversion cannot expulse the lessee, and make a lease for life or lives, according to the statute, nor *e converso;* for the words of the statute be, to make a lease for three lives, or one and twenty years, so as one or the other may be made and not both. *Fifthly*, It must not exceed three lives, or one and twenty years, from the making of it, but it may be for a lesser term or fewer lives. *Sixthly*, It must be of lands, tenements, or hereditaments, manurable or corporeal, which are necessary to be letten, and whereout a rent by law may be reserved, and not of things that lie in grant, as advowsons, faires, markets, franchises, and the like, whereout a rent cannot be reserved. *Seventhly*, It must be of lands or tenements which have most commonly been letten to farm,[16] or occupied by the farmers thereof by the space of twenty years next before the lease made, so as if it be letten for eleven years, at one or several times within those twenty years, it is sufficient.[17] *Eighthly*, That upon every such lease there be reserved yearly during the same lease, due and payable to the lessors and their heirs, as much yearly farm or rent, or more than hath been most accustomably yielded or paid for the lands within twenty years next before such lease made. *Ninthly*, The lease must not be *without impeachment of waste.*

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*32 HENRY VIII. CAP. XXXII. A.D. 1540.

Joint tenants for term of life or years.

FORASMUCH as in the parliament begun at *Westminster* the twenty-eighth day of *April*, and there continued till the twenty-eighth day of *June*, the thirty-first year of the king's most noble and victorious reign that now is, it was, amongst other things, there enacted and established, That all joint tenants and tenants in common, that then were, or hereafter should be of any estate or estates of inheritance, in their own rights, or in the right of their

16 If tenant in tail makes a lease of lands anciently demised, and of an acre of waste not before demised, reserving the ancient rent, and so much more as the acre of waste was worth, this addition of the acre of waste spoils the whole lease, because the rent being intire in the reservation issued out of the whole and every part thereof, and the acres of waste being never demised before, it could not be said *verus et antiquus redditus*, which issued out of that which never before yielded any rent at all. 5 Co. 5—Moor 197—Lord Mountjoy's case—Co. Litt. 44.b See also 3 Bar. Abr. 364, 5.

17. *Harg. Co. Lit.* 44.b

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wives, of any manors, lands, tenements or hereditaments within this realm of *England*, *Wales*, or marches of the same, shall and may be coacted and compelled by virtue of the said act, to make partition between them of all such manors, lands, tenements, or hereditaments as they then held, or hereafter should hold as joint tenants or tenants in common, as more at large appeareth by the said statute: (2) And forasmuch as the said statute doth not extend to joint tenants and tenants in common for term of life or years, neither to joint tenants or tenants in common, where one or some of them have but a particular estate for term of life or years, and the other have estate or estates of inheritance of and in any manors, lands, tenements and hereditaments: (3) Be it therefore enacted by the king our sovereign lord, and by the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, That all joint tenants and tenants in common, and every of them, which now hold, or hereafter shall hold, jointly or in common, for term of life, year or years, or joint tenants or tenants in common, where one or some of them have or shall have estate or estates for term of life or years, with the other that have or shall have estate or estates of inheritance or freehold in any manors, lands, tenements or hereditaments, shall and may be compellable, from henceforth, by writ of partition to be pursued out of the king's court of chancery, upon his or their case or cases, to make severance and partition of all such manors, lands, tenements and hereditaments which they hold jointly or in common for term of life or lives, year or years, where one or some of them hold jointly or in common for term of life or years with other, or that have an estate or estates of inheritance of freehold.

II. Provided always, and be it enacted, That no such partition or severance, hereafter to be made by force of this act, be, nor shall be, prejudicial or hurtful to any person or persons, their heirs or successors, other than such which be parties unto the said partition, their executors or assigns.

31 H. 8, c. 1. Joint tenants, and tenants in common for lives or years shall make partition—1 Leon. 162. Joint tenants for life or years are compellable to make partition—Bro. Partition 38, 41—Co. Lit. 175,a—*Dyer* 73, *pl.* 7, 179, *pl.* 43—*Cro. Car.* 44. Partition to be prejudicial to none but parties—Co. Ent. 412,b. *See further* 8 & 9 *Will.* 3, c. 31, *and* 7 *Anne* c. 18.

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The mode of proceeding in writs of partition, at the suit of any tenant in common, or joint tenant,[18] or tenant in co-parcenery is regulated by several acts of the legislature of Pennsylvania.

The first act on this subject is the act of *11th April*, 1799:[19] further provision was made by the act of *28th March*, 1806;[20] and "An act supplementary to the several acts of this commonwealth concerning partitions," passed *7th April*, 1807,[21] and also by the act of 26th March, 1808.[22]

The several courts of common pleas are authorised to issue writs of partition, in all cases wherein partition is demanded of lands, tenements, or hereditaments held in joint tenancy, co-parcenary, or in common; and whether the demandant, or demandants be minors.

These prescribe—1. The course of proceeding where the defendant or defendants are in a state of infancy.[24] 2. The manner of giving notice, which may be by service of process, or in some cases by publication in the papers.[25] 3. The abatement of the writ by the death of a defendant, is guarded against.[26] 4. The power of the sheriff and inquest to regulate and equalize the purparts, by valuing them, and awarding the payment of money.[27] 5. The remedy where the judgment is by default.[28] There are sundry other regulations, which will be better understood by a reference to the acts, than by the short notice which could here be taken of them. I shall therefore only remark further, that a recovery in partition is no bar to an action of dower, in that part of the premises which is assigned to the tenant.[29] That partition can only be made between tenants of the freehold.[30] And that a parol partition between tenants in common, made by making a line of division on the ground, and followed by a corresponding separate possession, is good, notwithstanding the act for the prevention of frauds and perjuries.[31]

18. By the act of 1st March, 1812, it is declared that the *jus accrescendi*, or right or survivorship shall no longer obtain between joint tenants; but that the lands shall descend, or pass by device as the estates of tenants in common. The act, however, is not to effect trust estates. *5 St. Laws Sm. Ed.* 395.

19. 3 State Laws, Sm Ed. 386.
20. 4 State Laws, Sm. Ed. 35.
21. ib. 398.
22. ib. 518.
23. ib. 398.
24. 4 State Laws, Sm. Ed. 398.
25. ib. 398, 519.
26. ib. ib.
27. ib. ib.
28. ib. ib.
29. 1 Dal. 18.
30. *M'Kee v Straube*, 2 Bin. 34.
31. *Ebert v Wood*, 1 Bin. 216. Respecting the partition of intestates' estates see the act of 19th April, 1794, and the valuable notes thereto subjoined. 3 St. Laws, Sm. Ed. 143.

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* 32 HENRY VIII. CAP. XXXIV. A.D. 1540.(s

Concerning grantees of reversions to take advantage of the conditions to be performed by the lessees

WHERE before this time, divers as well temporal as ecclesiastical and religious persons, have made sundry leases, demises and grants to divers other persons, of sundry manors, lordships, ferms, meases, lands, tenements, meadows, pastures, or other hereditaments, for term of life or lives, or for term of years, by writing under their seal or seals, containing certain conditions, covenants and agreements to be performed, as well on the part and behalf of the said lessees and grantees, their executors and assigns, as on the behalf of the said lessors and grantors, their heirs and successors; (2) and forasmuch as by the common law of this realm, no stranger to any covenant, action or condition, shall take any advantage or benefit of the same, by any means or ways in the law, but only such as be parties and privies thereunto, by the reason whereof, as well all grantees of reversions, as also all grantees and patentees of the king our sovereign lord, of sundry manors, lordships, granges, ferms, meases, lands, tenements, meadows, pastures, or other hereditaments late belonging to monasteries, and other religious and ecclesiastical houses dissolved, suppressed, renounced, relinquished, forfeited, given up, or by other means come to the hands and possession of the king's majesty since the fourth day of *February*, the seven and twentieth year of his most noble reign, be excluded to have any entry or action against the said lessees and grantees, their executors or assigns, which the lessors before that time might by the law have had against the same lessees for the breach of any condition, covenant or agreement comprised in the indentures of their said leases, demises and grants: (3) Be it therefore enacted by the king our sovereign lord, the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, That as well all and every person and persons, and bodies politic, their heirs, successors and assigns, which have or shall have any gift or grant of our said sovereign lord, by his letters patent, of any lordships, manors, lands,

s) "This statute is in force, except such parts as relate to the king of England and his grantee." *Report of the Judges.*

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tenements, rents, parsonages, tithes, portions, or any other hereditaments, or of any reversion or reversions of the same, which did belong or appertain to any of the said monasteries, or other religious or ecclesiastical houses, dissolved, suppressed, relinquished, forfeited, or by any other means come to the king's hands since the said fourth day of *February*, the seven and twentieth year of his most noble reign, or which at any time heretofore did belong or appertain to any other person or persons, and after come to the hands of our said sovereign lord; (4) as also all other persons being grantees or assignees to or by our said sovereign lord the king, or to or by any other person or persons than the king's highness, and the heirs, executors, successors and assigns of every of them, (5) shall and may have and enjoy like advantages against the lessees, their executors, administrators and assigns, by entry for non-payment of the rent, or for doing of waste or other forfeiture; (6) and also shall and may have and enjoy all and every such like, and the same advantage, benefit and remedies by action only, for not performing of other conditions, covenants or agreements contained and expressed in the indentures of their said leases, demises or grants, against all and every the said lessees and farmers and grantees, their executors, administrators and assigns, as the said lessors or grantors themselves, or their heirs or successors, ought, should, or might have had and enjoyed at any time or times, (7) in like manner and form, as if the reversion of such lands, tenements or hereditaments had not come to the hands of our said sovereign lord, or as our said sovereign lord, his heirs and successors, should or might have had and enjoyed in certain cases, by virtue of the act made at the first session of this present parliament, if no such grant by letters patents had been made by his highness.

II. Moreover be it enacted by authority aforesaid, That all farmers, lessees and grantees of lordships, manors, lands, tenements, rents, parsonages, tithes, portions, or any other hereditaments for term of years, life or lives, their executors, administrators and assigns, shall and may have like action, advantage and remedy against all and every person and persons, and bodies politic, their heirs, successors and assigns, which have or shall have any gift or grant of the king our sovereign lord, or of any other person or persons, of the reversion of the same manors, lands, tenements

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and other hereditaments so letten, or any parcel thereof, for any condition, covenant or agreement contained or expressed in the indentures of their lease or leases, as the same lessees, or any of them might and should have had against the said lessors and grantors, their heirs and successors; (2) all benefits and advantages of recoveries in value by reason of any warranty in deed or in law, by voucher or otherwise, only excepted.

III. Provided always, That this act, nor any thing or things therein contained, shall extend to hinder or charge any person or persons for the breach of any covenant or condition comprised in any such writing, as is aforesaid, but for such covenants and conditions as shall be broken or not performed, after the first day of *September* next coming, and not before; any thing before in this act contained to the contrary thereof notwithstanding.

1 Roll. 81, 359—2 Roll. 170—*Cro. El.* 457—Cro. Jac. 521—Godb. 161, pl. 227, 276, pl. 391—Vaugn. 39—Stile 326—1 Mod. 192—1 Show. 284, 285—1 Salk. 185—1 Vent. 10—1 Sid. 401, 402—2 Bulst. 282—Moor 93, pl. 230—Moor 94, pl. 232—Moor 159, pl. 300—Moor 242, pl. 380—Moor 243, pl. 382—Moor 525, pl. 691—Moor 527, pl. 695. Grantees of reversions may take advantage of conditions and covenants against the lessees of the same lands. Moor 876, pl. 1228—Goldsb. 175, pl. 109—Plowd. f. 175—Dyer f. 68, 131, 309—3 Co. 62—5 Co. 112—Bro. Entre. congeable 139—Cro. El. 600, 863—Cro. Jac. 305—Cro. Car. 24, 44, 137. Lessees may have the like remedy against the grantees of the reversions which they might have had against their grantors. Dyer f. 257—3 Co. 63—5 Co. 16—Co. Lit. 215.

At the common law, if a man had made a lease for life, reserving a rent, &c. and if the rent be in arrear, a re-entry, and the lessor should grant the reversion over, the grantee could take no advantage of the condition, as the lessor or his heirs might have done, had the reversion continued in them. But now, by virtue of the statute 32 *Hen. VIII.* c. 34, in the text, the grantee of the reversion may take advantage thereof, and upon demand of the rent, and non-payment, he may re-enter.

The grantee of the reversion, having by the statute the like advantage against the lessee, by entry for the non-payment of the rent, or for doing waste, or other forfeiture, &c. as the lessors or grantors themselves might or ought to have had.

In the construction of this act it has been held—

1. That the statute is general; and that the grantee of the reversion of every common person, as well as of the king, shall take advantage of conditions.[1]

2. That where the statute speaketh of *lessees*, that the same doth not extend to gifts in tail.

3. That where the statute speaks of grantees and assignees of the reversion, that an assignee of part of the estate of reversion

1. Co. Lit. 215,a—Pl. Com. 175-6.

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may take advantage of the condition. As if lessee for life, be, &c. and the reversion is granted for life, &c. So if lessee for years, &c. be, and the reversion is granted for years, the grantee for years shall take benefit of the condition in respect of this word [*executors*] in the text.

4. That a grantee of part of the reversion shall not take advantage of the condition; as if the lease be of three acres, reserving a rent upon condition, and the reversion is granted of two acres, the rent shall be apportioned by the act of the parties, but the condition is destroyed, for that it is entire, and against common right.

5. By act in law, a condition may be apportioned in the case of a common person. And likewise a condition shall be apportioned by the act and wrong of the lessee.[2]

6. There is a diversity between a condition that is compulsory, and a power of revocation that is voluntary: for a man that hath a power of revocation, may, by his own act, extinguish his power of revocation in part, as by levying a fine of part; and yet the power shall remain for the residue, because it is in nature of a limitation, and not of a condition.

7. If the lessor grant the reversion in fee, to the use of A. and his heirs, A. is a sufficient assignee within the statute, because he comes in by the act and limitation of the party, albeit he is in the *post*, and the words of the statute be, *to or by*, and they be assignees to him, although they be not by him.

8. Although the words of the statute be, for non-payment of the rent, or for doing of waste, or other forfeiture, yet the grantees or assignees shall not take benefit of every forfeiture, by force of a condition, but only of such conditions as either are incident to the reversion, as rent for the benefit of the state, as for not doing of waste, for keeping the houses in reparation, for making of fences, scouring of ditches, for preserving of woods, or such like, and not for the payment of any sum in gross, delivery of corn, wood, or the like, so as other forfeiture shall be taken for other forfeitures like to those examples, which were there put (*videlicet*) of payment of rent, and not doing of waste, which are for the benefit of the reversion.[3]

It has also been held upon this statute, that if a man makes a lease for years, upon condition that if the rent should be in arrear, it should be lawful to the lessor and his assigns to re-enter, and then the lessor assigns the reversion over, and the lessee attorns, and the lessor dies, the grantee shall not take advantage of the condition for want of these words, *his heirs* in the reservation of the condition; the condition being, that he and his assigns shall enter. By Brown, serg. who moved the case in C. B. *ex relatione* J. Hurst:—It appears, therefore, that this reservation of condition is to be resembled to secure a reservation of rent, as is mentioned before, Co. Litt. page 47,a. which determined by the death of the

2. Co. Lit. 148,a 215.a

3. Co. Lit. 215.

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lessor; but that, nevertheless, the grantee shall have advantage of the condition during the life of the grantor, by the 32 *H.* 8. So note, the grantee of part of the reversion in the whole, shall take advantage of a condition; for to this purpose the grantee of a reversion for life or years, is an assignee within the 32 *Henry* 8, who may enter; which, nevertheless, is very different in the case of a warranty; for a lessee for life, who has but part of the estate in the whole, is not assignee for voucher. On the other hand, the grantee of the whole estate in reversion in part, is not an assignee within the 32 H. 8: as if the reversioner in fee of 4 acres, grants 2 acres in fee, the grantee cannot enter, which also is very different in the case of warranty, for the feoffee of 2 acres is an assignee for voucher.[4]

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* 14 ELIZABETH, CAP. VIII. A.D. 1572.

An act for the avoiding of recoveries suffered by collusion by tenants for term of life and such others.

WHERE divers persons being seised, or that have been seised of lands, tenements and hereditaments, as tenants by the curtesy of *England*, tenants in tail, after possibility of issue extinct, or otherwise, only for term of life or lives, or of estates determinable upon life or lives, have heretofore permitted and suffered other persons by agreement or covin between them had, to recover the same lands and tenements and other hereditaments, against the same particular tenants, in the queen's majesty's court, (2) or have permitted and suffered themselves to be vouched by other persons, by agreement or covin between them had, in recoveries suffered of the same lands, tenements and other hereditaments, in the queen's majesty's court, (3) to the great prejudice of those to whom the reversion or remainder thereof hath appertained, or ought to appertain:

II. For remedy whereof, be it enacted by the queen's most excellent majesty, with the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, That all such recoveries hereafter to be had or prosecuted by agreement of the parties, or by covin as is

4. Co. Lit. 215, b note 1.

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aforesaid, against any such particular tenant of any lands, tenements or hereditaments, whereof the same particular tenant is or hereafter shall be seised of any such particular estate as aforesaid, (2) or against any other with voucher over of any such particular tenant, or of any having or that had a right or title to any such particular estate or tenancy as is aforesaid, (3) shall, from henceforth, as against such person or persons to whom any reversion or remainder thereof, by force of any conveyance or device before that time had or made, shall, ought or lawfully may appertain, and against their heirs and successors, to be clearly and utterly void and of none effect; any law or usage heretofore had to the contrary thereof in any wise notwithstanding.

III. Provided alway, That this act, nor any thing therein contained, shall extend or be prejudicial to any person or persons that shall hereafter, by good title, recover any lands, tenements or hereditaments, without fraud or covin, by reason of any former right or title; (2) but that all and every such recovery, and recoveries so to be had or prosecuted upon former rights, or titles, shall stand and be in like force, strength and effect, as they were before the making of this act; any thing herein contained to the contrary in any wise notwithstanding.

IV. Provided also, That all and every such recovery and recoveries to be had or prosecuted, of any lands, tenements or hereditaments as aforesaid, by the assent and agreement of any person or persons to whom any reversion or remainder thereof then shall or ought to appertain, (so that the same assent and agreement do appear of record in any court of our sovereign lady the queen's majesty, her heirs or successors) shall stand and be in like force, strength, and of like effect, against such person and persons that shall so assent and agree, their heirs and successors, as they were before the making of this act; any thing herein contained to the contrary in any wise notwithstanding.

V. Be it further enacted by the authority aforesaid, That one act, made in the two and thirtieth year of our late sovereign lord king *Henry* the eighth, entitled, *An act for the avoiding of recoveries by collusion, by tenants for term of life*, shall be from the first day of *July* next ensuing repealed, and shall no longer stand in force. Co. Lit. 356,a 362,a

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Co. Ent. 656, 670.—2 Leon. 60, 63. Recoveries against tenants for life, &c. by covin, shall be void—Moor 690, 953—Co. Ent. 15—Cro. El. 562. A recovery by the assent of him in the reversion or remainder—10 Co. 43. *See* 14 *Geo.* 2, *c.* 20, for amendment of common recoveries.

The object of this statute is the preservation of remainders and reversions, expectant upon any estate for life.[5]

If tenant for life aliens by feoffment, or fine, for the life of another, or in tail or fee, these being estates which either must, or may, last longer than his own, the creating of them is not only beyond his power, and inconsistent with the nature of his interest, but is also a forfeiture of his own particular estate to him in remainder or reversion, who may enter upon the alienee.[6]

So, if tenant for life suffer a recovery by agreement and covin, between himself and the demandant, this is a forfeiture of his estate, and he in the reversion or remainder may enter for the forfeiture. But the statute 14 *El.* *c.* 8, extends only to recoveries had by agreement or covin. And a recovery suffered by agreement between a tenant for life and tenant in tail, is valid to bar the remainder-man or reversioner in fee. For a tenant in tail in possession, or in remainder, with the assent of the tenant for life, has a power to bar the estate tail.[7]

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* 19 CHARLES II. CAP. VI. A.D. 1667.

An act for redress of inconveniencies by want of proof of the deceases of persons beyond the seas or absenting themselves, upon whose lives estates do depend.

WHEREAS divers lords of manors, and others, have used to grant estates by copy of court-roll for one, two or more life or lives, according to the custom of their several manors; and have also granted estates by lease for one or more life or lives, or else for years, determinable upon one or more life or lives; and it hath often happened, that such person or persons, for whose life or lives such estates have been granted, have gone beyond the seas, or so absented themselves for many years, that the lessors and reversioners cannot find out whether such person or persons be alive or dead, by reason whereof such lessors and reversioners have been

5. The 32 H. VIII. c. 31, which is repealed and supplied by this act, extended not to recoveries where tenant for life came in as a voucher, but by the statute 14 *El.* *c.* 8, ample remedy is provided for preservation of the entry of them in reversion or remainder. Co. Lit. 362.a

6. Co. Lit. 251,a—Lit. § 415—2 Black. Com. 274

7. Co. Lit. 362.a

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held out of possession of their tenements for many years, after all the lives upon which such estates depended, are dead, in regard that the lessors and reversioners when they have brought actions for the recovery of their tenements, have been put upon it to prove the death of their tenants, when it is almost impossible for them to discover the same:

II. For remedy of which mischief, so frequently happening to such lessors or reversioners, Be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, That if such person or persons, for whose life or lives such estates have been or shall be granted as aforesaid, shall remain beyond the seas, or elsewhere absent themselves in this realm, by the space of seven years together, and no sufficient and evident proof be made of the lives of such person or persons respectively, in any action commenced for recovery of such tenements by the lessors or reversioners; in every such case the person or persons upon whose life or lives such estate depended, shall be accounted as naturally dead; (2) and in every action brought for the recovery of the said tenements, by the lessors or reversioners, their heirs or assigns, the judges before whom such action shall be brought, shall direct the jury to give their verdict as if the person so remaining beyond the seas, or otherwise absenting himself, were dead.

III. And be it further enacted, That in any such action, wherein the life or death of any such person or persons shall come in question, between the lessor or reversioner and tenant in possession, it shall and may be lawful for the lessor or reversioner to take exception to any of the jurors returned for the trial of that cause, that the greater part of the real estate of any of such jurors is held by lease or copy for lives, who, upon proof thereof, shall be set aside as in case of other legal challenges.

[☞ § IV. is local and temporary; and therefore omitted.]

V. Provided always, and be it enacted, That if any person or persons shall be evicted out of any lands or tenements by virtue of this act, and afterwards if such person or persons, upon whose life or lives such estate or estates depend, shall return again from beyond the seas, or shall, on proof, in any action to be brought for recovery of the same, be made appear to be living,

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or to have been living at the time of the eviction; that then and from thenceforth the tenant or lessee, who was ousted of the same, his or their executors, administrators or assigns, shall or may re-enter, repossess, have, hold and enjoy the said lands or tenements in his or their former estate, for and during the life or lives, or so long term as the said person or persons upon whose life or lives the said estate or estates depend, shall be living; (2) and also shall have, upon action or actions to be brought by him or them against the lessors, reversioners or tenants in possession, or other persons respectively, which since the time of the said eviction received the profits of the said lands or tenements, recover, for damages, the full profits of the said lands or tenements respectively, with lawful interest for and from the time that he or they were ousted of the same lands or tenements, and kept and held out of the same by the said lessors, reversioners, tenants or other persons, who, after the said eviction, received the profits of the said lands or tenements, or any of them respectively, as well in the case when the said person or persons upon whose life or lives such estate or estates did depend, are or shall be dead at the time of bringing of the said action or actions, as if the said person or persons were then living.

Persons beyond the seas, or absenting themselves for seven years—Carthw. 246. See 6 Anne, c. 18, *which extends to reversioners after the death of minors or married women, &c.*

It is a well established rule of law, that persons once in being shall be intended still living, if the contrary be not proved.[1]—Therefore in ejectments, &c. great caution is required, in making out a pedigree, &c. not to prove the birth of any person, through whom the title is not deduced, and who might be heir if living; and to be prepared with proof of the death of such person if set up with the adverse party.

The inconvenience, which occasioned the making of the statute in the text, is clearly set forth in the preamble. In the construction of the statute it is held, that if a person absents himself for seven years, and no proof can be made that he is alive, he shall be presumed to be dead.[2]

Further and more effectual provision is made on this subject in *England*, by the statute 6 *Anne* c. 18, which authorises a person claiming in reversion, remainder, or expectancy in or to any es-

1. 2 Roll. Rep. 461.
2. Carthw. 246—2 Roll. 461—Townsend 525—35 H. 6. 50, b pl. 14. pr. Priscott. Dett. 60.

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tate, after the death of any minor, married woman, or any other person whatsoever, upon affidavit made in the court of chancery by the claimant, of his title, and that he hath cause to believe that the person upon whose life the reversion, &c. depends, is dead, and that his death is concealed, an order shall be made on the person concealing, or suspected of concealing the death, to produce and show the person suspected to be dead, to such persons, not exceeding two, as shall be named in the order, at the time and place therein appointed; and in default, the lands, &c. shall pass as if the person concealed were actually dead.

And upon affidavit made as aforesaid, the minor, married woman, &c. is, or lately was, at come certain place beyond the seas, the claimant may send one, or both the persons named in the order, to which he will be entitled, at his own charges, to the place named, to view such minor, married woman, &c. and the person or persons so appointed, are to make their return to the court of chancery.

It is provided, however, that if it should afterwards appear that such infant, &c. were alive at the time of the order, the right is not divested.

The act contains a provision in favor of guardians, trustees and husbands, who may have ineffectually endeavoured to produce the person upon whose life the estate depends.

The act declares those persons, who, as guardians, trustees, &c. hold estates after the lives upon which they depend are determined to be trespassers.

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* 11 GEORGE II. CAP. XIX. A.D. 1738.(r

An act for the more effectual securing the payment of rents, and preventing frauds by tenants.

WHEREAS the several laws heretofore made for the better securing of rents, and to prevent frauds committed by tenants, have not proved sufficient to obtain the good ends and purposes designed thereby, but rather the fraudulent practices of tenants, and the mischief intended by the said acts to be prevented, have of late years increased, to the great loss and damage of their lessors or landlords.

XIV. And to obviate some difficulties that many times occur in the recovery of rents, where the demises are not by deed, Be it

r) "The XIV. and XV. sections of this statute are in force." *Report of the Judges.*

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further enacted by the authority aforesaid, That from and after the said twenty-fourth day of *June*, it shall and may be lawful to and for the landlord or landlords where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements or hereditaments, held or occupied by the defendant or defendants, in an action on the case, for the use and occupation of what was so held or enjoyed; and if, in evidence, on the trial of such action, any parol demise or any agreement (not being by deed) whereon a certain rent was reserved, shall appear, the plaintiff in such action shall not thereupon be non-suited, but may make use thereof as an evidence of the *quantum* of the damages to be recovered.

XV. And whereas, where any lessor or landlord, having only an estate for life in the lands, tenements or hereditaments demised, happens to die before or on the day, on which any rent is reserved, or made payable, such rent, or any part thereof, is not by law recoverable by the executors or administrators of such lessor or landlord; nor is the person in reversion entitled thereto, any other than for the use and occupation of such lands, tenements or hereditaments, from the death of the tenant for life; of which advantage hath been often taken by the under-tenants, who thereby avoid paying any thing for the same; For remedy whereof, Be it enacted by the authority aforesaid, That from and after the twenty-fourth day of *June*, one thousand seven hundred and thirty-eight, where any tenant for life shall happen to die before or on the day, on which any rent was reserved or made payable upon any demise or lease of any lands, tenements or hereditaments, which determined on the death of such tenant for life, that the executors or administrators of such tenant for life shall and may, in an action on the case, recover of and from such under-tenant or under-tenants of such lands, tenements or hereditaments, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent, according to the time such tenant for life lived; of the last year or quarter of a year, or other time in which the said rent was growing due as aforesaid, making all just allowances or a proportionable part thereof respectively.

The statute in the text, § 14 and § 15, authorises recoveries to be had in actions *on the case*, for the use and occupation.

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An action of *debt* however will lie for the use and occupation generally, without setting forth the particulars of the demise.—In the case of *Wilkins v Wingate*,[3] which was an action of debt for rent, issue was taken on the first count. The *second* count alleged, that the plaintiff, on the 20th December, 1791, demised to the defendant a messuage, &c. for three years, to commence the 21st of that month, at 30*l.* payable on the 25th March, 29th *September*, and the 25th December; that the defendant entered on the 22d December, 1791; and that 15*l.* for half a year's rent became due *on that day*. The *third* count was for *use and occupation* generally, for 10*l.* for half a year. To the second count the defendant pleaded *nil habuit in tenementis;* and he demurred to the last count. In support of the demurrer, *Lawes*, for the defendant, was proceeding to argue that an action of debt would not lie for use and occupation generally, for that the particulars of the demise, the entry of the lessee, and the time when the rent became due, should have been stated. But lord Kenyon said, that the contrary had been lately determined in the court of common pleas, and they gave judgment for the plaintiff.[4]

An action of debt may be brought for a sum capable of being ascertained, though not ascertained at the time of the action brought. It is not necessary that the plaintiff should recover the exact sum demanded.[5] So it seems in cases where the gist of the action supported, and a case proved consistent with the declaration, the action not being for a precise sum, but for a sum in proportion to what the jury shall find to be the value of the damage, it is not necessary to prove the exact sum in the declaration. As in debt on a foreign judgment.[6] So for treble the value for not setting out tithes under the statute 2 & 3 Edw. 6, c. 13.[7] So in debt for the use and occupation of a messuage, &c. Or in an action against a tenant for double the value of the land when he holds over under the statute 4 *Geo.* 2, *c.* 28.[8]

To *indebitatus assumpsit* for use and occupation, the defendant pleaded *nil habuit in tenementis*, at the time he permitted the defendant to occupy the land, and upon demurrer it was held a bad plea. There being no occasion for a plaintiff to shew any title upon these contracts.[9] It would be very unreasonable that the defendant in such action should be allowed to deny the title of the plaintiff, by whose permission he entered upon and occupied the premises.[10]

3. 6 Term. Rep. 62.

4. *Strond v Rodgers*, 32 Geo. III. C. B. See also Clif Ent. 237—Com. Dig. *Pleader*—(2 W. 14) Gilb. on the action of debt 404, 407—Co. Lit. 47,b—3 Leon. 146—3 Vin. Sup. 118.

5. Per Lord Mansfield in Walker v Winter, Doug. 1. See Vin. Sup. 103—Black. Rep. 1321.

6. *Walker v Winter*, 19 Geo. 3—Doug. 1.

7. See Doug. 732 in (n.)

8. 3 Vin. Sup. 104.

9. *Lewis v Willis*, Hil. 25 Geo. II.—1 Wils. 314.

10. Sayer 13, cites *Richards v Holdfinch*, Hil. 13 Geo. II.—1 Viner's Sup. tit. *Actions* (Aa. 3) p. 151.

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To maintain an action for the use and occupation, it must appear that the occupation has been beneficial to the defendant; and where the contrary appeared the court directed a *non-suit.*[11]

EXECUTION.

*13 EDWARD I. CAP. XLV. A.D. 1285.

The process of execution of things recorded within the year, or after.

Because that of such things as be recorded before the chancellor and the justices of the king that have record, and be inrolled in their rolls, process of plea ought not to be made by sunmons, attachments, essoin, view of land, and other solemnities of the court, as hath been used to be done of bargains and covenants made out of the court; (2) from henceforth it is to be observel, That those things which are found inrolled before them that have record, or contained in fines, whether they be contracts, covenants, obligations, services, or customs knowledged, or other things whatsoever inrolled, wherein the king's court, without offence of the law and custom, may execute their authority, from henceforth they shall have such vigour, that hereafter it shall not need to plead for them. (3) But when the plaintiff cometh to the king's court, if the recognisance or fine levied be fresh, that is to say, leved within the year, he shall forthwith have a writ of execution of the sane recognisance made. (4) And if the recognisance were made, or the fine levied of a further time passed, the sheriff shall be commanded, that he give knowledge to the party of whom i is complained, that he be afore the justices at a certain day, to shew if he have any thing to say why such matters inrolled or contained in the fine, ought not to have execution. (5) And if he do not come at the day, or peradventure do come, and can say nothing why execution ought not to be done, the sheriff shall be commanded to cause the thing inrolled or contained in the fine to be executed. (6) In like man-

11. *Hearne et al. v Tomlin*, Mich. 34 Geo. III.—Peake's cases 192—1 Viner's Abp. 124.

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ner, an ordinary shall be commanded in his case, observing nevertheless as before is said of a mean, which by recognisance or judgment is bound to acquit.

Fleta 2, c. 13, p. 76, sect. 9—Co. Lit. 131,a—2 Inst. 469—Bro. Debt 10—Bro. Parl. 29—Fitz. Scire fac. 1, 2, 3, 8, 12, &c.—Fitz. Execut. 18, 35, 57, 96, 100—Cro. El. 164. A mean 13 Ed. 1 st. 1, c. 9.

By the common law, if a plaintiff had not sued out execution for a year and a day, after judgment in a personal action, he was driven to an action of debt upon the judgment; which indeed may still be maintained on such dormant judgment, but such actions are discountenanced by courts as being generally vexatious and oppressive, harassing the defendant with the costs of two suits instead of one. Whereas the statute in the text, affords a speedier and less oppressive remedy, by writ of *scire facias*, requiring the defendant to shew cause why the judgment should not be revived, and execution had against him.

A *scire facias*, although it is but a judicial writ, is in the nature of an action, and a release of actions, or of executions, discharges it.[1]

The computation of the year and day is to be from the time the judgment was entered, unless there were a *cessat executio*, in which case the year shall be computed from the time when execution might have been sued.[2]

If the defendant brings a writ of error, and thereby hinders the plaintiff from suing out execution, the year and day shall be accounted from the final judgment given.[3] So, where the delay has arisen from the part of the defendant, by bills of injunctions and by *obtaining* time for payment. In the case of *Michel v Cue & Ux*,[4] the court observed "that this rule for reviving a judgment above a year old, by *scire facias*, before suing out execution upon it, which was intended to prevent a SURPRISE *upon the defendant*, ought not to be taken advantage of by a defendant, who was so far from being *surprised* by the *plaintiff's* delay, that *he himself* had been trying all manner of methods, whereby HE *might delay the plaintiff*."

A *scire facias* lies to receive a judgment in ejectment, though this was formerly doubted.[5]

In debt against bail, the plaintiff may bring an action against all the persons bound in the recognizance or several actions against each of them: But one *scire facias* seems in all cases to be sufficient; for the recognizance being joint and several, it is held that the execution may be *several*, though the scire facias was *joint*.[6]

By an act of assembly of Pennsylvania,[7] it is declared—"That no judgment entered in any court of record, shall continue a lien

1. Co. Lit. 290.
2. 1 Crom. Prac. 341—Mod. ca. 200.
3. Cro. Jac. 364—5 Co. 88.
4. 2 Burr. Rep. 660.
5. 2 Bac. Abr. 361—2 Ld. Ray. 669.
6. 2 Bac. Abr. tit. Execution (G)—1 Sid. 339—1 Leo. 325.
7. 3 State Laws, Sm. Ed. 332.

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on the real estate of the person against whom such judgment may be entered, during a longer term than *five years*, from the first return day of the term of which such judgment may be so entered, unless the person who may obtain such judgment, or his legal representatives, or other person interested, shall, within the said term of five years, sue out a writ of *scire facias* to revive the same."

The act points out the description of persons, upon whom writs of *scire facias* shall be served: and where such persons cannot be found, substitutes proclamations in open court, at two succeeding terms, in place of service.

The construction put upon this act in the circuit court of the United States, in the case of *Hurst v Hurst*, was, that being intended for the security of *purchasers*, it afforded no protection to subsequent judgment creditors; but against them the lien continued for the five years, although the judgment were not revived by *scire facias*.[8]

A different construction, however, has since obtained, in the supreme court of Pennsylvania, where it has been held, that the act was intended as an act of *limitations*, and that after the lapse of five years the lien on the real estate of the defendant ceases to exist, though the debt continues.[9]

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* 32 HENRY VIII. CAP. V. A.D. 1540.

For the continuation of debts upon execution.

WHEREAS before this time divers and sundry persons have sued executions, as well upon judgments for them given of their debts and damages, as upon such statute merchant, statutes of the staple or recognizances, as have been to them before made, recognized and knowledged, and thereupon such lands, tenements and other hereditaments as were liable to the same execution, have been by reasonable extent to them delivered in execution, for the satisfaction of their said debts and damages, according to the laws of this realm; (2) nevertheless it hath been oftentimes seen, that such lands, tenements and hereditaments, so delivered and had in execution, have been recovered or lawfully divested, taken away, or evicted from the possession of the said recoverers, obligees or recognizees, their executors or assigns, before such time as they have been

8 See Washington's Rep. 9 Binney's Rep.

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fully satisfied and paid off their said debts and damages, without any manner of fraud, deceit, covin, collusion or other default in the said recoverers, obligees and recognizees, their executors or assigns; (3) by reason whereof the said recoverers, obligees and recognizees have been thereby set clearly without remedy by any manner suit of the law, to recover or come by any such part or parcel of their said debts and damages as was behind, and not by them levied or received before such time as the said lands, tenements and other hereditaments, so by them had in execution, were recovered, lawfully divested, taken or evicted out of and from their possessions, as is aforesaid, to their great hurt and loss, and much seeming to be against equal justice and good conscience; (4) for reformation whereof, Be it enacted by authority of this present parliament, That if hereafter any such lands, tenements or hereditaments, as be, or shall be had and delivered to any person or persons in execution, as is aforesaid, upon any just and lawful title, matter, condition or cause, wherewithal the said lands, tenements and hereditaments were liable, tied and bound at such time as they were delivered and taken into execution, shall happen to be recovered, lawfully divested, taken or evicted out of and from the possession of any such person and persons as now have and hold, or hereafter shall have and hold the same in execution, as is aforesaid, without any fraud, deceit, covin, collusion or other default of the said tenant or tenants by execution, before such time as the said tenants by execution, their executors or assigns, shall have fully and wholly levied or received the said whole debt and damages for the which the said lands, tenements and other hereditaments were delivered and taken in execution as is aforesaid; (5) then every such recoverer, obligee and recognizee, shall and may have and pursue a writ of *scire facias* out of the same court from whence the said former writ of execution did proceed, (6) against such person or persons as the said writ of execution was first pursued, their heirs, executors or assigns, (7) of such lands, tenements or hereditaments as were or been then liable or charged to the said execution, (8) returnable into the same court at a certain day, being full forty days after the date of the same writ: (9) at which day, if the defendant, being lawfully warned, make default, or appear and do not shew and plead a sufficient matter or cause (other than the acceptance of the said lands, tene-

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ments or hereditaments by the said former writ of execution) to bar, avoid or discharge the said suit for the residue of the said debt and damages remaining unlevied or unreceived by the said former execution, then the lord chancellor, or other such justice or justices before whom such writ of *scire facias* shall be returnable, shall make eftsoons a new writ or writs out of the said former record of judgment, statute merchant, statute staple, or recognizance of like nature and effect as the said former writ of execution was, for the levying of the residue of all such debt and damage as then shall appear to be unlevied, unsatisfied or unpaid, of the whole sum or sums in the said former writ of execution contained; any law, custom, or other thing to the contrary heretofore used in any wise notwithstanding.

A remedy for the cognizee or obligee, where lands delivered to him in execution, be recovered from him—13 *Ed.* 1, *c.* 18 & 45—2 Bulst. 97—Godbolt 258, pl. 354—4 Co. 66—Plow. f. 72—Co. Lit. 289,b—13 Ed. 1, st. 1, c. 45—2 Cro. 693. *Further provisions relating to executions,* 2 *Jac.* 1, *c.* 1—3 *Jac.* 1, *c.* 8—21 *Jac.* 1, *c.* 24—16 & 17 *Car,* 2, *c.* 5, *(which is made perpetual by* 22 & 23 *Car.* 2, *c.* 2)—16 & 17 *Car.* 2, *c.* 8, *and* 29 *Car.* 2, *c.* 3.

This statute had in view tenants by *elegit.*

Although the writ of *elegit* is unknown in Pennsylvania, yet the act of 1705,[10] declares that the person to whom lands shall be delivered by *liberari facias,* shall hold, in the same manner and method as those who hold under writs of elegit in England. Of course the statute 32 H. 8, which makes equitable provision as to the latter, is very properly applicable to the former.

An *elegit* is a judicial writ given by the statute of Westminster 2, 13 Ed. 1, c. 18. By the common law, a man could only have satisfaction of goods and chattels and the present profits of lands, by writs of *fieri facias* or *leviri facias;* but not the possession of the lands themselves, which was a natural consequence of the fœudal principles, which prohibited the alienation and of course the incumbering of the fief with the debts of the owner.

The statute therefore granted this writ,[11] 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 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, whether held in his own name or by any other in trust for him, are also to be delivered to the plaintiff, to hold till out of the rents and profits thereof the debt be levied, or till the defendant's interest be expired, as by his death if he were tenant in tail, or for life.

10. 1 St. Laws, Sm. Ed. 57.

11. It is called an *elegit,* because it is in the election of the plaintiff whether he will sue this or one of the other writs.

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The inconvenience which occasioned the statute in the text, was, that if the land so delivered should be recovered from the creditor before he had levied his debt, he could have no new extent of the effects of his debtor. This was an extreme hardship, which the statute very properly removed.

In Pennsylvania, though lands are deliverable to the creditor, to hold till his debt is satisfied, yet the previous steps differ from those pursued in England. Here they are first levied on, by virtue of a writ *fieri facias;* under which an inquisition[12] is then held by the sheriff to ascertain whether the rents, issues and profits, beyond all reprisal, will be sufficient to satisfy the debt or damages in such execution within seven years, if it be found that they are *insufficient*, and so returned by the sheriff, a *venditioni exponas* may issue, authorising a sale of the land; but if by the return of the inquisition, it should appear that they are *sufficient* to satisfy the debt or damages, with costs of suit, within seven years, they shall be delivered under a writ of *liberari facias* to the plaintiff in the execution, to hold the same "until the debt and damages be levied by a reasonable extent, in the *same manner and method* as lands are delivered upon writs of elegit in England."

In following the english *manner and method*, &c. an inconvenient practice crept into our law. It being conceived that a sheriff, on a *liberari facias* could only deliver the *legal* possession, but could not turn the defendant out of the *actual* possession, to obtain which the plaintiff was obliged to have recourse to an ejectment. To remedy this mischief, it was provided by the act of 13th April, 1807,[13] which provides, "That on the execution of a *liberari facias*, where the defendant, or his tenant, is in possession of the premises to be extended, the sheriff shall deliver the *actual* possession thereof to the plaintiff or his agent."

Tenants by *elegit*, and of course those holding lands under writs of *liberari facias* in Pennsylvania, have estates defeasible on condition subsequent. Such tenants (according to sir Edw. Coke) "have uncertain interests in lands and tenements, and yet they have but chattels and no freehold,[14] because, though they may hold an estate of inheritance for life, ut *liberum tenementum*, until their debt be paid, yet it shall go to their executors: for *ut* il similitudinary; and though to recover their estates they shall have the same remedy, as a tenant to the freehold shall have, yet it is but the similitude of a freehold, and *nullum simile est idem*."[15]

12. No inquisition is necessary to authorise the sale of *woodland* yielding no profits; nor of a life estate, 2 Dal. 75; or of reversions or remainders, or of estates of the husband in the wife's lands, 2 Bin. 91—1 St. Laws, Sm. Ed. 62, note.

13. 4 St. Laws, Sm. Ed. 477.

14. Which makes an exception to the general rule.

15. Co. Lit. 42, 43.

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* 3 JAMES I. CAP. VIII. A.D. 1605.

An act to avoid unnecessary delays of executions.

FORASMUCH as his highness' subjects are now more commonly withheld from their just debts, and often in danger to lose the same, by means of writs of error, which are more commonly sued than heretofore they have been: (2) Be it therefore enacted by the authority of this present parliament, That from and after the end of this present session of parliament, no execution shall be stayed or delayed upon or by any writ of error, or *supersedeas* thereupon to be sued, for the reversing of any judgment given, or to be given, in any action or bill of debt, upon any single bond for debt; (3) or upon any obligation, with condition for the payment of money only; (4) or upon any action or bill of debt for rent, or upon any contract; (5) sued in any of his highness' courts of record at *Westminster*, or in the counties *palatine* of *Chester*, *Lancaster*, or *Durham*, or in his highness' courts of great sessions in any of the twelve shires of *Wales*, (6) unless such person or persons in whose name or names such writ of error shall be brought, with two sufficient sureties, such as the court (wherein such judgment is or shall be given) shall allow of, shall first before such stay made, or *supersedeas* to be awarded, be bound unto the party for whom any such judgment is or shall be given, by recognizance to be acknowledged in the same court, in double the sum adjudged to be recovered by the said former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay (if the said judgment be affirmed) all and singular the debts, damages, and costs, adjudged or to be adjudged upon the former judgment; and all costs and damages to be also awarded for the same delaying of execution. (7) This act to have continuance to the end of the first session of the next parliament. [Made perpetual by 3 Car. I, sect. 4—16 & 17 Car. II. c. 8.]

32 H. 8, c. 5. In what cases execution shall not be stayed upon the suit of a writ of error—2 Bulst. 53, 284—Moor 853, pl. 1165—Cro. Jac. 402—*Cro. Car.* 59—1 Roll. 329, 392—2 Roll. 140. Further provisions relating hereto, 13 Car. 2, st. 2, c. 2—4 Mod. 7, 8, 245, 246—Cro Car. 59—Mod. cases in law 79, 237. *Further provisions relating to executions*, 21 *Jac.* 1, *c.* 24—16 & 17 *Car.* 2, *c.* 5 & 8, *and* 29 *Car.* 2, *c.* 3.

That a party may have sufficient opportunity to take out a writ of error, it is provided by the § 6 of the act of 11th March, 1809,[16]

16. 5 St. Laws, Sm. Ed. 17.

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that no execution shall issue upon any judgment, or any special verdict, demurrer or case stated, unless by leave of the court, in special cases for the security of the demand, within three weeks from the day on which such judgment shall be pronounced.

In order to obtain a writ of error, it is necessary that the party should make oath, to be filed with the record, that the same *is not intended for delay.*[17]

All recognizances of bail, or other surety by law required to be entered into, or given for the prosecution of any appeal or writ of error, may be taken by or before any of the judges of the court, from, or upon whose judgment or decree, the same shall be taken or issued, and shall be duly certified and transmitted with the record, and suit may be brought upon any such recognizance or bond, in the court of common pleas of the proper county, or elsewhere, if the defendant shall not reside in such county.[18]

By the act of 20th March, 1810,[19] it is declared that no writ of error shall issue to the court of common pleas, on the judgment of that court, on proceedings of justices removed by *certiorari*. But this provision does not extend to proceedings had before justices of the peace under the landlord and tenant law.

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* 21 JAMES I. CAP. XXIV. A.D. 1623.

An act for the relief of creditors against such persons as die in execution.

FORASMUCH as heretofore it hath been much doubted and questioned, if any person being in prison and charged in execution by reason of any judgment given against him, should afterwards happen to die in execution, whether the party at whose suit, or at whom such person stood charged in execution at the time of his death, be for ever after concluded and barred to have execution of the lands and goods of such person so dying:

II. And forasmuch as daily experience doth manifest, that divers persons, of sufficiency in real and personal estate, minding to deceive others of their just debts, for which they stood charged in execution, have obstinately and wilfully chosen rather to live and die in prison, than to make any satisfaction according to their abilities: To prevent which deceit, and for the avoiding of such doubts and questions hereafter; (2) Be it declared, explained and enacted

17. 5 St. Laws, Sm. Ed. 17.
18. 5 St. Laws, Sm. Ed. 17.
19. 5 St. Laws, Sm. Ed. 172.

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by the king's most excellent majesty, the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, That from and after the end of this present session of parliament, the party or parties at whose suit, or to whom any person shall stand charged in execution for any debt or damages recovered, his or their executors or administrators, may, after the death of the said person so charged and dying in execution, lawfully sue forth and have new execution against the lands and tenements, goods and chattels, or any of them, of the person so deceased, in such manner and form, to all intents and purposes, as he or they or any of them might have had by the laws and statutes of this realm, if such person so deceased had never been taken or charged in execution.

III. Provided always, and be it declared and enacted, That this act shall not extend to give liberty to any person or persons, their executors or administrators, at whose suit or suits any such party shall be in execution, and die in execution, to have or take any new execution against any the lands, tenements or hereditaments of such party so dying in execution, which shall at any time after the said judgment or judgments be by him sold *bona fide*, for the payment of any of his creditors, and the money which shall be paid for the land so sold, either paid or secured to be paid to any of his creditors, with their privity and consent, in discharge of his or their due debts, or of some part thereof; any thing before in this act to the contrary thereof in any wise notwithstanding.

The lands of him that dies in execution, shall be chargeable with the debts—*Vin. A.* 11, 37.

Where a person imprisoned under a *capias ad satisfaciendum* died in execution, it was held that the plaintiff had no further remedy;—because he had determined his choice by this kind of execution, which deprives the defendant of his liberty, and is therefore esteemed the highest and most rigid in the law.[20] But by the statute 21st James 1, in the text, if the defendant dies while charged in execution, upon this writ, the plaintiff may, after the death of such defendant sue out a new execution against the lands, goods or chattels.

If a person imprisoned on a *capias ad satisfaciendum*, escape or be rescued, though the sheriff is hereby liable, because he ought to have taken the *posse comitatus*, yet the plaintiff may sue out a

20. 3 Black. Com. 414—Hob. 52—6 Term Rep. 526.

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new execution; and shall not be compelled to take his remedy against the sheriff, who may be dead, or insolvent.[21]

EXECUTORS AND ADMINISTRATORS.

* 4 EDWARD III. CAP. VII. A.D. 1330.

Executors shall have an action of trespass for a wrong done to their testator.

ITEM, Whereas in times past executors have not had actions for a trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished; it is enacted, That the executors in such cases shall have an action against the trespassers, and recover their damages in like manner as they, whose executors they be, should have had if they were in life.

Rast. 640—13 Ed. 1, st. 1, c. 23—1 Ventr. 187—7 H. 4, f. 18—11 H. 4. 3—Fitz. Barr. 217—Fitz. Execut 52, 106—Cro. El. 377, 384—Latch. 167—Savil 118, 133—1 Leon. 193, 194—Regist. 98—25 Ed. 3, st. 5, c. 5, *extends the remedy to executors of executors*—and see further 21 H. 8, c. 4, sect. 1—43 El. c. 6, sect. 2—30 Car. 2, st. 1, c. 7, *sect.* 2, *and* 4 *&* 5 *W. & M. c.* 24, *sect.* 12.

It has been established as a maxim, *actio personalis moritur cum persona*. For wrongs, independently of contracts, the action must be brought by the party to whom the injury was done, against the party by whom it is done. And in case of the death of either of the parties the action is gone. Yet there are *some* exceptions to this rule, principally arising from an equitable construction of the statute in the text, by which *executors* shall have an action of trespass for a wrong done *to* their testator; whereas if it had been done *by* the testator, it would have fallen within the maxim, and no action could be sustained against the executor.[1]

Thus, if a sheriff suffers a person in his custody on mesne process to escape, the executor of the party at whose suit the person was imprisoned, may maintain an action against the sheriff; but if the sheriff were to die, after suffering an escape, the party could have no remedy against the executor of the sheriff.[2]

So an executor may charge another executor for a *devastavit* to

21. 2 Bac. Abr. tit. Execution (D) 355—Vent. 4.

1. 2 Bac. Abr. 445—Salk. 314—Lord Ray. 40, 437, 698, 733, 971, 1073—Stra. 60, 576—Gil. Eq. Rep. 190.

2. 2 Bac. Abr. 445—Jon. 173—Poph. 189—Latch. 167—Cro. Car. 279.

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the injury of his testator; but at common law, the executor of an executor was not liable for a *devastavit* of the first executor.[3]

And it has been held, that where a sheriff made a false return to a writ of *fieri facias*, the executor of the party injured by such false return, may maintain an action, for it is not properly an injury done to the person of the testator, for then *moritur cum persona*, but an injury to his estate.[4]

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* 25 EDWARD III. STAT. V. CAP. V. A.D. 1350.

Executors of executors shall have the benefit and charge of the first testator.

ITEM, It is accorded and established,—That executors of executors shall have actions of debts, accounts, and of goods carried away of the first testators, (2) an execution of statutes merchants and recognizances made in court of record to the first testator, in the same manner as the first testator should have had if he were in life, as well of actions of the time past, as of the time to come, in all cases where judgment is not yet given betwixt such executors;* (3) but that the judgments given to the contrary to this article in times past shall stand in their force; (4) and that the same executors of executors shall answer to other of as much as they have recovered of the goods of the first testators, as the first executors should do if they were in full life.

13 Ed. 1, stat. 1, c. 23—Plowd. 286—Fitz. Covenant 24—Fitz. Execut. 92, 103, 110, 120. *Add *of executors*. Fitz Execut. 10, 29, 70, 95, 120—30 *Car* 2, *stat.* 1, *c.* 7, *makes executors of executors in their own wrong answerable.* 4 *&* 5 *W. & M.* c 24, *sect.* 12, *makes executors of executors answerable for wasting assets*—*Rast.* 323.

The object of this statute was to invest, in the executors of executors, the same right to maintain suits, which belonged to their testators. And the 31 Ed. III. c. 11, extended like right of action to administrators.[5]

3. Salk. 314, pl. 12—2 Ld. Ray. 971, 1502.

4. 4 Mod. 403—Salk. 12, pl. 2—Cro. Car. 297.

5. See *ante* p. 14.

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* 31 EDWARD III. STAT. I. CAP. XI. A.D. 1357.(u

To whom the ordinary may commit the administration of the goods of him that dieth intestate. The benefit and charge of an administrator.

ITEM, It is accorded and assented,—That in case where a man dieth intestate, the ordinaries shall depute the next and most lawful friends of the dead person intestate, to administer his goods; (2) which deputies shall have an action to demand and recover, as executors, the debts due to the said person intestate, in the king's court, for to administer and dispend for the soul of the dead; (3) and shall answer also in the king's court to other to whom the said dead person was holden and bound, in the same manner as executors shall answer. (4) And they shall be accountable to the ordinaries, as executors be in the case of testament, as well of the time past as the time to come.

13 *Edw.* 1, *st.* 1, *c.* 19—Carthew. 376—1 Shower 407. *Amended by* 21 H. 8, c. 5—1 Roll. 105—Vaugn. 96—11 Ed. 3, f. 2—37 H. 6, f. 15—Dyer 256—5 Co. 2—9 Co. 38—Co. Lit. 133,b—Cro. El. 409—Cro. Car. 63, 106—Regist. 141—Rast. 320—2 Bulst. 315. *See further for the duty of ordinary and administrator*, 43 *El. c.* 8—22 & 23 *Car.* 2, *c.* 10—29 *Car.* 2, *c.* 3—1 *Jac.* 2, *c.* 17, *and* 14 *Geo.* 2, *c.* 20.

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* 21 HENRY VIII. CAP. V. A.D. 1529.(v

What fees ought to be taken for probate of testaments.

III. (6) AND in case any person die intestate, or that the executors named in any such testament refuse to prove the said testament, then the said ordinary, or other person or persons having authority to take probate of testaments, as is above said, shall grant the administration of the goods of the testator, or person deceased, to the widow of the same person deceased, or to the next of his kin, or to both, as by the discretion of the same ordinary shall be thought good, taking surety of him or them, to whom shall be made such commission, for the true administration of the goods, chattels, and debts, which he or they shall be so authorised to minister; (7) and

u) "This statute is in force, except that part which relates to expending money for the soul of the deceased."—*Report of the Judges.*

v) "That part only of this statute is in force, which relates to the persons to whom administration is granted." *Rep. of the Judges.*

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in case where divers persons claim the administration as next of kin, which be equal in degree of kindred to the testator or person deceased, and where any person only desireth the administration as next of kin, where indeed divers persons be in equality of kindred, as is aforesaid, that in every such case the ordinary to be at his election and liberty to accept any one or more making request, where divers do require the administration.

IV. Or where but one or more of them, and not all, being in equality of degree, do make request, then the ordinary to admit the widow, and him or them only making request, or any one of them at his pleasure, taking nothing for the same, unless the goods of the person so deceased amount above the value or sum of *cs.* (2) and in case the goods of the person so deceased amount above the value of *cs.* and not above the value or sum of *xl. li.* then the said bishop, ordinary or other person or persons so having authority to take probate of testaments, as is aforesaid, their ministers and officers shall take only iis. *vid.* sterling, and not above; (3) and that the executor and executors named by the testator, or person so deceased, or such other person or persons, to whom such administration shall be committed where any person dieth intestate, or by way of intestate, calling or taking to him or them such person or persons, two at the least, to whom the said person so dying was indebted, or made any legacy, and upon their refusal or absence, two other honest persons, being next of kin to the person so dying, and in their default and absence, two other honest persons, and in their presence, and by their discretions, shall make or cause to be made, a true and perfect inventory of all the goods, chattels, wares, merchandises, as well moveable as not moveable whatsoever, that were of the said person so deceased, (4) and the same shall cause to be indented, whereof the one part shall be by the said executor or executors, administrator or administrators, upon his or their oath or oaths, to be taken before the said bishop or ordinaries, their officials or commissaries, or other persons having power to take probate of testaments, upon the holy evangelist, to be good and true, and the same one part indented shall present and deliver into the keeping of the said bishop, ordinary or ordinaries, or other person having power to take probate of testaments, and the other part thereof to remain with the said executor or executors, administrator or administrators; (5) and that no bishop, ordinary, or other

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whatsoever person, having authority to take probate of testament or testaments, as is abovesaid, upon the pain in this statute hereafter contained, refuse to take any such inventory or inventories to him or them presented or tendered to be delivered as is aforesaid.

Hob. 250. Administration granted of the goods of the intestate—1 Salk. 36—Moor 871, pl. 1210—Bro. Admin. 47—3 Co. 40—9 Co. 39—Cro. El. 163—Cro. Car. 9, 106. How much the ordinary shall take for granting of administration, 3 Inst. 148. The testator's inventory, by whom it shall be made, and to whom delivered, 1 Roll. 358.

In respect to the disposition of intestates' estates and granting administration, it is evident that, by the common law, and before the statute of *Westm.* 2, *c.* 19, the ordinary had the absolute disposal of the whole personal estate; which he was to distribute according to his *conscience*, to pious uses. The statute of Westminster 2, so far restrained his power herein, as to oblige him to satisfy the *debts*, out of the funds which came to his hands; but as to the rest, it was disposed of at his discretion. This power was so exercised as to become a matter of great scandal to the church, and oppressive to the people.[1] Remedies had been partially, but ineffectually applied, till by the statute of 31 *Edw. III. s.* 1, *c.* 11, [in the text] the administration was removed out of the hands of the ordinary, and he was commanded, in case of intestacy, to depute *the next and most lawful friends* of the intestate to administer the goods.

The statute 21 *Hen. VIII. c.* 5, ordains, with greater precision, who shall be entitled to administration in case of intestacy, directing that it shall be granted to the *widow of the deceased, or to the next of his kin, or to both*, as the ordinary in his discretion shall think fit. The same rule is to be observed in committing administration, where executors refuse to take upon them the execution of a will.

Various regulations have been made by the laws of Pennsylvania, in relation to the probate of wills, granting letters of administration, the distribution of the estates of intestates, &c. some of which will be briefly noticed.

By the act of 14 *March*, 1777,[2] a registers' office for the probate of wills and granting letters of administration is established, in the city of Philadelphia, and in each county.

Where *femes covert* die intestate, their husbands may demand and have administration of their rights and credits, and other personal estates; and recover and enjoy the same.[3]

No letters testamentary, or probate of noncupative wills shall pass the seal of the register's office, till fourteen days, at the least, after the death of the testator.[4]

By the act of April, 1794,[5] provision was made in respect to granting letters testamentary with the will annexed.

1. 4 Reeve Eng. Law. 70.
2. 1 St. Laws, Sm. Ed. 443.
3. 1 St. Laws, Sm. Ed. 390.
4. 1 St. Laws, Sm. Ed. 35.
5. 3 St. Laws, Sm. Ed. 149.

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Upon granting letters of administration, the register is required to take a bond, with two or more sufficient sureties, respect being had to the value of the estate;[6] which bonds shall be in the name of the commonwealth.[7] Letters of administration granted without giving such bond are *void;* the register granting the same, and his sureties, are liable to pay all damages which shall accrue to any person; by occasion of granting such administration; and the person to whom administration is so granted may be sued as *executor of his own wrong.*[8]

When the surety given is insufficient, the orphans' court may cause better security to be given; and where it appears that administrators have embezzled, wasted, or misapplied any part of the decedent's estates, or refuse to give bonds with sufficient sureties, the court shall, by their sentence, revoke the letters of administration.[9]

Executors and administrators are compellable to make and exhibit before the orphans' court, within a reasonable time, true and perfect inventories and accounts, of the estates of the decedents.[10] By the act of 1794, administrators are bound to furnish the inventory within one month, and to adjust and settle their accounts within one year.[11] The register is to give notice when accounts of executors and administrators are to be presented to the orphans' court; and unless such notice be duly given, no such account shall be confirmed.[12]

The order of paying debts; and the manner in which they shall be apportioned, in case of deficiency of assets, is prescribed by the act of 1794, by which also creditors who neglect to exhibit their accounts within one year are excluded, in case of such deficiency in the assets. By this act provision is likewise made for the distribution of intestates' estates. No distribution of the goods of an intestate however is to take place till one year after his death.[13]

The act of 1718,[14] provides for the securing the estates of minors; putting out their money at interest, &c.

By the act of 1792,[15] executors and administrators are enabled, by leave of the court, to convey lands contracted for with the decedents; and the manner in which such contracts shall be proved and enforced is declared. Where only a naked authority to sell lands is given in a will, the act declares that the executors shall have the same powers respecting the lands, as if the same had been devised to them to be sold, unless it should be otherwise provided in the will.

6. 3 St. Laws, Sm. Ed. 143.
7. 3 St. Laws, Sm. Ed. 300.
8. 1 St. Laws, Sm. Ed. 82.
9. 1 St. Laws, Sm. Ed. 82.
10. 1 St. Laws, Sm. Ed. 81.
11. 3 St. Laws, Sm. Ed. 144.
12. 3 St. Laws, Sm. Ed. 300.
13. 3 St. Laws, Sm. Ed. 143.
14. 1 St. Laws, Sm. Ed. 82.
15. 3 St. Laws, Sm. Ed. 66.

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* 32 HENRY VIII. CAP. XXXVII. A.D. 1540.(w

For recovery of arrearages of rents by executors of tenant in fee simple.

FORASMUCH as by the order of the common law, the executors or administrators of tenants in fee-simple, tenants in fee-tail, and tenants for term of lives, of rents services, rent charges, rents secks, and fee farms, have no remedy to recover such arrearages of the said rents or fee-farms, as were due unto their testators in their lives, (2) nor yet the heirs of such testator, nor any person having the reversion of his estate after his decease, may distrain, or have any lawful action to levy any such arrearages of rents or fee-farms, due unto him in his life, as is aforesaid; (3) by reason whereof, the tenants of the demean of such lands, tenements, or hereditaments, out of the which such rents were due and payable, who of right ought to pay their rents and farms at such days and terms as they were due, do many times keep, hold and retain such arrearages in their own hands, so that the executors and administrators of the persons to whom such rents or fee-farms were due, cannot have or come by the said arrearages of the same, towards the payment of the debts and performance of the will of the said testators: (4) For remedy whereof, Be it enacted by the authority of this present parliament, That the executors and administrators of every such person or persons, unto whom any such rent or fee-farm is or shall be due, and not paid at the time of his death, shall and may have an action of debt for all such arrearages, against the tenant or tenants that ought to have paid the said rent or fee-farms so being behind in the life of their testator, or against the executors and administrators of the said tenants; (5) and also furthermore, it shall be lawful to every such executor and administrator of any such person or persons, unto whom such rent or fee-farm is or shall be due, and not paid at the time of his death as is aforesaid, to distrain for the arrearages of all such rents and fee-farms, upon the lands, tenements and other hereditaments, which were charged with the payment of such rents and fee-farms, and chargeable to the distress of the said

w) "This statute is in force, except the II. section." *Report of the Judges*. The 2d section is entirely local.

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testator, (6) so long as the said lands, tenements or hereditaments continue, remain and be in the seisin or possession of the said tenant in demesne, who ought immediately to have paid the said rent or fee-farm so being behind, to the said testator in his life, (7) or in the seisin or possession of any other person or persons claiming the said lands, tenements and hereditaments, only by and from the same tenant by purchase, gift or descent, (8) in like manner and form as their said testator might or ought to have done in his life time, and the said executors and administrators shall, for the same distress, lawfully make avowry upon their matter aforesaid.

III. And further be it enacted by the authority aforesaid, That if any man which now hath, or hereafter shall have, in the right of his wife, any estate in fee-simple, fee-tail, or for term of life, of or in any rents or fee-farms, and the same rents or fee-farms now be, or hereafter shall be due, behind and unpaid in the said wife's life; then the said husband, after the death of his said wife, his executors and administrators, shall have an action of debt, for the said arrearages against the tenant of the demesne that ought to have paid the same, his executors or administrators; (2) and also the said husband, after the death of his said wife, may distrain for the said arrearages, in like manner and form, as he might have done if his said wife had been then living, and make avowry upon his matter as is aforesaid.

IV. And likewise it is further enacted by the authority aforesaid, That if any person or persons which now have, or hereafter shall have, any rents or fee-farms for term of life or lives, of any other person or persons, and the said rent or fee-farm now be, or hereafter shall be due, behind, and unpaid in the life of such person or persons for whose life or lives the estate of the said rent or fee-farm did depend or continue, and after the said person or persons do die; then he unto whom the said rent or fee-farm was due, in form aforesaid, his executors or administrators shall and may have an action of debt against the tenant in demesne, that ought to have paid the same when it was first due, his executors and administrators, (2) and also distrain for the same arrearages, upon such lands and tenements out of the which the said rents or fee-farms were issuing and payable, (3) in such manner and form as he ought or might have done, if such person or persons by

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whose death the aforesaid estate in the said rents and fee-farms was determined and expired, had been in full life and not dead; and the avowry for the taking of the same distress to be made in manner and form aforesaid.

Vaugh. 39—2 Roll. 373, 382, 457—*Dyer* 375, pl. 20—Vin. V. 18, 542—1 Leon. 302—Cro. El. 805—Cro. Car. 471—2 Vern. Ca. 350. The husband's remedy for rent due in the right, and in the life of his wife—Co. pl. f. 119—Vaugh. 38—4 Co. 51—Co. Lit. 351,b—Goldsb. 30, pl. 1. The remedy for a rent, the estate whereof dependeth upon another's life being dead—1 Anders. 47—3 Leon. 59—5 Co. 118—7 Co. 39—2 Leon. 153—*Moor* 625, pl. 858—Co. Lit. 162,a *For further provisions concerning rents see* 18 *Car.* 2, *c.* 7—8 *Anne c.* 14—4 *Geo.* 2, *c.* 28, *and* 11 *Geo.* 2, *c.* 19.

It is said that at the common law there was no remedy for the recovery of rent-arrears in the life time of the testator: the heir could not maintain an action of debt for it, because he had nothing to do with the personal contracts of his ancestor; nor the executor, because he could not represent his testator, as to any contracts relating to the freehold and inheritance; but this is remedied by the 32 *H.* 8, *c.* 37, by which executors and administrators are enabled to sue for and recover all such arrears of rent, &c.[16]

The preamble of the statute is too general, and therefore calculated to mislead; for there can be no doubt but that the executors of a tenant for *his own life*, and also the executors of tenant *pur autre vie*, after the death of *cestui qui vie*, had remedy by action of debt before the statute.[17] According to the case of *Turner v Lee*,[18] the statute only applies where the common law gives no remedy. Yet in a case in Cro. Eliz. 332, it appears to have been taken for granted, that the statute did not operate thus restrictively; and in *Hoole v Bell*,[19] it was held that the statute being remedial, extends to the executors of ALL tenants for life, as well to those executors who, previously to the statute, were entitled to action of debt, as to those executors who had no remedy whatsoever.[20]

* 43 ELIZABETH, CAP. VIII. A.D. 1601.

An act against fraudulent administration of intestates' goods.

FORASMUCH as it is often put in uze, to the defrauding of creditors, that such persons as are to have the administration of the goods of others dying intestate, committed unto them, if they re-

16. 2 Bar. Abr. 439.
17. Harg. Co. Lit. 162,a n. 4.
18. Cro. Car. 472.
19. Ld. Ray. 172.
20. Harg. Co. Lit. 162,b (n. 1.)

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quire it, will not accept the same, but suffer or procure the administration to be granted to some stranger of mean estate, and not of kin to the intestate, from whom themselves, or others by their means, do take deeds of gifts and authorities by letters of attorney, whereby they obtain the state of the intestate into their hands, and yet stand not subject to pay any debts owing by the same intestate, and so the creditors for lack of knowledge of the place of habitation of the administrator, cannot arrest him nor sue him; and if they fortune to find him out, yet for lack of ability in him to satisfy of his own goods, the value of that he hath conveyed away of the intestate's goods, or released of his debts by way of wasting, the creditors cannot have or recover their just and due debts:

II. Be it enacted by the authority of this present parliament, That every person and persons that hereafter shall obtain, receive and have any goods or debts of any person dying intestate, or a release or other discharge of any debt or duty that belonged to the intestate, upon any fraud, as is aforesaid, or without such valuable consideration as shall amount to the value of the same goods or debts, or near thereabouts, (except it be in or towards satisfaction of some just and principal debt, of the value of the same goods or debts to him owing by the intestate at the time of his decease) shall be charged and chargeable as executor of his own wrong; (2) and so far only as all such goods and debts coming to his hands, or whereof he is released or discharged by such administrator, will satisfy, deducting nevertheless to and for himself allowance of all just, due and principal debts upon good consideration, without fraud, owing to him by the intestate at the time of his decease, and of all other payments made by him, which lawful executors or administrators may and ought to have and pay by the laws and statutes of this realm.

Fraud practised in taking of administrations, to deceive others of their lawful debts. 31 *Ed.* 3, *c.* 11—21 *H.* 8, *c.* 5. *Further provisions respecting administration, see* 22 & 23 *Car.* 2, *c.* 10—29 *Car.* 2, *c.* 3—1 *Jac.* 2, *c.* 17, *and* 1 *Geo.* 2, *c.* 20.

An executor *de son tort*, (of his own wrong) is one who without any authority from the deceased, or the officer to whom the probate of wills, and granting letters of administration is committed, does such acts as belong to the office of an executor or administrator.[21]

21. Sivinb. 448—Off. of Execut. 171.

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There are several acts which a stranger may do without making himself an executor *de son tort*, such as taking care of the deceased's funeral, in a manner suitable to his circumstances, provided the disbursements be made out of the money of the person so superintending, feeding the cattle of the deceased, taking an inventory of his estate and effects, paying or discharging with his own money (and not that of the deceased) debts and legacies; repairing his houses, providing necessaries for his children, &c. For these are considered as offices of friendship and charity, and not such as involve one in an executorship.[22]

There can be no executor *de son tort* after probate of a will, or where administration has been granted. A stranger afterwards getting into possession of the deceased's property, is a *trespasser;* and may be sued as such.[23]

As to the value of the things by a stranger, so as to make him an executor *de son tort;* it seems that coming to the possession of a bedstead only, was held sufficient to charge him with a debt of 60*l. sterling;* and the taking of a bible charged one with a debt of 100*l.* sterling.

Yet where the things are of very inconsiderable value, relief will be afforded in equity; where there is no defence at law, as where in actions against persons as executors *de son tort;* verdicts had been obtained by the plaintiffs, upon proving in the one case that a chimney back came to the hande of the person so charged, and in the other that the price of a pot of all sold by the testator had been received, the court of chancery relieved against the verdicts.[24]

Although an executor *de son tort*, should afterwards take out letters of administration, it is still in the election of creditor to charge him in that character, or as administrator, for he cannot discharge himself by matter *ex post facto.*[25]

An executor *de son tort* shall be allowed, in equity, all such payments as were incumbent on the executor, according to the course of law.[26]

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* 30 CHARLES II. CAP. VII. A.D. 1677.

An act to enable creditors to recover their debts of the executors and administrators of executors in their own wrong.

WHEREAS the executors and administrators of such persons, who have possessed themselves of considerable personal estates of

22. Godol. 95.
23. 5 Co. 33—Salk. 113, pl. 19—Cham. Ca. 33.
24. Robinson v Bell, 2 Vern. 147.
25. Godb. 217—3 Leon. 198—Cro. El. 102, 365, 565, 810—2 Vern. 180.
26. Cha. Ca. 33, 126, and see Roll. Abr. 919.

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other dead persons, and converted the same to their own use, have no remedy by the rules of the common law, as it now stands, to pay the debts of those persons whose estate hath been so converted by their testator or intestate, which hath been found very mischievous, and many creditors defeated of their just debts, although their debtors left behind them sufficient to satisfy the same, with a great overplus:

II. For remedy whereof, Be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority thereof, That all and every the executors and administrators of any person or persons, who, as executor or executors in his or their own wrong, or administrators, shall from and after the first day of *August* next ensuing, waste or convert any goods, chattels, estate, or assets of any person deceased, to their own use, shall be liable and chargeable in the same manner as their testator or intestate would have been if they had been living. (2) This act to continue in force for three years, and from thence to the end of the next session of parliament and no longer. [*Made perpetual and enlarged by* 4 & 5 *W. & M.* c. 24, § 12.]

3 Mod. 113—1 Jac. 2, c. 17.

At the common law, executors or administrators of those they represented were not considered liable, to the devastavit of the person whom they represented, because they could not be supposed to know how the testators, or intestates, had disposed of the goods; and therefore this was esteemed *actio personalis quæ moritur cum persona.* This inconvenience was removed by the statute 30 Car. II. c. 7, [in the text] upon which an executor or administrator of a rightful executor or administrator shall be charged upon a devastavit of the testator or intestate.[27]

27. 3 Mod. 113.

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4 & 5 WILLIAM AND MARY, CAP. XXIV. A.D. 1692.

An act for reviving, continuing, and explaining several laws therein mentioned, which are expired and near expiring.

XII. AND be it further enacted by the authority aforesaid, That an act made in the thirtieth year of the reign of king *Charles* the second, entitled, *An act to enable creditors to recover their debts of the executors and administrators of executors in their own wrong;* which said act, in the first year of the reign of the late king *James* the second, was enacted to be in force from the first day of the then present session of parliament, and to continue for seven years, and from thence to the end of the first session of the then next parliament, shall and be and is hereby continued and made perpetual. And forasmuch as it hath been a doubt whether the said act did extend to any executor or executors, administrator or administrators of right, who, for want of privity in law, were not before answerable, nor could be sued for the debts due from or by the first testator or intestate, notwithstanding that such executors or administrators had wasted the goods and estate of the first testator or intestate, or converted the same to his or their own use; For remedy whereof, Be it enacted and declared by the authority aforesaid, That all and every the executor or executors, administrator or administrators of such executor or administrator of right, who shall waste or convert to his own use, goods, chattels, or estate of his testator or intestate, shall from henceforth be liable and chargeable in the same manner as his or their testator or intestate should or might have been; any law or usage to the contrary notwithstanding.

The statute of 30 Car. II. c. 7, was limited in its duration to three years; in the succeeding reign in was further continued for seven years, and at length was made perpetual by the 4 & 5 *Will. & Mary*, [in the text,] which also removes a doubt which had been entertained on the original act. The section is therefore inserted.

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FINES.

* 18 EDWARD I. STAT. IV. A.D. 1290.

The manner of levying of fines: what things be requisite to make them good, and who are bound by them.

WHEN the writ original is delivered in presence of the parties before justices, a pleader shall say this, *Sir justice, conge, de accorder:* (2) and the justice shall say to him, **What saith sir R.?* and shall name one of the parties. (3) Then, when they be agreed of the sum of money that must be given to the king, then the justice shall say, *Cry the peace.* (4) And after the pleader shall say, *In so much as peace is licensed, thus unto you W. S. and A. his wife, that here be, do acknowledge the manor of B. with the appurtenances contained in the writ, to be the right of our lord the king, which he hath of their gift,* (5) *to have and to hold to him and his heirs, of the said W. and A. and the heirs of A. as in demeans, rents, seigniories, courts, pleas, purchases, wards, marriages, reliefs, escheats, mills, advowsons of churches, and all other franchises and free customs to the said manor belonging, paying yearly to R. and his heirs, as chief lords of the fee, the services and customs due for all services.* (6) And it is to be noted, That the order of the law will not suffer a final accord to be levied in the king's court without a writ original, and that must be at the least before four justices in the bench, or in eyre, and not otherwise, and in presence of the parties named in the writ, which must be of full age, of good memory, and out of prison. (7) And if a woman covert be one of the parties, then she must be first examined by four of the said justices; and if she doth not assent thereto, the fine shall not be levied. (8 And the cause wherefore such solemnity ought to be done in a fine, is, because a fine is so high a bar, of so great force, and of so strong a nature in itself, that it concludeth not only such as be parties and privies thereto, and their heirs, but all other people of the world, being of full age, out of prison, of good memory, and within the four seas, the day of the fine levied, (9) if they make not their claim of their action within a year and a day by the country.

* *Or,* Who will give? Sir R.

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2 Inst. 510—5 Co. 39. The order of levying of a fine. Rast. 349. What things be requisite to make a fine good—27 Ed. 1, st. 1, c. 1. † Elsewhere. What person shall be concluded by a fine—1 R. 3, c. 7—4 H. 7, c. 24—4 Co. 123—4 Ed. 3, f. 46—15 Ed. 2 st. of Carlisle, *requiring conusor to appear personally, if able. For the doctrine of fines see further* 34 Ed. 3, c. 16—5 H. 4, c. 14—32 H. 8, c. 36—1 Mar. st. 2, c. 7—23 El. c. 3—*and* 4 Anne c. 16, § 15.

Much has been said by english lawyers, respecting the great antiquity of fines. We are told that they are coeval with the first rudiments of the law, and formed an original conveyance or assurance; that they were well known in England before the norman conquest.[1] It is acknowledged, however, by *Dugdale and Madox*, who are considered the most diligent and learned enquirers into the ancient records and charters, that they have discovered no traces of fines in England before the reign of Henry II. which commenced in the year 1155.[2] Indeed it appears to be very satisfactorily established, that the idea of a fine was derived from the *transactio* of the civilians, which was the accommodation of a suit, or an agreement respecting some doubtful matter that would otherwise become the subject of a suit. *Transactio est super re dubia aut lite incerta conventio non gratuita aliquo data retento vel promisso.* The similarity observed in *Bracton's* definition of a fine, evidences, that this kind of assurance is borrowed from the civil law.[3] Proof of this fact might be had from *Sir Edw. Coke* himself, who says that "the civilians call this judicial concord *transactionem judicium de re in mobile.*"[4]

A fine is said to be an acknowledgment of a feoffment on record.[5] It is an amicable agreement or composition of a suit, whether real, or fictitious, between the demandant and tenant, with the consent of the judges, and inrolled amongst the records of the court, whereby lands and tenements are transferred from one person to another, or any other settlement is made relating to lands and tenements.[6]

It is difficult to ascertain the manner in which fines were originally levied. In some of the most ancient fines no original writ appears to have been sued out; and it is supposed that the parties having accommodated the matters in controversy, and thereupon drawn up a writing called a *chirographum*,[7] containing the terms of their agreement, used to appear in a court of justice, where they

1. 2 Inst. 511—Coke read on fines 1—Plow. 368-9—2 Black. Com. 349.

2. If the idea of a fine be derived from the civil law, they could not be known in England till some time after the year 1130; when a complete copy of the *Pandects* was found at Amalphia in Italy. A consequence of the discovery was, that the study of the roman law became very common throughout Europe. It appears that one *Vacarius* read public lectures on the roman law, at *Oxford*, in the year 1147. 1 Cruise on Fines 10—1 Reeve E. L. 66.

3. *Concordia in fero seculari idem est quod transactio, et est transactio de re dubia et lite incerta aliquo dato vel promisso vel retento a lite transactio.*—Bract. fo. 310 a & b.—Cruise on Fines 7.

4. 1 Inst. 262.a

5. Co Lit. 50—2 Black. Com. 348.

6. 1 Cruise on Fines 5.

7. A *chirographum* signified a deed of two parts written on the same parchment or paper. Co. Lit. 143.b

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acknowledged it as their agreement, and mutually set their seals to it; and upon the payment of a certain fine it was inrolled amongst the records of the court. Or else entered into an agreement in court, where it was immediately reduced into the form of a *chirographum*, and recorded, a copy of which was delivered to each of the parties.[8] At the time when *Feta* wrote, the law was so altered, in this respect, that an original writ was considered essential.[9]

The statute *de modo levandi fines*, in the text, was made for the express purpose of ascertaining the manner in which fines should, in future, be levied, and of declaring their effect.[10]

After this statute, a fine became an accommodation of a suit, in the most strict and technical sense, and was of no force unless an original writ was actually sued out; and since the passing of that statute no material alteration has been made in the manner of levying fines.

When the parties have agreed to levy a fine, the one to whom the land is to be conveyed, sues out a writ (usually) of covenant against the person who is to convey the land. The foundation of which is a supposed agreement or covenant, that the defendant should convey the land to the plaintiff, on the breach of which agreement the action is brought. Upon this writ there was a fine due to the king, called the *primer fine*.

The action being brought, it is supposed that the defendant, knowing himself to be wrong, proposes overtures of peace and accommodation to the plaintiff, who, accepting them, applies to the court for leave to compromise the matter. Permission is granted of course. For this permission another fine is due to the king, called the *post-fine*, or the *king's silver*.

The *concord* or agreement itself immediately follows the leave to agree. This is usually an acknowledgment of the defendant, that the lands in question of right belong to the demandant or plaintiff. From this recognition of the right of the party levying the fine is the *cognizor*, and he to whom it is levied the *cognizee*. The acknowledgment must be openly made in the court of common pleas, or before the lord chief justice of that court, or commissioners duly authorised for that purpose. This is the *foundation and substance* of the fine.

Next follows the *note* of the fine, which is merely an abstract of the writ of covenant, and the concord naming the parties, the parcels of lands, and the agreement. The statute 5 H. IV. c. 14, [in the text] requires that this should be inrolled of record by the proper officer in the court of common pleas.

The fifth and last part is called *foot* of the fine, or conclusion of it, which comprises the whole matter, setting forth the parties,

8. 1 Reeve Eng. Law 93—1 Cruise on Fines 13, 14.

9. 1 Cruise on Fines 15.

10. This is a privilege peculiar to his office, no other judge having power to take the acknowledgment of a fine out of court, unless authorised by *adedimus potestatem*. 1 Cruise on Fines 74.

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the day, the year and the place; and also before whom it was levied.

More solemnities are superadded, by several statutes with a view to give greater notoriety to fines, and to render them less liable to be levied by fraud or covin. Thus the 27 Edw. 1, c. 1, [in the text] requires that the *note* of the fine shall be openly read in the court of common pleas, at two several days in one week, and during such reading all pleas shall cease. By 5 *Hen. IV.* c. 14, and 23 *El.* c. 3, all the proceedings on fines shall be inrolled of record in the court of common pleas. By the 1 *Rich. III.* c. 7, confirmed and enforced by 4 *Hen. VII.* c. 24, it is required that the fine, after it is engrossed, shall be openly read and proclaimed in court sixteen times; *viz.* four times in the term in which it is made, and four times in each of the succeeding terms; but the 31 *El.* c. 2, reduces the number of proclamations to *four*, that is to say, one to be made in the term wherein the fine is engrossed, and one in every of the three next terms following; and requires that such proclamations shall be indorsed on the back of the record. The 23 *El.* c. 3, directs that the chirographer of fines shall, at every term write out a table of the fines levied in each county in that term, and shall affix the same in some open part of the court of common pleas, there to remain during the next term; and that he shall also deliver the contents of such table to the sheriff of every county, who shall, at the next assises, fix the same in some open place in the court.

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* 27 EDWARD I. STAT. I. CAP. I. A.D. 1290.

No exception to a fine that the demandant was seised. Fines shall be openly read.

FORASMUCH as fines levied in our court ought and do make an end of all matters, and therefore are called *fines* principally where, after waging of battail or the great assise in their cases, ever they hold the last and final place. (2) And now, by a certain time passed, as well in time of king HENRY of famous memory, our **grandfather*, as in our time, the parties of such fines, and their heirs, contrary to the laws† of our realm of ancient time used, were admitted to adnul and defeat such fine, alledging that before the fine levied, and at the levying thereof, and since, the demandants or plaintiffs, or their ancestors, were alway seised of

* Read *father*. † Add *and customs*.

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the lands contained in the fine, or of some parcel thereof; and so fines lawfully levied, were many times unjustly defeated and annulled by juries of the country falsely and maliciously procured; (3) we therefore, intending to provide a remedy in the premises, in our parliament at *Westminster*, have ordained, That such exceptions, answers, or inquisitions of the country, shall from henceforth in no wise be admitted contrary to such recognisances or fines. And further we will, That this statute shall as well extend unto fines heretofore levied, as to them that shall be levied hereafter. And let the justices see that such notes and fines, as hereafter shall be levied in our court, be read openly and solemnly, and that in the mean time all pleas shall cease; and this must be at two certain days in the week, according to the discretion of the justices.

. 2 Inst. 121. No exception to a fine, that the demandant was always seised. Rast. 349, &c.—3 Co. 88—Fitz. Replic. 62, 63, 66—42 Ed. 3, f. 19. Fines shall be openly read, and then all pleas shall cease. 18 Ed. 1, st. 4, of fines. 15 *Ed.* 2. *conusors shall be personally present* 1 *R.* 3, *c.* 7, *who are bound by fines.* 4 *H.* 7, *c.* 24, *how often fines to be proclaimed.* 32 *H.* 8, *c.* 36, *where fines levied according to statutes shall bar entails.* 31 *El. c.* 2, *abridging proclamation—and see farther* 1 *Mar. stat.* 2, *c.* 7—23 *El. c.* 3—*and* 4 *Anne c.* 16.

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* 15 EDWARD II. A.D. 1322.(x

The conusor of a fine shall come personally before the justices. Where a commission shall be awarded to take a fine. Who may admit attorneys.

THE king unto the justices of his bench, greeting: Whereas of late we have ordained, that all such fines as are to be levied in our court, be lawfully levied, which we will in no wise to be infringed or to be adnulled of their whole power, (2) we have sent unto you our mind in writing, firmly to be observed: that is to wit, That as well the parties demandant or plaintiff, as the tenants or defendants, that will yield or acknowledge their right of lands or tenements unto other in pleas of *warantia chartæ*, covenant, and other, whereupon fines are to be levied afore you, before such fines do pass, the parties shall appear personally, so that

x) "This statute is in force, except that part which relates to the admission of attorneys." *Rep. of the Judges.*

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their age, idiocy, or any other default (if any be) may be judged and discerned by you. (3) Provided, notwithstanding, That if any person be by age or impotence decrepit, or by casualty so oppressed and withholden, that by no means he is able to come before you in our court, then in such case we will that two, or one of you, by assent of the residue of the bench, shall go unto the party so diseased, and shall receive his cognisance upon that plea, and form of plea, that he hath in our court, whereupon the same fine ought to be levied. (4) And if there go but one, he shall take with him an abbot, a prior, or a knight, a man of good fame and credit, and shall certify you thereof by the record; so that all things incident to the same fine being examined by him or them, the same fines, according to our former ordinance, may be lawfully levied.

18 Ed. 1, st 4. The conusor of a fine shall come personally before the justice, that his defects may be discerned Rast. 349, &c—Bro. Fines levy 122. *For the doctrine of fines see further* 34 *Ed.* 3, *c.* 16—5 *H.* 4, *c.* 14—1 *R.* 3, *c.* 7—4 *H.* 7, *c.* 24—32 *H.* 8, *c.* 36—23 *El. c.* 3—*and* 4 *Anne c.* 16.

The 15 Edw. II. usually called the statute of *Carlisle*,[1] introduced the *dedimus potestatem*, which is a special commission issuing out of the court of chancery to certain persons, as the commissioners reciting that a writ of covenant is depending in the court of common pleas, between certain persons therein named, who, by reason of infirmity, are incapable of appearing personally in court; and authorising the commissioners to take the acknowledgment of the said parties, concerning the matters specified in the writ, and requiring them to certify such acknowledgment under their hands and seals to the court of common pleas.[2]

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* 34 EDWARD III. CAP. XVI. A.D. 1360.

Non-claim of fines shall hereafter be no bar.

ITEM, it is accorded, That the plea of *non-claim* of fines, which from henceforth be to be levied, shall not be taken nor holden for any bar in time to come.

1. Though called a statute, it seems rather to be a writ addressed by the king to the judges, for their government in taking the acknowledgment of fines. 1 Cruise on Fines 76.

2. 2 Brac. Abr. 127—1 Cruise on Fines 7. See some further observations on this statute, p. 195.

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Co. Lit. 262.a See 4 *H.* 7, *c.* 24, *and* 32 *H.* 8, *c.* 36, *which expounds the foregoing.*

The 34 Edw. III. c. 16, commonly called the statute of *non-claim*, was designed to remedy a grievance which had been occasionally experienced from the right to lands whereof a fine had been levied, being barred unless claim were made within a year and a day.[3]

This statute introduced an innovation in the common law, which, like most others, was productive of much greater inconveniences, than were attempted to be guarded against.[4] The efficacy of fines was entirely destroyed by this statute, and strangers were thereby allowed to claim lands at any indefinite period of time after a fine had been levied of them. In consequence "great contention arose, and few men were sure of their possessions."[5]

The mischief introduced by this statute was endured till the reign of Richard 3, when the common law was restored, and the doctrine of non-claim revived.[6] The statute of *non-claim*, however, is still in force with respect to fines which were levied without proclamations.[7]

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* 5 HENRY IV. CAP. XIV. A.D. 1403.(r

Enrolling of writs in the common place whereupon fines be levied.

ITEM, Whereas many feet of fines of lands and tenements within the realm of *England*, remaining in the king's treasury, and the notes of such fines remaining in the common bench, have been before this time imbesilled, and other feet and notes of fines falsely counterfeit and set in their places, by deceit and falsehood of some, whereby many people of the realm have been greatly endamaged before this time, and may be disherited in the time to come; (2) it is ordained and established, That all the writs of *covenant*, and all other writs, whereupon fines shall be levied in time to come, with the writs of *dedimus potestatem*, if any be, with all knowledges and notes of the same, before that they be drawn

3. Such was the common law; and the statute *de modo levandi fines*, only excepts the rights of those who labour under the disabilities specified in the act. 1 Cruise on Fines 149.

4. 1 Cruise on Fines 152.

5. 2 Inst. 518.

6. By 1 Rich. 3, c. 7.

7. 1 Cruise on Fines 151.

r) "That part only of this statute is in force which directs, that all the writs of covenant and all other writs whereupon fines shall be levied, with the writs of *dedimus potestatem*, if any, with all knowledges and notes of the same, shall be inrolled in a roll to be of record forever." *Rep. of the Judges.*

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out of the common bench by the cyrographer, shall be inrolled in a roll, to be of record forever, to remain in the safe custody of the chief clerk of the common bench, and of his successors, for the old fee of xxii pence, accustomed to be paid to the chief clerk, for the entering of the record of every fine, without paying any more; (3) to the intent that if the notes in the custody of the cyrographer, or the fines, be imbesilled, a man may have recourse to the said roll, to have execution thereof, as he should have if the fines were not imbesilled; (4) and that all the writs of *covenant*, and all other writs whereupon fines have been levied in times past, shall be also of record. (5) And moreover, all the fines that were now late imbesilled in the treasury of our lord the king, by persons unknown, if the notes and the same writs of *covenant*, of such fines imbesilled, remaining in the custody of the cyrographer may be found, that then the party shewing part of the fines imbesilled, such notes and writs of *covenant* shall remain of record as far forth as the same fines should have been, if no imbesilling thereof had been made.

5 Co. 39.

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* 1 RICH. III. CAP. VII. A.D. 1483.

Who shall be bound by a fine levied before the justices of the common pleas: and proclamations made thereof.

ITEM, Whereas it is ordained, **established, and enacted, in a parliament holden* in the time of the reign of king *Edward* the first, by the statute *De finibus*, that notes, and fines levied in the king's court, before his justices, should be openly and solemnly read, and that the pleas in the mean time should cease, and this to be done two days in the week after the discretion of the justices, as in the same statute more plainly appeareth: (2) our said sovereign lord the king, considering that fines ought to be of the greatest strength, to avoid strife and debates, and be a final end and conclusion, that it be willed and ordained, by the advice and assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same,

* Not on the roll.

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That after the ingrossing of every fine, to be levied after the feast of *Easter* next coming, in the king's court before the justices of the common pleas, of any lands, tenements, or other hereditaments, the same fine shall be openly and solemnly read and proclaimed in the same court the same term, and in three terms of the year next following the same ingrossing in the same court, at four several days in every term, 3 and in the same time that it is so read and proclaimed, all pleas shall cease. (4) and moreover a transcript of the same fine shall be sent by the said justices of the common pleas to the justices of assise of the county where the said lands and tenements be; they to cause the said fines to be read and proclaimed openly and solemnly in every their sessions and assises, to be holden the same year, if assises do then hold, and all the pleas in the mean time to cease.

II. Also it is ordained and established by the said authority of parliament, That a like transcript of the same fine shall be sent to the justices of the county where the said lands and tenements be, they to cause open and solemn proclamation of the said fine to be made at four general sessions of the peace to be holden in the same year.

III. The said justices of assises, and also justices of peace, to certify the same proclamation to the king's justices of the common pleas, at the second day of return of the term then next following; (2) after which proclamation done and certified, the said fine to be a final end, and to conclude, as well privies as strangers to the same; except women covert, other than be parties to the said fine, and every person or persons then being within age, in prison, or out of this realm of *England*, or not of whole memory at the time of such fine levied.

IV. And saving to every person or persons such right, title, claim, and interest, which they have to or in the said lands, tenements, and other hereditaments, at the time of such fine ingrossed, so that they do pursue their said right, title, claim, or interest, by way of action, or lawful entry, within five years next after the said proclamation made, had, or certified.

V. And also saving to all other persons such action, right, title, claim, and interest, in and to all the said lands, tenements, and other hereditaments, which shall grow, remain, descend, or come to them after the said fine ingrossed, by force of any gift in tail,

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or by any other cause or matter had or made before the said fine levied, so that those persons take their said actions, or pursue their said right and title according to the law, within five years next after such actions, right, title, claim, or interest, grown, descended, remained, or come to them; (2) and also, that the said persons, and their heirs, may have their said action against the taker of the profits of the said lands, tenements, and other hereditaments at the time of such action to be taken.

VI. And if the same persons at the time of such action, right, and title, grown, descended, remained, or came to them, be covert baron, or within age, or in prison, or out of this land, or not of whole memory; it is ordained, established, and enacted, by authority aforesaid, That their actions, right, and title shall be reserved, and saved to them and their heirs till the time they come and be at their full age, out of prison, within this land, unmarried, and of whole memory, so that they or their heirs take their said actions, or lawful entry, according to their right and title, within five years next after they come and be at their full age, out of prison, within this land, unmarried, and of whole memory, and pursue the same actions, or take their lawful entry with effect, according to the law of *England*.

VII. Also by authority of the said parliament, it is ordained, established, and enacted, That all such persons which be covert, not parties to the fine, and every person being within age, in prison, or out of this realm, or not of whole memory, at the time of the said fines levied and ingrossed, by this act of parliament before excepted, having any right or title, or cause of action to any of the said lands, tenements, and other hereditaments, that they or their heirs take their said actions, or lawful entry, according to their right and title, within five years next after that the said persons come to be of full age, out of prison, unmarried, within this land, and also become of whole memory; (2) and also sue the same actions, and take their lawful entry, and so pursue with effect, according to the laws of the realm of *England*. (3) And moreover, if they do not take their said actions, and also their said lawful entry in the manner as is aforesaid, that then they shall be concluded by the said fines for ever, in like form as they that be parties and privies to the said fines levied and ingrossed.

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VIII. Also by the said authority, it is ordained and established, That every fine which shall be from henceforth levied in any of the king's courts, of any manors, lands, tenements, or other possessions, after the manner, usage and form that fines have been levied before the making of this act before rehearsed, shall be of like strength, effect, and authority, as fines so levied be or were before the making of this act; this act, or any other act in this parliament made, or to be made, notwithstanding. (2) And that every person shall be at his liberty to levy any fine hereafter, as he will himself at his pleasure, after the manner contained and ordained in and by this act, or after the manner and form before used.

Anno 18 Ed. 1. stat. 4. modus levandi fines. *27 Ed. 1, stat. 1, c. 1—15 Ed. 2—31 Ed. 3, c. 16—5 H. 4 c. 14.* How often fines shall be proclaimed. Altered by 31 El. c. 2, *abridging proclamation. See 4 H. 7, c. 24, who shall be bound by fines.—32 H. 8 c. 36 who may levy fines. And see farther concerning fines, 1 Mar. stat. 2, c. 7—23 Eliz. c. 3, and 4 Anne c. 16.*

As all the clauses in this statute are copied almost *verbatim*, into 4 *H.* 7, c. 24, and some additional matters are subjoined; the statute of 1 Rich. III. c 7,[8] is now become useless and obsolete, and the whole effect of fines, at the present day, depends almost entirely on the 4 H. VII. c. 24.

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* 4 HENRY VII. CAP. XXIV. A.D. 1487.

How often a fine levied in the common pleas shall be read and proclaimed, and who then shall be bound thereby.

ITEM, Where it was ordained in the time of king EDWARD the first, by the statute *de finibus*, that notes and fines to be levied in the king's court, afore his justices, should be openly and solemnly read, and that pleas in the mean time should cease, and this to be done by two days in the week, after the discretion of the justices, as in the said statute more plainly appeareth: The king our so-

8. Many excellent laws were passed during the short reign of this usurper—Bacon's life of Henry VII. p. 3.—Cruise on Fines 15: His reign indeed is a remarkable epocha in the legislative annals of Great Britain, not only from the circumstance that the statutes from this period are in the english language; but likewise from their having been the first statutes that ever were printed. *Obs. on the Stat.*

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vereign lord considereth, That fines ought to be of the greatest strength, to avoid strifes and debates, and to be a final end and conclusion; and of such effect were taken afore a statute made of non-claim, and now is used to the contrary, to the universal trouble of the king's subjects, will therefore it be ordained, by the advice of the lords spiritual and temporal, and the commons, in the said parliament assembled, and by the authority of the same, That after the ingrossing of every fine to be levied after the feast of *Easter*, that shall be in the year of our Lord MCCCCXC. in the king's court, afore his justices of the common pleas, of any lands, tenements, or any other hereditaments, the same fine be openly and solemnly read and proclaimed in the same court the same term, and in three terms then next following the same ingrossing in the same court, at four several days in every term; and in the same time that it is so read and proclaimed, all pleas to cease. (3) And the said proclamations so had and made, the said fine to be a final end, and conclude as well privies as strangers to the same, except women covert (other than been parties to the said fine) and every person then being within age of twenty-one years, in prison, or out of this realm, or not of whole mind at the time of the said fine levied, not parties to such fine; (4) and saving to every person or persons, and to their heirs, other than the parties in the said fine, such right, title, claim, and interest, as they have to or in the said lands, tenements, or other hereditaments, at the time of such fine ingrossed; so that they pursue their title, claim, or interest, by way of action or lawful entry, within five years next after the said proclamations had and made. (5) And also saving to all other persons such action, right, title, claim, and interest in or to the said lands, tenements, or other hereditaments, as first shall grow, remain, or descend, or come to them after the said fine ingrossed and proclamation made, by force of any gift in the tail, or by any other cause or matter had and made before the said fine levied; so that they take their action, or pursue their said right and title, according to the law, within five years next after such action, right, title, claim, or interest to them accrued, descended, remained, fallen, or come: (6) And that the said persons, and their heirs, may have their said action against the pernor of the profits of the said lands and tenements, and other hereditaments, at the time of the said action to be taken. (7) And

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that the same persons, at the time of such action, right and title accrued, descended, remained, or come unto them, be covert de baron, or within age, in prison, or out of this land, or not of whole mind, then it is ordained by the said authority, That their action, right, and title, be reserved and saved to them and their heirs, unto the time they come and be at their full age of xxi years, out of prison, within this land, uncovert, and of whole mind, so that they, or their heirs, take their said actions, or their lawful entry, according to their right and title, within five years next after they come and be at their full age, out of prison, within this land, uncovert, and of whole mind, and the same actions pursue, or other lawful entry take, according to the law. (8) And it is also ordained by the authority aforesaid, That all such persons as be covert de baron, not party to the fine, and every person being within age of xxi years, in prison, out of this land, or not of whole mind, at the time of the said fines levied and ingrossed, and by this said act afore excepten, having any right or title, or cause of action, to any of the said lands and other hereditaments, that they, or their heirs, inheritable to the same, take their said actions or lawful entry, according to their right and title, within five years next after they come and be of age of xxi years, out of prison, uncovert, within this land, and of whole mind, and the same actions sue, or their lawful entry take and pursue, according to the law. (9) And if they do not take their actions and entry as is aforesaid, that they and every of them, and their heirs and the heirs of every of them, be concluded by the said fines forever, in like form as they be that be parties or privies to the said fines: (10) Saving to every person or persons, not party nor privy to the said fine, their exception to avoid the same fine, by that, that those which were parties to the fine, nor any of them, nor no person or persons to their use, nor to the use of any of them, had nothing in the lands and tenements comprised in the said fine at the time of the said fine levied. (11) And it is ordained by the said authority, That every fine that hereafter shall be levied in any of the king's courts, of any manors, lands, tenements, and other possessions, after the manner, use, and form that fines have been levied afore the making of this act, be of like force, effect, and authority, as fines so levied be or were afore the making of this act; this act, or any other act in this present parliament made, or to be made, notwithstanding.

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(12) And every person shall be at liberty to levy any fine hereafter at his pleasure, whether he will after the form contained and ordained in and by this act, or after the manner and form aforetime used.

27 Ed. 1, stat. 1, c. 1—15 *Ed.* 11—5 *H.* 4, *c.* 14—1 *Rich. III.* c. 7. Explained by 32 H. 8, c. 36—1 Leon. 77—1 Anders. 40—2 Anders. 109. 114—Savil 85, 88, 105—3 Bulst. 152—1 Roll. 153, 157, 171—2 Roll. 24[illegible], 325, 342, 374, 402, 417 [illegible]00, 501—7 Coke 32—34 Ed. III. c. 16. Proclamation of fines. Fines are to be proclaimed only once in each term. 31 El. c. 2—Co. pla. f. 16—Plow. f. 246—Dyer f. 182, 216, 234, 246, 254—Bro. taile 2—3 Coke 51, 77. 84—Skinner 95—Hob. 33[illegible]—Co. Lit. 372,a 264,a 266,b—9 H. 8, f. 7—Plow. f. 358, 360—Dyer 72, 337, 374—5 Coke 123—9 Coke 104—11 Co. 69, 71—Dyer 3. 133. 224—Co. pl. 222, 326—1 Anders. 171—1 Leon. 213—2 Leon. 157—3 Leon. 10, 227—7 Co[illegible]2—9 Co. 140—8 Co. 101—3 Leon. 221—Dyer f. 71—Bro. fines lev. 123—[illegible] Co. 84, 91—4 Co. 1[illegible]—1 Anders. 303—1 Roll. 157—3 Inst. 216—Bro. fines lev. 109—1 Mar. sess. 2, c. 7. *See further concerning fines*, 23 *El. c.* 3—31 *El. c.* 2, *and* 4 *Anne c.* 16, *sect.* 15.

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* 32 HENRY VIII. CAP. XXXVI. A.D. 1540.(z

For the exposition of the statute of fines.

FORASMUCH as in the fourth year of the reign of the late king of famous memory, king *Henry* the seventh, father of our most dread sovereign lord the king that now is, it was, among many good and sundry statutes and ordinances, then made for the commonwealth, enacted, ordained, and established, the form and manner how fines should be levied with proclamations in the king's court, before his justices of his common place, (2) and that such fines, with proclamations so had and made, to the intent to void all strife and debates, should be a final end, and conclude as well privies as strangers to the same, certain persons excepted and saved, as in the same statute more plainly appeareth; (3) sithen which time, by diversity of interpretations, and expounding of the same statute, it hath been, and is yet, by some manner of persons doubted and called in question, whether fines, with proclamations, levied or to be levied before the said justices, by any person or persons having or claiming to have in any manors, lands, tenements or hereditaments comprised in the same fine, in possession, reversion, remainder, or in use, any manner of estate-tail, should immediately after the said fine levied, ingrossed, and proclama-

z) "This statute is in force except the IIId and IVth sections." *Report of the Judges.*

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tion made, bind the right heir and heirs of such tenant in tail, and every other person and persons seised or claiming to their use or uses; by occasion whereof divers debates, controversies, suits and troubles have been begun, moved, and had within this realm, and more be like to ensue, if remedy for the same be not provided; (4) For the establishment and reformation whereof, and for the sure and sincere interpretation of the said statute, in avoiding all dangers, contentions, controversies, ambiguities and doubts that hereafter may ensurge, grow or happen, (5) our said sovereign lord the king, with the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, hath enacted and ordained, That all and singular fines, as well heretofore levied, as hereafter to be levied, before the said justices with proclamations, according to the said statute, by any person or persons of full age of one and twenty years, of any manors, lands, tenements or hereditaments, before the time of the said fine levied in any wise entailed to the person or persons so levying the same fine, or to any the ancestor or ancestors of the same person or persons in possession, reversion, remainder, or in use, shall be, immediately after the same fine levied, ingrossed, and proclamations made, adjudged, accepted, deemed and taken, to all intents and purposes, a sufficient bar and discharge for ever against the said person and persons, and their heirs claiming the same lands, tenements and hereditaments, or any parcel thereof, only by force of any such entail, (6) and against all other persons claiming the same, or any parcel thereof, only to their use, or to the use of any manner of heir of the bodies of them; any ambiguity, doubt or contrariosity of opinion, risen or grown upon the said statute to the contrary notwithstanding.

II. Provided alway, That this act, nor any thing therein contained, shall extend to bar or exclude the lawful entry, title, or interest, of any heir or heirs, person or persons, heretofore given, or hereafter to be given, grown or accrued to them or any of them, in or to any manors, lands, tenements and hereditaments, by reason of any fine or fines heretofore levied, or hereafter to be levied, by any woman after the death of her husband, contrary to the form, intent and effect of the statute made in the said eleventh year of the said king *Henry* the seventh, of any manors, lands,

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tenements and hereditaments, of the inheritance or purchase of the said husband or of any his ancestors, given or assigned to any such woman in dower, for term of life or in tail, in use or in possession, 2) but that the same act made in the said eleventh year of the said late king *Henry* the seventh, shall stand, remain and be in full strength and virtue in every article, sentence and clause therein contained, in like manner and form as though this present act had never been had nor made.

27 *Ed.* 1, *st.* 1, *c.* 1—15 *Ed.* 2—34 *Ed.* 3, *c.* 16—5 *H.* 4, *c.* 14—1 *R.* 3, *c.* 7—4 H. 7, *c.* 24—Moor 114 pl. 256, 115 pl. 258, 146 pl. 290—Savil 85, 105—2 Roll. 417, 504—Goldsb. 9, pl. 12—Plowd. 246—3 Co. 51 & 84,—7 Co. 32—9 Co. 140—11 Co. 75—Bro. Assur. 6—Bro. Feoffm. al. use 57—Bro. Taile 2—Bro. Fines 109, 118, 121—Co. Lit. 372,a—1 Bulst. 33—13 Ed. 1, st. 1, c. 1—1 Leon. 244—2 Leon. 36, 57, 62, 224—3 Leon. 10—1 Anders. 3, 39, 141—Skinner 95—2 And. 109, 114—*Cro. Car.* 435—*Vin V.* 13, 264—*Wood. Pt.* 1, 530. A fine levied by the wife of the inheritance of her late husband shall be void. 11 H. 7, c. 20.

This statute having been professedly made for the purpose of explaining the statute 4 H. 7, it is proper to consider them together.[9]

By the 4 H. 7, a fine, with proclamations, concludes all persons, both *privies* and strangers, except femes covert, persons within age, in prison, out of the realm, or of *non-sane* memory, not being parties to the fine.

The right and interest that any persons, (other than parties) have at the time the fine is engrossed is saved; provided such right or interest be prosecuted, by action or lawful entry, by them or their heirs, within *five* years, after the proclamations are made. So rights accruing after the engrossment of a fine, are saved if prosecuted within five years after they accrue. By the word *privy* in the act, is to be understood not only those who are privy in blood, to the person who levies the fine, but also privy in estate and title, to the land whereof the fine is levied, that is those who must necessarily mention the cognizor, and convey themselves through him, before they can make out their title to the estate.[10]

One who is a privy within the intention of the 4 H. 7, is an heir in tail within 32 Hen. 8, *et sic e converso.*[11]

9. 1 Cruise on Fines 156.
10. 2 Inst. 516, 681—Hob. 257, 333—9 Co. 139—3 Co. 90—1 Cruise on Fines 157.
11. Shep. Touch. 20.

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* 1 MARY, SESS. II. CAP. VII. A.D. 1553.

An act touching proclamations upon fines.

WHEREAS upon fines levied with proclamations, doubts have of late arisen, by reason of adjournment of terms, in which proclamations should have been made, according to the form limited for proclamations upon fines by the statute made in the fourth year of king *Henry* the seventh, and were not, by reason of such adjournments, had or made, according to the purvey of the same estatute:

II. Be it therefore enacted, That all fines, as well heretofore levied as hereafter to be levied, before the justices of the common place, of any manors, lands, tenements or other hereditaments, whereupon the proclamations have not or shall not, by reason of adjournment of any term by writ, be duly made, shall be of as good force, effect, and strength to all intents, constructions and purposes, as if any term heretofore so adjourned, or that at any time hereafter shall be so adjourned, had been holden and kept from the beginning to the end thereof not adjourned, and proclamations therein made according to the form and effect of the said statute.

III. Provided always, That this act shall not in any wise extend to any fine heretofore levied of any manors, lands, tenements or hereditaments, now in suit, demand or variance in any of the queen's courts, or whereof any charters, evidences or minuments concerning the same be now in demand in the queen's high court of chancery; (2) nor to any fine or fines heretofore levied of any manors, lands, tenements or hereditaments, which before the first day of this present parliament have been recovered, gotten or obtained, by reason of any judgment, entry, decree, arbitrament or other lawful means, contrary to the purport, intent or effect of any such fine or fines thereof heretofore levied.

Fines levied before the justices of common pleas shall be of force notwithstanding proclamations be not made by reason of adjournments. 4 *H.* 7, *c.* 24—18 *Ed.* 1, *st.* 4—27 *Ed.* 1, *st.* 1, *c.* 1—15 *Ed.* 2. Certain fines to which this statute shall not extend. Dyer 186. *See further concerning fines*, 23 *El. c.* 3—31 *El. c.* 2, *and* 4 *Anne c.* 16, *sect.* 1.

Before this statute, if one of three terms, immediately subsequent to that in which a fine had been levied, was adjourned, the proclamations would have been ineffectual, and the defect could not have been supplied at the next term: The statute 1 *Mary* re-

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medied this inconvenience.[12] Even an adjournment of a part of term, it has been held, is provided for by this act; for being a favorable law, it is to be construed by equity.[13]

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23 ELIZABETH, CAP. III. A.D. 1581.(A

An act for the reformation of errors in fines and recoveries.

FOR the appeasing of suits, the avoiding of false practices, deceits, devices and misdemeanors, and for helping of negligences and misprisions of clerks and officers, dangerous to assurances of men's lands and hereditaments; (2) Be it enacted by the queen's most excellent majesty, our sovereign lady, the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, That every writ of covenant, and other writ, whereupon any fine heretofore hath been levied or hereafter shall be levied, the return thereof, the writ of *dedimus potestatem* made for the knowledging of any of the same fines, the return thereof, the concord, note, and foot of every such fine, the proclamations made thereupon, and the king's silver, (3) and also every original writ of entry in the *post*, or other writ, whereupon any common recovery hath been suffered, or hereafter shall be suffered or passed, the writs of *summon. ad warrantizandum*, the returns of the said originals and writs of *summon. ad warrantizandum*, and every warrant of attorney had or to be had, as well of every demandant andt enant as vouchee, extant and remaining, or that shall be extant and in being, (4) may, upon the request or election of any person, be inrolled in rolls of parchment by such persons, and for such considerations, as hereafter in this act shall be mentioned; and that the inrollments of the same, or of any part thereof, shall be as good force and validity in law, to all intents, respects and purposes, for so much of any of them so inrolled, as the same being extant and remaining were or ought by law to be.

12. Plowd. 371—2 Inst. 519.
13. 2 Inst. 519—Dyer 337, 196.

A) "This statute is in force, except the 6th, 7th, 8th, 9th and 10th sections." *Rep. of the Judges.*

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II. And be it further enacted by the authority aforesaid, That no fine, proclamations upon fines, or common recovery, heretofore had, levied, suffered or passed, or hereafter to be had, levied, suffered or passed, shall be reversed or reversable by any writ of error, for false or incongrue *latin*, rasure, interlining, mis-entering of any warrant of attorney, or of any proclamation, mis-returning or not-returning of the sheriff, or other want of form in words and not in matter of substance.

III. Provided always, That this act, nor any thing therein contained, shall bar or exclude any person or persons from any writ of error which shall be had, taken or pursued within five years next after the end of the session of this present parliament, upon any fine or recovery heretofore had or suffered, nor from any writ of error, which shall be had, taken or pursued upon any fine or recovery heretofore levied, knowledged or had, which fine or fines, recovery or recoveries, or any part or parcel of them, or any of them, now is, or at any time before the first day of *June*, which shall be in the year of our Lord God, one thousand five hundred eighty-two, shall be exemplified under the great seal of *England*, at and by the suit of any person that is or may be intitled to have or sue any writ of error upon any the fines or recoveries heretofore passed: (2) Nor to bar any feme covert, or any person within the age of one and twenty years, or any person that is *non compos mentis*, in prison, or beyond the seas, of or from any writ of error to be had or prosecuted for the reversing of any fine or recovery heretofore passed, levied or suffered, so that such feme covert or her heirs, within seven years next after that she become sole, and such person within the age of one and twenty years, or his heirs, within seven years next after he shall come and be of full age of one and twenty years, and such person that is *non compos mentis*, within seven years next after he shall become of sane memory, and in default thereof the heirs of such person that is *non compos mentis*, within seven years next after the death of such persons being *non compos mentis*, and such person in prison, or his heirs, within seven years next after the same person shall be at liberty, and such person beyond the seas, or his heirs, within seven years next after the return of such person into this realm of *England*, or the death of the said person, if he shall before his return die in any

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foreign country, shall sue, take and prosecute their writs of error, as their cases severally shall require, for reversing of any the said fines or recoveries heretofore passed, levied or suffered.

IV. Provided always, and be it further enacted by the authority aforesaid, That if any person or persons shall, within the time and years aforementioned, commence or sue his or their writs of error for the reversing of any the said fines or recoveries heretofore passed, which suit shall fortune to abate by the death of any the parties to the same; That then it shall and may be lawful for his and their heirs, at any time within one year next after the said seven years expired, to have, sue and take their writ of error for the reversing of every such fine and recovery. (2) And if such heir be an infant within the age of one and twenty years, then within one year next after the full age of such infant; any thing in this present act contained to the contrary thereof in any wise notwithstanding.

V. And be it further enacted by the authority of this present parliament, That every person that shall at any time hereafter take the knowledge of any fine or warrant of attorney of any tenant or vouchee for suffering of any common recovery, or shall certify them, or any of them, shall, with the certificate of the concord or warrant of attorney, certify also the day and year wherein the same was knowledged: (2) And that no person that taketh any such knowledge of any fine, or warrant for any recovery, shall be bounden, or by any means inforced to certify any such knowledge or warrant, except it be within one year next after the said knowledge taken: (3) And that no clerk or officer shall receive any writ of covenant or writ of entry, whereupon any fine or common recovery is hereafter to pass, unless the day of the knowledge of the same fine and warrant shall appear in or by such certificate; (4) upon pain that every clerk that shall receive any such writ, shall forfeit for every time that he shall so offend, the sum of five pounds: (5) And that no attornment in or upon any fine be entered upon record, except the party mentioned to attorn therein, first have appeared in the court in person or by attorney warranted by the hand of one of the justices of the one bench or the other, or of one justice of assise, upon a writ of *quid juris clamat*, *quem reddit*, or *per quæ servitia*, as the case

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requireth: (6) And that every entry of attornment hereafter to be made, where there shall be no appearance as afore is said, shall be utterly void and of none effect, without any writ of error or other means to be used for the avoiding thereof.

Inrolment of fines and recoveries. 18 *Ed.* 1, *st.* 4—27 *Ed.* 1, *st.* 1, *c.* 1—15 *Ed.* 2—34 *Ed.* 3, *c.* 16—5 *H.* 4, *c.* 14—1 *R.* 3, *c.* 7—4 *H.* 7, *c.* 24—32 *H.* 8, *c.* 36—1 *Mar. st.* 2, *c.* 7. For what errors fines and recoveries are not reversible. *Ven. V* 13, 211, *V.* 18, 198—*Wood Pt.* 1, 530 & 595. *For farther provisions concerning fines see* 31 *El. c.* 2—4 *Anne c.* 16—*And see* 14 *Geo.* 2, *c.* 20, *for the amendment of recoveries.*

* 31 ELIZABETH, CAP. II. A.D. 1589.

An act for abridging of proclamations upon fines to be levied at the common law.

WHEREAS the statute made in the fourth year of king *Henry* the seventh, hath ordered, That every fine to be levied with proclamations in the king's court, afore his justices of the common pleas, should be proclaimed in the same court that term in which it is engrossed, and in three terms then next following, at four several days in every term; by reason whereof they ought to be proclaimed four times in every of the four several terms: And that during the time of proclaiming of such fines, all pleas shall cease: (2) which to do according to the said statute (considering the multitude of fines now usually levied) would require sixteen days in every term; and by reason of the many causes and suits in that court, is a far greater trouble than heretofore hath been, so as scarcely one day in every term can be spared for the proclaiming of fines: (3) Be it enacted by the authority of this present parliament, That all fines with proclamations, from and after the feast of *Easter* next ensuing, to be levied in the said court, shall be proclaimed only four times; that is to say, once in the term wherein it is engrossed, and once in every of the three terms holden next after the same engrossing: (4) And that every fine proclaimed as aforesaid, shall be of as great force and effect in law, to all intents and purposes, as if the same had been sixteen times proclaimed according to the statutes heretofore made.

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A fine levied in the common pleas shall be proclaimed four times, viz. every term once, for four terms. 4 H. 7, c. 24—1 R. 3, c. 7—1 Mar. st. 2, c. 7—2 Inst. 519—18 *Ed.* 1 *st.* 4. *See* 4 *Anne* c. 16, *s.* 15, *which provides that uses of fines, &c. may be declared by deed afterwards.*

In early times fines were really amicable compositions of *actual* suits; but for centuries past they have been so only in *name*; being in *fact* nothing more than *fictitious* proceedings, had for the purpose of transferring or securing real property by a mode more efficacious than ordinary conveyances: Wherein the superiority of a fine consists, will appear by referring to the uses to which it is applied. One purpose to which a fine is applied is the *extinguishing dormant titles*, by shortening the usual time of limitation. Being considered of equal notoriety with a judgment in a writ of right, it barred by the common law, all that should not claim within *a year and a day*.[14] The time for claiming however has been enlarged to *five years*.[15] It has been usual to levy fines for guarding against claims which, under the statutes of limitations, might subsist with a right of *entry*, for twenty years;[16] and with a right of action for a much longer time. Another use to which fines are applied is the barring estates tail, where the more extensively operative mode by common law is either unnecessary or impracticable. The one case may occur where one is tenant in tail with an immediate remainder or reversion in fee; for then as none can derive title to the estate except as the *privies* or *heirs*, a fine is an immediate and effectual bar to them. The other case may be where one has only a remainder in tail, and the person having the freehold in possession, refuses to make a tenant to the præcipe for a common recovery: under such circumstances all that the remainder man do is to bar those *claiming under* himself, by means of a fine. A fine however in general, is but a partial and inefficacious remedy to bar intails. A third effect of fines is passing the estates and interests of married women in the inheritance or freehold of lands and tenements.[17] Though most fines are now in fact taken by *dedimus*, yet they *are recorded as taken in court*, to prevent questions about captions.[18]

14. Plow. 357.

15. By first Rich. III. c. 7, and 4 H. 7, c. 24.

16. 21 *Jac.* 1, *c.* 16, which is not in force in Pennsylvania, where the time of limitation fixed by the act of 1785, is *twenty-one years*, after which the right is absolutely barred.

17. 1 Harr. Co. Lit. 121, a p. 1.

18. 13 Vin. Abr. 355.

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FORCIBLE ENTRY AND DETAINER.

5 RICHARD II. CAP. VIII. A.D. 1381.‡

The penalty where any doth enter into lands where it is not lawful, or with force.

And also, the king defendeth, That none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner. (2) And if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed at the king's will.

Godbolt 115 pl. 180—Carth. 407—Regist. 182. *Enforced and amended by* 15 R. 2, c. 2—4 H. 4, c. 8—8 H. 6 c. 9, which is explained by 31 Eliz. c. 11—10 H. 7, f. 27—11 H. 7, f. 15. *See further* 23 H. 8, c. 1—21 Jac. 1, c. 15, *whereby justices are enabled to give restitution in certain cases.*

By the common law, one who had a right of entry into lands might enter with force and arms, and detain his possession by force. This occasioned great inconvenience and frequent breaches of the public peace. It afforded an opportunity to powerful men, under the pretence of feigned titles, forcibly to dispossess their weaker neighbours. Hence it became necessary, by several statutes, to restrain all persons from the use of such violent methods even of doing themselves justice. The entry now permitted by law is a peaceable one; that prohibited is such as is carried on with force, violence and unusual weapons.

The 5 Rich. II. in the text, provided no speedy remedy, but leaves the party injured to the common course of proceeding by indictment or action—neither does it contain any provision against forcible *detainer*.

* 15 RICHARD II. CAP. II. A.D. 1391.(B)

The duty of justices of peace when any forcible entry is made into lands.

Item, It is accorded and assented, That the ordinances and

‡ This statute is omitted in the report, probably because the act of 1709, was considered analogous, and as supplying the place of the statute. 1 St. Laws, Sm. Ed. 2.

(B) "So much only of this statute is in force, as relates to forcible entry and detainer, or either of them." *Rep. of the Judges.*

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statutes, made and not repealed, of them that make entries with strong hand into lands and tenements, or other possessions whatsoever, and them hold with force, and also those that make insurrections, or great ridings, riots, routs or assemblies, in disturbance of the peace, or of the common law, or in affray of the people, shall be holden and kept, and fully executed; 2 joined to the same, That at all times that such forcible entry shall be made, and complaint thereof cometh to the justices of peace, or to any of them, that the same justices or justice take sufficient power of the county, and go to the place where such force is made; (3 and if they find any that hold such place forcibly after such entry made, they shall be taken and put in the next gaol, there to abide convict by the record of the same justices or justice, until they have made fine and ransom to the king: 4 And that all the people of the county, as well the sheriff as other, shall be attendant upon the same justices, to go and assist the same justices to arrest such offenders, upon pain of imprisonment, and to make fine to the king. (5) And in the same manner it shall be done of them that make such forcible entries in benefices or offices of holy church.

Kel. 41—3 Bulst. 71—Mod. cases in law 65—5 R. 2, st. 1, c. 8 *Enforced and amended by* 4 H. 4, c. 8—8 H. 6, c. 9—23 H. 8, c. 14. *See* 31 *El. c.* 11. *which explains* 8 *H.* 6, *c.* 9. *And see* 21 *Jac.* 1, *c.* 15, *which enables justices to give restitution in certain cases.*

The 15 Rich. II. affords a summary remedy in cases of forcible entry. These statutes have been confirmed, explained, and in some respects extended by the several others, which will be found under this head.

* 8 HENRY VI. CAP. IX. A.D. 1429.

The duty of justices of peace where land is entered upon or detained with force.

ITEM, Whereas by the noble king RICHARD, late king of *England*, after the conquest the second, at his parliament holden at *Westminster* the morrow after *all souls*, the fifteenth year of his reign, amongst other things it was ordained and established, That

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the statutes and ordinances made, and not repealed, of them that make entries with strong hand into lands or tenements, or other possessions whatsoever, and them hold with force, and of them that make insurrections, riots, routs, ridings and assemblies, in disturbance of the peace, or of the common law, or in affray of the people, should be holden and fully executed. (2) And moreover, it is ordained by the same statute, That at all times that such forcible entries be made, and complaint thereof come to the justices of peace, or any of them, that the same justices or justice shall take the power of the county, and shall go, or one of them shall go, to the place where such force is made; (3) and if they find, or he findeth, any holding such place forcibly, after such entry made, they should be taken and put into the next gaol, there to remain convict by the record of the same justices or justice, until they have made fine and ransom to the king; (4) and that all the people of the county, as well sheriffs as other, shall be attending to the said justices, to assist them to arrest such malefactors, upon pain of imprisonment, and to make fine and ransom to the king. And that in the same manner be done of them that make forcible entries into benefices or offices of holy church, as in the same statute is contained more at large.

II. And for that the said statute doth not extend to entries in tenements in peaceable manner, and after holden with force, nor if the persons which enter with force into lands and tenements, be removed and voided before the coming of the said justices or justice, as before, nor any pain ordained if the sheriff do not obey the commandments and precepts of the said justices for to execute the said ordinance, many wrongful and forcible entries be daily made in lands and tenements, by such as have no right, and also divers gifts, feoffments, and discontinuances sometimes made to lords, and other puissant persons, and extortioners within the said counties where they be conversant, to have maintenance, and sometimes to such persons as be unknown to them so put out, to the intent to delay and defraud such rightful possessors of their right and recovery for ever, to the final disherison of divers of the king's faithful liege people, and likely daily to increase, if due remedy be not provided in this behalf: (2) Our lord the king, considering the premises, hath ordained, That the said statute, and all other statutes of such entries or alienations, made in times

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past, shall be holden and duly executed; (3) joined to the same, That from henceforth where any doth made any forcible entry in lands and tenements, or other possessions, or them hold forcibly, after complaint thereof made within the same county where such entry is made, to the justices of peace, or to one of them, by the party grieved, that the justices or justice so warned, within a convenient time, shall cause, or one of them shall cause, the said statute duly to be executed, and that at the cost of the party so grieved.

III. And moreover, though that such persons making such entry be present, or else departed before the coming of the said justices or justice, notwithstanding the same justices or justice in some good town next to the tenements so entered, or in some other convenient place, according to their discretion, shall have, or either of them shall have, authority and power to inquire by the people of the same county, as well of them that make such forcible entries in lands and tenements, as of them which the same hold with force; (2) and if it be found before any of them, that any doth contrary to this statute, then the said justices or justice shall cause to reseise the lands and tenements so entered or holden as afore, and shall put the party so put out in full possession of the same lands and tenements so entered or holden as before: (3) And if any person, after such entry into lands or tenements holden with force, make a feoffment or other discontinuance to any lord or other person, to have maintenance, or to take away and defraud the possessor of his recovery, in any wise, if after in assise or other action thereof to be taken or pursued before justices of assises, or other the king's justices whatsoever, by due inquiry thereof to be taken, the same feoffments and discontinuances may be duly proved, to be made for maintenance, as afore is said, that then such feoffments, or other discontinuance, so as before made, shall be void, frustrate, and holden for none.

IV. And also, when the said justices or justice make such inquiries as before, they shall make, or one of them shall make, their warrants and precepts to be directed to the sheriff of the same county, commanding him, of the king's behalf, to cause to come before them, and every of them, sufficient and indifferent persons, dwelling next about the lands, so entered as before, to inquire of such entries, (2) whereof every man, which shall be in-

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panneled to inquire in this behalf, shall have land or tenement of the yearly value of forty shillings by year at the least, above reprises. (3) And that the sheriff return issues upon every of them, at the day of the first precept returnable xx. s. and at the second day xl. s. and at the third time c. s. and at every day after, the double. (4) And if any sheriff or bailiff within a franchise, having return of the king's writ, be slack, and make not execution duly of the said precepts to him directed to make such inquiries, that he shall forfeit to the king xx. li. for every default, and moreover shall make fine and ransom to the king.

V. And that as well the justices or justice aforesaid, as the the justices of assises, and every of them, at their coming into the county to take assises, shall have, and every of them shall have, power to hear and determine such default and negligences of the said sheriffs and bailiffs, and every of them, as well by bill at the suit of the party grieved for himself as for the king, to sue by indictment only to taken for the king. (2) And if the sheriff or bailiff be duly attainted in this behalf by indictment or by bill, that he which sueth for himself and for the king have the one moiety of the forfeiture of xx. li. together with his costs and expenses. (3) And that the same process be made against such persons indicted or sued by bill in this behalf, as should be against persons indicted or sued by writ of trespass done with force and arms against the peace of the king.

VI. And moreover, if any person be put out, or disseised of any lands or tenements in forcible manner, or put out peaceably, and after holden out with strong hand; or after such entry, any feoffment or discontinuance in any wise thereof be made, to defraud and take away the right of the possessor: that the party grieved in this behalf, shall have assise of *novel disseisin*, or a writ of trespass against such disseisor. (2) And if the party grieved recover by assise. or by action of trespass, and it be found by verdict, or in other manner by due form in the law, that the party defendant entered with force into the lands and tenements, or them after his entry did hold with force, that the plaintiff shall recover his treble damages against the defendant; (3) and moreover, that he make fine and ransom to the king. And that mayors, justices or justice of peace, sheriffs, and bailiffs of cities, towns,

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and boroughs, having franchise, have in the said cities, towns, and boroughs, like power to remove such entries, and in other articles aforesaid, rising within the same, as the justices of peace and sheriffs in counties and countries aforesaid have.

VII. Provided always, That they which keep their possessions with force in any lands and tenements, whereof they or their ancestors, or they whose estate they have in such lands and tenements, have continued their possessions in the same by three years or more, be not endamaged by force of this statute.

The statute of 15 R. 2, c. 2, touching forcible entries rehearsed and confirmed. 4 Co. 48---Hob. 94---Keilw. 207, 208. The defects of the statute of 15 R. 2, c. 2---Palmer 277. The office and duty of justices of peace when any forcible entry is made into lands, or peaceable entry and after detaining with force---Carthew. 40---1 Leonard 327. The remedy where any person entering by force, doth alienе the same land to have maintenance---1 R. 2, c. 9---Dyer 122, 187---9 Co. 118---11 Co. 65---7 Ed. 4, f. 8---4 H. 7, f. 18---Cro. Eliz. 184, 189, 306, 458, 461, 582, 654, 738, 915---Cro. Jac. 17, 19, 31, 41, 148, 151, 176, 214---Cro. Car. 201. What action may be had against him who doth put out, or keep out of possession with force---Savil 68---1 H. 7, f. 19---6 H. 7, f. 12---10 H. 7, f. 9---15 H. 7, f. 7---Dyer f. 142---Fitz. Ent. 15, 16, 17, 18, 21, 27, 33, 39, 45---10 E. 7, f. 12---10 Ed. 4, f. 10---Dyer 214---Fitz. Dam. 23, 25---Co. 116---11 Co. 30---Cro. El. 93, 96, 606, 697---21 H. 6 f. 18---Kel. 74, a. 187---14 H. 7, f. 28---Dyer 141---Bro. force 22---1 Bulst. 218---2 Leon. 52---Co. pl. f. 515. The authority of the chief officers in cities, &c. to repress force. Inforced *and explained by* 31 El. c. 11. They may keep their land by force who have had three years possession---1 Salk. 356---1 Last 257---5 R. 2, stat. 1, c. 7---4 H. 4, c. 8---23 H. 8, c. 14---*and see* 21 *Jac.* 1, *c.* 15, *which enables justices to give restitution in certain cases.*

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* 31 ELIZABETH, CAP. XI. A.D. 1589.

An act of explanation or declaration of the statute of octavo regis H. 6. *concerning forcible entries, the indictments thereupon found.*

WHEREAS there is one good act made and established in the eighth year of the reign of king *Henry* the sixth, against such persons as should make forcible entry into lands, tenements and other possessions, or them should forcibly hold; and one very good proviso or clause, in the said act contained, as ensueth:

II. Provided always, That they which keep their possessions with force, in any lands and tenements whereof they or their ancestors have continued their possession in the same by three years or more, be not endamaged by force of the said statute.

III. And whereas divers of the queen's majesty's good and loyal subjects, and their ancestors, or those whose estate they

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have, for many years together, above the space of three years or more, have been in quiet possession of their dwelling houses, and other their lands and possessions; and now of late divers of her majesty's said subjects, having entries made upon their possessions, having had such quiet and long possession, for disturbing of such entrers, and for keeping of their possession against such entrers, by colour of indictments of forcible entry, or forcibly keeping possession, found against them, by means of the oaths of such entrers, have been removed and put out of their dwelling houses, and other their possessions which they have quietly held by the space of three years together or longer time, next before such indictments found against them, against the true meaning and intent of the said proviso or clause contained in the said act: (2) For remedy of which inconvenience, and for true declaration and explanation of the law therein, (3) be it ordained, declared and enacted, by the authority of this present parliament, That no restitution upon any indictment of forcible entry, or holding with force, be made to any person or persons, if the person or persons so indicted hath had the occupation or hath been in quiet possession by the space of three whole years together, next before the day of such indictment so found, and his, her or their estate or estates therein not ended or determined; which the party indicted shall and may alledge for stay of restitution, and restitution to stay until that be tried if the other will deny or traverse the same: (5) and if the same allegation be tried against the same person or persons so indicted, then the same person or persons so indicted to pay such costs and damages to the other party, as shall be assessed by the judges or justices before whom the same shall be tried; the same costs and damages to be recovered and levied as is usual for costs and damages contained in judgments upon other actions. 5 R. 2, st. 1, c. 7—15 R. 2, c. 2—4 H. 4, c. 8—21 Jac. 1, c. 15.

8 H. 6, c. 9. The proviso in the statute of 8 H. 6, c. 9, touching continuance of possessions by three years—1 Salk 353. No restitution shall be made if the party indicted hath been three years in quiet possession and his estate not ended—Raym. 84, 85—Dyer 141.

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* 21 JAMES I. CAP. XV. A.D. 1623.

An act to enable judges and justices of the peace to give restitution of possession in certain cases.

BE it enacted by the authority of this present parliament, That such judges, justices or justice of the peace, as by reason of any act or acts of parliament now in force are authorised and enabled upon inquiry, to give restitution of possession unto tenants of any estate of freehold, of their lands or tenements which shall be entered upon with force, or from them withholden by force, shall by reason of this present act, have the like and the same authority and ability from henceforth (upon indictment of such forcible entries, or forcible withholdings before them duly found) to give like restitution of possession unto tenants for term of years, tenants by copy of court-roll, guardians by knight's service, tenants by *elegit*, statute merchant and staple, of lands or tenements by them so holden, which shall be entered upon by force, or holden from them by force. 5 R. 2, st. 1, c. 7—15 R. 2, c. 2—8 H. 6, c. 9—31 El. c. 11.

4 Inst. 176. Restitution of possession shall be given, to avoid entrers with force, in estates for years, &c. Latch. 183.

The entering into lands or tenements with a strong hand, unusual weapons, or with menace of life or limb, is deemed a forcible entry.[1]

If a man enters peaceably into a house, but turns the party out of possession by *force*, or by threats of personal *hurt* frightens him out of possession, this is a forcible entry.[2] So other acts of violence may amount to a forcible entry, as breaking open the doors of a house, whether any person be in it or not, especially if it be a dwelling house. But the mere entry by means of drawing of a latch, &c. would not be considered forcible.[3]

As to what shall be considered a forcible detainer, there is no doubt but that the same circumstances of violence and terror, which will make an entry forcible, will make a detainer forcible also.[4]

In respect to what kind of possession one may be guilty of such forcible entry and detainer; the statute 5 *Rich.* 2, c. 7, the 15 Rich. 2, c. 2, and the 8 Hen. 6, c. 9, extend only to *freehold estates*; and the 21 *Jac.* 1, c. 15, does only extend to estates holden

1. H. P. C. 138—Co. Lit. 257.
2. Dalt. 299—1 Hawk. P. C. 230.
3. 13 Vin. Abr. 380.
4. 1 Hawk. P. C. 231—Lamb. 145.

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by tenants for years, tenants by copy of court-roll, and tenants by elegit, statute merchant and statute staple.[5]

After a *peaceable uninterrupted possession of three years*, a man may hold the land by force; his possession being protected by 8 *Hen.* 6, *cap.* 9.[6]

For this offence the statutes afford remedy—

1. By summary proceedings had before one or more justices upon *view*, or by *inquisition*.

2. By *indictment* in the quarter sessions.

3. By a civil action.

Any one, or more justices of the peace, upon view of the force, may make a record of it, *fine* the offender and *commit* him, until the fine be paid; but they cannot award restitution of the possession without *inquisition*.

The record made by the justice, upon view, shall be a conviction, and is not traversable. It ought to be certified to B. R. or the next assizes or quarter sessions.

Regularly they ought to *set the fine* before they commit the offender; although they need not *eo instanti* set the fine, but may adjourn for a little time to consider of it. It is also held that if a *certiorari* came to the justices, they might proceed to set a fine, and complete their judgment and it would be no contempt. If no fine is set, and the offender is committed, B. R. cannot set the fine, but will quash the conviction.[7]

There ought to be an adjudication that the person, upon whom a fine is set, shall *be committed until the fine is paid*; and the want of such adjudication is sufficient ground to quash the conviction.[8]

Justices of the peace ought to adjourn their courts to *afford the party an opportunity of traversing the force.*

If the party tender a traverse of the force (which must be done in writing, and not by a bare denial by *parole*) or plead three years possession, the justice must award a *venire facias* to the sheriff, whereupon a jury will be returned to try the traverse, on whose verdict the award of restitution ought to depend.[9]

If the jury find part of the indictment to be true, and part false, yet if the part found to be true will warrant a restitution, it ought to be awarded, as where they find that the entry was peaceable and the detainer only *forcible*.[10]

Award of restitution ought not to be made in the defendant's absence, without calling upon him to answer for himself; for it is implied by natural justice in the construction of all laws, that no one ought to suffer any prejudice thereby, without having first an opportunity of defending himself.[11]

5. *Rex v Warmouse*, Trin. 28, Geo. 2—Sayer 142—4 Vin. Sup. 407. As those to whom lands are delivered, under a *liberari facias* in Pa. hold as tenants by *elegit*, the statute 21 *Jac.* 1, must equally apply to them.

6. 13 Vin. Abr. 383.

7. *Rex v Elwell* Stra. 794—Raym. 1514—13 Vin. Abr. 384—4 Vin. Sup. 409.

8. *Rex v Horde* 28 Geo. 2—Sayer 176.

9. *Cases Temp. Hardw.* 175—Salk. 587, 588—1 Hawk. P. C. 291, § 58.

10. 1 Hawk. P. C. 291, § 59—1 Sid. 97, 99.

11. Savil 68—Aleyn. 76—1 Hawk. 291.

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Further as to the form of the record upon these statutes, it seems to be required generally that the entry should be laid *(manu forti)* with a strong hand, or *(cum multitudine gentium)* with a multitude of people; but some have held that equipollent words will be sufficient; especially if the indictment concludes *(contra formam statuti)* against the form of the statute, &c. But it is not sufficient to say only that he entered *vi et armis*, which is the common allegation in every trespass.[12] The degree of force ought to appear on the face of the indictment.

The case of *Rex v Bathurst*[13] may appear to impugn this rule There the offence was not charged to have been committed with a strong hand, or a multitude of people, but merely *vi et armis:* It was, however, an indictment against *three persons* for entering a man's *dwelling house*, and *turning him out of possession*, and keeping him out; so that the fact itself naturally implied force.[14]

An indictment for a forcible entry and detainer may be maintained at *common law;* though they are generally brought on the statutes; and in an indictment grounded on the statutes, it is necessary to state the nature of the estate, because there must be restitution.[15]

It is absolutely necessary that it should appear what estate the person expelled had in the premises; otherwise it will be uncertain whether any one of the statutes relative to forcible entries, does extend to estates from which the expulsion was.[16]

An indictment may in some cases doubtless be good, at the *common law*, although the conclusion be *against the form of the statute;* yet it may be well questioned whether an indictment which on the face of it appears to be framed on a statute, can be held good as an indictment at the common law.[17]

In an indictment for a forcible *detainer*, it is necessary to alledge *an entry*, otherwise no offence appears; for if the party had been in the quiet and uninterrupted possession for three years, it would have been lawful to defend such possession with force.[18]

Where an indictment is removed by certiorari, B. R. may award restitution discretionally; and will do it, unless defendant plead very soon and take notice of trial within term.[19]

—2 Bac. Abr. 564. Upon conviction restitution must be awarded forthwith. *Rex v Harris*. Carth. 496.

12 Harg. Co. Lit. 257—Bac. Abr. 561—Style 13 —2 Bulst. 258—2 Roll. Rep. 46—2 Roll. Abr. 80—Mod. 80, 81—Cro El. 461. *Warner v Collins*, Noy. 135—Vent. 265—2 Keb. 133.

13. Say. 225—4 Vin. Sup. 407—3 Burr. 1702

14. 3 Burr 1701.

15. *Rex v Bake* et al. Term. 5 Geo. III. K. B.—Bur. 1732 4 Vin. Sup. 406. But mere informality in the expression will not vitiate, if sufficient appears upon the whole record to designate the nature of the estate or interest.

16. *Rex v Wannoss* Trin. 28 Geo. 2—Say. 142—4 Vin. Sup.—1 Hawk. P. C. 282—1 Salk. 260—1 Sid. 202—3 Com. Dig. 365.

17. See *Rex v Bathurst*, Say. 225—4 Vin. Sup. 407.

18. 3 Com. Dig. 366. Though it is not necessary to alledge that the entry was peaceable, for it shall be so intended, unless force be alledged.

19. *Rex v Morrow*, M. 9 Ed. II. B. R. H. 174.

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When the conviction is quashed restitution must be awarded, although the title of the party claiming restitution had expired before the conviction. The court said that they had no discretionary power in such case, but were bound to award restitution on quashing the conviction.[20] In a criminal proceeding under these statutes, title cannot be given in evidence to prevent restitution.[21]

The wife of the prosecutor may be examined as a witness to prove the *force*.[22]

It is said that three years peaceable possession bars restitution but does not justify the offence.[23]

The statutes of forcible entry and detainer were made for very wise and good purposes when the spirit of the times and the state of society were very different from the present; they are still beneficial, but in a variety of instances have been prostituted and abused. Their provisions though formerly construed liberally, should now, from the change of circumstances, receive a strict construction. Prosecutions for this offence ought to be discouraged unless there is an actual force against the party in actual possession.[24]

An action of trespass lies upon the statute 15 Rich. 2, c. 2, against him who makes a forcible entry; also upon 8 Hen. 6, c. 9, against one who makes a forcible entry and detainer, actions are usually grounded on the latter statute.

In such action the plaintiff in his declaration must recite the statute.[25]

To this action the defendant may plead *not guilty*; or *non est ingressus, contra formam statuti*; or *non expulit nec disseisivit querentem*[26]

If an action be brought on the statutes of forcible entry and detainer, and the defendant makes himself a title, which is found for him, he shall be dismissed without any inquiry concerning the *force*; for howsoever he may be punishable in a criminal prosecution for doing what is prohibited by statute, as a contemner of the laws and disturber of the peace, yet he shall not be liable to pay any damages for it to the plaintiff whose injustice gave him the provocation in that manner to right himself.[27]

20. *Rex v Jones*, Mich. 8 Geo. 1—Stra. 474.

21. *Respub. v Shryber et al.* 1 Dal. 68—See 1 Burns Inst. 411.

22. ib.

23. Addison's Rep. 17. The correctness of this opinion is perhaps questionable. The proviso in the statute 8 H. 6, c. 9, is, "That they who keep their possessions by force, in any lands and tenements, whereof they or their ancestors, or they whose estate they have in such lands and tenements, have continued their possession in the same by the space of three years or more, *be not endamaged by force of this statute.*"

This proviso is transcribed and extolled in 31 Eliz. c. 11, as it would seem in consequence of its tendency to suppress litigation, and the prosecution of stale claims. Might not three years' *peaceable and uninterrupted possession* then, with more propriety, be considered an absolute bar to a prosecution under these statutes?

24. See *Respublica v Devore* and *Resp. v Geo. Dixon et al.* Binney's Rep.

25. Lutw. 1548. Co. Ent. 44,b 305,b—See 1 Com. Dig. 230. How a statute shall be recited. 5 Com Dig. 228.

26. See Cl. Ass. 34—Co. Ent. 46,a—5 Com. Dig. 228.

27. 1 Hawk. P. C. 274, § 3—8 Burr. 1698, 1731—Harg. Co. Lit. 257,a (n. 1.)

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In an action for a forcible entry there was a verdict for the plaintiff with 20*l.* damages. As treble damages are in this case given by the statute 8 Hen. 6, c. 9, it was awarded by the court, that besides the damages of 20*l.* assessed by the jury, the plaintiff should recover 40*l.* more.[28] Or the court might award a writ of inquiry; but it is too late to apply for a writ of inquiry to assess the damages omitted to be assessed by the jury who tried the cause, after judgment has been entered up.[29]

If double or treble damages are given by statute, wherein single damages are recoverable at the common law, the plaintiff may recover double or treble *costs*, as well as such double or treble damages, although the statute be silent as to costs.[30]

The 8 *H.* 6, *c.* 9, whereby treble damages are given in the case of a forcible entry, is silent as to costs; yet treble costs are recoverable in an action upon that statute; because single damages were recoverable at the common law in an action for a forcible entry.[31]

FRAUD.

* 50 EDWARD III. CAP. VI. A.D. 1376.

Fraudulent assurances of lands or goods, to deceive creditors, shall be void.

ITEM, Because that divers people inherit of divers tenements, borrowing divers goods in money or in merchandise of divers people of this realm, do give their tenements and chattels to their friends, by collusion thereof to have the profits at their will, and after do flee to the franchise of *Westminster*, of *St. Martin le grand* of *London*, or other such privileged places, and there do live a great time with a high countenance of another man's goods and profits of the said tenements and chattels, till the said creditors shall be bound to take a small parcel of their debt, and release the remnant; (2) it is ordained and assented, That if it is found that such gifts be so made by collusion, that the said creditors shall have execution of the said tenements and chattels, as if no such gift had been made.

28 Bro. Dam. pl. 70—Say. law of dam. 244—see *ante* p. 115, 116.

29. Say. Dam. 244, see also *Burnet* v *Hart*. East. 28 Geo. 2 in B. R.

30. Say. law of costs, cap. 38, p. 228.

31. Sayer's Costs 228.

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East. 197—Dyer 295—Fitz. execution 38, 108. *Enforced by* 2 *R.* 2, *stat.* 2, *c.* 6—3 *H.* 7, *c.* 4—13 *El. c.* 5, *which make fraudulent deeds void.*

This act extends only to relief of creditors, and *to such debtors only as make to sanctuaries, or other privileged places.*

A man made a *gift of his goods*, with intent to defraud his creditors, and yet *continued the possession of them and took sanctuary*, and died there; now his executors having the goods were charged towards the creditors.

* 3 HENRY VII. CAP. IV. A.D. 1486.

All deeds of gift made to defraud creditors shall be voill.

ITEM, That where often times deeds of gift of goods and chattels have been made, to the intent to defraud their creditors of their duties, and that the person or persons that maketh the said deed of gift goeth to sanctuary, or other places priviledged, and occupieth and liveth with the said goods and chattels, their creditors being unpaid: (2) it is ordained, enacted, and established, by the assent of the lords spiritual and temporal, and at the request of the commons in the said parliament assembled, and by authority of the same, That all deeds of gift of goods and chattels made or to be made of trust, to the use of that person or persons that made the same deed of gift, be void and of none effect.

50 Ed. 3, c. 6—2 R. 2, st 2, c. 3. *Enforced by* 13 *El. c.* 5, *which is made perpetual by* 29 *El. c.* 5, *and see farther* 27 *El. c.* 4, *which is made perpetual by* 39 *El. c.* 18, § 32. *Also* 29 *Car.* 2, *c.* 3, *and* 3 *W. & M. c.* 14.

* 13 ELIZABETH, CAP. V. A.D. 1570.

An act against fraudulent deeds, alienations, &c.

FOR the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore: (2) which feoffments, gifts, grants, alienations, conveyances, bonds, suits,

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judgments and executions, have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and interest, to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, not only to the let or hinderance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued:

II. Be it therefore declared, ordained and enacted by the authority of this present parliament, That all and every feoffment, gift, grant, alienation, bargain and coveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise; (2) and all and every bond, suit, judgment and execution, at any time had or made sithence the beginning of the queen's majesty's reign that now is, or at any time hereafter to be had or made, (3) to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful, covinous or fraudulent devices and practices, as is aforesaid, are, shall or might be in any ways disturbed, hindred, delayed or defrauded) to be clearly and utterly void, frustrate and of none effect; any pretence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

III. And be it further enacted by the authority aforesaid, That all and every the parties to such feigned, covinous or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions and other things before expressed, and being privy and knowing of the same, or any of them; (2) which at any time after the tenth day of *June* next coming shall wittingly and willingly put in ure, avow, maintain, justify or defend the same, or any of them, as true, simple, and done, had or made *bona fide* and upon good consideration; (3) or shall aliene or assign

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any the lands, tenements, goods, leases or other things before mentioned, to him or them conveyed as is aforesaid, or any part thereof; (4) shall incur the penalty and forfeiture of one year's value of the said lands, tenements and hereditaments, leases, rents, commons or other profits, of or out of the same; (5) and the whole value of the said goods and chattels; (6) and also so much moneys as are or shall be contained in any such covinous and feigned bond; (7) the one moiety whereof to be to the queen's majesty, her heirs and successors, and the other moiety to the party or parties grieved by such feigned and fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, leases, rents, commons, profits, charges and other things aforesaid, to be recovered in any of the queen's courts of record by action of debt, bill, plaint or information, wherein no essoin, protection or wager of law shall be admitted for the defendant or defendants; (8) and also being thereof lawfully convicted, shall suffer imprisonment for one half year without bail or mainprise.

IV. Provided always, and be it further enacted by the authority aforesaid, That whereas sundry common recoveries of lands, tenements and hereditaments have heretofore been had, and hereafter may be had against tenant in tail, or other tenant of the freehold, the reversion or remainder, or the right of reversion or remainder, then being in any other person or persons; (2) that every such common recovery heretofore had, and hereafter to be had, of any lands, tenements or hereditaments, shall as touching such person and persons which then had any remainder or reversion, or right of remainder or reversion, and against the heirs of every of them, stand, remain and be of such like force and effect, and of none other, as the same should have been if this act had never been had or made.

V. Provided always, and be it further enacted by the authority aforesaid, That this act, or any thing therein contained, shall not extend to make void any estate or conveyance, by reason whereof any person or persons shall use any voucher in any writ of *formedon*, now depending or hereafter to be depending, but that all and every such vouchers in any writ of *formedon* shall stand and be in like force and effect, as if this act had never been had or made; any thing before in this act contained to the contrary notwithstanding.

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VI. Provided also, and be it enacted by the authority aforesaid, That this act or any thing therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be upon good consideration and *bona fide* lawfully conveyed or assured to any person or persons, or bodies politick or corporate, not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud or collusion as is aforesaid; any thing before mentioned to the contrary hereof notwithstanding.

VII. This act to endure unto the end of the first session of the next parliament. 50 Ed. 3, c. 6—2 R. 2, stat. 2, c. 3—3 H. 7, c. 4—made perpetual by 29 Eliz. c. 5. See 27 Eliz. c. 4.

3 H. 7, c. 4. Fraudulent deeds made to avoid the debts of others shall be void, and the penalties of the parties to such fraudulent assurances 2 Bulst. 218. All fraudulent conveyances made to avoid the debt or duty of others shall be void. Rast. 227—27 El. c. 4—2 Leon. 9, 223—2 Roll. 493—Latch. 222—Dyer 295, 351—3 Co. 80—5 Co. 60—8 Co 171—9 Co. 108—10 Co. 56—Co. Lit. 76,a—1 Leon. 47, 308—Hob. 72—Cro. El. 810—Bac. v. 2, 601—Vin. v. 13, 533. The forfeitures of the parties to fraudulent deeds. Co. pla. 162—Hob. 166—Dyer 351—Cro. El. 645—Cro. Jac. 270. *See farther provisions against fraudulent conveyances,* 29 *Car.* 2, *c.* 3, *and W. & M, c.* 14.

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* 27 ELIZABETH, CAP. IV. A.D. 1585.

An act against covinous and fraudulent conveyances.

FORASMUCH as not only the queen's most excellent majesty, but also divers of her highness good and loving subjects, and bodies politick and corporate, after conveyances obtained or to be obtained, and purchases made or to be made, of lands, tenements, leases, estates and hereditaments, for money or other good considerations, may have, incur and receive great loss and prejudice by reason of fraudulent and covinous conveyances, estates, gifts, grants, charges and limitations of uses heretofore made or hereafter to be made, of, in or out of lands, tenements or hereditaments so purchased or to be purchased; (2) which said gifts, grants, charges, estates, uses and conveyances were, or hereafter shall be, meant and intended by the parties that so make the same to

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be fraudulent and covinous, of purpose and intent to deceive such as have purchased or shall purchase the same; (3) or else by the secret intent of the parties the same be to their own proper use, and at their free disposition, (4) coloured nevertheless by a feigned countenance and shew of words and sentences, as though the same were made *bona fide*, for good causes, and upon just and lawful considerations:

II. For remedy of which inconveniences, and for the avoiding of such fraudulent, feigned and covinous conveyances, gifts, grants, charges, uses and estates, and for the maintenance of upright and just dealing in the purchasing of lands, tenements and hereditaments; (2) Be it ordained and enacted by the authority of this present parliament, that all and every conveyance, grant, charge, lease, estate, incumbrance and limitation of use or uses, of, in or out of any lands, tenements or other hereditaments whatsoever, had or made any time heretofore sithence the beginning of the queen's majesty's reign that now is, or at any time hereafter to be had or made, for the intent and of purpose to defraud and deceive such person or persons, bodies politick or corporate, as have purchased or shall afterwards purchase in fee-simple, fee-tail, for life, lives or years, the same lands, tenements and hereditaments, or any part or parcel thereof, or formerly conveyed, granted, leased, charged, incumbered or limited in use; (3) or to defraud and deceive such as have or shall purchase any rent, profit or commodity in or out of the same or any part thereof, (4) shall be deemed and taken only as against that person or persons, bodies politick and corporate, his and their heirs, successors, executors, administrators and assigns, and against all and every other person and persons lawfully having or claiming by, from or under them, or any of them, which have purchased or shall hereafter so purchase for money or other good consideration, the same lands, tenements or hereditaments, or any part or parcel thereof, or any rent, profit or commodity in or out of the same, to be utterly void, frustrate and of none effect; (5) any pretence, colour, feigned consideration, or expressing of any use or uses to the contrary notwithstanding.

III. And be it further enacted by the authority aforesaid, That all and every the parties to such feigned, covinous and fraudulent gifts, grants, leases, charges or conveyances before expressed, or being privy and knowing of the same or any of them, which after

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the twentieth day of *April* next coming shall wittingly and willingly put in ure, avow, maintain, justify or defend the same or any of them, as true, simple, and done, had or made, *bona fide*, or upon good consideration, to the disturbance or hindrance of the said purchaser or purchasers, lessees or grantees, or of or to the disturbance or hindrance of their heirs, successors, executors, administrators or assigns, or such as have or shall lawfully claim any thing by, from or under them or any of them, shall incur the penalty and forfeiture of one year's value of the said lands, tenements and hereditaments so purchased or charged; (2) the one moiety whereof to be to the queen's majesty, her heirs and successors, and the other moiety to the party or parties grieved by such feigned and fraudulent gift, grant, lease, conveyance, incumbrance or limitation of use, to be recovered in any of the queen's courts of record, by action of debt, bill, plaint or information, wherein no essoin, protection or wager of law shall be admitted for the defendant or defendants; (3) and also being thereof lawfully convicted, shall suffer imprisonment for one half year without bail or mainprize.

IV. Provided also, and be it enacted by the authority aforesaid, That this act or any thing therein contained shall not extend or be construed to impeach, defeat, make void or frustrate any conveyance, assignment of lease, assurance, grant, charge, lease, estate, interest or limitation of use or uses, of, in, to or out of any lands, tenements or hereditaments heretofore at any time had or made, or hereafter to be had or made, upon or for good consideration and *bona fide* to any person or persons, bodies politick or corporate; any thing before mentioned to the contrary hereof notwithstanding.

V. And be it further enacted by the authority aforesaid, That if any person or persons have heretofore sithence the beginning of the queen's majesty's reign that now is, made or hereafter shall make any conveyance, gift, grant, demise, charge, limitation of use or uses, or assurance of, in or out of any lands, tenements or hereditaments, with any clause, provision, article or condition of revocation, determination or alteration, at his or their will or pleasure, of such conveyance, assurance, grants, limitations of uses or estates, of, in or out of the said lands, tenements or hereditaments, or of, in or out of any part or parcel of them, contained or

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mentioned in any writing, deed or indenture of such assurance, conveyance, grant or gift; (2) and after such conveyance, grant, gift, demise, charge, limitation of uses or assurance so made or had, shall or do bargain, sell, demise, grant, convey or charge the same lands, tenements or hereditaments, or any part or parcel thereof, to any person or persons, bodies politick and corporate, for money or other good consideration paid or given (the said first conveyance, assurance, gift, grant, demise, charge or limitation, not by him or them revoked, made void or altered, according to the power and authority reserved or expressed unto him or them in and by the said secret conveyance, assurance, gift or grant,) (3) That then the said former conveyance, assurance, gift, demise and grant, as touching the said lands, tenements and hereditaments, so after bargained, sold, conveyed, demised or charged against the said bargainees, vendees, lessees, grantees and every of them, their heirs, successors, executors, administrators and assigns, and against all and every person and persons which have, shall or may lawfully claim any thing, by, from or under them or any of them, shall be deemed, taken and adjudged to be void, frustrate, and of none effect, by virtue and force of this present act.

VI. Provided nevertheless, That no lawful mortgage made or to be made *bona fide*, and without fraud or covin, upon good consideration, shall be impeached or impaired by force of this act, but shall stand in the like force and effect as the same should have done if this act had never been had nor made; any thing in this act to the contrary in anywise notwithstanding.

13 El. c 5—50 Ed. 3, c. 6—2 R. 2, st. 2, c. 3—3 H. 7, c. 4. Fraudulent conveyances made to deceive purchasers shall be void. Moor 602 pl. 833, 615 pl. 843—1 Roll. 167—Lane 47—Bridgm. 22—Goldsb. 8 pl. 11—3 Co. 80—5 Co. 60—6 Co. 72—11 Co. 74—Cro. El. 44—Cro. Jac. 168—Vin. v. 13, 526—Coke Entr. 677—Hob. 166. Conveyances made upon good considerations, and bona fide. Goldsb. 118 pl. 2—2 Roll. 305—3 Co. 83. Lands first conveyed with condition of revocation, or alteration, and after sold for money or other good consideration. Cro. Jac. 180. *Further provisions concerning fraudulent conveyances, see* 29 *Car.* 2, *c.* 3, *and* 3 *W. & M. c.* 14.

All deceitful practices, in defrauding or endeavouring to defraud another of his known right, by means of some artful devise, contrary to the plain rules of common honesty, are condemned by the common law; and are punishable according to the heinousness of the offence.[1]

1 2 Bac. Abr. 594.

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It is a rule of the common law that a wrongful manner of executing a thing shall avoid a matter that might have been executed lawfully.[2] As if a man who hath title and just cause of action to certain lands, by covin causes another to oust the tenant of the land to the intent that he may recover them of such disseisor; and he recovers accordingly against him by an action tried, yet he shall not be remitted to his ancient right, but is of the estate of him who committed the ouster.[3]

In respect to frauds in contracts and dealings, the common law subjects the wrongdoer in several instances to an action on the case; as if a person having the possession of goods sells them to another, affirming them to be his own, when in truth they are the property of another, an action on the case lies.[4]

The statute 3 *Henry 7, c. 4,* enacts that *all deeds of gifts of goods and chattels made in trust to the use of the grantor, to defraud creditors, shall be void. A general deed of gift of all his goods* is suspicious to be done upon fraud to deceive creditors.[5] Such a deed of gift made to prevent the taking of the goods in execution is void against creditors; but against himself, his executors or administrators, or any man to whom he shall convey them it is good.[6]

The 13 *Eliz. c. 5,* relates to *creditors* only, and the 27 *Eliz. c. 4,* to *purchasers.* These statutes cannot receive too liberal a construction or be too much extended in suppression of fraud.—The principles and rules of the common law however, as now universally known and understood, are so strong against fraud in every shape, that the common law would have obtained every end proposed by these statutes.[7]

By the 13 Eliz. c. 5, "*no act whatever, done to defraud a creditor or creditors shall be of any effect against such creditor or creditors.*" Yet such a construction is not to be made in support of creditors, as will make third persons sufferers. Therefore the statute does not militate against any transaction *bona fide,* and where there is no imagination of fraud. And so is the common law.[8] But if the transaction be not *bona fide* the circumstance of its being done for a *valuable* consideration alone will not take it out of the statute. Thus when the *possession* was *actually changed;* yet it being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore void. In one case where there had been a decree in chancery and a sequestration: A person with a knowledge of the decree, bought the house and goods belonging to the defendant, and *gave a full price for them.* The court said that the purchase being with a manifest view to defeat the creditor, was fraudulent, and therefore *void,*

2. Co. Lit. 35.
3. Co. Lit. 557.b
4. Cro. Jac. 474. See 1 Com. Dig. tit. "*Action upon the case for a deceit.*"
5. Bacon's use of the law 62—3 Rep. 81. *Twine case.*
6. Bacon's use of the law 62—Cro. El. 445.
7. P. *Ld. Mansfield. Cadogan v Kernet, Esq. et al.* Cowper 434.
8. ib.

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notwithstanding a valuable consideration. So if a man knowing of a judgment and execution, and with a view to defeat it, purchases the debtors goods, it is void; because the *purpose is iniquitous.* It is assisting one man to cheat another, which the law will never allow.[9]

There are many things which are considered as circumstances of fraud. The *statute* says not a word about *possession;* but the *law* says, if after a sale of goods, the vendor continue in possession, and appear as the owner, it is evidence of fraud; because goods pass by delivery.[10]

According to Twyne's case[11] several circumstances are enumerated as signs and marks of fraud.

1. A gift being general of all a man's goods without exception of apparel, or any thing of necessity.—For it is said *quod dolosus versatur in generalibus.*

2. Making such a transfer during the pendency of a suit against the donor.

3. The original owners continuing in possession is a fixed and undoubted character of a fraudulent conveyance, because the possession is the only *indicium* of the property of a chattel.[12]

4. Secrecy is also a badge of fraud; *et dona clandestina sunt semper suspiciosa.*

It is also considered a circumstance indicating fraud, that an unusual clause was inserted in the deed avering that it was honestly and truly made, and *bona fide.*[13]

The words "*good consideration*" in the statute mean a valuable consideration.[14] Fraud ought to be at the beginning; for *subsequent fraud* will not make a conveyance to be fraudulent.[15]

Yet a deed not at first fraudulent may *afterwards become so* by being *concealed,* or *not pursued;* by which means creditors are drawn in to lend money.[16]

A father makes a secret conveyance to his daughter, not intending to give her the estate, but as a means to avoid being sheriff of London:—he keeps possession of the estate, and pays the usual fine to be excused being sheriff—held that the conveyance had no effect.[17]

Though a man be arrested by due process, yet if he is induced

9. P. *Ld. Mansfield. Cadogan v Kennet, Esq. et al.* Cowper 434.

10. 3 Co. 80. Twine's case. Moore 638—2 Bac. Abr. 604.

11. 3 Co. 81. Though this is a *Star-chamber* case, the doctrine laid down in it is fully sanctioned in subsequent decisions. See Cowper 434—13 Vin. Abr. 555.

12. 13 Vin. Abr. 516—2 Vern. 262—5 Co. 60—Ch. Prec. 287. *Bucknal v Royston.* The original owners continuing in possession is not always an indication of fraud: such continuance of the possession may be consistent with the sale, as where goods are sold deliverable at a future day. So of a trust—see Cowper 432.

13. *Clausulæ inconsuetæ semper inducunt suspicionem.*

14. 3 Co. 81.

15. 2 Bulst. 226—Sel. Ch. Ca. in *Ld. King's time.* 6 Pasch.—11 Geo. 1.—*Dews v Brand.*

16. Vern. 262. *Holford v Holford.*

17. Amb. 264. *Birch v Blagcane.*—4 Vin. Sup. 433.

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thereby to execute a conveyance which never was in contemplation before; chancery will relieve.[18]

A conveyance obtained from persons uninformed of their rights; will be set aside although there be no actual fraud or imposition.[19]

Courts of equity and courts of law have a *concurrent* jurisdiction to suppress and relieve against fraud; but the interposition of the former is often necessary for the better investigation of truth; and to give more complete redress.[20]

A. articles for the *purchase of B's estate*, pretending he bought it for one whom B was desirous to oblige, and by that means got the estate at an undervalue; whereas in truth he bought it for another person: equity will not decree an execution of these articles.[21]

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29 CHARLES II. CAP. III. A.D. 1676.

An act for prevention of frauds and perjuries.

FOR the prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury; (2) Be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, That from and after the four and twentieth day of *June*, which shall be in the year of our lord one thousand six hundred and seventy-seven, all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding.

18. 1 Atk. 409. *Nichols v Nichols.*
19. 2 Bro. 150—March 1787. *Evans v Lewillyn.*
20. 1 Burr. 369. *Bright v Egnou.*—1 Black. Com. 431—2 Veg. p. 295.—*Bates v Graves.*
21. Vern. 227. *Philips v D. of Bucks.*

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II. Except nevertheless all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two-third parts at the least, of the full improved value of the thing demised.

III. And moreover, that no leases, estates or interests, either of freehold, or term of years, or any uncertain interest, not being copyhold or customary interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall at any time after the said four and twentieth day of *June* be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law.

IV. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of *June*, no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some *memorandum* or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

V. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of *June* all devises and bequests of any lands or testaments, deviseable either by force of the statute of wills, or by this statute, or by force of the custom of *Kent*, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect.

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VI. And moreover, no devise in writing of lands, tenements or hereditaments, nor any clause thereof, shall at any time after the said four and twentieth day of *June* be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his directions and consent; (2) but all devises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn and obliterated by the testator, or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding.

VII. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of *June* all declarations or creations of trusts or confidences of any lands, tenement or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

VIII. Provided always, That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; any thing herein before contained to the contrary notwithstanding.

IX. And be it further enacted, That all grants and assignments of any trusts or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect.

X. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of *June* it shall and may be lawful for every sheriff or other officer to whom any writ or precept is or shall be directed, at the suit of any person or persons, of, for and upon any judgment, statute or recognizance hereafter to be made or had, to do, make and deliver execution unto

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the party in that behalf, suing of all such lands, tenements, rectories, tithes, rents and hereditaments, as any other person or persons be in any manner of wise seised or possessed, or hereafter shall be seised or possessed, in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought have done, if the said party against whom execution hereafter shall be so sued, had been seised of such lands, tenements, rectories, tithes, rents or other hereditaments of such estate as they be seised of in trust for him at the time of the said execution sued; (2) which lands, tenements, rectories, tithes, rents and other hereditaments, by force and virtue of such execution, shall accordingly be held or enjoyed, freed and discharged from all incumbrances of such person or persons as shall be so seised or possessed in trust for the person against whom such execution shall be sued; (3) and if any *cestuy que trust* hereafter shall die, leaving a trust in fee-simple to descend to his heir, there and in every such case such trust shall be deemed and taken, and is hereby declared to be, assets by descent, and the heir shall be liable to and chargeable with the obligation of his ancestors for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession in like manner as the trust descended; any law, custom or usage to the contrary in anywise notwithstanding.

XI. Provided always, That no heir that shall become chargeable by reason of any estate or trust made assets in his hands by this law, shall by reason of any kind of plea or confession of the action, or suffering judgment by *nient de dire*, or any other matter, be chargeable to pay the condemnation out of his own estate; (2) but execution shall be sued of the whole estate so made assets in his hands by descent, in whose hands soever it shall come after the writ purchased, in the same manner as it is to be at and by the common law, where the heir at law pleading a true plea, judgment is prayed against him thereupon; any thing in this present act contained to the contrary notwithstanding.

XII. And for the amendment of the law in the particulars following, (2) Be it further enacted by the authority aforesaid, That from henceforth any estate *pur auter vie*, shall be deviseable by a will in writing, signed by the party so devising the same, or by some other person in his presence and by his express directions, attest-

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ed and subscribed in the presence of the devisor by three or more witnesses; (3) and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, or assets by descent, as in case of lands in fee-simple; (4) and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof, by virtue the grant, and shall be assets in their hands.

XIII. And whereas it hath been found mischievous, That judgments in the king's courts at *Westminster* do many times relate to the first day of the term whereof they are entered, or to the day of the return of the original, or filing the bail, and bind the defendants lands from that time, although in truth they were acknowledged or suffered and signed in the vacation-time after the said term, whereby many times purchasers find themselves aggrieved.

XIV. Be it enacted by the authority aforesaid, That from and after the said four and twentieth day of *June* any judge or officer of any of his majesty's courts at *Westminster*, that shall sign any judgments, shall at the signing of the same, without fee for doing the same, set down the day of the month and year of his so doing, upon the paper book, docket or record which he shall sign; which day of the month and year shall be also entered upon the margent of the roll of the record where the said judgment shall be entered.

XV. And be it enacted, That such judgments as against purchasers *bona fide* for valuable consideration of lands, tenements or hereditaments to be charged thereby, shall in consideration of law be judgments only from such time as they shall be so signed, and shall not relate to the first day of the term whereof they are entered, or the day of the return of the original or filing the bail; any law, usage or course of any court to the contrary notwithstanding.

XVI. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of *June* no writ of *fieri facias* or other writ of execution shall bind the property of the goods against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff or coroners, to be executed: and for the better manifestation of the said time, the sheriff, under-sheriff and coroners, their

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deputies and agents, shall upon the receipt of any such writ, (without fee for doing the same) endorse upon the back thereof the day of the month and year whereon he or they receive the same.

XVII. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of *June* no contract for the sale of any goods, wares and merchandizes, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or *memorandum* in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised.

XVIII. And be it further enacted by the authority aforesaid, That the day of the month and the year of the enrolment of the recognizances shall be set down in the margent of the roll where the said recognizances are enrolled; (2) and that from and after the said four and twentieth day of *June* no recognizance shall bind any lands, tenements or hereditaments in the hands of any purchaser *bona fide* and for valuable consideration, but from the time of such enrolment; any law, usage or course of any court to the contrary in any wise notwithstanding.

XIX. And for prevention of fraudulent practises in setting up nuncupative wills, which have been the occasion of much perjury; (2) Be it enacted by the authority aforesaid, That from and after the aforesaid four and twentieth day of *June* no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof; (3) nor unless it be proved that the testator at the time of pronouncing the same, did bid the persons present, or some of them, bear witness, that such was his will, or to that effect; (4) nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick, being from his own house, and died before he returned to the place of his or her dwelling.

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XX. And be it further enacted, That after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof were committed to writing within six days after the making of the said will.

XXI. And be it further enacted, That no letters testamentary or probate of any nuncupative will shall pass the seal of any court, till fourteen days at the least after the decease of the testator be fully expired; (2) nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same, if they please.

XXII. And be it further enacted, That no will in writing concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.

XXIII. Provided always, That notwithstanding this act, any soldier being in actual military service or any mariner or seaman being at sea, may dispose of his moveables, wages and personal estate, as he or they might have done before the making of this act.

XXIV. And it is hereby declared, That nothing in this act shall extend to alter or change the jurisdiction or right of probate of wills concerning personal estates, but that the prerogative court of the archbishop of *Canterbury* and other ecclesiastical courts, and other courts having right to the probate of such wills, shall retain the same right and power as they had before, in every respect; subject nevertheless to the rules and directions of this act.

XXV. And for the explaining of one act of this present parliament, entitled, *An act for the better settling of intestates estates;* (2) Be it declared by the authority aforesaid, That neither the said act, nor any thing therein contained, shall be construed to extend to the estates of feme coverts that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act. [Made perpetual by 1 Jac. 2, c. 17, sec. 5.]

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1 Roll. Abr. 24—2 Leo. 227—2 Show. 16—Skinn. 142, 143—2 Mod. 310—2 Vent. 361, 362—3 Leo. 65, 66—1 Salk. 280. Devises of lands shall be in writing, and attested by three or four witnesses. 3 Leo. 85—Carthew 35, 514—3 Mod. 218, 362. How the same shall be revocable, 3 Mod. 260. All declarations or creations of trusts shall be in writing. Explained by 4 Ann. c. 16, § 15. Trusts arising, transferred or extinguished by implication of law, are excepted. Trusts shall be assets in the hands of heirs. 2 Vern. 248, c. 232. Estates *per auter vie* shall be deviseable. 14 Geo. 2, c. 20, § 9. And where there is no special occupant, shall go to the executors.—Carthew 378—2 Salk. 464—2 Vern. 749, c. 707. Writs of execution shall bind the property of the goods but from the time of the delivery to the officer. 1 Salk. 320 —Carthew 419—1 Mod. 183—2 Lev. 257. Contracts for sales of goods for ten pounds or more. Hume. Hist. lib. 59, § 25. Nuncupative wills—Explained by 4 Ann. c. 16, § 14—Ray. 384—29 & 28 Car. II. c. 10. Husbands not compellable to make distribution of the personal estates of their wives, 1 Mod. 231.

The statute 29 *Car. II.* c. 3, does not extend to Pennsylvania.[22] But our act of the 21st March, 1772,[23] is in part copied from it. The first section of the act is in substance the same with the three first sections of the statute of *Charles II.*; and the second, third, fourth and fifth sections of the act of assembly correspond with the 14th, 15th, 16th and 25th sections of the statute of Charles.

The utility of inserting in a work of this kind the whole of this important statute is obvious.

The statute of Charles as well as the act of assembly were made to prevent *frauds* as well as *perjuries*. They should be construed liberally and beneficially expounded for the suppression of cheats and wrongs.[24]

GOAL DELIVERY.

* 4 EDWARD III. CAP. II. A.D. 1330.(c

The authority of justices of assise, goal delivery and of the peace.

(6) And the justices assigned to deliver the goals shall have power to deliver the same goals of those that shall be indicted before the keepers of the peace; (7) and that the said keepers shall send their indictments before the justices and they shall have power to enquire of sheriffs, goalers, and other, in whose ward such indicted persons shall be, if they make deliverance, or let to mainprize any so indicted, which be not mainpernable, and to punish the said sheriffs, goalers, and others, if they do any thing against this act.

22. 1 Dallas' Rep. 1.

23. 1 St. Laws Sm. Ed. 389.

24. Barnardeet. Cha. Ca 389—1 Dal. Rep. 427. For observations on this statute and references to decisions under it, the reader is refered to the APPENDIX.

c) "Only those parts of this statute are in force which are distinguished by the numbers 6 and 7." *Report of the Judges.*

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GUARDIAN.

* 52 HENRY III. CAP. XVII. A.D. 1267.

The authority and duty of guardians in socage.

IT is provided, That if land holden in socage be in the custody of the friends of the heir, because the heir is within age, the guardians shall make no waste, nor sale, nor any destruction of the same inheritance; but safely shall keep it to the use of the said heir, so that when he cometh to his lawful age, they shall answer to him for the issues of the said inheritance by a lawful accompt, saving to the same guardians their reasonable costs. (2) Neither shall the said guardians give or sell the marriage of such an heir, but to the advantage of the aforesaid heir; (3) but the next friends which had the ward, for all that time that writs of impleading did not lie, shall have such wardship unto the advantage of the heir, as is said before, without waste, sale, or destruction making.

Fitz. Waste. 1, 9, 100, 107—Fitz. Present. 10—Fitz. Brief. 847—Fitz. Guard. 159, 166—Plowd. 293—Fitz. Accompt 35, 59, 60, 77, 107—Co. Lit. 87, a—Co. Ent. 47—2 Inst. 135—Rast. 21. *See* 28 *Ed.* 1, *st.* 1, *where lands in socage descend on the part of the mother, the guardianship belongs to the next of kin on the part of the father; and* 12 *Car II. c.* 24, *giving power to the father to dispose of the wardship of his child by will.*

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* 12 CHARLES II. CAP. XXIV. A.D. 1660.(b)

An act for taking away the courts of wards and liveries and tenures in capite, and by knights-service, and purveyance, and for settling a revenue upon his majesty in lieu thereof.

VIII. AND be it further enacted by the authority aforesaid, That where any person hath or shall have any child or children under the age of one and twenty years, and not married at the time of his death, That it shall and may be lawful to and for the father of such child or children, whether born at the time of de-

b) "Only the 8th and 9th sections of this statute are in force." *Report of the Judges.*

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cease of the father, or at that time in *ventre sa mere*, or whether such father be within the age of one and twenty years, or of full age, by deed executed in his life-time, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner, and from time to time as he shall respectively think fit, to dispose of the custody and tuition of such child or children, for and during such time as he or they shall respectively remain under the age of one and twenty years, or any lesser time, to any person or persons in possession or remainder, other than popish recusants; (2) and that such disposition of the custody of such child or children made since the twenty-fourth of *February* one thousand six hundred forty-five or hereafter to be made, shall be good and effectual against all and every person or persons claiming the custody of such child or children as guardian in socage or otherwise: (3) And that such person or persons, to whom the custody of such child or children hath been or shall be so disposed or devised as aforesaid, shall and may maintain an action of ravishment of ward or trespass, against any person or persons which shall wrongfully take away or detain such child or children, for the recovery of such child or children; (4) and shall and may recover damages for the same in the said action, for the use and benefit of such child or children.

IX. And be it further enacted, That such person or persons to whom the custody of such child or children hath been or shall be so disposed or devised, shall and may take into his or their custody, to the use of such child or children, the profits of all lands, tenements, and hereditaments of such child or children; and also the custody, tuition and management of the goods, chattels and personal estate of such child or children, till their respective age of one and twenty years, or any lesser time, according to such disposition aforesaid; (2) and may bring such action or actions in relation thereunto, as by law a guardian in common socage might do.

Parents may dispose of the custody of their children during their minority. Vaugh. 177—3 Mod. 24.

By the common law no person could appoint a guardian because the law had appointed one, whether the father was tenant by knights-service, or in socage.[1]

1. 3 Co. 37—3 Inst. 62.

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But a tenant in socage being of age might, at common law, have disposed of his land by deed or last will, in trust for his heir; but not the custody and tuition of his heir, for the law gave that to the next of kin to whom the land could not descend.[2]

The act in the text authorises the appointment of a testamentary guardian. And in the construction of it the following opinions have been maintained.

1. That such a guardian comes *in loco parentis*, (in the place of a parent,) and is the same in office and interest with a guardian in socage, differing only as to the *modus habendi*, or in a few particular circumstances; as first that it may continue longer, as till the heir attaining the age of twenty-one years, whereas the other terminates upon his arrival at the age of fourteen years.

2. That although a person within age cannot dispose of his lands by will, yet he may dispose of the custody of his child, and such disposition may draw after it the land as incident to the custody.

3. That the same remedy may be had against a testamentary guardian, as might be had against a guardian in socage.

4. That a father of full age devising his land to J. S. during the minority of his son and heir, and for his maintenance and education in the mean time, J. S. is not thereby constituted a guardian within this statute.

5. That a devise of the custody without naming the time shall be good till the heir be of full age if he be *under fourteen*, at the death of his father; but if above that age it shall be void for the uncertainty.

6. That a testamentary guardian hath the custody not only of all the lands descended, or left by the father, but of all lands and goods any way acquired or purchased by the infant; which the guardian in socage had not.

7. That this guardianship cannot be assigned or transferred, for although it is an interest joined with a trust, yet it shall not go to execution; but if two or more be appointed guardians, and one or more die, the survivor or survivors shall be guardians, for the authority in its nature is joint and several; otherwise the more guardians who might be appointed for an infant the less secure he would be.[3]

8. That if one appointed under this statute die or refuse, the chancellor may appoint a guardian.[4]

9. That if such guardian become a lunatic or be otherwise incapacitated to execute the trust or abuses it by doing things prejudicial to the person or estates of the infant, chancery may remove him, and supply his place, or impose such terms on him in obliging him to give security, &c. as will effectually hinder him from doing any thing prejudicial to the infant.[5]

2. Vaugh. 178.
3. ib. 9 181, 184—5.
4. Abr. Ey. 260.
5. See Vern. 442—2 Cha. Ca. 237—3 Cha. Rep. 58—2 Sid. 424—Abr. Ey. 260, 261.

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A testamentary guardian cannot make a lease of infants' lands, and such lease is absolutely void.[6]

HUE & CRY.

* 3 EDWARD I. CAP. IX. A.D. 1275.(E

All men shall be ready to pursue felons.

(2) It is provided, That all generally be ready and apparelled, at the commandment and summons of sheriffs, and at the cry of the country to sue and arrest felons, when any need is.

2 Inst. 171. Enforced by 4 Ed. 1, stat. 2. *Officium coron. Enforced by* 13 *Ed.* 1, *stat.* 2, *c.* 1, 2 & 6—28 *Ed.* 3, *c.* 11—7 *Rich.* 2, *c.* 6. *Altered by* 27 *El. c.* 13—39 *El. c.* 25. *To these references may be added the* 8 *Geo.* 2, *c.* 16, *giving directions for pursuit of hue and cry; and* 22 *Geo.* 2, *c.* 24, *which amends the former.*

This is a statute of *hue and cry.*[1]

The *hutesium*, or hue and cry is the old common law process of pursuing from town to town, and arresting all felons, and such as had dangerously wounded another.[2]

The hue and cry, and suit was made in different ways according to the custom of different places. The suit was to be carried further than the search from town to town; for the offender was to be proclaimed in the county;[3] a method which had been adopted in mercy to the absent fugitive, who it would seem was considered, by the old law, as an outlaw without being proclaimed with this formality in the county court. The law now was that sentence should not be pronounced against the party till suit was made in this manner in the county court, and he had this warning to appear, and purge himself. The time allowed for appearance

6. 2 Wils. 129, 135.

E) "That part only of this statute is in force which provides that all generally, shall be ready at the commandment and summons of sheriffs, and at the cry of the country, to pursue and arrest felons, where any need is."

Report of the Judges.

1. 4 Black. Com. 293. *Judge Blackstone* derives the word hue from *huer* to shout, which would give the two words the same signification. The learned author of observations on the statutes, however, remarks that in *Joinville's* life of St. Louis the word *huer* signifies to *pursue*. "*Lessons huer ceste chiennaile.*" Let us give over the pursuit of these paltroons. By useing the word huer in this sense, *hue* and *cry* would signify what it really is, the *pursuit* and *cry* to apprehend the felon. *Obs. on the statutes* 105. *Histoire de St. Louis*, Paris 1761 Folio.

2. Bract. 124—2 Reeve E. L. 15.

3. This was in the reign of *Henry III.* before any statute had been passed on the subject of *hue and cry.* 2 Reeve E. L. 15.

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was five months, within which time, if he neglected to appear, he was adjudged an outlaw; and suffered all the consequences of such a sentence.

By appearance within that period, the forfeiture of his lands were saved; but his goods were forfeited by flight, although he might be innocent.[4]

The object of this and the subsequent statutes on the same subject, was not to compel men to join the *hue* and *cry: that* they were obliged to do by the common law; but the intention chiefly was to point out the method, of charging the hundred or district where a robbery had been committed.

The principal statute on this subject is that of *Winchester* 13 Edw. 1, st. 2, c. 1 & 4: the preamble of which recites, that when murders, burnings, robberies and thefts were committed, the inhabitants of the county were more willing to excuse the offender, than to punish for an injury to a stranger; and that if the felon was not an inhabitant of the county, yet the receiver of the stolen goods frequently was so; which produced the same partiality in juries, who did not give the proper satisfaction in damages to the party robbed.[5] This statute, by rendering the whole county answerable, took away from jurors the inducement to spare their countrymen, when indicted.

Actions against the hundred, for any robbery are founded on this statute. Although the grievances recited in it are no longer to be apprehended, still the mode of proceeding against the hundred is preserved in England, and regarded as an excellent regulation of police.[6]

Hue and *cry* is an old institution in many parts of *France;* and it is said that even at this day the lord of the *seignerarie* is obliged to prosecute every felon, at his own expense, which is often a heavy burthen.[7]

The raising of the hue and cry, it is said, is now as much disused in *France* as it is in *England.* It is believed that the hue and cry has not yet been raised in Pennsylvania, and probably never will be.

4. 2 Reeve Eng. Law. 15.

5. 1 Ruff. statutes at large 112.

6. Several regulations on this subject have been made by statutes, not necessary to be particularly noticed here. See 27 El. c. 13—29 Car. II. c. 7, par. 5—8 Geo. II. c. 16.

7. It is said that in the sixteenth century the method of rendering the district or the officers of justice liable for robberies committed therein, was introduced into the Mogul Empire with admirable effect; delivering that vast territory from robbers. 4 *Black Com.* 294.

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INFANCY AND AGE.

* 3 EDWARD I. CAP. XLVII. A.D. 1275.(F

In what case the nonage of the heir of the disseisor or disseisee shall not prejudice.

IT is provided also, That if any from henceforth purchase a writ of *novel disseisin*, and he against whom the writ was brought as principal disseisor, dieth before the assise be passed, then the plaintiff shall have his writ of entrie upon disseisin against the heir or heirs of the disseisor, **or disseisors*, † of what age soever they be. (2) In the same wise the heir or heirs of the disseisee shall have their writs of entrie against the disseisors, ‡ or their heirs, of what age soever they be, if peradventure the disseisee die before that he hath purchased his writ; (3) so that for the nonage of the heirs of the one party, nor of the other, the writ shall not be abated, nor the plea delayed; but as much as a man can without offending the law, it must be hasted to make fresh suit after the disseisin. (5) And if the parties in pleading come to an inquest, and it passeth against the heir within age, and namely, against the heir of the disseisee, that in such case he shall have an attaint of the king's special grace.

Dyer 157—6 Co. 4—17 Ed. 3, 16—12 Ed. 4, 17—8 Ed. 3, 71—21 Ed. 3, 27—27 H. 6, 1—Fitz. Age 71—3 Bulst. 137—Regist. 229, 230. *For *or disseisors* read *their ancestor*. †Add *or against their heirs*. ‡Add *their ancestors*. *See* 13 *Ed.* 1, *st.* 1, *c.* 15, *giving right to infants eloined to sue* prochein amy.

* 13 EDWARD I. CAP. XV. A.D. 1285.

An infant eloined may sue by prochein amy.

IN every case whereas such as be within age may sue, it is ordained, That if such within age be eloined so that they cannot sue personally, their next friends shall be admitted to sue for them.

r) "The whole of this statute is in force, except those parts which relate to prelates, men of religion, and writs of attaint." *Rep. of the Judges.*

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Infants' suit, Dyer 104—2 Edw. 3, 16—Bro. Gardein. 13, 22, 24, 25, 26, 27—Register. 78—2 Inst. 390—3 Ed. 1, c. 47.

At common law, infants could neither sue, nor defend, except by *guardian;* by whom was meant, not the guardian of the infant's person, or estate, but a guardian *ad litem*, either admitted by the court, for the particular suit, on the infant's personal appearance, or appointed for suits in general by the king's letters patent.[1]

This rule, however, was found inconvenient, as it sometimes happened, that an infant was secreted, by those having the legal custody of him, and so prevented from applying to have a guardian *ad litem* appointed. Hence it was deemed necessary, to permit any person, to litigate for the infant's benefit, who should be disposed to risk the expense. With this view the statute of *Westminster* the first [in the text] enables any one to sue as *prochein amy* (next friend) for an infant, in an assise where the infant himself is *esloigned* by his guardian, or otherwise disturbed from suing the assize.[2] And the statute of *Westminster* the second, 13 *Edw.* 1, *st.* 1, *c.* 15, extended this provision: permitting the *prochein amy* to sue in *all* actions. Although in both these statutes the eloignment of the infant is mentioned, yet by construction this circumstance is not deemed necessary, and the *prochein amy* may sue whether it occurs or not: the *esloignment* being considered merely as an instance of the necessity of the case, and only noticed as such by those who framed the statute 15 *Edw.* 1, *c.* 15.[3]

Notwithstanding these statutes, as there is nothing in them, which prohibits the suing by *guardian*, it seems to be a correct opinion, that the right remains as before; and probably when *Fitzherbert and lord Coke* tell us, that an infant *shall* sue by *prochein amy*, they did not mean to exclude the election of suing either in that way or by guardian. The meaning of the former may be collected, from the circumstance of his mentioning without disapprobation, a case of debt, where suing by guardian was allowed. Lord Coke too, in his report of *Rawlynnes'* case,[4] says that on search many precedents of infants suing by guardian were found; nor in that case was any objection grounded on its being *a suit by guardian.* In the case of *Young v Young*, as reported in *W. Jones* 177, the point is said to have been adjudged; but according to another report of that case (in Cro. Car.) the court delivered no opinion on the point, whether an infant might sue by guardian.[5]

The course has been, to appoint some of the officers of the court, who, by reason of their skill, make the best guardians, and *prochein amys* for the benefit of infants.[6]

1. Fitz. N. B. 27—Sty. 369—Bro. *tit.* Guard. p. 11, 17.
2. 2 Inst. 261.
3. 2 Inst. 390.
4. 4 Co. 53.b
5. Harg. Co. Lit. 135,b n. 1.—See further 3 Bac. Abr. 149—Salm. 295, and Vin. Abr. *Guardian and Ward.*
6. 2 Inst. 261.

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It has been held that no admission is necessary to sue by *prochein amy*, although it has been usually done.[7]

Action against baron and feme, the feme being within age, she ought to appear by *guardian*.[8] But if they bring an action they may sue by *attorney*; and the baron shall name an attorney for both.[9]

If an infant and one of full age are made *executors*, they must sue by attorney; and this seems to be founded in necessity; as it is requisite that all executors should be made parties to the action, and, where there are several executors, the act of one shall conclude his companions. He who is of full age therefore, may make an attorney, for both; but where they are defendants he cannot. As plaintiffs they could not sever in declaring, which they might do in pleading as defendants.[10]

If an infant executor sues by attorney, and has judgment *to recover*, this is not erroneous; because for his benefit; but it is otherwise if judgment be against him.[11]

When the defendant is an infant, the plaintiff ought to apply to him to name his guardian (according to the English practice) in *six days*; and in default thereof the plaintiff must apply to the court to oblige him to name his guardian; and upon such application the court will order him to name one, in 4 or 6 days; and upon default thereof, that the plaintiff shall name a guardian for him.[12]

Plaintiff may have a summons, for an infant defendant, to shew cause why he should not name a guardian to defend the suit.[13]

Where an attorney undertook to appear for an infant, and by mistake entered it *per attornatum*, the court ordered it to be amended, and made *per guardianum*, for he is bound to appear in a proper manner.[14]

An infant defendant pays costs, if verdict be against him.[15]

STATUTE OF GLOUCESTER.

6 EDWARD I. CAP. II. A.D. 1278.

In what case nonage of the plaintiff shall not stay an enquest.

If a child within age be holden from his heritage after the death

7. *Forward v Beavis.* Hil. 2 Geo. 1—Rep. Cases Pr. C. B. 11. *Archer v Frowde.* East 6 Geo. 2—1 Stra. 304.
8. 3 Bac. Abr. 150.
9. 2 Saund. 213—3 Bac. Abr. 150.
10. 3 Bac. Abr. 151—Carth. 124—4 Vin. Sup. 51. *Frescobaldi v Kinaston* Mich. 1 Geo. 2—Stra. 783—Style. 318.
11. Cro. Jac. 441.
12. 1 Crom. Pr. 158.
13. ib.
14. *Stratton v Burgis*, 1 Stra. 114.
15. Dyer 104—1 Bulst. 189—Stra. 1217.

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of his †*father*, cousin, grandfather, or great grandfather, whereby he is driven to his writ, and his adversary cometh into the court, and for his answer alledgeth a feoffment, or pleadeth some other thing whereby the justices award an enquest, there whereas the enquest was deferred unto the full age of the infant, now the enquest shall pass as well as if he were of full age.

Co. Litt. 6, f. 3—Dyer f. 104—3 Bulst. 137. †*Not in the original.*

This statute Sir Edw. Coke considers to be a very beneficial law, for avoiding delay.

The parol's demurring, until the full age of the infant, is a dilatory plea, or temporary bar, peculiar to the feudal law. In all cases where a naked right in fee descended, from any ancestor to an infant, there in every action ancestoral, brought by the heir within age, it was held that the *parol* should *demur;* for the law, in this case, considered it less prejudicial that the infant should be delayed of his right, than that he should hazard the losing it forever; which he might be in danger of, by his want of knowledge, to set forth his title, as he ought to do.[16]

The statute in the text, names only certain ancestors, but the construction has been, that these are only put for *example*, and that it extends to any of which a *mortdauncestor* lies.[17] But it extends not to actions *ancestorial droitural*, but giving the infant a trial during his minority, it gave it in such actions, as he might not be foreclosed of his right; but at his full age might have recourse to a writ of a higher nature, and therefore it extends not to any *formedon*, *dum non compos*, *infra ætatem*, *sur cui in vita*, &c.[18]

The general rule is, that where a naked right in fee descends, of which the ancestor was once in possession, there is an action ancestorial, brought by the infant, the parol shall demur, without plea; but the parol shall not demur, without plea, where the ancestor died seised, or where the action is brought, of the seisin or possession of the infant.[19]

If lands in fee descend on an infant, the parol shall demur in equity as in law; but where a lease is made to a man and his heirs during three lives, the heir does not take by *descent*, but as a *special occupant*, and shall not demur.[20]

But in an action *possessory* by an infant, the tenant, though he pleads such plea, cannot have the *parol* demur for his nonage.[21]

An infant cannot pray the parol to demur in any other stage of the proceedings than at the time of pleading.[22]

16. 6 Co. 3.b
17. 2 Inst. 291.
18. 2 Inst. 129, yet vide Bro. Age 5—3 Bac. Abr. 156.
19. 6 Co. 3,b 4,a—Dyer 137.
20. *Chaplin v Chaplin*, T. 1735, 3 Pr. Will. 365.
21. 6 Co. 3.b
22. *Dorisby v Constance*. M. 31 Geo. III.—4 Term Rep. B. R. 75.

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In an action of debt brought against baron and feme, upon an obligation of the ancestor of the *feme*, the *parol* shall demur for the nonage of the feme.[23]

An affidavit of infancy is not necessary: plaintiff may reply *full age*.[24]

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* 13 EDWARD I. CAP. XL. A.D. 1285.

A woman's suit shall not be deferred by the minority of the heir.

WHERE any doth aliene the right of his wife, it is agreed, That from henceforth the suit of the woman, or her heir, after the death of her husband, shall not be delayed by the nonage of the heir that ought to warrantise, but let the purchaser tarry, which ought not to have been ignorant that he bought the right of another, until the age of his warrantor, to have his warranty.

Fitz. Age 47, 76, 125, 132—Fitz. Voucher 180, 188, 226, 305—Rast. 139—2 Inst. 455—2 Leon. 148.

The mischief before this statute was, that when the husband aliened the estate of the wife, this working a *discontinuance*, and the wife being driven to her *cui in vita*, or her heir, to his *sur cui in vita*, those actions were frequently delayed, where the purchaser vouched the heir of the husband being within age, until he attained his full age, which is remedied by the act.[25]

This act is construed *strictly*, and extends only to a *cui in vita*, or *sur cui in vita*, which are the proper actions upon an alienation by the husband; for if the wife were tenant in tail, and the husband aliens such estate and dies, and she dies, her issue cannot have a *sur cui in vita*, but a *formedon*; in which the purchaser might vouch the heir of the baron, and for his nonage the parol should demur.[26] Further, it extends only to the heir of the baron that aliened, and to the *immediate purchaser*, but not to his heir nor alienee.[27]

However, since the statute 32 *H.* 8, c. 28,[28] by which an entry is given to the wife, or to her heir after an alienation of the husband, the statute in the text is of little or no use.[29]

23. Roll. Abr. 142—3 Bac. Abr. 159.
24. Barnes 267—3 Com. Dig. 168.
25. 2 Inst. 455.
26. ib.
27. ib. 4 Co. 50.a
28. See the statute and the commentary upon it, under the title ESTATES FOR LIFE AND YEARS.
29. 2 Inst. 456—3 Bac. Abr. 161.

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* 10 & 11 WILLIAM III. CAP. XVI. A.D. 1699.

An act to enable posthumous children to take estates as if born in their fathers lifetime.

WHEREAS it often happens, that by marriage and other settlements, estates are limited in remainder to the use of the sons and daughters, the issue of such marriage, with remainders over, without limiting an estate to trustees to preserve the contingent remainders limited to such sons and daughters by which means such sons and daughters, if they happen to be born after the decease of their father, are in danger to be defeated of their remainder by the next in remainder after them, and left unprovided for by such settlements, contrary to the intent of the parties that made those settlements; Be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this parliament assembled, and by the authority of the same, That where any estate already is or shall hereafter, by any marriage or other settlement be limited in remainder to, or to the use of the first or other son or sons of the body of any person lawfully begotten, with any remainder or remainders over to, or to the use of any other person or persons, or in remainder to, or to the use of a daughter or daughters lawfully begotten, with any remainder or remainders to any other person or persons, that any son or sons, or daughter or daughters of such person or persons lawfully begotten or to be begotten, that shall be born after the decease of his, her or their father, shall and may, by virtue of such settlement, take such estate so limited to the first and other sons, or to the daughter or daughters in the same manner, as if born in the lifetime of his, her or their father, although there shall happen no estate to be limited to trustees, after the decease of the father, to preserve the contingent remainder to such after born son or sons, daughter or daughters, until he, she or they come *in esse*, or are born, to take the same; any law or usage to the contrary in any wise notwithstanding.

II. Provided always, That nothing in this act shall extend or be construed to extend to divest any estate in remainder, that by virtue of any marriage or other settlement is already come to the possession of any person or persons, or to whom any right is accru-

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ed, though not in actual possession, by reason or means of any after born son or sons, or daughter or daughters, not happening to be born in the lifetime of his, her or their father.

Vin. V. 18, 408.

The civil law, for the benefit of the infant, reputes a child in its mother's womb in the same condition as if it were born; and, by our law, a child in *ventre sa mere* may be *vouched*, is capable of taking, the mother is justifiable in detaining charters on its behalf; a bill may be filed on behalf of such a child, and a court of equity will grant an injunction in its favor to stay waste.[30]

All the books agree that a devise to an infant, when he shall be born, or when God shall give him birth, is good, as an executory devise, and that the freehold shall descend to the heir at law, in the mean time.[31]

And although it was formerly a matter of much controversy whether a devise of lands to an infant in *ventre sa mere* (who should be born after the death of the testator) be good; yet at the present day it is clearly settled that a devise to an infant in *ventre sa mere* is good although he should be born after the testator's death, and he shall take by way of *executory devise*.[32]

In respect to the mesne profits, where an estate vested, is divested by the birth of a posthumous child; though it was held, by lord ch. *Hardwicke*,[33] that a posthumous son, claiming under a remainder in a settlement, was, by construction of the statute of 10 & 11 *Will.* 3, c. 16, which preserves remainders for posthumous children, where no estate is limited to trustees for that purpose, entitled to the mesne profits; yet his lordship in the same case, seems to have taken it for granted, that on a *descent*, the mesne profits do not belong to the infant; for he directed that the profits of the *estate descended*, should be accounted for, by the uncle, only *from the birth* of the posthumous son. And *lord Coke* appears to have entertained the same opinion, where he puts the case of a daughter being entitled, against a posthumous brother, to corn sowed before his birth.[34] Lord ch. j. *De Grey* too, in delivering the opinion of the court of c. p. on a question whether a *posthumous* son, was *actually seised*, denies that the posthumous son, in the case of a *descent*, can be entitled to any profits received before his birth, and cites 9 *H.* 6, 25 as an authority in point.[35]

30. 2 Vern. 710, 711—3 Bac. Abr. 125.
31. Sid. 153—Leo. 135—Ray. 163.
32. 1 Freem. 244, 293—See Fearne's Essay 429, &c.
33. In the case of *Basset v Basset*.—See 3 Aitk. Rep. 203.
34. Co. Lit. 55.b
35. It may perhaps be questionable, whether in Pennsylvania, a posthumous child may not be entitled to the mesne profits, from the time of his father's death; for the act of 11th April, 1794, declares, "That all posthumous children, shall, in all cases whatsoever, inherit *in like manner, as if they were born in the lifetime of their respective fathers*."
5 St. Laws, Sm. Ed. 148, § 10.

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INDICTMENT.

* 37 HENRY VIII. CAP. VIII. A.D. 1545.(o

The act that any indictment lacking these words, vi et armis, *shall be good.*

WHERE before this time it was and yet is commonly used in all indictments and inquisitions of treason, murder, felony, trespass and divers other, to have comprised and put in every the same indictments and inquisitions these words, *vi et armis*, and in divers of the same indictments to declare the manner of the force and arms; that is to say, *vi et armis, videlicet, baculis, cultellis, arcubus et sagittis*, or such other like words in effect, where of truth the parties so indicted had no manner of such weapons at the time of the said offence committed and done; (2) yet in default and lack of the same words, the said indictments were and yet be taken as void in the law, for to put any person to answer thereunto: (3) and the party or parties so indicted, for lack of the same words not being comprised and put in the said indictments, have taken advantage thereof, and have avoided the same indictments, by writ or writs of error, or by plea upon his or their appearance as the same case did require: (4) For reformation whereof, be it enacted by the king our sovereign lord, with the assent of the lords spiritual and temporal, and of the commons, in this present parliament assembled, and by the authority of the same, That from and after the feast of the nativity of our Lord God next coming, these words, *vi et armis, viz. cum baculis, cultellis, arcubus et sagittis*, or such other like shall not of necessity be put or comprised in any inquisition or indictment; (5) nor that the party or parties being hereafter indicted of any offence shall have or take any advantage by writ or writs of error, plea or otherwise, to adnul or avoid any such inquisition or indictment, for that, that the said words, *vi et armis, viz. baculis, cultellis, arcubus et sagittis*, or any of the same or like words, shall not be put or comprised in the said inquisitions or indictments: (6) But that the same inquisitions or indictments, and every of them, lacking

o) "This act is in force, except the 2d section." *Report of the Judges.*

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the said words, *vi et armis, viz. baculis, cultellis, arcubus et sagittis*, or any of them, shall from thenceforth, by the authority aforesaid, be taken, deemed and adjudged, to all intents, constructions and purposes, as good and effectual in the law, as the same inquisitions and indictments, having the said words, *vi et armis, viz. baculis, cultellis, arcubus et sagittis*, comprised and put in every of the same inquisitions and indictments, were or heretofore have been, taken, deemed or adjudged; any law, usage or custom heretofore had and used to the contrary notwithstanding.

Rex v Wynde—Pasch. 2 Geo. 2, in B. R.

At common law the words *vi et armis* were necessary, in indictments for offences, which amount to an actual disturbance of the peace, as assaults, rescouses, &c. but it seems they were never necessary, where it would be absurd to use them; as in indictments for conspiracies, cheats, escapes, and the like.[1]

The statute in the text seems evidently intended to obviate this necessity in every case; but since the statute exceptions to indictments of trespass and such like, for the want of the words *vi et armis*, where they have not been implied by other words, as *rescussit manu forti*, &c. have prevailed: The necessity of them is said to be owing to this, that without them there can be no *capiatur* entered, nor fine to the king.[2]

"Yet," says *Hawkins*, "they have been often overruled, and it is not easy to shew how they ever could prevail, since the said statute, consistent with the manifest purport of it; however, it is certainly safe and adviseable to make use of them where they are pertinent and proper, if it be to no other purpose than to aggravate the offence."[3]

1. 2 Hawk. P. C. 241—Cro. Jac. 473—3 Leo. 221—Skin. 426—3 Bac. Abr. 108.
2. 2 Hawk. 242—3 Leo. 221.
3. 2 Hawk. P. C. 344—1 Hal. Hist. P. C. 187. See also 2 Stra. 834.

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JURY.

* 13 EDWARD I. STAT. I. CAP. XXX. A.D. 1285.(H

The authority of justices of nisi prius. Adjournment of suits. Certain writs that be determinable in their proper counties. A jury may give their verdict at large. None but which are summoned shall be put in assises or juries.

II. And when such inquests be taken, they shall be returned into the bench, and there shall judgment be given, and there they shall be inrolled. (3) All justices of the benches from henceforth shall have in their circuits clerks to inroll all pleas pleaded before them, like as they have used to have in time passed. (4) And also it is ordained, That the justices assigned to take assises shall not compel the jurors to say precisely whether it be disseisin or not, so that they do shew the truth of the deed, and require aid of the justices. (5) But if they of their own head, will say that it is disseisin, their verdict shall be admitted at their own peril.

Clerks of assise, Dyer 175. A jury may give their verdict at large, Rast. 99, 333 Plow. 92—Dyer 173—7 Co. 11.

Before this statute civil causes were tried at bar, before all the judges of the court in term time; except some of little consequence which were tried before the justices in *Eyre*. This occasioned a great confluence of people to the superior courts, and consequently was attended with great expense and inconvenience, and hence was seen the necessity of the statute in the text: since the making of which, causes in general are tried at *nisi prius;* trials at *bar* being only allowed in causes which require great examination; wherein difficult questions of law will arise, and will be so complicated with questions of *fact*, that the whole matter must be determined by the jury, under the direction of the court.[1]

The granting or refusing a trial at bar is entirely in the discretion of the court, governed by the circumstances; except that where the crown is immediately concerned, the attorney general has a right to demand a trial at bar.[2]

The clause of *nisi prius* was inserted in the *venire facias* by virtue of this statute.

H) The only parts of this statute in force are those contained in the text. See *Report of the Judges.*

1. 5 Bac. Abr. 231—2 Salk. 648—2 Tidd's Pr. 767.

2. Say. Rep. 79—1 Term. Rep. 367—Stra. 52, 644, 816—2 Tidd's Pr. 767.

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Although this act introduced a considerable improvement in the administration of justice, still several inconveniences were experienced; for in the first place the jury were not obliged, under any penalty, to attend on the day of *nisi prius*; secondly, if they did appear, the ancient practice of the defendant's being *essoinable* on the *venire*, might oblige them to return, leaving the cause untried; and another inconvenience was, that the parties, not seeing the panel before hand, could not be prepared to make their challenges.[3] To obviate the latter inconvenience, it was enacted by the statute 42 *Edw. III.* c. 11, that "no inquest, except of assise and goal delivery, shall be taken by writ of *nisi prius*, or otherwise at the suit of any one, before the names of all of them that shall pass in the inquests, shall be returned in court." Of consequence the clause of *nisi prius* could no longer be inserted in the *venire facias*, but was transferred to the *distringas*; the *venire facias* being made returnable on a day before the trial; and thus the practice continues at the present day.[4]

The clause in the statute in the text, which prohibits the judges from compelling the jury to give a *general* verdict, was inserted for the protection of the jury who, in case such verdict were false, were liable to an attaint.[5]

It has become the practice upon this statute, for the jury, when they have any doubt as to the matter of *law*, to find a *special* verdict; stating the *facts*, and referring the law arising on them to the decision of the court; by concluding conditionally, that, if upon the whole matter alledged the court shall be of opinion the plaintiff had cause of action, they find for the plaintiff; if otherwise, then for the defendant.[6]

In these verdicts a jury must find *facts*; not the *evidences of facts*; and if in this, or any other particular, the verdict should be defective, so that judgment could not be rendered on it, the court will *amend* it if possible.[7] If it cannot be amended a *venire facias de novo* must be awarded.[8]

Another method of finding a species of special verdict, is when the jury find a verdict generally for the one party, or the other, but subject nevertheless to the opinion of the court above, on a special case, stated by the counsel on both sides, in regard to some controverted matter of law.[9]

The facts proved at the trial ought to be stated, in a special case in the same way as in a special verdict. It is usually dictated by the *court*, and signed by *counsel* before the jury are discharged. If in settling it, any difference occurs respecting a *fact*, the opinion of the jury is taken; and the fact stated agreeable to it.[10]

3. 3 Bac. Abr. 244—Gilb. C. P. 74, 75, 76, 77, 78.
4. 2 Tid. Pr. 715—Gil. C. P. 77—2 Salk. 454—2 Ld. Ray. 1143.
5. Gil. C. P. 71—2 Tid. Pr. 806.
6. 3 Black. Com. 377, 8.
7. See tit. *Amendment*, p. 64.
8. 2 Tid. Pr. 807.
9. 2 Tid Pr. 808.
10. 2 Wils. 168—1 Burr. *in prac.* IV.

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Every verdict, whether *general* or *special*, *non-suit*, &c. is entered on the back of the record of *nisi prius*: such entry, from the word with which it began, when the entries were in Latin, is called the *postea*; which must be returned to the court in bank where judgment is rendered.

By the act of 22d May, 1722,[11] which established the supreme court, the judges, or any two of them, were authorised to perform a certain circuit, for the trial of issues in fact, as fully as the justices of *nisi prius* in England might or could do. Since that period various alterations have taken place, in relation to the jurisdiction of the supreme court. At the present day it is merely a court of error in the last resort, in all parts of the state, except Philadelphia, where courts of *nisi prius* are still held for the city and county, as heretofore they were throughout the state.[12]

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* 33 EDWARD I. STAT. IV. A.D. 1305.

An ordinance for *inquests*.

He that challengeth a jury or juror for the king shall shew his cause.

Of inquests to be taken before any of the justices, and wherein our lord the king is party howsoever it be; it is agreed and ordained by the king and all his council, That from henceforth, notwithstanding it be alledged by them that sue for the king, that the jurors of those inquests, or some of them, be not indifferent for the king, yet such inquests shall not remain untaken for that cause; (2) but if they that sue for the king will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the court; and let it be proceeded to the taking of the same inquisitions, as it shall be found, if the challenges be true or not, after the discretion of the justices.

II. This ordinance precedent and the ordinance following of the forest, were made in the parliament at *Westminster*, the *Sunday* next before the feast of saint **Matthew the apostle*, the three

11. 1 St. Laws, Sm. Ed. 139.
12. See St. Laws, Sm. Ed. 1 vol. 139—Vol. 2. 484—Vol. 3. 29—Vol. 4. 271—Vol. 5. 16, 158, 808, and the notes of the learned editor, which afford all necessary information on the subject.

* Read *Michael*.

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and thirtieth year of the reign of king EDWARD, son of king HENRY.

Rast. 115—Fitz. Chall. 17, 63, 65, 107—Bro. Chall. 21, 154. See further 25 Ed. 3, st. 5, c. 3—7 H. 7, c. 5, and 23 H. 8, c. 23.

By the common law, in all capital cases, in which only peremptory challenges were allowed, the accused might challenge *thirty-five* of the jurors peremptorily. The reason of which was, that the trial by the pettit jury came instead of the *ordeal*, and consisting of twelve, being in manner of the canonical purgation, and because the whole *pares* were not of his jury but only a select number chosen by the criminal himself, as was usual amongst the canonists, they therefore adopted a middle course, and gave him liberty to challenge peremptorily any number under three juries; Four juries being generally as many as usually appeared to make the total *pares* of the county.[13]

On the part of the prosecution, by the common law, as many might have been challenged peremptorily, as the king, or any one acting in his behalf, might think fit. The statute in the text was intended to restrain this unlimited privilege of challenging.[14]

In the construction of the statute it has been held that cause of challenges, on the part of the prosecution, need not be shewn, till the whole of the panel is gone through, and it should appear that a full jury could not be had without the person so challenged.[15]

This construction appears to be calculated to prevent delays, as well as to promote a correct administration of justice. The shewing cause of challenge necessarily occasions a consumption of time. It frequently requires the attendance of several witnesses; the summoning of whom, however it might be expected on the part of the accused, is scarcely to be looked for, on behalf of the prosecution, in a capital case, which is usually conducted by the public prosecutor, who would neither consider it to be his duty, nor feel an inclination to hunt up witnesses for the prosecution. Yet he might have the strongest reasons to believe, a certain individual to be altogether improper to serve as a juror in the trial of the issue; and that placing him on the jury would altogether defeat the ends of public justice: he even might be able by the time the panel was exhausted, to shew good cause of exclusion. Under such circumstances, why should he be prevented from postponing the service of such exceptionable character at least till it shall appear that he is necessary to make up the jury? What injury can possibly arise? The accused is not obstructed in the full exercise of his right, to peremptory challenge, or challenges for cause; and he has the advantage of having even the person objected against, if his service be requisite to make up the jury, un-

13. Lamb 4, c. 14—3 Bac. Abr 263.
14. Co. Lit. 156—2 Inst. 432—2 Hale. P. C. 271.
15. Co. Lit. 156—2 Inst. 432—2 Hale. P. C. 271.

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less in the event sufficient cause be shewn to exclude him. And it is not to be apprehended that such an one is obtained in the conclusion, under circumstances less favorable to the accused, than if he had never been objected against.

Where unanimity is required in the jury, it is desirable, that it should be composed of men, honest, impartial, and even unsuspected.

By the act of assembly of 29th March, 1813,[16] regulating challenges, it is declared, "That the commonwealth shall not, in any criminal prosecution,[17] have a right peremptorily to challenge a greater number of jurors than the defendant or defendants in the case, and that all challenges shall be conducted as follows, *to wit:* the commonwealth shall challenge one, and then the defendant or defendants, and so alternately until all the challenges are gone through; *provided*, that in any case of felony the commonwealth shall not challenge without cause, and if in other cases the commonwealth should refuse to make any challenges, this act shall not be construed to take away the right of the defendant or defendants to challenge in such cases."

No juror could ever be challenged peremptorily, on the part of the prosecution, since the statute of 33 Edw. 1, before the act of March, 1813, as has been observed. Whether in the construction of that act it will be considered as introducing any alteration, in respect to the *time* when the commonwealth is to be called upon *to shew cause of challenge*, remains to be ascertained. On this point, the act is silent, as well as the statute 33 *Edw.* 1, neither the one nor the other directing, whether cause must be shewn, *at the time of taking the exception*, or may be postponed *till the panel is exhausted*. Now we have seen that the uniform construction of the statute has been, that the prosecution shall not be required to shew cause of challenge, till the panel is exhausted, and the service of the juror becomes necessary, unless just cause of exclusion can be made to appear against him. The construction of the act it is probable may be the same: why a different one could obtain, it is not easy to conceive.

There cannot exist the same cause of jealousy, in regard to challenges on the part of the prosecution, *here* that might be well founded in *England;* where the influence of the crown, especially in former times, was exerted to convict those who were obnoxious to the king. *Here* the accused has nothing to fear from those in power. The sole object of prosecutions (for the higher offences[18] at least) is to maintain the public peace and safety, by en-

16. St. Laws, 11 vol. 1 Sess. p. 207.

17. The act of 4th April, 1809, § 2, provides, "That in all civil suits each party shall be allowed to challenge *two* jurors peremptorily; and in all criminal prosecutions wherein peremptory challenges have not been heretofore permitted by law, the defendant or defendants shall be allowed to challenge four jurors peremptorily."—5 St. Laws, Sm. Ed. 59.

18. It is true that even in *those*, the passions of individuals, who have suffered, or whose friends have suffered, by the crime, are seen to mingle with the prosecution. But wherever a vindictive spirit is discovered in the prosecution, its effect is usually favorable to the accused.

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forcing laws of unexampled mildness. Let them be enforced by men totally free from prejudice and partiality, either against the accused, or in his favor.

The right of peremptory challenges was restrained by 32 *H.* 8, c. 14, § 6,[19] which declares, "That no person accused for any pettit treason, murder, or felony, be admitted to any peremptory challenge, above the number of *twenty*. But it has been held that the 1 *& 2 Ph. & Mar.* c. 10, § 7,[20] which restored the common law as to the trials of *treason*, revived the old challenge of *thirty-five* in trials of pettit treason. So that in cases of *high treason* and *pettit treason* the prisoner may challenge *thirty-five* peremptorily, and *twenty* in all other capital offences.[21]

Such was the law in England, at the time of passing our act of 31st March, 1718,[22] by which it is enacted, "That all inquests and trials of *high treason* shall be according to the course of the common law, observing the statute laws of Great Britain, relating to the trials, proceedings and judgments in such cases." "That the enquiries and trials of *pettit treason*, *misprision of treason*, *murder*, *manslaughter* and *homicides*, and all such other crimes and misprisions, as by this act, or any other act of assembly, are or shall be made capital, or felonies of death," shall be as by the same act is directed. And it is therein further enacted—"That upon all trials of the said capital crimes, lawful challenges shall be allowed; and further, "That if any of the said prisoners shall, upon their arraignment, for any of the said crimes, stand mute, or not answer directly, or shall peremptorily challenge above the number of *twenty* persons returned to serve upon the jury, he or she so offending shall suffer as a felon convict," &c.

Although by subsequent acts of assembly, capital punishment has been (in respect to all crimes except murder of the first degree) commuted to punishment at hard labour, the right of challenge remains the same, in trials of all offences heretofore capital.[23]

Exceeding the number of peremptory challenges, or standing mute, subjected the person charged with any capital felony in former times, to a most inhuman punishment, usually called the *peine forte et dure*.[24]

19. 2 Ruff. Stat. at large 158. Made perpetual by 32 Hen. 8, c. 3—2 Ruff 176.

20. 2 Ruff. Stat at large 483.

21. 2 Hal Hist. P. C. 267—2 Hawk. 413—3 Bac. Abr. 263.

22. 1 St. Laws, Sm. Ed. 105.

23. ib.

24. This punishment was probably unknown to the common law. For notwithstanding authorities of such weight as *lord Coke* and *lord Hale*, the better opinion seems to be, that the punishment was introduced by the statute of *Westminster* 1, (3 *Ed.* 1, c. 12) which directs that such persons "as will not put themselves upon inquests of felonies, before the judges, at the suit of the king "*soient mys en prison forte et dure*," which means that they should be remanded, to a most close and severe confinement. The statute authorised nothing more than a confinement *without any nourishment* TILL THE PARTY SHOULD PLEAD. That such was the meaning seems evident from a record in *Rymer* [vol. 3, part 9, p. 137] "Rex omnibus, &c. cum *Cecilia* quæ fuit ux or *Johannis de Rygeway*, nuper indictata de morte viri sui &c. pro eo quod

* 5 EDWARD III. CAP. X. A.D. 1331.

The punishment of a juror that is ambidexter, and taketh money.

ITEM, it is accorded, That if any juror in assises, juries or enquests, take of the one party or of the other, and be thereof duly attainted, that hereafter he shall not be put in any assises, juries, or enquests, and nevertheless he shall be commanded to prison, and further ransomed at the king's will. (2) And the justices before whom such assises, juries, or enquests shall pass, shall have power to enquire and determine according to this statute.

44 Ed. 3, f. 39. Fitz. decies tan. 12—Rast. 145—Regist. 188. *Enforced and amended by* 34 *Ed.* 3, *c.* 8—38 *Ed.* 3, *st.* 1, *c.* 12, *the latter enacting that jurors taking money shall forfeit ten times the sum taken.*

se tenuit *mutam* et *ad panam suam* restitit adjudicatur *ut dicitur*, in qua sine cibo et potu, in arcta prisona per quadraginta dies vitam sustinuit, via miraculi, et contra naturæ ordinem; nos ea de causa pietate moti pardonavimus," &c. This pardon was granted by Edward I. in the thirty-first year of his reign, and of consequence furnishes an extemporaneous exposition of his own law. How it is possible, from the words of this statute, to derive an authority to press the criminal to death, with all the apparatus of torture, which in aftertimes attended it, is not easy to conceive. It is remarkable that there is no settled *form* of this terrible judgment. The inhuman refinements in cruelty, which, at subsequent periods, were incorporated into it, are truly astonishing and disgusting. In the 14 Ed. IV. (which is the first form we meet with) it appears that the judgment was "that the prisoner be put into a low and close room, and there be laid on his back, nearly naked; that there be placed on his body as great a weight of iron as he can bear and more; that he have nothing to eat or drink unless of the very worst bread that can be found, and of water the nearest to the goal (except running water) and on the day he receives the water he should have no bread, and that he so remain till he should be *dead*." The judgment as stated in *Blackstone's Com.* varies a little from this. According to judge Blackstone, the prisoner was to have three morsels of the worst bread the first day, and three draughts of standing water the second day, and so to be supplied alternately.

The circumstance of being allowed but three draughts of water, every other day, must have been a great addition to the torment, as the agony probably must bring on a violent thirst and fever, which happens also to those that are broken on the wheel.

According to some forms of the judgment, the arms and legs of the prisoner were to be extended with cords as far as they could be stretched.

And at one time it was a part of the judgment, that the back of the prisoner should be placed on a sharp stone.

By suffering this heavy penance the judgment, and of course the corruption of blood and escheat of the lands were saved, in *felony*, and *pettit treason*.—Hence, from a principle of parental tenderness, persons have met this most dreadful punishment, rather than leave their families destitute.

Few indeed have been subjected to this punishment, because few would have the hardihood to encounter it: yet it was not unusual in England as late as the reign of Charles II. to force criminals to plead, by tying their thumbs together, with compressed whip cord; and there were even in the reign of queen *Anne* occasional instances of this practice.

Obs. on the statutes 61—Prin. Penal law 189—Kelage 28.

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* 34 EDWARD III. CAP. VIII. A.D. 1360.

The penalty of a juror taking reward to give his verdict.

ITEM, That in every plea, whereof the inquest or assise doth pass, if any of the parties will sue against any of the jurors, that they have taken of his adversary, or of him, for to give their verdict, he shall be heard, and shall have his plaint by bill presently before the justices before whom they did swear, and that the juror be put to answer without any delay; (2) and if they plead to the country, the inquest shall be taken presently. (3) And if any man other than the party will sue for the king against the juror, it shall be heard and determined as afore is said. (4) And if the juror be attainted at the suit of other than the party, and maketh fine, the party that sueth shall have half the fine; (5) and that the parties to the plea shall recover their damages by the assessment of the enquest; (6) and that the juror so attainted have imprisonment for one year, which imprisonment the king granteth that it shall not be pardoned for any fine. (7) And if the party will sue by writ before other justices, he shall have the suit in the form aforesaid.

31 H. 6, f. 8—Fitz. Damage. 76—Fitz. decies tantum 1, 2, 3, 4, 5, 6, 9, 11—Rast. 145—5 Ed. 3, c. 10. *Enforced by* 38 *Ed.* 3, *st.* 1 *c.* 12, *enacting that jurors taking money shall forfeit ten times the sum taken.* Regist. 188.

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* 38 EDWARD III. STAT. I. CAP. XII. A.D. 1363.

The punishment of a juror taking reward to give verdict, and of embraceors.

ITEM, As to the article of jurors in the four and thirtieth year; it is assented and joined to the same, That if any juror in assises sworn, and other inquests to be taken between the king and party, or party and party, do any thing take by them or other of the party plaintiff or defendant, to give their verdict and thereof be attainted by process contained in the same article, be it at the suit of the party that will sue for himself, or for the king, or any other person, every of the said jurors shall pay ten times as much as he

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hath taken, (2) and he that will sue shall have the one half, and the king the other half. (3) And that all the embraceors that bring or procure such inquests in the country to take gain or profit, shall be punished in the same manner and form as the jurors; (4) and if the juror or embraceor so attainted have not whereof to make gree in the manner aforesaid, he shall have the imprisonment of one year. (5) And the intent of the king, of the great men, and of the commons is, that no justice nor other minister shall enquire of office, upon any of the points of this article, but only at the suit of the party, or of other, as afore is said.

34 Ed. 3, c. 8—Fitz. decies tantum 1, 2, 3, 4, 5, 6, 9, 11, the punishment of embraceors. None shall inquire of this statute but at the suit of the party. 5 Ed. 3, c. 10—Regist. 188—Rast. 145.

The three statutes preceding relate to the offence of *embracery;* which is one species of *maintenance.*

MAINTENANCE in general signifies an unlawful taking in hand, or upholding of quarrels, or sides, the disturbance or hindrance of common right, *culpa est rei se immiscere ad se non pertinenti.*[25]

It is said to be twofold.

First, *Ruralis*, or in the country, as where one supports the pretensions of another to lands, by taking or holding the possession for him, by force, or subtlety; or where a person stirs up quarrels and suits in the country, in relation to matters wherein he is no way concerned.

Secondly, *Curialis*, or in a court of justice, where one officiously intermeddles in a suit pending in such court, which no way belongs to him, by assisting either party with money, or otherwise in the prosecution.

Of this kind of maintenance there are three species:—

1. Where one maintains another, without any contract to have a part of the thing in controversy; this goes under the common name of *maintenance.*

2. Where a person maintains the one side, to have part of the thing in suit; which is called *champerty.*[26]

3. Where one laboreth a jury; which is called *embracery.*

Any attempt whatsoever to corrupt, or influence, or instruct a jury, or any way to incline them to be more favorable to the one side than to the other, either by money, promises, letters, threats, or persuasions, except only by the strength of the evidence, and the argument of counsel, delivered in open court, at the trial of the cause, is an act of *embracery*, whether the jurors, on whom such

25. Co. Lit. 368, b—1 Hawk. P. C. 335. 26. *Vide ante*, p.

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an attempt is made, give any verdict or not, or whether the verdict be true or false.[27]

By the common law, the offender was subject either to an indictment or to an action, in the same manner as those guilty of any other kind of unlawful maintenance were.[28]

In the construction of the aforegoing statutes, it has been held: 1. That in all actions of *decies-tantum*, being founded on an offence supposed to have been committed in some former action, appearing upon record, it will be a good plea in bar, either that there is no such record, or that there is not any such record by which it may appear, that the juror was sworn.[29] 2. That it is not sufficient to shew that the defendant took money, in order to embrace a jury, without shewing also that he actually disposed of it accordingly.[30] 3. That it must be shewn, in certain, how much was received, otherwise the court will not know for what sum to give judgment.[31] 4. That the giving money to a juror, after the verdict, is not within the statute, unless there be some precedent contract relative to it.[32] 5. That it is not material whether any verdict be given. 6. That all the jurors and embraceors may be joined in one action, notwithstanding they may have severally received different sums; but it seems they ought to *plead* severally.[33] 7. That they ought specially to deny the taking of the money, &c. 8. That the plaintiff shall be paid the moiety of the money due to him, on a judgment in *decies tantum* before the king. 9. That the husband alone may maintain a *decies tantum*, for embracery in a suit by him and his wife. 10. That one who buys land at an undervalue, as the reward for maintaining a suit, is equally culpable with one who receives money. 11. That, being a popular action, it may be barred by the king's release, before action brought; but cannot be barred by release of the party injured. 12. That no process of outlawry lies in this action, but only a *capias*, or distress infinite, upon a *nihil* returned.[34]

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* 25 EDWARD III. STAT. V. CAP. III. A.D. 1350.

No indictor shall be put upon the inquest of the party indicted.

ITEM, it is accorded, That no indictor shall be put in inquests upon deliverance of the indictees of felonies or trespass, if he be challenged for that same cause by him which is so indicted.

27. Co. Lit. 369—Fitz. N. B. tit. *Decies tantum* 396—1 Hawk. 548.
28. Co. Lit. 157—Hob. 294—1 Hawk. 549.
29. F. *Dec. tan.* 2, 11, 13—5 Ed. 4, 3.
30. Fitz. N. B. tit. *Decies tan.* 396—1 Hawk. P. C. 551.
31. Pl. Com. 85.
32. 1 Hawk. P. C. 551.
33. ib.
34. ib. 550, 551.

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Bro. Chall. 42, 101, 120, 142, 166.

It must have been at the common law a good cause of challenge on the part of the indictee, that the juror was the indictor.

This hath been adjudged to be a good exception not only on the trial of the same indictment, but also in the trial of another indictment, or action, wherein the matter found in such former indictment is either directly in issue or happens to be material.[35]

† 28 EDWARD III. CAP. XIII. A.D. 1354.(1

The warranty of packing of wool shall be put out. *An inquest shall be* medietate linquæ, *where an alien is party.*

II. And that in all manner of inquests and proofs which be to be taken or made amongst aliens and denizens, be they merchants or other, as well before the mayor of the staple, as before any other justices or ministers, although the king be party, the one half of the inquests or proof shall be denizens, and the other half aliens, if so many aliens and foreigners be in the town or place where such inquest or proof is to be taken, that be not parties, nor with the parties in contracts, pleas or other quarrels, whereof such inquests or proofs ought to be taken; (2) and if there be not so many aliens, then shall there be put in such inquests or proofs as many aliens as shall be found in the same towns or places, which be not thereto parties, nor with the parties, as afore is said, and the remnant of denizens, which be good men, and not suspicious of the one party nor to the other.

An inquest shall be *de medietate linquæ* where an alien is party to any trial. *Confirmed by* 8 H. 6, c. 29—27 Ed. 3, st. 2, c. 8—Dyer 144—3 Ed. 4, f. 11—27 H. 6, f. 4—Fitz. Trial 30, 32, 71—Bro. Denizen 1, 12.

It is a matter of astonishment, how this statute ever became incorporated in our laws. It certainly falls within no principle, upon which English statutes have been adopted.

In the case of *Resp. v Mesca et al*,[36] though the court felt themselves constrained, by former practice, to admit the statute to be

35. Sid. 214—2 Hawk. P. C. 418—3 Bac. Abr. 256.

36. 1 Dal. 73.

1) "That part only of this statute is in force, which gives an inquest *de medietate linquæ*." *Rep. of the Judges.*

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in force; yet the *Ch. Just.* in delivering the opinion of the court, observes, "if this were a new case the judgment of the court would be different, for the reasons which gave rise to the 28 *Edw.* 3, do not apply to the present government, nor to the general circumstances of the country. Prisoners here have a right to the testimony of their witnesses *upon oath*, and to the assistance of counsel, as well in matters of *fact*, as of *law*, which was not the case in *England* in the year 1353, when that statute was enacted.—We do not think, indeed, that granting a *medietas linguæ*, will, at all, contribute to the advancement of justice." *See title* TRIAL, 8 *Hen. VI. cap.* 29.

* 5 HENRY VIII. CAP. VI. A.D. 1513.(K

An act concerning surgeons to be discharged of quests and other things.

SHEWETH unto your discreet wisdoms, your humble orators the wardens and fellowship of the craft and mystery of surgeons enfranchised in the city of *London*, not passing in number twelve persons, that whereas they and their predecessors, from the time that no mind is to the contrary, as well in this noble city of *London*, as in all other cities and boroughs within this realm or elsewhere, for the continual service and attendance that they daily and nightly, at all hours and times, give to the king's liege people, for the relief of the same, according to their science, have been exempt and discharged from all offices and business wherein they should use or bear any manner of armour, or weapon, and with like privilege have been intreated as heralds of arms, as well in battles and fields, as other places, therefore to stand unharnessed and unweaponed, according to the law of arms, because they be persons that never used feats of war, nor ought to use, but only the business and exercise of their science, to the help and comfort of the king's liege people in the time of their need: (2) And in the aforesaid city of *London*, from the time of their first incorporation, when they have been many more in number than they be now, were never called nor charged to be on quest, watch, nor other office, whereby they should use or occupy any armour or de-

K) "So much only of this statute is in force, as discharges surgeons from service on juries." *Report of the Judges.*

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fencible geer of war, where though they should be unready, and letted to practice their cure of men being in peril: (3) Therefore, for that there be so small number of the said fellowship of the craft and mystery of surgeons, in regard to the great multitude of patients that be, and daily chance, and importune happeneth and increaseth in the foresaid city of *London*, that many of the king's liege people suddenly wounded and hurt, for default of help in time to them to be shewed, perish, and so divers have done, as evidently is known, by occasion that your said suppliants have been compelled to attend upon such constableship, watches, and juries, as is aforesaid; (4) be it enacted and established by the king our sovereign lord, and the lords spiritual and temporal and by the commons, in this present parliament assembled, and by authority of the same, That from henceforth your said suppliants be discharged, and notchargeable of constableship, watch, and of all manner of office bearing any armour, and also of all inquests and juries within the city of *London:* (5) And also that this act in all things do extend to all barber-surgeons admitted and approved to exercise the said mystery of surgeons, according to the form of the statute lately made in that behalf, so that they exceed not, nor be at one time above the number of twelve persons.

The surgeons of London shall be exempt from bearing armour, or parish offices, &c. 3 *H.* 8, *c.* 11—14 *&* 15 *H.* 8, *c.* 5—32 *H.* 8, *c.* 42. *See farther* 34 *&* 35 *H.* 8, *c.* 8—1 *Mar. st.* 2, *c.* 9—6 *W.* 3, *c.* 4, and 18 *Geo.* 2, *c.* 15.

There are persons who, by the common law, are privileged from serving on juries; as peers of the realm, by reason of their rank, who if they be not challenged, by either party, may challenge themselves.[37] There are also others who are privileged, on account of their offices or professions, as those whose attendance is

37. The reason of this being a good cause of challenge may be, that they are considered as a distinct order in society, but the common course is, that those who have *privilege* must assert it in a proper time and in a proper manner. Thus, by the statute of *Westminster*, 2 c. 38, it is provided, "That neither old men, above the age of seventy years, nor persons perpetually sick, nor those who do not reside in the county shall be put on juries in the lesser assises." Yet it hath been held, that although such persons may sue out a writ of privilege, for their discharge, grounded on this statute, yet if they be actually returned, and appear, they can neither be challenged by the party, nor excuse themselves from not sueing, if there be not a sufficient number without them. But the court on application of the juror himself will generally excuse, if there is a sufficient number remaining. 2 Inst. 446—F. N. B 165—3 Bac. Abr. 261.

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required in the superior courts of justice, such as sergeants at law, counsellors, attorneys and other officers of the courts.[38]

The act in the text was designed for the encouragement and protection of surgeons.[39] Surgery as well as physic, being at that period more liberally professed in England, than perhaps in any other part of Europe. A preceding statute in this reign, for licensing physicians and surgeons, and suppressing empiricism, contains a remarkable preamble in favor of the regular physicians and surgeons.

JUSTICES OF THE PEACE.

* 34 EDWARD III. CAP. I. A.D. 1360.(L

What sort of persons shall be justices of peace; and what authority they shall have.

FIRST, *That in every county of England shall be assigned for the keeping of the peace, one* LORD,[1] *and with him three or four of the most worthy in the county, with some learned in the law,* (2) and they shall have power to restrain the offenders, rioters, and all other barators, and to pursue, arrest, take, and chastise them according to their trespass or offence; (3) and to cause them to be

38. Co. Lit. 157—9 Co. 46—6 Co. 53—3 Bac. Abr. 260. A member of the house of commons has no such privilege. Yet in the case of *Sir Edward Bainson*, returned as a juror in B. R. the court would not force him to be sworn, against his will: the parliament then being in session, and he a member. Pash. 17—Car. II.

39. A learned commentator on this statute, observes: "It may perhaps be thought singular to suppose that this exemption from serving on juries, is the foundation of the vulgar error, that a surgeon, and a butcher, (from the barbarity of their business) may be challenged as jurors. It is difficult to account for many of the prevailing vulgar errors, with regard to what is supposed to be law. Such as, that the body of a debtor may be taken in execution after his death; which however was practised in *Prussia* before the late king abolished it by the *Code Frederique*." Obs. on the Statutes 351. [*note e*]

L) "Those parts only of this statute are in force which are distinguished by the numbers 2, 3, 4, 5, 6, and 10."
Report of the Judges.

1. [*one lord*] In the original it is *un seigneur*. Now the word *seigneur* does not signify a *lord* or *peer* of the realm.—There is an instance in the preceding statute of the owner or skipper of a fishing smack being styled seigneur. [31 Ed. III. c. 2] Indeed at this period there was not a sufficient number of peers in the kingdom to furnish from that body a justice for each county.

Seigneur seems to be derived from *senior*, age formerly giving the only rank and precedence.

"*Credebant hoc grande nefas, et morte piandum,*
Si juvenis vetulo non assurrexit."
JUVENAL.

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imprisoned and duly punished according to the law and customs of the realm, and according to that which to them shall seem best to do by their discretions and good advisement; (4) and also to inform them, and to inquire of all those that have been pillors and robbers in the parts beyond the sea, and be now come again, and go wandering, and will not labour as they were wont in times past, (5) and to take and arrest all those that they may find by indictment, or by suspicion, and to put them in prison; (6) and to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the king and his people, and the other duly to punish, to the intent that the people be not by such rioters or rebels troubled or endamaged, nor the peace blemished, nor merchants nor other passing by the highways of the realm disturbed, nor put in the peril which may happen of such offenders. (10) And that fines, which are to be made before justices for a trespass done by any person, be reasonable and just, having regard to the quantity of the trespass, and the causes for which they be made.

Who shall be justices of the peace and what authority they shall have. Cro. El. 148, 689—8 Co. 36—1 Ed. 3, st. 2, c. 16—2 Ed. 3, c. 6—4 *Ed.* 3, *c.* 2—18 Ed. 3, st. 2, c. 2. *Enforced and amended by* 13 R. 2, st. 1, c. 7—2 H. 5, st. 1, c. 4. Fines for trespasses shall be reasonable. 9 *H.* 3, *stat.* 1, *c.* 14—3 *Ed.* 1, *c.* 6. *And see* 1 *W. and M. sess.* 2, *c.* 2, *declaring excessive fines and cruel punishments to be illegal; and likewise grants of fines before conviction. See farther for the qualification and duty of justices of the peace.* 12 *R.* 2, *c.* 10—2 *H.* 5, *st.* 1, *c.* 4—18 *H.* 6, *c.* 11—1 *Ed.* 4. *c.* 2—1 *R.* 3, *c.* 3—3 *H.* 7, *c.* 1—4 *H.* 7, *c.* 12—1 *Mary*, *st.* 2, *c.* 8—1 *and* 2 *P. and M. c.* 13—2 *and* 3 *P. and M. c.* 10—7 *J.* 1, *c.* 5—21 *Jac.* 1, *c.* 12—6 *Geo.* 1, *c.* 21, *sect.* 12—9 *Geo.* 1, *c.* 7—5 Geo. 2, *c.* 18 & 19—15 *Geo.* 2, *c.* 24—16 *Geo.* 2, *c.* 18—18 *Geo.* 2, *c.* 20—23 *Geo.* 2, *c.* 26—24 *Geo.* 2, *c.* 44 & 55—26 *Geo.* 2, *c.* 14 & 27—27 *Geo.* 2, *c.* 16 & 20, *and* 30 *Geo.* 2, *c.* 24.

The parts of this statute which are declared to be in force, may be considered to be *declaratory* of the powers of justices of the peace, rather than as tending to enlarge them.

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LAND.

33 EDWARD I. STAT. VI. A.D. 1305.

An ordinance for measuring of land.

When an acre of land containeth *x* perches in length, then it shall be in breadth *xvi* perches; (2) when it containeth *xi* perches in length, then it shall be in breadth *xiv di.* and three quarters of one foot; (3) when it is *xii*, then *xiii*, *v* foot, and *di.* (4) When it is *xiii*, then *xiii*, *v* foot, and almost an inch; (5) when *xiv*, then *xi*, *vii* foot, and almost an inch; (6) when *xv*, then *x* and *di.* *ii* foot, and *iii* quarter of a foot; (7) when *xvi*, then *x*; (8) when *xvii*, then *ix*, *vi* foot, *iii* q of a foot, and almost half an inch; (9) when *xviii*, then *viii*, *xiv* foot, and *viii* inches; (10) when *xix*, then *viii*, *vi* foot, and *xi* inches, and *di.* (11) when *xx*, then *viii* perches; (12) when *xxi*, then *vii* perches, *x* foot *ii* inches, and *iii* 9 of an inch; (13) when *xxii*, then *vii*, *ii* foot and an half; (14) when *xxiii*, then *vi*, *iii* q, *ii* foot, and *xi* inches and *di*; (15) when *xxiv*, then *vi*, and *di.* *ii* foot, and *vi* inches; (16) when *xxv*, then *xi*, *vi* foot, and almost *ii* inches; (17) when *xxvi*, then *vi*, *ii* foot, and almost *di*; (18) when *xxvii*, then *v*, *iii* q, *v* inches and *di*; (19) when *xxviii*, then *v*, *xi* foot, *x* inches and *di*; (20) when *xxix*, then *v*, *viii* foot, *v* inches and *di*; (21) when *xxx*, then *v*, *v* foot and *di*; (22) when *xxxi*, then *v*, *ii* foot, and *viii* inches; (23) when *xxxii*, then *v*; (24) when *xxxiii*, then *iv*, *xiv* foot, and *iv* inches; (25) when *xxxiv*, then *iv* and *di*, *iii* foot and *iv* inches; (26) when *xxxv*, then *iv* and *di*, *i* foot, *iii* inches and *di*; (27) when *xxxvi*, then *iv*, *vii* foot and *iv* inches; (28) when *xxxvii*, then *iv*, *v* foot, and *iv* inches; (29) when *xxxviii*, then *iv*, *iii* foot, and almost *di*; (30) when *xxxix*, then *iv*, *i* foot, and almost *ix* inches; (31) when *xl*, then *iv*; (32) when *xli*, then *iii*, *iii* q, *i* foot, and *x* inches; (33) when *xlii*, then *iii*, *iii* q, and *vii* inches; (34) when *xliii*, then *iii* and *di*, *iii* foot, and an inch and *di*; (35) when *xliv*, then *iii* and *di*, *ii* foot, and *iii* inches; (36) when *xv*, then *iii* and *di*, *di* a foot, and *iii* inches.

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LARCENY.

* 21 HENRY VIII. CAP. VII. A.D. 1529.(x)

Servants imbezling their masters goods to the value of forty shillings, or above, shall be punished as felons.

WHERE before this time divers, as well noblemen, as other the king's subjects, have upon confidence and trusts delivered unto their servants their caskets, and other jewels, money, goods, and chattels, safely to be kept to the use of their said masters or mistresses, and after such delivery the said servants have withdrawn themselves, and gone away from their said masters or mistresses, with the said caskets, jewels, money, goods, and chattels, or part thereof, to the intent to steal the same, and defraud their said masters or mistresses thereof, and sometime being with their said masters or mistresses, have converted the said jewels, money, and other chattels, or part thereof, to their own use, which misbehaviour so done was doubtful in the common law, whether it were felony or not; and by reason thereof the foresaid servants have been in great boldness to commit such or like offences. (2) Be it therefore enacted, ordained, and established by the king our sovereign lord, by the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, That all and singular such servants, to whom any such caskets, jewels, money, goods, or chattels, by his or their said masters or mistresses, shall from henceforth so be delivered to keep, that if any such servant or servants withdraw him or them

x) The statute was made at London, at a parliament begun and held at that city, and continued afterwards by prorogation and adjournment to Westminster, A.D. 1529. It was limited to continue in force till the next parliament. By the 27 Hen. VIII. c. 17, clergy was taken away in this case. By the 27 Hen. VIII. c. 7, [A.D. 1536] both these statutes were made perpetual. And by the statute 1 Edw. VI. c. 12, § 18, [A.D. 1547] the statute 27 Hen. VIII. c. 17, was confirmed. These statutes however, were considered as repealed without a particular reference to them by the general repealing clause contained in the 5 § of stat. 1, Mariæ sessio prima c. 1, which provides that all offences made felony by statutes made since the 1st year of Hen. VIII. *which were not felonies before*, the same statutes are repealed.

The stat. in the text 21 Henry VIII. c. 7, was afterwards re-enacted and revived by 5 Eliz. c. 10, but not the stat. 27 Hen. VIII. c. 17, so that the offender still had his clergy. By the statute of 12 Ann. c. 7, clergy is taken away if the offence be committed in a dwelling house or outhouse thereto belonging.

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from their said masters and mistresses, and go away with the said caskets, jewels, money, goods, or other chattels, or any part thereof, to the intent to steal the same, and to defraud his or their said masters or mistresses thereof, contrary to the trust and confidence to him or them put by his or their said masters or mistresses, or else being in the service of his said master or mistress, without assent or commandment of his master or mistress he imbezil the same caskets, jewels, money, goods, or chattels, or any part thereof, or otherwise convert the same to his own use, with like purpose to steal it, that if the said caskets, jewels, money, goods, or chattels, that any such servant shall so go away with, or which he shall imbezil with purpose to steal it, as is aforesaid, be of the value of xl *s.* or above, that then the same false, fraudulent, and untrue act or demeanour, from henceforth shall be deemed and adjudged felony; and he or they so offending, to be punished, as other felons be punished for felonies committed, by the course of the common law.

II. Provided always, That this act or any thing therein contained, shall not in any wise extend, or be prejudicial to any apprentice or apprentices, nor to any person within the age of eighteen years, going away with his or their masters goods or jewels, or otherwise converting the same to his or their own uses, during the time of their apprenticeship, or being within the age of eighteen years, but that every apprentice or apprentices, such person or persons being within the said age, doing or offending contrary to this present act, shall be, and stand in like case as they and every of them were before the making of this act; (2) the same act to continue and endure unto the next parliament.

3 Inst. 104—*Dyer* 5. This statute shall not extend to an apprentice, or one within 18 years of age. 27 H. 8, c. 17—28 H. 8, c. 2. Rep. by 1 Mar. sess. 1, c. 1, and made perpetual by 5 El. c. 10.

The title of this chapter of the statute is as follows: "Servants embezzling heir masters' goods to the value of forty shillings to be punished as felons;" and the preamble states that it "was *doubtful in the common law*, whether such misbehaviour,[1] were felony, or not." Mr. Barrington in his observations on this statute, pronounces this doubt to be one of those which being recited in the

1. Obs. on the stats. 353.

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preambles of statutes have much enervated the principles of the common law: a doubt which, as he conceives could never have been the doubt of a lawyer. The correctness of the opinion of this judicious commentator, it is presumed, will be manifest by a recurrence to the principles of the common law, recognized by the most eminent lawyers of modern times. A late elementary writer[2] observes, that the statute of 21 H. 8, c. 7, "is but little resorted to at this day; for notwithstanding the inference which might at first sight be drawn from it, it is a clear maxim of the common law, that where one has only the bare *charge* or *custody* of the goods of another, the legal possession remains in the owner, and the party may be guilty of trespass and larceny in fraudulently converting the same to his own use. Thus a butler may commit larceny of plate in his custody, or a shepherd of sheep, the same of a servant entrusted to sell goods in a shop. This rule appears to hold *universally* in the case of servants, whose possession of their masters' goods by their delivery or permission is the possession of the master. Why an exception was introduced into this statute in favor of apprentices,[3] is not understood, but they are equally liable with servants, by the common law. This liability extends to all cases where the goods were once *in the possession* of the master; but if the master had no otherwise the possession than by the bare receipt of his servant, upon the delivery of a stranger, for the master's use, and the servant hath done no act to determine his original lawful and exclusive possession, as by depositing them in his master's house, or the like, if the servant under such circumstances should purloin them, this would not be felony;[4] for although to many purposes, and as against third persons, a delivery to the servant to the master's use, is in law a receipt of the goods by the master, yet it is otherwise in respect to the servant himself, upon a charge of larceny at common law, in converting such goods to his own use: because as to *him*, there was no tortious taking in the first instance and consequently no trespass, as there is where a servant converts to his own use, property in the virtual possession of the master, whereof he has but the *bare charge for special purposes, committed to him by the master*. But if a servant be sent by his master to receive goods, in a boat or other vehicle, belonging to the master, and if after the delivery of the goods into such boat, &c. the servant should embezzle any part of them, this would be felony.[5]

2. 2 East's Pleas of Cr. 564, § 14.

3. 562, § 11—1 Hale. 668.

4. See *Waite's* case H. 16, Geo. II. B. R. determined upon a consultation of all the judges, nem. con. 2 East's fr. Law, 570, § 17—1 Leach 33—Bazely's case O. B.—Feb. 99—2 Leach 973—2 East 571—Bull's case O. B. 97—afterwards before 9 judges 2 East. 572.

5. Spear's case Kingston spring ass. 1798, 2 East Cr. L. 568—2 Leach 962.—In this case prisoner had been sent in a boat to receive an indefinite quantity of wheat in bulk, he received part in bulk and part in sacks, put up by his direction, and embezzled the wheat in the sacks.

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Goods delivered to a tradesman's servant to carry to a customer are still in the possession of the owner, and the servant is guilty of larceny, in converting them, whether he break the package, or sell, or dispose of the whole together.[6] Servant going off with money which his master had given him to carry to another, and applying it to his own use is guilty of larceny, by the common law.[7] And so it would seem to be, if the money had been given to him to purchase goods.[8]

MORTGAGE.

* 7 GEORGE II. CAP. XX. A.D. 1734.(N

An act for the more easy redemption and foreclosure of mortgages.

WHEREAS mortgagees frequently bring actions of ejectment for the recovery of lands and estates to them mortgaged, and bring actions on bonds given by mortgagors to pay the money secured by such mortgages, and for performing the covenants therein contained, and likewise commence suits in his majesty's courts of equity, to foreclose their mortgagors from redeeming their estates; and the courts of law, where such ejectments are brought, have not power to compel such mortgagees to accept the principal monies and interests due on such mortgages, and costs, or to stay such mortgagees from proceeding to judgment and execution in such actions; but such mortgagors must have recourse to a court of equity for that purpose; in which case likewise the courts of equity do not give relief until the hearing of the cause: For remedy thereof and to obviate all objections relating to the same; Be it enacted

6. In Bass's case (O.B. 1782) it was mentioned as an additional *circumstance* that the package was broken open but the ground of the decision by all the judges was "*because the possession still remained in the master.*" And so the case was cited by judge Gould in giving judgment in Wilkins' case—O.B. 1789—2 East. fr L. 673—2 Leach 586. In the case of Bass the defendant was not the menial servant of the prosecutor, but a *porter* in his general employ. See 2 East fr. L. 566, § 15—1 Leach 285.

7. Lavender's case, determined in 1793 by the opinion of all the judges. 2 East fr. L. 566.

8. It was indeed determined otherwise in *Watson's* case. Worcest. Sp. ass. 1788 cor. Heak J. and afterwards by all the judges. 2 East 562.

But this determination is deemed to be law in Lavender's

N) "The 1st and 3d sections of this statute are in force." *Rep. of the Judges.*

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by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That from and after the first day of *Easter* term, one thousand seven hundred and thirty-four, where any action shall be brought on any bond for payment of the money secured by such mortgage, or performance of the covenants therein contained or where any action of ejectment shall be brought in any of his majesty's courts of record at *Westminster* or in the court of Great Sessions in *Wales* or in any of the superior courts in the counties palatine of *Chester*, *Lancaster*, or *Durham*, by any mortgagee or mortgagees, his, her, or their heirs, executors administrators or assigns, for the recovery of the possession of any mortgaged lands, tenements or hereditaments, and no suit shall be then depending in any of his majesty's courts of equity, in that part of *Great Britain* called *England*, for or touching the foreclosing or redeeming of such mortgaged lands, tenements or hereditaments; if the person or persons having right to redeem such mortgaged lands, tenements or hereditaments, and who shall appear and become defendant or defendants in such action, shall at any time pending such action, pay unto such mortgagee or mortgagees, or in case of his, her, or their refusal shall bring into court, where such action shall be depending, all the principal monies and interest due on such mortgage, and also all such costs as have been expended in any suit or suits at law or in equity upon such mortgage, (such money for principal, interest and costs to be ascertained and computed by the court where such action is or shall be depending, or by the proper officer by such court to be appointed for that purpose) the monies so paid to such mortgagee or mortgagees, or brought into such court, shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the court shall and may discharge every such mortgagor, or defendant of and from the same accordingly; and shall and may, by rule or rules of the same court compel such mortgagee or mortgagees at the costs and charges of such mortgagor or mortgagors, to assign, surrender or re-convey such mortgaged lands, tenements and hereditaments, and such estate and interest as such mortgagee or mortgagees have or hath therein, and deliver up all deeds, evidences and writings, in his, her, or their custody relating to the title of such mortgaged lands, tene-

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ments and hereditaments unto such mortgagor or mortgagors, who shall have paid or brought such monies into the court, his, her, or their heirs, executors or administrators, or to such other person or persons, as he, she, or they, shall for that purpose nominate or appoint.

III. Provided always, That this act, or any thing therein contained, shall not extend to any case when the person or persons, against whom the redemption is or shall be prayed, shall (by writing under his, her or their hands, or the hand of his, her, or their attorney, agent or solicitor to be delivered before the money shall be brought into such court at law, to the attorney or solicitor for the other side) insist either that the party praying a redemption has not a right to redeem, or that the premisses are chargeable with other or different principal sums, than what appear on the face of the mortgage, or shall be admitted on the other side; nor to any case where the right of redemption to the mortgaged lands and premisses in question in any cause or suit shall be controverted or questioned by or between different defendants in the same cause or suit; nor shall be any prejudice to any subsequent mortgagee or mortgagees, or subsequent incumbrancer; any thing in this act contained to the contrary thereof in any wise notwithstanding.

4 & 5 W. and M. c. 16.

Upon this statute, the proceedings in ejectment on a mortgage may be stayed by the mortgagor, or his assignee, of the equity of redemption, on payment of the principal, interest and costs without paying off a bond debt due to the mortgagee.[1] If there be any doubt, as to the amount of what is due, the court will refer it to the master who taxes the costs: if the debt and costs are not paid, the plaintiff must proceed in the action and cannot have an attachment.[2] It is said that the court will not stay the proceedings in an ejectment, brought by the mortgagee against a mortgagor, on payment of principle, interest and costs, if the latter has agreed to convey the equity of redemption to the mortgagee.[3]

And the proceedings cannot be stayed, without consent upon this statute, after a writ of possession has been executed.[4]

In Pennsylvania we have a positive act of assembly[5] directing the mode of proceeding upon mortgages, entirely different from

1. 2 Barnes No. 147—2 Stra. 1107—Ande. 341, S. C.—Prec. in Chan. 407, 419.

2. 2 Stra. 1226.

3. 7 Term. Rep. 185—But see 1 Wils. 80, *semb. contra.*

4. *P. Cur.* 7—41 Geo. III.—1 Tidd's Pr. 487.

5. 1 St. Laws, Sm. Ed. 94.

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the modes prescribed in *England*. This act expressly confines the remedy of the mortgagee, to the recovery of the *principal and interest* due on the mortgage: and the proceedings under the law shew the uniform construction of it. The *scire facias* is to shew cause why the land should not be sold, for payment of the *principal and interest* due on the mortgage: when judgment is obtained, the *levari facias* is to levy the *principal and interest money only*. There is no *penalty*, no judgment for a penalty and the court might as well refuse to stay proceedings in a suit on *a single bill*, till a subsequent debt was discharged, as in the case of a mortgage.—Upon the execution in both cases, no more can be levied than the principal and interest." Wherefore the court in the case of *Dorrow assignee v Kelly*,[6] made the rule absolute to stay proceedings on the *scire facias*, upon payment of the principal mortgage money, interest and costs only, without payment of the simple contract debts, due by the defendant to the plaintiff. Although it was urgent that, as these debts were contracted since the assignment it was to be presumed, they had been contracted on the faith of the first security.

MORTMAIN.

*7 EDWARD I. STAT. II. A. D. 1279.‡

A statute of *Mortmain*.

Who shall take the forfeiture of lands given in Mortmain.

§ WHERE of late it was provided, That religious men should not enter into the fees of any without licence and will of the chief lord, of whom such fees be holden immediately; and notwithstanding such religious men have entered as well into their own fees, as in the fees of other men approprying and buying them, and sometimes receiving them of the gift of others, whereby the services that are due of such fees, and which at the beginning were provided for defence of the realm, are wrongfully withdrawn and the chief lords do †leese their escheats of the same: (2) We therefore to the profit of our realm, intending to provide convenient remedy, by the advice of our prelates, earls, ‖ *barons*, and other ¶ *our subjects*, being of our council, have provided, made, and ordained, That no person, religious or other, whatsoever he be that will, buy

6. 1 Dal. Rep. 144.

† *Read lose.*

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or sell any lands or tenements, or under the colour of gift, or lease, or that will receive by reason of any other title, whatsoever it be, lands or tenements, or by any other craft or engine will presume to appropriate to himself under pain of forfeiture of the same, whereby such lands or tenements may anywise come into mortmain. (3) We have provided also, That if any person religious or other, do presume either by craft or engine to offend against this statute it shall be lawful to us and other chief lords of the fee immediate, to enter into the land so alienated, within a year from the time of the alienation, and to hold it in fee as an inheritance. (4) And if the chief lord immediate, be negligent, and will not enter into such fee within the year, then it shall be lawful to the next chief lord immediate of the same fee to enter into the same land within half a year next following, and to hold it as before is said; and so every lord immediate, may enter into such land, if the next lord be negligent in entering into the same fee, as is aforesaid. (5) And if all the chief lords of such fees, being of full age, within the four seas, and out of prison be negligent or slack in this behalf, * we, immediately after the year accomplished, from the time that such purchases, gifts or appropriations hap to be made shall take such lands and tenements into our hands, and shall infeoff other therein by certain services to be done to us for the defence of our realm; saving to the chief lords of the same fees their wards and escheats, and other services thereunto due and accustomed. (6) And therefore we command you that ye cause the foresaid statute to be read before you, and from henceforth to be kept firmly and observed. Witness myself at *Westminster* the fifteenth day of *November*, the seventh year of our reign.

§ Add *the king to the justices of his bench, greeting, whereof late, &c.* ‖ *Not in the original.* ¶ Read *liege men of our kingdom.* * Add *for one whole year* 9 H. 3, st. 1, c. 36—1 Roll. 154, 157, 457—2 Roll. 170—9 H. 3, st. 1 & 2, c. 36—8 H. 4, 15—41 Ed. 3, 16, 21—47 Ed. 3, 11—Bro. Mortmain 15, 16, 18, 20, 24, 27, 31, 38, 39, 41, 43—50 Ed. 3, 22, Fitz. Mortmain. 13 Co. Lit. 2, b—15 Ed. 4, 13—Fitz. Formedon, 57—Fitz. 2 Quan. imp. 163. No land shall be aliened in mortmain upon pain of the forfeiture thereof. 2 Bulst. 187, 3 Bulst. 45. *Enforced & amended by* 13 *Ed.* 1, *st.* 1, *c.* 32—18 *Ed.* 1, *st.* 1, *c.* 3,—34 *Ed.* 1, *c.* 3—*See.* 18 *Ed.* 3, *st.* 3, *c.* 3, *with respect to licences for purchases in mortmain; and* 15 *R. II. c.* 5, *what purchases shall be adjudged mortmain.* 23 *H.* 8, *c.* 10, *for giving lands to pious uses for* 20 *years, See.* 22, *Car.* 2, *c.* 6, *enabling corporations to purchase in mortmain.* 7 *& 8, W.* 3, *c.* 37, *empowering the king to grant licences to alien in mortmain, and* 9 *Geo.* 2, *c.* 36 *restraining gifts in mortmain by will.*

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*13 EDWARD I. STAT. I. CAP. XXXII. A.D. 1285.†

Mortmain by recovery of land by default.

WHEN religious men and other ecclesiastical persons do implead any, and the party impleaded maketh default, whereby he ought to †leese the land; forasmuch as the justices have thought hitherto, that if the party impleaded make default by collusion, that where the demandant, by occasion of the statute, could not obtain seisin of the land by title or gift, or other alienation, he shall now by reason of the default, and so the statute is defrauded; (2 it is ordained by our lord the king, and granted, That in this case, after the default made, it shall be inquired by the country whether the demandant had right in the thing demanded or no. And if it be found that the demandant had right in his demand, the judgment shall pass with him, and he shall recover seisin; and if he hath no right, the land shall accrue to the next lord of the fee if he demand it within a year from the time of the inquest taken; (3) and if he do not demand it within the year, it shall accrue to the next lord above, if he do demand it within half a year after the same year: (4) and so every lord after the next lord shall have the space of half a year to demand it successively, until it come to the king to whom at length, through default of other lords the land shall accrue. (5) And to challenge the jurors of the inquest, every of the chief lords of the fee shall be admitted, and likewise for the king, they that will shall challenge; (6) and after the judgment given, the land shall remain clear in the king's hands, until it be designed by the demandant, or some other chief lord, and the sheriff shall be charged to answer therefore at the exchequer.

7 Ed. 1, st. 2—2 Inst. 428—Fitz. Coll. 1, 2, 4, 5, 6, 7, 9. 10. 11. 22, 24, 25, 26, 27, 31. 40, 42, 46—10 H. 7, f. 3—11 Ed. 3, st. 3. c. 3*—9 H. 3—st. , c. 6. *See further* 18 *Ed.* 1, *st.* 1, *c.* 3—34 *Ed.* 1, *st.* 3—18 *Ed.* 3, *st.* 3, *c.* 3—15 *R.* 2, *c.* 5—23 *H.* 8, *c.* 10, *restraining alienations in mortmain*—1 *& 2 Ph. & M. c.* 8 *permitting them to spiritual corporations.* 39 *El. c.* 5—21 *Jac.* 1, *c.* 1—13 *& 14 Car.* 2, *c.* 12. *permitting them for the benefit of the poor, &c.* 7 *& 8 Will.* 3, *c.* 37, *empowering the crown to grant licences to alien in mortmain; and* 9 *Geo.* 2, *c.* 36, *restraining gifts in mortmain by will.*

* *This seems to be a mistaken reference.*

† *Read lose.*

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18 EDWARD I. STAT. I. CAP. III. A.D. 1290.

No feoffment shall be made to assure land in mortmain.

AND it is to be understood that by the said sales or purchases of lands or tenements or any parcels of them, such lands or tenements shall in nowise come into mortmain, either in part or in whole, neither by policy nor craft, contrary to the form of the statute made thereupon of late. (2) And it is to wit, that this statute extendeth but only to lands holden in fee simple; (3) and that it extendeth to the time coming, and it shall begin to take effect at the feast of Saint Andrew the apostle next coming. Given the eighteenth year of the reign of king *Edward* son to king *Henry*.

See the references to the foregoing statute.

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* 15 RICHARD II. CAP. V. A.D. 1391.†

Assurance of lands to certain places, persons and uses, shall be adjudged mortmain.

ITEM, Whereas it is contained in the statute *De religiosis*, That no religious, nor other whatsoever he be, do buy or sell, or under colour of gift, or term, or any other manner of title whatsoever, receive of any man, or in any manner by gift or engine cause to be appropriated unto him any lands or tenements, upon pain of forfeiture of the same, whereby the said lands and tenements in any manner might come to *mortmain*. (2) And if any religious, or any other, do against the said statute by art or engine in any manner, that it be lawful to the king, and to other lords, upon the said lands and tenements to enter, as in the said statute doth more fully appear. (3) And now of late by subtile imagination, and by art, and engine, some religious persons, parsons, vicars, and other spiritual persons, have entered in divers lands and tenements, which be adjoining to their churches and of the same, by sufference and assent of the tenants, have made church-yards, and by bulls of the bishop of *Rome* have dedicated and hallowed the same, and in them do make continually parochial burying without licence of

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the King and of the chief lords; therefore it is declared in this parliament, That it is manifestly within the compass of the said statute. (4) And moreover it is agreed and assented, That all they that be possessed by feoffment, or by other manner to the use of religious people, or other spiritual persons, of lands and tenements, fees, advowsons, or any manner other possessions whatsoever, to amortise them, and whereof the said religious and spiritual persons take the profits, that betwixt this and the feast of St. *Michael* next coming, they shall cause them to be amortised by the licence of the king and of the lords or else that they shall sell or alien them to some other use between this and the said feast, upon pain to be forfeited to the king, and to the lords, according to the form of the said statute of religious, as lands purchased by religious people: (5) And that from henceforth no such purchase be made, so that such religious or other spiritual persons take thereof the profits as afore is said upon pain aforesaid. (6) And that the same statute extend and be observed of all lands, tenements, fees, advowsons and other possessions, purchased, or to be purchased to the use of gilds or fraternities. (7) And moreover it is assented, because mayors, bailiffs, and commons of cities, boroughs and other towns, which have a perpetual commonalty, and others which have offices perpetual, be as perpetual as people of religion, that from henceforth they shall not purchase to them, and to their commons or office, upon pain contained in the said statute *De religiosis.* (8) And whereas others be possessed, or hereafter shall purchase to their use, and they thereof take the profits, it shall be done in like manner as afore is said of people of religion.

Mortmain in respect of taking of lands in use. 8 H. 4, f. 15—1 Co. 123, *& the references to the aforegoing statutes.*

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23 HENRY VIII. CAP. X. A.D. 1531.‡

An act for feoffments and assurances of lands and tenements made to the use of any parish church, chapel, or such like.

WHERE, by reason of feoffments, fines, recoveries, and other estates, and assurances, made of trusts, of manors, lands, tenements, and hereditaments, to the use of parish churches, chapels, church-wardens, guilds, fraternities, comminalities, companies or brotherhoods erected and made of devotion, or by common assent of the people, without any corporation, and also by reason of feoffments, fines, recoveries, wills, and other acts made to any uses aforesaid or to the uses and intents to have obities perpetual, or a continual service of a priest for ever, or for three score or four score years, founden of the issues and profits of the manors, lands, tenements and hereditaments, whereof such feoffments, fines, recoveries, wills, and other acts been made, or that the feoffees, consees, recoverees, or other persons, and their heirs thereof seised, shall take, levy, receive, and perceive, or cause or suffer to be taken, levied, and perceived, the issues, revenues, and profits, thereof and the same to dispose, pay, convert, or otherwise employ or suffer, or cause to be disposed, paid, converted or imployed to any such uses, intents or purposes, as been above specified, or to any other like uses and intents; there groweth and issueth to the king our sovereign lord, and to other lords and subjects of the realm, the same like losses and inconveniences, and is as much prejudicial to them, as doth, and is, in case where lands be alienated into mortmain:

II. Be it therefore enacted by the king our sovereign lord, the lords spiritual and temporal, and the commons, in this present parliament, assembled, and by authority of the same, That all and

‡ ‡ ‡ "There are several statutes called statutes of *mortmain* one of which ("the statute *de religiosis*") was passed in the seventh year of Ed. I. st. 2—Another in the 13th year of Ed 1, c. 32—Another in the fifteenth year of Rich. 2. chap. 5—And another in the 23d year of Henry VIII. c. 10. These statutes are in part inapplicable to this country, and in part applicable and in force—They are so far in force, that all conveyances, either by deed or will, of lands, tenements, or hereditaments, made to a body corporate, or for the use of a body corporate, are void unless sanctioned by charter or act of assembly.—So also are all such conveyances void, made either to an individual, or to any number of persons associated, but not incorporated, if the said conveyances are of a *superstitious* nature, and not calculated to promote objects of charity or utility." *Rep. of the Judges.*

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every such uses, intents, and purposes, of what name, nature, or quality they shall be called, that shall be devised, covenanted, made, declared, or in any wise ordained, after the first day of *March*, in the three and twentieth year of the reign of our sovereign lord, king HENRY the eighth, by any feoffee, recoverer or conisee, or by any other person or persons, to whose use any such feoffee, recoveree or conisee shall be seised, of any manors, lands, tenements, or hereditaments, or of the issues, revenues and profits of them, or any of them shall be utterly void, and of no strength, virtue nor effect in the law.

III. Provided always, That it shall be lawful to every person, being seised of any manors, lands, tenements, or hereditaments, to his or her own proper use, or having feoffees, recoverees or consees, to his use, to make, ordain, or devise, or cause to be made, ordained, or devised, any of the uses intents, or purposes, above specified, in such manner as they might have done before the making of this act, and as if this act had never been had or made; (2) so that no such uses, intents, or purposes to be so made, ordained or devised after the first day of *March*, be not in any wise made, ordained, devised or appointed, to endure, continue or abide by any craft, colour, terms, sentences, clauses, words or other means, above the term of twenty years next after the first making and beginning of any such uses, intents or purposes.

IV. And it is further enacted, That if any person or persons, in defraud of this statute, bind or ordain any their heirs or successors, or any other person or persons, that they shall suffer any such uses, intents and purposes, to endure and continue contrary to this act, upon pains or penalties of losses of any other lands, tenements or hereditaments, or of any other thing or things; or do attempt or devise by any colour, craft or means, any thing or things, to make any such uses, intents or purposes to be declared, contrary to the true meaning of this act, to continue or abide for any longer time or season than is above limited for the same; that then every such pain, penalty, craft, colour and every other thing and things, of what kind, nature or quality soever it be that shall be so made, ordained or devised in defraud of this act, shall be utterly void in the law to all intents; and that this statute shall be always interpreted and expounded as beneficially may be, to the destruction and utter avoiding of such uses, intents and purposes therein

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above remembered, and of all other like uses and intents, otherwise than only after manner as is afore by this present act provided.

Feoffments and assurances of lands, tenements, &c. to churches, commonalities, &c. prejudicial to the king and his subjects. 9 *H.* 3, *stat.* 1, *c.* 36—7 *Ed.* 1, *stat.* 2—13 *Ed.* 1, *stat. c.* 32—18 *Ed.* 1, *st.* 1, *c.* 3—18 *Ed.* 3, *st.* 3, *c.* 3—15 *R.* 2, *c.* 5. Assurances of lands to churches, chapels, &c. shall be void. Cro. El. 288.—11 Co. 71. *See the references to the foregoing statutes.*

By the xxxvi chapter of *Magna Charta* it is provided, that "No land shall be given in *mortmain*." This is considered the foundation of all the statutes of mortmain;[1] and it is interpreted to extend as well to lands given to a religious house to hold to their own use, as to those which were given back to the donor to hold of the same house:[2] Though the words appear to apply to the latter case, whence the grievance probably most frequently arose; not indeed as respected the community at large, but to the feudal lords.

Lands were frequently given to monasteries, and other religious incorporations *pro salutæ animæ*, by those who were induced to believe that the donations of their temporal possessions would secure everlasting happiness in another world. The donations were very prejudicial to the feudal lords; inasmuch as thereby the lands remained in an unchangeable perpetuity without descent to an heir; and therefore never produced the casualties of wardship, relief, &c. It was in consequence common before this statute, to guard against the inconveniences, by a clause inserted in the deed of feoffment to this effect, *quod licitum sit donatori rem datam dare, vel vendere, cui voluerit exceptis* VIRIS RELIGIOSIS *et judæis.* This statute was designed to guard against the grievances, but ecclesiastical persons who sir *Edward Coke* tells us "in this were to be commended that they had ever the best learned men in the law, that they could get of their council, found many ways to creep out of this statute, viz. religious men, as abbots," &c.[3]

To defeat the various devices, by which ingenious men, from time to time, evaded the designs of the legislature, a number of statutes were successively passed on this subject.

The statute 7 *Edw.* 1, *c.* 2, intended to provide against the devices by which the law on this subject had been evaded.

To elude the provisions of this statute they obtained land, by pretending title to it; and under such pretended title sued out a *præcipe quod reddat*, against the tenant, and he by consent and collusion made default, and a recovery was had, and thereupon judgment—*Et sic fieret fraus statuto* says Sir Edw. Coke.

1. 2 Inst. 74, 5.
2. Woods Inst. 200—1 Reeve E. L. 244.
3. 2 Inst. 75.

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To prevent these practices the statute 32 *West.* 2, [13 Ed. 1, c. 32] was enacted. In the exposition of which statute, it is observed, the judges went as far beyond the *letter*, as their exposition of 7 *Ed.* 1, seems to have fallen short of the meaning and intent of the law.[4]

Now they could neither get land by purchase, gift, lease or recovery: nevertheless the resources of ecclesiastical ingenuity were not defeated,

"*Effugiet tamen hæc sceleratus vincula Proteus.*"

They found out an evasion of these statutes, by causing the land to be conveyed to divers persons and their heirs, to the use of the bodies corporate and their successors, by reason whereof they took the *profits*. This device served them effectually for some time; for the clergy, generally sitting in chancery, were uses even solely cognizable, obliged the feoffee to execute the use according to the trust and confidence reposed in him.

But this mischief was guarded against by 15 *Rich.* 2, c. 5, and 23 *Hen. VIII. cap.* 10.[5]

One of their contrivances was to consecrate land, as for a burying-ground, and under that pretence they purchased considerable property in mortmain. As this was a sort of device which appeared to be within the terms *arte vel ingenio*, of the statute of mortmain, the statute 15 *Rich.* 2, c. 5, declared it to be so; as also the purchase of lands to the use of religious persons. By this act the statute of mortmain was also extended to lands, tenements, fees, advowsons, and other possessions purchased to the use of *guilds* and fraternities. Further, inasmuch as mayors, bailiffs, and the commonalities of cities, boroughs and other towns, which have a perpetual commonality; and others that have offices perpetual, were as perpetual as religious institutions; any purchases made by them or to their use were declared to be within the statutes of mortmain. "Thus was the jealousy excited by the wealth of the clergy, felt in relation to lay corporations, which were therefore subjected to the same restraints, in making purchases of lands and tenements."[6]

Another device practised by ecclesiastics was, to get their villains to marry free women, who had inheritances, so that the land might come to their hands, by the right which the lord had over the property of his villains.[7]

4. 2 Inst. 75.
5. 1 Bac. Abr. 363—2 Inst. 75.

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NISI PRIUS.

* 12 EDWARD II. STAT. I. CAP IV. A.D. 1318.(o

Justices of nisi prius *shall record nonsuits, defaults, &c.*

And the justices or justice shall have power to record nonsuits and defaults in the country, at the days and places assigned, as afore is said. (2) And that which they shall have done in the things above mentioned, shall be reported in the bench at a day certain, there to be inrolled, and thereupon judgment shall be given. (6) And if it happen, that the justice or justices that shall be assigned to take such inquests in the country, do not come, or if they come into the country at the day assigned, yet the parties and persons of such inquests shall keep their day in the bench.

Dyer 163.

Though the statute of *Westminster* the second, cap. 30,[1] authorised justices of *nisi prius* to take *verdicts* and *inquisitions*, yet they could not record *nonsuits* of the demandant or plaintiff, or defaults of the tenant, or defendant. This power was given by the statute of *York* in the text.[2]

A nonsuit can only be at the instance of the defendant: Therefore, where a cause at *nisi prius* was called on, and the jury sworn, but no counsel, attornies parties, or witnesses appeared on either side, the judge held that the only way was to discharge the jury; for no one had a right to demand the plaintiff, but the defendant, and the defendant not demanding him, the judge *could not order him to be called.*[3]

* 2 EDWARD III. CAP. XVI. A.D. 1328.

Nisi prius *may be granted as well at the tenants suit as the demandants.*

Item, Whereas in a statute made at *York* in the time of the father of our lord the king that now is, it is contained that inquests

o) "Only those parts of this statute are in force, which are distinguished by the numbers 1, 2 and 6." *Rep. of the Judges.*

1. See the statute *ante* tit. *Jury*, p.
2. 2 Inst. 424.
3. 1 Stra. 267—2 Stra. 1117—2 Tidd's Pr. 796.

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and juries, which be and shall be hereafter taken requiring no great examination, shall be taken before one justice of the place where the plea is, adjoining to him one discreet man of the country, knight or other, so that a certain day be given in the bench, and a certain day and place in the country, in the presence of the parties, if the demandant pray the same. (2) And also the inquests and juries in plea of land which require great examination, shall be taken in the country in the said form before two justices of the bench. (3) It is accorded and enacted, That all such inquests which are or in time to come shall be taken, in plea of land, shall be taken as well at the request of the tenant as the demandant; (4) all other process according to the said statute in such case saved and kept.

Before what persons nisi prius may be granted, see 14 *Ed.* 3, *stat.* 1, *cap.* 16.—*For further regulations concerning nisi prius, see* 14 *H.* 6, *c.* 1—35 *H.* 8, *c.* 6—18 *El. c.* 12—12 *Geo.* 1, *c.* 31, *and* 24 *Geo.* 2, *c.* 18.

It is in general true, that the defendant is not entitled to a writ of *nisi prius*, unless the plaintiff has made default in proceeding to trial. But in every action wherein the defendant is an *actor* equally with the plaintiff, as in *replevin* or *quare impedit*, the defendant may sue out a writ of *nisi prius* although plaintiff has not made default in proceeding to trial.[4]

The defendant is never allowed, in a criminal case, to carry down the record to trial by *proviso*.[5]

The trial by *proviso* has almost fallen into disuse in England since the statute 14 *Geo.* 2, *c.* 17.

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* 14 EDWARD III. STAT. I. CAP. XVI. A.D. 1340.(p)

Before what persons nisi prius may be granted.

(12) And whereas it hath been another time established, that the justices before whom the *nisi prius* hath been granted in pleas of assises, should have power to give the judgments in the country upon the verdicts of assise, and of inquests, and upon nonsuits

4. Bro. Nisi Pr. pl. 40—5 Bac. Abr. 234—2 Tidd's Pr. 700—1 Crom. Pr. 214.

5. 2 Tidd's Pr. 700.

p) "That part only of this statute is in force, which enacts that 'the justices of *Nisi prius* shall have power to give judgments on verdicts of assise, and upon nonsuits and defaults and return the same to the court in bank.'" *Report of the Judges.*

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and defaults; (13) it is assented, That the justices of the one bench and of the other, the chief baron of the exchequer and the justices assigned, before whom the *nisi prius* is granted by this statute, shall have power to give judgments in the country and return the same according as it is contained in the statute of *York* thereupon made.

See 14 *H.* 6, *c.* 1—33 *H* 8, *c.* 6—18 *El. c.* 12—12 *Geo.* 1, *c.* 31—24 *Geo.* 2, *c.* 18, *sect.* 5, *containing various regulations concerning trials at nisi prius.*

PERJURY.

* 5 ELIZABETH, CAP. IX. A.D. 1562. (a)

An act for punishment of such as shall procure or commit any wilful perjury.

WHERE in the parliament holden at *Westminster* in the two and thirtieth year of the reign of the late king of famous memory, king *Henry* the eighth, amongst other things, it was ordained, enacted and established, That no person or persons of what estate, degree or condition soever he or they were, should from henceforth unlawfully suborn any witness or witnesses, by letters, rewards, promises, or by any other sinister labour or means, for to maintain any matter or cause, or to the disturbance or hindrance of justice, or to the procurement or occasion of any manner of perjury, by false verdict or otherwise, in any of the king's courts of chancery, the star-chamber, the *Whitehall*, or elsewhere within any of the king's dominions of *England* or *Wales* or the marches of the same, where any person or persons, have or from henceforth should have authority by virtue of the king's commission, patent or writ, to hold plea of land, or to examine, hear and determine any title of lands, or any matter of witnesses concerning the title, right, or interest of any lands, tenements or hereditaments, upon pain of forfeiture for every such offence, ten pound, the one moi-

(a) "This statute is in force, except the 10th, 11th, 12th, and 13th sections, which are inapplicable to this commonwealth, and except the punishment by imprisonment and paying of money, which is altered by our act of assembly for reforming the penal laws." *Report of the Judges.*

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ety thereof to be to the king, and the other to the party that would sue for the same, as by the same estatute, amongst divers other things, more plainly it doth appear.

II. Sithence the making whereof, for that the said penalty is so small towards the offenders in that behalf, the said offence of subornation, and sinister procurement of false witnesses, hath nevertheless greatly increased and augmented, (2) and by reason of the wilful perjury committed by the same suborned witnesses, divers and sundry of the queen's majesty's subjects have sustained disherison and great impoverishment, as well of their lands and tenements as also of their goods and chattels:

III. Be it therefore enacted by our sovereign lady the queen, by the assent of the lords spiritual and temporal, and the commons in this present parliament assembled, and by the authority of the same, That all and every such person and persons, which at any time after the tenth day of *April* next coming shall unlawfully and corruptly procure any witness or witnesses by letters, rewards, promises, or by any other sinister and unlawful labour or means whatsoever, to commit any wilful and corrupt perjury, (2) in any matter or cause whatsoever, now depending, or which hereafter shall depend in suit and variance, by any writ, action, bill, complaint or information, (3) in any wise touching or concerning any lands, tenements or hereditaments, or any goods, chattels, debts or damages, (4) in any of the courts before mentioned, or in any of the queen's majesty's courts of record, or in any leet, view of frank pledge or law-day, antient demean court, hundred court, court baron, or in the court or courts of the stannery in the counties of *Devon* and *Cornwall*; (5) or shall likewise unlawfully and corruptly procure or suborn any witness or witnesses, which shall from and after the said tenth day of *April* be sworn to testify *in perpetuam rei memoriam*; (6) that then every such offender or offenders shall for his, her, or their said offence, being thereof lawfully convicted or attainted, lose and forfeit the sum of forty pounds.

IV. And if it happen any such offender or offenders, so being convicted or attainted as aforesaid, not to have any goods or chattels, lands or tenements, to the value of forty pounds, that then every such person so being convicted or attainted of any the offences aforesaid, shall for his, her or their said offence suffer im-

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prisonment by the space of one half year, without bail or mainprise, and to stand upon the pillory the space of one whole hour, in some market-town, next adjoining to the place where the offence was committed, in open market there, or in the market-town itself where the offence was committed.

V. And that no person or persons being so convicted or attainted, to be from thenceforth received as a witness to be deposed and sworn in any court of record within any of the queen's highness dominions of *England*, *Wales* or the marches of the same, until such time as the judgment given against the said person or persons shall be reversed by attaint or otherwise; (2) and that upon every such reversal, the parties grieved, to recover his or their damages against all and every such person and persons as did procure the said judgment so reversed to be first given against them or any of them, by action or actions to be sued upon his or their case or cases, according to the course of the common laws of this realm.

VI. And be it further enacted by the authority aforesaid, That if any person or persons after the said tenth day of *April* next coming, either by the subornation, unlawful procurement, sinister persuasion, or means of any others, or by their own act, consent or agreement, wilfully and corruptly commit any manner of wilful perjury, by his or their deposition in any of the courts before mentioned, or being examined *ad perpetuam rei memoriam*, that then every person or persons so offending, and being thereof duly convict or attainted by the laws of this realm, shall for his or their said offence lose and forfeit twenty pounds, and to have imprisonment by the space of six months without bail or mainprise; (2) and the oath of such person or persons so offending from thenceforth not to be received in any court of record within this realm of *England* or *Wales* or the marches of the same, until such time as the judgment given against the said person or persons shall be reversed by attaint or otherwise: (3) and that upon every such reversal the parties grieved to recover his or their damages against all and every such person and persons as did procure the said judgment so reversed to be given against them or any of them, by action or actions to be sued upon his or their case or cases, according to the course of the common laws of this realm.

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VII. And if it happen the said offender or offenders so offending not to have any goods or chattels to the value of twenty pounds; that then he or they to be set on the pillory in some market-place within the shire, city or borough where the said offence shall be committed, by the sheriff or his ministers, if it shall fortune to be without any city or town corporate; (2) and if it happen to be within any such city or town corporate, then by the said head officer or officers of such city or town corporate, or by his or their said ministers, and there to have both his ears nailed, and from thenceforth to be discredited and disabled for ever to be sworn in any of the courts of record aforesaid, until such time as the judgment shall be reversed, and thereupon to recover his damages in manner and form before mentioned.

VIII. The one moiety of all which sums of money, goods and chattels, to be forfeited in manner and form aforesaid, to be to the queen our sovereign lady, her heirs and successors, and the other moiety to such person or persons as shall be grieved, hindered or molested by reason of any the offence or offences before mentioned, that will sue for the same by action of debt, bill, plaint, information or otherwise, in any of the queen's majesty's courts of record, in the which no wager of law, essoin, protection or injunction to be allowed.

IX. And be it also enacted by the authority aforesaid, That as well the judge and judges of every such of the said courts where any such suit is or shall be, and whereupon any such perjury is or shall happen to be committed, as also the justices of assise and goal delivery in their several circuits and the justices of the peace in every county within this realm or in *Wales*, at their quarter sessions, both within the liberties and without, shall have full power and authority by virtue hereof to enquire of all and every the defaults and offences perpetrated, committed or done contrary to this act, by inquisition, presentment, bill or information before them exhibited or otherwise lawfully to hear and determine the same, and thereupon to give judgment, award process and execution of the same, according to the course of the laws of this realm.—— 5 Coke. 99, made perpetual by 29 El. c. 5, and 21 Jac. 1, c. 28, sect. 8.

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What punishment shall be inflicted upon persons who commit wilful perjury,—1 Roll. 79—2 Roll. 195, 244, 429—11 Co. 101—Latch. 38—Vaugh. 152—*Cro. Car.* 352. A rehersal of the statute of 32 H. 8, c. 9, made against the subornation of witnesses. Hetley 12—Godbolt 71, pl. 86—Savil. 43—Mod. Cases in law 179—1 *Hawk. P. C.* c. 69—2 *Hale's P. C.* 191—3 Bulst. 147—2 Leon. 198—3 Leon. 201. The penalty for procuring of wilful perjury, Co. pla. 367—Rast. pla. 481—Goldsb. 191, pl. 140. The penalty enlarged by 2 G. 2, c. 25—2 Leon. 12. The penalty of him that doth commit wilful perjury, Coke. pla. 164, 165—Cro. El. 201, 434—Cro. Car. 99—5 Coke. 99. Who shall have authority to hear and determine the offences aforesaid, Cro. El. 105, 147, 148, 267, 428—Cro. Jac. 120, 133.

Perjury by the common law[1] is defined, "*A wilful false oath, by one who being lawfully required to depose the truth, in some judicial proceeding, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not.*"[2]

To constitute the offence the oath must be *wilful*, i. e. it must be taken with some degree of deliberation; for if it occurred through the weakness of the party, by surprise, inadvertency, or a mistake of the true state of the question, it will not amount to perjury. As to the kind of proceedings wherein this offence may be committed: Perjury may be committed before those who are in anywise intrusted with the administration of justice, in relation to any matter before them in controversy. So perjury may be committed before persons authorised by a court to examine a matter, the knowledge whereof is necessary, for the right determination of a cause; of consequence, in ascertaining the damages, either upon a writ of inquiry, or otherwise.[3] Any false oath is punishable as perjury, which tends to mislead the court, in any of their proceedings relating to a matter judicially before them, though it no way affect the principal judgment, which is to be given in the cause.[4]

The notion of perjury is confined to such public oaths only, as affirm or deny some matter of fact, contrary to the knowledge of the party; and therefore it doth not extend to any *promissory* oath whatsoever. *Thirdly*, The oath must be lawfully adminis-

1. A doubt seems to be suggested, from very high authority, whether *perjury* was punishable by the common law, as it was understood in ancient times. We meet with no prosecution for the offence, unless the attaint of a jury be considered as such. Yet the crime appears to have been much more frequently committed in the thirteenth century, than in modern times. The ancient form of the oath was "*So help me God and the saints.*" "I do not find," says Mr. Barrington, "that the witness was sworn upon the *Evangelists*, which perhaps might contribute to irreverance in the observation of it."—*Obs. on the stat.* 130. The frequency of the crime in those days, however, may be ascribed rather to the impunity of those who were guilty of it, and the uncultivated manners of the age, than to any particular form of administering the oath.—At the time of passing the statute 27 *Edw.* 3, it seems that perjury of jurors prevailed in an alarming degree. Convictions by attaint had become less frequent, and jurors seeing witnesses, with impunity, sport with their oaths, were encouraged to take like liberties themselves. If we may judge of the prevalence of a particular crime from the frequency of prosecutions for it, the conclusion would be, that perjury is not very common at the present day.

2. 3 Bac. Abr. 814—1 Hawk. P. C. 318.

3. 1 Hawk. P. C. 319, 320—Cro. El. 168—Hob. 62—1 Roll. Abr. 39.

4. Cro. Car. 146—1 Hawk. P. C. 320.

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tered, *i. e.* by some one legally authorised to administer it.[5] *Fourthly*, in relation to the kind of oaths; It seemeth clear, that a man may be in danger of being guilty of perjury, not only in respect to a false oath, taken by him as a witness for another, but in respect to a false oath taken in his own cause. *Fifthly*, In respect to the *matter* of the oath being false. It is not material whether the fact sworn be *in itself* true or false. One who swears that he *knows* a thing to be true, of which at the same time he knows nothing, is equally guilty of perjury, whether the thing sworn may happen to prove true or false.[6] As to the *sixth* particular, *viz.* How far the oath must be *absolute*. It is not necessary that the knowledge of the fact should be asserted positively; one who swears that he *believes* a fact to be *true*, which he *knows* to be *false*, is as guilty of perjury, as if he had asserted his knowledge of the fact positively.[7] *Seventhly*, How far the thing sworn ought to be *material*, to the point in question. If the oath be wholly foreign from the purpose, and altogether immaterial, and no way pertinent to the matter in question, not tending to aggravate or extenuate the damages, nor calculated to induce the jury to give a readier credit to the substantial part of the evidence, it cannot amount to perjury.[8] But if the immaterial circumstance alledged tend to corroborate evidence concerning what is material, the attesting it is no less criminal, than a false oath touching a material circumstance.[9] *Eighthly*, As to the consideration how far the false oath must be credited. It is not material whether the false oath were at all credited, or whether any one were thereby prejudiced, for this is not a prosecution grounded on the damages of the *party*, but on the abuse of *public justice*.[10]

Two witnesses at the least are required to convict a man of perjury.[11] A party prejudiced by the perjury is not admissable as a witness, to prove it.[12]

Subornation of perjury consists in procuring a man to take a false oath amounting to perjury, who actually takes such oath.[13]

The punishment of perjury by the common law, was fine and imprisonment, to which pillory[14] was sometimes superadded.

The 5 *Eliz. cap.* 9 in the text, not only authorises a prosecution under it by *indictment*,[15] but also gives an *action* to the party *grieved*.

5. 1 Hawk. P. C. 321, § 4—3 Inst. 165.
6. ib. 322, § 6. ib. 166.
7. ib. *index* tit. *Perjury*, pl. 16.
8. ib. 323, § 8.
9. ib. 2 Roll. 368—Palm. 382—1 Sid. 274.
10. 1 Hawk. P. C. 325.
11. O. B. 1786, p. 812—10 Mod. 195.
12. Ld. Ray. 396—1 Hawk. P. C. 325.
13. 1 Hawk. P. C. 325.
14. The *collistrigium* improperly translated *pillory*, as well the *trebuchetum*, or ducking stool were designed *magis ad lubibrium et infamiam quam ad pœnam*, rather to expose the offender to public odium and ridicule than to inflict any corporal pain. For this purpose the ancient *collistrigium* or stretch-neck seems to have been much better calculated than the modern pillory; it being so contrived that the criminal was thereby suspended in the air, in the same manner that children are sometimes put into swings, in order to stretch their necks, and make them grow. Obs. on the stat. 163.
15. In the case of the *king v Thorogood*. Trin. 9 Geo. 1. The defendant made an affidavit in the common plea

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In the construction of this statute it has been holden, That every indictment or action grounded on it, must pursue the exact words of it.[16] That one cannot be guilty of perjury within the statute, in any case where he cannot be guilty of *subornation* of perjury within it; which latter crime seems to have been considered the greater by the makers of the act.[17]

It hath been collected from the clause, which gives an *action* to the party grieved, that no false oath is within the statute, which doth not give some person a just cause of complaint; and therefore if the thing sworn be *true*, though it be not known to him who swears it to be so, the oath is not within the statute. Neither can any oath be within the statute, unless the party against whom it was sworn suffer some disadvantage by it; therefore you must set forth the record, wherein the perjury is supposed to have been committed; and must prove it at the trial, either by actually producing it, or an attested copy. Also in the pleadings you must not only set forth the point wherein the false oath was taken, but must also shew how it conduced to the proof, or disproof of the matter in question.[18]

Prosecutions upon this statute, are very seldom brought; being more difficult than by indictment at common law, especially at the sessions; and at common law the sessions have no jurisdiction over the offence.[19] The safest and most usual mode, therefore, is by indictment at the assises, or in the king's bench.[20]

PLEAS AND PLEADINGS.

* 25 EDWARD III. STAT. V. CAP. XVI. A.D. 1350.

The exception of nontenure of parcel shall not abate the whole writ.

ITEM, it is accorded, That by the exception of nontenure of parcel no writ shall be abated, but for quantity of the nontenure which is alledged.

36 H. 6, f. 15—Bro. Nonten. 33, 40, 50—Rast. 440

and confessed it was false; the court recorded his confession and sentenced him to the pillory. It was objected that this court has no jurisdiction, and that he ought to be brought before the court by indictment; but those objections were overruled because any court may punish such an offence committed in *facie curiæ* under this act of 5 El. c. 9—8 Mod. 179—1 Hawk. 335.

16. Cro. El. 104, 147—Hill. 12—3 Bac. Abr. 817.

17. 5 Co. 99—3 Inst. 64—Cro. El. 148—3 Bac. Abr. 817.

18. 1 Hawk. P. C. 331—3 Bac. Abr. 817.

19. 1 Hawk. P. C. 327, (*n*)—2 Hawk. P. C. cap. 8, § 38—Stra. 1088.

20. 3 Burr. 294.

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NONTENURE[1] is a plea in *abatement*, by which the tenant shews that he is not tenant of the freehold, or of some parcel thereof, at the time of the writ brought, or at any time since.[2]

It may be pleaded generally, or specially *Special nontenure* is where the tenant shews what interest he hath in the land demanded; as that he is tenant by *statute-merchant, elegit*, &c. and therefore the plea of special nontenure must always shew who is tenant.[3]

At common law, nontenure of parcel of an entire thing, as a *manor*, &c. abated the whole writ; but the statute of 25 Edw. III. cap. 16, remedied this inconvenience.[4]

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* 1 HENRY V. CAP. V. A.D. 1413.

In which original writs additions of the defendants names shall be put.

ITEM, it is ordained and established, That in every original writ of actions personals, appeals, and indictments, and in which the exigent shall be awarded, in the names of the defendants in such writs original, appeals, and indictments, additions shall be made of their estate or degree, or mystery, and of the towns, or hamlets, or places and counties, of the which they were, or be, or in which they be or were conversant; (2) and if by process upon the said original writs, appeals or indictments, in the which the said addition be omitted, and utlagaries be pronounced, that they be void, frustrate and holden for none; (3) and that before the utlagaries pronounced, the said writs and indictments shall be abated by the exception of the party where in the same the said additions be omitted. (4) Provided always, That though the said writs of additions personals be not according to the records and deeds, by the surplusage of the additions aforesaid, that for that cause they be not abated; (5) and that the clerks of the chancery, under whose names such writs shall go forth written, shall not leave out, or make omission, of the said additions as is afore said, upon pain to be punished, and to make a fine to the king, by the

1. This plea is founded on the rule laid down by *Bracton l. 3, c. 27. Admittere non potest quod non habet et ita cadit breve.*

2. 2 Bac. Abr. tit. PENNENDON, p. 591
3. ib. ib.
4. ib. ib.

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discretion of the chancellor. (6) And this ordinance shall begin to hold place at the suit of the party from the feast of *St. Michael* next ensuing forward.

4 Ed. 4, f. 10—6 Co. 67—Cro. El. 198—Cro. Jac. 610—Dyer 46—Bro. Addit. 4, 5, 7, 8, 9, 10, 11, 14, 15, 19—Fitz. Brief. 30. 36, 40, 47, 49, 51, 61, 67, 72, 75. 109, 122, 124, 125, 129. 151, 163, 169, 201, 236, 940—2 Leon: 183, 200—3 H. 6, 30, b pl. 17—2 Roll. 225—3 Mod. 139—1 Shower 16—Hob. 129. Surplussage of additions shall not prejudice, Mod. Cases in law 52. *See* 8 *H.* 6, c. 12—5 *El.* c. 23, *where count of additions is not amendable.*

In actions by original writs, the omission or mistake of the defendant's addition, that is of his estate, degree, mystery, or place of abode, may be pleaded in abatement of the writ. But the defendant may be sued either by the addition of his *degree*, or of his mystery or trade; and he may be named by the place where he *lately* dwelt.[5]

* 27 ELIZABETH, CAP. V. A.D. 1585.

An act for furtherance of justice, in case of demurrer and pleadings.

FORASMUCH as excessive charges and expenses, and great delay and hindrance of justice hath grown in actions and suits between the subjects of this realm by reason that upon some small mistaking or want of form in pleading, judgments are often reversed by writs of error, and oftentimes upon demurrers in law given otherwise than the matter in law and very right of the cause doth require, whereby the parties are constrained either utterly to lose their right, or else after long time and great trouble and expenses, to renew again their suits: (2) For remedy whereof, Be it enacted by the queen's most excellent majesty, the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, That from henceforth, after demurrer joined and entered in any action or suit in any court of record within this realm, the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any

5. 2 Stra. 904—1 Tidd's Pr. 582.

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imperfection, defect or want of form in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding whatsoever, except those only which the party demurring shall specially and particularly set down, and express together with his demurrer; (3) and that no judgment to be given shall be reversed by any writ of error, for any such imperfection, defect or want of form as is aforesaid, except such only as is before excepted.

II. And be it further enacted, That after demurrers joined and entered, the court where the same shall be, shall and may by virtue of this act from time to time amend all and every such imperfections, defects and wants of form as is before mentioned, other than those only which the party demurring shall specially and particularly express and set down together with his demurrer as is aforesaid.

III. Provided always, and be it further enacted by the authority aforesaid, That this act or any thing therein contained, shall not extend to any writ, declaration or suit of appeal of felony or murder, (2) nor to any indictment or presentment of felony, murder, treason or other matter, nor to any process upon any of them, (3) nor to any writ, bill, action or information upon any popular or penal statute; any thing aforesaid to the contrary notwithstanding. [This act extended to writs of mandamus, &c. by 9 Anne, cap. 20, § 7.]

Enforced by 4 Anne, cap. 16. After demurrer joined and entered, judgment shall be given, notwithstanding any defect in process or pleading. What defects in form shall be amended by the court, and what not. 1 Leon. 44, 80, 193, 238—1 Anders. 168, 172. The party demurring shall set down the causes. 1 Leon. 311—Hob 232—Hult. 15—Moor 885—1 Roll. 112—Golds. 35, pl. 10—Savil. 78, 87—Cro. El. 232, 233, 588—Hob. 232—10 Co. 88. The court may amend defects of form after demurrer joined. 8 H. 6, c. 12—1 Mod. 281. *Further provided for by* 5 *Geo.* 2, *c.* 13.

At the common law there were special demurrers, but being never necessary, except in cases of duplicity of pleading, they were seldom practised. But upon a general demurrer, the party might take advantage of all manner of defects, that of duplicity only excepted; and the pleadings being at the bar *viva voce*, and the exceptions taken *ore tenus*, the causes of demurrer were as well known upon a *general* demurrer as upon a *special* one.

But when the practice of pleading was altered, this public inconvenience occurred from the use of *general demurrers*, that the parties went on to argument, without knowing what they were to argue. To remedy which inconvenience, occasioned the statute 27 *Eliz.* c. 5 in the text, which requiring that the *causes* of de-

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murrer should be made known, was so far restorative of the common law; and as a general demurrer before did confess all matters formally pleaded, so by this statute, whenever the right sufficiently appeared to the court, it confessed all matters though pleaded informally.[6]

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* 17 CHARLES II. CAP. VIII. A.D. 1665.

An act for avoiding unnecessary suits and delays.

FOR the avoiding of unnecessary suits and delays, be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by authority of the same, That in all actions personal, real or mixt, the death of either party between the verdict and the judgment, shall not hereafter be alledged for error, so as such judgment be entered within two terms after such verdict.

II. And be it further enacted by the authority aforesaid, where any judgment after a verdict shall be had, by or in the name of any executor or administrator; in such case an administrator, *de bonis non*, may sue forth a *scire facias* and take execution upon such judgment.

III. This act to continue for the space of five years, and from thence to the end of the next session of parliament. [*Made perpetual by* 1 *Jac.* 2, c. 17, § 5.]

Death of either party between the verdict and judgment. 1 Lev 277, Salk. 8—2 Keb. 800—2 Vern. Ca. 220. Judgment obtained by an executor. Yelv. 133—1 Salk. 323.

By this statute, where either party dies between *verdict* and *judgment*, his death shall not be alledged for error, so that the judgment be entered within two terms after the verdict.

In the construction of the statute, it hath been held, that the death of either party, *before* the assises is not remedied; but if the party die *after* the assises begin, though *before the trial*, that is

6. 3 Salk. 122—Hob. 233—1 Tidd's Prac. 618.

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within the remedy of the statute; for it is a remedial act and shall be construed favorably: the assises being considered as but one day.[7]

By the statute 8 & 9 *Will.* 3, c. 11, further provision is made on this subject.[8]

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* 4 & 5 WILLIAM & MARY CAP. XXI. A.D. 1692.

An act for delivering declarations to prisoners.

WHEREAS, by the course of practice in the respective courts of record at *Westminster*, after the plaintiff or plaintiffs, in any writ issued out of any of the said courts, have been at great charge to arrest the defendant or defendants upon such writ, and the defendant or defendants, for want of sufficient bail, are often committed to goal, and unless the plaintiff or plaintiffs shall, before the end of two terms, next after such arrest cause such defendant or defendants, by writ of *habeas corpus*, to be removed, to be charged in the said respective courts with declarations of the cause of such action or actions, such prisoner or prisoners are upon a common bail or appearance by attorney discharged from their imprisonment, to the great prejudice of the plaintiffs; for remedy whereof,

II. Be it enacted by the king's and queen's most excellent majesties, by and with the advice and consent of the lords spiritual and temporal and the commons in this present parliament assembled, and by the authority of the same, That if now or at any time after the five and twentieth day of *March*, one thousand six hundred ninety and three, any defendant or defendants be taken or charged in custody at the suit of any person or persons, upon any writ or writs out of any of the said courts at *Westminster*, and imprisoned or detained in prison for want of sureties for their appearance to the same, the plaintiff or plaintiffs, in such writ or writs, shall and may by virtue of this act, before the end of the next term, after such writ or process shall be returnable, declare against such prisoner or prisoners, in the respective court or courts

7. 1 Salk. 8, 42—2 Ld. Ray. 415—7 Term. Rep. 81—1 Sid. 385—2 Tidd's Pr. 847.

8. See the statute and the commentary upon it, tit DAMAGES AND COSTS. *Ante* p. 139.

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out of which the writ or writs shall issue, whereupon the said prisoner or prisoners shall be taken and imprisoned or charged in custody, and shall or may cause a true copy thereof to be delivered to such prisoner or prisoners, or to the goaler or keeper of the prison, or goaler in whose custody such prisoner shall be or remain: To which declaration or declarations the said prisoner or prisoners shall appear and plead; and if such prisoner or prisoners shall not appear and plead to the same, the plaintiff or plaintiffs in such cases shall have judgment in such manner as if the prisoner or prisoners had appeared in the said respective courts, and refused to answer or plead to such declaration.

III. And be it further enacted by the authority aforesaid, That in all declarations against any prisoner or prisoners detained in prison by virtue of any writ or process issued or to be issued out of the court of *king's bench*, it shall be alledged, in custody of what sheriff, bailiff, or steward of any franchise, or other person having the return and execution of writs, such prisoner or prisoners shall be at the time of such declaration by virtue of the process of the said court at the suit of the plaintiffs: Which allegation shall be as good and effectual to all intents and purposes, as if such prisoner or prisoners were in the custody of the marshal of the *marshalsea* of our sovereign lord and lady, the king and queen.

14 El. c. 5—43 El. c. 2, § 14—22 and 24 Car. 2, c. 20—1 Salk. 98. In the king's bench declaration must be *in custodia* of such a sheriff &c. Carthew. 469. *Farther provisions concerning prisoners, &c.* 8 *and* 9 *W.* 3, c. 27—11 *and* 12 *W.* 3, c. 19—1 *Anne st.* 2, c. 6—5 *Anne c.* 9—9 *Geo.* 1, c. 28—11 *Geo.* 2, c. 20—16 *Geo.* 2, c. 3—27 *Geo.* 2, c. 3 *and* 17, *and* 32 *Geo.* 2, c. 28—11 *Geo.* 1, 22.

Before the making of the statute in the text, there could have been no declaration in B. R. against a defendant in custody of the sheriff or other officer, by whom he was arrested; but he must have been brought up by *habeas corpus cum causa*, and turned over to the custody of the marshal in order to charge him with a declaration. But the statue was passed to relieve plaintiffs from the trouble and expense of bringing prisoners up by *habeas corpus*.[9]

The mode of charging a defendant in the actual custody of the sheriff &c. for a bailable cause of action, is by making an affidavit thereof, and suing out process, which should be duly marked or indorsed for bail, and left at the sheriff's office. But if the cause of action be not bailable, the same plaintiff or a third person may pro-

9. 1 Wils. 190 1 Term. Rep. 192.

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ceed against the defendant as if he were at large, by serving him with a copy of the process.[10]

POPULAR ACTIONS.

* 4 HENRY VII. CAP. XX. A.D. 1487.

Actions popular, prosecuted by collusion, shall be no bar to those which be pursued with good faith.

ITEM, That where actions popular in divers cases have been ordained by many good acts and statutes afore this time made, for the reformation of extortions, maintenances, oppressions, injuries, exactions and wrongs used and committed within this realm; (2) which actions been very penal to all misdoers and offenders in such actions condemned, and much profitable as well to the king as to every of his subjects that them will sue and maintain, if the same actions so sued and commenced might be truly pursued without covin or collusion. 3) But now it is so commonly used within this realm, that if any such offenders offending in cases, where any of the said actions lie, then the said misdoers or offenders in eschewing to leese [lose] the said penalties, will cause an action popular to be commenced against them by covin of the plaintiff, upon that case wherein they have so offended; (4) or else if any such action popular be commenced against any such offender by good faith, then the same offender will delay the said action, either by non-appearance or by traverse, and hanging the same action, the same offender will cause like action popular to be brought against him by covin, for the same cause and offence that the first action was sued, and then by covin of the plaintiff in that second action he will be condemned, either by confession, feigned trial, or release; (5) which condemnation or release, so had by collusion and covin, pleaded by the said offender, shall bar the plain-

10. 1 Term. Rep. 192. The times and modes of proceeding, under this statute against prisoners are determined by a number of rules of court, to which the English authorities constantly refer. See in relation to this subject Carthew. 469—1 Salk. 98—3 Burr. 1418—4 Burr. 2060—6 Term. Rep. 547—1 Stra. 474—1 Bos. and Pul. 535. 1 Term. Rep. 192.—1 Tidds. Prac. 313.

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tiff in the action sued in good faith; (6) and by these subtile means of collusion and covin the said good acts and statutes seldom been executed against such offenders which causeth them to be bolder to offend the king, as well in breaking of the said statutes, laws and peace, as in robbing, murdering, exactions taking, quarrels maintaining, and the king's poor subjects by extortion and many other unlawful means oppressing: (7) Therefore the king our sovereign lord, in reforming of the premisses, by the advice and assent of the lords spiritual and temporal, and at the request of the said commons, in this said present parliament assembled, and by authority of the same, hath ordained, established, and enacted, That if any person or persons hereafter sue with good faith, any action popular, and the defendant or defendants in the same action plead any manner of recovery of action popular, in bar of the said action, or else that the same defendant or defendants plead, that he or they before that time barred any such plaintiff or plaintiffs in any such action popular, that then the plaintiff or plaintiffs in the action taken with good faith, may aver that the said recovery in the said action popular was had by covin, or else to aver that the said plaintiff or plaintiffs was or were barred in the said action popular by covin, that then if afterward the said collusion or covin so averred be lawfully found, the plaintiff or plaintiffs in that action sued with good faith, shall have recovery according to the nature of the action; and execution upon the same in like wise and effect, as though no such action afore had been had. (8) And moreover, that it is enacted and ordained by the authority aforesaid, That in every such action popular, wherein the defendant or defendants shall be lawfully condemned or attainted of covin or collusion, as is aforesaid, that every of the same defendants have imprisonment of two years by process of *capias* and outlagary to be sued within the year after such judgment had, or at any time after, till the said defendant or defendants shall be had and imprisoned, as is afore said, and that as well at the king's suit, as of every other that will sue in that behalf: (9) And that no release of any common person hereafter to be made to any such party whether before or after any action popular, or indictment of the same had or commenced, or made hanging the same action, be in any wise available or effectual to let or surcease the said action, indictment, process or execution. (10) Provided always, That no plain-

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tiff or plaintiffs be in any wise received to aver any covin in any action popular, where the point of the same action, or else the covin or collusion, have been once tried, or lawfully found with the plaintiff or plaintiffs, or against them, by trial of twelve men and not otherwise.

Actions *qui tam* are such as are given by statutes, which give a penalty, and create a forfeiture, for neglect of some duty, or the commission of some crime, to be recovered by action or information, at the suit of him who prosecutes in the name of the king (or of the commonwealth) as in his own.[1]

They are sometimes called *popular actions*, where the penalty or a part of it is given to *any one who will sue for the same.*

Wherever a statute prohibits a thing, as being an immediate offence against the public good in general, under a certain penalty, and the penalty or any part of it is given to him who will sue for it, any person may bring such action or information.[2]

Where a statute prohibits or commands a thing, the doing or omission whereof is a damage to the party, and also highly concerns the peace, safety, or good government of the public, the party may bring his action on such statute; which as some say *may*, and according to others *ought* to be laid, *tam pro domino rege quam pro seipso.*

If a recovery in a former suit be pleaded in bar of any popular action, the plaintiff may, by the express words of the statute in the text, aver that the recovery was by covin, without shewing wherein the covin consisted. But otherwise such general pleading would be vicious.[3]

But the plea must state that the plaintiff in the other action had priority of suit, or on demurrer it will be bad.[4]

The record of the former recovery cannot be given in evidence upon NIL DEBET, it must be pleaded specially; and then the plaintiff may reply NUL TIEL RECORD, or that it was a recovery by fraud, to defeat a real prosecutor; which the plaintiff could not be prepared to shew upon the general issue.[5]

An informer on a popular statute shall in no case whatsoever have *costs*, unless they be specially given him by such statute, for costs were not recoverable at the common law, and the statute of *Gloscester* gives the defendant costs, only in cases where he shall recover his damages, which supposes some damages to have been done to the defendant, or plaintiff in particular. But where the penalty is given to the *party grieved*, he shall recover his damages and costs also.[6]

1. 1 Bac. Abr. 37.
2. ib. Plowd. 36, 346—2 Hawk. P. C. 377.
3. 2 Hawk. P. C. 393, § 65—Plowd. 49, 50.
4. *Jackson v Gisling.* Trin. 15 Geo. 2—2 Stra. 1169—2 Levintz. 141—3 Burr. 1433—Black. 437.
5. Bredin *qui tam v Harman*—Stra. 709.
6. 2 Inst. 238—2 Hawk. P. C. 389.

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PROMISSORY NOTES.

3 & 4 ANNE, CAP. IX. A.D. 1704.(R

An act for giving like remedy upon promissory notes, as is now used upon bills of exchange, and for the better payment of inland bills of exchange.

WHEREAS it hath been held, That notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum of money therein mentioned, are not assignable or indorsable over, within the custom of merchants to any other person; and that such person to whom the sum of money mentioned in such note is payable, cannot maintain an action, by the custom of merchants, against the person who first made and signed the same; and that any person to whom such note should be assigned, indorsed, or made payable could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same. Therefore, to the intent to encourage trade and commerce, which will be much advanced, if such notes shall have the same effect as inland bills of exchange, and shall be negociated in like manner; Be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That all notes in writing, that after the first day of *May*, in the year of our lord one thousand seven hundred and five, shall be made and signed by any person or persons, body politick or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant or trader, who is usually intrusted by him, her, or them, to sign such promissory notes for him, her, or them, whereby such person or persons, body politick or corporate, his, her, or their servant or agent as aforesaid, doth or shall promise to pay to any other person or persons, body politick and corporate, his, her, or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any

R) "The 1st, 3d, 4th, and 8th sections of this statute are in force." *Report of the Judges.*

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such person or persons, body politick and corporate, to whom the same is made payable; and also every such note payable to any person or persons, bodies politick and corporate, his, her, or their order, shall be assignable or indorsable over, in the same manner, as inland bills of exchange are or may be, according to the custom of merchants; and that the person or persons, body politick and corporate to whom such sum of money is or shall be by such note made payable, shall and may maintain an action for the same, in such manner as he, she, or they might do, upon any inland bill of exchange, made or drawn, according to the custom of merchants, against the person or persons, body politick and corporate, who or whose servant or agent as aforesaid, signed the same; and that any person or persons, body politick and corporate, to whom such note that is payable to any person or persons, body politick and corporate, his, her, or their order, is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain his, her, or their action for such sum of money, either against the person or persons, body politick and corporate, who, or whose servant or agent as aforesaid, signed such note, or against any of the persons that indorsed the same, in like manner, as in cases of inland bills of exchange: And in every such action the plaintiff or plaintiffs shall recover his, her, or their damages and costs of suit; and if such plaintiff or plaintiffs shall be nonsuited or a verdict be given against him, her, or them, the defendant or defendants, shall recover his, her, or their costs against the plaintiff or plaintiffs; and every such plaintiff or plaintiffs, defendant or defendants, respectively recovering, may sue out execution for such damages and costs by *capias*, *fieri facias*, or *elegit*.

III. Provided, That no body politick or corporate, shall have power by virtue of this act, to issue or give out any notes, by themselves or their servants, other than such as they might have issued, if this act had never been made.

IV. And whereas by an act of parliament made in the ninth year of the reign of his late majesty king WILLIAM the third, intitled, *An act for the better payment of inland bills of exchange*, it is, among other things, enacted, That from and after presentation and acceptance of the said bill or bills of exchange, (which acceptance shall be by the underwriting the same under the party's

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hand so accepting) and after the expiration of three days after the said bill or bills shall become due, the party to whom the said bill or bills are made payable, his servant, agent or assigns, may, and shall cause the same bill or bills to be protested in manner as in the said act is enacted. And whereas by there being no provision made therein for protesting such bill or bills, in case the party on whom the same are or shall be drawn, refuse to accept the same, by underwriting the same under his hand, all merchants and others do refuse to underwrite such bill or bills, or make any other than a promissory acceptance, by which means the effect and good intent of the said act in that behalf is wholly evaded, and no bill or bills can be protested before or for want of such acceptance by underwriting the same as aforesaid: For remedy whereof be it enacted by the authority aforesaid, That from and after the first day of *May* which shall be in the year of our lord one thousand seven hundred and five, in case, upon presenting of any such bill or bills of exchange, the party or parties, on whom the same shall be drawn, shall refuse to accept the same, by underwriting the same as aforesaid, the party to whom the said bill or bills are made payable, his servant, agent or assigns, may and shall cause the said bill or bills to be protested for non-acceptance, as in case of foreign bills of exchange; any thing in the said act or any other law to the contrary notwithstanding: For which protest there shall be paid two shillings and no more.

VIII. Provided, That nothing herein contained shall extend to discharge any remedy, That any person may have against the drawer, acceptor or indorser of such bill.

Promissory notes were considered by the common law, as evidences of debt, and were not assignable, or negotiable in their own nature; no action could be maintained on them; but the increase of trade, and necessity of paper credit, put bankers and others upon an expedient of bringing promissory notes within the custom of merchants, and making them negotiable, as inland bills of exchange. But this the judges would not admit of: the legislature, however, perceiving the necessity to make use of this kind of credit, passed the statute 3 *and* 4 *Anne*, c. 9, a part whereof is in the text.[1]

1. Con. Law. of Bills, &c. 105—1 Salk 129—*Clarke v Martin*—ib. 126.

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There is no precise form of words necessary to be used, in a promissory note or bill of exchange.[2]

A note in these words, *I promise to account with J. S. or his order, for* 50*l. value received by me*, &c. is said to be a good note within the statute, by the word *account* shall be intended *pay*.[3]—But it seems a note payable upon a contingency is not a good note within the statute; as to pay so much money, *or surrender the principal;* or to pay so much money, *if* my brother *does not pay it within such a time.*[4]

A note which is not payable to *order*, or *bearer* is not within the statute; and cannot be indorsed or transferred so as to enable the indorsee or holder to sue in his own name.[5]

An original *unindorsed* promissory note has no resemblance to a bill of exchange. But when once *indorsed*, it has an exact *analogy* to a *bill of exchange*. The *indorser* then resembles the *drawer* of a bill; the *maker*, the *acceptor* of a bill; and the *indorsee*, the *payee* of a bill. And promissory notes and inland bills of exchange, are just on the same footing, and are under the same rules of determination.[6] A confusion has arisen from the circumstance of calling the *maker* of the note the *drawer*.[7]

Every drawer of a bill of exchange is liable to the payment thereof, as is every acceptor and indorser. If there are several indorsers of the same bill, the last indorsee may bring his action against the first indorser, or either of them; for the indorsement is *quasi* a new bill, or at least a warranty, as some books express it, by the indorser that the bill shall be paid.[8]

But although the drawer, acceptor and indorsers are all liable, yet the party can have but one satisfaction; however, until such satisfaction is *actually had*, he may sue *all*, or *any* of them; and a judgment is no satisfaction, nor will the obtaining judgment against one, prevent the prosecution of suits against the others.[9]

To entitle the indorsee of an inland bill of exchange, to bring an action against the indorser, upon failure of payment by the drawer, it is not necessary to make any demand of, or inquiry after the first *drawer*.[10]

The law is exactly the same, and fully settled, upon the analogy of *promissory notes* to *bills of exchange*. As a bill of exchange is an order, by the *drawer* or maker of the bill, upon the *drawee*, who if he accept it, becomes the first indorser; so a promissory

2. Ld. Ray. 1397—Cun. bills of ex. 110—Salk. 128—Stra. 591.

3. *Marcus v Lea*, Stra. 629—2 Ld. Ray. 1396—*quere tamen* and see 1 Burr. 227.

4. Ld. Ray. 1362, 1396—Stra. 629—Gill. Cases 93, 8—Mod. 302—1 Burr. 127.

5. *Barriere v Nairac*, 2 Dal. Rep. 249—H. Black. 605—2 Ld. Ray. 1397—3 Burr. 1516—Bailey on Exch. 1.—*Such indorsee would merely acquire the equitable interest like the assignee of a book debt.*

6. 2 Burr. 676, 7.

7. ib.

8. Molloy 178—Ld. Ray. 181—Stra. 479—3 Bac. Abr. 607.

9. 4 Co. 32—*Claxton v Swift*, Skin. 355, pl. 3—3 Mod. 86.

10. 2 Burr. 676.

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note indorsed, is an order by the *indorser* upon (his debtor,)[11] the *maker* (or drawer) to pay the amount of the note to the indorsee. Here then the *indorser* being the *drawer;* the *maker* the *acceptor*, (or person promising to pay) and the *indorsee* the person to whom it is payable; the indorsee only undertakes to pay *in case* the maker of the note does not pay. The indorsee is bound to *apply to the maker* of the note: he takes it upon *that condition*, and therefore must in all cases know who the maker is, and where he lives; and if, after the note becomes payable, the indorsee is guilty of a neglect, he loses his money, in case the maker becomes insolvent; and cannot resort to the indorser at all. Therefore, before the *indorsee* of a promissory note brings an action against the *indorser* he must shew a demand, or due diligence to get the money from the *maker* of the note; just as the person to whom a bill of exchange is made payable must shew a demand, or due diligence to get the money from the *acceptor*, before he brings an action against the *drawer*.[12]

A protest does not raise any debt but only serves to give formal *notice*, to those who are eventually liable, that the bill is not honored, or that it is not paid, by the acceptor; or that a note is not paid by the (drawer or) *maker*. It is necessary on every foreign bill of exchange, before the drawer can be charged; but before the statute 9 *&* 10 *Will. III. c.* 17, it was not necessary on *inland* bills of exchange; nor does the want of it destroy the remedy which the party had against the drawer, but only deprives him of interest and costs, unless there be notice of protest as the statute prescribes.[13]

11. The doctrine here laid down is well established, in respect to notes negotiable, in the way of trade, which are sometimes called *notes of business;* but there is another species of notes, that have obtained the denomination of *accommodation notes*, which are essentially different from the others. *They* carry upon the face of them, the clearest evidence, that no debt subsists between the *maker* (or drawer) and the *drawee*. To apply then the law which relates to the one description of notes, to another so totally different, could not lead to a correct result.

Can the first indorsee of such a note be considered as the drawee of a bill of exchange, i. e. as one giving an order upon his *debtor*, to pay to the indorsee the sum specified in such note or bill? Surely he cannot. Such a note is drawn for the benefit of the *maker*. The first indorser, as well as the other indorsers, are SURETIES, that the money shall be paid to the person or persons, who, upon the joint responsibility of the drawer and indorser or indorsers, will *lend* it to the *maker* of the note. As to the last indorsee, there can be no doubt but that his remedy is equally effectual against the *maker* and *all the indorsers;* and for the best reason imaginable, because *he has advanced his money* to the *maker* of the note, upon their joint responsibility. He must, doubtless, before he proceeds against the indorsers, make a demand, or use due diligence to get the money from the *maker* of the note: he being the real debtor, not indeed of the first indorsee (as in the case of notes of business) but of the last indorsee, who advanced the money, upon his credit and that of sureties or indorsers.

As to the *indorsers*, if any one pays the money he may doubtless recover it against the *maker* of the note; but *amongst themselves*, it would seem, that they are on a perfect equality, as the sureties in a bond. If the maker of the note be insolvent, it is conceived, that the indorsers must *equally contribute*, in the payment of the note.

12. 2 Burr. 676—2 Stra. 1087—See 5 Binney's Rep. 341.

13. 2 Ld. Ray. 992—Salk. 131—3 Bac Abr. 612.

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Merchants generally allow *three* days (usually called days of grace) after the bill becomes due, for the payment; and for non-payment within three days, protest is made, but is not sent away till the next post after the time of payment is expired; and if Saturday be the third day no protest is made till *Monday*.[14]

By an act of assembly of 1715,[15] provision is made for the assignment of bonds, specialties and promissory notes.[16]

By the "act regulating banks,"[17] it is enacted that all bills and notes issued by banks established under the authority of that act, signed by the president and counter signed by the cashier thereof, promising the payment of money to any person or persons, his or their order under the seal of the corporation, shall be binding and obligatory on such corporation. Those payable to any person or order shall be assignable by indorsement in like manner and with like effect as foreign bills of exchange; and those payable to bearer shall be negotiable and assignable by delivery only; and all notes or bills at any time discounted by any of the said corporations, or deposited for collection, and falling due at any of the said banks, are placed on the same footing as foreign bills of exchange, or as bills obligatory, so that the like benefit shall be had in the payment and the like remedy for the recovery thereof against the drawer and drawers, indorser and indorsers and their representatives, and with like effect, *except so far as relates to damages.*

QUO WARRANTO.

The statute of *quo warranto.*

18 EDWARD I. STAT. II. A.D. 1290.

How they shall hold their liberties which claim them by prescription or grant. A quo warranto *shall be pleaded and determined before justices in eyre.*

FORASMUCH as writs of *quo warranto*, and also judgments given upon pleas of the same, were greatly delayed, because the justices in giving judgment were not certified of the king's pleasure

14. Molloy 284—Show. 264—3 Bac. Abr. 614. In respect to notice in Pennsylvania, see 2 Dal. Rep. 78, 158, 292, 333.

15. 1 St. Laws, Sm. Ed. 90.

16. In the case of *M'Cullegh v Houston*, 1 Dal. Rep. 441. It was determined that the assignee of a promissory note takes it subject to all equitable considerations to which it was subject in the hands of the indorser the original payee.

17. Passed 21st March, 1814—State Laws, 11 vol. sess. 2, p. 168.

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therein; (2) our lord the king, at his parliament holden at *Westminster*, after the feast of *Easter*, the eighteenth year of his reign, of his special grace, and for the affection that he beareth unto his prelates, earls, and barons, and other of his realm, hath granted, That all under his allegiance, whatsoever they be, as well spiritual as other, which can verify by good enquest of the country, or otherwise, that they and their ancestors or predecessors have used any manner of liberties, whereof they were impleaded by the said writs, before the time of king *Richard* our cousin, or in all his time, and have continued hitherto (so that they have not misused such liberties) that the parties shall be adjourned further unto a certain day reasonable before the same justices, within the which they may go to our lord the king with the record of the justices, signed with their seal, and also return; and our lord the king, by his letters patents, shall confirm their estate. (3) And they that cannot prove the seisin of their ancestors or predecessors in such manner as is before declared shall be ordered and judged after the **law and custom of the realm*; (4) and such as have the king's charter shall be judged according to their charters.

II. Moreover, the king of his special grace hath granted, That all judgments that are to be given in pleas of *quo warranto*, by his justices at *Westminster* after the foresaid *Easter*, for our lord the king himself, if the parties grieved will come again before the king, he of his grace shall give them such remedy as before is mentioned. (2) Also our said lord the king hath granted, for sharing of the costs and expenses of the people of his realm that pleas of *quo warranto* from henceforth shall be pleaded and determined in the circuit of the justices, and that all pleas so depending shall be adjourned into their own shires, until the coming of the justices into those parts.

2 Inst. 594—Fitz. brief. 886—Kel. 137, &c.—Bro. Quo warranto 1, 2, 3, 4, 6, 8, 11—Bro. Prescription 10, 14, 18, 32, 33, 34, 52, 54, 64, 65, 73, 83, 98, 107, 108.—Bro. Franchise 4, 10, 14, 22, 26, 37. * Read *after the common law*. Liberties by the king's grant. Fitz. Conusance 16, 19, 21, 26, 30, 31, 36, 39, 46, 51, 54, 57, 60, 61, 62, 63, 64. Where pleas of quo warranto shall be determined. Rast. 540.

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Another new statute of *quo warranto*, statute 8, made the same year to that effect.

Concerning the writ that is called *quo warranto*, our lord the king, at the feast of *Pentecost*, in the eighteenth year of his reign, hath established, That all those which claim to have quiet possession of any franchise before the time of king *Richard*, without interruption, and can shew the same by a lawful enquest, shall well enjoy their possession; (2) and in case that such possession be demanded for cause reasonable, our lord the king shall confirm it by title. (3) And those that have old charters of franchise, shall have the same charters adjudged according to the tenor and form of them. (4) And those that have lost their liberties sith *Easter* last past by the foresaid writ, according to the course of pleading in the same writ heretofore used, shall have restitution of their franchise lost, and from henceforth they shall have according to the nature of this present constitution.

Rast. 540.

A *quo warranto* is in the nature of a writ of right for the *king*, against him who usurps or claims any franchises or liberties, to compel him to shew by what authority he claims them.[1]

The writ of *quo warranto*, or *quo jure*, lay at the common law.—This writ by which a man might be called upon to shew his title, enabled a litigious person to disturb the peace of any man's estate, whenever he pleased.[2]

This writ was brought into more notice, by the frequent and oppressive use which *Edward* the first made of it; and to the two statutes in the text, for regulating the proof and proceeding therein.[3]

The 18 *Edw.* 1, *st.* 2, was called the *new* statute of *quo warranto* in respect to the statute of *Gloscester*, made in the sixth year of *Edw.* 1.[4] And it was immediately followed by another new statute of *quo warranto*.

The king had in view the reducing of his nobles to his sovereign authority, and in execution of the plan this terrible inquiry by *quo warranto* was, for a time, let loose upon the great men of the nation, till the king at length consented to suspend it, and wholly to abolish the more oppressive parts of that proceeding.[5]

1. 2 Inst. 282—9 Co. 28.a—Yelo. 191—3 Com. Dig. 385.
2. 1 Reeve Eng. Law. 417—2 Reeve Eng. Law. 221.
3. See 2 Inst.
4. 1 Ruff. Stat. at Large, 70.
5. 2 Reeve Eng. Law. 220, 221, 222.

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Proceedings under the writ of *quo warranto* have long since fallen into disuse, and have been succeeded by *informations* in nature of a writ of *quo warranto*, which tend to the same purpose as the ancient writ; being made use of to try the *civil rights*, to offices or franchises.[6]

An information, is "An accusation or complaint exhibited against a person for some criminal offence, either immediately against the king, or against a private person, which from its enormity or dangerous tendency the public good requires it should be restrained and punished." It differs from an *indictment* in *this*, that an indictment is an accusation found by the oaths of twelve men, whereas an information is only the allegation of the officer who exhibits it.[7]

This mode of prosecution is as ancient as the common law itself, but the shameful oppressions practised, by means of informations, in times preceding the revolution in England, occasioned a struggle, at that period, to have them declared to be illegal by the judgment of the court of king's bench, but the judges were clearly of opinion that the proceeding was legal and could not be impeached. One great objection to them was, that as the power of filing them, without controul, was possessed by the master of the crown office, he not unfrequently permitted men to be harassed with vexatious informations, whenever applied to by any malicious or revengeful prosecutor; to whom they furnished an easy mode of wreaking vengeance on an enemy, as the prosecutor was subjected to no costs, though on trial there should appear no ground for the prosecution. To remedy this inconvenience the statute of 4 & 5 *W. and M.* c. 18,[8] prohibits the filing of any informations without express directions from the court of king's bench; that every prosecutor permitted to promote such information shall give surety to prosecute the same with effect; and to pay costs to the defendant, in case he be acquitted thereon, unless the judge who tries it certify that there was reasonable cause for filing it, and at all events to pay costs unless the same be tried within one year after issue joined.[9] This act extends to all informations except those exhibited in the name of the king by the attorney general. It is held to extend to an information in nature of *quo warranto*.[10]

The information in the nature of a writ of *quo warranto*, though it is commenced in the same manner as other informations are by leave of the court, or at the will of the attorney general, and has the form of a criminal prosecution to punish the defendant for his usurpation, as well as to oust him from his office; yet it is usually considered at present, as merely a civil proceeding. The fine in most cases being but nominal.[11]

6. 4 Black. Com. 312.
7. 3 Bac. Abr. 164. 5.
8. See the substance of this statute in 3 Bac. Abr. *tit. Informations* (D) p. 170.
9. 4 Black. Com. 311.
10. Ld. Ray. 426—Salk. 376—3 Bac. Abr. 171.
11. 4 Black. Com. 312.

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9 ANNE, CAP. XX. A.D. 1710.

An act for rendering the proceedings upon writs of mandamus, and informations in the nature of a quo warranto, *more speedy and effectual; and for the more easy trying and determining the rights of offices and franchises in corporations and boroughs.*

WHEREAS divers persons have of late illegally intruded themselves into and have taken upon themselves to execute the offices of mayors, bailiffs, portruves and other offices, within cities, towns corporate, boroughs and places within that part of *Great Britain* called *England* and *Wales;* and where such offices were annual offices, it hath been found very difficult, if not impracticable by the laws now in being, to bring to a trial and determination the right of such persons to the said offices within the compass of the year; and where such offices were not annual offices it hath been found difficult to try and determine the right of such persons to such of-

☞ The statute 9 *Anne, c.* 20, is not contained in the report of the judges — But believing that act to be in force, it has been thought right to insert it in this work. It contains very salutary provisions for regulating, expediting and rendering less oppressive the proceeding on writs of *mandamus*, and informations in nature of *quo warranto*. It also extends to such proceedings in all the statutes of amendment and jeofails. It is therefore to be presumed that an act so extremely useful would be adopted in practice; but this is not the only ground from which the act is inferred to be in force. It seems to have received the sanction of the legislature. By the act of 1722 it is declared, that "the judges of the supreme court shall have full power and authority as often as there may be occasion, to issue forth writs of *habeas corpus, certiorari*, and writs of error, and all remedial and other writs and processes returnable to the said court." "And generally shall minister justice to all persons, and exercise the jurisdictions and powers hereby granted concerning all and singular the premisses according to law, *as fully* and amply to all intents and purposes whatsoever, *as the justices of the court of king's bench, common pleas and exchequer at Westminster, or any of them may or can do.*" 1 St. Laws, Sm. Ed. 139.

Now if it be inquired what power the court of king's bench then possessed, touching writs of *mandamus*, and informations in the nature of *quo warranto?* The answer necessarily is, *all the powers derived from the common and statute laws of England, subject to the regulations and restrictions imposed by statute.* The conclusion appears inevitable, that under the act of 1722, such are also the powers invested in the supreme court of Pennsylvania. The act of 9 *Anne, c.* 20, had been more than eleven years in operation when the act of 1722 was passed. Some embarrassment may arise in the exercise of this power, in consequence of the supreme court being now divested of the power to try *issues in fact* in any part of the state except in the city and county of Philadelphia. And from the decision in the case of the commonwealth v Smith, 4 Bin. 117, it may be a proper subject for legislative consideration whether it be most expedient to restore to the supreme court the power of trying issues in fact in such cases, or to confide in the judges of the courts of common pleas, the president being one, the powers of issuing writs of *mandamus* and granting informations in the nature of writs of *quo warranto*.

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fices, before they have done divers acts in their said offices, prejudicial to the peace, order and good government within such cities, towns corporate, boroughs and places, wherein they have respectively acted. And whereas divers persons, who had a right to such offices, or to be burgesses and freemen of such cities, towns corporate, boroughs or places, have either been illegally turned out of the same, or have been refused to be admitted thereto, having in many of the said cases no other remedy to procure themselves to be respectively admitted, or restored to their said offices or franchises of being burgesses or freemen, than by writs of *mandamus*, the proceedings on which are very dilatory and expensive, whereby great mischiefs have already ensued, and more are likely to ensue, if not timely prevented: For remedy whereof, Be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present parliament assembled, and by the authority of the same, That from and after the first day of *Trinity* term in the year of our Lord one thousand seven hundred and eleven, where any writ of *mandamus* shall issue out of the court of *queen's bench*, the courts of sessions of counties palatine, or out of any of the courts of grand sessions in *Wales*, in any of the cases aforesaid, such person or persons, who by the laws of this realm are required to make a return to such writ of *mandamus*, shall make his or their return to the first writ of *mandamus*.

II. And be it further enacted by the authority aforesaid, That from and after the said first day of *Trinity* term, as often as in any of the cases aforesaid, any writ of *mandamus* shall issue out of any of the said courts, and a return shall be made thereunto, it shall and may be lawful to and for the person or persons suing or prosecuting such writ of *mandamus*, to plead to, or traverse all or any the material facts contained within the said return; to which the person or persons making such return shall reply, take issue or demur; and such further proceedings, and in such manner shall be had therein, for the determination thereof, as might have been had if the person or persons suing such writ had brought his or their action on the case for a false return; and if any issue shall be joined on such proceedings, the person or persons suing such writ shall and may try the same in such place as an issue joined in such action on the case, should or might have been tried; and in case a

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verdict shall be found for the person or persons suing such writ, or judgment given for him or them upon a demurrer, or by *nil dicit*, or for want of a replication or other pleading, he or they shall recover his or their damages and costs in such manner as he or they might have done in such action on the case as aforesaid; such costs and damages to be levied by *capias ad satisfaciendum, fieri facias, or elegit;* and a peremptory writ of *mandamus* shall be granted without delay, for him or them for whom judgment shall be given, as might have been, if such return had been adjudged insufficient; and in case judgment shall be given for the person or persons making such return to such writ, he or they shall recover his or their costs of suit, to be levied in manner aforesaid.

III. Provided always, That if any damages shall be recovered by virtue of this act against any such person or persons making such return to such writ as aforesaid, he or they shall not be liable to be sued in any other action or suit, for the making such return; any law, usage or custom to the contrary thereof in any wise notwithstanding.

IV. And be it further enacted by the authority aforesaid, That from and after the said first day of *Trinity* term, in case any person or persons shall usurp, intrude into, or unlawfully hold and execute any of the said offices or franchises, it shall and may be lawful to and for the proper officer in each of the said respective courts, with the leave of the said courts respectively, to exhibit one or more information or informations in the nature of a *quo warranto*, at the relation of any person or persons desiring to sue or prosecute the same, and who shall be mentioned in such information or informations to be the relator or relators against such person or persons, so usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises, and to proceed therein in such manner as is usual in cases of information in the nature of a *quo warranto;* and if it shall appear to the said respective courts that the several rights of divers persons to the said offices or franchises may properly be determined on one information, it shall and may be lawful for the said respective courts to give leave to exhibit one such information against several persons, in order to try their respective rights to such offices or franchises, and such person or persons, against whom such informa

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tion or informations in the nature of a *quo warranto* shall be sued or prosecuted, shall appear and plead as of the same term or sessions in which the said information or informations shall be filed, unless the court where such information shall be filed, shall give further time to such person or persons, against whom such information shall be exhibited, to plead; and such person or persons, who shall sue or prosecute such information or informations in the nature of a *quo warranto*, shall proceed thereupon with the most convenient speed that may be; any law or usage to the contrary thereof in any wise notwithstanding.

V. And be it further enacted and declared by the authority aforesaid, That from and after the said first day of *Trinity* term, in case any person or persons, against whom any information or informations in the nature of a *quo warranto* shall in any of the said cases be exhibited in any of the said courts, shall be found or adjudged guilty of an usurpation, or intrusion into, or unlawfully holding and executing any of the said offices or franchises, it shall and may be lawful to and for the said courts respectively, as well to give judgment of *ouster* against such person or persons, of and from any of the said offices or franchises, as to fine such person or persons respectively, for his or their usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises; and also it shall and may be lawful to and for the said courts respectively to give judgment, That the relator or relators, in such information named, shall recover his or their costs of such prosecution; and if judgment shall be given for the defendant or defendants in such information, he or they for whom such judgment shall be given shall recover his or their costs therein expended against such relator or relators; such costs to be levied in manner aforesaid.

VI. And be it further enacted and declared by the authority aforesaid, That it shall and may be lawful to and for the said courts respectively to allow to such person or persons respectively, to whom any writ of *mandamus* shall be directed, or against whom any information in the nature of a *quo warranto* in any of the cases aforesaid, shall be sued or prosecuted, or to the person or persons who shall sue or prosecute the same, such convenient time respectively, to make a return, plead, reply, rejoin or demur, as to the said courts respectively shall seem just and reasonable; any thing herein contained to the contrary thereof in any wise notwithstanding.

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VII. And be it further enacted by the authority aforesaid, That after the said first day of *Trinity* term, an act made in the fourth year of her majesty's reign, intitled, *An act for the amendment of the law and the better advancement of justice*, and all the statutes of *jeofayles*, shall be extended to all writs of *mandamus*, and informations in the nature of a *quo warranto*, and proceedings thereon, for any the matters in this act mentioned.

32 H. 8, c. 30—18 El. c. 14—37 El. c. 5—21 Jac. 1, c. 13—16 & 17 Car. 2, c. 28.

This statute was calculated only against *individuals* usurping offices or franchises *in* corporations; and not against any *corporation itself as a body*. There is no instance of an information in nature of a *quo warranto*, at the relation of a private prosecutor being brought against a corporation, as such. These can only be filed by and in the name of the *attorney general*, on behalf of the *crown*.[12]

The prosecutor shall pay costs, where he knowingly makes a groundless and frivolous application, for an information in the nature of a *quo warranto*.[13]

It is contrary to the trust reposed in the court, by 9 *Anne*, *c.* 20, (which was designed for *speeding* prosecutions, and to quicken the removal of usurpers,) to give leave to private informers, to make use of the king's name and suit, to call the validity of a franchise in question, when such private persons apply under very unfavorable circumstances.[14]

After twenty years unimpeached possession of a corporate franchise, no rule ought to be granted to shew by what right the possessor holds it: within that period, the granting an information will depend on the particular circumstances of each case. A great length of quiet enjoyment ought always to weigh with the discretion of the court.[15]

12. 2 Burr. 809.
13. ib. 780.
14. 4 ib. 2123.
15. 2 Hawk. P. C. 373, 4—*Rex v Stephens*, 1 Burr. 433.

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RECORDS.

* 8 RICHARD II. CAP. IV. A.D. 1384.

The penalty if a judge or clerk make a false entry, rase a roll, or change a verdict.

ITEM, At the complaint of the said commonality, made to our lord the king in the parliament, for that great disherison in times passed was done of the people, and may be done by the false entering of pleas, rasing of rolls, and changing of verdicts; (2) it is accorded and assented, That if any judge or clerk be of such default (so that by the same default there ensueth disherison of any of the parties) sufficiently convict before the king and his council, by the manner and form which to the same our lord the king and his council shall seem reasonable, and within two years after such default made, if the party grieved be of full age, and if he be within age, then within two years after he shall come to his full age, he shall be punished by fine and ransom at the king's will, and satisfy the party. (3) And as to the restitution of the inheritance desired by the said commons, the party grieved shall sue by writ of error, or otherwise, according to the law, if he see it expedient for him.

14 *Ed.* 3, *st.* 1, *c.* 6. *What defects may be amended and what not. see* 1 *H.* 5, *c.* 5—9 *H.* 5, *st.* 1, *c.* 4—4 *H.* 6, *c.* 3—8 *H.* 6, *c.* 12 *and* 15—13 *H.* 6, *c.* 4—18 *H.* 6, *c.* 9—5 *El. c.* 23—27 *El. c.* 5, *and* 4 *Anne*, *c.* 16.

This statute "punishes the judge, or clerk who should make a false entry, or erase any part of a record, with fine and imprisonment, and he is moreover to make satisfaction to the party for the alteration or rasure. It is remarkable, however, that this satisfaction is only for such a rasure as might be attended with the *disherison* of the parties, from which it may be inferred that personal estate was little considered; as an injury or fraud, affecting this species of property, seems equally deserving of punishment and reparation."[1]

1. Obs. on the statutes 250.

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SHERIFF.

* 13 EDWARD I. STAT. I. CAP. XXXIX. A.D. 1285(s

The manner to deliver writs to the sheriff to be executed. The sheriff returneth a liberty where none is. Returning of issues. Resistance of execution of process.

FORASMUCH as justices, to whose office it belongeth to minister justice to all that sue before them, are many times disturbed in due execution of their office, for that sheriffs do not return writs original and judicial; (2) and also for that they make false returns unto the king's writs. (15) Many times also sheriffs make false returns as touching these articles, *quod de exitibus*, &c. returning some time, and lying, that there be no issues, sometime that there are small issues, when they may return great, and sometime do make mention of no issues; (16) wherefore it is ordained and agreed, That if the plaintiff demand hearing of the sheriff's return it shall be granted him; (17) and if he offer to aver that the sheriff might have returned greater issues unto the king, he shall have a writ judicial unto the justices assigned to take assises, that they shall inquire in presence of the sheriff (if he will be there) of what and how great issues the sheriff might have made return from the day of the writ purchased unto the day contained in the writ.—(18) And when the inquest is returned, if he have not afore answered for the whole, he shall be charged with the overplus by the extreats of the justices delivered in the exchequer, and nevertheless shall be grievously amerced for the concealment. (19) And let the sheriff know, that rents, corn in the grange, and all moveables (except horse, harness, and household stuff) be contained within the name of *issues*. (20) And the king hath commanded, that sheriffs shall be punished by the justices once or twice (if need be) for such false returns; (21) and if they offend the third time, none shall have to do therewith but the king. (22) They make also many times false answers, returning that they could not

s) "Those parts only of this statute are in force, which define 'what shall be accounted *issues*,' direct the punishment of the sheriff for false returns, give authority to the sheriff to do certain things, in case of resistance of the execution of process, and direct the punishment of those who resist the execution of process."
Report of the Judges.

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execute the king's precept for the resistance of some great man; wherefore let the sheriffs beware from henceforth, for such manner of answers redound much to the dishonour of the king. (23) And as soon as his bailiffs do testify that they found such resistance, forthwith all things set apart (taking with him the power of the shire) he shall go in proper person to do execution; and if he find his underbailiffs false, he shall punish them by imprisonment, so that other by their example may be reformed; and if he do find them true, he shall punish the resisters by imprisonment, from whence they shall not be delivered without the king's special commandment. (24) And if percase the sheriff when he cometh do find resistance, he shall certify to the court the names of the resisters, aiders, consenters, commanders, and favourers, and by a writ judicial they shall be attached by their bodies to appear at the king's court: (25) And if they be convict of such resistance, they shall be punished at the king's pleasure. Neither shall any officer of the king's meddle in assigning the punishment, for our lord the king hath reserved it specially to himself, because that resisters have been reputed disturbers of his peace and of his realm.

How writs shall be delivered to the sheriffs to be executed. Enforced by 2 Ed, 3, c. 5—Regist. 86—1 Inst. 400—1 Roll. 440. The sheriff's default in returning of issues, 27 H. 8. f. 3—10 H. 7, f. 11—Fitz. averment 16 26, 43, 45, 47, 48, 49. The sheriff returneth that there was disturbance of execution of process, Regist. 83—18 Ed. 1, c. 16. *This seems to be a mistaken reference.*

By issues is to be understood the profits of the lands; which were to be accounted for from the test of the writ until the return of it. Sheriffs it seems had been in the habit of making false returns in respect to the amount of the issues; which was intended to be remedied by the statute. It proceeds to explain what shall be considered as issues, that is to say, not only the rent and revenue of the land, but corn in the grange, and all other moveables, as hay in the barn, and other moveable and personal goods whatsoever, except horse, harness, apparel and household stuff.[1]

That part of the statute which authorises the sheriff to take with him the *posse comitatus* to overcome any resistance, is merely in affirmance of the common law.[2]

1. 2 Inst. 453.

2. 2 Inst. 453.

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* 28 EDWARD I. STAT. III. CAP. XVI. A.D. 1300.

What shall be done with them that make false returns of writs.

That shall be done with them that make false return (whereby right is deferred) as it is ordained in the second statute of *Westminster*, with like pain.

2 Inst. 568—18 Ed. 1, stat. 1, c. 39.

"This is an act of confirmation," says lord Coke, "whereby the statute of Westminster the second, c. 39, touching false returns is confirmed."[3]

For a false return the sheriff may be amerced.[4]

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* 12 EDWARD II. STAT. I. CAP. V. A.D. 1318.(T

An indenture shall be made between the sheriff and bailiff of liberty of every return.

(4) Also it is agreed, That from henceforth sheriffs, and other bailiffs that receive the king's writs returnable in his court, shall put their own names with the returns, so that the court may know of whom they took such returns, if need be. (5) And if any sheriff or other bailiff leave out his name in his return, he shall be grievously amerced to the king's use.

Bro. Return de brief. 81—Bro. scire fac. 233. Sheriffs and bailiffs shall set their names to the returns, Carthew. 56.

The return ought to be made under the name of the proper officer.[5]

But if the sheriff does not put his name, the return will be good, and the sheriff shall be amerced.[6]

In pleading of a return the name of the sheriff need not be mentioned.[7]

3. 2 Inst. 568.
4. Rast. 372.a—5 Com. Dig. 448.
5. Pl. Com. 63.a
6. 1 Leon. 139—*semb. cont.*—Hob. 70—Dub. Dal. 63.
7. 1 Leon. 139.

T) "That part only of this statute is in force, which obliges sheriffs and other officers to sign their names to the return of writs." *Rep. of the Judges.*

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Now by the statute 21 *Jac.* 1, *c.* 13, the want of the sheriff's name shall be aided.[8]

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[u] 1 RICHARD II. CAP. XII. A.D. 1377.

A prisoner by judgment shall not be let at large. Confession of a debt to the king to delay another's execution.

ITEM, Whereas divers people, at the suit of the party commanded to the prison of the *Fleet*, by judgment given in courts of our lord the king, be oftentimes suffered to go at large by the warden of the prison, sometime by mainprise or by bail, and sometimes without any mainprise with a baston of the *Fleet*, and to go from thence into the country about their merchandizes and other their business, and be there long out of prison nights and days, without their assent at whose suit they be judged, and without their gree thereof made, whereby a man cannot come to his right, and recovery against such prisoners, to the great mischief and undoing of many people: (2) It is ordained and assented, That from henceforth no warden of the *Fleet* shall suffer any prisoner there being by judgment at the suit of the party, to go out of prison by mainprise, bail, nor by baston, without making gree to the said parties of that thereof they were judged, unless it be by writ or other commandment of the king, upon pain to lose his office and the keeping of the said prison (3) And moreover, if any such warden from henceforth be attainted by due process that he hath suffered or let such prisoner go at large against this ordinance, then the plaintiffs shall have their recovery against the same warden by writ of debt.

3 Bulst. 97—Plow. 35—Dyer 66, 162, 271, 278. 297, 306, 322—Kel. 2—3 Co. 52, 71—5 Co. 89—8 Co 142—Fitz. Delte. 3, 67, 110 130. 162—Fitz. Execut. 74, 100—1 Roll. 205, 241, 275. The penalty of the warden of the Fleet, if he suffer a prisoner, being there by judgment, to go at large, 13 Ed. 1, st. 1, c. 11—1 Saund. 38.—*By 7 Hen.* 6, *cap.* 4, *no protection allowable for a goaler who lets prisoners escape.*

u) "This statute is in force, except such parts as relate to confessions of debts to the king." *Rep. of the Judges.*

8. *Vide ante*—Tit. AMENDMENT, p. 38.

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The action of debt against the sheriff was first given by the statute of *Westminster* 2, c. 11,[9] for the escape of an *accountant*, found in arrear. The statute 1 *Richard* 2, *cap.* 12, gives an action of debt against the *warden* of the *Fleet prison*, for escapes of prisoners in *execution*. Upon the equity of these two statutes the action of *debt* is held to be maintainable against any goaler or sheriff, for the escape of one charged in *execution*.

The statutes being affirmative do not take away the common law remedy, so that the plaintiff in the execution may adopt either the action *on the case*,[10] or the action of *debt*. In the latter it is said he shall recover the whole sum, which he would have recovered against the prisoner, namely, the sum indorsed on the writ, and the legal fees of execution.[11]

If it be true, that in a case of negligent escape, where the prisoner escaping was *insolvent*, a recovery shall be had for the whole amount of the creditor's claim, it must be acknowledged, that, in this instance the law does not approach the confines of common sense, so near as in any other that could be referred to. But it is not believed that such is the law in Pennsylvania. The question seems to have been unsettled in England, till the year 1776, when the case of *The assignees of Frost, a bankrupt, v Plomer & Hart*,[12] was decided. In that case the court ground their decision on the exploded notion, that in an action on *debt*, which goes for a specific thing, the *whole* amount must be recovered or *nothing*, "And so," they say, "are the precedents in *Rastal & Saunders*." And in support of this doctrine we are referred to *Roll.* and *Fitzherbert*. But it is now well settled that in an action of debt, on a simple contract, the plaintiff may prove and recover a sum less than he demands in his writ.[13]

9. *Vide ante*, tit. ACCOUNT, p. 12.

10. In the action *on the case* he shall recover damages for the officer's misconduct, and still has his remedy against the debtor. Yet in this action even for the escape of one confined on *mesne* process the plaintiff may recover from the sheriff the whole sum due to him from the original defendant. *Gabel v Perchard*—Hil. 35—Geo. 3—Anst. 522. Where the sum due from the original debtor is recovered from the sheriff, the plaintiff has no further claim against such debtor, but the sheriff may maintain an action on the case against him for money paid, laid out and expended, whether the escape was voluntary or negligent. *Espinasse N. P.* 612—4 Vin. Sup. 101. But it is held that the officer has no remedy against the person escaping where the escape was *voluntary*.

11. 4 Vin. Sup. 100—See *Bonafous v Walker*, Mich. 28 Geo. 3—*Hawkins et al. assignees of Frost v Plomer & Hart, sheriff of Middlesex.* Hil. 16 Geo. 3—2 *Black.* 1048.

12. 2 Black. 1048.

13. *M'Quillan v Coxal*, 29 *Geo.* 3—1 Hen. Black. 249. *Walker v Witter*, 19 *Geo.* 3—*Doug.* 1. Debt is maintainable wherever *indebitatus assumpsit* will lie, *vid.* Doug. 732 in (n)—See *Aylett v Lowe* Black. 1221. The argument of Lord Loughborough, C. J. in giving judgment in the case of *Ruddu v Prier, H.* 31—*Geo.* 3, contains many learned remarks on the actions of debt and assumpsit, and merits particular attention. See 1 *Hen. Black.* 530. See *Emery v Fell*, 27 *Geo.* 3—2 Term. Rep. 28—*Stroud v Rogers*, Hil. 32—Geo. 3—6 *Term. Rep.* 13, *R.* 63, mb—*Wilkins v Wingate*, 35 *Geo.* 3—6 *Term. Rep. B. R.* 62.

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The action for an escape, arises indeed *ex delicto*, but, unless it differs from all others of this class, the plaintiff ought to recover a sum proportioned to the injury he may have sustained.

It would outrage every idea of just retribution, if because a debtor in execution, may have eluded the vigilance of his keeper, or have been rescued by an overwhelming force,[14] that such keeper should be liable to pay to the plaintiff in the execution, ten or twenty thousand dollars, in place of an escaped *pauper*, from whom not a cent could ever have been obtained; but by the imprisonment of whom the creditor would have sustained a charge, instead of being benefitted.

It would be strange indeed, if the case of *The assignees of Frost v Plomer & Hart*, should settle the law here, not only for the reasons which have been suggested, but because it seems not entirely to have settled the law in England; for in a case[15] which occurred many years after, we find the court taking time to consider these questions, which had been argued before them: 1. *Whether an action of debt would lie for a negligent escape;*[16] and 2. *Whether it would lie where there was in fact no negligence in the keeper.*

I strongly incline to the opinion, that the plaintiff in an action of debt, against the sheriff, for an escape would be entitled to recover *so much as he might have obtained from the prisoner, and no more.*

This it is conceived would be a correct rule in England, where the body is a pledge for the debt, whilst life lasts; but in Pennsylvania the body is not properly a pledge for the *debt:* it may be considered merely as a pledge *for the delivery of the defendants property;* for after *that* is delivered in the manner prescribed by law, the body cannot be held.

If an escape be *voluntary* in the sheriff, or jailer, nothing afterwards will purge it; but in case of a *negligent* escape the officer may justify by recaption.[17]

Under a count for a *voluntary* escape, the plaintiff is at liberty to give a *negligent* escape in evidence.[18]

14. It is said that nothing but the act of God, or a public enemy will excuse, therefore where the prison was thrown down by rioters, whose numbers forbid any opposition from the sheriff, the *posse commitatus*, or indeed from any force of the kingdom, which could in time, be drawn to that point, the sheriff was held liable for the escapes of those who were thus set at large. *Elliot v the duke of New Castle, Trin.* 32 *Geo.* 3—4 *Term. Rep. B. R.* 789.

15. *Alsept v Eyles. Trin.* 32 *Geo.* 3—2 H. Black. 108—4 Vin. Sup. 98.

16. Yet in *Stackhouse v Mullins, T.* 4 *Geo.* 2—*Stra.* 873, it had been held that debt lies by 1 *Rich.* 2, *c.* 12, as well where the escape is *negligent*, as where it is *voluntary.* 4 Vin. 98.

17. *Ravenscroft v Eyles, esq.* H. 6, Geo. 3—2 Wils. 294—*Wilkinsan v Salter et al.* T. 9 Geo. 2. *Cases temp. Hardwick* 310—See also *West v Eyles, H.* 16, *Geo.* 3—*Black.* 1059.

18. *Bonafous v Walker, M.* 28 *Geo.* 3—2 *Term. Rep. B. R.* 126.

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The party escaping may be a witness to prove a *voluntary* escape, because it is a thing of secrecy, between the prisoner and the jailer.[19]

When the plaintiff names a person to execute the writ, and obtains his appointment as special bailiff for this purpose, the risk is the plaintiff's and not the sheriff's; who is not liable if an escape should take place.[20]

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* 3 HENRY VII. CAP. III. A.D. 1486.(w

Justices of peace may let prisoners to bail. The sheriff shall certify the names of all his prisoners at the goal delivery.

(5) And moreover it is enacted by the same authority, That every sheriff, bailiff of franchise and every other person, having authority or power of keeping of goal or of prisoners for felony, in like manner and form do certify the names of every such prisoner in their keeping, and of every prisoner to them committed for any such cause, at the next general goal delivery, in every county or franchise where any such goal or goals have been, or hereafter shall be, there to be kalendred before the justices of the deliverance of the same goal, whereby they may, as well for the king as for the party, proceed to make deliverance of such prisoners according to the law.

TRIAL.

* 2 HENRY IV. CAP. VII. A.D. 1400.

In what case the plaintiff shall not be nonsuit if the verdict pass against him.

ITEM, Whereas upon verdict found before any justice in assise of *novel disseisin*, *mortdauncester*, or in any other action whatso-

19. *Rex v warden of the Fleet*, Bal. N. P. 67, S. P.—*Cass et al v Cameron*, East. 32 Geo. 3—Peake's N. P. 124.

20. *De Morander et al v Dunkin et al*, M. 31 Geo. 3—4 *Term. Rep. B. R.* 119.

w) "Only that part of this statute is in force, which is distinguished by the number 5.

Report of the Judges.

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ever, the parties before this time have been adjourned upon difficulty in law upon the matter so found; (2) it is ordained and established, That if the verdict pass against the plaintiff, that the same plaintiff shall not be nonsuited.

Br. Nonsuit 6—Fitz. Nonsuit 6, 12, 13, 15—1 Inst. 139.b

At the common law, upon every continuance or day given over before judgment, the plaintiff might have been nonsuited; and therefore before the statute 2 *Hen.* 4 in the text, after verdict given, if the court took a day to be advised, at that day the plaintiff was demandable, and therefore might have been nonsuit; which is remedied by this statute.[1]

But notwithstanding the statute, it has been held that the plaintiff may be nonsuited after a special verdict or after a demurrer and argument thereupon.[2]

In *account*, after judgment *quod computet*; auditors assigned and thereupon a *capias ad computandum*, the plaintiff cannot be nonsuited.[3]

† 8 HENRY VI. CAP. XXIX. A.D. 1429.‡

An inquest shall be de medietate linquæ; *where an alien is party.*

ITEM, Whereas in the parliament holden at *Westminster* the twenty-eighth year of king EDWARD the third, amongst other things in favour and liberty of the merchants strangers repairing into the realm of *England*, it was ordained, That if a plea or debate be moved before mayor of the staple amongst the merchants or ministers of the same, and for to try the truth thereof, an inquest or proof is to be taken, if the one party and the other be strange it should be tried by strangers; (2) and if the one party and the other be denizens it should be tried by denizens; (3) and if the one party be denizen, and the other an alien, the one half shall be of denizens, and the other half aliens; (4) and moreover, that in all inquests and proofs which shall be taken and made betwixt aliens and denizens, be they merchants or other, as well before the may-

1. 3 Bac. Abr. 680—1 Inst. 139.b—5 Mod. 208.
2. ib. 2 Jon. 1—2 Roll. Abr. 131—3 Lev. 28, and see Cro. Jac. 35.
3. Co. Lit. 139.b

‡ This statute and that of 28 Edw. 3, c. 13, which will be found under title JURY, ought to have been classed under the same head, but accident has separated them.

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or of the staple, as before any other judges or ministers, although our lord the king be party, the one half of the inquest or proof should be of denizens, and the other half of aliens, if there be so many aliens in the town or place, where such inquest or proof is to be taken, that be not parties, not with the parties in contracts, pleas or other quarrels, whereof such inquests or proofs ought to be taken; (5) and if there be not so many aliens, then so many aliens shall be put in such inquests or proofs as shall be found in the same places or towns which be not parties thereunto, nor with the parties as before is said, and the remnant of denizens which be good men, and not suspect of the one party nor of the other. (6) Sithence which ordinance the said merchants aliens have been always demeaned and ruled, as well in the staples, as in other of the king's courts, after the form of the said ordinance, until now of late they have been thereof restrained and impeached by colour of another statute made in the parliament holden at *Westminster* the second year of king HENRY, father to our lord the king that now is; (7) by which statute, for the great mischiefs, damages and disherisons, which daily do happen through the realm, as well in the case of the death of a man as in case of freehold and other cases, by them that pass in inquests in the said case, which were common jurors, and other which had but little or nothing to live upon but by such inquests, and which had nothing to lose because of their false oaths, whereby they do the more lightly offend their consciences; (8) and for amendment and correction thereof to be had, it was ordained and stablished, That no person be admitted to pass in any inquest upon trial of the death of a man, nor in any inquest between party and party in plea real or personal, whereof the debt and the damages declared do amount to forty marks, except the same person have lands and tenements to the yearly value of forty shillings above all charges: (9) because of which restraint and impeachment so made to divers merchants aliens, many of the same merchants aliens have withdrawn and daily do withdraw them, and eschew to come and be conversant on this side the sea, and likely it is, that all the same merchants aliens will depart out of the same realm of *England*, if the said last statute be not more plainly declared and the said merchants aliens ruled, governed, and demeaned in such inquests according to the first ordinance aforesaid, to the great diminishing of the king's subsidies, and grievous loss

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and damages of the said realm of *England*. (10) Our lord the king, considering the premisses, and how that it was not the meaning of the said late king, nor of the lords spiritual and temporal of the said parliament, to hinder or prejudice the said first ordinance by the said last statute, (11) and that the said last statute was made in respect of the mischiefs and disherisons that happened by the false oaths of the common jurors of the realm of *England*, as it appeareth by express words of the same statute, and how that the said merchants aliens be not common jurors, nor inhabiting within the said realm, nor may not purchase nor enjoy any lands or tenements in the same without the king's special licence; (12) and the same our lord the king willing therein to provide for the weal and profit of him and all his realm, and to eschew the damages and inconveniences which may easily happen in this behalf, and also to give to the said merchants aliens the greater courage and desire to come with their wares and merchandizes into this realm by the advice and assent of the lords spiritual and temporal being in this present parliament, hath declared the said last statute, made in the time of his father, to be in no wise prejudicial to the said ordinance nor to extend itself but only to the inquests to be taken betwixt denizen and denizen, and not to other inquests and proofs aforesaid; (13) and the said first ordinance to be effectual and stand in force, and to be put in due execution according to the form of the same, notwithstanding the said last statute, or that the aliens have not lands or tenements to the value of forty shillings by the year, according to the purport of the same last statute and ordinance.

The introduction of the trial *per medietatem linguæ* is to be found in the *statute of the staple*, 27 Edw. 3, st. 2, which was a constitution containing a set of regulations, for the establishment and government of the markets or *staples*, which were the resort of foreign merchants.

Amongst other methods devised, to render the administration of justice more acceptable to foreigners, who resorted to those *staples*, this mode of trial was established. If the parties were both strangers, the inquest was to consist entirely of strangers; but if one was an *alien* and the other a *denizen*, the inquest was to consist of half denizens, and half aliens.

This privilege however was local; and it was confined to matters of contract; but by the statute 28 *Edw.* 3, *c.* 13,[4] it was explicitly extended to criminal cases.[5]

4. *Ante* tit. JURY, p. 336

5. 2 Reeve E. L. 395, 461.

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The statute 8 Hen. 6, was intended to secure to foreigners the right to trial *per medietatem linguæ*, authorised by the statute of 28 *Edw.* 3, *c.* 13, of which it had been supposed they were impliedly deprived by 2 *Hen.* 5, *s.* 2, c. 3, which had required as a qualification of a juror where the matter in controversy amounted to forty marks, that he should hold lands by the annual value of *forty shillings* beyond all reprises.[6]

May not the trial *per medietatem linguæ* be considered to be virtually abolished in Pennsylvania, by the act of 1805, which directs the mode of selecting and returning jurors?

According to that act no person is qualified to serve as a juror but a *taxable* CITIZEN. Jurors are to be selected by the sheriff and commissioners, from "the list of *taxable* CITIZENS."[7]

The § 10 of the act, which authorised the court to award a *tales de circumstantibus*, in case of a deficiency of jurors, declares, that the order of the court shall be to fill the jury from "*qualified* by-standers," i. e. from those of the by-standers who are *taxable* CITIZENS.[8]

6. As the statute of 2 *Hen.* 5, *c.* 3, never extended to Pennsylvania, the necessity of extending the statute in the text may be questioned.

7. 4 State Laws, Sm. Ed. 237, § 1.

8. The summoning of the by-standers, in order to make up a jury, is derived from the common law, according to which if a sufficient number of jury-men did not appear at the trial, or so many of them were challenged and set aside, that the remainder would not make up a full jury, a writ issued to the sheriff of *undecim decim*, or *octo tales*, according to the number that was deficient, in order to complete the jury. *Gil. P. C.* 73. And such writ is still necessary in England, on trials at bar. 5 *Term. Rep.* 457–8, 462—2 *Tidd's Pr.* 783.

But the statute 35 *Hen.* 8, *c.* 6, (which was extended to *qui tam* actions, by 4 & 5 *Ph. & M. c.* 7) authorises the justices of assise and *nisi prius*, in case of a deficiency of jurors, to order a *tales*.

Tales-men are annexed to the panel, and placed upon the same footing with those before empannelled and returned; of course they are subject to the like challenges. A juror, however, who has been challenged, on the principal panel, ought not to be sworn as a *tales-man*. 1 Str. 640—2 Ld. Ray. 1419—See Foster's Reports 63, where there seems to be a departure from the principle.

The statute of 7 *and* 8 *W.* 3, *c.* 32, § 3, requires, that *tales-men* shall be taken from those, who being returned upon some other panel, are attending the court. Hence, a practice has arisen to draw their names out of the box. 2 *Tidd's Pr.* 784.

This would probably be the best method of procuring a *tales* in case of a *special* jury in Pennsylvania. *See* 2 *Dal.* 382.

In capital cases, the *tales* may be of a larger number than the first process, as *forty*, *sixty*, or any other even number, in order to prevent delays from peremptory challenges; and herein such challenges differ from those in other cases, where the *tales* must be of a *less* number than the original process required to be summoned. *Bulst.* 121—*Dyer* 213, pl. 41—3 *Bac. Abr.* 248.

If no juror appears, or the whole array be challenged, and set aside, there can be no *tales* but a new *venire*. Yet if but one juror appears, and he is challenged, twelve *tales-men* may be sworn who may try the cause. 3 *Bac Abr.* 249—10 *Co.* 104—*Dyer* 245, *pl.* 54—*Seld. Cases of Evid* 110.

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* 2 & 3 EDWARD VI. CAP. XXIV. A.D. 1548.

An act for trial of murders and felonies committed in several counties.

FORASMUCH as the most necessary office and duty of the law is to preserve and save the life of man, and condignly to punish such persons that unlawfully and wilfully murder, slay or destroy men, and also that another office and duty of law is to punish robbers and thieves, which daily endeavour themselves to rob and steal, or give assistance to the same, and yet by craft and cautele do escape from the same without punishment.

II. And where it often happeneth and cometh in ure in sundry counties of this realm, that a man is feloniously stricken in one county and after dieth in another county, in which case it hath not been founden by the laws or customs of this realm, that any sufficient indictment thereof can be taken in any of the said two counties, for that by the custom of this realm the jurors of the county where such party died of such stroke, can take no knowledge of the said stroke being in a foreign county, although the same two counties and places adjoin very near together; ne the juries of the county where the stroke was given cannot take knowledge of the death in another county, although such death most apparently come of the same stroke: So that the king's majesty within his own realm cannot, by any laws yet made or known, punish such murderers or manquellers, for offences in this form committed and done; (2) nor any appeal at some time may lie for the same, but doth also fail, and the said murderers and manquellers escape thereof without punishment, as well in cases where the counties where such offences be committed and done may join, as otherwise where they may not join. (3) And also it is a common practice amongst errant thieves and robbers in this realm, that after they have robbed or stolen in one county, they will convey their spoil, or part thereof so robbed and stolen, unto some of their adherents, into some other county where the principal offence was not committed ne done, who knowing of such felony, willingly and by false covin receiveth the same: (4) In which case although, the

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principal felon be after attainted in one county, the accessary escapeth by reason that he was accessary in another county, and that the jurors of the said other county, by any law yet made, can take no knowledge of the principal felony ne attainder in the first county, and so such accessaries escape thereof unpunished, and do often put in ure the same, knowing that they may escape without punishment: (5) For redress and punishment of which offences, and safeguard of man's life, be it enacted by the authority of this present parliament, That where any person or persons hereafter shall be feloniously stricken or poisoned in one county, and die of the same stroke or poisoning in another county, that then an indictment thereof founden by jurors of the county where the death shall happen, whether it shall be founden before the coroner upon the sight of such dead body, or before the justices of peace, or other justices or commissioners which shall have authority to enquire of such offences, shall be as good and effectual in the law, as if the stroke or poisoning had been committed and done in the same county where the party shall die, or where such indictment shall be so founden; any law or usage to the contrary notwithstanding.

III. And that the justices of goal-delivery and *Oyer* and *Terminer* in the same county where such indictment at any time hereafter shall be taken, and also the justices of the king's bench, after such indictment shall be removed before them, shall and may proceed upon the same in all points as they should or ought to do, in case such felonious stroke and death thereby ensuing or poisoning and death thereof ensuing, had grown all in one and the same county: (2) And that such party to whom appeal of murder shall be given by the law, may commence, take and sue appeal of murder in the same county where the party so feloniously stricken or poisoned shall die, as well against the principal and principals as against every accessary to the same offences, in whatsoever county or place the accessary or accessaries shall be guilty to the same.—(3) And further, the justices before whom any such appeal shall be commenced, sued and taken, within the year and day after such murder and manslaughter committed and done, shall proceed against all and every such accessary and accessaries in the same county where such appeal shall be so taken, in like manner and form as if the same offence or offences of accessary or accessaries had been committed and done in the same county where such ap-

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peal shall be so taken, as well concerning the trial by the jurors, or twelve men of such county where such appeal or appeals shall be hereafter taken upon the plea of not guilty, pleaded by such offender or offenders, as otherwise.

IV. And further be it enacted by authority aforesaid, That when any murder or felony hereafter shall be committed and done in one county, and another person or more, shall be accessary or accessaries in any manner of wise to any such murder or felony in any other county, that then an indictment found or taken against such accessary and accessaries upon the circumstance of such matter before the justices of the peace, or other justices or commissioners, to enquire of felonies in the county where such offences of accessary or accessaries, in any manner of wise shall be committed or done, shall be as good and effectual, in the law, as if the said principal offence had been committed or done within the same county where the same indictment against such accessary shall be found: (2) And that the justices of goal-delivery, or *Oyer* and *Terminer*, or two of them, of or in such county where the offence of any such accessary shall be hereafter committed and done, upon suit to them made, shall write to the *custos rotulor*, or keepers of the records where such principal shall be hereafter attainted or convicted, to certify them whether such principal be attainted, convicted or otherwise discharged of such principal felony; who upon such writing to them or any of them directed, shall make sufficient certificate in writing under their seal or seals to the said justices, whether such principal be attainted, convicted or otherwise discharged or not. (3) And after they that so shall have the custody of such records, do certify that such principal is attainted, convicted or otherwise discharged of such offence by the law; that then the justices of goal-delivery or of *oyer* and *terminer*, or other there authorised, shall proceed upon every such accessary in the county where such accessary or accessaries became accessary, in such manner and form as if both the said principal offence and accessary had been committed and done in the said county where the offence of accessary was or shall be committed or done: (4) And that every such accessary, and other offenders above expressed, shall answer upon their arraignments and receive such trial, judgment, order and execution, and suffer such forfeitures, pains

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and penalties, as is used in other cases of felony; any law or custom to the contrary heretofore used in any wise notwithstanding.

Trials of murders may be in several counties, 3 Inst. 48, 49, 73, 135. The trial of a man-queller that poisons or strikes a man in one county which died thereof in another, Rast. pla. 51—3 Inst. 135—3 Mod. 131—1 *Hale's P. C.* 437. Trial of an accessary in one county to a felony done in another, 1 Leon. 270—3 Inst. 48—1 Co. 117. *For provisions concerning murder, see* 1 *Jac.* 1, *c.* 8—21 *Jac.* 1, *c.* 27—2 *Geo.* 2, *c.* 21, *and* 25 *Geo.* 2, *c.* 37—*Dyer* 254, *pl.* 103.

It is a general rule, that let the nature of the offence indicted be what it will, if it appear upon *not guilty*, to have been committed in a different county from that in which the indictment was found, the accused shall be acquitted.[9]

And therefore at the common law if a man had died in one county of a stroke which he received in another, it was holden that the homicide was indictable in neither, because the offence was not complete in either. To remedy this inconvenience the statute 2 *and* 3 *Ed.* 6, in the text, was enacted.[10]

If A had committed a felony in the county of D, and B had been accessary, *before* or *after* the fact, in the county of C, an indictment could not be maintained at the common law against B, as accessary in either county; but by the above statute he is indictable, and shall be tried in the county where he became accessary.[11]

USES AND TRUSTS.

27 HENRY VIII. CAP. X. A.D. 1535.(x

An act concerning uses and wills.

WHERE, by the common laws of this realm, lands, tenements, and hereditaments be not devisable by testament, (2) nor ought to be transferred from one to another, but by solemn livery and seisin, matter of record, writing sufficient made *bona fide*, without covin or fraud; (3) yet nevertheless divers and sundry imaginations, subtle inventions and practices have been used, whereby the hereditaments of this realm have been conveyed from one to an-

9. 3 Bac. Abr 98—2 Hawk. P. C. 220.

10. 2 Hawk. P. C. 220. But at the common law an *appeal* might have been brought in either county. 7 Co. 2—*Bulwer's* case, 2 Hale's P. C. 163.

11. 3 Bac. Abr. 98—2 Hale's P. C. 163.

x) "Only the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 9th and 10th sections of this statute are in force." *Rep. of the Judges.*

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ather by fraudulent feoffments, fines, recoveries and other assurances craftily made to secret uses, intents and trusts; (4) and also by wills and testaments, sometime made by *nude parolx* and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have scantly had any good memory or remembrance; (5) at which times they being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances; (6) by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries and other like assurances to uses, confidences and trusts, divers and many heirs have been unjustly at sundry times disherited, the lords have lost their wards, marriages, reliefs, harriots, escheats, aids *pur fair fitz chivalier, & pur file marrier*, (7) and scantly any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or executions, for their rights, titles and duties; (8) also men married have lost their tenancy by the curtesy, (9) women their dowers, (10) manifest perjuries by trial of such secret wills and uses, have been committed; (11) the king's highness hath lost the profits and advantages of the lands of persons attainted, (12) and of the lands craftily put in feoffments to the uses of aliens born, (13) and also the profits of waste for a year and a day of lands of felons attainted; (14) and the lords their escheats thereof; (15) and many other inconveniences have happened, and daily do increase among the king's subjects, to their great trouble and inquietness, and to the utter subversion of the ancient common laws of this realm; (16) for the extirping and extinguishment of all such subtle practised feoffments, fines, recoveries, abuses and errors heretofore used and accustomed in this realm, to the subversion of the good and ancient laws of the same, and to the intent that the king's highness, or any other his subjects of this realm, shall not in any wise hereafter by any means or inventions be deceived, damaged or hurt by reason of such trusts, uses or confidences: (17) It may please the king's most royal majesty, that it may be enacted by his highness, by the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same in manner and form following; that is to say,

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That where any person or persons stand or be seized, or at any time hereafter shall happen to be seized, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders or other hereditaments, to the use, confidence or trust of any other person or persons, or of any body politick, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will or otherwise, by any manner means whatsoever it be; that in every such case, all and every such person and persons, and bodies politick, that have or hereafter shall have any such use, confidence or trust, in fee-simple, fee-tail, for term of life or for years, or otherwise, or any use, confidence or trust, in remainder or reverter shall from henceforth stand and be seized, deemed and adjudged in lawful seisin, estate and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders and hereditaments, with their appurtenances, to all intents, constructions and purposes in the law, of and in such like estates as they had or shall have in use, trust or confidence of or in the same; (19) and that the estate, title, right and possession that was in such person or persons that were, or hereafter shall be seized of any lands, tenements or hereditaments, to the use, confidence or trust of any such person or persons, or of any body politick, be from henceforth clearly deemed and adjudged to be in him or them that have, or hereafter shall have, such use, confidence or trust, after such quality, manner, form and condition as they had before, in or to the use, confidence or trust that was in them.

II. And be it further enacted by the authority aforesaid, That where divers and many persons, be, or hereafter shall happen to be, jointly seized of and in any lands, tenements, rents, reversions, remainders or other hereditaments, to the use, confidence or trust of any of them that be so jointly seized, that in every such case that those person or persons which have or hereafter shall have any such use, confidence or trust in any such lands, tenements, rents, reversions, remainders or hereditaments, shall from henceforth have, and be deemed and adjudged to have only to him or them, that have or hereafter shall have any such use, confidence or trust, such estate, possession and seisin, of and in the same lands, tenements, rents, reversions, remainders, and other hereditaments, in like nature, manner, form, condition and course, as he or they had

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before in the use, confidence or trust of the same lands, tenements or hereditaments; (2) saving and reserving to all and singular persons, and bodies politick, their heirs and successors, other than those person or persons which be seized, or hereafter shall be seized, of any lands, tenements or hereditaments, to any use, confidence or trust, all such right, title, entry, interest, possession, rents and action, as they or any of them had, or might have had, before the making of this act.

III. And also saving to all and singular those persons, and to their heirs, which be, or hereafter shall be, seized to any use, all such former right, title, entry, interest, possession, rents, customs, services and action, as they or any of them might have had to his or their own proper use, in or to any manors, lands, tenements, rents or hereditaments, whereof they be or hereafter shall be seized to any other use, as if this present act had never been had nor made; any thing contained in this act to the contrary notwithstanding.

IV. And where also divers persons stand and be seized of and in any lands, tenements or hereditaments, in fee-simple or otherwise, to the use and intent that some other person or persons shall have and perceive yearly to them, and to his or their heirs, one annual rent of x. li. or more or less, out of the same lands and tenements, and some other person one other annual rent, to him and his assigns for term of life or years, or for some other special time, according to such intent and use as hath been heretofore declared, limited and made thereof.

V. Be it therefore enacted by the authority aforesaid, That in every such case the same persons their heirs and assigns, that have such use and interest, to have and perceive any such annual rents out of any lands, tenements or hereditaments, that they and every of them, their heirs and assigns, be adjudged and deemed to be in possession and seisin of the same rent, of and in such like estate as they had in the title, interest or use of the said rent or profit, and as if a sufficient grant, or other lawful conveyance had been made and executed to them, by such as were or shall be seized to the use or intent of any such rent to be had, made or paid, according to the very trust and intent thereof; (2) and that all and every such person and persons as have, or hereafter shall have, any title, use and interest in or to any such rent or profit, shall lawfully distrain for

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non-payment of the said rent, and in their own names make avowries, or by their bailiffs or servants make conisances and justifications, (3) and have all other suits, entries and remedies for such rents, as if the same rents had been actually and really granted to them, with sufficient clauses of distress, re-entry or otherwise, according to such conditions, pains, or other things limited and appointed, upon the trust and intent, for payment or surety of such rent.

VI. And be it further enacted by the authority aforesaid, That whereas divers persons have purchased, or have estate made and conveyed of and in divers lands, tenements and hereditaments unto them and to their wives, and to the heirs of the husband, or to the husband and to the wife, and to the heirs of their two bodies begotten, or to the heirs of one of their bodies begotten, or to the husband and to the wife for term of their lives, or for term of life of the said wife; (2) or where any such estate or purchase of any lands, tenements or hereditaments, hath been or hereafter shall be made to any husband and to his wife, in manner and form expressed, or to any other person or persons, and to their heirs and assigns, to the use and behoof of the said husband and wife, or to the use of the wife, as is before rehearsed, for the jointure of the wife; (3) that then in every such case, every woman married, having such jointure made, or hereafter to be made, shall not claim nor have title to have any dower of the residue of the lands, tenements or hereditaments, that at any time were her said husband's, by whom she hath any such jointure, nor shall demand nor claim dower, of and against them that have the lands and inheritances of her said husband; (4) but if she have no such jointure, then she shall be admitted and enabled to pursue, have and demand her dower by writ of dower, after the due course and order of the common laws of this realm; this act or any law or provision made to the contrary thereof notwithstanding.

VII. Provided alway, That if any such woman be lawfully expulsed or evicted from her said jointure, or from any part thereof, without any fraud or covin, by lawful entry, action, or by discontinuance of her husband, then every such woman shall be endowed of as much of the residue of her husband's tenements or hereditaments, whereof she was before dowable, as the same lands and tenements so evicted and expulsed shall amount or extend unto.

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IX. Provided also, That if any wife have, or hereafter shall have any manors, lands, tenements or hereditaments unto her given and assured after marriage, for term of her life, or otherwise in jointer, except the same assurance be to her made by act of parliament, and the said wife after that fortune to outlive her said husband, in whose time the said jointure was made or assured unto her, that then the same wife so overliving shall and may at her liberty, after the death of her said husband, refuse to have and take the lands and tenements, so to her given, appointed or assured during the coverture, for term of her life, or otherwise in jointure, except the same assurance be to her made by act of parliament, as if aforesaid, (2) and thereupon to have, ask, demand and take her dower by writ of dower or otherwise, according to the common law, of and in all such lands, tenements and hereditaments, as her husband was and stood seized of any state of inheritance at any time during the coverture; any thing contained in this act to the contrary thereof notwithstanding.

X. Provided also, That this present act, or any thing herein contained, extend or be at any time hereafter interpreted, expounded or taken, to extinct, release, discharge or suspend any statute, recognizances or other bond, by the execution of any estate, of or in any lands, tenements or hereditaments, by the authority of this act to any person or persons or bodies politick; any thing contained in this act to the contrary thereof notwithstanding.

1 R. 3, c. 1—1 Co. f. 123—1 Leon. 14—2 Leon. 16—Lane 93. How by the common law lands ought to be transferred from one person to another, 3 Bulst. 185, 252—Godbolt 299, pl 416. Several inconveniences ensuing by conveyance of lands to uses and by the devising them by wills. 1 Roll. 260, 327, 385—2 Roll. 170, 335, 336—Poph. 21, 70. *Gilbert of Uses and Trusts.* The possession of lands shall be in him or them that have the use—1 Leon. 258—2 Leon. 6, 15—3 Co. 903—1 Co. 162—8 Co. 94—11 Co. 24—Cro. El. 46, pl. 2—Cro Jac. 6, 401, 453—Cro. Car. 44, 218—1 Ander. 337—Bro. feoff. al. uses 55, 56, 58—Plow. f. 111, 346—Moor 859, pl. 1180—Dyer f. 155, 235, 274, 309, 340, 349, 362, 369—Co. Inst. 237, a 272, a 287. b—Co. Lit. 187. b *Ld. Bacon's reading on this statute, Vin. Abr. V.* 22, 176 to 291—1 *Hale's P. C.* 247. Assurance made of divers to the use of one or some of them, 13 Co. 55, 56—2 Roll. 246. Saving of the right of feoffees to use, 2 Leo. 126, 127—1 Salk. 241—1 Anders. 84—2 Roll. 105, 245—7 Co. 39—Dyer f. 349—Moor 196, pl. 345—Jones 179. Land assured to the use that rent should be paid out thereof to some other, 1 Anders. 275, 338. A woman shall not have both a jointure and dower of her husband's lands, Co. pla. f. 171, 172—Co. l. 4, f. 1, &c.—Dyer f. 61, 97, 228, 248, 266, 317, 340—Co. Inst. 36. b A woman shall be endowed whose jointure is recovered, Moor 717. Jointure after marriage may be taken or refused by the wife, Co. l. 3, f. 27—Moor 721.

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An *use*, at the common law, was an equitable right which he reserved who conveyed a legal estate to another, upon trust and confidence, that the person to whom he so conveyed it, would nevertheless suffer him to take the rents and profits of the land, and that he would execute estates according to his directions.[1]

Uses are derived from the civil law which allows of an usufructory possession, distinct from the substance of the thing itself. They were introduced by the clergy, in order to avoid the statutes of mortmain, which being considered contrary to natural justice, by the ecclesiasticks, the subterfuge was sanctioned by the judges of the court of chancery, who in those days were usually clergymen.[2]

It may in general be observed—1. That at common law, an use is alienable. 2. That it is descendible. 3. That it is devisable. 4. That it is not extendible or assets. 5. That it is not liable to forfeiture, and 6. That a woman is not dowable of an use.[3]

The design of the statute 27 *Hen.* 8, c. 10, in the text, was utterly to abolish and destroy that pernicious mode of conveyances to uses, from which inconveniences so great had resulted. The means adopted was to make the *possession* fall in with the *use* in the same manner as the use was limited; but the method answered not the intent of the legislature. This act having introduced several sorts of conveyance quite opposite to the rules of the common law; for now when an use is raised, the statute gives *cestui que use* the possession; so that it is only necessary to form an *use* and the *possession* passes.

It would as far exceed the limits of this work, as it would be contrary to its object, to treat at large on the subject of *uses* and *trusts*. The means of information may readily be obtained by all who are desirous of possessing it.[4]

VOUCHER TO WARRANTY.

* 3 EDWARD I. CAP. XL. A.D. 1275.

Voucher to warranty, and counter-pleading of voucher.

FORASMUCH as many people are delayed of their right by false vouching to warranty; it is provided, That in writs of possession

1. 1 Co. Chudleigh's case—Gil. Law of Uses 175—5 Bac. Abr. 338.
2. Gil. Law of Uses 9—5 Bac. Abr. 340.
3. 5 Bac. Abr. 341.
4. See Gil. Law of Uses—5 Bac. Abr. Tit. Uses and Trusts. Ld. Bacon's reading on this statute is esteemed the most accurate and complete of all his treatises on the law.

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first in writ of *mortdauncestor*, of cosinage, of *Aiel, nuper obiit*, and of intrusion, and other like writs, whereby lands or tenements are demanded, which ought to descend, revert, remain, or escheat by the death of any ancestor, or otherwise, if the tenant vouch to warranty, and the demandant counterpleadeth him, and will aver by assise, or by the country, or otherwise, as the court will award, that the tenant or his ancestor, (whose heir he is) was the first that entered after the death of him, of whose seisin he demandeth; the averment of the demandant shall be received, if the tenant will abide thereupon; (2) and if not, he shall be further compelled to another answer, if he have not his warrantor present, that will warrant him freely, and incontinent enter into the warranty; saving unto the demandant, his exceptions against him, if he will vouch further as he had before against the first tenant. (3) From henceforth, in all manner of writs of entry, which make mention of degrees, none shall vouch out of the line; or in other writs of entry where no mention is made of degrees, which writ shall not be maintained, but in cases where the other writs of degrees cannot lie, nor hold place: (4) and in a writ of right it is provided, That if the tenant vouch to warranty, and the demandant will counterplead him, and be ready to aver by the country that he that is vouched to warranty, nor his ancestors had ever seisin of the land or tenement demanded, nor fee or service by the hands of his tenant, or his ancestors since the time of him, on whose seisin the demandant declareth, until the time that the writ was purchased, and the plea moved, whereby he might have infeoffed the tenant or his ancestors, then let the averment of the demandant be received, if the tenant will abide thereupon; (5) if not, the tenant shall be further compelled unto another answer, if he be not present that will warrant him freely, and incontinent enter in answer, saving unto the demandant his exceptions against him, as he had afore against the first tenant, (6) and the said exception shall have place in a writ of *mortdauncestor*, and in other writs before named, as well as in writs that concern right. (7) And if percase the tenant have a deed, that compriseth warranty of another man, which is bound in none of these cases, before mentioned to the warranty of an elder degree; his recovery, by a writ of warranty of charters out of the king's chancery, shall be saved to him, af

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what time soever he will purchase it; howbeit the plea shall not be delayed therefore.

2 Inst. 239—Bro. Parl. 34—Fitz. Counter Pl. de voucher 78, 81, 82, 83, 89, 96, 98, 100, wherein writs of entry no voucher out of the line shall be—Hob. 22—Fitz. Counter-plea &c. 3, 4, 5, 7 8, 9, 10, 17, 18, 20, 23, 24, 27, 29, 30, 40, 41, 42, 44, 48, 49, 58, 59, 60, 63, 65, 85, 88, 94, 114, 126—See 20 Edw. 1, st. 4, of Vouchers. Averment of demandant shall be admitted whether party vouched be absent or present. And 14 Edw. 3, st 1, c. 18, where averment shall be received that vouchee is dead, &c. Fitz. Execut. 122—Fitz. Gar. de charters 3, 5, 7 to 13, 19 to 31.

The mischief before this statute, was, that every tenant in a real action, was permitted to vouch any of the people, though neither he, nor any of his ancestors, had any thing in the land whereof they might have enfeoffed the tenant, or any of his ancestors, and again the vouchee might vouch another in like manner; and upon every summons *ad warrantizandum*, there must be *nine* returns, &c. so that the delay was in a manner infinite, and all upon false vouchers.[1]

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13 EDWARD I. STAT. I. CAP. VI. A.D. 1285.

The penalty if a tenant impleaded voucheth, and the vouchee denieth his warranty.

When any demandeth land against another, and the party which is impleaded voucheth to warranty, and the warrantor denieth his warranty, and the plea hangeth long between the tenant and the warrantor; (2 and at length, when it is tried, that the vouchee is bound to warranty: by the law and custom of the realm hitherto used, there was none other punishment assigned for the vouchee that denieth his warranty, but only that he should warrantize, and should be amerced, because he did not warrant before, (3) which was prejudicial unto the demandant, because he suffered oftentimes great delays by collusion between the tenant and the warrantor. (4) Wherefore our lord the king hath ordained, That like as the tenant should *leese*‡ the land being in demand, in case where he vouched, and the vouchee could discharge himself of the warranty, in the same wise shall the warrantor leese in case where he denieth his warranty, and it be tried against him, that he

1. 2 Inst. 240—2 Reeve E. L. 120.

‡ *lose.*

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is bounden to warranty. (5) And if an inquest be depending between the tenant and the warrantor, and the demandant will require a writ to cause the jury to come, it shall be granted him.

The penalty where the vouchee denieth his warranty, 2 Inst. 366—45 Ed. 3, 16. A venire facias at the demandant's request, Rast. 312, 687, &c.

This statute was intended to prevent the great delay of the demandant, which frequently occurred by agreement and collusion between the tenant and the voucher.[2]

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* 20 EDWARD I. STAT. III. A.D. 1292.

The statute *De defensione juris.*

Where a stranger coming in by a collateral title, not party to the suit, shall be received.

WHERE one by the king's writ, doth demand any tenements against tenant by the curtesy, in tail, in dower, or for term of life, or of years, and the demandant sueth so far that the lands be in manner recovered, whereupon another, not party to the suit, cometh in before judgment given, and saith, That he hath fee and right in those lands, and prayeth the court, that in as much as he is come before judgment, ready to defend his tenement, and to make answer unto the demandant, that he may be admitted thereunto by force of a statute made by the king that now is, amongst other the last statutes made at *Westminster;* (2) by which statute as well such as had no right, as they which had right, oftentimes in the case before mentioned, falsely and in deceit of the court did come in and pray to be received to make answer, that by their admission they might prolong the demandant from the judgment and seisin of his land, and to cause those demandants to plead of new; and so the demandants are greatly deferred in the case aforesaid to recover their right in the king's court, by reason of such malice, as well by mistaking of the said statute, as for any other cause just and reasonable; and this is used and found often before our

2. 2 Inst. 365.

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justices: (3) Wherefore our lord the king, for to withstand all such malice in the aforesaid case, and intending to provide a remedy therein, in his full parliament, and by his common council, hath ordained and from henceforth commanded straitly to be observed, that is to wit, from the *Monday* next after the feast of the *purification* of the virgin, the twentieth year of his reign, that when any before judgment in the foresaid case, cometh in by a collateral title, and desireth to be received, before his receipt he shall find sufficient surety (as the court will award) to satisfy the demandant of the value of the lands so to be recovered, from the day that he is received to make answer until the time that final judgment be given upon the petition of the demandant. (4) And if the demandant recover his demand, the defendor shall be grievously amerced, if he have whereof; and if he have not, he shall be imprisoned at the king's pleasure. (5) And if he can prove his right to be as good as he affirmed at such time as he was received, he shall go quit.

By 13 R. 2, s. 1, c. 17, a reversioner may be received in a suit against the particular tenant. Kel. 110, 160—Fitz. Receit, 76, 80, 99, 189.

Receipt is, when in an action between others a stranger prays to be received, to defend his right or interest.[3]

By *aid* and *voucher* a third person was introduced into the action, through the solicitude of the tenant *to defend* the land in dispute. But if the tenant pursued a different course, and appeared to defend faintly or collusively, or made default, the person in reversion, or remainder or any one otherwise interested might pray to be received, and defend his freehold or inheritance.[4]

The first statute which gave *receipt* in any case was that of *Gloucester*, 6 Edw. 1, c. 40,[5] which was succeeded by the statute of *Westminster* the second and others,[6] extending the privilege; but the principle upon which a person interested was allowed to interpose in a suit that was likely to affect his interest, is to be found in the old practice at common law. Thus if a tenant for life, or in dower was impleaded, and neglected to vouch the reversioner in fee, the reversioner might appear unvouched and enter into the warranty.[7]

3.

4. 3 Reeve E. L. 446.

5. That statute authorised a *termor* to defend his term before judgment, where the tenant of the freehold was impleaded, by collusion to oust him of his term. 2 Inst. 323.

6. See 13 Rich. 2, st. 1, c. 17, *ante* p. 210.

7. 2 Inst. 321, 344—Bract. 393.b—1 Reeve's E. L. 446—3 Reeve 151.

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Defending the inheritance in this way, was extremely important to the *revesioner*, who upon a recovery had against such particular tenant was driven to his *writ of right;* and to him in *remainder* the privilege was of still greater consequence, as he was without remedy, if he never had seisin.[8]

The statute *de defensione juris* was intended to correct the abuses which had arisen from the liberty given, by the statute of *Westminster* the second,[9] of receiving persons before judgment, to defend the inheritance, where actions were brought against *tenants by the curtesy*—in *tail*, in *dower*, for *life* or *years*.[10]

It requires that the persons received should find such surety as the court should think fit, to satisfy the demandant of the value of the land from the day he was received till final judgment. He was to be amerced in case the demandant recovered, and if he had not the means of payment, he was to be committed to prison during the king's pleasure; yet if he could make his title to have been, as he stated it, at the time he was received, he was to go quit.[11]

It was a common practice for a tenant, after the writ was brought, to convey the estate in fee, and take back an estate for life, so as to baffle the demandant: when a tenant under such circumstances pleaded that he was only *tenant for life*, this used to be replied, and would oust him of his *aid;* and if replied to prayer of receipt, it would oust such collusive revesioner of his receipt.

Receipt was only allowed in *real actions;* but it was extended beyond the actions mentioned in the statutes of Edward the first, as to waste *quem reditum reddit*, and many others.

To the prayers of *aid, voucher & receipt* the demandant might by way of counter-plea, alledge such matter as would take away the prayer of the tenant or defendant; and the vouchee besides might counter-plead the warranty, and shew that he was not bound to warrant the land.

The common counter-plea to *aid* and *receipt* was, that the prayee had nothing in the reversion the day of the writ purchased.[12]

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* 14 EDWARD III. STAT. I. CAP. XVIII. A.D. 1340.

If the tenant will vouch to warranty a dead man, the demandant may aver that he is dead.

ITEM, Because the demandants in plea of land have been often delayed, for that the tenants have vouched to warranty a dead

8. 2 Inst. 345—Co. Lit. 280, 281.
9. See the statute *ante* p. 149.
10. 2 Reeve's E. L. 228.
11. 2 Reeve E. L. 228.
12. 3 ib. 447.

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man, against which voucher the demandants before this time might not be received to aver that the vouchee is dead, to their great delay and mischief. (2) It is accorded and established, That from henceforth if the tenant vouch to warranty a dead man, and the demandants will aver that the vouchee is dead, or that there is none such, their averment shall be received without delay.

This statute like those which preceded it, was intended to prevent the delays which prevailed from abuses in respect to vouching to warranty, at this period, when the decisions in Westminster hall seemed rather to turn on learned subtleties, than doing substantial justice to the parties. One of these it seems was vouching to warranty a dead man, against which voucher the demandant before this time might not be received to aver that the vouchee was dead.[1 3]

WASTE.

Waste is the committing of any spoil or destruction in houses, lands; &c. by tenants, to the damage of the heir in reversion or remainder.[1]

Magna charta contains a provision against waste by a guardian, declaring that he shall not take of the lands of the heir, but reasonable issues, reasonable customs, and reasonable services, and that without destruction of his *men* and his goods.[2]

13. The learned author of observations of the ancient statutes confesses he does not pretend to understand the ancient forms of pleading in real actions sufficiently well to explain why such an averment could not be received at the common law, but notices a well known story in Westminster hall, that a party in perfect health, who was hearing his cause, being killed by a pleader in a plea, the judges could not take notice that he was alive. Obs. on the Stat. 194.

1. Bac. Abr. 455. Of these terms *waste, destruction* and *exile*, the two first signified the same thing: they are words convertible; but *exilium* meant something of a more enormous nature; as spoiling the capital messuage; prostrating or selling houses, prostrating or extirpating trees in an orchard or avenue, or about a house. These, it was considered, were calculated to render the country less eligible to reside in, and had a tendency to drive off the inhabitants; and hence were called *exilium:* yet exile is sometimes comprehended under the general word *waste.* Bract. 315—1 Reeve Hist. Eng. Law 386—Co. Lit. 53.b

2. *Sine destructione et vasto hominum et rerum*—hence it seems that the villians, who held by servile tenures, were considered as so many negroes on a sugar plantation. Obs. on the Stat. 8.

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The statute of *Marleberge* 52 Hen. 3, c. 23,[3] enacts that "*fermors*,"[4] *during their terms, shall not make waste, sale nor exile of house, woods and men, &c.*

By the common law, tenant in dower, tenant by the curtesy, and guardians, were alone punishable for waste. The first statute that gave remedy for waste done by lessee for life, or lessee for years, is that of *Marleberge*. This statute extends not only to waste *done*, but to waste *suffered*; not only to that which is *voluntary* or *actual*, but to that which is *negligent* or *permissive*.[5]

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* 6 EDWARD I. CAP. V. A.D. 1278.(y

Several tenants against whom an action of waste is maintainable.

IT is provided also, That a man from henceforth shall have a writ of waste in the chancery against him that holdeth by law of *England*, or otherwise, for term of life, or for term of years, or a woman in dower. (2) And he which shall be attainted of waste, shall leese the thing that he hath wasted, and moreover, shall recompense thrice so much as the waste shall be taxed at.

4 Dyer 25—Fitz. waste 62, 117, 146—Bro. Parl. 17—Fitz. Judgment 85, 134, 255—Fitz. damage 7, 22, 42, 52, 90, 114, 133—Co. Inst. 53,b 54,b 200,b 355.b—1 Roll. 91, 97, 156—Rast. 689, &c—Savil. 42. 9 *H.* 3, *stat.* 1, *c.* 4—52 *H.* 3, *c* 23. Regist. 72—2 Inst. 299. *See further* 13 *Ed.* 1, 14 *&* 22—20 *Ed.* 1, *st.* 2, *and* 11 *H.* 6, *c.* 5; *against whom action of waste is maintainable.*

This act removes a doubt, which had been entertained whether a *tenant by the curtesy* was liable to an action of waste.

Neither this statute nor the statute of *Marleberge* doth create any *new kind of waste*, but merely afford new remedies: What is *waste* and what not must be determined by the common law.[6]

It is said that this is a penal statute, and shall not be taken by equity.[7]

He that hath an estate for his own life, or for the life of another, by conveyance at common law, or by limitation of use, is a tenant within this statute.[8]

3. See the statute tit. ACCOUNT ante, page 10.

4 By *fermors*, or farmers, is understood all such as hold by lease for life or lives, or for years, by deed or without deed. 2 Inst. 145. It has been also held that it shall extend to strangers. *Hammond v Webb*, 10 Mod. 281.

5. 10 Mod. 281, *Hammond v Webb*. 5 Bac. Abr. 456. In respect to what shall be considered waste, see Co. Litt. 53, 54.

y) "The whole of this statute is in force, except that part which relates to waste in the time of wardship, which is not applicable to this country." *Report of the Judges.*

6. 2 Inst. 300, 301 & see Co. Lit. 53, 54.

7. Doct. & Stud. 122.

8. 2 Inst. 302.

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Action of waste lies against an *occupant for life*, because he has the estate of the lessee for life, and holds for life, as the statute mentions.[9]

Wherever the common law, gave single damages against any, this act gave *treble*, unless there be some special provision in the act.[10]

As to the recovery of the place wasted, it is said that if waste be done in divers rooms of a house, the rooms only shall be recovered, and not all the house; but if waste be done in a house *sparsim* throughout it, the whole house shall be recovered.[11]

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* 6 EDWARD I. CAP. XIII. A.D. 1278.

No waste shall be made hanging a suit for the land.

IT is provided also, That after such time as a plea shall be moved in the city of *London* by writ, the tenant shall have no power to make any waste or estrepement of the land in demand (hanging the plea) and if he do, the mayor and bailiffs shall cause it to be kept at the suit of the demandant. (2) And the same ordinance and statute shall be observed in other cities, boroughs, and every where throughout the realm.

Rast. pla. f. 317—14 H. 7, f. 7, 10—Dyer f. 315—5 Co. 115—Godbolt. 112 pl. 134—Regist. 76—2 Inst. 327. See 13, Ed. 1, c. 14, which takes away the writ of prohibition of waste. *See further* 13 *Ed.* 1, *c.* 22—20 *Ed.* 1, *st.* 2, *and* 11 *H.* 6, *c.* 5, *containing further provisions respecting waste.*

A writ of *estrepement* against the tenant, for waste done after the judgment, and before execution was maintainable at the common law before this statute; and so for waste done after verdict and before judgment.[12]

There are two kinds of estrepements prohibiting waste, *pendente placito* (during the pendency of the suit) one original which may be sued out of *chancery*, either together with the original, *præcipe* by which the land is demanded, or at any time after whilst the plea is depending, directed to the sheriff, or the party or to both; the other is a *judicial* writ, to be granted by the court where the plea is depending. The judicial writ to be issued by the court during the pendency of the suit, is given by this statute.[13]

9. 6 Rep. 37.b—*Dean and chapter of Worcester.*
10. 2 Inst. 305.
11. 2 Inst. 303.
12. Fitz. N. B. 142—2 Inst. 328.
13. 2 Inst. 328. This judicial writ was in effect, a prohibition upon which there might be an *attachment* and the parties would come to plead—2 Reeve E. L. 152.

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If the tenant aliens the land whilst the suit is depending still the demandant may have an estrepement against him and his feoffee also.[14]

Upon a writ of estrepement, grounded on this act, the sheriff may resist them that do, or offer to do waste; and if he cannot otherwise do it, he may lawfully imprison them or make a warrant to others to do it; and if it be requisite, he may take the *posse comitatus:* so odious in law is waste and destruction.[15]

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* 13 EDWARD I. STAT. I. CAP. XIV. A.D. 1285 (z

The process in an action of waste. A writ to enquire of waste.

WHEREAS for waste, done in the inheritance of any person, by guardians, tenants in dower, tenants by the curtesie of *England*, or otherwise for term of life, or years, a writ of prohibition of waste hath been used to be granted, by which writs, many were deceived, thinking that such as had done the waste, should not need to answer but only for waste done after the prohibition to them directed; (2) our lord the king, to remove from henceforth this error, hath ordained, That of all manner of waste done to the damage of any person, there shall from henceforth be no writ of prohibition awarded, but a writ of summons, so that he of whom complaint is, shall answer for waste done at any time; (3) and if he comes not after the summons, he shall be attached, and after the attachment he shall be distrained; (4) and if he come not after the distress, the sheriff shall be commanded that in proper person he shall take with him twelve, &c. and shall go to the place wasted, and shall enquire of the waste done, and shall return an inquest, and after the inquest returned, they shall pass unto judgment, like as it is contained in the statute of *Gloucester*.

2 Inst. 389—Fitz. Waste, 129, 130, 131, 134, 135, 136, 137. The process in an action of waste, Regist. 72, &c.—1 Brownl. 240—Dyer 204. A writ to enquire of waste, 3 Cro. 18. 3 *Ed.* 1 *c.* 21. 6 Ed. 1, st. 1, c. 5—20 Ed 1, st. 2, concerning waste, Rast. 697. *And see* 11 *H.* 6, *c.* 5, *where waste is maintainable, against a tenant who grants over his estate and takes the profits.*

14. *Same as note* 13.

15. 2 Inst. 328—5 Co. 115, *Foljamb's* case.

z) "This law," it is observed "deserves notice, as it shews that the statutes of the greatest consequence, at this time were little known to the generality of the subjects. Waste had been forbidden both by *Magna Charta* and 3 *Ed.* 1, *c.* 21, and yet we find that these statutes either were not known, or not considered as binding; for they expected to evade the penalties of disobedience, if they had not express notice, by a writ, to forbid the committing of waste *Obs. on the stat.* 94.

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By this statute the *prohibition* of waste, whereon an attachment might be had, &c. is taken away, and instead thereof, an action called here a writ of summons, is given [16]

If the defendant be returned *nihil* &c. so that perhaps he was never summoned nor any other writ served upon him, whereby he might have notice, yet a writ of enquiry of waste shall be awarded under this statute.[17]

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* 13 EDWARD I CAP. XXII. A.D. 1285.

Waste maintainable by one tenant in common against another.

WHEREAS two or more do hold wood, turf-land or fishing or other such things, in common, wherein none knoweth his several, and some of them do waste against the minds of the other, an action may lie by a writ of waste; (2) and when it is come unto judgment, the defendant shall choose either to take his part in a place certain, by the sheriff, and by the view, oath, and assignment of his neighbours sworn and tried for the same intent, or else he shall grant to take nothing from henceforth in the same wood, turf-land, and such other, but as his partners will take. (3) And if he do choose to take his part in a place certain, the party wasted, shall be assigned for his part, as it was before he committed the waste. (4) And there is such a writ in this case, that is to say, *Cum A. & B. tenent boscum pro indiviso, B. fecit vastum, &c.*

21 Ed. 3, f. 29—Fitz. waste 25, 96—2 Inst. 403—Co. Lit. 200—52 H. 3, c. 23—6 *Ed.* 1, c. 5—Regist. 76, *and the references to the aforegoing chapters.*

By the statute of *Westminster* the second, 13 *Ed.* 1, c. 22, the action of waste is given to one tenant in common, or joint-tenant against another; but the statute does not extend to *coparceners* [18]

Where there are tenants in common for life, one shall not have *trespass* against the other for cutting *trees*, but shall have *waste pro indiviso*, though they are only tenants for term of life &c. but the one may have tresspass of corn cut against the other.[19]

16. 2 Inst. 389.

17. Ib. See farther Fitz. N. B. tit. *Writ of Waste.*

18. 2 Inst. 403—Co. Lit. 200—5 Bac. Abr. 468.

19. 5 Bac. Abr. 468—Bro. waste, pl. 79.

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A STATUTE OF WASTE.

* 20 EDWARD I. STAT. II. A.D. 1292.

Tenant for life committeth waste, he in the reversion brought an action of waste and dieth before judgment, his heir brought an action for the same waste.

WILLIAM BUTLER, which is within age and in ward of our lord the king, hath shewed unto his highness, that where *Gawin Butler* his brother (whose heir he is) had impleaded one *Walter de Hapeton* by the king's writ, for waste and destruction made by him the said *Walter* in certain his lands and tenements, which the same *Walter* held for term of his life, of the inheritance of the foresaid *Gawin*, in *Winime and Thirke;* and the foresaid *Gawin*, before he had obtained judgment, died, after whose death, the foresaid *William* by like writ impleaded the foresaid *Walter* for the waste and destruction made by him of long time. The same *Walter*, before *Gilbert Thornton* and his companions assigned to hear the king's pleas, came in, and said, that he ought not to answer to the said *William* for the waste and destruction made in the time of another, before the right of the said inheritance descended unto him, and thereupon demanded judgment. (2) And forasmuch as certain justices did not agree in giving of the said judgment, because it seemed to some that it should not be agreeable to the law, that any person should obtain advantage and recompense by the foresaid writ, which is a writ of trespass done to a person certain, but only the same person to whom and in whose time the trespass was done; (3) other justices, with the more part of the king's council, were in the contrary opinion, alledging by divers reasons, that the said *William* ought to be heard and answered unto, and all other whatsoever they be, in like cases or in like trespasses: And because like matters have remained not amended, and trespasses unpunished, which was inconvenient:

II. Wherefore our lord the king, in his full parliament holden the day after the feast of the *purification*, in the twentieth year of his reign, by a general council hath ordained, and from henceforth hath commanded to be straitly observed, That every heir (in whose ward soever he be, and as well within age as of full

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age) shall have his recovery by a writ of waste in the foresaid case, and also in other where the same writ ought to hold place; (2) and it shall hold place as well for waste and destruction made in lands and tenements of his own inheritance, and as well in the times of his ancestors, as at any other time that the fee and inheritance descended unto him, and shall be answered unto therefore; (3) and that he shall recover the tenements wasted, and damages, as it is ordained in the second statute of *Westminster*, of damages to be recovered in a writ of waste, if the tenant be convict of waste. (4) And it is commanded by the king himself unto the same *Gilbert Thornton* and his companions, that they do proceed in the foresaid matter and in other like from henceforth, and judgment shall be given according as the matter is found. (5) And likewise it is commanded unto the justices, that they shall cause all the foresaid things to be straitly observed before them from henceforth.

Not a statute. Maynard Ed. 2, 231—Regist. 73—2 Roll. Abr. 284, pl. 9, 825.—*See the references to the aforegoing statute.*

By this statute an action of waste is maintainable for waste done in the time of his ancestors, as well as for waste done in his time.[20]

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* 11 HENRY VI. CAP. V. A.D. 1433.

The remedy where the tenant granteth over his estate, taketh the profits, and committeth waste.

ITEM, Because that divers people in time past have let their lands and tenements to divers persons, that is to say, some for term of life, or of another man's life, and some for term of years, the said tenants have oftentimes let and granted their estate which they had in the same lands and tenements, to many persons, to the intent that they in the reversion, that is to say, their lessors, their heirs, or their assigns, might not have knowledge of their names, and after the said first tenants continually occupy the said lands and tenements, and thereof take the profits to their proper

20. 5 Bac. Abr. 468.

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use, and in the said lands and tenements commit waste and destruction, to the disheritance of them in the reversion: (2) it is ordained and established, That they in the reversion in such case may have and maintain a writ of waste against the said tenants for term of life, of another's life, or for years, and so recover against them the place wasted, and their treble damages, for the waste by them done, as they ought to have done for the waste committed by them before the said grant and lease of the estate. (3) Provided always, That this ordinance hold not place, but where the first tenants before the lease and grant of their said estates, in the manner and form abovesaid, were punishable of waste; (4) and also where after the said grant and lease the said first tenants of the said lands and tenements take the profits at the time of the waste done, to their own proper use. (5) And this ordinance shall extend as well to waste by such tenants done before this ordinance, as after.

5 Co. 77.

Where tenants for their own lives, or for the lives of others, or for years, grant over their estates, and take the profits to their own use, and commit waste, they in remainder may, by this statute, maintain an action of waste against them.

The action lieth against him that taketh the profits.[21]

If tenant for life or years, does waste and grants over his estate, the writ lies against him who did the waste and not against the grantee.[22]

WRIT OF DECEIT.

* 2 EDWARD III. CAP. XVII. A.D. 1328.

A writ of deceit shall be maintainable in case of garnishment in plea of land.

ITEM, it is enacted, That a writ of deceit shall be maintainable, and hold place, as well in the case of garnishment touching plea of land where such garnishment is given, as in case of summons in plea of land. Dated at *Northampton*.

21. 2 Inst. 302—5 Bac. Abr. 469.

22. Fitz. Nat. Br. tit. Writ of Waste. 5 Bac. Abr. 469.

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A writ of *deceit* is founded on the common law, though no mention is made of it till the reign of *Edward* the second. It was to redress a person in damages for any injury he had sustained by reason of collusive, oppressive or deceitful proceedings in judicial matters.[1]

Garnishment was one of the ways in which a defendant might release himself from the burthen of contesting singly with the plaintiff. It was only allowed in the action of *detinue*.

The practice of depositing deeds, in the hands of a third person to await the performance of covenants, or the doing of some act, upon which they were to be re-delivered to one or other of the parties, was very ancient. It gave rise to many actions of *detinue*; in which actions the defendant might plead that they were delivered by the plaintiff and one J. N. *upon certain conditions*, and that he did not know whether the conditions were performed, and therefore he prayed *garnishment*, as it was called, against J. N. that is, that J. N. might be summoned to shew whether they were performed; whereupon a *scire facias* would issue against J. N. who under the name of *garnishee*, became defendant to the suit, the first defendant being considered as out of court by the garnishment.[2]

1. 2 Reeve Eng. Law 319.
2. For further information on the subject of *garnishment* and *interpleader*, the reader is referred to Mr. Reeve's history of the English law, 3 vol. 448, &c.

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APPENDIX.

STATUTE OF FRAUDS AND PERJURIES.

29 *Charles II.* c. 3.[1]

AS but a part of the statute of frauds has been incorporated into our laws, by the act of 21st March 1772, the important provisions contained in the *fourth* and *seventh* sections of the English statute being omitted, a great difference arises between the English system and our own; which ought carefully to be kept in view, in referring to the English decisions on this subject.

Under the act of assembly, as well as the English statute, it is a general rule, that no estate or interest in lands shall pass, but by deed, or some instrument in writing, signed by the parties; and that no parol proof shall be admitted, to *contradict, add to, diminish* or *vary*, from a deed or writing.[2]

To this rule however there are some exceptions. Thus where fraud has been interposed, to prevent an agreement from being put into writing, courts will relieve, notwithstanding the act, for it will not be suffered that a law designed to prevent fraud shall itself be made the instrument of fraud. Cases however of this class require great nicety of discrimination. The statute must not be repealed by construction.[3]

Where a parol agreement is in part *executed*, it shall be enforced, as if a man, on a promise of a lease to be made to him, lays out money on improvements, the lessor shall be compelled to execute the lease; for being *executed* on the part of the lessee, the lessor shall not be allowed to take advantage of his own fraud, and to appropriate to himself the improvements made by another, on the faith of his promise. But if no such expense had been incurred, on the lessee's part, a bare promise of a lease, though accompanied with possession, would be within the statute of *frauds*.[4]

If a parol agreement be made concerning the purchase of lands, and the party receives the whole, or a part of the purchase money,

1. See the statute *tit.* FRAUDS, *ante* page 304.
2. 1 Dal. Rep. 424.
3. 1 Bac. Abr. 73—Prec. in Chan. 519, 561—Vern. 159.
4. See the cases above cited; and also the case of *Ebert v Woods*, 1 Binney 216. Several cases on this subject are noticed, with very appropriate remarks upon them, in Mr. *Smith's* edition of the State Laws, 1 Vol. p. 391, 398.

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equity will compel a specific performance of the whole agreement.[5]

Where a court of chancery would compel a specific performance of the agreement, it may be enforced in a court of law in Pennsylvania. The method pursued is for the jury to give such damages as will make it the interest of the party to conform to his contract, to be released upon such performance and payment of costs.

A parol partition between tenants in common, made by marking a line of division on the ground, and followed by a corresponding separate possession, is good, notwithstanding the act of frauds and perjuries.[6]

A parol gift of lands, by a father to his son, and followed by the son's making improvements on the land, is valid.[7]

It has been held that an action for damages may be maintained on an unexecuted parol contract, for the sale of lands, notwithstanding the act of frauds and perjuries; or on a written contract, with an agent who has merely a parol authority.[8]

Where a parol sale of lands has been made, money paid, and possession delivered, the contract is good between the parties; but to make it good against a *bona fide* purchaser, there must be clear evidence of notice to him either actual or *legal*. *Legal* notice exists only where there is a violent presumption of actual notice.—Undisturbed possession by the equitable owner has generally been considered as legal notice; but it must be a clear unequivocal possession. Hence, where A bought by parol from B a corner of B's tract, paid for it, was put into possession, and had buildings erected, but at the same time had no survey of the part, or other admeasurement to reduce it to certainty; and on B's own part, there was a forge, dwelling house, grist and saw mill, and buildings for the workmen, which with A's buildings, might strike the eye as one establishment, the possession of A was held not to be legal notice of his title to a purchaser at sheriff's sale, under a judgment against B. The equity of a second purchaser will prevail over such a title as A's, under these circumstances, particularly if A gave no actual notice of his title, when he probably knew of the judgment, execution and sale.[9]

5. Vern. 151, 159, 363—2 Vern. 220.

6. *Ebert v Woods*, 1 Binney 216.

7. *Lee of Syder v Echart*, 1 Binney 378. But in every case of this kind, there ought to be unequivocal proof of a *gift*. A mere *permission to reside*, is commonly followed by improvements; which may be equally beneficial to both parties.

8. 1 Bin. 450—If damages might in such case be given, so as to enforce a specific performance, would not that branch of the statute which makes a writing necessary in the transfer of lands, be rendered nugatory?

9. *Lessee of Billington v Welsh*, 5 Binney 129. If one article to buy an estate, and pay the purchase money, and afterwards a judgment is recovered against the vendor by a third person, who had no notice, yet this judgment shall not in equity affect the estate; because from the time of the articles, and payment of the money the vendor was only a trustee for the purchaser. 1 P. Wms. 278—10 Mod. 468—2 Ev. Cas. Abr. 683—2 Tidd Pr. 851.

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At the common law where writing was not necessary to the validity or *proof* of a contract, courts still were cautious of permitting parol evidence to vary or controul the import of a written agreement. There is greater reason for caution in cases falling within the provisions of the statute, which has rendered certain contracts remediless at law without writing. In establishing a practical *criteria* for the rejection, or admission of parol evidence, in relation to a written agreement, the judges have been called upon for the exercise of their soundest discretion. "The rule of distinction commonly resorted to in those cases, turns upon the tendency of such evidence to *contradict*, *vary*, or *add to*, or only to *explain* and *elucidate* an instrument: a rule very good and intelligible in theory, and if not universally easy of application, yet fully adequate to the resolution of a great majority of the cases.—Its application is well illustrated in the case of *The king v the inhabitants of Laindon.*"[10]

Parol evidence has been admitted to prove that a legacy bequeathed to *Samuel* was intended for *William.*[11]

Analogous to the principal on which parol evidence is admissable to *explain* but not to *contradict* or enlarge the import of a written agreement, a distinction is taken between *latent* and *patent* ambiguities. "The technical and almost figurative conciseness of which places them above common apprehension."

In legal acceptation an ambiguity is *latent*, when the equivocality of expression, or obscurity of intention does not arise *from the words themselves*, but from the ambiguous or delitescent state of extrinsic circumstances to which the words of the instrument refer; and which is susceptible of explanation by the mere developement of *extraneous facts*, without altering or adding to the written language, or requiring more to be understood thereby than will fairly comport with the ordinary or legal sense of the words and phrases made use of. An ambiguity *patent* is where it is produced by the uncertainty, contradictoriness or deficiency of the language of an instrument, so that no discovery of facts, or proof of declarations can restore the doubtful or smothered sense, without adding ideas which the actual words will not of themselves sustain.[12] In this particular the statute is declarative and corroborative of the rule of the common law, which forbids in the cases within its provisions, the resort to extrinsic proof in those instances wherein the ambiguity is *patent;* but where the ambiguity is only *latent*, as in such case the object of the collateral testimony is only by a comparison of the words of the instrument, with external circumstances, whether consisting of facts, or declarations, to attach a meaning and applicability to expressions within the

10. 8 Term. Rep. 379. See *Roberts on Frauds* 11. The Lee of *Thomson & ux. v White*, 1 Dal. Rep. 424.

11. *Powel v Biddle* admr. *De bonis non*, &c. of S. Mifflin, 2 Dal. Rep. 70.—See also 2 Atk. 239, 372—2 P. Wms. 141, and 2 *Dal. Rep.* 80, 133, 171, 173, 196–7, 266.

12. See Ld. Bacon's Maxims 99—Sir T. Ray, Rep. 412—Roberts on Frauds 16.

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limits of their grammatical or legal acceptation. The statute seems in no danger of violation by the admission, for these purposes, of this species of proof.[13]

An example of the *ambiguitas latens* is that of a devise to a person of the same name with another, without any specific description appearing upon the face of the will, to designate the real object of the testator's bounty.[14]

The case of *Hayter v Joinville*,[15] furnishes an example of the ambiguity *patent*, where the uncertainty was inherent in the term itself, which, unless the context of the will had defined its applicability, could scarcely receive explanation from any extrinsic circumstances; and was therefore considered to be an incurable ambiguity.

Where a devise to one of the sons of J. S. who has many sons, no regard can be paid to any thing extraneous of the will, as the medium of expounding the testator's intention.[16]

Parol and extrinsic evidence is admissable to *rebut presumptions*, to prevent *fraud*, to correct *mistakes*, and to protect against the consequences of *loss or accident*.[17]

The act of frauds and perjuries does not prevent a declaration of trust by parol in Pennsylvania.[18]

No lease by parol will be good which imports to convey an interest for more than three years *from the time of making thereof*.[19]

A lease for three years, and so from *three* to *three* years, is a lease for *six* years, and so void by the statute unless it be in writing. But a lease *from year to year, during the pleasure of the parties*, is only a lease for one year certain, and every year after it is a springing interest arising from the first contract, and parcel of it; so that with a view to the time which has elapsed, or the number of years which the tenant has occupied, it is considered as an estate for *all* that time, including the current year; and the lessor may distrain and avow, as for so much rent in arrear upon one *entire* lease. After the commencement of each new year it becomes an *entire* lease certain for years past and also for the year entered upon.[20]

Notwithstanding the statute declares that leases by *parol* for more than three years shall have the effects of estates *at will* only, the construction has been that such a lease enures as a tenan-

13. See Ld. Bacon's Maxims 99—Sir T. Ray. Rep. 412—Roberts on Fraud 16.

14. Roberts on Fraud 16—See 5 Rep. 68. *Lord Cheyney's* case, Hob. 32.—*Comder v Clarke*, 1 Salk. 7. *Lepeor v Brown*.

15. 3 East. 172. But see *Crevys v Coleman*, 1 Ves. J. N. S. 319.

16. 2 Vern. 625—Amb. 175—2 Mod. Ca. in Law, and Ev. 122—See 2 Atk. 373—3 Atk. 493—Plow. Com. 441, margin where all the authorities are collected.

17. See Roberts on Fraud B. 1, c. 1.

18. Lee *German v Gubbald*, 3 Binney 302.

19. And a lease of any duration would seem to be invalid, if not in writing and signed according to the § 4 of the statute (and § 1 of the act of assembly) unless it can operate as a present demise. *Roberts on Fraud* 241.

20. *Birch v Wright*, 1 Term. Rep. 380—Roberts on Fraud 242.

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cy *from year to year*, and requires therefore a regular notice to determine the interest as in other similar holdings.[21]

Though a lease be void under the statute, as to the *extent* of the term, yet it may be regarded as having an operation to regulate the terms of the substituted interest.[22]

A lease which would have been good by *parol* at the common law would not now be good by being in writing merely.[23]

Surrenders of estates for life, or years were good, at common law, if made by *parol*, unless the subject were such as could not pass without deed, by reason of their nature and quality; which was the case with respect to those things which are said to lie in *grant*, as all incorporeal hereditaments. An advowson or rent therefore could not nor can they now be *surrendered* without an instrument sealed and delivered; for they are incapable of being *passed* without it. So of *remainders* which are the proper subjects of the conveyance by grant, and can only be surrendered by deed.[24]

But with respect to lands in possession, which at the common law might have been surrendered by word only, without deed or writing, the statute has created a necessity for a written document.[25]

As to the effect of cancelling a deed since the statute, whether it shall operate as a determination under a lease, the great lord Bacon has given contradictory opinions. That which was judicially delivered by him as chief baron, is, that destroying the deed will not determine the lease. This opinion seems to be entitled to the preference.[26]

The statute makes an express exception of surrenders which take effect "*by operation of law.*"

To obtain a right understanding of this branch of the statute, it is necessary to inquire what constitutes a surrender in law, or implied surrender.

The acceptance of a new lease, to begin presently or at any time prior to that fixed for the termination of the first lease is a virtual surrender of the first.[27]

Upon this principle, if a lessee for twenty years, or any greater number, takes a lease for a shorter term as ten or five years, to take place during the continuance of the first lease, the first term of twenty years is thereby determined; for the acceptance of the new lease imports an admission and affirmance of the lessor's ability to make a new contract, which he could no otherwise obtain but by the surrender of the first lease.[28]

21. *Clayton v Blakely*, 8 Term. Rep. 3—Roberts on Fraud 244.

22. *Doe ex dim. Rigge v Bell*, 5 Term. Rep. 471.

23. Roberts on Fraud 246.

24. ib. 247.

25. See the third section which is copied into the first section of our act of assembly.

26. See 3 Bac. Abr. tit. *Leases*, &c. (T.) p. 463, and *Mogennis v Macculough*, Gilb Eg. Rep. 236—Roberts on Fraud 252.

27. 3 Bac. Abr. 459—Gilb. Eg. Rep. 236.

28. 2 Roll. Abr. 496—Cro. El. 605.—*Hutchins v Martin*—Roberts on Fraud 254.

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So if the second lease contain a condition, which is broken, and in consequence the lease becomes void, before the time expressed in the first, for its termination, has arrived, yet the first lease is irrevocably merged and gone, by the acceptance of the second.[29]

Even the acceptance of a *void* lease will operate a surrender of the first lease.[30] Yet if the lease be not intrinsically defective, but is void from the disability of the lessor, it will not operate a surrender of the first.[31]

Surrenders by implication being wholly founded on the supposed *intention*, may be reasonably inferred wherever the new interest is inconsistent with the subsisting lease. *Quando aliquis per chartam aliquid accipit, omnia fecisse videtur sine quo res esse non potuit.* Thus it has been held that if a lessee takes a grant from his lessor, of a *rent charge* out of the same land, or of *common*, or even of *estovers* his lease is surrendered in law. The same consequence, by implication from his acts, will arise if he accepts a new lease from his lessor, *de vestura terræ.*[32] Although the consistency or inconsistency of the two interests furnishes the criterion for judging whether a surrender is, or is not produced. Yet it must be a *necessary* inconsistency in the interests that will make a surrender in law. Whether the acceptance of a future interest is a surrender of another future interest, appears to be a moot point.[33]

The 14th, 15th, and 16th sections of the statute relate to the effect of judgments and executions.[34]

By the common law a judgment has relation to the first day of the term whereof it is entered, unless any thing appears upon the *record*, that it can *not* have that relation.[35]

The relation of judgment to the first day of the term, is taken away as against *purchasers* by the statute of frauds and perjuries, which declares that they shall take effect only from the time of *signing*.

This provision, however, is confined to *purchasers bona fide* and for valuable consideration, and does not apply as between the parties to the suit; in respect to whom the judgment still has relation to the first day of the term. And therefore if the defendant should die in vacation, judgment may be entered after his death, as of the preceding term, when he was living, and it will be a good judgment at common law, as of that term.[36]

29. 3 Bac. Abr. 461—Co. Lit. 218.b

30. *Mellows v May*, Cro. El. 873—Roberts on Fraud 256.

31. *Watt v Maidwell*, Hulton 104.

32. 2 Roll. 490.

33. *Ld. Coke* says it will so operate, (Co. Lit. 338.a) But he cites 2 *Roll. Abr.* 496, *pl.* 13, which far from supporting him is directly contrary. The year book intended to be referred to is 37 *H.* 6, 5 *De Term. Pach.*—See Roberts on Fraud 261.

34. These are copied in the 21 and 3d sections of our "*Act for prevention of frauds and perjuries*," of course the construction of these branches of the statute will be applicable to our own act.

35. 3 Burr. 1569—3 Salk. 212—1 Wils. 39—7 Term. Rep. 21. In actions by *original* the judgment seems to relate to the *essoin* day, in actions by *bill* to the first day in full term. See 1 Sel. 8, and the cases there cited.

36. Ld. Ray. 695, 766, 849, 869—1 Salk. 87—2 Salk. 401—7 Mod. 39—3 P. Wms. 399—Willes 428—6 Term. Rep. 368—7 Term. Rep. 202—1 Binney's Rep. 172, *Griffith v Ogle.*

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Doubts appear to have arisen whether there be a priority in respect to judgments entered on the *same day*. According to the report of a case determined in the court of common pleas of Philadelphia county,† it was there held that where judgments are entered on the same day, there is *no priority* but that judgment creditors shall be paid *pro rata*. The reporter refers to some case said to have been decided by judge Cox contrary, as it would seem, to his own judgment, in conformity with some alledged decision of the supreme court. I have not met with any such determination of the supreme court; and consider the question fairly open to discussion.

Any argument drawn from the words of this section of the act, which are, that "the *day* of the month and year" shall be set down would prove too much; for precisely the same words are used in the following section, which relates to *executions;* yet the law unquestionably notices fractional parts of a day in respect to executions, and the sheriff is bound at his peril to execute first the execution first delivered. "At common law, if two writs had been of the same *teste*, the sheriff was bound to execute first, that which was first delivered. By the same reason, if two writs of *fieri facias*, since the statute, come to the sheriff in one day, he ought to execute that writ first which came to his hand first, for he has no election. And in this case there is *prius* and a *posterius* in the same day."[37]

It would appear somewhat whimsical, that the *same words* occurring in the succeeding sections of the *same act*, should receive different constructions.

"The moment the *law* said *judgments should bind purchasers* ONLY FROM THE TIME OF SIGNING, it followed that in case of purchasers, the *time* of signing might be *shewn*."[38]

The most ruinous consequences would result, as to purchasers, if the *true time* of signing might not be shewn. It never could be imagined that a purchaser could be affected by a judgment entered subsequent to the purchase, though on the same day.

But if the *hour* or precise time of signing a judgment is to be noticed, as it regards a *purchaser*, why may it not with equal propriety be noticed as it relates to a judgment creditor?

Shall it be in the power of a man who obtains money on the faith of a judgment, to deprive his creditor of the security, by confessing judgments to a swarm of other creditors afterwards on the same day?

"The lieu of a judgment," says Judge Yates, "attaches *at the moment of entry*. Its effects are *immediate*, and must be known, and ascertained when the judgment is given, and cannot depend upon subsequent events."[39]

† 1 Br. Rep. 23.

37. *Smallcomb v Cross & Buckingham.* 1 Ld. Ray. 251—1 Salk. 320.
38. 2 Burr. 967.
39. 6 Binney's Rep. 138.

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The statute requires that the day of the month, &c. shall be set down on the *paper-book*, *docket* or *record*, and shall be also entered upon the *margent of the roll of the record*.[40]

The *dogget*, commonly called the *docket* or *docquet*, is an *index*, to the judgment invented by courts, for their own ease, as well as the security of purchasers, to avoid the trouble and inconvenience of turning over the rolls at large.[41]

The practice of doggeting judgments appears to have first obtained in the court of Common Pleas, where the dockets were entered on a separate roll called the docket-roll.[42]

In the court of King's Bench the docket was nothing more than a note in parchment or paper, containing the names of the plaintiff and defendant, the debt or damages recovered, with the term and number of the judgment roll.[43]

Before the statute of 4 *& 5 W. & M. c.* 20, the judgment bound the lands, and the docket was nothing more than an index to find it readily. But since that statute, it is necessary *in England* that the judgment should be docketed in order to bind the lands as to purchasers and mortgagees.[44]

In Pennsylvania, it has been considered in the case of a judgment confessed by virtue of a warrant of attorney, that an indorsement made by the prothonotary upon the declaration in the following words and figures *to wit*, "*Filed 25th August* 1815" was a sufficient entry upon the record of the time of signing the judgment, within the "*act for the prevention of frauds and perjuries.*"[45]

At the common law a *fieri facias*, had relation to its *teste* and bound the defendant's goods and chattels from that time; so that if he had afterwards sold them even *bona fide*, and for a valuable consideration, they were still liable to be taken in execution, into whose hands soever they might come.[46]

But this relation to the *teste* of the execution being productive of great inconvenience to fair purchasers, was taken away by the statute of frauds, which declares that they shall only bind the goods, from the time of delivery to the sheriff, to be executed. However, neither *before* nor *since* the statute, is the property of the goods *altered*. The meaning of these words, "*That no writ of execution shall bind the property but from the delivery of the writ to the sheriff*" is, that after the writ is so delivered, the defendant should make an assignment of his goods, unless by a sale in *market-overt*, the sheriff may take them in execution.[47]

40. Further provisions are superadded in England, limiting and restraining the operation of judgments by 4 *& 5 W. & M. c.* 20.

41. Gilb. C. P. 164.

42. Cro. Car. 74—Sid. 70.

43. The regulations on this subject were made by rules of court till the statute of 4 *& 5 W. & M. c.* 20, provided for the making of an alphabetical dogget by the defendants' names, of all the judgments entered in the court respectively.

44. 2 Tidd's Pr. 860—Gilb. C. P. 165.

45. Determined in the case of *Hart v Trotter*, in Allegheny county. Which decision has been acquiesced in.

46. 8 Co. 171—Cro. Eliz 174, 440—Cro. Car. 149—Gilb. Exec. 13, 14—2 Vent. 218—7 Term. Rep. 21, but see 1 Leo. 174.

47. 2 Eg. Cas. Abr. 381—1 Ld. Ray. 252.

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Though it be the duty of the sheriff to execute first the writ first delivered, yet if he should levy and sell under that last delivered the sale would be valid; and the remedy of the plaintiff in the first execution would be against the sheriff.[48]

R. delivered a writ of execution to the sheriff, under which his officer levied the debt and made the bill of sale. Then the sheriff discovered a former execution in the office and returned *nulla bona*. This was a false return; for, though the other writ of execution being first delivered was material between the plaintiff in that suit and the sheriff, and would be sufficient to charge the sheriff with the debt, yet it was not material between R. and the sheriff, for he having once sold under R's execution, was answerable to him for the debt.[49]

A writ of *fi. fa.* at the suit of F. was delivered to the sheriff on the 25th Nov. by virtue of which one of his officers entered and took the defendant's goods on the evening of that day. On the 27th Nov. another officer entered the defendant's house, and levied under an execution delivered the 23d Nov. at the suit of G. On the return of F's writ, he applied to the sheriff for a *bill of sale*,[50] who informed him, that G's execution being brought into the office prior to the plaintiff's, must be first satisfied; upon which the plaintiff paid into the sheriff's hands the amount of G's execution, and afterwards applied to the court to have that sum repaid to him. But it was refused, for, the bill of sale to the plaintiff was not a bill of sale under an execution to an innocent purchaser, but to a person who purchased with notice of a prior claim. Though the possession of an innocent vendee shall not be disturbed, yet, as to all the rest of the world, the goods are bound from the delivery of the writ; here G's writ was first delivered to the sheriff.[51]

Not only *personal* chattels are bound from the time *fi. fa.* is lodged in the hands of the sheriff, but a lease hold estate is also affected from that time; and if the debtor subsequent thereto makes an assignment of the lease hold estate the judgment creditor need not being an ejectment to come at it, by setting aside the assignment, but may proceed at law to sell the term; and the vendee will be entitled at law to the possession notwithstanding such assignment.[52]

In the construction of the 22 & 23 *Charles* 2, c. 10, which provided for the distribution of the personal estates of intestates, it was doubted, whether the husband was entitled to administer to his

48. 1 Ld. Ray. 252—1 Salk. 320—Carth. 419—*Rybot v Peckham in notes.* See 1 Wils. 44—Peake's Ca. N. P. 66.

49. *Rybot v Peckham*, Mich. 19 Geo. 3—1 Term. Rep. B. R. 731, (n. a.)

50. A practice has obtained in England, where goods are seized under a *fieri facias*, to make a *bill of sale* of them to the plaintiff in the execution, at an appraised value. 2 *Bac. Abr.* 352, *Comb.* 452—*Carth.* 419—*Ld. Raym.* 251—*Salk* 20, *p.* 4—5 *Mod.* 376—6 *Mod.* 292—12 *Mod.* 126, *and vide* 2 *Vent.* 95.

51. *Hutchinson v Johnson. East.* 27, *Geo.* 3—1 *Term Rep.* 729. Where it occurs that a levy and sale is made under the execution *last* delivered, would not the court order the money arising from the sale, to be applied in satisfaction of the *first*; and not turn the party round to his remedy against the sheriff who might be insolvent?

52. *Burden v Kennedy, Trin.* 31 *Geo.* 2—3 *Atkyns* 739.

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wife, as before he had been, so as not to be obliged to distribute the personal estate amongst the kindred of the wife. The § 25 of the statute declares that he shall not be compellable to make distribution.[s 3]

* 1 RICHARD II. CAP. IX. A.D. 1377.† ‡

A feoffment of lands or gift of goods for maintenance shall be void. An assise is maintainable against the pernor of the profits of lands.

ITEM, Because it is complained to the king that many people of the said realm, as well great as small, having right and true title as well to lands, tenements and rents, as in other personal actions, be wrongfully delayed of their right and actions, by means that the occupiers or defendants to be maintained and sustained in their wrong, do commonly make gifts and feoffments of their lands and tenements which be in debate, and of their other goods and chattels to lords and other great men of the realm, against whom the said pursuants, for great menace that is made to them, cannot nor dare not make their pursuits. (2) And also on the other part complaint is made to the king, that oftentimes many people do disseise other of their tenements, and anon after the disseisin done, they make divers alienations and feoffments, sometime to lords and great men of the realm to have maintenance, and sometime to many persons of whose names the disseisees can have no knowledge, to the intent to defer and delay by such frauds the said disseisees, and the other demandants, and their heirs, of their recovery, to the great hinderance and oppression of the people: (3) It is ordained and established, That from henceforth no gift or feoffment of lands, tenements, or goods be made by such fraud or maintenance; (4) and if any be in such wise made they shall be

† "This statute is in force, except such parts as are altered by the statutes of *4th of Hen.* 4, *c.* 7—11 *Hen.* 6, *c.* 3—*4th of Hen.* 7, *c.* 24, *and* 27 *Hen.* 8, *c.* 10."
Report of the Judges.

‡ This statute ought to have appeared under title DISSEISIN, &c. but was accidentally omitted.

53. The § v. of our *act for prevention of frauds and perjuries* contains a similar provision.

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holden for none and of no value; (5) and the said disseisees shall from henceforth have their recovery against the first disseisors, as well of the lands and tenements, as of their double damages, with out having regard to such alienations, so that the disseisees commence their suits within the year next after the disseisin done. (6) And it is ordained and stablished that, The same statute shall hold place in every other action * *in* plea of land where such feoffments be made by fraud or collusion, to have their recovery against the first such feoffor. (7) And it is to wit, that this statute ought to be understood where such feoffors take the profits.

* *or*

1 Co. 123—Bro. Feoffments 1, 19—Fitz. Counter plea de voucher 3—Fitz. Return de viscount 5—Co. Lit. 369—1 H. 5, f. 4—12 H. 4, f. 21—9 Hen. 6, f. 14—22 Hen. 6, f. 16—39 Hen. 6, f. 44—1 Ed. 4, f. 2—4 Ed. 4, f. 17—21 Hen. 6, f. 55—Rast. 68. A disseisee may maintain an assise against the perpor of the profits. *Altered by* 4 *H.* 4, *c.* 7, *which is explained by* 11 *H.* 6, *c.* 3. *Altered further by* 1 *H.* 7, *c.* 1—27 *H.* 8, *c.* 10—4 *Hen.* 4, *c.* 7—4 *Hen.* 7, *c.* 24.

It was a high offence at the common law, as evidently tending to oppression, for any one to buy at an underrate, a doubtful title known to be disputed, to the intent that the buyer might carry on the suit; and it seems not to be material, whether such title be in fact good or bad; or whether the seller were in possession or not, unless the possession were lawful and uncontested.[54]

The statute in the text declares gifts or feoffments made by fraud or maintenance to be void.[55]

THE STATUTE OF VOUCHERS.

* 20 EDWARD I. STAT. I. A.D. 1292.†

In a plea of land, the tenant voucheth, and the demandant counterpleadeth.

WHEREAS the tenant impleaded in a plea of land* heretofore had vouched to warranty, and thereupon the demandant would a-

54. *Plow.* 80—*Hob.* 115—Moore 751, *pl.* 1031—3 *Bac. Abr.* 525.

55. They are so as to the disseisees; but they are effectual between the feoffor and feoffee. *Co. Lit.* 369.a—See farther in relation to this subject *ante* pages 163 and 334.

† This statute ought to have been placed under title VOUCHING TO WARRANTY; but was omitted.

* Add *or tenement.*

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ver, that neither he that is vouched, nor any of his ancestors (since the time that the ancestor of the demandant was seised) was in possession of the said lands, neither in demean nor in service, (2) if the party vouched were present, and would warrantise the land freely unto the tenant, such averment of the demandant hath not been used to be admitted, unless the party vouched had been absent, and that by reason of a certain statute of the king's, lately made amongst other statutes of *West.* 1.

II. Wherefore our lord the king, considering the fraud, deceit, and malice, and also his own damage, and disherison of his crown, that in the said case hath many times happened in this court, and daily doth, whereas some holding of the king in chief by a whole barony, in a plea hanging before the justices of the bench, upon their demand do vouch particularly, base persons, unknown and strangers (which they will bring forth) and of whom neither they nor their ancestors had ever any thing in the lands that they warranted, nor in any other lands or tenements within this realm, neither in demean nor in service, as hath been testified by divers of the king's faithful subjects; (2) so that by such cautel, fraud, and malice the same tenants, holding by an entire barony, do defraud the king of the amerciament that they should incur, if the demandant should recover against them.

This statute and those of waste and *de defensione juris* were designed for improving some provisions in the statute of *Westminster* 1. *c.* 40.[1] Thus the privilege given, by that statute, to counterplead a warranty, if the warrantor was *absent*, is by this statute extended to cases where he was *present* also.

Vouching to warranty had been greatly abused, by litigious and powerful men, who would vouch some indigent person; and, if such vouchee entered into the warranty, there could be no counterpleading his title, but the *duel* might be waged, and the demandant obliged to rest the determination upon that decision: These inconveniences are guarded against by this act.[2]

The trial of titles to lands, and some other questions, by *duel*, had been a very ancient custom amongst the Normans; and was introduced into England by the Conqueror.

In the reign of Henry II. this mode of trial had become decisive, in pleas concerning freeholds; in writs of right; in *warranty of land*, or goods sold; debts upon mortgage or promise; the validity

1. See the statute ante p. 410.

2. 2 Reeve E. L. 227.

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III. And likewise when such base persons have warranted, that is to wit, every one for his portion that he ought to warrant, he may defend himself by the body of his servant, procured and hired by them that hold baronies, and so upon one writ and one demand there were two or three wagers of battail, the which was a hard and perilous example for poor men in time coming, that shall be demandants against great and rich men, which will defend themselves by the malice aforesaid: (2) And the demandant cannot have his averment against such warranters, when they be vouched in form aforesaid, because they be present, and will warrantise freely: (3) By his common council hath ordained, and from henceforth, that is to say, from the feast of St. *Hilary*, the twentieth year of his reign, he hath commanded to be observed, that when the tenant doth vouch any to warranty, and the demandant will aver in form before rehearsed, his averment shall be admitted, whether the party vouched be absent or present, without any respect had unto his absence or presence.

Fitz. Voucher 276. *By* 14 *Ed.* 3, *s.* 1, *c.* 18—*Averment shall be received that vouchee is dead, &c.*

of charters; the manumission of a villian; and questions concerning services.[3]

In these trials the demandant could not engage in the combat himself, but must produce his champion: The defendant however might engage, either in his own person, or by that of another.[4]

The undue advantages which this mode of trying titles afforded, to wealthy and powerful men, may be readily imagined. The statute recites, that servants, procured and hired for the purpose, were produced as champions; and that upon one demand two or three wagers of battail occurred; to the great peril of the poor claimants; who, doubtless, not unfrequently, were drubbed out of their claims.

The statute in the text, by authorising the demandant to counterplead the voucher, enabled him to draw the question to a trial by the assise, or by the country, in place of one, the result whereof depended on brutal force. The importance therefore of the statute of *vouchers* at the period it was enacted, is apparent.

3. 1 Reeve Eng. Law 83.

4. 1 Reeve E. Law 83.

FINIS.

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☞ The frequent absence of the Compiler, in the necessary attention to his official duties, rendered it impossible that so close an attention to the printing of the work could be given as was desirable: many of the proof sheets did not pass through his hands; hence, he has to regret that a want of arrangement has occurred, and that the typographical errors have been more numerous than they would otherwise have been.

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INDEX.

A

Abatement of freehold - - - 148-9
——— of writs - - - - - - ib.
Abstract of a fine - - - - - - 263
Acceptance of bills - - - - 376-7
Accessary - - - - - - - 403-4
Accommodation notes - - - 379n.
ACCOUNT, against whom maintainable 9
——— Bail in - - - - - - 11
——— Auditors in - - - - - 11
——— Pleadings in - - - - - 15
——— maintainable by Executors 14
Acknowledgement of deeds - 190, 196
Acre, its contents - - - - - - 341
Actions popular, see POPULAR ACTIONS
Additions of degree, &c. - - - 366-7
Admeasurement of dower - - - 185
Administration, to whom grantable 356
——— fraudulent - - - ib.
Administrators, see EXECUTORS, &c.
Age, Action suspended by - - - 320
Aid, prier - - - - - - - - 414
Alienation, Forfeiture by - - - 320
ALIEN, The disadvantages of - - 20
——— friend, Who is - - - - ib.
——— Actions by - - - - - ib.
——— The children of - - - - ib.
Ambiguities, *latent and patent* 427-8
AMENDMENT, and Jeofail - 28 to 35
——— of misprison of a clerk 28
——— after judgment - - 31
——— Statutes of, extend not to criminal cases - 30
——— of writs of mandamus, &c. - - - - - - 384
——— at common law - 29, 50
——— of form - - - - 50
——— under the act of 1806 49
Amercements, - - - - - - - - 4
Ancestral actions - - - - 148, 320
APPEAL, Prosecution by - - - 56-7
——— of death, by whom prosecuted 56
——— of mayhem, &c. by the injured party - - - - - ib.
——— by approvers - - - - 53
——— never prosecuted in Pa. - 66
Approvers - - - - - - - - 53
ARBITRATION, under 9 & 10 W. 3. 63
——— The different kinds of 65
——— What may be submitted - - - 65-6
——— of the umpire - - 67
Arrest, Persons privileged from 89-90
——— of judgment - - - - - 112
Assault and Battery, costs in - - 119
Assise, Afforeing the - - - - - 7
——— Writs of - - - - 168, 147-8
Attachment for a rescue - - - - 86
Attestation of deeds by femes covert 190-4
Attorney, Appearance by - - 162-3
Avowries for rents & services - 117
Auditors in account - - - - 15-16
Awards, Five species of in Pa. - 65
——— good in part - - - - - 68
——— Costs consequent on - - ib.
——— Enforcing by attachment ib.
——— Exceptions to - - - - 70
——— Compelling performance of 71
Ayle, Writ of - - - - - - - - 148
——— Damages in - - - - - 109

B

BAIL, in criminal cases - - - - 75
——— Who are bailable - - 76-83
——— Who may admit to - - - ib.
——— excessive - - - - - - - 78
——— in *civil causes* - - - - - 83
——— Sheriff to take bail and a bond ib.
——— where he may not bail - - 84
——— *De die in diem* - - - - - 16
——— and Mainprise - - - - - ib.
——— Bonds - - - - - - - - 85
——— Assignment of bail 47-87
——— Proceedings on - - 86-7
——— Where special - - - - 88-9
——— Excepting to and justifying 87
Bailiff special named by plaintiff - 396
Ballot for jurors - - - - - - - 400
Bank, Notes issued by - - - - 380
Bar of dower - - - - - 186 to 196
——— Trials at - - - - - - - 326
BASTARD, who is so considered 90-1-2
Besayle, Writ of - - - - - 148
BILL OF EXCEPTIONS, where it lies 93
——— must be tendered before verdict 95

C

Calendar of prisoners - - - - 396
Calling the plaintiff - - - - - 357
Cancelling deeds - - - - - - 429
Capias - - - - - - - - - 10
Case for use and occupation - - 238
——— for an escape - - - - - 394
——— stated - - - - - - - 327
Casu consimili, Writs *in* - - - 160
——— *proviso*, Writs of entry *in* - ib.
Causes of demurrer - - - - 368-9
Certificate of acknowledgment 190, 196
Challenge of jurors - - 329-30-31
CHAMPERTY - - - - - - - 97
Chirograph of a fine - - - - - 263
Citizenship, how acquired - - - 23
Civil actions - - - - - - - 108
Collistrigium or stretch neck, - 314
Common bail - - - - - - - 89
——— estate in - - - - 210-17
——— informer - - - - - 374
——— law - - - - - 29, 50, 98
——— recovery - - - - 168, 205
Concord in a fine - - - - - - 263
Conjunctim feoffatis - - - - 159
CONSPIRACY, &c. - - - - - - 97
Conditions - - - - - - - - 230
CORONER, The duties of - 100 to 106
——— A judicial and ministerial officer - - - - - 104

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CORONER to charge the inquest - 105
——— to cause the accused to be arrested - - - 106
COSTS are interlocutory or final - 118
——— restrained by, &c. - - - - 119
——— in trespass, &c. - - - - 122
——— in case of non-suit - 120 to 122
——— for not declaring discontinuance - - - - - - 128
——— no more than damages - 119
——— for not going to trial - - 128
Cui in Vita - - - - - - - 149

D

Damage-feasant - - - - - - 173
DAMAGES, where recoverable - 108
——— Double & treble 111, 115, 418
——— in error - - - - 109-10
Day and date - - - - - - - 223
——— fractional parts of - - - - 431
Dead man, Vouching a - - - - 416
Debt, Less than the demand recoverable in - - - - 238
——— for use and occupation - - ib.
——— for an escape - - - 13, 394-5
Deceit, Action for - - - - 302, 424
Declaration, Amendment of - - 51
De defensione juris - - - - - 429
Deeds, Cancelling - - - - - - 223 n 14
——— Sealing and indenting of 226
Dedimus potestatem - - - - - 368-9
Demurrer, general and special - 368-9
DETAINER, Forcible - - - 284, &c.
Discontinuance, Costs in case of - 128
DISSEISIN explained - - - - 144
——— remedies for - - 148, &c.
DISTRESS, how to be used - - 170-1
——— excessive - - - - - 171
——— for what cause - - - 172
——— what may be distrained 173-5
——— manner of distraining 175
——— by purchaser at sheriff's sale - - - - - 176
——— - - - - - - - 177
DOWER, the intent of it - - - 181-2
——— acceptance of part - - 181-2
——— not barred by feigned recovery - - - - - 183-4
——— Admeasurement of - - 185
——— of what it shall be - 187-8
——— how barred - - 186 to 196
——— Emblements of dower lands 206

E

Ejectment demise amended - - 52
Election - - - - - - - - 152
Elegit, Tenant by - - - - - 243
Emblements - - - - - - - 206
Embracery, its meaning - - - 334
Enquiry, Writ of - - - - 114, 115
——— under fi. fa. - - - - 244
ENTRY, Writs of - - - - - 147
——— forcible - - - - 283, 294
Error, Writ of - - - - - - 109
——— Costs in - - - - - - 111
Escape of prisoners in execution 86, 394
——— remedy of sheriff - 13, 393-4-5
Escape voluntary and permissive 395-6
——— maintainable by executors 248
ESSOIN, But one, and one default 119
——— after issue - - - - - 196
——— Where there shall be no 197
——— No *fourcher* by - - - ib.
——— Husband and wife shall not *fourch* by - - - - 198
——— *De malolecti et ultra mare* 198-9
ESTATES FOR LIFE AND YEARS 206 to 238
ESTATE TAIL - - - - - 202 to 206
Estrepements, Writs of - - 418-19
Evidence (parol) explanatory of writings - - - - - - - - 425
Examination of prisoners - - - 81-2
EXCEPTIONS, BILL OF - - - 93 to 95
Exchange, Bill of - - - - - 378
EXECUTION, - - - - - 239 to 248
——— priority of - - - 432-3
——— The lien of - - - 433
——— Bill of sale under - ib. n
EXECUTORS AND ADMINISTRATORS - - - - - - 248 to 260
Exparte talis, Writ of - - - - 12

F

False return - - - - - 249 to 391
Farmers or farmers, signification of 417
Fetters - - - - - - - - 12
Fieri facias, Lien of - - - - 432-3
Fine of lands - - - - - 261 to 282
Fines in Criminal Cases - - - - 5
FORCIBLE ENTRY & DETAINER 283 to 294
Forma pauperis, Suits in - 116, 133-7
Formedon, Writ of - - - - - 205
Fourcher by essoin - - - 197, 201
Frank-marriage, Gifts in - - 178-9
Fraudulent conveyances, gifts, &c. - - - - - - 284, 304
Fraud, Badges of - - - - - 308
Frauds and perjuries, Statute of - - - - - 304, 425 to 434
Freeholders, Privilege of - - - 89

G

Garnishment, Meaning of - - - 424
GOAL DELIVERY - - - - - - 311
General Demurrer - - - - - 327
——— Verdict - - - - - - 327
Goods stolen, Restitution of - - - 63
Grand & petit jury, when introduced 8
GUARDIAN, *ad litem* - - - - - 312
——— in socage - - - - - 312
——— Testamentary, - 313, 314

H

Habeas corpus ad subjiciendum - 83
HUE AND CRY - - - - - 315, 316
Husband and wife, Conveyance by 190

I

Jetfails, Statutes of - - - - - 54
Indenture - - - - - - - 223 n 14
Indictment lacking *vi et armis* - 324
Indorsement of Bills and Notes - 372
Infant - - - - - - - 317 to 323
——— not liable in account - - - 15

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Infant *in ventre sa mere* - - - - 323
Informations, *Quo warranto* - - 283
Informer, Common - - - - - 374
Intrusion on freehold - - - 144, 152
Inquisition - - - - - - 115, 244
Issues, What shall be - - - - 391
Judgments, The lien of - - 430-1-2
——— entered after defendant's death - - - - - 369
——— as in case of *non-suit* 129, 138
Jurors must be taxable citizens - 400
——— *de circumstantibus* - - - ib.
Jury, Surgeons not to serve on - 337
——— *de medietate linguæ* - 336, 396

L

Land, Measurement of - - - 341
Larceny, Appeal of - - - - 60
——— by servants - - 342 to 345
Leases parol - - - - - - - 428
Leap-year - - - - - - - - 207
Liberari facias, Tenure under, - 243

M

Mainprise - - - - - - - - 84 n
Maintenance - - - - - - 334, 434
Mandamus, Writ of - - - - 384 n
Marritagium, signification of - 177
Medietate, Jury *de* - - - 336 to 397
Mixed actions - - - - - - 108
Mordauncestor - - - - 109, 148
Mortgage - - - - - 345 to 348
Mortmain - - - - - 348 to 356
Mute, Standing - - - - - 331-2

N

Nations, Law of - - - - - - 18
Naturalization - - - - - 19 to 24
Negligent escape - - - - - - 394
Nisi prius - - - - - - - 357-8
Non-suit - - - - - 128, 131-3, 397
——— Judgment as in case of 129 to 133
Norman conquest, Effects of - - 2, 3
Notes issued by banks, &c. - - 380
Nuisances, publick and private - 155

O

Occupant for life - - - - - 418
——— Special - - - - -
Ostium ecclesiæ, Dower, *ad* - - 187
Outlawry - - - - - - - 13, 315

P

Pais, Trial *per* - - - - - 6, 7, 8
Pandects - - - - - - - - 262 n
Parceners - - - - - - - - 218
Parol contracts - - - - - - 425-6
——— demurring - - - - - 320
——— evidence - - - - - 425
Partition, Writ of - - - - 217-18
Patent ambiguity - - - - - 427-8
Pauper causes - - - 116, 133 to 137
Peine forte & dure - - - - 331 n
Per et cui, writ of entry - - - 151-2
Perjury - - - - - - 359 to 364
Performance specific - - - - 426
Pillory - - - - - - - - 335
Pleas and pleadings - 365 to 372
Popular actions - - - 372 to 374
Posthumous children - - - - 322-3
Post disseisin - - - - - - 150
Prisoners, Examination of - - - 81
Prochien amy - - - - - - 317-18
Promissory notes - - - 375 to 380
Proviso, Trial by - - - - 132, 358
Punishments, Certainty of - - - 5

Q

Qualification of jurors - - - - 400
Quarentine - - - - - - - 176
Qui tam actions - - - - - 374
Quo warranto - - - 380 to 388

R

Ransom, Signification of - - - - 6
Real actions - - - - - - - 108
Receipt, Signification of - - - 414
Record, Erasing of - - - - - 389
Recovery, Common - - - 168, 206
Re-disseisin, - - - - - - - 156
Reference - - - - - - - - 69
Remitter - - - - - - - - 302
Rent - - - - - - - - 236-7-8
Replevin - - - - - - - - 175
Rescue - - - - - - - - - 86
Restitution of stolen goods - - - 60
Return of sheriff - - - - - - 390
Rolls, Penalty for erasing - - - 389

S

Sale of distress - - - - - - 175-6
Scire facias - - - - - - - 240
——— on mortgages - - 348
——— to revive judgments 439
Sealing of deeds - - - - 223 n 14
Seigneur, Signification of - - 339 n 1
Servants embezzling - - - - 342
Sheriff returning issues - - - 390
——— to sign his return - - - 392
——— punishment for false returns - - - - - 391-2
——— to return a calendar - - 396
Slander, costs in - - - 119 to 122
Surgery encouraged - - - - 339
Surgeons not to serve on juries - 337
Surrenders of estates for life, &c. 429
——— how affected by statutes of frauds - - - - ib.
——— in deed - - - - - ib.
——— by operation of law - 430
——— by bail - - - - - 87

T

Tales de circumstantibus - - - 400
Tenant by the curtesy - - 208 to 417
Tenants in common - - - - - 218
Termor - - - - - - - - 216
Testamentary guardian - - 313, 314
Trespass, Costs in - - - - - 122
——— by execution - - - - 248
Trial - - - - - - - 396 to 404
——— Rule for by *proviso* - 132, 358
Trebuchetum, or ducking stool - 364

U V

Uses and trusts - - - 404 to 410

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—— derived from the civil law 410
Verdicts, Penalty on changing - 389
Villains - - - - - - - - 4, 416 n
Vicontiel writs - - - - - - - 149
Umpire - - - - - - - - - 67
VOUCHER TO WARRANTY 410 to 416
——— counterpleading - - 410
Vouching a dead man - - - 415
Use and occupation, Action for - 238

W

Wainage, Signification of - - - 4
Waste - - - - - - 9, 416 to 423
Will, Estates at - - - - - - 428
Women, Appeals by - - - 55-6
Words, Action for - - - 119 to 122
Writ of conspiracy - - - - - - 58
—— restitution of stolen goods - 60
—— False return of - - - - 391
—— of *formedon* - - - - - - 20
—— of *conjunctim feoffatis* - - 160
Writs in *consimili casu* - - - ib.
—— of entry and assise antiquated 168

7 JU 62

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ERRATA.

Page

3, note 8, for *persecutari*, read *perscrutari*.
14, line 3, for *debt*, read *debtor*.
18, note b, last line, for *bastards*, read *bastardy*.
27, line 9, for 1897, read 1807.
28, note 21, first line, 2d col. for *laws*, read *lands*.
42, note 8, for *demurrer*, read *Pleas und Pleadings*.
61, to 13 Edw. 1, c. 12, prefix †.
80, 10th line from bottom, for *Judge* read *Judges*.
85, note 7, for *Gil. P.* read *Gilb. C. P.*
—, note 8, to 1 *Vin. Sup*, add *page* 441.
87, note 37, for *Co.* read *cases*.
91, note 1, for *antequipimas*, read *antiquissimas*.
100, the references belonging to the statute, are placed *under* the notes in place of being *above* them.
102, the same mistake as on page 100.
133, line 4 from the bottom, for 23 *H.* 8, *c.* 15, read 11 *H.* 7, *c.* 12.
138, to 22 & 23 Charles 2, c. 9, prefix *.
139, to 5 & 9 Will. 3. c. 11, prefix *.
149, for *Merton*, read *Marlbridge*.
204, first line of Commentary, for *conditionibus*, read *conditionalibus*.
226, note 18, line 3, for *or*, read *of*.
230, line 2 from bottom, for *secure*, read *such*.
243, line 15 from bottom, for *leviri*, read *levari*.
244, line 4 from bottom, for *it*, read *is*.
248, line 4 of Commentary, for *is*, read *was*.
256, line 2 of Commentary, for *arrears*, read *arrear*.
—, line 1 of 43 Eliz. c. 8, for *uze*, read *ure*.
258, line 25, for *all*, read *ale*.
262, line 14 from bottom, for *in mobile*, read *immobile*.
—, note 2, line 4, for 1130, read 1137.
—, note 2, line 5, for *Amalphia*, read *Amalfi*.
—, note 3, line 1, for *fero*, read *foro*.
263, line 6, for *Feta*, read *Fleta*.
264, above the statute 27 *Ed.* 1, *s.* 1, *c.* 1, insert *De finibus levatis*.
282, line 25, for *remainder-man do*, read *remainder-man can do*.
293, line 27, for *expalit*, read *expulit*.
296, line 3, section 2, for *coveyance*, read *conveyances*.
304, note 20, for *Bun.* 369, &c. read *Bur.* 396—*Bright v Eynou*,
314, line 13 from bottom, for *execution*, read *executors*.
316, line 29, for *seignierarie*, read *seigneurie*.
317, line 24, for *to sue prochien amy*, read *to sue by prochien amy*.
320, line 13 from bottom, for *is*, read *in*.
330, line 8 from bottom, for *could*, read *should*.
332, line 2, of note, for *restitit*, read *exstitit*.
334, line 4 of the Commentary, for *or sides the*, read *or sides to the*, &c.
—, note 26, fill the blank with 97.
336, for *shall be medietate linguæ*, read *shall be de medietate linguæ*.
338, note 37, line 7, col. 2, for *sueing*, read *serving*.
339, last line of note 1, for *assurrexit*, read *assurrexerit*.
343, line 2, of the Commentary, for *heir*, read *their*.
344, note 2, for *fr.* read *Cr.*
345, note 8, for *is deemed to be law in Lavender's*, read *is deemed* NOT *to be law in Lavender's case*.
348, line 17, for *urgent*, read *urged*.
356, lines 14 & 15, for *were uses even solely*, &c. read *where uses were solely*, &c.
371, line 7 from bottom, for *statue*, read *statute*.
383, line 10 of note, for *to such proceedings in all the*, read *to such proceedings all the*.
415, line 2, for *revesioner*, read *reversioner*.
416, line 2, of Waste, for *damage of the heir, in reversion*, &c. read *damage of the heir, or of him in the reversion*, &c.
—, line 2 of note 13, for *of*, read *on*.
—, note 1, read 5 *Bac.* &c.
529, line 6, for *which would have been good*, read *which would not have been good*.

7 JU 62

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